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THE LORD PRESIDENTS.

XII.—ROBERT DUNDAS OF ARNISTON.

The subject of our portrait was Lord President of the Court of Session from 1748 to 1753. One of his sons, also Robert Dundas, occupied the Presidential Chair from 1760 to 1787, and no family has contributed a greater number of illustrious names to the roll of Scots lawyers than has the family of Dundas of Arniston. Sir James Dundas of Arniston, the grandfather of the first Lord President Dundas, was a Judge of the Court of Session from 1662 to 1666, when he resigned rather than sign a declaration abjuring the National and Solemn League and

Covenant. His son, Robert Dundas, was appointed a Senator of the College of Justice in 1689, and held that office till his death in 1726.

Robert Dundas was born in 1685, and admitted to the Faculty of Advocates in 1709. Success at the Bar came to him rapidly, and he had not to wait long for office. In 1717 he was appointed Solicitor-General under Sir David Dalrymple as Lord Advocate, and though he held the subordinate position, he enjoyed, more than his official superior, the confidence of the Duke of Roxburghe, then Secretary for Scotland, and the other members of the Government.

When Solicitor-General Dundas on one occasion got into trouble with the Judges of the Court of Justiciary. Having been summoned to London he appointed an advocate-depute, conferring on him full powers to carry on all actions on his behalf before the Civil and Criminal Courts, and generally to do everything appertaining to his office which he might have done if personally present. The Bench objected to the appointment on the ground that the Solicitor-General had no power to appoint a depute to appear for him in Court, and Dundas finally wrote to his depute, Robert Craigie, afterwards Lord President, that though the decision of the Judges had been taken without thinking, the point was not one it was worth disputing about. In 1720, Dalrymple resigned and Dundas became Lord Advocate. Two years later he entered Parliament as Member for Midlothian. His tenure of office terminated in 1725, when the Walpole Ministry was formed, and Duncan Forbes of Culloden became Lord Advocate. In opposition Dundas was closely associated with the Duke of Roxburghe. He resumed his practice at the Bar, and held from 1721 to 1736 the office of Dean of Faculty. He acted as leading counsel for the defence in the trial of James Carnegie of Finhaven for the murder of the Earl of Strathmore. The case, which was tried in 1728, was notable not only for its own circumstances, but as being the occasion on which the right of a jury to return verdicts of "guilty" or "not guilty" as against verdicts of "proven" or "not proven" was vindicated. Carnegie was found "not guilty."

In 1737 Dundas was appointed a Judge of the Court of Session, and in 1748 he was elevated to the office of Lord President, which he held till his death in 1753. Lord Woodhouselee wrote of him: "He shone equally as a powerful pleader and an ingenious reasoner. His eloquence, though as various as the nature of the case required, was consequently subservient to his judgment; and though master of all the powers of expression, he rarely indulged in what is properly termed declamation. As a judge he distinguished himself no less by the vigour of his talents and his knowledge of the law than by his strict principles of honour and inflexible integrity."

One of the sons of the Lord President was, as already stated, one of his successors in the office of Lord President. Another was the Right Hon. Henry Dundas, First Viscount Melville. One of his grandsons, a son of the second Lord President, was Lord Advocate from 1789 to 1801, and thereafter for eighteen years Lord Chief Baron of Exchequer.

Three important changes in Scottish legal procedure have been proposed during the vacation which has just closed. They deal with the House of Lords, the Court of Session, and the Sheriff Courts respectively. In the first two instances the measures legalising the proposed changes have been carried through. In regard to the third, the Sheriff Courts, a Bill to regulate procedure there has been read a first time in the House of Commons. In another column an outline is given of the main features of the Bill. In regard to appeals to the House of Lords, questions were asked some time ago in Parliament as to the period of two years which is allowed in the ordinary case before a judgment of the Court of Session becomes final. In England an appeal to the House of Lords must be taken within a year, but Scottish appeals were regulated by sect. 25 of the Act 6 George IV. cap. 120, which allows an appeal to be presented any time within two years. The Lord Chancellor and the Lord Advocate both expressed a view in favour of shortening the period, and on the 6th inst. the standing orders of the House were amended so as to reduce the period during which appeals must be taken from the Court of Session to the House of Lords, to one year instead of two as formerly. The change is one which will be generally approved, as one year is amply sufficient time for deliberation as to the advisability of appealing, and the possibility of an appeal often subjects a successful litigant in the Court of Session to an unnecessarily long period of uncertainty as to the ultimate result. In the ordinary case appeals are generally presented within a few months of the judgment, but within recent years there have been several instances of appeals being taken almost at the end of the two years allowed. For example, the appeal in the case of *Macdougall* v. *Nisbet*, reported in our issue of this week, was taken only seven days before the expiry of the two years. Procedure in the Court of Session has been in many respects materially altered and improved by the Act of Sederunt of date 30th March, which having lain on the table of both Houses of Parliament for thirty-six days, and not having been objected to, has now become a binding enactment to be read as part of the Court of Session Act 1868. Section 106 of that Act gave the Court of Session power to pass Acts of Sederunt for regulating the practice of the Court in respect of the matters to which that Act related, and "so far as may be

found expedient for altering the course of proceeding hereinbefore prescribed in respect to the matters to which this Act relates or any of them." On one or two occasions the Court has exercised the powers conferred on it by the Act and made minor alterations in procedure, but the new Act of Sederunt makes far more important changes than any of its predecessors. The text of the Act will be found in an Appendix to our edition of the statutes which is issued with this part. The new regulations as to amendment of records, abolition of supplementary actions, power to amend so as to obtain a larger or different remedy from that originally concluded for, simplification of the form of summons and of procedure in reductions, extension of the class of business which can be done at Vacation Courts, and the facilities for interdicts and other proceedings in the Bill Chamber, all tend to save expense, to avoid delay, and to facilitate the administration of justice. The provision under which in actions of damages, where a sum of less than £50 is recovered by the verdict of a jury, the pursuer is not to be entitled to charge more than half the taxed amount of his expenses (unless the judge certifies that he shall be entitled to recover a larger proportion not exceeding two-thirds thereof), will have a most salutary effect in discouraging a class of action which had become an abuse in the Court of Session. The arrangement for the constitution, when necessary, of a Third Division of the Inner House takes the place of a provision in sect. 8 of the Court of Session Act. That section provided for a Court of four Lords Ordinary to hear cases which did not come into the Inner House by Reclaiming Note. Such a Court sat on a few occasions shortly after the passing of the Act, but the result was far from satisfactory. There was only one Judge left in the Outer House, and the remedy for the congested state of business at that time was worse than the disease. Under the new Act, the Third Division will be able to take up any class of Inner House business, any three Judges may sit in it, and the removal of one Judge from the Outer House will enable the three Divisions to sit with three Judges each. The profession, and the public in Scotland, would much deprecate any proposal to permanently reduce the number of Judges sitting in each Division. A decision by a Court of Four Judges inspires confidence and tends to discourage appeals to the House of Lords. Nothing is more unsatisfactory than a judgment of two Judges reversing the opinion of a Lord Ordinary which is concurred in by the dissenting Judge in the Division. As a temporary arrangement, however, to get rid of the accumulation of arrears in the Inner House the proposal is an admirable one, and it may be hoped that after the Third Division has sat for two or three months the arrears will be overtaken. The constitution of the new Court has not yet been announced, and it is understood that it will not commence its sittings till towards the end of the present session.

The state of the rolls in the Court of Session and the figures in the Inner and Outer House, as after the first Box Day, was referred to in our issue of 13th April. On the second Box Day 76 new cases were called, 27 before Lord Dundas, 7 before Lord Johnston, 20 before Lord Salvesen, 4 before Lord Mackenzie, and 18 before Lord Guthrie. 53 additional cases were called on Tuesday and Thursday. On these days 51 new cases were sent to the rolls of the First Division and 8 to those of the Second. The Court of Session resumed its sittings on Tuesday All the Judges were present except Lord Ardwall who has been slightly indisposed. His Lordship took his seat in the Second Division on Thursday.

SCOTTISH LEGAL APPOINTMENTS.

New Keeper of Register of Sasines.

The King has been pleased, upon the recommendation of the Secretary for Scotland, to appoint Mr J. Smith Clark, Solicitor before the Supreme Courts, Edinburgh, to be Keeper of the Register of Sasines, Edinburgh, in room of the late Mr J. Hope Finlay. Mr Smith Clark, who comes of Forfarshire stock, was born in Musselburgh in 1851. He was educated in Dundee, and served an apprenticeship in the office of Mr Haliburton, solicitor there. In 1868 he came to Edinburgh, and after spending some years as a clerk in the office of Mr M'Breyer, he became assistant to Mr Lawrance Macara, W.S., with whom he afterwards entered into partnership. On the death of Mr Macara in 1875 Mr Smith Clark continued the business in his own name. In 1897 he assumed as a partner his son, Mr D. Smith Clark, W.S., and the firm name was changed to that of J. & D. Smith Clark. In his student days Mr Smith Clark obtained high honours in the Law Classes. He took an active part in the work of the Scots Law Society, and his gifts as a speaker and a resourceful debater are remembered by those who were his contemporaries there. Thoroughness has been the characteristic of all his work; and his energy, common sense, and the instinctively legal bent of his mind, have combined to give him a large measure of professional success. He is a sound conveyancer, though by no means a slavish follower of precedent. He has conducted a large Court practice, and has been agent in many important cases; amongst others, in the numerous keenly-fought litigations in which he has appeared as legal adviser to The Assets Company. Mr Smith Clark is a member of the Commission which is now sitting on Registra-

tion of Title in Scotland, and whether the result of their deliberations may be to establish a new system or to maintain the old one, Mr Smith Clark is well fitted to take command of the important legal department of which he is now the head. Mr Smith Clark has always been a keen Liberal, and has done much effective platform work for his party.

The New Clerk of the Bills.

The King has been pleased, on the recommendation of the Secretary for Scotland, to appoint Mr T. Swinton Paterson, S.S.C., Edinburgh, to be Clerk of the Bills and Sequestrations in the Court of Session, Edinburgh, in room of the late Mr Duncan Antonio. Mr Paterson, who is a son of Mr Alexander Paterson, merchant, Edinburgh, was born in 1861. He was educated at Watson's College and at the Edinburgh Institution, and in 1885 took the degree of Bachelor of Law in the University of Edinburgh. In the same year he was admitted a member of the S.S.C. Society, and in 1886 he joined in partnership Mr James T. Gibson, W.S. The firm of Gibson & Paterson continued till 1893, when Mr Gibson went to Australia. Since then Mr Paterson has conducted business alone. In December 1905 he was appointed by the Lord Advocate Agent for the Crown as *ultimus hæres*. For a number of years Mr Paterson was Secretary of the West Edinburgh Liberal Association, and represented the Liberals in the Registration Court. He was election agent for Mr Edwin Adam in 1900, and for Mr (now Lord) Courtney in 1905. He has taken an active interest in the work of the Edinburgh Night Asylum and the Edinburgh Discharged Prisoners' Aid Society. He is known as a sound, careful lawyer, and is in every way well equipped for the delicate and responsible duties of his new office.

Mr James Marchbank, S.S.C., Edinburgh, has been appointed Agent for the Crown as *ultimus hæres* in Scotland in room of Mr T. Swinton Paterson, recently appointed Clerk on the Bills. Mr Marchbank, who is a partner of the firm of Cuthbert & Marchbank, S.S.C., was admitted to the Society of Solicitors before the Supreme Court in 1882. He has acted as election agent for Mr Arthur Dewar, K.C., M.P., in the Southern Division of Edinburgh.

THE SHERIFF COURTS BILL.

Some years ago a Departmental Committee was appointed to take evidence and report upon the procedure in the Sheriff Courts in Scotland and any suggested reforms. It met under the chairmanship of Lord Advocate Graham Murray, and afterwards of Lord Advocate Scott Dickson, and in 1904 made an exhaustive and very valuable report. A committee of experts was formed, who drew up a Bill on the lines of the Departmental Committee's report and submitted it to the law officers of the day, but no progress was made in the late Parliament. The present Government have now taken the subject up, and have introduced a Bill dealing with Sheriff Court procedure which is partly a consolidating and partly an amending Bill. Its object is to consolidate the provisions of a large number of statutes dealing with Sheriff Courts, and at the same time to simplify the procedure and to extend the jurisdiction of the Sheriff Courts. The Bill deals with a large variety of topics, and in the schedule to it there is a code of Sheriff Court procedure, so that in the space at our disposal it is not possible to do more than summarise briefly some of the principal changes in the law which are proposed, without entering into any discussion of them on their merits.

Sheriff's Ordinary Court.—The jurisdiction of the Sheriff will be extended to (1) actions of declarator (except actions of declarator of marriage and nullity of marriage and actions to determine status); (2) actions of aliment, or separation and aliment, and for regulating the custody of children; (3) actions of division of commonty, or division and sale of common property; (4) actions relating to heritable right or title (except actions of adjudication save in so far as now competent, and actions of reduction); (5) suspensions of charges upon decrees of registration proceeding upon bills, bonds, contracts, etc., registered in the books of the Sheriff Court or others competent where the debt, exclusive of interest and expenses, does not exceed £50. There is a proviso that either party may at the closing of the record or six days thereafter require the case to be remitted to the Court of Session in the case of actions (*a*) relating to heritable right or title, or (*b*) relating to division of commonty, or division and sale of common property, where the value of the subject in dispute exceeds £50 by the year, or £1000 in value. The same rule applies to actions relating to the right of succession to moveables where the subject in dispute exceeds £1000, and the Sheriff may on cause shown, or *ex proprio motu*, remit actions of separation and aliment or custody of children to the Court of Session. It is provided by another clause that, subject to the provisions of this Act (by which the Sheriff-Principal may grant leave to appeal to the Court of Session upon important questions of law), and of the Small Debt Acts, all causes not exceeding £50 in value competent in the Sheriff Court shall be brought and followed forth in the Sheriff Court only, and shall not be subject to review by the Court of Session. These provisions will greatly add to the work and increase the importance of the Sheriff Courts. Not only will their jurisdiction be privative in all actions under £50 in value, but it will now

be competent to bring actions for separation and aliment on the ground of adultery or cruelty, which at present take up so much of the time of the Supreme Court, in the Sheriff Court. Moreover, questions as to heritable estate of any value may be settled there so long as neither party exercises his right to have the case remitted to the Court of Session. Expert opinion has for a long time been in favour of extending the jurisdiction of the Sheriffs. Upon this question reference may be made to the articles by Sheriff Mackay and Sheriff Dove Wilson on the Sheriff Courts in Green's "Encyclopediæ," and to the discussion of the whole subject by the latter in his most recent book on "The Law of Process." Whatever criticism may be made on details, on the whole these changes will undoubtedly be most beneficial.

Summary Cause.—A new class of causes called summary causes is created by the statute, and include (*a*) Applications or appeals to the sheriff under special statutes where no other procedure is prescribed; (*b*) claims (except those under the Workmen's Compensation Act) for payment of money exceeding £20 and not exceeding £50; (*c*) any other cause which the Sheriff, of consent, may order to be treated as a summary cause; (*d*) summary suspension applications. The Debts Recovery Court, which never was popular, is now abolished, but the procedure in a summary cause (with some modifications), and the right to appeal to the Sheriff, will in future be the same as it is in that Court at present. No appeal will lie to the Court of Session unless the Sheriff-Principal shall find that there are important questions of law involved, and shall grant leave to appeal.

Sheriffs.—The clauses dealing with the appointment, retention of office, removal and retiral of Sheriffs, are mainly a consolidation of the law as at present. Three changes are introduced with reference to Sheriffs-Substitute: (1) A Sheriff-Substitute of five years' standing, though not an advocate, will be eligible for the office of Sheriff-Principal; (2) the limits on the salaries of Sheriffs-Substitute are removed; (3) in the event of illness the Secretary of Scotland may grant leave of absence and appoint a temporary substitute, whose salary will be paid by the Treasury. It is understood that the last change will put Sheriffs-Substitute on the same footing upon that matter as the County Court Judges in England.

Procurators-Fiscal.—The position of these officials is so greatly changed in recent times from being responsible to, and taking his orders in criminal matters from, the Sheriff, to reporting all questions of importance to the Lord Advocate or his deputes, and receiving his instructions from them, that it is only proper that their appointment should be vested in the Lord Advocate. Clauses are added as to their removal and appointment of deputes.

Appeals.—The interlocutors of the Sheriff-Substitute, which may be appealed to the Sheriff, are very much the same as at present. No appeal lies to the Court of Session unless the value of the cause exceeds £50 and the interlocutor appealed against is a final judgment; or is an interlocutor—(*a*) Granting interim decree for payment of money; (*b*) sisting the action; (*c*) against which the Sheriff, either *ex proprio motu* or on the motion of either party, grants leave to appeal. Appeal to the Court of Session for jury trial is also provided for.

Jury Trials.—The necessity of obtaining a speedy and inexpensive settlement of disputes under the Employers' Liability Acts has induced Parliament to restrict the raising of actions under these Acts to the Sheriff Court. This was carried one step further by the Workmen's Compensation Act of last year. Undoubtedly the effect was to deprive the parties of their right to have these questions settled by a jury. The Lord Advocate, by taking advantage of the precedent set by the inquiries before a jury under the Fatal Accidents and Sudden Deaths Inquiry Acts, proposes to restore to employees the right of trial by jury in actions against their employers. The Bill provides that in actions under the Employers' Liability Act 1880, or alternatively under that Act or at common law in respect of injury caused by accident arising out of and in course of the employment, where the claim exceeds £50, either party may, at the closing of the record, require that the cause be tried before a jury. The verdict of the jury is to be applied by an interlocutor of the Sheriff. Appeal to the Court of Session is allowed on the grounds (1) That the verdict has been erroneously applied; (2) that the verdict is contrary to evidence; (3) that the Sheriff has unduly admitted or excluded evidence, or misdirected the jury; (4) that an award of damages is inadequate or excessive. The difficulty of framing an issue is ingeniously met under the rules in the schedule, by requiring the Sheriff to state in an interlocutor the questions which he proposes to submit to the jury. After a little practice, this method may be found superior to the adjustment of an issue as at present practised in the Court of Session.

Small Debt Court.—The limit in this Court is raised from £12 to £20. Some discussion took place before the Departmental Committee as to whether a right of appeal should be allowed in this Court. The balance of opinion was in favour of finality, on the ground that this Court was popular among the poorer classes, because the process was inexpensive and the decision speedy. If appeal were allowed, there would always be the risk of greater cost and delay. Moreover, the difficulty in particular cases may be met by the Sheriff's power to remit a case to the Ordinary Roll. Some minor changes are introduced into the rules of this Court.

The Bill also deals with such matters as Removals, The Poors Roll, etc., to which it is not necessary to refer in detail.

Rules for procedure are embodied in the schedules to the Act, which the Court of Session have power to alter or supplement by Act of Sederunt.

In so far as it provides a simpler and more inexpensive means of deciding cases with regard to separation and aliment and money claims of small amount, which are the cases affecting especially the poorer classes of the people, the Bill will recommend itself to most legal reformers. Moreover, there is a growing feeling in favour of the restriction of the power of appeal in cases of small money claims. Indeed, some would carry it much further than has been done in the Bill. It is difficult to foretell what the effect will be on the employment of counsel. The work in the Court of Session will probably be lessened, but, on the other hand, counsel may be much more frequently employed than at present in the Sheriff Courts, especially at the busier centres of population.

In the interests of the public it is earnestly to be hoped that the Bill may speedily be passed into law.

INCORPORATED SOCIETY OF LAW AGENTS.

Taxation of Feu-Duties.

A special general meeting of the Incorporated Society of Law Agents in Scotland was held on 25th April in Dowell's Rooms, Edinburgh, to consider certain resolutions with reference to that part of the report of the Select Committee of the House of Commons upon the Land Values Taxation (Scotland) Bill, 1906, which dealt with the taxation of feu-duties, adopted at a meeting of representatives of the principal law societies of Scotland held on 8th March last. Mr George D. Ballingal, W.S., presided over an attendance of about thirty gentlemen. The resolutions referred to set forth:—

That the statement that, in law, a superior was owner of land, and that feu-duty was truly the rent of land, on which statement certain recommendations of the Select Committee were based, was erroneous as a statement of the law of Scotland, and that the law of Scotland was correctly stated in the passage in the Minority Report of the Local Taxation Commission to which the late Lord Kinross, Lord President of the Court of Session, gave his sanction, that the feuar, so long as he paid the feu-duty and observed the other stipulations of the feu charter, was the proprietor or owner of the land.

The argument that ownership of feu-duties was ownership of land, and that feu-duties were therefore a proper subject for local taxation, because the Conveyancing Act of 1874 included estate of superiority under the definition of an "estate in land," was unsound for two reasons: in the first place, the statutory definition was for purposes of title only, and in no way affected the intrinsic quality of the right; and, in the second place, the statutory definition included various forms of property, such as heritable securities, which could not be regarded in any view as ownership of land.

That inasmuch as the owners of feu-duties, ground annuals, and other burdens on land had been regarded, according to the law and practice of Scotland, as incumbrancers, and inasmuch as feu-duties, ground annuals, and mortgages on land have been sanctioned by the Trust Acts as investments for trustees, it would constitute a breach of public faith and involve serious loss to a very large number of innocent persons if the revenue from such investments were to be subjected to local rates.

That if, for reasons of State policy, it should be thought desirable to make a change in the system of levying local rates to the effect of subjecting feu-duties and other burdens on land to local rating, existing rights and interests acquired on the faith of the existing law ought to be respected in accordance with the assurance given by the Lord Advocate in the House of Commons.

The last resolution was to the effect that the existing state of uncertainty having disturbed public confidence and paralysed the sale of feu-duties and ground annuals, to the serious loss of trustees and other investors, the Government be requested to make a public statement in the sense of the Lord Advocate's assurance, and that copies of the resolutions should be sent to the Prime Minister and others.

The Chairman said that about a year ago at a special meeting of the Society the Land Valuations Taxation Bill was considered, and the Society had then before it a report by a Committee, which was adopted. That report disapproved generally of the principle of taxation of land values, but as regarded taxation of feu-duties the report touched very lightly on the subject, in respect that the Lord-Advocate had stated in Parliament that that portion of the Bill, so far as relating to existing feu-duties, would not be proceeded with. The matter of taxation of feu-duties was, however, touched upon, and the Society disapproved of that principle in the Bill at that time, but since that meeting was held the Bill had been before a Select Committee of the House of Commons. That Committee had taken evidence and issued its report about the end of last year. The terms of the report generally were to the effect that the Bill then before the House was disapproved of, but, so far as he could gather, on grounds not quite similar to their reasons for disapproval. But, further, the Select Committee, he thought to the surprise of most lawyers, took up a position as regarded the taxation of feu-duties contrary altogether to the views indicated by the Lord Advocate. Their (the Society's) view was that in this matter the Committee had gone wrong. Already the effect of the report had been to greatly depreciate feu-duties. At the present moment feu-duties were practically unsaleable, and that was an extremely hard

case for trustees and others who had to realise their securities, and for other investors. He thought in these circumstances it was right they should let their voice be heard. The Faculty of Glasgow Procurators took the matter up some time ago, and called a meeting representative of the various leading societies. These were the Society of Writers to the Signet, the S.S.C. Society, the Faculty of Procurators, the Society of Advocates in Aberdeen, the Society of Solicitors in Dundee, and their Society, and after some discussion they passed the resolutions, which were generally to the effect that the report proceeded on false lines, and that the proposed taxation of feu-duties was wrong. He moved that the Society should confirm the resolutions come to at the joint meeting of law societies on March 8.

Professor Brown, Glasgow, seconded. He thought the Select Committee, even though it was presided over by so very eminent a gentleman as the Solicitor-General, and even though he had given his *imprimatur* to the terms of the report, it contained a great deal of very bad law. The idea of ownership in the holder of a feu-duty was due, in his opinion, solely to the fact that it was a relic of the old feudal system, which had no real existence; and if they just attempted to answer the question what was an owner, he thought they could solve the difficulty very easily. An owner was one who had the possession and power of disposal of land, to whose heirs the land would go in ordinary succession, and who had otherwise the right of property in the land. But there might be half a dozen or more superiors, holders of feu-duties, all in direct sequence each with the other. In regard to these holders of feu-duties which of them could claim to be really the owner? They began with the Crown. Was the Crown really the owner in the sense they understood ownership? and so on with the different degrees of superiority, and it was a rather significant fact that the Committee had not given them any light whatever in regard to what was to be done with ground annuals. A ground annual, in his view, differed in no respect from a feu-duty except on account of its permanency, nor did it differ in any point of principle from a bond and disposition in security except on account of its terms. The whole difficulty had arisen from a false interpretation of the law as it stood, and that mistake had arisen from the technicalities of the feudal system. Mr J. W. Whitelaw, Dumfries, moved the previous question. It had again and again been stated, he said, that local rates were imposed on and in respect of rental. That was not so. If they were going to tax the proprietor because he got so much rent into his pocket, it would be absurd to tax the tenant because he had to pay so much rent out of his pocket. The fact was, local taxes were imposed as a payment for services rendered. They should oppose the proposals, and tender their opposition to the Secretary for Scotland. Mr Alexander Jeans, Greenock, moved that feu-duties and ground annuals should be taxed for local purposes, but subsequently withdrew his motion. Mr A. B. Shearer, Greenock, seconded the previous question. He said unless they were going to tax feu-duties, and tax existing feu-duties, the taxation of feu-duties would be a mere form of words. If they were only going to tax feu-duties in the future, they might as well not tax them at all, because the superior would merely add the tax to the feu-duty which he exacted. The discussion being concluded, it was intimated that there were 160 proxies in favour of the resolutions and 2 against. A vote of those present resulted:—For the resolution, 24; previous question, 2, so that the resolutions were confirmed by 184 to 6. The Chairman was appointed to represent the Society on the deputation to the Prime Minister.

LEGAL AID FOR THE POOR.

A "Central Legal Aid Society," designed to help in bringing the resources of the law within the reach of the poor, was formed at a meeting over which the Lord Mayor of London presided on 3rd inst. at the Mansion House.

Letters expressing sympathy with the movement were sent by the Lord Chancellor, Lord Salisbury, Lord Kinnaird, the Bishop of Stepney, Mr J. W. Cleland, M.P., the Rev. H. Adler, Chief Rabbi; Mr A. Chichele Plowden, the Lord Provost of Edinburgh, Canon Horsley, and many others. Lord Loreburn, in the course of his letter, said: "Everything which will place poor people in a position as advantageous as that of rich people for defending their rights and obtaining access to the Courts of Justice, when that is necessary, ought to be encouraged. I do not know how the associations of poor men's lawyers are doing, but if properly managed they may well be of much utility. In regard to proceedings *in forma pauperis*, I shall be prepared to consider any practical suggestions. Any proposals which will have for their effect the cheapening of legal proceedings and the protection of poor men against loss by their inability to pay for legal assistance are certain to meet with widespread support, and will surely be supported by me." Lord Salisbury wrote that his experience in county magistrates' courts led him to welcome the recent legislation, which enabled the presiding magistrates at quarter sessions, among other tribunals, to assign counsel to poor defendants. The Bishop of Croydon moved a resolution expressing gratification at the work of the "poor men's lawyers," and the hope that more such voluntary associations would be formed. It was, he said, the regrettable position at present that the poor were inclined to look upon the law as

an instrument rather of oppression than of help. Mr Percy Alden, M.P., seconding, said that in practice, if not in theory, there was in this country one law for the rich and another for the poor. The motion was carried, and a resolution calling for further provision in the interest of poor persons with regard to civil litigation was moved by Sir John Macdonnell, C.B., LL.D., who declared that the present system of allowing poor people to sue *in forma pauperis* was defective. Sir John Bamford Slack, F.R.G.S., himself a "poor man's lawyer" of many years' experience, seconded the resolution, which was carried. Sir Charles Mathews proposed a resolution urging that in all criminal courts professional assistance should be provided gratuitously for accused persons unable to pay for it. He said that he should like to live to see it brought about that in London's New Sessions House no prisoner was placed in the peril of trial without having the benefit of professional legal assistance. He would suggest the preparation of a list of counsel, of not less than three years' standing and not more than ten, who were willing to give gratuitous service in any case allocated to them by the presiding judge. He believed that if the judges would co-operate in carrying out that suggestion the Bar would not be unwilling to do their part. The proposition was seconded by Mr J. P. Coldstream, W.S.—who said that the system now prevailing in Scotland was almost perfect —supported by Mr Cecil M. Chapman, Metropolitan Police Magistrate, and adopted. Other speakers included Lord Reay, P.C., Mr B. Fossett Lock, Mr H. Y. Stanger, K.C., M.P., Dr W. R. Bisschop, and Mr W. R. Bousfield, K.C. A resolution formally constituting the Central Legal Aid Society to carry into effect the previous motions was carried unanimously.

LAW AGENTS' EXAMINATIONS.

The quarterly examination in law was held in Edinburgh in April. Seventy-three candidates presented themselves for examination. Sixty-six of these were examined in all the subjects, and thirty-nine passed. Seven candidates being graduates in law (LL.B. or B.L.), were examined in Court procedure, and all passed.

The following is the official list of those who have passed the Examination in Law:—Robert Smith Aitchison; Thomas Mitchell Alexander; James Craig Allan; William Anderson; Alexander Fyfe Barr; Daniel Trench Beath; Harold Robert Bird; Alexander Bisland Boyd, B.L.; Thomas Dunlop Brown; Alfred Ernest Copeland; Robert Davidson; Alexander Denoon; James Hastings Edwards, M.A., B.L.; Adam Robert Fraser; James Muir Galloway; William John Gilchrist; Alexander Gray; James Gray; Douglas Harper, M.A., B.L.; James Keay; Duncan Kennedy, B.L.; Thomas Lillie; David Linning, jun.; Matthew Harold Murray Lochhead; William M'Culloch; George Clunie Macgregor; Albert Alexander Mackenzie, M.A., LL.B.; Charles Gordon Alexander MacKinnon; William Marchbank; Herbert Mellor; Gordon James Milligan; David Moffat; Charles John Davie Munro; Alexander Miller Murray; John Mackenzie Orr; James Symington Quig; James Reid; Robert John Reid; James Scobie, jun., M.A., LL.B.; John Simon Scott; John Gordon Simpson, M.A., LL.B.; David Willocks Skea; Francis Souter; James Binnie Tait; Andrew Topping; Thomas M'Kinlay Weir.

THE 1904 LAW CLUB, EDINBURGH.

Between sixty and seventy members of the 1904 Law Club attended the annual dinner of the Club, which was held on 5th April in the Carlton Hotel, North Bridge, Edinburgh. Mr Hugh A. Heggie, the President, presided, Messrs Geo. R. Fleming and John Roddick were croupiers, and among others present were Professor Rankine, Sheriff Guy, Mr Forbes T. Wallace, solicitor, an ex-President of the Club, and Mr A. A. Fraser, advocate. After the loyal toasts, Mr M'Ewan gave "The Imperial Forces," and Mr H. Livingstone replied. "The Club" was proposed by Mr A. A. Fraser. It was, he said, in a very flourishing condition. This spoke volumes for the originators of the club. He did think it was an admirable Club, and one that deserved all assistance. Mr G. R. Fleming, one of the Vice-Presidents of the Club, acknowledged the toast. When the Club was formed in 1904 it was not anticipated they should proceed on the lines now being followed. The membership at the start did not exceed a dozen. In the following year the membership was increased, but the annual dinner was the sole bond of membership. Last year they introduced a series of debates, and it was resolved to widen the constitution, and invite members of the legal profession to become members. That was the beginning of their prosperity. They now had a membership of ninety-two. The Chairman gave "The Profession." Law he described as the corner-stone of a nation. If there was no law there would be chaos. And yet there were times when one felt called upon to rescue the legal profession from carping, petty, and false criticism. It was a fallacy for anyone to say that members of the legal profession were the people to raise strife. Why, they were ministering angels endeavouring to still troubled waters, to bring peace and concord. Sheriff Guy, who replied, took occasion to advise his hearers on some of the niceties of the law. He advised them to be very careful and precise about written pleading. "Don't state more than you need to say," he remarked; "but always state enough." Don't let them try to improve upon their pre-

recognition. Let them take it for granted that a careful agent had given all a witness had got to say. He warned them not to cross-examine blindly, but to be pretty sure what the answer was to be. In regard to oratory—he excepted jury trials, where a good many tricks of the trade might be pardoned—he advised them not to bore the judge by saying the same thing over and over again. Mr F. T. Wallace proposed the "Alma Mater," and Professor Rankine replied.

The Late W. Peacock Edwards, Esq., S.S.C.—The death took place on the 14th inst. at his residence, 17 Belgrave Crescent, Edinburgh, of Mr William Peacock Edwards, senior partner of the firm of Skene, Edwards & Garson, W.S. Mr Edwards, who was in his seventy-eighth year, was a native of Forfarshire. He came to Edinburgh as a young man, and acquired legal training and experience in the office of the late Mr John Hope, W.S., and in other well-known Edinburgh offices. In 1856 he was admitted a member of the S.S.C. Society, and at his death was third senior member of that body. Early in the "sixties" Mr Edwards joined Mr William F. Skene, W.S., and that partnership continued until Mr Skene's death about fifteen years ago. During the whole of his professional career, Mr Edwards enjoyed the confidence of a large circle of clients, and his firm acted as agents for a number of the principal landowners in the North and West of Scotland. At an early stage he interested himself in the crofters' agitation. He took a prominent part in the discussion of the Crofters Act, and of the various schemes put forward for the alleviation of the condition of the crofter and congested districts in the Highlands and Islands of Scotland. He was for long associated with the Canada North-West Land Company, of which he became managing director. In that capacity, and as agent for several Highland proprietors, he organised a scheme of emigration for crofters and others from the congested districts of the country. Under the auspices of that scheme a considerable number of men went to Canada, and in the great majority of cases the venture proved prosperous. Mr Edwards was regarded as an authority on all matters of land management, of which he had had large experience. He held the office of trustee in many family and estate trusts. In all matters of business he was an exceptionally shrewd and able man. For many years he was a director of the Commercial Bank of Scotland, and he was connected with various other public companies. Before the passing of the Private Bill Legislation Act for Scotland he was much engaged in connection with private legislation work in London. In politics he was a Conservative, but he took no part in the public discussion of political questions.

The Late Hugh Davidson, Esq., Solicitor, Lanark.—Mr Hugh Davidson, Braedale, Lanark, who died there on 29th April, was one of the most influential and best known men in the Upper Ward of Lanarkshire. Born at Lanark in the year 1828, and educated in his native town, he proceeded to the University of Edinburgh, and was employed in the office of Messrs Mackenzie, Innes & Logan, W.S. In 1858 he returned to Lanark, was assumed as partner in the firm of Messrs Gray & Anderson, Writers, and on the death of Mr Stephen Gray he succeeded that gentleman as Procurator-Fiscal for the Upper Ward of the county, both in the Sheriff Court and the Court of Justices of the Peace. In addition to these public appointments, which he held for over thirty years, he was successful in acquiring an extensive practice as a solicitor. He was Chairman of the first School Board of the Royal Burgh of Lanark from 1873 to 1876, and has since taken a deep interest in matters educational. Of the history of Lanark in the Upper Ward he was the chief authority, and wrote many articles on such matters, which are treasured by those interested in historical research. He was a Fellow of the Society of Antiquaries and a Fellow of the Royal Society of Edinburgh, and the holder of many semi-private appointments in connection with various Upper Ward charities and trusts. He was approached at one time by a deputation to allow his name to be brought forward with a view to the Provostship, but he ultimately refused, owing to the pressure of business. Mr Davidson was a devoted Churchman, and the moving spirit in the erection of St Kentigern United Free Church in Lanark.

The Late David Miller, Esq., Solicitor, Hamilton.—Mr David Miller, solicitor, Hamilton, died suddenly at his residence, Shawburn, Burnbank, on 8th April. He was born at Perth fifty-seven years ago, and was educated at the Trades' School there and at Perth Academy. Beginning his law apprenticeship in Glasgow, he subsequently qualified for the legal profession at Edinburgh University, and started business as a solicitor in Hamilton thirty years ago. Mr. Miller was a man of varied gifts, and by the members of the Bar at Hamilton he was greatly respected for his unfailing geniality of disposition and obliging nature. He was one of the first persons in Hamilton to begin amateur photography, and as an artist, whether in the use of the brush or pen and pencil, he earned no small reputation. He also wrote on local history, and was the author of more than one play.

The Late D. A. M'Tavish, Esq., Solicitor and Banker, Johnstone.—Mr D. A. M'Tavish, agent of the Union Bank of Scotland at Johnstone, died on 24th April at the age of fifty-five years. Mr M'Tavish was head of the firm of Holmes & Co., Solicitors, and he acted as factor and agent for Mr John Charles Cunningham of Craigends,

late Parliamentary candidate for West Renfrew. He was also agent for several West Highland landowners, was a member of the County Council, and until lately Chairman of the Johnstone Conservative Association. He was also Chairman of the Johnstone Combination Hospital Board. He was a native of Islay.

The subject of the portrait in our next issue will be the late Walter Haddon, Esq., Solicitor, Hawick.

The King, on the recommendation of the Home Secretary, has been pleased to appoint John Roskill, Esq., K.C., to be Recorder of Burnley, in place of Henry Gordon Shee, Esq., K.C., resigned on appointment as Recorder of Liverpool.

Mr Thomas Kennedy Douglas, Scone, has been admitted a Law Agent by the Lords of Council and Session.

Mr John M'Michael, M.A., LL.B., Commercial Bank Buildings, Callander, has been admitted a Law Agent by the Lords of Council and Session, and has been assumed as a partner in the firm of Messrs M'Michael & Buchanan, Solicitors, Callander.

Mr Kerr A. Simpson intimates that he has commenced business at Lesmahagow as a Solicitor and Law Agent. He will also carry on business at No. 8 Albany Street, Edinburgh, in association with Mr George S. Donaldson, S.S.C.

Mr Robert Somerville, W.S., 16 Rutland Square, Edinburgh, has assumed Mr James Black Cameron, LL.B., W.S., as a partner. The business will in future be carried on at the above address under the firm name of Somerville & Cameron, W.S.

Mr John Lumsden, agent for the Commercial Bank, Callander, has been appointed to the agency of the branch at Stobcross, Glasgow, and Messrs M'Michael & Buchanan, solicitors, have been appointed joint agents of the Callander branch.

Appeals to House of Lords. — Standing Orders of the House. At a sitting of the House of Lords on the 6th inst. the Standing Orders of the House relating to Appeals from Scotland were amended so as to reduce the time during which appeals may be taken from two years to one year.

Among those called to the English Bar by the Inner Temple on the 24th April last was Mr Hector Burn Murdoch, Advocate, who was admitted to the Faculty in 1905. Mr Burn Murdoch obtained a special prize in Constitutional Law and Legal History at Easter 1906, and in the final examination at Hilary 1907 was awarded a Certificate of Honour.

Interim Sheriffs-Substitute for Lanarkshire.—Two new interim Sheriffs-Substitute for Lanarkshire have been acting during the vacation. Sheriff Moncrieff held Courts in Glasgow, and Sheriff Spens at Hamilton. Both are (says the "Glasgow Herald") advocates of considerable experience, and enjoying large practice at the Bar. Mr Alexander Moncrieff, who is taking the place of Sheriff-Substitute Davidson at Glasgow, was admitted a member of the Faculty in 1894. Having received an excellent legal training in Glasgow, he soon gained a good footing in the Court of Session. A fluent pleader, and having a thorough grasp of his cases, he commands the attention of the Bench. Mr J. G. Spens, who is temporarily performing the Sheriff-Substitute's duties at Hamilton, also belongs to a Glasgow legal family. He was admitted a member of the Faculty of Advocates in 1899. From the first he had a fair share of general practice, and as years passed that practice increased until now he is one of the busiest junior practitioners at the Bar. He has a large Glasgow business connection, and takes a particular interest in shipping cases.

FOR THE POOR OF THE PARISH.

By Henry H. Brown, Procurator-Fiscal, Cupar.

It is related of Mrs Gilpin on a famous occasion that "though on pleasure she was bent, she had a frugal mind." In similar phrase it may be said of our ancestors that, though they were resolutely bent on the protection of sporting rights, they had a charitable mind. In most of the older statutes relating to game and trout-fishing the penalty, or part of it, is directed to be utilised for the poor of the parish in which the offence was committed. It was thought astute policy to make the poacher provide for the poor. Ideas respecting the best mode of relieving poverty have changed in the last century, and altered circumstances often compel the prosecutor to ask himself,—"How shall I carry out the statutory direction?" The question has been answered in various ways, so that diversity of practice exists, both as to the terms of the conviction, and the disposal of the money.

The first point is not important. It was decided in the case of *Hume* (1846, Ark. 88) that the respondent discharges his duty under the Act by paying the penalty to the Clerk of Court, and therefore the terms of the conviction do not present much difficulty. Although competent to omit any direction as to the disposal of the penalty, it is expedient to insert one, either directly or by reference; thus,—"Directs the penalty when recovered to be paid by the complainer to the Moderator, or other officer, of

the Kirk Session of the said Parish of A., for the use and benefit of the poor of such parish"; or, "Directs the penalty when recovered to be applied by the complainer in the manner prescribed by the said Act." Doubt may in this particular be obviated by using the latter form.

The second point is of greater moment—the proper application of the money. An examination of the statutes dealing with game and fishings from 1772 to 1860 shows that the direction takes five forms:—

(*a*) To the use of the poor of the parish (1772).
(*b*) To the overseer (in Scotland, Inspector) of the poor of the parish, for the use of the general rate of the county (1831).
(*c*) To the moderator or other officer of the Kirk Session of the parish, for the use and benefit of the poor of such parish (1832).
(*d*) To the poor of the parish (1845).
(*e*) To the Inspector of the Poor of the parish on behalf of such poor (1860).

Some prosecutors make no distinction, and in all these cases pay the penalty to the Inspector of Poor. This seems to be the obvious course as regards forms (*a*), (*b*), (*d*), and (*e*); but in form (*c*) the proper recipient is the moderator or other officer of the Kirk Session.

A curious question has been known to arise in practice. A portion of a large parish may have been disjoined from it, and erected into a new parish. When an offence has been committed in the new parish, it may be asked—What poor ought to benefit from the penalty, those of the original parish or those of the smaller area? The answer depends upon the terms of the disjunction and erection. If the disjoined portion has been erected a parish *quoad sacra tantum*, the erection affects only ecclesiastical rights and obligations, such as religious services or the proclamation of banns. In that case the poor of the whole original parish should share in the penalty. But if the erection has been *quoad omnia*, the right passes to the poor of the disjoined portion. The practical importance of the question rests in this, that the prosecutor will in the latter case have to libel the offence as having been committed within the new parish. The provisions of the Local Government Acts have also affected parish boundaries to a large extent; but under them little difficulty can arise, because the lands disjoined or annexed, as the case may be, become part of the new parish as regards all matters of civil administration.

The system of utilising the penalties of poaching for the benefit of the poor has been abandoned in modern statutes, and might well be abrogated. It has nothing to recommend it economically, socially, or judicially. I am afraid that the poor do not greatly benefit by this device of the charitable mind of our ancestors, and I know that it is an annoyance to those who have to administer the law.

DECISIONS IN THE ENGLISH COURTS.

Furber v. *Fieldings Ltd.*

Statute—Moneylenders Act, 1900 (63 & 64 Vict. cap. 51), sect. 6 (*d*).—A valuer advanced money at 15 per cent. interest on bills of sale to any person to whom there was no personal objection, such advances bringing legitimate valuation business in an indirect manner. *Held* that he did not require to be registered as a moneylender.—K.B. Div. (Phillimore, J.).—23*rd February* 1907.

Joseph Thorley Ltd. v. *The Orchis Steamship Co. Ltd.*

Ship—Bill of Lading.—Decision of Channell, J. (*supra*, p. 135), *affirmed*.—Court of Appeal (Collins, M.R., Cozens-Hardy and Fletcher Moulton, L.JJ.).—25*th February* 1907.

Cairn Line of Steamships, Ltd. v. *Corporation of Trinity House.*

Ship—Light Dues — Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60), sect. 85.—*Held* that light dues were payable on the deck space occupied by coal which was to be consumed in the ship's boiler fires, the provisions of sect. 85 of the Merchant Shipping Act, 1894, not being limited to space occupied by freight-earning cargo.—K.B. Div. (Bray, J.).—25*th February* 1907.

Burton v. *The Companies Registration Agency*

Statute—Moneylenders Act, 1900 (63 & 64 Vict. cap. 51), sect. 1.—Decision of Bucknill, J. (*supra*, p. 148), *reversed*.—Court of Appeal (Collins, M.R., Cozens-Hardy and Fletcher Moulton, L.JJ.).—26*th February* 1907.

Darling & Son v. *Raeburn & Verel.*

Ship — Charter-party — Construction.—Decision of Kennedy, J. (*supra*, p. 19), *affirmed*.—Court of Appeal (Lord Alverstone, C.J., Farwell and Buckley, L.JJ.).—27*th February* 1907.

S.S. "Albano" v. *S.S. "Parisian."*

Ship—Collision.—Where two vessels were converging on a pilot-cutter for the purpose of getting a pilot, *held* that they were crossing vessels in the sense of the rules for preventing collisions at sea, although the vessel whose duty it would then be to keep out of the way had little motion in her on arriving at the cutter.—Judicial Committee of the Privy Council (Lord Macnaghten, Lord Davey, Sir Arthur Wilson, and Sir Gorell Barnes).—27*th February* 1907.

Whittall & Co. v. *The Rahtkens Shipping Co. Ltd.*

Ship — Demurrage.—A charter-party provided that the charterers might have the option of using neighbouring loading ports, "paying all port charges, and time shifting port to count as lay-days." Thirteen running days were allowed, "Sundays and holidays excepted," for loading, "to commence when the steamer is moored and ready." On arriving at the loading port the steamer was put into quarantine, and when there was ordered to a neighbouring port to load, whither she went on getting out of quarantine. She also loaded on a Sunday and a holiday. *Held* that the time going to the neighbouring port was to be counted in the lay-days although the vessel had not previously been moored at the original port of loading, that the Sunday and holiday were to be counted as lay-days, but that the expression "port dues" did not include pilotage dues.—K.B. Div. (Bray, J.)—28*th February* 1907.

Mayor, etc., of the Borough of Lambeth v. *South London Electric Supply Corporation Ltd.*

Electric Lighting—Transfer of Powers—Collateral Agreement.—A local authority got power under a provisional order to carry on an electric undertaking, and they were entitled, with the sanction of the Board of Trade, to transfer their powers. They entered into two agreements with the defendants, viz.—(1) for a transfer of their powers under the provisional order, this agreement receiving the sanction of the Board of Trade, and (2) for the construction and maintenance by the defendants of a dust destructor and the disposal of the refuse of the borough, this agreement not being sanctioned by the Board of Trade. *Held* that the local authority having power under the Public Health Act to dispose of its refuse, the second agreement was valid, and that it did not require the consent of the Board of Trade.—Court of Appeal (Lord Alverstone, C.J., Farwell and Buckley, L.JJ.).—28*th February* 1907.

Moulis v. *Owen.*

International Law—Illegal Contract—Gaming Debt.—Decision of Darling, J. (*supra*, p. 95), *reversed*.—Court of Appeal (Collins, M.R., Cozens-Hardy and Fletcher Moulton, L.JJ.).—1*st March* 1907.

The "Wallsend."

Ship—Collision—A vessel became a wreck by collision through the fault of the other colliding vessel, and the owners of the wreck had to pay for its removal. *Held* that the owners of the vessel in fault were liable to repay this amount.—P.D. and A. Div. (Bargrave Deane, J.).—4*th March* 1907.

The "Bodlewell."

Ship—Collision.—A vessel which was being run at a loss in order to secure a footing in the trade, with the hope of afterwards earning a profit, was damaged by collision through the fault of the other vessel. *Held* that the owners of the damaged vessel were not entitled to claim from the owners of the vessel in fault damages for the loss of the use of their vessel.—P.D. and A. Div. (Bargrave Deane, J.).—4*th March* 1907.

Thornton v. *Little.*

Property—Servitude.—*Held* that a right granted to the owner of a house of user of a footpath for "her tenants, visitors and servants" included a right of user by pupils attending a school carried on at the house.—Chan. Div. (Kekewich, J.).—5*th March* 1907.

The "Oravia."

Ship — Collision. — The plaintiffs' vessel sighted the defendants' vessel at a distance of about three miles, both being on courses on which they would have passed clear. The defendants' vessel was then lost in a fog bank and the plaintiffs' vessel kept on her course and did not sound her whistle until she heard the whistle of the defendants' vessel, which had altered her course in the fog bank. *Held* that the defendants' vessel was not in fault in not altering her course or sounding her whistle until then.—Court of Appeal (Lord Alverstone, C.J., Cozens-Hardy, M.R., and Fletcher Moulton, L.J.)—7*th March* 1907.

Polsue & Alfieri v. *Rushmer.*

Nuisance—Increase of Noise—Standard of Comfort—Printing Machinery.—Decision of the Court of Appeal (*ante*, Vol. XIII. p. 152) *affirmed*.—House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Robertson, and Lord Atkinson).—11*th March* 1907.

Smitton v. *The Orient Steam Navigation Co. Ltd.*

Carriage—Liability of Carrier—*Held* that the liability of a carrier for goods in the personal control of a passenger did not alter when the passenger went to sleep at night in his berth and placed the goods in a receptacle in his cabin provided for the purpose. *Held* also that fault on the part of the marine superintendent of a shipping company in the matter of the construction of the cabin of a ship was not the fault of the owners in the sense of sect. 502 of the Merchant Shipping Act 1894. — K.B. Div. (Channell, J.)—11*th March* 1907.

The Late WALTER HADDON, Esq., Solicitor, Hawick.

When a man has for more than a generation lived in the eye of his native town; when he has filled many public offices of responsibility and trust; when he has been identified with public movements and enterprises which appeal to public sympathies and evoke criticism as well as praise, his death is likely to be widely and deeply felt in the community among which his labours were spent. And when on his death no word is heard but of regret and appreciation, it may be said that he not only bulked largely in the public eye, but merited the respect and confidence with which his fellow-townsmen regarded him. Such a man was the late Mr Walter Haddon, solicitor, Hawick, who died at his residence at Colislinn, there, on 8th April last.

The son of a manufacturer in Hawick, Mr Walter Haddon was born in the year 1841. He served his apprenticeship with the late Mr Thomas Purdom, solicitor there; and after attending the law classes in Edinburgh, returned to his native town in 1864, where he took over the business of the late Mr Charles Kirk and commenced practice under the name of Kirk & Haddon. In the same year he was appointed Treasurer and Collector to the Police Commissioners, an office which he held till his death. Other appointments which came to him in subsequent years included Sub-Distributor of Stamps and Sub-Collector of Imperial Taxes; Sheriff-Clerk Depute, which he held until the weekly Sheriff Court was established in Hawick; Clerk to the School Boards of the Parishes of Cavers and Lilliesleaf; Secretary to the Upper Teviotdale Fisheries Association; Agent of the Royal Bank of Scotland, and a member of the Board of Advice for the South of Scotland of the Caledonian Insurance Company.

Mr Haddon had an extensive private practice, and his counsel was much sought after, especially in questions of estate management and agricultural affairs. He acted as factor for Cavers estate from the year 1879, and was also a director of the Teviotdale Dairy Company, in whose affairs he took much interest.

To his public duties and an assiduous attention to the interests of his many clients, Mr Haddon added a zeal for the practical responsibilities of citizenship. As a member of the Hawick District Committee of the Roxburgh County Council, and also as a member of Cavers Parish Council, he was able to bring to the work of these Boards a trained mind, large experience, and an enthusiasm for the public service. The Border Mounted Rifles, now extinct, and the Hawick Archæological Society, also were sharers in his multifarious interests.

It may not be within the scope of this article to touch upon the private life of a man. But to one who knew him well, Mr Haddon was happiest with his family around him. By the banks of his beloved Slitrig, with rod in hand, or on the moors with gun and dog, he appeared at his best. There the worries of business were forgotten, and on such occasions his mind was centred on the pleasures of sport and the joys of friendship.

Before commencing the business in Hawick Sheriff Court on Wednesday, 10th April—

Sheriff Baillie, referring to the death of Mr Haddon, said that although not practising in the Court of recent years, he had done much good work in the old days when only the Small Debt Courts had been held in Hawick. At that time

he was Depute Sheriff Clerk, and rendered valuable service both to the Court and to the members of the Bar. He thought, however, it was not so much Mr Haddon's connection with the Court by which he would be chiefly remembered. He would be remembered as a very excellent man indeed, a very sound adviser, and a very good friend to all his clients. He always did his very best for them, and consulted their interests in every way. He set a very honourable example to the members of his profession, and he was sure they were all the poorer by his death.

Mr J. R. Purdom, on behalf of the Bar, concurring in all that his Lordship had said, added that Mr Haddon had been very well known to them for a great number of years, having practised as a lawyer since 1864. He was Dean of their Faculty, and senior member of their profession, and had been known to them both as a friend and professional gentleman. He had always been held in very high esteem, and trusted by a very large body of clients with important business, and was always understood to be one of the shrewdest men in the town, and one of the clearest and most level-headed men in the profession. He did not think they could pay a higher compliment to a professional man that that. He held a great many public offices in the town with appreciation, and there was no doubt that his death was a very serious loss to the community.

It was, of course, on his resignation, over a year ago, that Lord Young actually severed his long and memorable connection with the administration of law in Scotland. Since then he has taken no part in public affairs. But it is only his death that has fully brought home to the minds of his countrymen that Lord Young's life work is finished and that he will sit in judgment no more. We venture to think that, amid all the tributes to his position and worth which his removal has called forth, the extent of the loss to Scottish jurisprudence has scarcely been adequately realised. Justice has been done to his powerful intellectual qualities; and more than justice, perhaps, has been done to the exuberance and brilliance of his sardonic humour. But surely something less than justice has been accorded to his greatness as a lawyer and as a judge. Lord Young was a great lawyer. Moreover (apart from a tendency to too contemptuous or impatient treatment of what he considered either prolix or untenable), he was a *great* judge. He was such a lawyer and such a judge as were scarcely once excelled in his own generation. Not only was his knowledge of law exceptionally wide and exceptionally ready; he had assimilated its principles in a rare degree; while his discrimination between the essential and the accidental or the spurious never failed. He has left his impress on the case law of his time more extensively than merely his own powerful and courageous decisions would imply, for beyond a doubt he leavened, in no small measure, the views of his brother senators.

Faculty of Advocates.—A meeting of the Faculty was held on the 17th May—the Dean of Faculty, Mr William Campbell, K.C., presiding. Committees were appointed to consider and report upon the following Bills now before Parliament: — Sheriff Court (Scotland) Bill, Small Landholders (Scotland) Bill, the Intestate Husband's Estate (Scotland) Bill, also the Companies Bill and the Companies (Debenture and Debenture Stock) Bill.

Election of Procurator of the Church of Scotland.—In the General Assembly on 21st May Lord Balfour of Burleigh proposed the election of Sheriff C. N. Johnston to the office of Procurator, in room of the late Sir John Cheyne. He was, he said, old enough to remember four Procurators, three of whom were promoted to the Bench. Sheriff Johnston had long served the Church efficiently, with much sacrifice to himself and with great benefit to the Church at large. He had acted with Sheriff Johnston on the Church Interests Committee, and a more unselfish and devoted son the Church did not at the present time possess. The Rev. Dr Fisher, Morningside, seconded the nomination. Mr James Wallace, as the senior member of the Bar having a seat in the Assembly, supported the motion, stating that Sheriff Johnston's position as Sheriff of Perthshire, his ability as a lawyer, his knowledge of church law and procedure, and the eminent services he had rendered to the Church, both by speech and pen, fully entitled him to the high office for which he had been nominated. The motion was unanimously agreed to. Sheriff Johnston, when called in, appeared in full-bottomed wig, and was congratulated by the Moderator on his appointment. Having taken the oath of office, he returned thanks, stating that he hoped to be able to discharge the duties in a manner not altogether unworthy of the traditions of the office. A portrait and biographical sketch of the new Procurator appeared in the "Scots Law Times," Vol. III. p. 13.

His Imperial Highness Prince Fushimi, accompanied by his suite, paid a visit to the Parliament House on Saturday, 16th May. The Prince, who was received in the Judge's Robing Room by the Lord Justice-General, was conducted by him to a seat on the Bench of the First Division, where he remained for a few minutes and heard part of a discussion before that Court. The Dean and the other officials of the Faculty of Advocates were thereafter presented to His Imperial Highness, who paid a short visit to the Parliament Hall and Advocates' Library.

The Late William Thomson, Esq., Solicitor, Dumfries.—We have to record the death of Mr William Thomson, solicitor, Buccleuch Street, Dumfries, which took place on Monday, 20th May, at the residence of his brother in Ayr. Mr Thomson had been seriously ill for about a year, and had been laid aside for some months. In October he installed Mr John Dickie to manage his business, and appearances in his court cases were made on his behalf by a fellow-member of the Bar, Mr James Hyslop, solicitor. Mr Thomson had made for himself a high reputation in his profession, and had built up an extensive business, and his death at the early age of forty-four is much regretted. Born in Ayr, he was apprenticed to the law in the office of Mr Kirkpatrick, solicitor, there. He had a distinguished career as a student in Glasgow University. In 1886 he gained a place in the honours list for Conveyancing, and acquitted himself with great credit in the Scots Law Class. In 1887 he gained the second prize for eminence in ordinary Conveyancing class examinations, and second prize in special written examination on "the completion of titles in feudal conveyancing." For some years he served in the office of Messrs Black, Honeyman, & Monteath, writers, Glasgow. In 1889 he was admitted a law agent, in which year he came to Dumfries, where, as stated, he succeeded, by sheer ability and application, in coming to the front in legal circles. For a number of years he was one of the most prominent figures in Court work in Dumfriesshire and the Stewartry. He was no hectoring cross-examiner, but endeavoured rather by steady persistence to gain his points, and as a pleader he deservedly had a high reputation. His pleasing and obliging manners earned for him the respect both of his fellows of the Bar and the general public. For some time he was on the Dean's Council of the Faculty of Solicitors. He was agent for the Licensed Victuallers' Association, and Secretary to the Dumfries and Galloway Property Investment Company. In politics he was a Liberal, but beyond appearing as one of the platform party at political meetings, he took no active share in political campaigns. He was unmarried.

Levee at Holyrood.—His Grace the Lord High Commissioner on Wednesday, 22nd May, held a levee, which was attended by the Senators of the College of Justice, members of the Faculty of Advocates, of the Society of Writers to His Majesty's Signet, of the Society of Solicitors in the Supreme Courts, the Senatus Academicus of the University of Edinburgh, representatives of the Royal College of Physicians and of the Royal College of Surgeons, of the Society of Chartered Accountants, and of the Faculty of Actuaries in Scotland. The Judges present were:—The Lord Justice-General, the Lord Justice-Clerk, Lord M'Laren, Lord Kinnear, Lord Stormonth-Darling, Lord Pearson, Lord Dundas, Lord Ardwall, Lord Johnston, Lord Salvesen, and Lord Guthrie. Among the other gentlemen who attended the Levee were: Faculty of Advocates—Mr William Campbell, K.C., Dean of Faculty; Mr James A. Fleming, K.C., Sheriff of Dumfries and Galloway, Vice-Dean of Faculty; Mr A. A. Grainger Stewart, Treasurer of Faculty; Mr W. K. Dickson, Keeper of the Advocates' Library; the Right Hon. C. Scott Dickson, K.C.; Mr C. N. Johnston, K.C., Sheriff of Perthshire; Mr Donald Crawford, K.C., Sheriff of Aberdeen; Mr George L. Macfarlane, K.C.; Mr G. L. Crole, K.C.; Mr R. L. Orr, K C., A.-D.; Mr John F. M'Lennan, K.C., Sheriff of Caithness; Mr A. L. M'Clure, K.C., Sheriff of Argyllshire; Mr John A. Reid, K.C., Sheriff of Ross, Cromarty, and Sutherland; Mr T. B. Morison, K.C., A.-D.; Mr Edwin Adam, A.-D.; Mr A. M. Anderson, A.-D.; and many members of the Junior Bar. The Society of Writers to the Signet was represented by Mr G. M. Paul, Deputy Keeper; Mr John Cowan, Treasurer; Mr W. S. Fraser, Fiscal; and Mr W. S. Haldane, Crown Agent. The President of the S.S.C. Society, Mr John Campbell, the Vice-President, Mr William Robson, and the Treasurer, Mr Charles Ritchie, also attended.

Edinburgh Legal Dispensary.—The annual meeting of the subscribers to the Edinburgh Legal Dispensary—an institution which was founded seven years ago for providing poor persons with legal advice—was held on 20th May in the Goold Hall, St Andrew Square. Mr G. M. Paul, D.K.S., presided. The report stated that every week an average of about twenty-four persons attended the rooms. The number of clients who sought assistance in the course of the year was 848, as against 857 in the previous year, and there were 1194 consultations, compared with 1232 in the preceding year. The year's income was £53, 7s. 5d., and the expenditure amounted to £56, 14s. There was a balance in hand of £6, 14s. 3d. The Chairman, in moving that the report be approved and circulated, remarked that Mr John P. Coldstream,

W.S., was entitled to the high credit of having been the first to suggest the idea of instituting a legal dispensary in Edinburgh, and it was mainly by his care and watchfulness that it had been made a success. The motion was seconded by Mr Grainger Stewart, Advocate, and was unanimously agreed to. Mr A. Hewat, Mr J. E. Dovey, C.A., Sir John M. Clark, Bart., Mr James Urquhart, and Mr W. S. Haldane, Crown Agent, commended the Dispensary to the support of the public.

Mr George Allison Scrimegour, solicitor, who has been for the last six years principal assistant to Messrs Thurburn & Fleming, solicitors, Keith, has commenced business on his own account at Portsoy.

AN IMPERIAL COURT OF APPEAL.

At the meeting of the Colonial Conference on 26th April the following resolution of the Commonwealth of Australia was moved by the representative of that Colony:—"That it is desirable to establish an Imperial Court of Appeal." The meagre minute of the proceedings which was communicated to the press bears that the resolution "was submitted and discussed." We are left to infer—from the discussion, and on the principle of exclusion—that the proposition was not accepted.

At present it is sufficiently accurate to say that there are two Supreme Courts of Appeal for the Empire. The inhabitants of the United Kingdom appeal to the House of Lords; the King's people beyond the seas appeal to His Majesty in Council, and the appeal is disposed of by the Judicial Committee of the Privy Council under the orders of reference.

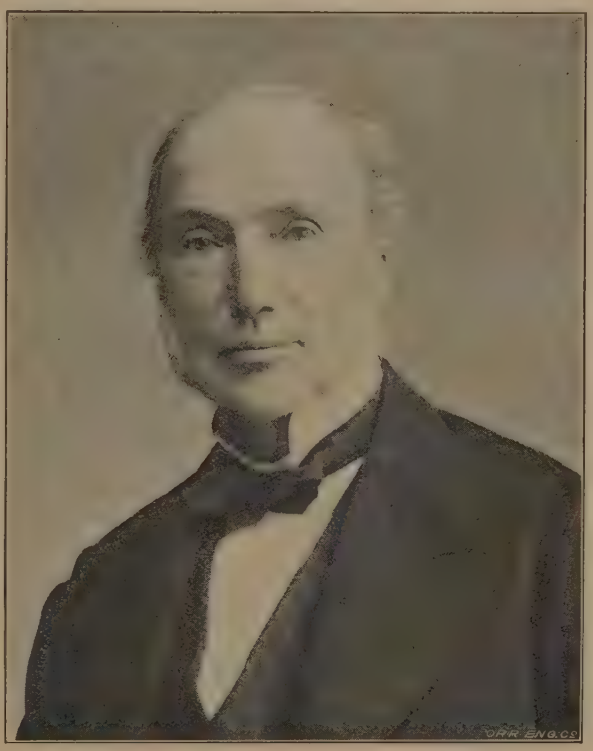
The proposal to constitute one Court for the whole Empire would certainly have the advantage of securing uniformity. There, however, we venture to think its advantages would end. It cannot be doubted that the system of appeal to the Privy Council has worked well. The composition of the Judicial Committee (as amended by 3 & 4 Will. IV. c. 41, and 58 & 59 Vict. c. 44, to the effect of admitting members experienced in Indian and colonial law) is generally approved; and the findings of the Committee have always commanded confidence and respect. In the circumstances in which the tribunal has to work, moreover—dealing with appeals which come from both hemispheres and from very near both poles—commendable despatch has generally characterised its labours. Nor can it be said with truth that its rules and procedure are either exceptionally complicated or tedious, or that to invoke its aid involves undue expense. In all these respects, it may be conceded, there is room for a certain amount of improvement. But, as human institutions go, the Judicial Committee of the Privy Council as a Court of Appeal has worked well. The Colonial representatives one and all bore testimony to its success; while the Lord Chancellor had an easy task as its apologist. Mr Deakin, who moved the Australian resolution, had an alternative suggestion to offer. If one uniform Court could not be established, he stated, Australia desired an Order in Council giving a Colony power to transfer its appeals to the Lords if it wishes. Such an arrangement would leave other Colonies who desire no change to continue as at present. With this alternative also Lord Loreburn was able to deal effectively. He pointed out that the judges of the House of Lords Appeal Court are all members of the Judicial Committee of the Privy Council and available for service upon it, while the Committee has this advantage over the House of Lords as an Imperial Court, that it is strengthened by the inclusion of judges who have had experience in the Colonies of all forms of colonial law. There would not be any advantage in substance if the Judicial Committee were displaced as suggested in the alternative.

The conference, therefore (wisely, as it humbly seems to us) did not adopt the Australian resolution, but addressed itself to the improvement of the venerable existing tribunal. To this end the resolution submitted by General Botha, in which the Prime Minister of Cape Colony had concurred, was adopted. As amended and accepted, the resolution was in these terms:—

"This Conference, recognising the importance to all parts of the empire of the appellate jurisdiction of His Majesty the King in Council, desires to place upon record its opinion (1) that in the interests of His Majesty's subjects beyond the seas it is expedient that the practice and procedure of the Right Honourable the Lords of the Judicial Committee of the Privy Council be definitely laid down in the form of a code of rules and regulations; (2) that in the codification of the rules regard should be had to the necessity for the removal of anachronisms and anomalies, the possibility of the curtailment of expense, and the desirability of the establishment of a course of procedure which would minimise delays; (3) that with a view to the expansion of uniform rights of appeal to all Colonial subjects of His Majesty, the various Orders in Council, instructions to governors, charters of justice, ordinances, and proclamations upon the subject of the appellate jurisdiction of the Sovereign, should be taken into consideration for the purpose of determining the desirability of equalising the conditions with equal right of appeal to His Majesty; (4) that much uncertainty, expense and delay would be avoided if some portion of His Majesty's prerogative to grant special leave to appeal in cases where there exists no right of appeal was exercised under definite rules and restrictions."

The Late LORD YOUNG.

It is with great regret that we record the death of Lord Young, which took place in London on the 21st ult. Since his resignation, two years ago, Lord Young had enjoyed fairly good health, and about a month ago, feeling sufficiently vigorous to go South, he took up his residence in the chambers in the Middle Temple which belonged to him as one of the Benchers of that Inn. When in London he overtaxed his strength and met with an accident as the result of sudden heart failure. After a time he rallied, and it was hoped that he might be able to return to Edinburgh. But the improvement in his condition was not maintained, and after an illness of nearly a month's duration he passed away within a few weeks of his eighty-eighth birthday.



A portrait and biographical sketch of his distinguished career as a lawyer, a politician, and a judge appeared in our columns when he resigned in 1905 (Vol. XIII. p. 1). It is needless to repeat the facts which were there detailed. The notes which follow are from the pen of one who was long associated with him and was privileged to enjoy his friendship.

The death of Lord Young, at the great age of eighty-eight, severs a link with the far past, and is an event of no ordinary kind in the Scottish legal world. It is strange to recal the fact that as a boy he frequently had tea in Dumfries with Bonnie Jean, the widow of Robert Burns, in the very house in which the poet died. He was at the Bar before the days of the penny post, even before people got letters done up in the Mulready envelopes now so dear to stamp collectors. When he was a student he used to see the coaches starting from the head of Leith Walk for Dumfries and other provincial towns. The year George Young attended the Conveyancing Class he had among his competitors the late T. G. Murray (whose only son is now Lord Justice-General), Patrick Fraser, who rose to be a Judge, and Samuel Raleigh, a Castle-Douglas boy, who became in due time manager of the Scottish Widows Fund. It is sixty-seven years since he took the oath as an advocate before Lord President Hope in what is now the Second Division Court; for at that date the present First Division building was still unfinished, and the Second Division judges sat in what is now known as the Law Room.

It is perhaps not altogether inappropriate that his death took place in London, for it sometimes appeared as if his great gifts would have been seen to more advantage and had larger scope in the wider sphere of the English Bar, of which he became a member in 1869, and many of whose most famous men were his intimates when as Lord Advocate and Solicitor-General he sat in Parliament. Some years ago one of his brethren, who did not always see eye to eye with him, admitted somewhat reluctantly, "I daresay he is the ablest of us all, but he does not care much for the rules of law. If these conflict with his view of what should be, so much the worse for the rules of law."

It was his great characteristic to be more than a mere lawyer. He took an interest in aspects of a case that had nothing to do with rules of law. He would interrupt junior counsel by asking "How much did this testator leave?" "How old was

he when he died?" and other similar questions, to which budding Counsel had paid no attention, and could not answer. When he found out that the subject of dispute was of trifling value, he was scathing in his remarks about the absurdity of litigating over trifles. If, on the other hand, he thought a matter important, he spared no pains or trouble. If he was likely to be in a minority, his energy was redoubled. In *The Assets Co.* v. *Bain's Trustees* he wrote and re-wrote his judgment, and no doubt was vastly gratified that he was unanimously upheld in the House of Lords; but he could only be got to say, with a grave look and a twinkle in his eye, "It may be right for all that." What astonished one most, even up to the last, was the rapidity of his mental movements, and the unexpected turns he could give to apparently trifling incidents He thoroughly appreciated the answer of a witness who, on being asked "What doctor attended the deceased?" replied "Oh, there was no doctor; he just died a natural death."

Lord Young did not mind treading on other people's toes. Years ago he brought a Bill into Parliament abolishing the Feudal System. His reforming zeal led him to abolish offices which he considered were sinecures. To the place-hunter this is the one unpardonable sin, and is sure to create enemies. Further, his undisguised contempt for anything in the nature of stupidity was a cause of offence to an even larger class. "I have not made up my mind yet who I shall vote for," said someone in the Wigtown burghs. "Well, when you have made up what you are pleased to call your mind, perhaps you will give me your vote," was the reply. To a Tory admirer who once said to him across the dinner-table, "Upon my word, Young, I'm thinking of joining your party," swift as lightning came the answer: "Oh, no, K. If I were you I wouldn't; the party is weak already." There was, moreover, a fearlessness in his Lordship's expressions of opinion at all times. Once pleading a case in the House of Lords he was interrupted by one of the judges, who said, "There is a remedy for every wrong, Mr Young." "No, my Lord," he replied; "if your Lordships should decide this case against me there is no remedy." He lived long enough to learn that even a House of Lords decision, when it results in practical absurdity, may be rectified, though only after expense, delay, suffering and commotion past all reckoning. A young man was once asked by Lord Young what he intended to become, and replied saying he meant to become a member of the W.S. Society. "Oh," said Lord Young, "I thought I had abolished that body when I was Lord Advocate," adding "How long does it take to qualify to become a W.S.?" On learning that it involved an apprenticeship of five years, he said, "Yes, I suppose that is on the principle, expressed by the Latin poet, *nemo repente venit turpissimus*, No man becomes a scoundrel all at once."

To say, as is the fashion, that Lord Young was not a successful judge may mean a great deal among lawyers. However, this was the very reason why he was such an interesting personality to the great body of his fellow-countrymen. They desired to see the law giving effect to their sense of what was right and equitable. Lord Young was accustomed to use the expression "the good sense and meaning of the transaction is this," and then to proceed to show what ought to be the law. If he thought the result of quoted cases was unjust, and if the precedents of learned legal pedants tended in that direction, then he had little or no respect for them. He was inclined to adopt the view that it would have been all the same if the whole of the old cases reported in Morrison's "Dictionary of Decisions" had been exactly the reverse of what they were. No wonder, perhaps, that those who, before everything, defer to precedents thought this was playing fast and loose with very serious matters.

He had a marvellous memory, and it was richly stored with splendid passages from the Bible, from the Book of Psalms, and from the Scottish Paraphrases. His knowledge of English literature, and particularly his love of poetry, were very marked, and he was accustomed to quote in old-world fashion from the great poets of the past. Wordsworth he knew thoroughly, and he had a particular fondness for stately passages from Tennyson. After repeating one of these he would relate how a friend once took Tennyson for a week-end to a country inn. When leaving on the Monday morning the friend thought the least he could do was to tell the innkeeper what a famous man had been living in the house. "My companion," he said, "is a poet. His name is Tennyson." The innkeeper replied, "A poet! damn him, and he has had the best bedroom."

Lord Young was all his life a lover of little children; their sayings, their ways, and their society were dear to him. No sight was more familiar on the streets of Edinburgh than his Lordship driving in his carriage with a child seated opposite him. Only once after his resignation did he ever drive up the Mound. It was too much for him, recalling too vividly the long years of strenuous professional toil, but he merely said, "I don't think we shall come this way again."

We rather think Sir George Reid painted Lord Young's portrait many years ago. It is to be hoped that in due time some representation of him may adorn the walls of the Parliament House to remind future generations of one of the greatest advocates whom Scotland has produced.

P. W. C.

No part of the "Scots Law Times" was issued last Saturday, as practically no reports were then ready for publication. The double numbers issued on March 30th and April 13th, at the close of Volume XIV., contained reports of (with one or two exceptions) all cases decided before 20th March. Very few cases have been decided so far this session, and, as the opinions of the Judges do not appear in the "Scots Law Times" until after they have been revised by their Lordships, some reports are not ready for publication for some time after the dates on which the judgments are given. In order that reports may be issued whenever they are ready, a double number of the "Scots Law Times" is published when required.

DECISIONS IN THE ENGLISH COURTS.

The "Tactician."

Ship — Collision — Pilot.—A collision occurred through the fault of a compulsory pilot who was in charge of the defendants' vessel. *Held* that the defendants were liable in respect their master was also to blame, because he did not point out to the pilot that the plaintiffs' vessel was at the time of the collision stationary, the collision being caused by the pilot mistaking the lights of the plaintiffs' vessel for those of a moving ship.—Court of Appeal (Lord Alverstone, C.J., Fletcher Moulton, L.J.).—12*th March* 1907.

James Nisbet & Co. Ltd. v. *The Gulf Agency.*

Copyright — Disjunction.— The plaintiffs, for the purpose of an annual publication which they issued, sent a list of questions to various persons, and from the answers compiled biographical notes which were contained in their annual publication. The defendants, who also issued an annual publication, copied from the plaintiffs' biographical notes. Before this action was raised the defendants sold their book with the copyright therein. *Held* that the plaintiffs were owners of the copyright in the biographical notes, and that they were entitled to an injunction against the defendants.—Chan. Div. (Kekewich, J.).—13*th March* 1907.

Bank of England v. *Cutler.*

Reparation — Damages — Warranty.—The defendant filled up and handed to the plaintiffs a form containing certain particulars, and the plaintiffs thereupon prepared a transfer of India stock standing in their books in the name of M. M. P. The defendant went to the plaintiffs' bank with a woman whom he identified to them as M. M. P. (the defendant having the privilege of identifying holders of stock for the purpose of transfer in the bank books), and this woman executed a transfer of the stock in the name of M. M. P. The stock was afterwards transferred to a *bona fide* purchaser for value. The defendant had acted in this matter in the *bona fide* belief that the woman was M. M. P., but it afterwards transpired that the name M. M. P. signed by her was a forgery. When this was discovered the plaintiffs purchased in the market an equivalent amount of India Stock which they transferred to M. M. P. *Held* that the defendant, having requested the plaintiffs to perform a ministerial act, which they were bound to perform on request, in consequence of doing which they had suffered loss, was under obligation to reimburse them for the loss sustained.

The "Anselm."

Ship—Collision.—*Held* that the Rules for Preventing Collisions at Sea applied to the Para estuary, being an inland water in which the tide flowed which was navigable by seagoing vessels; that the provision making the Rules applicable to such waters was not *ultra vires*; and that a course dictated by good seamanship was a course "authorised by" the Rules.—Court of Appeal (Lord Alverstone, C.J., and Fletcher Moulton, L.J.).—13*th March* 1907.

Dakhyl v. *Labouchere.*

Reparation—Slander—Fair Comment.—In an action of damages for defamation against the proprietor of a newspaper on the ground that the plaintiff had been described as "a quack of the rankest species," the presiding judge directed the jury that a quack meant a pretender to skill which the pretender did not possess, and that if there was a personal attack the paragraph complained of could not be fair comment. *Held* that there had been a misdirection; that the judge had usurped the function of the jury in deciding the meaning to be attributed to the word "quack" as used in the passage; and that the defendant was entitled to the verdict of the jury on the questions (1) whether the statement was justified, and (2) whether, if not justified, it was fair comment.—House of Lords (Lord Loreburn, L.C., Lord Robertson, and Lord Atkinson).—14*th March* 1907.

Smith v. *Associated Omnibus Co. Ltd.*

Master and Servant — "Workman" — Employers and Workmen Act, 1875 (38 & 39 Vict. cap. 90), sect. 10.—*Held* that the driver of a motor omnibus was a workman within the meaning of the Employers and Workmen Act, 1875.—K.B. Div. (Darling and A. T. Lawrence, JJ.).—15*th March* 1907.

LAW LIBRARY.

BOOK NOTICES.

The Law of Water and Water Rights in Scotland. By James Ferguson, K.C., Sheriff of Forfar (formerly Sheriff of Argyll and Sheriff of Inverness, Elgin and Nairn). Edinburgh: William Green & Sons, 1907.

Price 45*s. net.*

The learned author of this treatise is well known as a Scottish legal writer. He has written the standard work on the Law of Roads, and is the part author of a well-known book on Railways. His experience as a judge in several counties with extensive sea-boards and abundantly supplied with rivers, must have given him a wide experience in legal questions connected with water. That fact, coupled with the acknowledged excellence of his previous books, ensures for the present volume a hearty reception. Its subject is one which has not hitherto been discussed in detail by any Scottish writer, and Sheriff Ferguson may be congratulated both on the choice of his subject and on the way in which he has dealt with it. The book, which extends to a little over 1000 pages (of which an appendix containing Statutes and Provisional Order Rules occupies over 400 pages), is divided into nine parts:—The Sea and Seashore; Public Rivers; Lochs; Private Rivers and Streams; Surface and Underground Water; Water Pollution; Water Supply; General Legal Responsibility and Statutory Rights; Canals, Ferries and Harbours. From these headings it will be seen that Mr Ferguson has taken a comprehensive view of the scope of his subject. Almost in every branch there are recent decisions of the Scottish Courts. The Moray Firth case in the Court of Justiciary, as to fishing in territorial waters; the case of the *Dumfries Harbour Commissioners* (14 S.L.T. 680), as to the defective state of a harbour bottom, in the Second Division; *The Inveresk Paper Company* (14 S.L.T. 790), as to the entering of a conduit in the Valuation Roll, in the Lands Valuation Appeal Court; and the case of *Dougall* v. *Magistrates of Dunfermline* (14 S.L.T. 656), in the Outer House, are among the recent judgments which are referred to in the text. There is a plentiful citation of English cases, and a detailed index adds to the convenience and usefulness of the book.

The Law of Building, Engineering, and Shipbuilding Contracts. By Alfred A. Hudson, of the Inner Temple, Barrister-at-Law. Third Edition, in two volumes. Vol. I. London: Sweet & Maxwell Ltd., 1907.

Price £2, 12*s.* 6*d.*

Mr Hudson's work on Building Contracts is an eminently practical one. The author has technical knowledge gained as an architect, and that, added to his legal training, has contributed to the success of the former editions of this book. It first appeared in 1891. The second edition was issued in 1895, and the third edition, which has been brought down to date and much enlarged, is completed by the issue of this, the first volume. The second volume, which was noticed in the "Scots Law Times" some weeks ago, consisted of a digest of cases on the subject, many of which are not reported elsewhere, and contained numerous forms for use in building and engineering contracts. Vol. I. is in the form of a systematic treatise. The rules to be deduced from decided cases are stated with great clearness and precision, and the value of the work is enhanced by the "illustrations" of the rules, printed in smaller type, which contain more in detail the facts of the cases on which rules are founded. Mr Hudson has not only exhaustively dealt with English case law, but has noted the more important decisions of the Scottish, Irish and American Courts. He treats of the authority of architects and engineers, of their duties and liabilities, and of the charges which they are entitled to make. The chapter on "Tenders and Contracts" may be specially commended, also the chapter on the difficult subject of "Extras." But the excellence of the whole book is far above the average of legal treatises.

The Lawyers' Manual. Edited by R. Geoffrey Ellis, of the Inner Temple, Barrister-at-Law, and Max A. Robertson, of the Inner Temple, Barrister-at-Law. London and Edinburgh: William Green & Sons, 1907.

Price 10*s. net.*

The Lawyers' Manual of Reference is the successor of a publication of which two issues have appeared under the title of "The Law Annual." It contains considerable additional matter, and is somewhat altered in form and arrangement from its predecessors. It is subdivided into sections on the same principle as the Parliament-House Book, with which Scottish practitioners are familiar, and gives the text of a very large number of statutes applicable to England. An epitome of Colonial Law is a useful feature in the work, and a great deal of information is to be found in the 350 pages, which contain a "Compendium of Points of Law, alphabetically arranged."

The Late ALEXANDER HOWE, Esq., W.S.

By the death of Mr Howe, which took place on the morning of the 24th May, Forfarshire has lost one of her best sons and the legal profession one of its most able members. Born in the county town of Forfar on 26th April 1820, he had entered upon the eighty-eighth year of his age. He was the oldest W.S. engaged in practice, although his name stood third on the list of Writers to the Signet. He joined the Society in the year 1849. His life has been an example of continuous industry and quiet activity. Thrown on his own resources at an early age, he came to Edinburgh in the "Thirties," and good fortune secured him a place in the office of Mr John Mackenzie Lindsay, W.S., the Whig Crown Agent, afterwards Principal Clerk of Session, and later Director of Chancery. Mr Lindsay was not slow to recognise the abilities of his youthful assistant, who became his partner so long ago as the year 1844. Associated with them originally was Mr T. G. Mackay, W.S., and for many years the firm of Lindsay, Mackay & Howe carried on a large and influential legal and factorial business. The firm, during Mr Howe's connection with it, has from time to time changed in *personnel* and in name, but the subject of this notice has all along been its moving spirit and guide. He was a "born lawyer." No client ever had a sounder and safer adviser. Nothing left his hand half done. His draughtsmanship was characterised by lucidity and simplicity, and it may safely be asserted that no deed prepared by him ever required a law suit to settle its proper construction.

Though unknown to the present generation in Parliament House, Mr Howe's figure in days gone by was not unfamiliar there. Many important litigations have been successfully piloted by him, — notably the Stow and the Gask succession cases and the Awe Salmon Fishing suit.

Having lived to so great an age, and being of a retiring disposition, Mr Howe was known, even by sight, to comparatively few lawyers of the present day, but those with whom he did come in contact had the greatest respect and esteem for him. Combined with a dignified presence he possessed an urbanity of manner which had its own peculiar charm.

For several years Mr Howe was a Director of the British Linen Bank and of the North British and Mercantile Insurance Company, both of which positions, however, he resigned many years ago. At the time of his death he was an Extraordinary Director of the former institution.

In private life Mr Howe was a warm friend and a hospitable host. Many acts of kindness and charity were known only to himself and the recipient. Though taking no active part in public or municipal life, he contributed liberally to all deserving objects. To the end he was an expert and enthusiastic angler. Argyllshire latterly was his summer resort.

The Lord Justice-General left Edinburgh on Saturday, 1st inst., for London, *en route* for Royat, France. Lord Dunedin made an excellent recovery from the serious illness from which he suffered in autumn of last year, and it will be remembered that he was able to return to Court in December, at least a month earlier than his medical advisers expected. He has, however, been advised that to complete his cure he should now undergo a course of treatment at Royat, and

he has gone there to take the waters. His Lordship hopes to return to Court on 3rd July, and on that day the first sitting of the Third Division will take place. Notice of this has been given by Act of Sederunt, which nominates the three Judges appointed to constitute the Court.

Act of Sederunt appointing Judges and Clerk for additional Division of the Inner House.—Edinburgh, 7th June 1907. The Lords of Council and Session, in pursuance of powers vested in them by the Court of Session Act, 1868, sect. 8, as amended by Act of Sederunt of 20th March 1907, sect. 1, hereby appoint Lord M'Laren, Lord Pearson, and Lord Ardwall to sit on and after Wednesday, 3rd July 1907, as a Court for the hearing and disposal of causes standing on the Rolls of the First Division; and further, appoint Mr John Cairns, Depute Clerk in the Outer House, to act as Clerk of said Court.—J. H. A. Macdonald, *I.P.D.*

Sheriff M'Lennan, K.C., Sheriff of Caithness, Orkney and Zetland, has granted a commission as Honorary Sheriff of these counties in favour of Mr Thomas Mackenzie, Sheriff-Substitute of Ross, Cromarty and Sutherland at Dornoch. Sheriff Mackenzie holds the distinguished position of senior judge—not by age but by length of service—certainly in the United Kingdom, and probably in the British dominions. He was born in 1831, and was appointed a Sheriff-Substitute on 8th October 1859. His portrait appeared in the "Scots Law Times," Vol. XI. p. 37.

The rule under which civil servants retire on attaining a certain age doubtless has many advantages, but it sometimes prevents the community getting the full benefit of the knowledge and experience of valued public servants. Mr William Andrew, who has been for many years in the office of the Solicitor of Inland Revenue at Edinburgh, retires this month, and his resignation will be much regretted in the Parliament House. He is well versed in all the intricate details of the often perplexing Revenue laws, and the courtesy with which he has always placed his knowledge at the disposal of his opponents has been much appreciated both by counsel and agents. Having retired from the public service, he has intimated that he is prepared to advise members of the legal profession with regard to questions in connection with the Death Duties, and to frame and to pass at the Inland Revenue Office the relative Accounts; to advise as to the stamping of Deeds, and to carry through the adjudication thereof; to prepare Returns of Income Tax and Claims for repayment of same; to carry through the registration of Companies under the Companies Acts; to attend to the insertion of Notices in the Edinburgh and London Gazettes. His business will be carried on in Glasgow as well as Edinburgh.

Mr Charles Powrie Campbell, The Ross, Glencarse, Perthshire, has been admitted a law agent by the Lords of Council and Session.

The Court will not sit on Friday, 28th inst., that day having been appointed by His Majesty's command to be kept as a Holiday in celebration of the King's Birthday.

Mr J. Ogilvie Grey, S.S.C. and P.N., 33 Castle Street, has been appointed by the High Court of the Orange River Colony a Commissioner in Edinburgh to examine witnesses and to take affidavits therefor.

Society of Solicitors in the Supreme Courts.—At a statutory meeting of the Society, held on 4th inst., the following appointments were made for the ensuing year, viz.:—President, Mr John Campbell; Vice-President, Mr William Robson; Fiscal, Mr Campbell Smith; Librarian, Mr John Mathison; Treasurer and Collector, Mr Charles Ritchie; and Secretary, Mr A. Ellison Ross. Messrs Robert Gray, LL.B., 45 Frederick Street, and John M'Clure Brodie, B.L., 44 Frederick Street, were admitted members of the Society.

The Hawick Police Treasurership.—At a meeting of Hawick Town Council on 31st ult., the question of filling up the vacant offices of Police Treasurer and Collector, formerly held by the late Mr Walter Haddon, was under consideration. The Provost's Committee stated that in terms of the remit they had reconsidered the whole matter, along with the summons served by Mr Adam Laing, Burgh Chamberlain, to have it declared that he was entitled to the office of Treasurer, and relative letter offering to have it settled by stated case or reference. This showed that Mr Laing did not now maintain a claim to the office of Collector. The Committee, without prejudice to the Council's legal rights or the claims of either party, now recommended that the office of Burgh Chamberlain cease to exist, and that the duties be merged in the Treasurer of the burgh; that Mr Adam Laing be appointed Treasurer at a salary of £130 per annum; and that Mr James Conn, solicitor, be appointed Collector to the burgh at a salary of £150 per annum, these appointments to commence on 15th August next, and to be held during the Council's pleasure, subject to three months' notice on either side, and each party to give security for £1000. On the motion of Provost Melrose, the recommendation was unanimously agreed to.

The Late P. A. Speirs, Esq., Advocate.—The death of Mr P. A. Speirs, formerly Sheriff-Substitute at Roxburgh, which took place at Bonjedward House, near Jedburgh, on the 26th ult., is much regretted by a large circle. During the last two or three years he had suffered from

recurrences of severe illness, and though he possessed great recuperative power and was till recently in fairly good health, his death did not come as a surprise to his friends. He was a son of Mr Archibald Speirs, of the Honourable East India Company's Service, and a grandson of Mr Peter Speirs of Culcreuch, Stirlingshire. Born in 1842, he was educated at Trinity Hall, Cambridge, and took the degree of B.A. in 1864. Two years later he was admitted to the Faculty of Advocates. In 1877 he was appointed Sheriff-Substitute for the Skye district of Inverness-shire, and took up his residence at Portree. Nine years later he was transferred to Jedburgh as Sheriff-Substitute of the Counties of Roxburgh, Berwick and Selkirk. That office he held till 1897, when he retired on account of his health. In the ten years which have passed since then he was always ready to give the benefit of his experience and assist in the work of the Sheriffdom as an honorary Sheriff-Substitute. He discharged his judicial duties most faithfully. His work was done unobtrusively. A certain diffidence of himself led him to spare no pains in arriving at his decisions. He was eminently fair minded, had a sound judgment, and was courteous and patient to those appearing at his Court. In private life he had many friends, and they regarded him with real affection. He was fond of outdoor sports, and was an excellent shot. He was a Deputy-Lieutenant of Stirlingshire. A portrait of Sheriff Speirs appeared in the "Scots Law Times," Vol. IV. p. 129.

At the Jedburgh Sheriff Court, on the 30th May, Sheriff Baillie, referring to the death of Mr Speirs, said that during his years of service in that Court its work had been most admirably and efficiently carried out. That was due to Sheriff Speirs, who brought to the discharge of his duties qualities which eminently fitted him for the position he held. With a sound and useful knowledge of the law of Scotland, he possessed many gifts of a high order. His innate and all-pervading kindliness would long be affectionately remembered in the county.

DECISIONS IN THE ENGLISH COURTS.

Lloyd's Banking Co. Ltd. v. *Cooke.*

Personal Bar—Bill of Exchange.—S signed in blank a stamped piece of paper which was to be filled in by C as a promissory note for £250, and paid to the plaintiffs in security of an advance of that amount. C filled it in for £1000, which sum the stamp covered, and which amount C received from the plaintiffs in return for the note. *Held* that S was estopped from denying his authority to fill in the amount of £1000.—Court of Appeal (Collins, M.R., Cozens-Hardy and Fletcher Moulton, L.JJ.).—1*st March* 1907.

Wilson & Furness-Leyland Line Ltd. v. *British and Continental Shipping Co. Ltd.*

Principal and Agent—Trust.—The defendant company, who acted as loading brokers for the plaintiffs, received advance freights and paid disbursements on their behalf, and from time to time rendered accounts showing the balance to the credit or debit of the plaintiffs. The money received for the plaintiffs was paid into the defendant company's general bank account with the plaintiffs' consent. On the defendant company's liquidation, *held* that the plaintiffs were not entitled to claim the money in the defendant company's general bank account as being advance freights collected and held in trust for them.—K.B. Div. (Walton, J.).—13*th March* 1907.

The "Crusader."

Ship—Master—Authority.—A ship having stranded, the master sent a letter to a firm who had acted as ship's agents at the last port of call asking for a powerful tug and saying that a salvage boat would be of assistance on the principle of "no cure no pay." The ship's agents hired a tug for which they became personally liable, and wired to the owners of the stranded vessel that their interests were being attended to. On the tug's arrival the master of the stranded ship refused her assistance except on the principle of "no cure no pay"; and an agreement was made between him and the representative of the ship's agents on board the tug for payment of £4000 if the vessel was floated and safely brought into the nearest port. The ship was floated and brought into port. In an action for payment of the £4000, *held* that the master of the stranded vessel had no power to enter into the above agreement on behalf of the owners, there being no necessity.—Court of Appeal (Lord Alverstone, C.J., Fletcher Moulton and Kennedy, L.JJ.).—15*th March* 1907.

In re Grant Richards. Exparte Deeping.

Contract — Breach — Bankruptcy. — An author sold the copyright in his book to the publisher for a royalty on each copy sold. The publisher became bankrupt. *Held* that the author was only entitled to a claim of damages, and that the money received for the sales was not received in trust to the extent of the amount of the royalties.—K.B. Div. (Bigham, J.).—18*th March* 1907.

Barnes v. *Lucile Ltd.*

Reparation—Damages—Dog.—In an action of damages for the bite of a dog, *held* that it was not necessary to prove that the dog had previously bitten anyone, if it was proved that

the dog was at times of a ferocious propensity. —K.B. Div. (Darling and A. T. Lawrence, JJ.). —19*th March* 1907.

Attorney-General v. *London County Council.*

Revenue—Income Tax.—Decision of the Court of Appeal (*ante*, Vol. XIII. p. 68) *reversed.*—House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Robertson, and Lord Atkinson).—19*th March* 1907.

Villar v. *Gilby.*

Will—Construction.—Decision of the Court of Appeal (*ante*, Vol. XIV. p. 4) *reversed.*—House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Robertson, and Lord Atkinson).—19*th March* 1907.

Malone v. *Laskey.*

Reparation — Personal Injury. — The plaintiff was the wife of the manager of a company who were sub-lessees of part of premises belonging to the defendants. The lessee was Witherby, and the plaintiff and her husband lived on the premises. The defendants were under no obligation to repair the premises, but owing to complaints by the plaintiff and her husband to Witherby, transmitted to the defendants, they repaired a cistern, which was said to be in a dangerous condition, by putting a supporting bracket below it. The bracket fell and injured the plaintiff owing to (1) a (private) nuisance caused by vibration due to an engine on adjoining premises belonging to the defendants, and (2) defective workmanship in repairing the condition of the cistern. *Held* that the defendants were not liable in damages to the plaintiff.—Court of Appeal (Gorell Barnes, P., Fletcher Moulton and Kennedy, L.JJ.).—20*th March* 1907.

His Majesty's Postmaster-General v. *National Telephone Co. Ltd.*

Statute—Telegraph Act 1869 (32 & 33 Vict. cap. 73), sect. 5.—*Held* that telegraphs do not fall within the exception of those "used solely for private use" unless they are used solely for the private use of the owner of the telegraph. *Held* also that the defendants by supplying and maintaining a fire-alarm system consisting of boxes in streets connected with fire stations, and an electric bell so placed as to enable tramway servants to warn members of a club of the starting of the cars, no telephone being attached in either case, and the owners of the lines being the corporation and the club respectively, were transmitting telegrams in contravention of the above Act. — Chan. Div. (Swinfen Eady, J.)—20*th March* 1907.

Wakefield and District Light Railway Co. v. *Mayor, etc. of Wakefield.*

Statute—Public Health Act 1875 (38 & 39 Vict. cap. 55), sect. 211 (1) (*b*).—Decision of Divisional Court (*ante*, Vol. XIV. p. 19) *affirmed.* — Court of Appeal (Cozens - Hardy, Vaughan-Williams and Buckley, L.JJ.).—21*st March* 1907.

Day v. *Kent Collieries Ltd.*

Company—Debentures.—A company issued debentures to rank *pari passu*, and it was provided that at a meeting of debenture-holders each should have one vote "in respect of every principal sum of £10 secured by the debentures." A bank held debentures as security for an overdraft. *Held* that they were entitled to a vote for every £10 of face value of debentures so held, although that was more than double the amount of the debt due. *Held* also that the company was entitled to take power to re-issue paid-up debentures to rank *pari passu* with the others.—Chan. Div. (Parker, J.).—22*nd March* 1907.

Parkin v. *South Hetton Coal Co.*

Master and Servant—Wages.—A putter in a coal pit was paid according to the amount of coal drawn per day, but his wages were only payable fortnightly. *Held* that his wages accrued *de die in diem.*

Master and Servant—Breach of Contract. —The putters in a coal pit, who were under a fortnightly engagement, owing to a dispute about the wages due to one of their number, ceased work so as to lay the pit idle. *Held* that they had committed a breach of contract.—K.B. Div. (Darling and A. T. Lawrence, JJ.).—23*rd March* 1907.

Oppenheimer v. *Fraser & Wyatt.*

Statute—Factors Act 1889 (52 & 53 Vict. cap. 45), sect. 2.—Decision of Channell, J. (*ante*, Vol. XIV. p. 158), *reversed.*—Court of Appeal (Sir Gorell Barnes, Fletcher Moulton and Kennedy, L.JJ.).—25*th March* 1907.

The Hopper No. 66.

Ship — Collision. — Decision of Bargrave Deane, J. (*ante*, Vol. XIII. p. 159), *affirmed.*—Court of Appeal (Sir Gorell Barnes, Fletcher Moulton and Kennedy, L.JJ.).—25*th March* 1907.

The King v. *The Governor of Brixton Prison.*

Criminal Law—Extradition.—A prisoner was convicted in absence in Belgium of larceny. According to Belgian law there was a prescriptive period after which he could not be punished. Before that period elapsed he was convicted and

sentenced in England, and a magistrate made an order of committal for his extradition, such extradition to be carried out on the expiry of his sentence. His sentence expired after the prescriptive period according to Belgian law had elapsed. *Held* that the order for the prisoner's extradition was valid, and should be carried into effect.—K.B. Div. (Lord Alverstone, C.J., Darling and A. T. Lawrence, JJ.).—25*th March* 1907.

Latchford v. *Kelsey.*

Revenue—Excise.—A farmer who occasionally used a cart for conveying his farm labourers to and from their work had not taken out a carriage license. *Held* that he was not liable to conviction for keeping a carriage without a license.—K.B. Div. (Lord Alverstone, C.J., Darling and A. T. Lawrence, JJ.).—25*th March* 1907.

"*The Commonwealth.*"

Insurance—Marine.—Decision of Bargrave Deane, J. (*ante*, Vol. XIV. p. 19 *sub nom.* "The Welsh Girl") *affirmed.*—Court of Appeal (Sir Gorell Barnes, Fletcher Moulton and Kennedy, L.JJ.).—26*th March* 1907.

In re Hermann Lichtenstein & Co. Ltd.

Company—Winding-up.—An order made for the compulsory winding-up of a company while a voluntary winding-up was in progress, although the petitioner did not say that he would be prejudiced by a voluntary winding-up.—Chan. Div. (Parker, J.).—26*th March* 1907.

Williams v. *Richards.*

Statute—Dogs Act 1871 (34 & 35 Vict. cap. 56), sect. 2.—*Held* that a dog may be proved to be "dangerous" within the meaning of sect. 2 of this Act by evidence of danger to other animals, and that evidence of danger to human beings is not necessary.—K.B. Div. (Lord Alverstone, C.J., Darling and A. T. Lawrence, JJ.).—26*th March* 1907.

North Staffordshire Colliery Owners Association v. *North Staffordshire Railway Co.*

Railway — Rates — Railway and Canal Traffic Act 1894 (57 & 58 Vict. cap. 54), sect. 1 (1).—*Held* that sect. 1 (1) of this Act did not set up a standard of rates as at 31st December 1892 up to which they might be increased without the railway company being under the *onus* of proving the reasonableness of the increase, but that that *onus* was upon the company in the case of every increase.—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Kennedy, L.JJ.).—26*th March* 1907.

Evans v. *Weatheritt.*

Statute—Sale of Food and Drugs Act 1875 (38 & 39 Vict. cap. 63), sects. 9, 25.—In a prosecution for a contravention of sect. 9 of this Act the appellant proved a contract with a third party to supply the whole of his milk for twelve months, containing a sufficient warranty; the delivery of the milk sold to the prosecutor in the state in which it was delivered to him by the third party; and that he bought no milk from anyone else. The milk was delivered during the currency of the contract with a delivery order which made no reference to the contract. *Held* that the appellant had established the defence allowed by sect. 25.—K.B. Div. (Lord Alverstone, C.J., Darling and A. T. Lawrence, JJ.).—26*th March* 1907.

THE LORD ADVOCATE AND THE FREEDOM OF DUNFERMLINE.

The freedom of Dunfermline was conferred on Monday evening on Mrs Louise Whitfield Carnegie, wife of Mr Andrew Carnegie, and the Right Hon. Thomas Shaw, K.C., M.P., the Lord Advocate. The Town Council conferred the freedom on the Lord Advocate "in testimony of their admiration of his honourable character and eminent public services, and in recognition of the distinction his brilliant gifts and attainments have brought to this his native city of Dunfermline." The ceremony took place in St Margaret's Hall, and was attended by over fifteen hundred of the townspeople, to whom invitations had been sent. Provost Macbeth presided, and among others present were Mrs Shaw, Mr Carnegie, the Sheriff of Fife (Mr Cullen, K.C.), Lord Bruce, Mr John Ross, LL.D.; Mr John D. Hope, M.P.; Sheriff-Substitute Hay Shennan, Mr T. B. Morison, K.C.; Mr Robert Munro, Advocate; Mr W. Dunbar, Advocate; Mr M'Cormick, LL.D., Secretary of the Carnegie University Trust, and Dr Hew Morrison, Edinburgh. Apologies for absence were received from Sir Henry Campbell-Bannerman, the Marquis of Linlithgow, the Earl of Elgin, and many others.

After the presentation to Mrs Carnegie, who made a short speech in reply, the Provost handed to the Lord Advocate a burgess ticket enclosed in a silver casket bearing the Shaw crest and the Dunfermline Burgh Coat-of-Arms. In making the presentation the Provost said that when he had the privilege, a few weeks ago, of proposing that the freedom of the city should be conferred on one who occupied a prominent position in the present Administration, the motion was carried without a dissentient voice. Many, both in the Council and Committee, thought Mr Shaw was worthy of the high honour because, amongst other things, of his politics, and others notwith-

standing his politics. That was a fact of which any man might feel justly proud. They in his native city had watched his onward career with pride and affection. A son of Dunfermline in the beginning, he was now a son of the people. Belonging once to them, he now belonged to the nation. He was one of those "who never turned his back, but marched breast forward, never doubted clouds would break," and commencing life with no exceptional advantage other than the inestimable benefit of parents who lived for their home and their children, Mr Shaw entered on a strenuous life. Dux medallist at the High School of his native city, he at the University of Edinburgh proved himself to be an able and resourceful student, and both in his arts and law courses he upheld the promise of his youth. In 1886 he was appointed an Advocate-Depute, and in 1894 Solicitor-General. To-day he held the highest office attainable at the Scottish Bar. Trusted as the Lord Advocate is by his constituents, he had by sheer ability and force of character and high purpose made a place for himself in the House of Commons. It was not merely because of the exalted position which he held in the legal world, or as a man of letters, or in the world of politics, that they had assembled to do him honour, but also because of what he was as a man, who, during his whole career, had proved himself to be of unimpeachable character, of pure and lofty motive.

The Lord Advocate replied as follows:—

Mr Provost Macbeth, members of the Corporation, and my good friends and fellow-citizens of Dunfermline,—There are occasions in life when one is not only startled, but completely circumvented by human kindness. My appreciation of your goodness and my wonder at the situation in which I find myself help me to recognise that gratitude speaks best from silence. And yet your arrangements to-day have so hemmed me in that not only must I speak, but, alas, I must gratify your curiosity and suit the occasion by certain allusions in the odious vicinity of autobiography. Why you should compel me to this I do not know. Not even my allegorical progenitor—who, I suppose, was the prodigal son—had this put upon him. I have come back amongst you, and you have, so to speak, fallen on my neck and kissed me, all, of course, in a strictly proper and a strictly metaphorical sense. You have even served up for me the fatted calf. There it is in that silver casket. But I fear you have done violence to Scripture in the remainder of the story. It is not said that the prodigal was asked to give to the festive meeting any account of his ongoings during his absence; and the fact that it is recorded that "they began to be merry," makes it clear to my mind that there were no speeches on the occasion. Yet, as I say, you have mastered and circumvented me: I must stand and deliver. Let me tell, therefore, my brief story to you with becoming modesty and without affectation.

Mr Provost, your eloquent words, while they have greatly erred in their indulgence towards myself, do, I know, sincerely express the affection towards me of this "Auld Grey Toon." This is a very precious burgess ticket, and these are very precious words, to me and mine. To be accounted so worthy by those I hold so dear, it would require a heart of marble to resist the impression that all this ceremony makes. You have conferred upon me the greatest honour which it is in the power of any community to bestow, upon either son or stranger. The stranger you adopt, and by the act you add to his high distinctions; me you do not adopt. I am, I always have been, and always shall be, your own.

Looking round me to-day, I reflect how the scene has changed. Two generations have passed—from youth to age, from age to memory; all the activities of my manhood have been spent elsewhere, and yet when I return in answer to your kindly summons, I recal in the faces, both new and old, which greet me here, the lineaments of former days; and the power of old associations gets its grip upon me. How—to take only one instance—how can I fail at this moment to realise that within a stone-throw of this building rises the venerable Abbey, and that in its shadow, ever as the day declines, the curfew booms across my father's and my mother's grave? Are these sad memories? Nothing of the kind. Of him—he died in my infancy—I of course remember little. His reading and his faculty for humour and pith in closing a discussion became proverbial, and for many years any saying at once weighty and witty was wont to be dubbed by his name. And I remember those who had been his friends from youth—men like the late Provost Whitelaw—paying their tribute to his character by conjuring me to be like that good man my father. Of her—it would not be fitting that I should publicly venture on that hallowed ground. Her infinite forbearance with the little dare-devil of a boy left on her hands; the memory of it all amazes, humbles me. The mother of Thomas Carlyle used to declare that "her Tammas was a gey ill man to deal wi'," and Froude, the historian, shakes his head over this and mourns and misquotes it. He might have spared himself the trouble. How could an Englishman understand? The same thing has been said of much smaller Thomases than Carlyle. My mother said it a hundred times of myself, but it conveyed not a spark of reproach; it was a term of real endearment. So long as the principle was sound—and I admit that she was stern enough on that head—she encouraged the energy, and she defended even its irksomeness with her quaint proverb, "Rather a coal than a clod!" Gradually, even through the frolic of youth, some ideas became instilled and very plain—as, for instance, this about

work and play—that scamped work was always mean, and good fun was always clean; or this other—that the regulation pattern did not matter over much if only the heart kept sound. And so adventurous freedom had its run, and forbearance watched it with a caution and a smile.

That forbearance and that fine association of goodness with warmth of heart, penetration of judgment, and strength of mind, these very things met me again at the next and final stage of my career in this town. It happened in this way. I had got my schooling at the High School of Dunfermline, and being dux medallist just as I had turned fourteen I became conscious that I was past the available machinery for secondary education, and neither fit in years nor attainments to enter the University. There struck me as something wrong here, and I made a mental note of it. The gap I refer to, the career which appeared closed but which I felt should be open, these things have changed much since my boyhood, and in the years of my public career I have humbly tried to help the change. As it was, I had to be set to something, and so found myself starting a legal career with, after a little, the unbounded advantage of being the confidential helper of Dr John Ross. He, to my delight, worked upon the very same maxims, practised the very same abounding forbearance, and showed in his character the very same association of goodness with clear-sightedness and strength, as those with which I had become familiar from my earliest days. But, of course, he introduced me to a wider ambit of knowledge and experience. And it was in him that I saw, as in a fine and living picture, what are the qualities — accuracy, ungrudging industry, tenacity of purpose, and sureness of hand—which, with the elevation and persuasiveness which can alone spring from a love of letters, are the qualities which go to the wise guidance and courageous management of men and of affairs. So far as Dunfermline is concerned that is about all the story which I dare tell. The old High School had given me of its best; and the gap which I then deplored in my scholastic life had been, as I discovered later, more than filled up by an inkling of business and of knowledge of the world. As to the love of work, it was not that I had learned in part to "scorn delights and live laborious days," but that I had also learned that that line represented only half of the greater truth, namely, that laborious days are themselves a delight and that there are an exhilaration and a joy in achievement. And so Dunfermline's share in me, that about which you asked me to speak—at least, its open share in me—seems to come to a close. You see for yourselves the advantages. They were not strictly derived from place or climate, from traditions or surroundings, but from near association with what transcends all these, that best product of any city, good men and women. Rest assured, citizens of Dunfermline, that the secret of your worth and greatness lies just there. Not your golden fortunes, or that kings were born or dwelt within earshot of where we stand; not that your merchandise still grows in volume, or that you hold your place in the material advancement of the world. Not that, but rather this: that, freshly inspired by all these things, you keep in your midst, or send from amongst you to the bounds of the earth, good men and women.

Such memories as these are too often made the occasions of municipal self-glorification. Now, I may say at once that I doubt the wisdom of the practice, and I do not come to praise you but to show you a much greater respect. You get impatient, do you not, with the trumpetings of self-praise by a man? Tell me, if you please, wherein is the difference in moral quality between such trumpetings on the part of a man or on the part of a city, a kingdom, or even an empire? My view is the very simple one that the wider the area of vainglory, the bigger is the blow to self-respect. But yet when I think of it, how infinitely larger are your possibilities and your chances now even for that best product to which I have referred! Your High School on its secondary and its technical sides is on a scale unknown in my youth, and ranks with the best in Scotland. In your College of Hygiene you are the pioneer in a too neglected branch of education; and in your Carnegie Trust a colossal fortune will be more and more employed in initiating you not only into the delights but the practice of art. Yet all these things come to you, I feel assured, not as a privilege of slothfulness and pleasure, but as a call to culture of the mind and of the spirit, to those gentler manners which are civilisation's finest fruit, to the uprooting of vulgarity in every habit of your community's thought, and to that distinction at once in achievement and in virtue which can make any city famous in the annals of the world.

The philosophy of the entourage, the theory that surroundings are everything and that we are the children of circumstance, all that is already somewhat *passé*. I never much believed in it, inclining always to the view which squared with Scottish independence of mind, that man was man and master of his fate. Persons are more than circumstances, but the interaction of personal influence, the power of personal associations, the uplifting of words of cheer, the restraining of words of counsel, the force of personal example, these things, through every part of my life's experience, I have come to prize more and more highly as the leverage, not only of kinship, but of progress. I well remember, for instance, how in my young manhood, when philosophy and history and law were each presenting their attractions, when I was lecturing in the University on the one, writing on the other, and practising the third, one kindly figure appeared in each arena to beckon me onward

—Calderwood to make me his assistant professor; Masson to put me on the staff of the "Britannica"; and Lord President Inglis, by kindly appreciation which I shall never forget, cheering me in the practice of a learned profession. Help indeed, counsel, encouragement, and over them all that great forbearance to which I have referred,—these things have been experienced by me also at every later stage from men of marked distinction. Did I labour in public affairs? Say it was the Church. Having been brought up to believe that principles which are worth holding are worth fighting for, when a time of testing and of suffering came, and my wig happened to be on the green, then it was that my association with Dr Rainy became much closer, and there ensued an intimacy of converse with him which will ever remain one of the serenest pleasures of memory. Say it was education. What I believed in and was fighting for seemed to very estimable men to be but a dream —beyond the attainments of a frugal nation: and suddenly a large measure of realisation took place by the world-famous University benefaction of two million pounds sterling by a fellow-townsman, Andrew Carnegie—and the privilege was given to me of association with one of the most notable bands of trustees that any nation has ever seen, headed by your neighbour, Lord Elgin. Was it the stormier world of politics? It was the same story repeated,—of encouragement, counsel, forbearance. And, however humble may have been my function in the co-operation, yet to have passed through storm to sunshine with one who has become the Prime Minister of this country, and who daily adds lustre to the greatness of that pre-eminent position—these are experiences very striking and memorable. But the interest of Dunfermline in them is peculiar, and is this—that, as you will have observed, the bulk of these experiences have been gained in association with the burgesses of your own good town, Dr Ross, Lord Elgin, Mr Carnegie, Sir Henry Campbell-Bannerman! And so to-day I am humbly filled with a great thankfulness that you have been pleased to place me on your burgess roll and by their side. I begin to think that there must be something in a place after all, and that there are more things in heaven and earth than are dreamt of in my philosophy. What the magic is I know not, but the fact is distinctly notable that among them, your burgesses have no small share in managing the affairs of the British Empire and even the philanthropy of the world.

I wonder if another dream of mine will ever come true? You hear the plea so frequently made for a great national school of art, and that is well. But I remember that some of the greatest triumphs of art were achieved by municipalities no bigger than your own, so that the schools of Pisa, Bologna, Verona and Venice, to name no others, have left to the world the finest trophies of the imagination of man. If it is replied to me that these municipalities had their great patrons, men of rank, men of wealth and high estate, I answer that you too have your Grand Duke whose lavish generosity outdistances the gifts of a score of Italian princes. There is the beginning of much in this direction in Scotland already. Glasgow has its noted school, Aberdeen struggles upward, and Dundee makes its beginning. Perhaps in the fulness of an early time the art of Dunfermline, the fruit of enlightened imagination working upon a most romantic history, may yet enrich the world. Very well indeed do I know that the actual government even of a small city like this is engrossed, not with these dreams, but with those details which concern the hardships, the squalor, the misery, the social curses which afflict large sections of our population. May you have enlightenment and strength, preserving these higher ideals to which I have alluded and wielding these instruments for advancement with which you are so favoured, to address yourselves to this humble daily task of civic effort in such a manner as to justify your high opportunities and character.

I shall conclude with two brief words. The first is one devoted to personal regard. The charm of this occasion is increased to me and mine by the fact that to-day you do honour to Mrs Andrew Carnegie. I will only say of her husband, what I fear he has very often declared of my own case, that I know not how in the world he came to the good fortune of such a wife. I dare not presume to touch upon her character. You will find it sketched beforehand in the last chapter of the book of Proverbs. But I may say that the grace of your act and the grace of your lady burgess are worthy of each other. As for myself, I leave you with this final word. Amid the struggles of a pretty full and strenuous life, in all the services to which I have been or may be called, in all the posts of duty, humble or high, which I have been or may be charged to fill, I trust that in the future, as in the past, there will ever remain for me among the incitements to fidelity, the thought of the kindly watching eyes of my fellow-citizens and the desire to do no discredit to the town which bore me.

Mr Carnegie, in the course of a speech later in the proceedings, said: I wish to say this about Mr Shaw. It was reading his article in the "Nineteenth Century Magazine" that first attracted my attention to the question of Scottish Universities and the great idea of opening the door, free from the schools, into the universities, without money and without price. I wish to make that public recognition which brought me in communication with him, and that is the way that I came across the great idea in the whole affair.

JOHN LAMB, Esq.,

ADVOCATE.

Mr John Lamb, who belongs to a well-known Brechin family, was born in 1871 and was educated at Merchiston Castle School—an institution in which he takes great pride, and of which he is, and has been for some years, a Director. After leaving school he proceeded to the University of Edinburgh, and graduated there as Master of Arts in 1894. Thereafter he entered the office of Messrs Tods, Murray & Jamieson, W.S. (of which his uncle, Mr George Dalziel, is a partner), and had the benefit of two years' training in its Parliament House department. In 1897 he was admitted to the Faculty of Advocates.

Mr Lamb has for long been known as an independent thinker, and has made a close and thorough study of political questions. A convinced and enthusiastic Liberal, he worked hard for his party. He acted as Treasurer, and afterwards as Secretary, of the Scottish Reform Club, and the efficiency of the electoral machinery of the Liberal Party in Scotland in 1905 was in no small measure due to his energy. In 1906 he was nominated by the Secretary for Scotland as Secretary of the Royal Commission on Registration of Title in Scotland, and a few months later the Lord Advocate appointed him his Legal Secretary in room of Sheriff Gardner Millar. For a few months before he went to Dover House he acted as Reporter for the Official Reports of the High Court of Justiciary.

Mr Lamb has many personal qualities which singularly fit him for the post of Legal Secretary. His duties are responsible, and often require delicate handling, but he is amply endowed with tact, shrewdness, industry, and common sense; he is always courteous, and his work is never either scamped or allowed to fall into arrear. He is rapidly becoming as popular at Westminster as he is in the Parliament House.

The House of Lords has this week been busy with Scottish Appeals. On Tuesday their Lordships delivered judgment in the cross appeals in the case—the last of a long series—between the Clippens Oil Company and the Edinburgh and District Water Trustees. Both appeals were dismissed, the House finding no sufficient reason for disturbing the award of £27,000 of damages given by the First Division. The judgment is among our reports issued this week. The opinion of Lord Collins in the case is the first which his Lordship has delivered in a Scottish appeal. Two other Scotch cases have been heard, *Colquhoun* v. *Glasgow Faculty of Procurators' Widows' Fund*, and *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, in both of which judgment has been reserved. The appeal by the Bile Beans Manufacturing Company has been or is to be withdrawn, and there is now only one Scotch case standing for hearing. The list of English appeals is also almost exhausted, and the House has not been so well abreast of its judicial work for many years.

Resignation of Professor Kennedy of Aberdeen.—Mr N. J. D. Kennedy, K.C., Professor of Scots and Roman Law in the University of Aberdeen, has intimated, by letter which was read at the meeting of the Aberdeen University Court on Tuesday, that he is to resign that office at the end of the academic year in September. This step is taken in consequence

of his recent appointment to the Sheriff Principalship of Renfrew and Bute. The Court resolved to advertise for a successor, and to proceed to the appointment at its next meeting in July. The salary attached to the Law Chair at Aberdeen is £600 per annum.

Mr Robert Stewart Brown, 33 Marchmont Crescent, Edinburgh, has been admitted a Law Agent by the Lords of Council and Session.

DECISIONS IN THE ENGLISH COURTS.

Wagstaff v. *Jalland.*

Will — Construction.—The testator W. went through the form of marriage with D. J. in the knowledge that she was a married woman. He left a will in which, after a gift to "my wife D. W.," he gave the annual produce of his residuary estate to "my said wife during her life if she shall so long continue my widow for her own use and benefit, and from or after her decease or second marriage," etc. He died while D. J.'s husband was still living. *Held* that D. J. was entitled to the annual produce of the residuary estate.—Chan. Div. (Kekewich, J.).—26*th March* 1907.

Perkins v. *Stead.*

Master and Servant — The Contract — Master's Liability.—The defendant purchased a motor car in London, the vendors providing a driver to drive the car to Barnet, from which place the defendant's driver was to drive it to the defendant's house. On the road to Barnet, the defendant and his driver being passengers in the car, the plaintiff's motor bicycle was injured through the negligence of the person supplied by the vendors to drive the car. *Held* that the defendant was liable, on the ground that that person was at the time his servant.—K.B. Div. (Ridley and Bray, J.J.).—9*th April* 1907.

Adamson v. *Adamson.*

Husband and Wife—Desertion.—A husband left his wife and told her that she would get nothing from him unless she agreed to sign a deed of separation, when he would make her an allowance of £1 a week. She had a child three months old, and had no friends to go to and no means of subsistence. She signed the deed. *Held* that she was not thereby a consenting party to the separation.—P. D. and A. Div. (Bucknill, J.).—9*th April* 1907.

Newmark v. *The National Phonograph Co. Ltd. and The Edison Manufacturing Co. Ltd.*

Copyright—Copyright Act 1842 (5 & 6 Vict. cap. 46), sect. 2.—*Held* that a phonographic record on a wax cylinder was not a sheet of music, and therefore a book in the sense of sect. 2 of this Act.—K.B. Div. (Sutton, J.).—10*th April* 1907.

Leicester & Co. v. *Cherryman.*

Statute—Pawnbrokers Act 1872 (35 & 36 Vict. cap. 93), sect. 30.—*Held* that an order made under sect. 30 of this Act did not preclude the owner of the stolen goods from exercising his common law rights for their recovery.—K.B. Div. (Ridley and Bray, JJ.).—12*th April* 1907.

Hull Steam Shipping Co. v. *Lamport & Holt.*

Ship — Charter-party. — The defendants chartered a ship belonging to the plaintiffs to go to, *inter alia*, the Boca and there deliver cargo "at the customary discharging places named by the charterers' agents into lighters or alongside . . . . wharves as per bills of lading." The owners authorised the charterers "to sign bills of lading for the cargo as usual," and the cargo was to "be brought to and taken from alongside at the charterers' risk and expense." The charterers signed a bill of lading for cargo to be discharged at D's wharf at the Boca. On reaching that place the ship was not allowed to discharge except at one place on account of explosives being on board, and D's goods had to be lightered. *Held* that the charterers were liable for the lighterage.—K.B. Div. (Channell, J.)—15*th April* 1907.

Sargeant v. *Butterworth.*

Friendly Society—Expulsion of Member.—The rules of a friendly society stated that "it shall be exclusively composed of members of the Loyal Orange Institution of England." A member of the society was expelled from the Orange Institution, and the society thereupon passed a resolution expelling him from membership. *Held* that he was not entitled to be reinstated as a member of the society.—K.B. Div. (Ridley and Bray, JJ.).—16*th April* 1907.

Hooper v. *Furness Railway Co.*

Carrier—Liability.—The plaintiff went for an evening cruise on one of the defendants' steamers. During the cruise he purchased a ticket which contained conditions relieving the defendants from liability for their servants' negligence. The plaintiff did not read the conditions, and no sufficient notice was given to him that the ticket contained conditions. His hand

was injured owing to negligence on the part of servants of the defendants. *Held* that he was entitled to recover damages from them.—K.B. Div. (Ridley and Bray, JJ.).—16*th April* 1907.

Thellusson v. *Valentia.*

Club—Alteration of Rules.—Decision of Joyce, J. (*ante*, Vol. XIV. p. 5), *affirmed.*—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes and Kennedy, L.J.).—17*th April* 1907.

Mayor, etc. of Hastings v. *Letton.*

Company — Dissolution — Lease — Termination.—A lease was granted to a company, and there were two sureties for payment of the rent, the lease containing an express clause binding the sureties to pay. The company was dissolved. *Held* that the dissolution of the company terminated the lease, and that the sureties were no longer liable for the rent.—K.B. Div. (Darling and Phillimore, JJ.).—17*th April* 1907.

Jude v. *Reid Brothers Ltd.*

Copyright—Assignment.—Decision of Kekewich, J. (*ante*, Vol. XIV. p. 94), *affirmed.*—Court of Appeal (Lord Alverstone, C.J., Fletcher Moulton and Buckley, L.JJ.).—19*th April* 1907.

Simon v. *London General Omnibus Co. Ltd.*

Reparation—Negligence.—When the plaintiff was a passenger on a bus belonging to the defendants, the driver drove round a corner close to the curb, with the result that the plaintiff's elbow, which was projecting over the rail, came in contact with a fingerpost affixed to an electric standard, and was injured. The fingerpost was almost flush with the curb. *Held* that there was no evidence of negligence on the part of the driver of the bus.—K.B. Div. (Ridley and Bray, JJ.)—20*th April* 1907.

Waddington & Sons v. *Neale & Sons.*

Principal and Agent—Mercantile Factor—Factors Act 1889 (52 & 53 Vict. cap. 45), sects. 2, 7.—The plaintiffs employed H to sell pianos for them. H gave a piano to the defendants, a firm of auctioneers, to be sold by auction, and received an advance of £10. H then disappeared. The plaintiffs then claimed the piano from the defendants, who refused to deliver it up. The piano was sold by arrangement, and the defendants refused to pay over the price except under deduction of their costs and the £10. *Held* that the defendants were not protected by the Factors Act, and were bound to pay over the whole price.—K.B. Div. (Darling and Phillimore, JJ.)—20*th April* 1907

White, Tomkins & Courage v. *Wilson.*

Contract—Illegal—Restraint of Trade.—The defendant entered into a contract of service with the plantiffs which provided that he would not for a period of five years after leaving the plaintiffs' employment enter or be in the employment of any house carrying on the business of manufacturing or producing any special product as therein defined, or carry on or be engaged in any such business, but there was an exception in favour of any business not competing or calculated to compete with the plaintiffs. *Held* that the stipulation was not so unreasonable as to be void.—Chan. Div. (Swinfen Eady, J.).—24*th April* 1907.

Bist v. *London and South-Western Railway Co.*

Workmen's Compensation Act 1907 (60 & 61 Vict. cap. 37), sect. 1 (2) (*c*)—Serious and Wilful Misconduct.—A railway engine-driver was killed through breaking a rule of the company forbidding any driver or fireman leaving the footplate while the engine was in motion. He knew the rule, and no reason for the breach was proved. *Held* that he was guilty of serious and wilful misconduct.—House of Lords (Lord Loreburn, L.C., Earl of Halsbury, Lord Macnaghten, Lord James of Hereford, and Lord Atkinson).—25*th April* 1907.

Hooker v. *Gray.*

Criminal Law—Cruelty to Animals Act 1849 (12 & 13 Vict. cap. 92), sect. 2.—The respondent shot at his neighbour's cat with a saloon rifle, wounding it severely. The cat crawled into its owner's premises, where the respondent lost sight of it. The owner of the cat found it twenty minutes later in great pain, and had it destroyed. *Held* that the respondent was not guilty of a contravention of sect. 2 of this Act.—K.B. Div. (Lord Alverstone, C.J., Darling and Phillimore, J.J.).—25*th April* 1907.

Sherwell v. *Combined Incandescent Mantles Syndicate Ltd.*

Company—Allotment.—The directors of a company got copies of a prospectus headed "strictly private and confidential, not for publication." These were circulated privately by the directors among their friends. *Held* that this was not an offer of share capital to the public for subscription within the meaning of sect. 4 (1) of the Companies Act 1900.—Chan. Div. (Warrington, J.).—26*th April* 1907.

Hoare v. *Robert Green Ltd.*

Statute — Factory and Workshop Act 1901 (1 Edw. VII. cap. 22), sect. 149.—In a room at the back of a florist's shop women were employed in making wreaths and crosses, etc., such articles being made with flowers and

wooden frames. *Held* that the room was a workshop within the meaning of the Factory and Workshop Act.—K.B. Div. (Lord Alverstone, C.J., Darling and Phillimore, JJ.).—26*th April* 1907.

Star Omnibus Co. Ltd., London, v. *Tagg.*

Motor Car—Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. cap. 77), sect. 30—Locomotives on Highways Act 1896 (59 & 60 Vict. cap. 36), sect. 1.—*Held* that the offence created by sect. 30 of the Act of 1878 of using a locomotive on a highway which did not consume its own smoke did not refer to the case of smoke caused by the negligence of a driver in supplying an excessive quantity of lubricating oil to the working parts of the machinery. *Held* also that the section could not apply to a car, which came within the exemption given by sect. 1 of the 1896 Act.—K.B. Div. (Lord Alverstone, C.J., Darling and Phillimore, JJ.).—26*th* April 1907.

LAW LIBRARY.

BOOK NOTICES.

Encyclopædia of the Laws of England, with Forms and Precedents, by the most eminent legal authorities. Second Edition, Revised and Enlarged. Vol. IV. Corporation to Domicile. Edinburgh: William Green & Sons, 1907. *Price* 21*s. net.*

In October of last year we noticed the issue of the first volume of the new edition of this encyclopædia, and already the fourth volume—which completes a quarter of the whole publication—has made its appearance. The promptitude with which the work is being issued has in no way interfered with the thoroughness of the revision. Among the more important subjects dealt with in this volume are "Costs," "County Courts," "Criminal Law," "Demurrage," "Defamation," and "Domicile." Mr Odgers, K.C.; His Honour Judge Smyly, K.C.; Mr Justice Phillimore, Mr Manson, Mr Cyprian Williams, and Mr Fitzgerald, K.C., are among the contributors to the volume. Mr Justice Wood Renton, one of the editors, is himself responsible for the revision of many of the articles.

The Law of Meetings. By James Muirhead, Member of the Faculty of Procurators in Glasgow. Glasgow and Edinburgh: William Hodge & Co., 1907. *Price* 3*s. net.*

The subject of this handbook, if a small and special one, is by no means free from difficulty. The conduct of a meeting is looked at from all aspects—that of the Chairman, the Clerk, and the ordinary members present. The author discusses the notice requisite for a meeting, the quorum, the standing orders, the resolutions, the debate and the taking of votes, and many other subjects. The text is adapted and amplified from the author's well-known work on the "Law of Municipal and Police Government in Burghs," and contains much information in a convenient form.

The Juridical Review, Vol. XIX. Part I. Edinburgh: William Green & Sons, 1907.

This part of the Juridical Review contains a variety of excellent matter—literary, antiquarian, and historical, as well as of practical legal interest. The work of Frederic William Maitland is discussed by Mr D. P. Heatley, and the history of the Earldom of Norfolk (the subject of a recent judgment in the House of Lords) by Mr R. Geoffrey Ellis, Barrister-at-Law. A very readable article is contributed by Mr Inglis, advocate, on "Eighteenth Century Pleading." He has examined a number of volumes of old Session papers, and he quotes from them many passages illustrating the style of pleadings written by Robert Dundas of Arniston (the first Lord President of the name), and many other distinguished advocates and judges. Mr Campbell Lorimer, K.C., deals with "Insurance as Affecting the Measure of Damages," and suggests an uncontentious bill on the subject which, he thinks, might pass through Parliament even in this crowded session. Mr W. C. Smith, K.C., discusses the "Appropriation of Trust Funds to Legacies," and a number of recent books are reviewed.

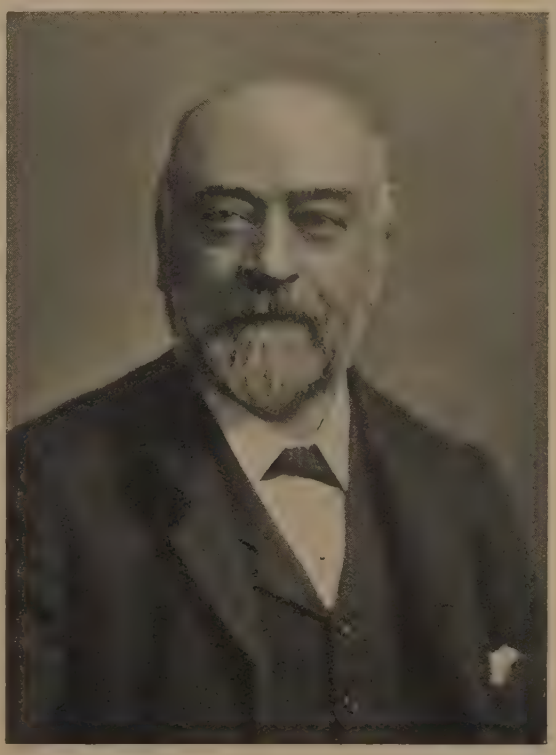
Lawyers' Reference Book. Published by Sweet & Maxwell, London, 1907. *Price* 2*s.* 6*d.*

This book contains (1) complete chronological lists of English, Scotch, Irish, and Canadian Law Reports, showing the period covered by each series; (2) lists of English Law Reports from 1810 to 1907, showing the year covered by each volume; (3) a list of abbreviated citations of Law Reports; (4) a table of Regnal Years from 1 William I. to 6 Ed. VII., showing the dates of commencement and end of each year; (5) a table shewing the corresponding volumes of the old reporters and the revised reports. These items are all useful; but No. 5 would be more generally acceptable if the corresponding volume of the complete reprint of the old reports, "The English Reports," were given as well as the volume of the "Revised Reports." Also, the list of Scotch reports requires some revision.

The Late ALEXANDER FORBES, Esq.,

Formerly Principal Keeper of the Register of Deeds.

We regret to record the death of Mr Alexander Forbes, which took place on the 11th inst. Mr Forbes came in contact with many members of the legal profession in the course of his duties at the Register House, where there was no more obliging, courteous, or painstaking official. He enjoyed a well-deserved popularity both among his colleagues and in a wide circle of friends.



Born at Stonehaven in 1834, he attended school there, and at the early age of fourteen proceeded to the University of Aberdeen. After attending classes there he returned to Stonehaven and served an apprenticeship with the late Mr John Falconer, writer, in that town. In 1852 he came to Edinburgh and obtained from Mr George Kinloch, then Principal Keeper of the Register of Deeds, a place in that department. In 1856 he entered the Law Faculty in Edinburgh University, and in 1858 he qualified as a Solicitor. In 1866 he was promoted to be an Assistant Keeper of the Register of Deeds, and nineteen years later he succeeded the late Mr Murdoch as Principal Keeper. That office he held till his resignation, under the age limit rule, in 1899.

Since then, till about a year ago, when his health began to fail, he employed his leisure in gardening and walking. He also rode on a tricycle—an art which he acquired after he had reached his sixty-fifth year. He was a staunch Conservative, but did no active political work; he, however, took a keen interest in the affairs of the parish of Liberton, where he resided for more than twenty years.

Mr Forbes was predeceased by his wife, who died in 1889. She was a sister of the late Mr James Henderson, publisher in London, to whom Stevenson submitted "Treasure Island," and who accepted and published it in "Young Folks." Mr Forbes is survived by five sons, one of whom, Mr J. Wright Forbes, is a well-known member of the Junior Bar.

THE COST OF EXTRADITION.

The question of the extradition of criminals has recently been brought prominently before the public by the trial of a case in which it was held that an escaped French convict from Devil's Island could not be extradited to France because he was found to be a British subject. But the matter of extradition is one which has a more practical interest in Scotland. Every few months it happens that a person who has embezzled a considerable sum of money escapes from Scotland to some foreign country. Seldom, if ever, is any attempt made to bring him back to be tried for his crime. This is due to the fact that the Treasury will not pay the expenses of bringing back a fugitive offender whose crime was against property. Only on condition that the private party who has been aggrieved will guarantee all the expenses of extradition and bringing back will sanction be given for steps towards arrest and extradition. Unless the injured party, who may have been robbed of every penny he possesses, is able and willing to find the money and thereby to feed his revenge, the offender goes scot free.

This rule is, it is thought, quite inconsistent with our criminal system, whereby, as the law is now administered, the public prosecutor is recognised as the proper person, and the only

proper person, to investigate and prosecute crime, and private prosecution is discountenanced and virtually obsolete. Unfortunately embezzlement, and that often on a large scale, is a growing offence in this country, and its prevalence is inimical to financial confidence to a degree disproportionate to the actual number of offences. It ought, therefore, to be most sternly and rigorously dealt with. But the embezzler is just the kind of criminal who finds it easiest to start for a foreign shore before his crime is found out. Hence the necessity for extradition if the law is to have real terror for this class of offender. Why should a wholesome administration of the law be left to be dependent upon the resources and the personal lust for vengeance on the part of the person whose money has been appropriated? Why should this unfortunate, who is a taxpayer and who is entitled to the protection of the law, be required to spend some of such means as the defaulter has left to him in paying for the vindication of the public law of the land, or else be content to see that law set at defiance and the thief snapping his fingers both at his creditor and the law from some foreign retreat?

C. N. J.

Faculty of Advocates.—Mr Patrick Johnston Ford, B.A. Oxford, LL.B. Edinburgh, was on the 14th inst. admitted to the Faculty of Advocates.

Mr C. T. Couper, advocate, one of the Principal Clerks of Session, who has not been in his place in the First Division since the commencement of the Summer Session, has obtained leave of absence on account of the state of his health.

Mr Laing, K.C., has been elected a Bencher of the Middle Temple, in succession to the late Lord Young. Mr Laing, who is a leading practitioner in the Admiralty Court, was called to the Bar in 1883, and took silk in 1899. The youngest son of Mr Robert Laing, at one time town clerk of Jedburgh, he was born in 1856.

The annual meeting of the American Bar Association will be held at Portland, Maine, on Monday, Tuesday, and Wednesday, 26th, 27th, and 28th August 1907. The International Law Association is considering holding its meeting in America this year, and the suggestion has been made to that body to hold its meeting in Portland on the last three days of the same week.

Mr David Taylor, solicitor, lately managing clerk to Messrs J. & A. F. Adam, W.S., Edinburgh, and Mr Charles Powrie Campbell, solicitor, from the office of Messrs Macandrew, Wright & Murray, W.S., Edinburgh, have commenced practice at 61 George Street, Perth, under the firm name of Taylor & Campbell.

The Late J. M. Lely, Esq., Barrister-at-Law.—Mr John Mountney Lely died at 23 Summer Place, Onslow Square, London, on 12th June. Mr Lely, who was born in 1839, was educated at Cheltenham College and Magdalen College, Oxford. Called to the Bar at the Inner Temple in 1869, he joined the Oxford Circuit, but he early devoted himself to legal literature rather than to the practice of the law. No name appeared more frequently than his on the title-pages of law books. He was joint-author of "Lely and Agg's Agricultural Holdings," "Lely and Foulkes's Licensing Acts," and "Lely and Foulkes's Judicature Acts"; he was author of a work on the law of municipal corporations, and of another on the legal position of the Church of England; he was editor of "Wharton's Law Lexicon," "Chitty's Statutes of Practical Utility," "The Annual Statutes," "Woodfall's Law of Landlord and Tenant," "Hodges' Law of Railways," and "Chitty on Contracts." He supplied "The Times" with its annual survey of legislation. Few men had a better knowledge of the Statute-book, and none was more persistent in condemning the inconvenient and mischievous system of legislation by reference. His death, which will be widely regretted, has brought to a close a career of much industry and worth.

THE BENIGNANT CONSTRUCTION OF CHARITABLE BEQUESTS AS ILLUSTRATED IN THE DICK WILL CASE.

As the latest exposition of the law as to the validity of charitable bequests the judgment of the First Division of the Court of Session in the case of *Dick's Trustees* v. *Dick and Others*, reported in the current volume of the "Scots Law Times," at p. 43, affords a fresh illustration of the length to which the doctrine of the benignant construction of charitable bequests has been carried. By this judgment the right of the late Mr James Dick's trustees has been established to divide the residue of his estate, amounting to £600,000 or thereby, among such "local or charitable institutions and schemes already constituted, or which may hereafter be constituted," as they may select, and that at such time and in such proportions all as they in their absolute discretion may deem proper. Apart from the designation of the purposes of the bequest, the specialty in the case, which afforded to the next of kin their principal ground of challenge, arose from the very wide powers conferred upon the trustees in regard to the administration of the trust. By the trust disposition and settlement it was provided that the trustees should have "the fullest powers of and in regard to realisation, investment, administration, management, and division as if they were *beneficial owners*"; and it was further declared that the trustees might, should they in their

discretion see fit, retain the investments of which the trust estate consisted at the truster's death, "for such time or times as they might think fit, or indefinitely." For the next of kin it was contended that the bequest was void, having regard both to the scope of the purposes declared, and to the wide discretionary powers conferred upon the trustees—a view which has been negatived by the Division.

Special interest attaches to the judgment of Lord M'Laren in the expression of his opinion as to the unfortunate results which may arise from the extension of the doctrine of the benignant construction of charitable bequests. While concurring in the judgment of the Court, his Lordship stated: "I may, however, be allowed to say that I think it is a subject of regret that our law has given such a very wide extension to the doctrine of the benignant construction of charitable bequests. In the earlier cases on the subject we know that the decisions related to estates of moderate amount, and in these cases we have indications either of the parties or of the localities that were to be benefited, with directions that clearly pointed to the immediate realisation of the testator's wishes. But in the progress of the law these restrictions have been gradually and insensibly removed. Now, as I think, it results from all the authorities that the expression 'charitable purposes,' in a bequest of residue, coupled with the appointment of persons who are to administer that bequest, suffices to exclude the next of kin, even where the will contains no evidence that the testator had ever applied his mind to the consideration of what was to be done with his estate, or that he had any other motive than that of disappointing the expectations of his next of kin. . . . In the present state of the case law on the subject, I think it must be left to the House of Lords, either in its *judicial* or *legislative* capacity, to determine within what limits the right of charitable disposition is to be allowed." The opinion of Lord M'Laren raises an important issue which is worthy of careful consideration, for there can be little doubt that if the decision in the *Dick* will case is to stand as the last word on the subject, it will afford encouragement to testators who desire to defeat the legitimate expectations of their next of kin, and may lead to an abuse of the powers of testamentary disposition.

The attitude of the House of Lords in its consideration of bequests in general terms has hitherto been well defined. The criterion which has in each case been applied, is, whether the testator's intentions in regard to the disposal of his estate are expressed with sufficient clearness and certainty as to amount to a proper exercise of the power of testamentary disposition, or whether he has in effect delegated to his trustees or executors, by conferring upon them a wide discretion, the power to make a will for him. In the latest House of Lords case, that of *Grimond or Macintyre* v. *Grimond's Trs.*, reported in 7 Fraser (H.L.) 90, the Lord Chancellor, in the leading opinion, stated the ground of judgment in the following words:—"In my opinion the testator here has not given a class from which he allowed his trustees to select individually, but he has left his directions so vague that it is in effect giving some one else power to make a will for him instead of making a will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant." In that case the direction to the trustees was to divide a portion of the residue of the testator's estate "to and among such charitable or religious institutions and societies as my trustees, or the survivors or survivor of them, may select." The decision, no doubt, turned upon the use of the word "religious" in defining the class, but the Lord Chancellor's judgment in effect proceeded upon the wider ground that the trustees' discretion in selecting the objects from such an indefinite class was so enlarged as to enable them to make a will for the testator. Although the purposes in the *Dick* case are probably such as the House of Lords would give effect to, standing alone, the addition of the wide discretionary powers conferred upon the trustees in the realisation, distribution, and administration of the estate introduces into the case the same element which lay at the root of the judgment in the *Grimond* case, viz., an absolute discretion on the part of the trustees in dealing with the bequest. While the restriction of the limits within which the application of the rule as to the benignant construction of charitable bequests has already been recognised and approved by the House of Lords is now a matter which can only be dealt with by the Legislature, the specialties referred to in the *Dick* case which distinguish it from all the previous cases under review, might afford to the House of Lords in its judicial capacity, and without violation of precedents, the opportunity indicated by Lord M'Laren of strictly determining the limits within which the right of charitable disposition is to be exercised.

DECISIONS IN THE ENGLISH COURTS.

Agincourt Steamship Co. Ltd. v. *Eastern Extension Australasia and China Telegraph Co. Ltd. and Great Northern Telegraph Co. Ltd.*

Reparation—Measure of Damages.—*Held*, altering the decision of Bray, J. (*ante*, Vol. XIV. p. 187) that the liability of the companies was to make compensation for the sacrifice of the anchor or chain sacrificed, but not further to pay damages

resulting from such sacrifice.—Court of Appeal (Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.).—27*th* April 1907.

In re Kingsbury Collieries Ltd. and Moore's Contract.

Company—Memorandum of Association.—A company was incorporated for carrying on a colliery business, and the memorandum of association did not expressly give power to sell land. *Held* that power to do so for a proper purpose was necessarily implied.—Chan. Div. (Kekewich, J.).—2*nd May* 1907.

Harris v. *Fiat Motors Ltd.*

Master and Servant—The Servant as Agent—Master's Liability for Negligence of Servant.—Decision of Divisional Court (*ante*, Vol. XIV. p. 45) *reversed*.—Court of Appeal (Lord Alverstone, C.J., Fletcher Moulton and Buckley, L.JJ.).—3*rd May* 1907.

Kettlewell v. *Refuge Assurance Co. Ltd.*

Principal and Agent—Fraud of Agent—Liability of Principal.—The plaintiff K took out a policy of insurance with the defendants on the life of a third person. After one year she told the defendants' agent that she would pay no more premiums, and she was induced to go on paying by the agent, who told her that after five years she would be entitled to the policy free of future premiums. After the five years the defendants claimed further premiums, and the plaintiff sued for the return of the four years' premiums.—*Held* that she was entitled to recover.—K.B. Div. (Phillimore and Bray, JJ.).—3*rd May* 1907.

Levene v. *Tichener.*

Statute—Moneylenders Act 1900 (63 & 64 Vict. cap. 51), sect. 1.—In consideration of an advance of £50 the defendant gave the plaintiff a promissory note for £70, to be paid by twenty-three weekly instalments, and in the event of default in the payment of any instalment or part thereof, the whole was to become payable.—*Held* that the bargain was unconscionable and should be re-opened.—K.B. Div. (Channell, J.).—4*th May* 1907.

Holdsworth v. *Lancashire and Yorkshire Insurance Co.*

Principal and Agent—Liability of Principal—Knowledge of Agent.—A policy of insurance under the Workmen's Compensation Act was issued to the plaintiff by the defendants. The policy proceeded on a proposal in which the plaintiff was described as a joiner, which had been drawn up by E, an agent of the defendants, and signed by the plaintiff without reading it. The plaintiff was a joiner and builder, and this was known to E. When the plaintiff saw the policy he refused to accept it until the words "and builder" were added to his designation. These words were added by E, after communicating with a branch office, but the alteration was not brought to the notice of the head office, and the policy was accepted and premiums paid on it. *Held* that the defendants were bound to relieve the plaintiff of a claim under the Act on account of an injury to a builder's labourer in his employment.—K.B. Div. (Bray, J.).—7*th May* 1907.

Wilkinson v. *Lancashire and Yorkshire Railway Co.*

Railway—Liability—Loss of Luggage.—Decision of Divisional Court (*ante*, Vol. XIV. p. 55) *reversed*.—Court of Appeal (Lord Alverstone, C.J., Fletcher Moulton and Buckley, L.JJ.).—7*th May* 1907.

Newton, Chambers & Co. Ltd. v. *Hall.*

Revenue—Land Tax.—Where the land tax on certain lands had been redeemed at a time when the coal under the lands was unworked and the surface had not been separated from the minerals underneath, *held* that the redemption applied to the coal mines as well as the surface.—K.B. Div. (Bray, J.).—7*th May* 1907.

"*The Hibernian.*"
Tasker & Co. v. *Allan Brothers & Co.*

Ship—Bill of Lading.—Decision of the Divisional Court (*ante*, Vol. XIV. p. 45) *affirmed*.—Court of Appeal (Lord Alverstone, C.J., Fletcher Moulton and Kennedy, L.JJ.).—7*th* May 1907.

In re Actien Gesellschaft Apollinaris Brunnen Vormals Georg Kreuzberg.

Trade Mark—Trade Marks Act 1905 (5 Edw. VII. cap. 15), sect. 9 (5).—*Leave granted* under sect. 9 (5) of the above Act to register "Apollinaris" as a "distinctive mark."—Chan. Div. (Kekewich, J.).—8*th May* 1907.

De Jager v. *Attorney-General of Natal.*

Criminal Law—High Treason.—A foreigner living in British territory, whose own country was at war with Britain, rendered services to his own country, as he was compelled to do by the laws of his country, while the troops of his country were in occupation of that part of British territory where he resided and the British troops were temporarily withdrawn. *Held* that he was rightly convicted of high treason.—Judicial Committee of the Privy Council (Lord Loreburn, L.C., Lord Macnaghten, Lord Atkinson, and Sir Arthur Wilson).—9*th* May 1907.

THE LORD PRESIDENTS.

XIII.—SIR HEW DALRYMPLE OF NORTH BERWICK, Bart.

Sir Hew Dalrymple occupied the Presidential Chair for almost forty years, holding the office for a very much longer period than any of his predecessors or successors.

The third son of the first Viscount Stair, Lord President of the Court of Session, Hew Dalrymple was born in 1652 and admitted to the Faculty of Advocates in 1677. When his elder brother held, at the same time, the offices of Scottish Secretary and Lord Advocate, Hew Dalrymple appeared on several occasions to represent the Crown in the Court of Justiciary as "substitute to their Majesties' Advocat." This arrangement seems to have lasted for nearly a year, but afterwards the Solicitor-General, Sir William Lockhart, appeared to prosecute. Sir James Stewart succeeded the Master of Stair as Lord Advocate in 1692. He was also Dean of Faculty, but he resigned that office in 1695, and Hew Dalrymple was chosen in his place. The first Lord Stair died in 1695, and the office of Lord President remained vacant for three years, but on 17th March 1698 Hew Dalrymple was nominated to the post. In April of the same year he was created a Baronet. He did not take his seat till the meeting of the Court in June, and in connection with his elevation considerable discussion took place as to whether he should pass his trials like any other Lord of Session. It was suggested that as the Lord President never sat in the Outer House it was unnecessary that he should undergo his Outer House trials, which then lasted three days, but a majority of the Judges decided that he should undergo the same trials as any other Lord Probationer.

Sir Hew Dalrymple sat in the Scottish Parliament from 1698 to 1702 as Member for New Galloway, and from 1703 till the Union as Member for North Berwick, from which latter place he took his judicial title of Lord North Berwick. In 1706 he was appointed one of the Commissioners for accomplishing the Union, a measure which he had all along supported. He was one of the Trustees for the Improvement of the Fisheries and Manufactures of Scotland.

Though he had not the distinguished talents of his father, his contemporaries regarded him as one of the best Presidents ever known, and he was described as "one of the compleatest lawyers in Scotland." Strained relationships existed for a time between him and Lord Chancellor Seafield. The Chancellor claimed the right to preside in the Court and subscribe the decisions. The President so much resented this that for a considerable time he absented himself. He appears to have allowed the business of the Court to get into great arrears, which his successor Duncan Forbes took pride in clearing off in little more than a year. In 1726 he desired to relinquish his duties, and went to London to try to arrange for his resignation with a pension equal to his salary. Sir Robert Walpole, however, considered that the granting of the pension would be a bad precedent, and told him that the King so valued his services as President that he could not do without them. He returned to Edinburgh, and remained head of the Court till his death in 1837, in his 85th year. His collection of decisions of the Court of Session from 1698 to 1720 was published in 1758. One of his sons, also Hew

Dalrymple, was appointed a Senator of the College of Justice in 1726. He took the title of Lord Drummore, and for eleven years sat on the Bench along with his father.

The portrait which we reproduce is by Aikman, and was presented by the Lord President to the Faculty in 1722.

The Lord Justice-Clerk left Edinburgh on Friday of last week to attend His Majesty's garden party at Windsor. His Lordship was prevented by slight indisposition from returning to Edinburgh on Monday, and was absent from the Second Division on Tuesday. He resumed his seat in Court on Wednesday. The Lord Justice-General, who has derived much benefit from his stay at Royat, expects to be in Court on Tuesday. On that day Lord M'Laren will be absent, as he is to preside along with Lord Salvesen at the Glasgow Circuit. On Wednesday the first sitting of the Third Division will take place. Lord Dundas will leave the Outer House to make one of the quorum in the First Division, and the three Divisions of the Inner House will be constituted as follows: First Division, The Lord President, Lords Kinnear and Dundas. Second Division, The Lord Justice-Clerk, Lords Stormonth-Darling and Low. Third Division, Lords M'Laren, Pearson and Ardwall.

Court of Session Notices.—The sittings of the First and Second Divisions of the Court for the trial of civil causes by jury in the ensuing vacation will commence on Monday, 22nd July next; and notice of trial must be given on or before Thursday, 4th July. Agents giving notice for trial, and those who have already given notice, must hand forthwith to the Keeper of the Rolls of the Division in which the cause is to be tried, a copy of the closed record and adjusted issue or issues. The Lords appoint Thursday the 15th day of August and Thursday the 26th day of September to be box-days in the ensuing vacation. The Lord Ordinary officiating on the Bills will sit in Court on Wednesday, 21st August, and Wednesday, 2nd October, each day at 11 o'clock forenoon, for the disposal of motions and other business falling under the 93rd section of The Court of Session Act 1868 and the 10th section of the Act of Sederunt of 20th March 1907; and rolls will be taken up on Monday, 19th August, and Monday, 30th September, between 11 and 12 o'clock.

GAME.

By Henry H. Brown, Procurator-Fiscal at Cupar.

The eccentricities of Parliamentary drafting are familiar to all lawyers. They are the cause of frequent difficulty and doubt, and have led to the expenditure of much money which might have been more profitably employed. There is something very peculiar, however, about that eccentricity to which I am going to refer. One would have expected that the county gentlemen who shot it, and the cabinet ministers who ate it, would have had their minds definitely made up as to what they meant by "game," and what animals they wished to protect under that term. Ridiculous blunders in conveyancing or procedure statutes may be excused on the plea that the subjects of these measures are technical and not "understanded of the people." But game—the daily subject of conversation of half the members who then constituted both Houses of Parliament, the constant theme of discussion at county meetings and at sessions—might have been thought to be a thing so clearly defined that no possible doubt could exist as to what was comprehended by the term. We shall see that there is hardly any subject of legislation that has been subjected to so much manipulation as this word of four letters. It is safe to say that barely two Game Acts extend their protection to the same group of living creatures.

The most comprehensive definition of the term is contained in the third section of the Game Laws Amendment (Scotland) Act 1877 (40 & 41 Vict. cap. 28): "The word 'game' shall include all the animals enumerated in the Game Acts or any of them." The first schedule furnishes a list of the Game Acts, and, if we run over the principal ones, we shall soon perceive what a heterogeneous mixture of beasts and birds they enumerate.

(1) The Scots Act 1587, cap. 43, mentions harts, hinds, does, roe, hares, rabbits and "*other beasts.*"

(2) The Game (Scotland) Act 1772 (13 Geo. III. cap. 54) mentions the hare, partridge, pheasant, muirfowl, ptarmigan, heathfowl, snipe, and quail.

(3) The Night Poaching Act 1828 (9 Geo. IV. cap. 69) defines game as including hares, pheasants, partridges, grouse, heath or moor game, black game and bustards, but extends its protection to rabbits.

(4) The Game Act 1831 (1 & 2 Will. IV. cap. 32), an English Act partly extended to Scotland, defines game in the same way as the Night Poaching Act, but adds, for England, other species.

(5) The Game (Scotland) Act 1832 (2 & 3 Will. IV. cap. 68) speaks of "game" without defining the word, and adds to the term deer, roe, woodcocks, snipes, quails, landrails, wild ducks, and rabbits.

(6) The Game Licences Act 1860 (23 & 24 Vict. cap. 90) refers to "game" without definition, but as it partly incorporates the Act of 1831 (No. 4 above), the definition in the latter Act probably applies to this one. It adds woodcock, snipes, quails, landrails, rabbits, and deer.

(7) The Poaching Prevention Act 1862 (25 & 26 Vict. cap. 114) defines "game" as hares, pheasants, partridges, woodcocks, snipes, rabbits, grouse, and black or moor game. The eggs of the game birds, excluding woodcock and snipe, are also protected by this Act.

Out of all this catalogue the most authoritative definition is undoubtedly that given in the Night Poaching Act, and repeated, directly, in the English Game Act of 1831, and by implication in the Scottish Act of 1832. It is a faulty one. It includes the bustard, a bird practically extinct in Britain at the passing of the Act, and which is now never seen except as an occasional migrant. One might as well charge a man with being in pursuit of the great auk, as of a bustard! Then it omits woodcock, snipe, and quail, which are among the finest of edible wild birds, and which are especially in need of protection. To make amends for this, it includes the same birds twice. It names grouse, heath game, moor game, and black game, apparently oblivious of the fact that the red grouse is the moor fowl, and the blackcock is the heath fowl. Game, therefore, for practical purposes merely includes hares, pheasant, partridges, grouse, and blackcock. At least this is so, if we are to accept the definition of 1828 as conclusive.

But supposing we hold this definition as sufficient, with the addition of rabbits, for the protection of game by night, what is to be the rule by day? This leads us to a fresh eccentricity of draughtsmanship. The Game (Scotland) Act 1832, while it forbids illegal trespass on land by day "in search or pursuit of game," nowhere explains what is understood by the word "game." The blunder seems incredible, but is readily accounted for. Sect. 1 of the Scottish Act of 1832 is copied from sect. 30 of the English Act of 1831, and the copyist omitted to observe that the word "game," standing by itself, is intelligible in the English statute, which has an interpretation clause, but not in the Scottish statute, which has none. It has been the practice of our Courts to supply the lack of a definition by reading into the Act the English one, which is the same as that in the Night Poaching Act.

The varied and often doubtful interpretation of the essential term is not the only peculiarity of the Game Acts. Others might be mentioned; for example, the anomaly that the Court can forfeit and destroy a net if a police constable has found it in the possession of a poacher on the highway, when he is not using it, but cannot do so if the poacher has been caught on land red-handed, making use of the net for poaching; or the absurdity that the Procurator-Fiscal, who can on his own application obtain a warrant to arrest a man upon a charge of murder, cannot procure a warrant to cite a poacher under the Poaching Prevention Act unless his application is fortified with an oath of verity. But what would it avail? Those slipshod statutes have for three-quarters of a century regulated a matter in which tens of thousands of persons are deeply interested, and in which hundreds of thousands of pounds are annually expended, and they will continue to do so, for it is not likely that, in the spirit of the present day, any Government will bring in a Bill to facilitate the working of the Game Laws.

GARRISON *v.* BAR CRICKET MATCH.

This annual game was played on Monday at the Grange ground, Raeburn Place. The weather, unfortunately, was unfavourable, rain falling steadily until almost one o'clock, and it was consequently after two before a start was made. Although the sun shone brightly in the afternoon there was a much poorer attendance than usual. During the afternoon the band and pipers of the Seaforths played selections.

Winning the toss, the Garrison went first to the wickets and totalled 94 runs, of which Capt. Lumsden was top scorer with 31. The Bar batsmen made a disastrous start, G. A. Smith being clean bowled by the first delivery. C. J. L. Boyd played a splendid innings for his side, but none of the others managed to stay with him, and the innings closed for 76, of which Boyd took 55 not out; the Garrison thus repeating their victory of last year. Bowling for the Garrison, Lumsden had 7 wickets for 28, and for the Bar, Orr took 7 wickets for 56 and Chapel 3 for 32.

GARRISON.		BAR.	
Capt. Ravenhill, b Orr ..	3	C. J. L. Boyd, not out ..	55
Capt. Vyvyan, c Smith, b Orr	11	G. A. Smith, b Lumsden ..	0
Capt. Lumsden, b Chapel	31	D. Anderson, c Lumsden, b Vine	6
Major Ritchie, b Orr ..	0	J. H. Orr, c and b Lumsden	4
Capt. Holland, b Chapel ..	5	D. Chapel, c Ravenhill, b Lumsden	0
Capt. Hon. C. St Clair, b Chapel	2	N. Armit, lbw, b Lumsden	1
Capt. Pelham Burn, b Orr	19	A. M. Mackay, c. St Clair, b Stroud	8
Capt. Anstruther, b Orr ..	0	D. S. M'Diarmid, b Lumsden	0
Lieut. B. Lumsden, st Mackay, b Orr	13	C. R. A. Howden, b Stroud	0
Sergt. Stroud, b Orr ..	3	M. Dods, c Lieut. Lumsden, b Capt. Lumsden.. ..	1
Corpl. Vine, not out ..	1	C. H. Brown, c Vine, b Lumsden	1
Byes	6		
Total	94	Total	76

THE LATE JOHN FRASER, ESQ., SOLICITOR, KEITH.—The death is announced of Mr John Fraser, solicitor, Keith, a gentleman well known in legal circles in the North of Scotland. Enrolled a law agent in the year 1865, Mr Fraser had built up a considerable business, and had the reputation of being a sound and cautious adviser. For a period of over forty years he had taken an active part in public matters, not only in Keith, but also throughout Banffshire. For many years he was a member of the old Parochial Board, and later was Chairman of the Parish Council of Keith. He had also been Chairman of the Keith School Board, of which he had been a member

for over twenty years. More lately he was a magistrate of Keith. He had also been for many years Assessor in the J.P. Court. Mr Fraser's death has caused great regret in the community in which he lived, where his qualities of head and heart were very highly esteemed.

DECISIONS IN THE ENGLISH COURTS.

Craxton v. *Craxton.*

Husband and Wife—Desertion.—*Held* that a husband could not be held to be in desertion while he was suing his wife for divorce.—P. D. and A. Div. (Bucknill and Bargrave Deane, JJ.).—8*th May* 1907.

Taff Vale Railway Co. v. *Cardiff Gas Light and Coke Co.*

Statute — Gasworks Clauses Act 1847 (10 & 11 Vict. cap. 15), sect. 6.—*Held* that a gas company was entitled, under sect. 6 of the above Act, to dig a trench in the surface of the road over a bridge belonging to the plaintiffs and lay a gas main resting on the structure of the bridge.—Chan. Div. (Swinfen Eady, J.).—10*th May* 1907.

Andersen v. *Marten.*

Insurance—Marine.—A marine policy containing the clause "warranted free from capture" was effected on a vessel which was captured while on a voyage during the Russo-Japanese war. She was being taken to port when she became a total loss. She was afterwards condemned by a prize court. *Held* that the condemnation related back to the time of capture, and that the vessel had been lost to the policyholders by capture.—K.B. Div. (Channell, J.).—10*th May* 1907.

Pickfords Ltd. v. *London and North-Western Railway Co.*

Railway—Rates.—In cases where a railway company gives a rebate to a trader on the ground that the trader does his own carting, *held* that the correct basis for the calculation of the rebate is to be found, not in disintegrating a collected and delivered rate in order to discover what sum was really charged for cartage, but in the cost of the service rendered and the saving to the railway company when the trader does his own carting, but without allowing anything for profit, which, along with cost, would make up the charge.—Rail. and Can. Com. (Bigham, J., Hon. A. E. Gathorne-Hardy and Sir James Woodhouse).—11*th May* 1907.

Fine Cotton Spinners' and Doublers' Association Ltd. and John Cash & Sons Ltd. v. *Harwood Cash & Co. Ltd.*

Company—Name—Trade Name.—J. Harwood Cash was one of the managers of a mill belonging to the plaintiffs. He left their employment, and, in company with others, formed the defendant company to carry on a similar business to that of the plaintiffs in the same town under the name of Harwood Cash & Co. Ltd. *Held* that the plaintiffs were entitled to an injunction against the defendants carrying on business under a name of which the word "Cash" formed a part without clearly distinguishing their goods and business from those of the plaintiff.—Chan. Div. (Joyce, J.)—13*th February* 1907.

In re Pontardawe Rural District Council Election. Hodgson v. *Evans.*

Election Law—Voting.—At an election in which there were nine candidates and five vacancies, an elector voted correctly for five candidates, and in the voting space opposite the name of a sixth he put a cross and enclosed it with a circle which touched the ends of the lines of the cross. *Held* that he had recorded six votes. Another voter had put a cross opposite the name of one candidate, and on the margin of the paper opposite the name of another candidate but outside the space for voting, he put a stroke like the figure 1. *Held* that the stroke was a vote.—K.B. Div. (Ridley and Phillimore, JJ.).—13*th May* 1907.

Von Eckhardstein v. *Von Eckhardstein.*

International Law—Husband and Wife—Separation.—A wife raised an action of separation against her husband in England, the domicile of the spouses being in Germany, but their matrimonial home in England. Her husband applied to have the action of separation stayed on the ground that he had raised an action of divorce against her in Germany for disobedience. *Held* that the Court in England had jurisdiction to entertain the action of separation, and application *refused.*—P. D. and A. Div. (Bargrave Deane, J.).—13*th May* 1907.

The King v. *The Judge of the Marylebone County Court and the Great Western Railway Co.*

Ex parte Phillips.

Arbitration — Jurisdiction — Railway—Demurrage.—Decision of the Divisional Court (*ante*, Vol. XIV. p. 32) *affirmed.*—Court of Appeal (Vaughan Williams, Fletcher Moulton and Buckley, L.JJ.)—13*th May* 1907.

Sir DAVID BRAND,

ADVOCATE.

In the list of birthday honours published on the 28th of last month is the name of Mr David Brand, upon whom the King has conferred a knighthood. Among the younger generation of the members of Faculty Mr Brand is not a familiar figure, as his duties as Chairman of the Crofters Commission have necessitated his being absent from the Parliament House. But by those who recollect him when he was yet practising he will be remembered as a vigorous and striking personality.

Mr Brand was educated at Glasgow, Edinburgh, and Heidelberg Universities, and at the last of these he took the degree of Doctor Utriusque Juris. He was admitted a member of the Faculty of Advocates in 1864. His sound knowledge of law, and his forcible and energetic style of pleading, speedily secured for him a large junior practice. The Courts could always rely on Mr Brand presenting his argument in terse and vigorous terms, and his pleading was marked by strong common sense.

Mr Brand threw himself with his characteristic enthusiasm into the arena of politics, and along with the late Mr J. J. Reid (a brother of the present Lord Chancellor), was at the head of a band of zealous young Liberal workers who organised the first Midlothian campaign.

Under the Liberal Government of 1880 Mr Brand was appointed an Advocate-Depute. In any prosecution committed to his charge Mr Brand thoroughly mastered the whole facts, and while keen in prosecuting where he thought justice demanded it, he was always dominated by a desire to do what was fair and just towards the prisoner at the bar. In 1885 he was appointed Sheriff of the important county of Ayr. In that capacity he has earned the respect and confidence of the local practitioners by his courtesy and the soundness of his judgments.

On the passing of the Crofters Act Mr Brand was appointed the first Chairman of the Crofters Commission. Few people can understand the difficulties of such a position. The Act had been passed in the teeth of strenuous opposition, and every act of the Commission was watched with the most jealous eye by its opponents. Forms of various kinds of writs had to be drawn up, rules of procedure had to be laid down, and the services of various officials organised. While this was being done there was the constant pressure of multitudes of applications from every part of the districts to which the Act applied. Moreover, there were no precedents to guide those who had charge of the Commission. The Act was a novel remedy for a long-standing grievance, and there was little in the previous law which could in the matter of procedure be usefully employed in its working. The main brunt of these difficulties fell on the Chairman, who was the legal member of the Commission. Upon all questions involving forms of procedure and legal disputes they naturally looked to him for guidance. Mr Brand's sympathy with the crofters, and his anxious desire to be fair and just to the rights of the landlord, stood him in good stead. Moreover, his exact knowledge of legal procedure, and his sound grasp of the principles of law, enabled him to cope with the difficulties of the position in a manner which would have been impossible to anyone without his training. Comparing the working of the Crofters Act with that of similar Acts elsewhere there can be no doubt that it has been attended with marked success. No small

amount of this has been due to the patience, the energy, and the ability of the Chairman.

In the course of the discussions on the land question in the Highlands, disputes arose as to the land available for the formation and extension of the crofters' holdings. A Commission was appointed in 1892 to enquire into the whole question. Mr Brand was appointed Chairman of this Commission, which sat for three years, and its labours resulted in a most interesting and valuable report on the present condition of the Highland crofters, the occupation of the land, and the feasibility of the extension of crofters' holdings.

Since 1897 Mr Brand has also been a member of the Congested Districts Board. As Sheriff of a maritime county he is a Commissioner of Northern Lighthouses.

In private life Sir David Brand is one of the kindliest of men, with a strong vein of humour. He is an accomplished reciter, and has been known to declaim some of the great passages of Shakespeare, his favourite author, with great skill and animation.

All those who know and value the Sheriff's work, and they are many, will warmly congratulate him on the honour which the King has conferred on him.

The Lord President resumed his seat in the First Division on Tuesday morning. His Lordship has derived considerable benefit from his sojourn at Royat.

The first sitting of the Third Division—or, as it is officially called in the Rolls of the Court of Session, "The Extra Division"—took place on Wednesday. Lord M'Laren returned from the Glasgow Circuit in order to preside in the new Court, leaving Lord Salvesen to finish the criminal business in Glasgow. The Extra Division is sitting in the Justiciary Court Room. There is no formal transfer of cases to it, but a roll is to be put out each week composed of cases standing in the rolls of the First Division. The Extra Division will sit next week, and afterwards for some time in the Winter Session. A sitting of the Justiciary Appeal Court is expected to take place in the last week of the Session.

Faculty of Advocates.—A meeting of the Faculty of Advocates was held on Tuesday afternoon—Mr James A. Fleming, Vice-Dean, presiding. A Committee was appointed to receive and dispose of applications for the Chrystie bursary, which is in the patronage of the Faculty. It was announced that Mr Charles E. Green had offered to present to the Faculty an original portrait of Sir Walter Scott, by Andrew Geddes, A.R.A. The Faculty agreed to accept the gift, which will be hung in the hall, and thanks were conveyed to Mr Green for his interesting and valuable donation.

The Chair of Law in Aberdeen University.—The following is a complete list of the candidates for the Chair of Law in Aberdeen University:—Alexander Morris Brown, M.A., LL.B. (Edinburgh), J.M.D. (Heidelberg), 5 Merchiston Crescent, Edinburgh; Henry H. Brown, solicitor, Procurator-Fiscal of Fifeshire, County Buildings, Cupar-Fife; Duncan M. Burden, M.A. LL.B. (Edinburgh), solicitor, 20 Whitehall Street, Dundee; Charles R. A. Howden, M.A. (Edinburgh), advocate, assistant to the Professor of Scots Law, University of Edinburgh; James Mercer Irvine, M.A. (St Andrews), B.Sc., LL.B. (Edinburgh), advocate, Edinburgh, Lecturer in Civil Law, University of Glasgow; William Charles Smith, K.C., M.A., LL.B. (Edinburgh), advocate, Edinburgh; Robert Moir Williamson, M.A. (Aberdeen), LL.B. (Edinburgh), advocate, Aberdeen. The appointment is to be made on Tuesday.

The Legal Profession in the King's Birthday Honours List.—The legal profession does not bulk very largely in the list of honours announced on Friday of last week, but it is not unrepresented, and on this occasion Scotland has not been entirely forgotten. The knighthood conferred upon Sheriff Brand, of whom we publish a portrait this week, is welcomed in the Parliament House, although the learned Sheriff is personally unknown to the younger generation of pleaders there. Mr Eugene Wason, the member for Clackmannan and Kinross, who has been created a Privy Councillor, is nominally a member of the profession. He was called to the English Bar in 1870. Six years later he became a solicitor, but in 1885 he resigned that position and rejoined the Bar. For some years he acted as assistant examiner to the Incorporated Law Society. He succeeded the late Lord Kinross as member for Clackmannan and Kinross in 1899, and previously he represented South Ayrshire. He has recently come into prominence as Chairman of the Scottish Committee of the House of Commons. Mr John Emmott Barlow, who is one of the new baronets, was called to the Bar at the Inner Temple in 1884, but does not practise. Among the new knights is Sir Alfred Billson, M.P., who is a solicitor. He was admitted in 1860, and is a member of the firm of Oliver, Jones, Billson & Co., Liverpool. Mr Francis Oppenheimer, His Majesty's Consul-General at Frankfurt, who is a member of the Bar at the Middle Temple, has also received a knighthood. The honour of K.C.M.G. has been conferred upon the Hon. Charles Fitzpatrick, K.C., Minister of Justice in the Dominion of Canada since 1901. He was admitted to the Canadian Bar in 1876, and has held several legal offices in Canada. The honour of knighthood has been conferred upon the Hon. W. Mortimer Clark, Lieutenant-Governor of Ontario. Mr Clark, who was born in Aberdeen in 1836, was admitted a member

of the W.S. Society in 1859. He emigrated to Toronto, and was called to the Bar there in 1869. In 1890 he was appointed a Queen's Counsel, and has since held many important offices. In the Colonial Office list of new knights are also the names of Francois Charles S. Lengelier, Assistant Chief Justice, Superior Court, Quebec, and William Henry Soloman, Senior Puisne Judge of the Supreme Court of the Transvaal. Sir H. A. White, solicitor to His Majesty the King, who was admitted a solicitor in 1873, and received a knighthood in 1897, has been appointed a Commander of the Royal Victorian Order.

The subject of the portrait in our next issue will be:—

The Late Charles M'Kie, Esq.,
Sheriff-Clerk of Dumfriesshire.

THE TAXATION OF FEU-DUTIES.

DEPUTATION TO THE PRIME MINISTER FROM LEGAL SOCIETIES AND OTHER PUBLIC BODIES.

On Friday the 28th ult. the Prime Minister received in his private room in the House of Commons several deputations on the subject of the taxation of feu-duties fixed under existing contracts. These were (1) from the leading Societies of Solicitors in Scotland; (2) from owners of feu-duties in Edinburgh, Glasgow, Aberdeen, and elsewhere; and (3) from the Associated Life Assurance Offices of Scotland. With the Prime Minister were the Secretary for Scotland and the Lord Advocate.

The following were the representatives of the Legal Societies: Mr George M. Paul, Deputy-Keeper, Mr John Cowan, Treasurer, Professor Mounsey, Mr William Garson, and Mr H. E. Richardson, representing the Society of Writers to the Signet; Mr John Campbell, President, and Mr Charles Ritchie, Treasurer, of the S.S.C. Society; Mr James A. Reid, LL.D., Dean, and Mr J. T. T. Brown, of the Faculty of Procurators, Glasgow; Mr James Ross, President, and Mr William Smith, of the Society of Advocates, Aberdeen; Mr J. P. Kyd, the Faculty of Procurators, Dundee; and Mr G. D. Ballingall, the President of the Incorporated Society of Law Agents.

Among other legal gentlemen present were Mr Christopher N. Johnston, K.C., Sheriff of Perth; Sir Henry Cook, W.S.; Mr Nevill Dundas, W. S.; Mr G. J. Wood, W.S.; Mr David Campbell, S.S.C.; Dr David Murray, Writer, Glasgow; Mr W. J. Alexander, Writer; Mr Ledingham, S.S.C., Aberdeen; Mr Macindoe, Kirkcaldy; and Mr Peter Macnaughton, S.S.C., Secretary of the Deputation. Among the non-legal gentlemen present were Lord Overtoun, Sir Andrew Macdonald, Mr James Chatham, Manager of the North British and Mercantile Insurance Company, Sir Thomas Gibson Carmichael, Bart., and many others. The deputation from the legal societies was introduced by Mr Caldwell, M.P., who informed the Prime Minister that Mr George M. Paul, Deputy-Keeper of the Signet, would address him on behalf of the Societies.

Mr Paul said—The Societies which this deputation represents, and which are the largest and most influential societies of solicitors in Scotland, are (1) the Society of Writers to the Signet; (2) the Society of Solicitors in the Supreme Courts of Scotland; (3) the Faculty of Procurators in Glasgow; (4) the Faculty of Advocates in Aberdeen; (5) the Faculty of Procurators and Solicitors in Dundee; and (6) the Incorporated Society of Law Agents in Scotland. By the accident of my being president of the senior Society of those represented by this deputation, the duty has devolved upon me of making the Societies' statements to you.

The Societies feel deeply grateful to you for the honour you have done them in so kindly agreeing to spare them a portion of your precious time in order that they might state to you the grounds of the strong feelings which they entertain as to the injustice which would result if effect should be given to the recommendation of the Select Committee, passed by a bare majority, that liability should now and for the first time be laid upon the owners of feu-duties fixed under existing contracts of relieving the owner of the ground in respect of which they are payable of a proportionate share of local burdens. The injustice would be more marked, and the hardship would be rendered more acute, if this recommendation of the Committee should become law as part of their further proposal that local rates should be levied upon the value of sites alone apart from the value of the buildings thereon. For the result of such a combination of the rating of such feu-duties and the restriction of rates to site values, would be that—assuming the total amount required by any town from owners' rates not to be increased beyond what it is at present—feu-duties would have to bear as their share of burdens as much as from 8s. per £ of feu-duty (estimated for Edinburgh) to 15s. per £ of feu-duty (estimated for Glasgow). And not only would that be so, but the capital value, *i.e.* the selling price, of what was left of the feu-duty must be depreciated, because purchasers would go upon the universal experience of modern days that local rates never fall, but invariably increase, and of course any increase must mean a further encroachment on the balance left. And when one considers that feu-duties are now in great part held as investments of funds in trust for the poor and provident classes, and that the amounts so held are enormous, one can see that great hardships must be the result. Indeed,

had the Societies not been deeply impressed with the importance of the question raised by the Select Committee they would not have united as they have now, for the first time in their history, done to take the unusual course of approaching the Prime Minister on the subject. They have no personal interest of their own to serve. They have solicited this interview solely in the interests of the numerous clients of their members in all parts of Scotland. Their action is entirely non-political. The Societies have all of them among their members men of all shades of political opinion, and, whatever the views of individual members may be, it is outside the province of the Societies as such to deal with matters of general policy or which might give rise to party differences. The present case is not one of these. The matter is one of general interest.

The Societies are aware that no step has been taken with a view to legislation on the lines of that part of the Select Committee's report as to which we are here; and having regard to the very distinct and very satisfactory assurance which the Lord Advocate gave last year on behalf of the Government, they are confident that nothing of the kind will be proposed. But the Select Committee's report has had such a disquieting effect in Scotland that the Societies feel that something should be done without delay to reassure the vast numbers of people who are interested in feu-duties as investments.

In the use of the word "injustice" I am fortified by the report of the Royal Commission on local taxation, and in particular by the separate minority report, which deals with urban rating and site values in Scotland. It was a minority report, because, differing from the majority of the Commissioners, the minority were not unfavourable to the idea of the rating of site values to a certain limited extent, and for certain limited purposes, to which I need not refer, as they have no application to the matter now before us. But they were in full agreement with the majority as to the impossibility of allowing existing contracts to be broken. The late Lord Justice-General, Mr Balfour—afterwards Lord Kinross—was one of that minority. I venture to think, sir, you must have known him well, and therefore I need scarcely say of him that he was one of the ablest and most learned lawyers that Scotland has known. As this part of the report deals with matters of which he had exceptional knowledge, I feel entitled to assume that it at least must have been drafted by him, or at any rate had the impress of his full approval and unquestioned authority as a great lawyer. It says — "The rating of feu-duties fixed under existing contracts would be a peculiarly objectionable and indefensible breach of contract."

Words of condemnation could not well be stronger. They were fully accepted by the Lord Advocate on behalf of the Government last year. And yet this, which has been characterised by the highest authority as "a peculiarly objectionable and indefensible breach of contract," is what the Select Committee recommend. Of course I do not for one moment mean to suggest that the gentlemen who composed the bare majority of the Select Committee made a recommendation which they believed would lead to injustice. I mean no more than this, that, if the Committee's proposals, based mainly on technicalities and on what the Societies believe to be a misapprehension, to some extent, of the law of Scotland, should be carried out, serious injustice would be the result. In the observations which seem necessary in order that I may make the Societies' position clear to you, I shall avoid as much as possible making any reference to legal technicalities, although it is really upon these and upon what the Societies are satisfied are mistaken views of the law that the Committee base their conclusions. The Societies have said what they have to say upon this subject in the closely reasoned and exhaustive representation of which I had the honour to send you a copy, and to which I respectfully take leave to refer you.

The first observation I have to make is this — that urban feuing, which has attained to such gigantic proportions, was all but unknown in its modern form before the latter part of the eighteenth century, when towns first began to expand beyond the ancient burgh limits to which they had previously been confined. From that time to the present—upwards of a hundred years—the law has been held as clearly settled, that owners' burdens must be borne by the owner of the soil without recourse to any extent against the person to whom he pays his feu-duty. No question has ever during that long period been raised as to this. That the law is so has hitherto been accepted on all hands. As I shall be able to show you presently, this has been assumed on more than one occasion by the Legislature, and the constant practice of the judges of the Supreme Court has been conducted on that assumption. Nevertheless, the Committee say that it may be true, or it may not be true, that, by the common law, the superior is bound to relieve the feuar of a share of burdens; on that they say they offer no opinion. Why should the Committee cast any doubt upon the common law, which is quite clear? If there had ever been any doubt the point must have been raised long ago at the instance of some intelligent feuar or some ingenious or learned lawyer, but it has never been done. The constant, unvarying, undisputed practice of both payers and receivers of feu-duties must have been within the knowledge of the Committee, and supplementary and corroborative of that, the Committee had the decisions of the Court of Session and the House of Lords, which they pointedly refer to and strongly found upon, for a different purpose no doubt, in the immediately succeeding sentences of their report.

Nothing could establish more clearly what the common law is than these decisions. The question in each of them arose out of a special contract in the feu grant that the superior should relieve the feuar of all public burdens payable in respect of the feu. And what were the judgments of the Court of Session and the House of Lords? They held that an undertaking which inferred an inversion of legal liability must have some limitation, that it must have been intended that the relief should be limited to such burdens as might have been fairly within the contemplation of the parties at the time the contract was entered into. To that extent the superior was, by virtue, and by virtue only, of the express contract, held to be liable in relief, but no further. And why? Obviously because the common law imposed upon him no liability whatever, and therefore, consequently, the whole common law liability rested on the feuar. Surely the Committee cannot have considered the true bearing of these decisions. So much for the common law; but then, to make assurance doubly sure, feu grants contain a special contract whereby the superior undertakes to relieve the feuar of all burdens payable in respect of the ground at and prior to the feuar entering into possession; the feuar, on the other hand, undertaking to relieve the superior of all such burdens from and after the date of his taking possession of the feu. This clause will be found in every book of Styles or Precedents.

The Societies have no hesitation in saying that it is clear beyond dispute that the owner of feu-duties has been considered on all hands to be free from any obligation to relieve the owner of the soil to any extent of local burdens, and it has been on the faith of that being so that all feu-duties have been created and purchased since urban feuing began, and, as I shall point out later, the amounts which have been purchased and are now held as investments for trust and charitable funds on that faith are enormous. A purchaser of a feu-duty buys it on the faith that the law will be respected, and that the owner of the ground will continue to be legally bound to pay him the feu-duty in full. Now, seeing that the enormous sums I have referred to have been invested on the faith that the purchasers of feu-duties are legally entitled to receive them without deduction, and also, seeing that the owners of the feus acquired them on the footing and in the knowledge that they are legally bound to pay the whole burdens in respect of their feus without relief, surely, unless some very strong reason be assigned, effect should not be given to what, in the absence of any such reason, seems the very unfair and unreasonable proposal of the Committee, that the owner of the ground should be authorised without compensation to do what, by the common law and by express contract, he is bound not to do. But they give no such reason, unless we can consider as a reason their single observation that as a feu-duty is payable out of the annual return from the ground upon which rates are levied, it should bear a share of such rates. But it was on the footing and on the faith that it should not be so that all parties transacted—that the feuar bought his land and the feu-duty owner his feu-duty; and, moreover, the same reasoning would apply to ground annuals and other charges on land which it is not suggested should be taxed.

As regards these other charges, I should like to explain that, while the Bill upon which the Committee reported provided that a share of the special local rate proposed to be levied should be laid upon all ground burdens, including not only feu-duties but also ground annuals (rent charges) and the like, the Committee's recommendation is silent on the subject of all ground burdens except feu-duties. And they rightly dropped out rent charges and the like, because, although these are manifestly payments out of the annual return from the land, there the relation is too obviously that of debtor and creditor, mortgagor and mortgagee. The Committee have, however, excluded feu-duties from that category, because of the peculiar nature of the title under which they are held. I am not going to trouble you with any disquisition upon this subject, as it is a technical one, and has been fully dealt with in the representations. I would gladly avoid saying a single word about it, but the Committee's whole case is based upon it. They say the superior, the owner of the feu-duties, is the true owner of the ground: the feu-duty is simply a rent which the person who, we say, supposes himself, and whom every other body supposes, to be the owner of the ground, pays as tenant to the owner of the feu-duty. That very learned lawyer, Lord Kinross, and the other eminent members of the Royal Commission, held no such theories. The separate report puts the matter in the true common-sense way when it says in one place that "it is particularly clear in the case of feu-duties that the transaction is equivalent to a sale, except that the purchase money is paid in the form of a perpetual annuity," and in another, where it defines a feu-duty as a perpetual annuity payable to its owner out of the feuar's property. With all respect to the Committee, I take leave to say that they have been pursuing the shadow, entirely neglecting the substance. Legislation does not proceed upon technicalities, but upon the substance of the thing. The technical title is nothing; it is the thing itself that is important, for truly feu-duties of urban subjects have long been treated as being economically and substantially in the same category with perpetual rent charges, or as perpetual annuities issuing out of land—only with more simple and effective remedies for their recovery than the

more troublesome method for attaining the same end in the case of rent charges and annuities.

There is another important matter which I must refer to — the purchase of feu-duties is a mode of investing trust funds specially authorised by statute, while the purchase of land is not, and the reason is evident. Trust funds must be placed in investments good to hold and easily realisable, which land is not. But feu-duties have been eminently so. When well secured they have been much sought after, and have always been readily saleable when trustees required to realise their investments. But the experience of members of the Societies has been very different since the Committee's report was issued. Feu-duties are either quite unsaleable, or only saleable at a totally inadequate price. Then what has been the practice of the judges of the Supreme Court during these last sixty years? When Parliament in 1843 authorised *quoad sacra* parishes to be created, it delegated the power to create them to the judges of the Supreme Court, provided they were satisfied that a permanent minimum stipend of £120 a year had been secured in all time coming for the ministers of such parishes. Well, how have these learned judges for the last sixty years considered that this could be most safely and securely effected? Why, it was by the investment of the funds, raised by voluntary subscriptions for the endowment, in the purchase of well-secured feu-duties to an amount equal to the required minimum statutory stipend. Upwards of £55,000 a year is receivable from feu-duties for these small stipends.

The contention that feu-duties fixed under existing contracts should bear a share of local rates was not raised for the first time before this Select Committee. A Select Committee of the House of Commons on town holdings, which reported in 1892, had the matter fully before them, and reported against any portion of local rates being laid upon the owners of such feu-duties. Then some years later the subject was again considered by the Royal Commission on Local Taxation, to which I have more than once referred. With your permission I will read a sentence from the final minority report: "Legislation enabling occupiers to violate the contracts which they have deliberately made, and to escape the obligations which they have solemnly undertaken, would be, in our opinion, indefensible. We could admit no compromise on this matter of principle." These words speak loudly in support of the views of the Societies. Then we have the weighty opinion which the Lord Advocate expressed on behalf of the Government on the second reading of the Bill of last year. Applying these opinions of the very highest authority to present circumstances, could any form of words be suggested which would more emphatically condemn the Select Committee's recommendations? The Committee, however, in their report have entirely ignored the very grave and weighty condemnation by Lord Kinross and the other members of the Royal Commission of such a course as they have proposed, just as they have paid no regard to the Lord Advocate's opinion. They came to an opposite conclusion for reasons which are technical and unsubstantial—reasons, however, the conclusions from which, if they should receive effect, would inflict much injury upon many poor and provident persons. The matter is really one of great moment for hosts of people with small incomes derived, either directly from such investments made by themselves, or indirectly through trust investments or allowances from charitable and similar funds. I think the Committee can scarcely have been aware of the many people of slender means who are interested in feu-duties—not merely private individuals with whom, particularly in Glasgow, I am informed, this is a common mode of investing savings, but also trustees on comparatively small private trust estates, who have taken advantage of the statutory powers to purchase feu-duties to which I have referred.

Besides these small investors, there are the great trusts for the advancement of religion, for charitable purposes, educational institutions, insurance and friendly societies, and other associations of a similar nature. It must be borne in mind that the proposal of the Committee is, not to lay a special supplementary rate of 10 per cent. on the estimated annual value of the site, as was intended by the Bill of last year, but to lay all local rates, without exception, on land value.

Now, an alteration of the incidence of taxation from the present system of rating on site and buildings to that upon site alone would not of itself take anything more out of the pockets of owners in the aggregate than they are at present paying. The only difference would be that in order to get from them, after the alterations, the same annual sum as they are at present paying, they would have to be assessed at a much higher rate per pound on the necessarily much lower site value than would have been the case as regards the much higher value of site and buildings. Thus it has been estimated that in Edinburgh the value of site and buildings is, taking an average over the whole city, five times that of site alone, so that the present assessment of 1s. 7d. per £ on site and buildings for all owners' burdens would be represented as nearly as may be by 8s. per £ on site alone. If the Committee's recommendation should receive effect, then, in the proportion that the feu-duty bears to the total value of the site, the owner of the feu-duty would have to relieve the owner of the site of a corresponding proportion of burdens at 8s. per £ of his feu-duty. The effect of the Committee's recommendation would simply be this—not to impose any additional burden on owners of property who, in the aggregate, would

be assessed for no larger a sum than before, but simply to allow feuars to retain two-fifths of the feu-duties which, at common law and by express contract, they were bound to pay without deduction; that is to say, on the above hypothesis, every £20 of feu-duty would, in future, be only £12. And who would derive the benefit? Not the community. The community would not benefit to the extent of a brass farthing. Not all the successive owners of the ground. Not a soul would derive any benefit from it but the person who might happen to be the owner of the ground when the Act passed, and his heirs. While the ground remained unsold this man and his heirs would alone get the benefit of the reduced feu-duty they would have to pay, and when they sold their property they would sell it subject to the reduced feu-duty. In respect of that reduction they would, of course, get an enhanced price which they would carry off, and with it the whole benefit conferred by the Act. Then, as regards the feu-duty owners, the precise converse would happen to them. So long as they held their feu-duties, they would (to continue the illustration) get £12 a year instead of £20, with the risk of that reduced feu-duty being still further reduced; and when they came to sell their feu-duty, the purchaser would only pay a reduced price for the depreciated article. Thus the person who was owner of the feu when the Act passed would be the only gainer; the person who was owner of the feu-duty when the Act passed would be the only loser. To take money away from one person to whom it belongs absolutely in order to give it to another who has no right to it, legal or moral, would be an outrage. Not only have persons who have invested their own money in feu-duties and beneficiaries under trusts, large and small, been made anxious, I may say become alarmed, at the prospect held out to them by the Select Committee, but the same uncertainty affects persons who would otherwise have readily purchased feu-duties, so that persons wishing to realise investments—in particular trustees requiring to close their trusts and divide their funds among the beneficiaries—find these feu-duties, which used to be considered investments of the highest class, either unsaleable or only realisable at a serious sacrifice.

The Societies therefore trust, sir, that you may see your way to remove these grounds of anxiety, and to restore the confidence in feu-duties fixed under existing contracts as an investment, which has existed in the past and which the Government's perfectly satisfactory declaration of last year did so much to continue, but which has been so much shaken by the Select Committee's report. We trust you may see your way now to do this by confirming that declaration, which was not only entirely in agreement with the very carefully considered reports of the Town Holdings Committee and the Royal Commission on Local Taxation, but, if I may be allowed with the utmost respect to say so, is so obviously right in itself.

Mr Christopher N. Johnston, K.C., said that he represented trusts and institutions for religious, charitable, or educational purposes, and benefit societies having capital invested in feu-duties to the amount of some five and a half millions, besides a large number of private investors. Superiors or owners of feu-duties are of two classes: (1) Ground landlords in the popular sense, who have feued out parts or the whole of their estate; and (2) investors who never had any relation to the land other than as purchasers of a feu-duty as an investment secured upon the land. The former class, no doubt, bulk largely in the eye of those who advocate this rating proposal, but it is believed that by far the larger part in value of the feu-duties of the country are held by the latter class, *i.e.* the investors. The case for the investors is, that under the law and practice of the feuing system, as that has been understood for a century, the owner of a feu-duty is not a proprietor of land, but has right merely to a fixed annual payment secured over the land. He takes no benefit if the property increases in value; he has no share in its administration, no parliamentary or municipal vote or heritors' rights in respect of it; in many cases he never saw it, and may have only a vague idea where it is situated. One sometimes hears of an absentee landlord, but to talk of an absentee superior would be as ridiculous as to talk of an absentee bondholder. The superior, as Lord Braxfield long ago pointed out, might be interdicted if he sought to set foot upon the feu. On the other hand, the settled understanding, on the faith of which investments have been made, has been that the superior is free from rates and burdens of ownership which must be borne by the true proprietor. A builder in Edinburgh creates a feu-duty, and to purchase it trust money is invested on which, say, a clergyman in Shetland or a widow in Dollar is dependent. Edinburgh gets the use of that trust money at a low rate of interest; but on what theory, either of benefit conferred or of ability to bear the burden, should the minister in Shetland or the widow in Dollar be required to bear a share of the expenses of Edinburgh municipal administration?

An attempt has been made to assimilate feu-duty to rent and to represent that the superior as a joint owner with the feuar should be made liable in part of the proposed rate. But this attempt rests upon old theories of feudal conveyancing, and the argument has no relevancy to the practical conditions and the understandings which have governed the creation and the purchase of feu-duties for upwards of a century. By far the greater part in value of existing feu-duties have been created since 1840, and the subtleties of eighteenth-century lawyers

can throw no light upon the question as to what was the understanding in regard to rights and obligations under which these modern feudal relationships have been entered into.

If, as has been proposed, the whole burden of the rates should be imposed upon site value, and the owner of the feu-duty should be called upon to contribute in proportion to the amount of his feu-duty, the rate upon owners, even if occupiers bore one-half the burden, would not, it has been estimated, be less than 10s. in the pound, a truly confiscatory proposal. But even if a much smaller rate were imposed, the disturbance of the immunity from rating would depreciate the capital value of the security to a degree out of all proportion to the amount of the rate. Feu-duties would cease to be what Parliament in respect of their stability and their immunity from rates has made them, a proper trust investment.

The use of a very large sum invested in feu-duties is enjoyed by householders at a low rate of interest. The withdrawal or curtailment of this capital would be most prejudicial to all interested in building property, whether builders, owners, or occupiers. But this will be the inevitable result of any system which destroys the gilt-edged character of this form of investment, deprives it of its privilege as a trustee investment, and renders it subject to fluctuation and periodical diminution. Already the influence of these proposals is being felt in the greatly increased difficulty of financing building operations in large towns.

The declarations of the Lord Advocate when the recent Bill was before Parliament were quite satisfactory upon this matter. They were not dictated by any preconceptions in favour of superiors, but were the result of a careful examination of the considerations which brought his distinguished predecessors Lord Moncreiff and Lord Kinross to a like conclusion. All that the deputation now asked was such an endorsement of the declaration of the Lord Advocate as would restore public confidence in this class of investment.

Certain other members of the deputation having spoken, Sir Henry Campbell-Bannerman, in replying, said:—

I am obliged to you for coming here to-day and putting your case so strongly and completely before me. Mr Paul, Sheriff Johnston, Lord Overtoun, and the other two gentlemen who have spoken, have all told the same story, and sung the same tune. It is a very simple matter; I mean simple from my point of view, and from the point of view of my answer. It is a most complicated subject. Everything connected with these burdens upon land and the valuation and assessment of land is complicated. But we can put aside altogether to-day all questions regarding it, ancient and modern. We have nothing to do with the question whether there should be a discrimination between the value of the site and the value of the buildings. We have nothing to do with the policy that may be going to be pursued, upon which there is abundant room for difference of opinion. What we have to do, and your sole object, as I understand, in coming here, is to know whether the Government contemplate going back upon existing contracts. In one sentence that is the whole question, and to that question I can answer, I think, in the most condensed form in which we are accustomed to answer questions in the House of Commons, by the words, "No, Sir." My friend the Lord Advocate, who knows a vast deal more on this subject than I do in its details, made a speech last year, the greater part of which I have before me here, and it has been quoted by Mr Paul, but there is one sentence which seems to me to be the crucial sentence: "He desired to associate this great and salutary reform with no violence whatever to existing contracts, and with no invasion of rights sanctioned by the State." That is our attitude in the matter, and I really think that having said that—*solvuntur tabulae*, not *risu*, I hope—I do not think I need detain you by attempting any elaboration of the subject with which those who have spoken are much better entitled to deal than I am; but I can assure you that we have no idea of going back upon existing contracts, and therefore, all the alarms, so far as they have existed in Scotland and elsewhere, may be allowed safely and healthily to subside. The Lord Advocate is here and you might like to hear him, but I have no doubt that what I have said would be the gist of what he would say, and if you will allow me, I will leave it there, thanking you for having put the whole case before me so fully as has been done, especially by Mr Paul, and not occupying more of your time, but dismissing you, I hope, with a relieved heart and in a friendly spirit.

DECISIONS IN THE ENGLISH COURTS.

In re The Kent Collieries Ltd.

Day v. *Kent Collieries Ltd.*

Company—Debentures.—Decision of Parker, J. (*supra*, p. 24), *affirmed*.—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes and Buckley, L.J.).—16*th May* 1907.

Wilson v. *Carnley.*

Contract—Illegal—Public Policy.—*Held* that an agreement by a married man to marry a woman on the death of his wife, the woman knowing that he was a married man, was not illegal as contrary to public policy.—K. B. Div. (Channell, J.)—3*rd June* 1907.

The late CHARLES M'KIE, Esq.,

Sheriff-Clerk of Dumfriesshire.

We much regret to record the death of Mr Charles M'Kie, Sheriff-Clerk of the county of Dumfries, which took place at his residence in the county town on the 27th ult., after a very short illness, in his sixty-first year. Only two days before his death he was attending to his accustomed duties in the Sheriff Court-house, and the news of his death came as a shock to the community of Dumfries, where he was held in the highest esteem alike by the profession and the public.

Mr M'Kie was born at the farm of New Hall, in the parish of Keir, on the 5th of March 1847, just three weeks before the death of his father, after whom he was named. He came to Dumfries at the age of seventeen, and entered upon his apprenticeship in the office of the Sheriff-Clerk, in which his whole working life has been passed, and of which he rose to be the head. The Sheriff-Clerk at that date was the late Mr Henry Gordon. In 1871 Mr M'Kie was appointed Sheriff-Clerk Depute, and for many years while occupying that position he virtually discharged the whole duties of the Sheriff-Clerk. He did so in a manner which commanded the full confidence of the Bench and the Bar, and of the Crown departments with which his work brought him into touch. He had a most intimate knowledge of procedure, and a comprehensive and accurate acquaintance with the numerous statutes which are administered in the Sheriff Court; and he discharged his executive duties with great precision and regularity. He sought to maintain a high ideal of the prestige of the court and of the legal profession, and he brought to the discharge of his duties a stately courtesy and a desire to be helpful, which set him quite apart from the ranks of the mere official. The members of the Bar took occasion to show in tangible form their appreciation of his professional abilities and personal qualities on the occasion of his majority as Sheriff-Clerk Depute in 1892, when they entertained him to dinner and presented him with a silver salver and a purse of sovereigns. On Mr Gordon's resignation of office, the Faculty unanimously petitioned the Government of the day to appoint Mr M'Kie, and in March 1897 he received his commission as Sheriff-Clerk.

The high reputation which he had made as Sheriff-Clerk Depute he more than maintained during the ten years in which he held the more important office. His standing among his professional brethren was attested by the fact that for ten years he acted as Honorary Secretary of the Society of Sheriff-Clerks. He enjoyed great personal popularity with all classes. Genial, amiable, and with many interests, he was always an agreeable and entertaining companion. His kindliness of heart shewed itself in ready and generous help to many benevolent institutions, and in many acts of charity which were known only to the recipient and himself. He was a member of St Michael's Parish Church, and took much interest in its work. He was unmarried.

At the usual Friday sitting of the Sheriff Court at Dumfries on 28th June there was a large attendance of members of the local Bar. Referring to the death of Mr M'Kie, Sheriff Campion said:—

"We are met to-day, gentlemen, in the shade of a great and unexpected sorrow. It seems hardly possible that we can realise the fact that we shall never see present in the Court again one

who for so many years has been a moving spirit in it. It is needless for me—speaking to the Faculty—to enlarge upon the many qualifications which Mr M'Kie possessed for his important office. His long training, his interest in the work, his pride in the Sheriff Court, and his endeavour to maintain the best traditions of the Sheriff Court and to make the Dumfries one a model of Sheriff Courts in Scotland, are all well known to you. He was a man who was fortunate in occupying a position he took both pride and pleasure in. His place will be difficult to fill. We all know that we have lost an official most valuable to the county and the country, but his loss as an official is dwarfed for the time to all of us, I am sure, by thinking of his loss to us as a friend. I don't suppose there are any connected with the Sheriff Court but have applied to Mr M'Kie for advice on some subject or other in the course of his career; and what is more, they never applied to him without getting sage, sensible advice, courteously and most tactfully given. It was a privilege to enjoy the friendship of such a man as Mr Charles M'Kie. I, during the seventeen years I have been connected with this Court, owe much of the pleasure I have experienced in administering the work to his thoughtful and kind attention. And I have received this morning a telegram from Sheriff Fleming desiring that he should be associated with any remarks that were made about Mr M'Kie. He mourns his loss as a tactful and courteous assistant, and as an ever kind and thoughtful friend. We have often spoken together of how fortunate we were in possessing such an assistant. I fear that in the rapid run of time nowadays faces often disappear and places are filled up and the memories pass away; but I am quite sure that the memory of Charles M'Kie will not lightly pass away. He stamped his personality upon the tone of the Sheriff Court at Dumfries, and will be long and affectionately remembered by everyone who was privileged to enjoy his friendship. I believe it is your wish that the Court should be adjourned in the circumstances."

Mr John Grierson, Dean of Faculty, on behalf of the members of the Bar, paid a tribute to Mr M'Kie, and concurred in what had been said by Sheriff Campion. The Court then adjourned.

The Chair of Law in Aberdeen University.—On Tuesday the Aberdeen University Court (Principal Lang presiding) met to appoint a successor to Mr N. J. D. Kennedy, K.C., formerly Professor of Law in the University, now Sheriff of Renfrew and Bute. In our last issue a list of the candidates for the vacancy was published. The Court, after full discussion, unanimously chose Mr J. Mercer Irvine, M.A., LL.B., B.Sc., Advocate, Lecturer in Civil Law in Glasgow University, to be professor. Mr Irvine is to be congratulated on having been selected from so full a list of able and eminently qualified candidates. No less is the University to be congratulated in having secured a professor so admirably fitted to do credit to the Chair and to further the interests of legal learning in the venerable University. The new professor, who is forty-four years of age, studied in the University of St Andrews, where he graduated in Arts. Subsequently he studied classics and mathematics in the University of Edinburgh, and took the degree of B.Sc. in pure mathematics in that University. In 1886 he entered the Law Faculty of Edinburgh University, where he had a distinguished career, and took the degree of LL.B., "with distinction." In December 1889 he was admitted a member of the Faculty of Advocates, and since that date has been in regular practice at the Scottish Bar. In December 1905 he was appointed additional Advocate-Depute on the Western Circuit. As Vans Dunlop law scholar, he delivered courses of lectures in the University of Edinburgh in two successive sessions, 1890–1 and 1891–2. In 1894 he was appointed University assistant in Civil Law in the University of Edinburgh. In 1895 he was elected by the University Court to the Lectureship in Civil Law in the University of Glasgow. He is the joint-author, along with Professor Gloag, of a treatise on the law of rights in security, which was published in 1897. Professor Irvine has contributed many articles to law journals. Mr Irvine will enter on his duties in October next. [A portrait and biographical notice of Mr Irvine was published in the "Scots Law Times" of 11th December 1897, Vol. V. 145.]

The Extra Division of the Court continued its sittings this week. Lord Low was unfortunately, owing to indisposition, unable to sit in the Second Division on Tuesday and Wednesday. As Lord Ardwall was in the Extra Division, Lord Johnston attended on Tuesday to make up a quorum along with the Lord Justice-Clerk and Lord Stormonth-Darling. On Wednesday no Outer House Judge was available, and the Second Division did not sit.

The directors of the Commercial Bank of Scotland Ltd. have appointed Mr William Babington, W.S., to a seat at the Board rendered vacant by the resignation of Professor Mounsey, who has been appointed Law Agent of the Bank.

The Advocates' Library (with the exception of the Law Room) will be closed as usual during the month of August. In consequence of the alterations on the buildings, now in progress, it will be necessary that it should remain closed to the public until further notice.

Autumn Vacation Jury Trials.—The sittings of the First and Second Divisions of the Court for the trial of civil causes by jury during the ensuing vacation commence on Monday, 22nd inst. There were eighteen cases on the First Division list and seven on the list of the Second Division. Three of these cases have since been transferred from the First to the Second Division.

"PERSONAL INJURY BY ACCIDENT."

By James D. Wyllie, Solicitor, Kilmarnock.

When a claim under the Workmen's Compensation Act is contemplated, one of the first questions for consideration is, "Has the workman sustained personal injury by accident?" The phraseology of sect. 1 of the Act of 1906, so far as this phrase is concerned, is exactly the same as the 1897 Act, and decisions under the repealed statute will still be regarded as precedents and authorities.

The interpretations of the terms "personal injury" and "accident" have been discussed in several cases, and in *Fenton* v. *Thorley* [1903], A.C. 443, Lords Macnaghten and Lindley gave remarkably clear and authoritative opinions on the question. In that case a workman while turning a wheel connected with a machine ruptured himself, and in holding that the injury was caused by an accident, Lord Macnaghten said: "Now the expression 'injury by accident' seems to me to be a compound expression. The words 'by accident' are, I think, introduced parenthetically, as it were, to qualify the word 'injury,' confining it to a certain class of injuries and excluding other classes, as, for instance, injuries by disease or injuries self inflicted. Then comes the question, Do the words 'arising out of and in the course of the employment' qualify the word 'accident' or the word 'injury,' or the compound expression 'injury by accident'? I rather think the latter view is the correct one. If it were the question whether the qualifying words apply to 'injury' or to 'accident,' there would, I think, be some difficulty in arriving at a conclusion. The truth is, that in the Act, which does not seem to have had the benefit of careful revision, 'accident' and 'injury,' that is, injury by accident, appear to be used as convertible terms. I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap, or an untoward event which is not expected or designed." In the same case Lord Lindley said: "The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended or unexpected loss, or hurt, apart from its cause; and if the cause is not known, the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and effect, no attempt being made to discriminate between them." In *Fenton* v. *Thorley* the decision in *Stewart* v. *Wilson's & Clyde Coal Company*, 1902, 5 F. 120, 10 S.L.T. 204, was expressly approved of. In that case Lord Adam stated he was not going to attempt to define the term "accident," but Lord M'Laren gave it as his opinion that if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in, that is an accidental injury in the sense of the statute.

Not only the word "accident," but the whole statute must be interpreted in its ordinary and popular meaning (Lord Chancellor in *Brintons* v. *Turvey* [1905], A.C. 230). At first some doubts existed as to whether diseases brought on by accidents sustained by workmen while in the course of their employment fell under the category of accidental injuries, but it is now clear where the date of the accident which caused the disease or accelerated it can be fixed (*Steel* v. *Gammell, Laird & Co.* [1905], 2 K.B. 232), and it is proved that, but for the accident, the disease would not have started or been accelerated, the workman is entitled to compensation (*Golder* v. *Caledonian Railway Co.* [1902], 5 F. 123, 10 S.L.T. 373; *Lloyd* v. *Sugg & Co.* [1900], 1 Q.B. 481; *Walker* v. *Lillieshall Coal Co.* [1900], 1 Q.B. 481; *Timmins* v. *Leeds Forge Co.* (1900), 16 T.L.R. 521; *Thomson* v. *Ashington Coal Co.* (1901), 17 T.L.R. 345; *Boardman* v. *Scott & Whitworth*, C.A. (1901), W.N. 222; *Dunham* v. *Clare* [1902], 2 K.B. 292; *Higgins* v. *Campbell & Harrison* (1903), 20 T.L.R. 129). In *Brintons* v. *Turvey*, *supra*, the Lord Chancellor, in the course of his opinion, said: "It does not appear to me that by calling the consequence of an accidental injury a disease, one alters the nature of the consequential results of the injury that had been inflicted. Many illustrations of what I am insisting on might be given. A workman, in the course of his employment, spills some corrosive acid on his hands; the injury caused thereby sets up erysipelas, a definite disease; some trifling injury by a needle sets up tetanus. Are these not within the Act, because the immediate injury is not perceptible until it shews itself in some morbid change in the structure of the human body, and which, when shewn, we call a disease? I cannot think so." A disease, however, which may be caused by the work in which the workman is engaged, and which cannot be attributed to a special occurrence on a given date, but is gradual, is not an accident (*Steel* v. *Gammell, Laird & Co.*, *supra*; *Marshall* v. *East Holywell Coal Co.* (1905), 21 T.L.R. 494; *Gorley* v. *Owners of Backworth Collieries* (1905), 21 T.L.R. 494; see also *Wilkes* v. *Dowell & Co.* [1905], 2 K.B. 325). In *Higgins* v. *Campbell & Harrison* [1904],

1 K.B. 328, the Master of the Rolls, in referring to Lord Macnaghten's exclusion of diseases (see his opinion in *Fenton* v. *Thorley, supra*) from the category of accidents, said the word disease "meant disease which was already in the workman, and which the workman brought with him to his work. The expression does not seem to me to cover the accidental catching of infection arising out of the work, or receiving accidentally a blow which is a physical blow, though infinitesimal in force and given by a bacillus invisible to the naked eye."

This Act (sect. 8, third schedule) specifies certain diseases which are to entitle workmen to compensation as if they were personal injuries by accident, but it does not follow that a disease which is not included in that section will not fall under sect. 1 (1) under the category of an accident.

If the arbitrator holds that the injury does not result from the accident, that is a question of fact not subject to review by appeal (*Warnock* v. *Glasgow Iron and Steel Co.* (1904), 6 F. 474, 11 S.L.T. 697).

DECISIONS IN THE ENGLISH COURTS.

In re Wedmore.

Wedmore v. *Wedmore.*

Will — Legacy — Abatement. — A testator left a legacy of £3000 to his daughter's marriage-contract trustees in implement of an obligation to pay to them a sum of £1000. *Held* that the legacy must abate along with other legacies, the testator's estate not being sufficient to pay all in full.—Chan. Div. (Kekewich, J.).—14*th May* 1907.

Hudwell v. *Rightson.*

Reparation—Negligence.—The defendant was the owner of some fowls which strayed on the highway adjoining his premises. One of them, being frightened by a dog belonging to a third party, flew into the wheel of the plaintiff's bicycle, upsetting him and injuring him and his bicycle. *Held* that there was no evidence of negligence on the part of the defendant rendering him liable in damages to the plaintiff.—K.B. Div. (Phillimore and Bray, JJ.).—14*th May* 1907.

Cribb v. *Kynoch Ltd.*

Master and Servant—Master's Liability—Fellow Workman.—A girl of fifteen years of age was set to work in an explosives factory with loaded cartridges without being warned of the danger. A cartridge exploded and she was severely injured. *Held* that the accident was due to the fault of the forewoman, whose duty it was to warn the girl, and that, the forewoman being a fellow-workman, the employers were not liable.—K.B. Div. (Ridley and Bray, JJ.).—15*th May* 1907.

The "Kaiser Wilhelm der Grosse."

Ship—Collision.—*Held* that an entrance to a harbour which was an opening in a breakwater half a mile in width was a "narrow channel" within the meaning of Article 25 of the Regulations for Preventing Collisions at Sea, 1897.

Where one vessel was entering and another going out of a harbour, and it was the duty of both to go at the time on a port helm, the incoming vessel ported her helm and signalled to the other that she had done so. The outgoing vessel starboarded, and signalled that she had done so. The incoming vessel then continued on a port helm, and signalled that she was doing so. The outgoing vessel then signalled that she was continuing on a starboard helm, whereupon the incoming vessel reversed. *Held* that it was not the duty of the incoming vessel in the circumstances to reverse when she got the first signal that the outgoing vessel was starboarding her helm.—Court of Appeal (Lord Alverstone, C.J., Fletcher Moulton and Kennedy, L.JJ.).—15*th May* 1907.

Poole v. *National Bank of China Ltd.*

Company — Reduction of Capital.—*Observed* by Lord Macnaghten that there was a tendency to narrow and restrict the power to reduce capital conferred by the Companies Act 1867; that that power was perfectly general; that the condition that gave jurisdiction was not proof of loss of capital, or proof that capital was unrepresented by available assets, or that capital was in excess of the wants of the company; that the jurisdiction arose whenever the company seeking reduction had passed a special resolution to that effect; and that the only questions to be considered were (1) Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who might be induced to take shares in the company? and (2) Was the reduction fair and equitable as between the different classes of shareholders?—House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord Robertson and Lord Atkinson).—28*th May* 1907.

In re A Solicitor. Ex parte Hales.

Contract — Guarantee. — The plaintiff, a solicitor, had a bill of costs against F, who made application to have the bill taxed. Hales, another solicitor, who was at the time acting for F, wrote a letter to the plaintiff in which he said that F, who was at the time an undischarged bankrupt, had handed to him the full amount of the bill "so that on the completion

of the taxation we shall be in a position to pay the amount certified by the Master due to you." When the bill of costs was taxed F had died, and Hales refused to pay the amount certified to be due to the plaintiff, on the ground that he had a bill of costs against F and was entitled to retain the money against that debt. *Held* that Hales had guaranteed payment of the plaintiff's bill out of the sum in his hands for the purpose, and was liable to make it forthcoming.—K.B. Div. (Darling and A. T. Lawrence, JJ.).—29*th May* 1907.

Mersey Docks and Harbour Board v. *Owners of the Steamship "Marpessa."*

The "Marpessa."

Ship—Collision—Measure of Damages.—Decision of Gorell Barnes, P. (*ante*, Vol. XIII. p. 120), and of the Court of Appeal, *affirmed*.—House of Lords (Lord Loreburn, L.C., Lord Ashbourne, Lord Macnaghten and Lord Robertson).—29*th May* 1907.

Apthorp v. *Neville & Co.*

Contract — Illegal — Publication of Slander. — The plaintiff wrote a manuscript and made a contract with the defendants through their agent to print 5000 copies. The manuscript contained libellous matter, and this was known to the defendants' agent as well as to the plaintiff, but not to the defendants. When the defendants became aware of it they refused to go on with the contract, on which they had done some work, and for which the plaintiff had advanced to them £50. The plaintiff claimed damages for breach of contract, or return of the £50. The defendants claimed payment for the work done by them on the contract. *Held* that, the contract being an illegal one, the plaintiff was not entitled either to damages or the return of his £50, and that the knowledge of the defendants' agent being the knowledge of the defendants, they were not entitled to claim payment for the work done by them on the contract.—K.B. Div. (Pickford, J.)—30*th May* 1907.

Casswell v. *Cheshire Lines Committee.*

Carriage — Railway — Passenger's Luggage.—Passenger's luggage was carried free under a contract contained in the railway company's time-table. *Held* that this was not inconsistent with a limitation on the railway company's liability if a sum for safe carriage was not paid in accordance with the provisions of the Carriers Act 1830.—K.B. Div. (Darling and A. T. Lawrence, JJ.)—3*rd June* 1907.

Smith v. *Prosser.*

Principal and Agent—Fraud of Agent.—The defendant signed and handed to his agent in South Africa an unstamped form of promissory note with the date and amount blank, and gave instructions that it was to be filled up with such particulars as he should direct if the agent received instructions to that effect, otherwise it was to remain in the custody of the agent. The agent fraudulently filled it up and negotiated it, no instructions to deal with it having been received. *Held*, in an action on the note, that the defendant was not barred from denying authority to the agent to fill it up.—Court of Appeal (Vaughan Williams, Fletcher Moulton and Buckley, L.JJ.).—5*th June* 1907.

Williams v. *Ocean Coal Co. Ltd.*

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 7 (2), Sched. I. sect 1 (*a*) —Dependant.—A workman had not contributed anything to his wife's maintenance for over a year preceding his death, and she had maintained herself as a domestic servant. *Held* that she was nevertheless a dependant. *Held* also that a child born after the workman's death was a dependant.—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes and Kennedy, L.J.).—5*th June* 1907.

Wheatley v. *Smithers.*

Bill of Exchange—Liability—Partnership.—Decision of the Divisional Court (*ante*, Vol. XIV. p. 55) *reversed*, on the ground that the partnership agreement contemplated the acceptance of bills by one partner for partnership debts. Opinions on the question decided by the Divisional Court *reserved*.—Court of Appeal (Vaughan - Williams, Fletcher Moulton and Buckley, L.JJ.).—6*th June* 1907.

British Vacuum Cleaner Co. Ltd. v. *New Vacuum Cleaner Co. Ltd.*

Company—Name—Trade Name.—*Held* that the name of the defendant company was not so nearly resembling that of the plaintiff company as to be calculated to deceive in the sense of sect. 20 of the Companies Act 1862; also that the words "vacuum cleaner" were descriptive, and that the plaintiff company had failed to prove that they had acquired the secondary meaning of being appropriated to their process.—Chan. Div. (Parker, J.).—6*th June* 1907.

Mitchell v. *Glamorgan Coal Co. Ltd.*

Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sect. 1 (1)—Arising Out of and in the Course of Employment.—A miner died from blood-poisoning due to an injury to his hand. He left home for his work in the evening, and reached his work without injury. He returned home early next morning with his hand injured. Some days later blood-poisoning supervened. *Held* that the County Court judge

was entitled to draw the inference that the injury arose out of and in course of his employment.—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes and Kennedy, L.J.).—*7th June* 1907.

London and India Docks Co. v. *Thames Steam Tug and Lighterage Co. Ltd.*

Harbour — Dock Dues. — A harbour company had power to charge dues on all lighters entering the docks, but they were exempted from payment "so long as such lighter . . . . shall be *bona fide* engaged in discharging . . . . goods." A lighter entered the docks for the purpose of discharging into a vessel lying there, but was prevented owing to the vessel being full. *Held* that it came within the exemption clause.—Court of Appeal (Vaughan Williams, Fletcher Moulton and Buckley, L.JJ.).—*7th June* 1907.

Williams v. *Vauxhall Colliery Co. Ltd.*

Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), Sched. I. (*a*) (1).—A workman was injured, and was paid by agreement a proportion of his wages while he was incapacitated, which was for about a year. He returned to work and remained at work for about ten months, during which time he was earning rather more than before the accident. There was no express agreement as to the right to compensation having terminated. About two years after the accident he died from the effects of the injuries received. *Held* that there was no evidence from which the County Court judge was entitled to hold that there was an agreement that the right to compensation should be considered as terminated, and that the workman's dependants were entitled to claim in respect of his death. *Opinions* that the dependants had under the Act a claim which the workman could not discharge nor defeat, and which they were entitled to enforce so long as the employer was not thereby required to pay more than the maximum amount.—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes and Kennedy, L.J.).—*7th June* 1907.

Harvey v. *The Tivoli, Manchester, Ltd.*

Contract — Termination — Death. — Three brothers who performed in music halls under the name of the Harvey Boys entered into a contract with the defendants to perform in their theatre. Before the time for performance came, one of them died and another man was engaged by the survivors to take his place. The defendants refused to accept their performance, and these three persons, who now composed the troupe, raised this action of damages for breach of contract. *Held* that they had no title to sue on the contract.—K.B. Div. (Darling and A. T. Lawrence, JJ.).—*7th June* 1907.

LAW LIBRARY.

BOOK NOTICES.

Burge's Commentaries on Colonial and Foreign Law Generally and in their Conflict with each other and with the Law of England. New Edition, under the general Editorship of Alexander Wood Renton of Gray's Inn, Barrister-at-Law, Puisne Justice of the Supreme Court of Ceylon, and George Grenville Phillimore, B.C.L., of the Middle Temple, Barrister-at-Law. In Five Volumes. Vol. I. London: Sweet & Maxwell Ltd.; Stevens & Sons Ltd., 1907. *Price for the Five Volumes* £8, 8*s.*

In 1838 William Burge, one of Her Majesty's counsel, then an ex-Attorney-General for Jamacia, published his "Commentaries on Colonial and Foreign Law" in four volumes. The work was immediately recognised in England as one of outstanding merit, and the author took rank as a high authority on questions of International Law. Mr Justice Story, referring to the book in 1841, said that it exhibited great learning and research, and that he had frequently quoted from it with the view of enabling the profession in America to obtain more illustrations of the doctrines than his own brief work could suggest, and also fully to appreciate Mr Burge's learned labours. Bar in his treatise on "Private International Law" thus commends Mr Burge's book: "This most comprehensive work, consisting for the most part of a comparison of the different systems of law that are recognised throughout the British Empire, is remarkable for the astounding knowledge of the most various systems of law and of legislation displayed by the author, for the wealth of legal cases and decisions that are cited and criticised with acuteness and great independence, and for many excellent discussions of different questions." Such recommendations indicate how widespread was the reputation which Mr Burge's work acquired, and the issue of a new edition, published after a lapse of nearly seventy years, is an important event in the annals of legal literature. The new edition is in excellent hands. Both of the general editors, Mr Justice Wood Renton and Mr G. G. Phillimore, are well-known writers. Mr Renton has varied experience of colonial judicial work, and Mr Phillimore has always devoted much attention to the subject of International Law. There are also a number of assistant editors—mostly members of the English Bar who have settled in the Colonies or abroad—who are responsible for the articles on the law relating to various parts of the British dominions and foreign states. French Law is in the hands of Dr Sewell, legal adviser to the British Embassy in Paris. The articles on Roman-Dutch Law are revised by Dr Bisschop, legal adviser to the Dutch Legation,

London; those on the Law of the Empire of India by the late Dr Birdwood, formerly one of the Judges of the High Court of Bombay; and those on the Law of Quebec by Professor Walton of Montreal, a member of the Faculty of Advocates. In addition to the editors and assistant editors, the services of a large number of well-known colonial and foreign judges and others have been secured to revise portions of the work, dealing with the systems of law on which they are specially qualified to write. The present volume contains a general introduction to the whole work, and consists practically entirely of new matter. Codification of law has taken place in a majority of countries and states since the first edition was issued, and a general sketch of the sources of law, legal codes, and courts of law all over the world will be found in this volume. It also contains in tabular form the conditions of appeal to the Privy Council from British Courts of Justice outside the United Kingdom.

"The Prisoner at the Bar." By Arthur Train, Assistant District Attorney, New York County. London: T. Werner Laurie, 1907. *Price* 8*s.* 6*d.*

The object of this book is to correct certain erroneous but general impressions as to the administration of justice in large cities of the United States of America in ordinary criminal cases. It is therefore written primarily for the instruction of lay readers. The author writes with a confidence arising from large practical experience of his subject, but the philosophical aspect of the questions discussed has not been lost sight of, and his book will undoubtedly be instructive to lawyers as well as laymen. The arrangement of the chapters is excellent, and the amount of clear, but condensed, statistical information given is surprising. Starting with a searching analysis of what constitutes crime and where the true responsibility for crime rests, Mr Train goes on to trace the course of a criminal prosecution from the arrest of a suspect to the sentence on a convicted prisoner. He has always present to his mind the object of vindicating the administrative machinery of his own country from unjust misconception, but this detracts little, if at all, from the value of the book as a thoughtful contribution to the literature of the criminal courts. Mr Train has an excellent and clear style, well adapted to his subject, but in our opinion he interrupts his exposition too frequently with descriptions of "scenes" either in or out of Court, generally between prisoners and constables, and always giving *verbatim* with appropriate Hibernian spelling the exact language used by the characters. The learned author on these occasions indulges a propensity to slang, much of it purely Transatlantic, and all of it unworthy of his book. A police officer, described as "a copper who is not popular in the neighbourhood," demurs to arresting one Maria Holohan in these words: "You can't expec' me t' arrest a person unless I know who I'm doin' it fer. How do I know yer ain't throwing some game into me?" We wish the author had omitted these passages; but his book is an excellent one in spite of them.

Principles of English Law, founded on Blackstone's Commentaries. By Robert Campbell, M.A., of Lincoln's Inn, Barrister-at-Law, Advocate of the Scotch Bar, Editor of "Ruling Cases." London: Stevens & Sons Ltd., 1907. *Price* 20*s.*

Mr Campbell's work will be received in Scotland with special interest on account of his being one of the senior members of the Scottish Bar. He was admitted to the Faculty of Advocates in 1856, in the same year as Lord Kinnear and Lord M'Laren. In 1862 he published a work on the "Law of Citation and Diligence in Scotland." He practised for some years in the Parliament House, but in 1867 he joined the English Bar and removed to London. In the short compass of little more than 600 pages the learned author presents an excellent treatise on the principles of English Law. He follows generally the arrangement of Blackstone's Commentaries, and discusses (1) Status; (2) Ownership of Property; (3) Obligations; (4) Civil Procedure; and (5) Crimes and Criminal Procedure. As the title indicates, the work deals not with details, but with the general or main principles of the law. It is well written, and the principles are clearly and succinctly explained. It will admirably suit the purpose of Scots lawyers who desire to have a general knowledge of the salient points of the legal system of the sister country.

A Complete System of Conveyancing, adapted to the Present Practice of Scotland and the Recent Statutes, comprehending the Constitution, Transmission and Extinction of Heritable and Moveable Rights. By the Juridical Society of Edinburgh. In Two Vols. Vol. I. Sixth Edition. William Green & Sons, 1907. *Price* 30*s. net.*

Very considerable changes have been made on the original work in the new edition of this "System of Conveyancing"—more familiarly known as "The Juridical Styles." The various editions of the Style Book published by the Juridical Society have always been regarded as of high authority by the profession in Scotland, and we feel sure that the sixth edition, under the editorship of Mr Henry Aitken, K.C., supported by the committee and contributors whose names

appear on the title-page, will maintain the reputation of the work of the Society. The arrangement in previous editions of dividing the work under "Heritable Rights" and "Moveable Rights" has been abandoned, and in the present volume the collection of writs is grouped under ten headings irrespective of whether they refer to heritage or moveables. The placing of the ten titles dealt with on the back of the volume will greatly facilitate reference. Not only is the arrangement of the new edition novel, but many of the titles have been practically entirely rewritten, new forms having in many cases been substituted for the old-fashioned ones contained in former editions. In the present volume the changes are perhaps best exemplified in the titles dealing with Feus and with Leases. The printing and general get-up of the volume leave nothing to be desired.

Trade Union Law. By Herman Cohen, of the Inner Temple, Barrister-at-Law. Second Edition. London: Sweet & Maxwell Ltd. Price 6s.

Since the day when Mr Cohen first collaborated with Mr George Howell, the veteran trade union leader, their names have been inseparably connected as guides and counsellors to the trade union world. When the last edition of this book, then their united work, was published, that world was staggering under the double shock of the decisions in *Quinn* v. *Leathem* [1901], A.C. 495, and the *Taff Vale* case [1901], A.C. 426. Much litigation has flowed through the Courts since then, and the perplexities of trade union officers were not thereby diminished. But the Trade Disputes Act of last year has added a new, and, as they believe, a brighter chapter to their history, and the present volume explains with the author's well-known caution and completeness of information how the ground of action has been cleared and definite principles at last enunciated. The form which has served so useful a purpose in the former edition has been retained—a commentary on the statutes; but the bulk has been kept within the familiar limits by the omission of Mr Howell's historical introduction. Mr Cohen is to be congratulated on the production of a volume so much required, and which asks no recommendation beyond the author's name on its title-page.

The Workmen's Compensation Act, 1906, *with Explanatory Notes and Decided Cases. Popular Edition. By Henry Lynn, of the Inner Temple, Barrister-at-Law. London: Jordan & Sons Ltd. Price 1s. net.*

Of the making of books on the new Workmen's Compensation Act there is no end. Mr Lynn's contribution to this literature, although described as a popular edition, is by no means the least useful from the point of view of the practitioner. It is in form a compilation of the cases under the old Acts, so far as applicable to the new, collected under the relative sections. The facts and decision in each case are shortly stated, and *dicta* of any importance are also given. The creditable desire for succinctness is perhaps exaggerated, so that the statement of facts frequently gives little, if any, clue to the ratio of decision; and an appeal dismissed because it was held to raise no question of law is treated in the same manner as one in which a question of law was decided and the decision affirmed. It is a little surprising also (although one would not expect to find an exhaustive collection of cases in a popular manual) to have to note the omission of any reference to so important a decision as *Dobson* v. *United Collieries Ltd.*, 1905, 8 F. 241. But the book has much to recommend it; and not least, that first of all requisites in a book of daily reference, an excellent index.

The Revised Table A, being the Regulations of Companies Limited by Shares as Sanctioned by the Board of Trade in 1906. *With Notes and Comments by Paul F. Simonson, M.A., Oxon; of the Inner Temple, Barrister-at-Law. London: Effingham Wilson; Sweet & Maxwell Ltd.*, 1907. *Price 3s 6d. net.*

The set of articles contained in the Revised Table A will in future apply to all Companies which have not special articles of their own. And, moreover, many of their provisions will be much used by draftsmen preparing special sets of articles. This book contains the text of the Revised Table A, with very full notes citing numerous authorities, prepared by Mr Simonson, an author whose other works on Company Law are well known.

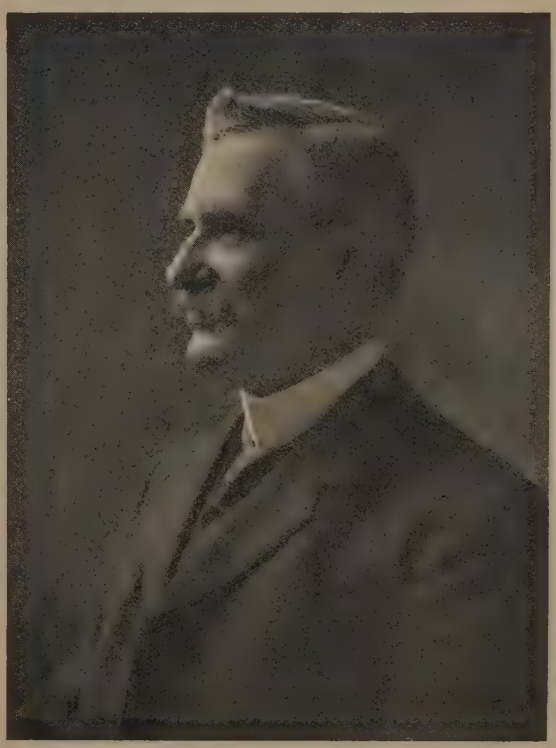
Prescription and Custom. By Thomas H. Carson, of Lincoln's Inn, One of His Majesty's Counsel. London: Sweet & Maxwell, 1907. *Price 6s.*

The author of this book, who is one of the joint editors of Tudor's Leading Cases on Conveyancing, delivered a course of six lectures in the Old Hall of Lincoln's Inn in 1907 at the request of the Council of Legal Education. These lectures are reproduced in the present little volume. No better guide to the subject could be found for students. It is treated in an admirable, clear, and lucid way, and in brief compass gives an accurate general survey of the branch of law with which it deals.

JOHN PROSSER, Esq., W.S.

Mr John Prosser is one of the partners of the well-known firm of Messrs Morton, Smart, Macdonald & Prosser, W.S., and both he and his firm stand deservedly high in the estimation both of the legal profession and of the public.

A son of the late Mr David Prosser, an officer of Excise, the subject of our portrait was born in 1857 at Bridge of Cally, where his father was for the time resident. His early education he received at the local schools, and later at Alyth Parish School; but at the age of fifteen he went to Dundee, and for four years, from 1872 to 1876, he occupied a desk in the office of Messrs Patullo & Thornton, solicitors there. He did not fail to take full advantage of the facilities which that office afforded him for active work and practical legal training. In 1876 he came to Edinburgh and entered as junior clerk the office of which he is now a partner. The senior partner of the firm at that time was the late Mr Charles Morton, W.S., who under three successive Liberal Administrations held the office of Crown Agent for Scotland. In 1877 Mr Prosser entered the Law Faculty of the University of Edinburgh, and in that and the succeeding year he was first prizeman in the classes of Scots Law and Conveyancing. He acted as assistant both to Mr Macpherson, Professor of Scots Law, and to Mr Fraser-Tytler, Professor of Conveyancing. Having passed through various departments in his office, he was on 1st January 1883 assumed as a partner of the firm. In the following year he was admitted to the Society of Solicitors in the Supreme Courts, and in 1898 he joined the Society of Writers to the Signet. A shrewd and able man of business, ever zealous in the interests of his clients, Mr Prosser has in the thirty years of his professional life in Edinburgh made a record rarely equalled of strenuous and unremitting hard work. Though he always avoids litigation when that is possible, he is very frequently to be seen in the Parliament House, and if his clients are forced to litigate he misses no points and spares no exertions on their behalf. He has a high reputation as a commercial lawyer, and his standing as a conveyancer has recently been recognised in his appointment as a member of the Commission on Registration of Title in Scotland, which is being presided over by the Lord Justice-General. Mr Prosser is the trusted adviser of many private clients and bodies of trustees as well as of a number of public Companies and Corporations. He is a Justice of the Peace for the County of the City of Dundee.



We publish this week in the Appendix to "The Scots Law Times" Edition of the Statutes, three sets of Statutory Rules and Orders which have been issued under powers conferred upon the Secretary of State under the Workmen's Compensation Act of 1907. We direct special attention to these Rules, which are of great importance in the working of the new Act. The Act of Sederunt on the subject we published some weeks ago.

The Court of Session rises to-day for the autumn vacation. Several of the Jury Trials put out for the sittings have been settled, but there are still a number of trials which will take place next week. The Lord Justice-General left Edinburgh on Thursday evening to attend a State Ball at Buckingham Palace. His Lordship returns for the Jury sittings next week.

The Inner House cases published this week practically complete the reports of Inner House decisions in all three Divisions down to the end of last week. During the present week there have been a large number of advisings in the Inner House, and several cases have been decided in the Justiciary Appeal Court. Double numbers of the "Scots Law Times" will be issued in vacation, and it is expected that the cases which still remain to be reported will be published early in August.

It is announced that a special sitting of the High Court of Justiciary will be held at Elgin on the 30th inst. This is the first occasion on which the Circuit Court has ever sat in Elgin, and also the first occasion on which the provision in sect. 47 of the Criminal Procedure Act of 1887, to the effect that the High Court of Justiciary may sit at places other than the regular circuit towns, has been used. The case which is to be tried in Elgin is a very extraordinary one, the charge against the accused being that he ravished a woman of the age of eighty-three. The reason of the special sitting is that the principal witness is unable to be removed to Inverness.

Mr J. M. Haining, who has for the last two years acted as Procurator in the Perth Courts for Messrs M'Cash & Hunter, solicitors there, has now commenced practice on his own account at 30 St David Street, Dumfries.

The Late WILLIAM SHAW, Esq., Writer, Glasgow.

The announcement of the death of Mr William Shaw, at Skelmorlie, on 13th July, caused a shock of surprise and pain in legal circles in Glasgow, and far beyond the limits of Glasgow.

Mr Shaw was a native of Paisley. He was educated in the University of Glasgow, and there, among other distinctions, gained the first prize in the class of Scots Law in the session 1876–77.

He received his professional training in the office of Messrs Wright, Johnston & Mackenzie, where he acquired valuable experience in court work, and also laid the foundation of a thorough knowledge of mercantile and shipping law. Subsequently he entered the office of Messrs Roberton & Ross, and, as procurator to the firm, conducted the extensive court and arbitration work of that firm for several years.

In 1881 he became a partner with Messrs Borland and King, the firm taking the style of Messrs Borland, King & Shaw.

In 1887 he was admitted to the Faculty of Procurators, and was a member of the Council of the Faculty for three years.

In 1890 he was appointed Procurator-Fiscal of Police for the city of Glasgow, but three years later he found it necessary to resign that appointment on account of the growth of the business of his firm.

In March 1900 he was elected to the Lectureship on Mercantile Law in the University of Glasgow. He threw himself into the duties of this office with his customary zeal and assiduity; and the spontaneous growth in the number of the students attending the class furnished striking testimony both to his success as a teacher of law and to the appreciation in which he was held by his students.

For many years Mr Shaw has been deeply immersed in legal business. His qualities as a lawyer were of a high order. Few men had a greater faculty for marshalling facts and presenting them effectively. He was a man of untiring energy, sound in judgment, sagacious in counsel, and prompt in action—qualities which gained him, in no ordinary measure, the confidence of clients and the esteem of his professional brethren.

There are, however, others whose thoughts now dwell rather on more intimate things—his winsome personality, his unselfish kindness, his loyal friendship—qualities rarer and more priceless than professional attainments.

The Late Alexander Watt, Esq., Solicitor, Banff.—Mr Alexander Watt, solicitor, Banff, died on Tuesday evening, after an illness extending over several months. Mr Watt, who was a native of Macduff, and a brother of Mr George Watt, K.C., was one of the best known and most prominent legal practitioners in Banffshire. He held many important appointments, such as Clerk of Lieutenancy of the county, local law agent for the Duke of Richmond and Gordon, and for the Countess of Seafield, and he was for many years Conservative agent for the county. He was a prominent member of Banffshire County Council, taking a leading part in its discussions, and was some time ago a useful member of Banff Town Council and School Board. Mr Watt was a man of great force of character, and in the county exercised great influence. He was an elder in the Banff High United Free Church.

LONDON LETTER.

Temple, 17*th July* 1907.

Mr Justice Channell had occasion in *Andersen* v. *Marten* [1907], 2 K.B. 248, to give a decision on a point that has been the subject of much learned debate. Belligerent capture does not vest the ownership of the vessel in the captors unless it has been regularised by a decree of the prize court; but is the effect of the decree, when made, to make their title relate back to the time

of capture? The German ss. "Romulus," insured with an exception of war risks, was captured on 26th February 1905, as a contrabandist, by the Japanese. She subsequently stranded (27th February), and became a total wreck. Proceedings which resulted in condemnation on 17th May were taken in the prize court at Yokosuka; and on these facts the English court found that there had been a total loss by capture prior to the wreck, and that the insured could not recover. It is not at first apparent on what ground the Japanese decision proceeded. Contraband trading is not a cause of confiscation except in particular circumstances. But in this case the shipowner was the merchant as well. He engaged to supply the goods to the Russian importer, and sent them out in his own vessel. Condemnation therefore proceeded on correct principles. The only question was as to its effect. Had the ship, when lost by wreck, been previously lost by capture? Or was she not so lost until 17th May? As already observed, the former view prevailed. Generally these questions arise with regard to captures from the enemy and not from neutrals. The two cases are not quite on all fours; because there is a general license to seize the enemy's property, whilst a neutral's is only taken from him when particular complex conditions are fulfilled ("The Statira," Wheaton's Int. Law, sect. 365), to determine which some judicial investigation is not only desirable but necessary.

Without entering on the region of politics, and speaking simply from the juridical standpoint, such statutes as the recent Workmen's Compensation Act seem much to be deprecated, as divorcing responsibility from control. Their economic pressure on persons with the slightest physical defect, such as hardness of hearing, advanced age, poverty of blood and the like, is a very real and genuine thing, and by no means a figment of the alarmist. Lodging-house proprietors, to whom seven-and-sixpence is a serious matter, are inclined to dismiss their domestics when they find a fourfold premium charged on account of a slight defect. It is easy to wave disquietude aside by a glib reference to insurance. Is it so certain that insurance is a complete protection against the crushing liabilities of the recent Act? The companies in many cases attach a tissue of conditions to their policies, which afford an indefinite number of loopholes by which they may escape from liability. And for any case not precisely on ordinary lines, the ordinary policy cannot be made to work. The companies, naturally, will not modify it; and the result is that inaccurate recitals are made, impossible conditions accepted, and a false position set up, which may easily result in the insurance being invalid. Take, for instance, the glaring matter of employment of one servant by several masters. The insurance company requires to know the total amount of the servant's earnings. One master may not know who the others are; and very certainly may not care to enquire how much they pay. Earnings may be in casual ways which one employer may know of, whilst the others have no idea of it. The case becomes very acute where the contracts of service are not simple, definite engagements, like those usual in factories (for which the Act was first framed), but rest on understandings and custom. Under such engagements it may be very difficult, and very inadvisable, to say exactly who is the master, and to what extent. Say, for instance, that a daughter of the family has the benefit of the services of a lady's maid, and contributes to the household expenses. Or, as a very conspicuous instance, with which you are probably not troubled in Scotland, take the case of a man who is clerk in a set of chambers which are occupied by several barristers. Probably only one barrister pays him his weekly wage: perhaps two or three do so. Probably only one engages him; but is that one the agent of the rest? Probably their rent (which itself may be subject to all kinds of mutual arrangements) contains a virtual return for the clerk's services: possibly the clerk's fees on their briefs are considered sufficient. No apportionment is generally made, showing what portion of rent is attributable to "use of clerk." Under these circumstances, how can a barrister contract, as the insurance requires, "to keep a proper wages-book," and the like? But he must do so, or go uninsured, in a fond reliance on the common-sense of the Courts. Again, is *uberrima fides* a condition of these contracts? Numberless persons must have insured their servants without imagining that they are bound to give the insurers notice of slight defects of physique. It would be a great responsibility to say that such persons are not protected.

The Law Society has been much exercised of late as to the financial dealings of solicitors. The cases—not perhaps very frequent, but very conspicuous—in which laxity in the treatment of clients' money has led to deplorable consequences, led to the appointment some months since of a committee of eleven members, charged with recommending some system which should restore public confidence in the profession. They recently reported in favour of a system by which all clients' moneys should be paid into a separate banking account or accounts, and only used under the authority of the client:—whilst any increment on moneys of the client should be the sole property of the latter, as long as the solicitor retained it; which he should not do for any prolonged period. This is not to go much beyond what is usually accepted as strictly proper. But the *crux* of the proposals was one for an independent annual audit by an accountant in cases where no separate bank accounts are kept—and a detailed statutory declaration of proper dealing even in

cases where they are. No scheme of mutual guarantee could be agreed upon. The audit provisions were dissented from by a minority, and have been rejected by a large majority at the adjourned annual meeting of the society. The feeling was expressed by Sir J. G. Hill and Mr Cobbett (Manchester) that, "if they admitted that the honour of the profession was at such a low ebb that it needed stimulating once a year," the public would cease to have any confidence in them at all. A poll was however demanded, and the result is still in suspense.

The Hague Conference continues its slow debates. Its course is somewhat perplexing to those who do not analyse it closely. Four committees, with sub-committees, are sitting simultaneously, yet not generally on the same days, as so many delegates belong to two or more. One committee deals with Arbitration, another with Land War, a third with Naval War, and a fourth with Prize Law (*i.e.* Naval War as it affects neutrals). The outstanding feature is the British offer to abolish contraband. This would put a sudden and desirable end to a great number of difficult problems, and one may be inclined, with great lawyers like Von Bar, to think it the best solution of them.

DECISIONS IN THE ENGLISH COURTS.

Curtice v. *London City and Midland Bank.*

Bank—Cheque—Countermand—Bill of Exchange—Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), sect. 75.—The plaintiff gave a cheque on the defendants' bank, and on the same day he sent a telegram to the bank countermanding payment. The telegram arrived after bank hours, and was put into the letter-box. Next morning when the box was cleared the telegram was overlooked, and it was not found until the box was again cleared on the following day. Meantime the cheque was presented for payment and was paid. *Held* that payment had been duly countermanded, and that the defendants were liable to the plaintiff for the amount of the cheque.—K.B. Div. (Darling and A. T. Lawrence, JJ.).—8*th June* 1907.

Glenie v. *Tucker and Bruce Smith.*

Bill of Exchange—Indorsement.—A sold goods to B, payment for which was to be guaranteed by C. B signed a blank bill form which was endorsed by C. The form was then filled up by A for the amount due. It was then in the form of a bill accepted by B, of which A was the drawer, and which was endorsed by C. *Held* that C was liable on the bill.—K.B. Div. (A. T. Lawrence, J.).—11*th June* 1907.

Johnston v. *Mew, Langton & Co.*

Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Sched. II., sects. 8, 10.—Where a memorandum of agreement for compensation was disputed and the County Court judge, preparatory to making an order, heard evidence, *held* that he was acting in a judicial and not in a ministerial capacity, and that his decision was subject to appeal to the Divisional Court in ordinary form.—K.B. Div. (Darling and A. T. Lawrence, JJ.).—11*th June* 1907.

Hill v. *Clifford.*
Clifford v. *Timms.*
Clifford v. *Phillips.*

Partnership — Dissolution — "Professional Misconduct."—Decision of Warrington, J. (*ante*, Vol. XIV. p. 172), *reversed*.—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes and Buckley, L.J.).—12*th June* 1907.

Riley v. *Mayor, etc. of Halifax.*

Property—Infringement—Remedy. — The defendants by inadvertence carried an erection which they were making on their own land on to that of the plaintiff for a distance of forty-two feet underground, but without affecting the surface. *Held* that, as the cost of removing it would be great, the Court should make an order to pay damages and refuse to order the removal of the works.—Chan. Div. (Joyce, J.).—13*th June* 1907.

Lancaster Rural Dis rict v. *Fisher and Le Fanu.*

Statute—Locomotives Act 1898 (61 and 62 Vict. cap. 29), sect. 12 (1) (*b*).—A contract for the laying of water-pipes in connection with an aqueduct provided for their maintenance by the contractors for twelve months after completion. *Held* that the time limit for bringing an action in reference to damage done to roads did not count from the end of the twelve months but from the time when the damage was done, or from the completion of the works.—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes and Kennedy, L.JJ.).—15*th June* 1907.

Hase v. *London General Omnibus Co. Ltd.*

Reparation—Negligence.—A passenger on an omnibus was struck on the chest by an iron arm projecting from a lamp-post at the corner of a street. This was due to the omnibus being driven round a corner close to the curb and the top of the omnibus projecting over the pavement, owing to the camber of the road. The driver of the omnibus did not notice the projecting arm of the lamp-post. *Held* that the County Court judge was entitled to find that there was no negligence on the part of the driver.—K.B. Div. (Lord Alverstone, C.J., Darling and A. T. Lawrence, JJ.).—17*th June* 1907.

The Late CHARLES RAMPINI, Esq., Advocate.

Mr Charles Rampini, D.L., LL.D., advocate, of Burnside, Paignton, South Devon, and late Sheriff of Dumfries, died in Edinburgh on 25th July. About a week previously Mr Rampini was seized with apoplexy, and he never rallied. Born in Edinburgh in 1840, Mr Rampini was educated at the Academy, and afterwards at the Edinburgh University, where in 1865 he was first prizeman in Roman Law. In June of the same year he was admitted a member of the Faculty of Advocates. A year later he was appointed a Stipendiary Magistrate of Jamaica; in 1867 he became District Court Judge at Port Antonio, in 1868 at Maudville, and in 1876 at Kingston. A few years prior to the last-mentioned appointment Mr Rampini was made a Commissioner to prepare rules for the District Courts. In 1873 he was chosen to be puisne Judge of the Supreme Court of British Guiana, but on account of ill-health he was unable to take up the appointment. In 1877 he prepared a volume of Law Reports for the Government of Jamaica, and in the following year he retired from the Colonial service with a pension. He had been medically certified at that time as unable to reside longer in a tropical climate. On his return to this country he was appointed in 1878 a Sheriff-Substitute of Caithness, Orkney and Shetland, with residence at Lerwick, and during his term there of seven years he took the greatest interest in the social welfare of the islanders. He took an active part in the scheme for the erection of a public hall at Lerwick, and for public services rendered to the islands he was in 1882 made a Deputy-Lieutenant of Shetland, and his portrait, which now hangs in Lerwick, was presented to him. Three years afterwards he was transferred to Elgin, and he remained there until 1899, when he was appointed Sheriff of Dumfries and Galloway in succession to Sheriff Wallace. Unfortunately his health broke down, and after holding only one Court in the south he was compelled to resign. Since then he has lived in retirement. In 1891, in acknowledgment of his worth, the Aberdeen University conferred upon him the degree of LL.D. Of a fine literary taste, Mr Rampini made not a few contributions to literature. He was the author of a history of Moray and Nairn, in Messrs Blackwood's "County Series," "Tales of Old Scotland," "Shetland and the Shetlanders"—the last being a reprint of two lectures delivered before the Edinburgh Philosophical Institution in 1884; "Letters from Jamaica," and other works of general interest. In private life Mr Rampini was much esteemed. His brother—Mr Robert Rampini—is a Judge in the Supreme Court of Calcutta.

The Late MARCUS J. BROWN, Esq., S.S.C.

The death took place in Edinburgh on 24th July of Mr Marcus J. Brown, S.S.C., of Messrs M. J. Brown, Son & Co. Born at Musselburgh in 1858, Mr Brown was educated at the Edinburgh Institution, and after being trained for the legal profession and attending the law classes at Edinburgh University, he was admitted a law agent in 1885, in which year he also joined the S.S.C. Society. From the outset of his professional career Mr Brown was singularly successful. A shrewd man of business, quick to grasp the strong or the weak points of a case, he soon acquired a large practice in the Sheriff Courts, and it was not unusual to find him successfully arguing cases before the Sheriff, with prominent counsel opposed to him. In the Court of Session, also, he had an extensive practice, and in the other branches of legal work he was regarded as a man of wide knowledge and experience. Though a keen business man, Mr Brown found it possible to give some time to golf and other forms of sport. A Musselburgh man, he made the most of his opportunities of acquiring early in life a knowledge of the royal and ancient game, and twenty years ago he had possibly no superior amongst the amateurs of his native town. As a member of the Royal Musselburgh Club he was one of the most consistent winners of their cherished old silver cup. His name was first inscribed on it in 1875, and he was winner again in 1880, 1881, 1882, 1883, 1884, 1886, 1888, 1889, and 1891. Indeed, such was his success on the links that from 1875 to 1901 he won no fewer than thirty-eight gold scratch medals in various clubs. He was one of the players in the first amateur golf championship held at St Andrews in 1886, when he was beaten by Mr H. S. C. Everard in the second round. Latterly, Mr Brown played principally in the competitions of the New Club, Musselburgh, and in those of the Kilspindie Club at Craigielaw. Mr Brown was also a good shot, and was skilful with the rod.

ACT OF SEDERUNT.

Edinburgh, 18*th July* 1907.—The Lords of Council and Session, in pursuance of powers vested in them by the Court of Session Act 1868, sect. 8, as amended by Act of Sederunt of 20th March 1907, sect. 1, hereby appoint Lord M'Laren, Lord Pearson, and Lord Ardwall to sit from Tuesday, 15th October 1907, until Saturday, 2nd November 1907, as a Court for the hearing and disposal of causes standing on the Rolls of the First Division; and further, appoint Mr John Cairns, Depute Clerk in the Outer House, to act as Clerk of said Court.—Dunedin, *I.P.D.*

The appointment of Mr J. M. Irvine to the Chair of Law in the University of Aberdeen created a vacancy in the staff of "The Session Cases." Mr J. Hossell Henderson, B.A., LL.B., has been selected as Professor Irvine's successor. The vacancy on Mr Rettie's staff was the first which has occurred since the Faculty of Advocates took over the Session Cases, and the appointment was made by the Faculty Committee. Mr Hossell Henderson, though comparatively junior at the Bar (he was called in 1900), has had considerable experience as a reporter. He has represented "The Scots Law Times" in the Second Division since May 1903.

Faculty of Advocates.—Mr James Campbell Henderson-Hamilton and Mr John Macgregor, M.A., LL.B., were on 19th July admitted to the Faculty of Advocates.

The following gentlemen have been admitted members of the Society of Writers to His Majesty's Signet, viz.:—William Leslie Christie, LL.B., 3 Whitehouse Terrace; John Cook, 22 Eglinton Crescent; Robert Stormonth Darling, 1 Atholl Crescent; Maurice Rhynd Dickson, 1 Atholl Crescent; Robert Gibb, 31 East Claremont Street; Charles Fellowes Moncrieffe Maclachlan, 5 Strathearn Place, Edinburgh.

THE FACULTY OF ADVOCATES AND BILLS IN PARLIAMENT.

At a meeting of the Faculty of Advocates held on 19th July, reports of Committees on the Sheriff Courts (Scotland) Bill, the Companies Bill and Companies (Debentures and Debenture Stock) Bill, and the Intestate Husband's Estate (Scotland) Bill, were presented and adopted by the Faculty.

THE SHERIFF COURTS BILL.

The report of the Committee on the Sheriff Courts Bill stated that the Bill, in addition to consolidating the present law, proposed to introduce numerous innovations. The principal of these are (1) the abolition of the Debts Recovery Court as a separate court; (2) an extension of the jurisdiction of the Sheriff Court, both in regard to the class of persons subject to its jurisdiction and in regard to the class of actions which may competently be tried therein; and (3) an extension of the Sheriff's jurisdiction in the Small Debt Court up to £20. The Bill proposes to repeal the Debts Recovery Act (30 and 31 Vict. cap. 96), and thus to abolish this court as a separate court. The court, in the opinion of the Committee, has never been a satisfactory one, and the Committee unanimously approved of its abolition. The Bill proposes to introduce into the ordinary court a form of procedure intermediate between the informal procedure of the Small Debt Court and the formal procedure of the ordinary court, and to make this intermediate procedure applicable to all claims for payment of money exceeding £20 and not exceeding £50. This, in their opinion, perpetuates the unsatisfactory procedure of that court, and makes it applicable to a larger number of cases. The Committee disapproved of this proposal. The Committee suggested that there should be only two forms of procedure, viz.—(1) the informal procedure of the Small Debt Court, and (2) the formal procedure of the ordinary court. On the assumption that an intermediate procedure is to be retained, the Committee suggested it should be made applicable to all cases under £50 in value which are not raised in the Small Debt Court. On the question of jurisdiction, the Committee saw no objection to Sheriffs being empowered to consider actions concerning heritable property, whatever their value, when the action is undefended, or when both parties are willing; but they considered that in the event of the action being defended either party should have the right of transferring the action to the Court of Session within six days of closing the record. The Committee made a number of suggestions limiting the jurisdiction over foreigners conferred by the Bill. The Committee approved of the proposal that all actions under £50 in value should be raised in the Sheriff Court. They, however, suggested that when the value of the case is over £20, power should be given to the Sheriff to grant leave to appeal upon questions of fact as well as of law. With regard to Sheriffs, Clause 12 provides—"Every person appointed to the office of Sheriff shall be an advocate of five years' standing at least, or, if not an advocate, a Sheriff-Substitute of five years' standing at least." The present requirements are that a person appointed to the office of Sheriff shall be an advocate of at least three years' standing, who at the date of his appointment is either in regular attendance upon the Court of Session, or acting as a Sheriff-Substitute. The Committee approved of the clause in so far as it requires an advocate to be of at least five years' standing before becoming eligible for a Sheriffship. They thought, however, that the present qualification regarding attendance on the Court of Session, or acting as a Sheriff-Substitute, should be retained in a modified form. The Committee suggested that Sheriff-Substitutes removed from office on account of inability should be eligible for an annuity in the same manner as Sheriffs. The Committee disapproved of the clause vesting the right of appointing the Procurator-Fiscal in the Lord Advocate, instead of in the Sheriff, with the approval of the Secretary for Scotland. The Committee disapproved of the proposal to introduce jury trials into the Sheriff Courts. They, however, approved of the raising of the Small Debt Court limit from £12 to £20.

INTESTATE HUSBAND'S ESTATE BILL.

The Committee on the Intestate Husband's Estate (Scotland) Bill reported that the Bill proposed to make an amendment on the law of Scotland such as was effected in England by the Intestates Estates Act 1890 (53 and 54 Vict. cap. 29). The present Bill follows the lines of the English Act, only differing from it where it is necessary to make the phraseology apply to Scotland. The effect of the Bill in Scotland will be to give to widows of such intestates, within the limits prescribed in the Bill, the one-half of the moveables which the next of kin would otherwise have taken, and the fee of the heritage which would otherwise have gone to the heir at law. The Committee approved generally of the Bill, which appears to remove a hardship which especially affects widows who are left in poor circumstances, but pointed out that the phraseology of sect. 3, in referring to a charge on the estate, required verbal alteration to adapt it to Scots law.

THE COMPANIES BILLS.

The report of the Committee on the Companies Bill and Companies (Debentures and Debenture Stock) Bill, stated that the two Bills remitted to the Committee are the Companies Bill, as amended in Committee of the House of Lords, and now in the House of Commons, and the Companies (Debentures and Debenture Stock) Bill, introduced in the House of Lords by Lord Avebury, the provisions of which were now substantially embodied in the first, which is a Government Bill. The Bill is mainly based on recommendations of a report of a Departmental Committee appointed by the Board of Trade on 8th February 1905, which reported on 18th June 1906. The Committee considered the several parts in their order, and made a number of recommendations. They approved of Clause 1 of the Bill, which proposes that a company which does not issue a prospectus on its formation shall not allot any of its shares or debentures unless before the first allotment there has been filed with the Registrar a "statement in lieu of prospectus," verified by a director and the Company's solicitor, containing the required particulars, but excludes "private companies" from its operation. With reference to Clause 6, the Committee thought that the allotment of shares for a consideration other than cash was an important and often delicate matter, and ought to be reduced to writing and not left to the uncertainty of a verbal bargain. The Committee also approved of Clause 10, which authorises, in the case of the expenditure of share capital in constructing works or erecting plant which cannot earn profit for a long period, the payment of interest out of capital during construction. Suggestions are made with regard to the provisions relating to mortgages and charge. On that subject the Committee reported :—

"The main question is whether the methods recognised by the law of Scotland of completing securities over property, heritable or moveable, viz., recording in the Register of Sasines, delivery, possession, intimation, etc., according to the nature of the subject transferred, are to be adhered to, or a valid security allowed to be constituted without these essentials, and, *inter alia*, by what is called in England a 'floating charge' over the undertaking and property of the Company, including corporeal moveables. On two former occasions (in 1896 and 1899) the Faculty, on considering Reports on the Bill which ultimately became the Act of 1900, resolved against the change, being satisfied that the present Scotch system is much preferable, and in any view that so sweeping a change in our law should not be dealt with merely by clauses in a Companies Bill. To this view the Committee adhere, and are of opinion that a declaration to that effect, similar to that contained in the Act of 1900, should be inserted in the Bill. They are, however, of opinion that where uncalled capital of a company is made a security for debt, filing the deed of charge or assignment with the Registrar of Joint-Stock Companies should be sufficient intimation, and should be substituted for the present cumbrous method of intimation to the shareholders individually, with notice on the share certificates. This suggestion is in conformity with the principle of the law of Scotland, but improves the mode of its application, and was formerly approved by the Faculty."

The Committee were also of opinion that the requirements with regard to foreign companies carrying on business in the United Kingdom are reasonable and not too onerous.

LAW AGENTS' EXAMINATIONS.

The results of the half-yearly examinations in general knowledge, which were held lately in Edinburgh, Glasgow, Aberdeen, and Dundee, have been published. For the first examination in general knowledge 110 candidates entered, 42 have passed or been found qualified in all the subjects, and 30 have satisfied the examiners or been found qualified by Leaving or other accepted Certificates in two subjects. For the second examination in general knowledge 195 candidates presented themselves. Of these 89 passed in one subject, 31 in two, 12 in three, and 2 in four subjects. The papers of the candidates of this examination were as follows:—Mathematics 24, passed 10; Logic 55, passed 45; Latin 98, passed 50; Greek 5, passed 3; French 69, passed 32; German 6, passed 3; Italian 2, passed 1; book-keeping 89, passed 51. The quarterly examination in Law was held in Edinburgh on 15th inst., when 58 candidates presented themselves for examination. Fifty-six of these were examined in all the subjects, and 28 passed. Two graduates

in law (LL.B. and B.L.) were examined in Court Procedure, and both passed.

The following is a list of those who were successful in the examination in law, viz.: William Angus, Robert Fergusson Brown, Robert Smith Candlish, John Henderson Davie, Oliver Dow, James Ogilvie Duncan, M.A., B.L.; Alexander Fyfe, Anthony Murray John Graham; Weir Grieve, M.A.; Joseph Blacklock Halliday, Samuel Smiles Jerdan, George Robert Marshall Jockel, Alexander Robert Henry Johnston, Alexander Laurie, Thomas Lyell; James M'Intosh, M.A., LL.B.; Ian Mackay, Tom Perceval Mackenzie, Samuel Dow Macmillan, Lawrence Marshall, John Crichton Masterton, Alexander Innes Millar, William Thomson Mitchell, Allan Grant Pirie, William Pirie, William Pitcairn, junior; James Hunter Scott, James Primrose Stark, Alexander Macdonald Whyte, James Hampton Brown Will.

LAW LIBRARY.

BOOK NOTICES.

Vital Registration. A Manual of the Law and Practice concerning the Registration of Births, Deaths and Marriages. Second Edition. By G. T. Bisset-Smith, F.S.S. Edinburgh: William Green & Sons, 1907. *Price* 10s.

The aim of this book is to collect in a handy form the gist of the law and practice of vital registration as carried out in Scotland, and that aim is fully accomplished. It gives in comparatively small bulk a collection of the Acts regarding the registration of births, deaths and marriages in Scotland, a commentary on those Acts, an explanation of the technicalities in the administration of those Acts, and a variety of matter calculated to be of use to registrars and others concerned in the preparation of our national registers. In these respects the work is fairly complete, and may with confidence be recommended as a work of reference to those concerned with registration, and a work from which reliable guidance can be obtained in most difficulties likely to arise in the work of registrars. In the preface it is stated that the previous issue was disposed of in a short period, and that fact is an indication of how this book supplies a want. The principal difference between this edition of Mr Bisset-Smith's book and the first edition is the inclusion in it of a chapter on vital statistics. This chapter, however, hardly attains to the standard of the rest of the work, for not only is it too short to be comprehensive, but the short space there is at the author's disposal, instead of being devoted to the essentials of vital statistics, is to a great extent utilised for the discussion of such subjects as Malthusianism, Neo-malthusianism, and Illegitimacy, subjects which may be of interest to theorists, but are of only passing interest to the practical registrars for whom the work is primarily intended.

The Law of Mines, Quarries, and Minerals. By Robert Foster MacSwinney, M.A., Barrister-at-Law. Third Edition. London: Sweet & Maxwell Ltd., 1907. *Price* £2, 2s.

The treatise of which this is the third edition occupies a deservedly high place in legal literature. It is the principal book on its subject. The late Mr Ross Stewart, advocate, wrote on "Mines and Minerals," and "Bainbridge on Mines" was in its day a well-known English law book, but it is nearly thirty years since the last edition was published, and neither of these books can now compete with Mr MacSwinney's work. The learned author is evidently a man of strong opinions and not afraid to state them. Referring to recent statutes he says: "It would be hard to find in modern times anything more shameful than the Trade Disputes Act 1906, except perhaps the circumstances under which it became law. Against the Workmen's Compensation Act 1906 (although due to similar picketing on the one side and imbecility on the other) little by comparison can be urged." Happily the bulk of the author's work deals with subjects less exciting than modern legislation, and they receive judicial and impartial discussion free from any political bias. Even on the controversial question of what is included under the term "mineral" in the legal sense, the learned author deals without impatience with the somewhat confusing diversity of legal opinion. The book is very complete. It includes a large variety of subjects within its scope, and it deals exhaustively with them all. A number of the leading Scots cases are referred to, and, in addition to the statement of the law of England generally, there are chapters treating specially of the Rights and Customs recognised in Cornwall, Devonshire, Gloucestershire and Derbyshire.

Registration of Voters. By M. Moloney, of the South-Eastern Circuit, Barrister-at-law. Second Edition. London: Sweet & Maxwell Ltd. *Price* 7s. 6d.

This is a compendium of rules and forms for the guidance of overseers, vestry and town clerks, registration officers and rate collectors, whose duty it is to prepare lists of voters. It is a manual for the use of a business man in his business, not a treatise on a branch of law. Annotation of statutes and citation of case law are alike proscribed, and the lawyer in search of authority for a bad proposition will therefore peruse it in vain. It is perhaps due to the scheme of the book that it contains no little duplication of information when the same qualification suffices for county, parish, municipal or parliamentary borough. But this avoids a more or less unsatisfactory system of cross references; and the utility of the manual, evidenced in a second edition, is not thereby lessened.

The Late DUNCAN ROBERTSON, Esq.,

Sheriff-Substitute of Aberdeen, Kincardine and Banff.

The sudden death of Mr Duncan Robertson, the senior Sheriff-Substitute of Aberdeen, Kincardine and Banff at Aberdeen, came as a great shock to all who knew him. He had just returned to duty after his holiday, part of which he had spent in Norway and part in Mull, and appeared to be in excellent health; but, after an illness of a few hours, he expired on the morning of the 29th of September.

Mr Robertson was born in 1851, and was educated at the Edinburgh Academy, where he was a class-fellow of Sir Thomas Raleigh. His father was well known in legal circles in Edinburgh as the clerk (and the intimate personal friend) of Lord President M'Neill, and it was not unnatural that the son should turn to the Bar as his profession. After the usual arts and law curriculum at the University of Edinburgh, he passed Advocate in 1873.

Mr Robertson's practice was never very large, but he did what work he had to do with a care and an ability eminently satisfactory alike to the Court and to his clients. His mind was cast in an essentially judicial mould, and his instinctive fairness, coupled as it was with sound judgment and an exemplary moderation of tone, made him later on an ideal public prosecutor. His term in the Crown Office, however, was destined to be short. Appointed one of his deputes by Lord Advocate Macdonald in 1888, he accepted in 1892 the Sheriff-Substituteship at Aberdeen, then vacant through the appointment of Mr Grierson to the Solicitorship of Inland Revenue. Had Mr Robertson remained at the Bar, there can be little doub tthat his exceptional qualifications would ultimately have received ample recognition.

But what was Edinburgh's loss was Aberdeen's gain. It is no exaggeration to say that in the course of his fifteen years' service there Mr Robertson made for himself an unique position. The Sheriff Court of Aberdeen is fortunate in having a more than respectable tradition, and that tradition was if possible enhanced by Mr Robertson's example. For conscientiousness, for sagacity, for patience, for the *constans et perpetua voluntas* which ought to animate every judge, he had no superior in any tribunal in Scotland. This happy combination of the judicial temperament with unwearying industry and a keen point of honour, produced their natural result. No man was less disposed than he to court popularity. Save for his ever-welcome visits to the golf course his private life in Aberdeen was practically that of a recluse. He took no part in public affairs, finding that the work of his Court furnished more than sufficient occupation for his time. Yet he soon won in a remarkable degree, and having won, never lost, the confidence, the respect, and even the affection of the practitioners in his Court, of the legal profession generally, and indeed of the whole community in the North. More than once, it is believed, he was offered a Sheriffship, but he preferred to remain where he was.

Mr Robertson was a good shot, an excellent and enthusiastic fisherman, and a more than average golfer. He inherited from his father the estate of Penyghael in Mull, and there he spent a portion of his vacation every year. His unusually commanding figure will never again be seen in the Parliament House, where to the younger generation it was, of course, unknown.

But it will be long before his friends forget that sensitive and generous spirit, that strong and affectionate nature. He had a great sense of humour, and was delightful company in the society of intimate friends, though an overwhelming domestic calamity sustained within a year of his marriage threw a cast of melancholy over his spirits which was never perhaps wholly dissipated.

Mr Robertson married in 1889 Susan, daughter of the late William Scott-Kerr of Chatto and Sunlaws, who died in 1890. He is survived by one daughter.

The subject of the portrait in our next issue will be:—

The Late Lord Brampton.

The Court of Session resumed its sittings on Tuesday. All the Judges were present except Lord Stormonth Darling, who is indisposed. His Lordship—whose illness, we are glad to know, is not serious—expects to be able to be in Court next week. As a result of his absence the sittings of the Extra Division, which were appointed by Act of Sederunt to be held from Tuesday, 15th October, to Saturday, 2nd November, did not commence this week.

Considerable progress has been made during the vacation in the construction of the extension of the Court of Session accommodation. None of the Court-rooms have as yet been touched, but a great deal of work has been done in the Advocates' Library underneath the Outer House Bars. The foundations of the new building between the Library and the Cowgate have been laid, and the outside wall has been built to a height of about 20 feet. The new windows in the Advocates' Library facing towards the Sheriff Court have been made, and will provide light for the public reading-room in place of the old south windows, which will be blocked up by the accommodation for witnesses underneath the extension of the Courts. The series of rooms, including the enrolling-room, the Judges' retiring-room and the Principal Clerks' room, over which an extra flat is to be built, have been in the hands of the builders since 20th July. The old roof has been removed, and a new roof, which will form the floor of the new flat to be erected above, has been built on. A few weeks ago it looked as if the enrolling-room and the other rooms adjoining it could not possibly be ready for the meeting of the Court; but by working by night as well as by day the stage of the work aimed at has been completed, and the clerks have resumed possession of their quarters. A new drainage scheme and new heating arrangements have also been carried out during the vacation. The change which is most visible to the frequenter of the Courts is in the public entrance, part of which has been cut off to form a new staircase to the Crown Office in place of the old staircase, which has been taken down to make room for an extension of the advocates' robing room. Critics of the alterations to the public entrance to the Courts must keep in view that the work there is by no means completed. The enclosure where the public refreshment bar is now situated will be taken down, and the walls and ceiling of the vestibule will be redecorated in keeping with the style and design of the oak wood-work on the wall next the new Crown Office stair. Mr Oldrieve and his assistants in the Office of Works deserve great credit for the expedition with which the alterations have so far been carried out.

Business in the Court of Session. — The Rolls of the Court at the commencement of the Winter Session show that while the cases standing for hearing in the Inner House are somewhat less numerous than they were a year ago, there is a slight increase in the Outer House business. In the Frst Division there are 7 cases on the Summar Roll, 74 on the Short Roll, 6 on the Jury Cause Roll, and 12 on the Long Roll—total, 99. In the Second Division there are 6 cases on the Summar Roll, 90 on the Short Roll, 6 on the Jury Cause Roll, and 21 on the Long Roll—total, 123. Last October there were 125 cases before the First Division and 95 before the Second Division. In the Outer House Lord Dundas has at present 12 cases on his Procedure Roll, 2 hearings on evidence, 14 proofs, and 11 new cases. Lord Johnston has 18 cases on his Procedure Roll, 12 proofs, and 20 new cases. Lord Salvesen has 37 cases on his Procedure Roll, 20 proofs, and 63 new cases. Lord Mackenzie has 13 cases on his Procedure Roll, 8 proofs, 2 jury trials, and 24 new cases. Lord Guthrie has 25 cases on his Procedure Roll, 15 proofs, 1 hearing on evidence, 3 jury trials, and 49 new cases. There are thus 349 cases in the Outer House, as against 296 at the same period last year.

Resignation of Mr C. T. Couper, P.C.S.— The resignation of the Principal Clerk of Session in the First Division was not unexpected, as Mr Couper had not been in his place in Court since March, having received leave of absence for the Summer Session on account of the state of his health. Though he has not felt able to resume his duties, his many friends will be glad to know that he has much benefited by his period of rest. Born in 1831, Mr Charles Tennant Couper was educated in Glasgow and was admitted to the Faculty of Advocates in 1858. For some years he acted as the Editor of the Official Reports of the High Court of Justiciary, and in addition he prepared special reports of the trial of the Directors of the City

of Glasgow Bank, and the trial of the Glasgow dynamitards. In 1886 he was appointed a Principal Clerk of Session in succession to Mr Archibald Broun. In the twenty-one years in which he has sat in the First Division he has served under four Lord Presidents, and has read the Queen's and King's Commissions appointing no fewer than sixteen Judges of the Court of Session. Always courteous and willing in the discharge of the responsible duties of his office, he leaves the Court, where he has so long been a familiar figure, with the good wishes of his professional brethren. A portrait of Mr Couper appeared in the "Scots Law Times," Vol. VII. p. 117.

In our last issue there was published the concluding portion of the Statutes for 1907. It included the new Sheriff Courts Act, which comes into force on 1st January of next year. The legal profession and the public will welcome the many reforms which the new Act contains, and it is a satisfaction to see it in the Statute Book, more especially as it looked for some time as if the Bill was to be crowded out owing to the pressure of other business in the House of Commons. The scope of the main provisions of the Act was explained in some detail in these columns when the Bill was introduced in Parliament, and it now need only be added that although a number of changes in the draughtsmanship both in the Act itself and in the rules for regulating procedure were made while the Bill was in Committee, the Act as finally adjusted does not differ materially from the Bill as introduced. The work of the Sheriff Court will doubtless be largely increased, and a certain amount of business will be taken away from the Court of Session. But the Judges of the Supreme Court, being relieved of many cases more suitable for the Sheriff Court, will be enabled to give to litigation in the Court of Session that more speedy determination the want of which often makes litigants settle their disputes rather than face the law's delays.

NEW ENGLISH JUDGE.

Lord Coleridge, K.C., has been appointed one of the Justices of the High Court of Justice. Lord Coleridge, whose appointment to the additional judgeship of the High Court, for which an address to the Crown was carried last session, was generally expected, was born in 1851, and was educated at Eton and Trinity College, Oxford. He was called to the Bar at the Middle Temple in 1877, was created a Q.C. in 1892, and elected a Bencher of his Inn in 1894. He represented the Attercliffe Division of Sheffield as a Liberal from 1885 to 1894, when he succeeded his father in the peerage. At that time he made an unsuccessful effort to remain a member of the House of Commons by refusing the writ of summons to the Upper House. Lord Coleridge is the son and the grandson of a judge, and a record has thus been created (in England though not in Scotland), of one family supplying the country with three judges in three succeeding generations. His grandfather, Sir John Taylor Coleridge, was forty-five years of age when he succeeded Mr Justice Taunton as a Judge of the King's Bench in 1835; his father, who was Lord Chief Justice for fourteen years, was fifty-three when he succeeded Sir William Bovill as Chief Justice of the Common Pleas in 1873. Lord Coleridge has therefore taken rather longer to reach the Bench than either his grandfather or his father. He is not without some experience of judicial work. He has twice acted as a Commissioner of Assize, and for several years past has been Chairman of the Devon Quarter Sessions.

Appointment of Hamilton Procurator-Fiscal.—The Lord Advocate has appointed Mr William Thomson, B.L., law agent, Airdrie, to be Procurator-Fiscal of the Sheriff Court of the Hamilton district of the Middle Ward of Lanarkshire, in succession to the late Mr Robert Wilson. Mr William Thomson is a partner of Forsyth & Thomson, solicitors, Airdrie. He is well known as an able lawyer and a careful and thorough adviser. He is a native of Airdrie, and has for upwards of twenty years been a keen and active worker in the Liberal cause. He is chairman of Airdrie School Board, and was recently made a Justice of the Peace of Lanarkshire.

Sheriff Court of Lanarkshire.—A commission as Sheriff-Clerk Depute, with charge of the Commissary Department, has been granted by the Sheriff-Clerk of Lanarkshire to Mr John Jarvie, chief clerk to the late Commissary Clerk, Mr Wright. Mr Jarvie has been identified with the work of the department for forty-two years, and, along with his late chief, was employed in the Commissary Clerk's office before it was incorporated in that of the Sheriff-Clerk.

At a special meeting of Wishaw Town Council on 7th October, a letter was read from Mr John Burgess, resigning the offices of Burgh Procurator-Fiscal, Prosecutor in the Dean of Guild Court, Prosecutor under the Licensing (Scotland) Act 1903, and Prosecutor under the Public Health (Scotland) Act 1897. These several offices were filled up by the appointment of Mr Thos. Rae.

Hamilton Society of Solicitors.—A meeting of the members of this Society was held on the 15th inst. in the Procurator's Room, County Buildings, Hamilton, to consider a circular on the

subject of bankruptcy law reform, with special reference to the terms of the Bill lately before Parliament, and which was accorded a first reading. The Dean (Mr William Stodart, Hamilton) presided over a large and representative meeting. In conformity with the recommendation contained in the circular, it was agreed to send two delegates to a conference of Scottish members of Parliament, representatives of the various Faculties of Law, and others, in favour of the principle of the Bill. The two delegates appointed were the Dean and Mr James Burns, Motherwell.

Ayr Faculty of Solicitors.—Mr Archibald Brakenridge, solicitor, Cumnock, has been unanimously elected Dean of Faculty for the current year.

Law Lectureships in Glasgow University.

The Court of the University of Glasgow on the 3rd inst. filled up the two vacancies in the Law Lectureships caused by the appointment of Mr Irvine as Professor of Law in Aberdeen and the death of Mr William Shaw.

For the lectureship in Civil Law the following were the candidates:—James Adamson, LL.B., 18 Dundas Street, Edinburgh; Douglas A. Bannatyne, LL.B., 145 West George Street, Glasgow; Hugh R. Buchanan, LL.B., 138 West Regent Street, Glasgow; A. D. Donald, B.L., 5 Pitt Street, Edinburgh; William Dunbar, LL.B., 18 Nelson Street, Edinburgh; J. R. Haldane, LL.B., 18 Nelson Street, Edinburgh; William Hutchison, LL.B., 208 West George Street, Glasgow; J. Dalrymple Johnston, LL.B., 48 West Regent Street, Glasgow; William G. Macalister, LL.B., 39 Ashton Terrace, Glasgow, W.; A. A. Mitchell, LL.B., 7 Huntly Gardens, Glasgow; Robert A. Moody, LL.B., Benvue, Bothwell; Roderick M. Nicol, LL.B., 47 Overdale Street, Langside; Alexander Taylor, LL.B., 1 Albyn Place, Edinburgh; George D. Valentine, LL.B., 13 Pitt Street, Edinburgh; James Waddell, LL.B., Municipal Buildings, Coatbridge.

The Court appointed Mr H. R. Buchanan. Mr Hugh Reid Buchanan is a graduate of Glasgow University in Arts and in Law. Among the distinctions he gained in Arts were the Edward Caird medal in the moral philosophy (honours) class, first-class honours in mental philosophy, and the George A. Clark Scholarship in that subject. While taking his law course Mr Buchanan served his apprenticeship to the firm of Messrs John Steuart & Gillies, Writers, Glasgow, and in the examination for the LL.B. degree he achieved distinction in civil law, Scots law, mercantile law, public international law, international private law, jurisprudence, and forensic medicine, and graduated with distinction. He also studied philosophy and law in Germany. As a George A. Clark scholar he delivered lectures to the Moral Philosophy classes in Glasgow University, and in 1904 was appointed interim lecturer in jurisprudence, while in that year he was also appointed an Examiner to the University for degrees in Arts and Law. Mr Buchanan is thirty years of age, and is a partner of the firm of Messrs D. & J. Hill, Writers, Glasgow.

For the lectureship in Mercantile Law the following were the candidates:—Richard Brown, 166 St Vincent Street, Glasgow; David Bruce, LL.B., 141 West George Street, Glasgow; William Brunton, LL.B., 48 West Regent Street, Glasgow; J. Roberton Christie, LL.B., 3 Gloucester Place, Edinburgh; A. D. Donald, B.L., 5 Pitt Street, Edinburgh; John Grant, B.L., 204 St Vincent Street, Glasgow; John Jubb, B.L., 124 St Vincent Street, Glasgow; Thomas G. Wright, LL.B., 150 St Vincent Street, Glasgow.

The Court appointed Mr T. G. Wright. Mr Thomas G. Wright is twenty-nine years of age, and is a graduate of Glasgow University in Arts and Law. During his law course he gained prizes in the classes of civil, constitutional, and Scots law, jurisprudence, forensic medicine, and conveyancing, and he graduated with distinction. He is a partner of the firm of Messrs Wright, Johnston & Mackenzie, and has dealt entirely with the mercantile side of their business since he became associated with them about four years ago.

Mr James Wilkie, solicitor, Kirriemuir, has assumed as partner Mr David Shiress Whitson, Writer to the Signet, who has assisted him in his business for the past nine years. The business will in future be carried on under the firm of Jas. Wilkie & Whitson, W.S.

Messrs Andrew Hendry & Sons, solicitors, British Linen Bank Buildings, 39 Murraygate, Dundee, have assumed Mr James Fenton, solicitor, as a partner of their firm.

Mr James J. Kelly, solicitor, Penicuik, has been appointed Treasurer and Collector of Rates for the burgh of Penicuik.

Mr John Roddick, writer and notary public, has been appointed joint agent of the Commercial Bank of Scotland (Limited), at Annan, along with his father, Mr William Roddick.

Mr John Bremner Davidson, East View, Dunfermline, has been admitted as a law agent by the Lords of Council and Session.

INCORPORATED SOCIETY OF LAW AGENTS IN SCOTLAND.

The annual meeting of this Society was held within the County Council Chambers, Inverness, on Friday, 27th September. There was a large attendance.

On the motion of Mr George D. Ballingall, W.S., Edinburgh, who presided at the commencement of the proceedings, seconded by Professor Richard Brown, Glasgow, Mr D. M. M. Milligan, advocate, Aberdeen, was unanimously elected President for the ensuing year. Mr Milligan, in taking the chair, assured the Society that he highly appreciated the honour they had conferred on him. He would enter upon the duties of President with an ardent desire and a firm resolution to discharge them to the best of his ability, succeeding, as he did, a gentleman who had discharged them with unvarying courtesy, great ability, and characteristic integrity and impartiality.

On the motion of Mr Robert Smith, Dundee, seconded by Mr William Cochran, Glasgow, Mr James W. Whitelaw, Dumfries, was unanimously re-elected Vice-President. For the vacancies in the Council the following were elected:—James Brown, Stirling; James Duff, S.S.C., Edinburgh; James Glen, Greenock; William Mackay, Inverness; Hugh Stewart, Elgin; and Robert S. Walker, Greenock. Dr J. W. Barty, Dunblane, was re-elected Secretary, and Mr F. B. Anderson, C.A., Edinburgh, was re-appointed Auditor.

Mr Milligan, in delivering the President's address, said the past history of the Society and the work it had accomplished formed a retrospect of which they might well feel proud, and which, he thought, justified their expecting even more support from the profession than had been accorded to them. They had to congratulate themselves on the passing of the Sheriff Court Bill. The subject had been under the consideration of the Society since 1886, and great though the debt of the profession was to Lord Balfour, Lord Advocate Shaw, and Sheriff Fyfe, he doubted if anyone had done more to bring about the much-needed reform than Mr Spens, Glasgow, one of their previous vice-presidents. In view of what the Society had done and of what remained to be done, he appealed to those who had not yet joined its ranks to do so, and enable it to do still better work in the future. The main object of the Society's existence was the unification of the profession, and that was a subject on which they must concentrate their forces. The Solicitors (Scotland) Bill ought to have the first place in their programme. Until such a Bill was passed they could never hope to see the many reforms that were admittedly called for, such as the reform and consolidation of their conveyancing statutes, carried into law. They were about 3500 enrolled law agents in Scotland, and there were 33 different legal societies, besides their own, containing about 2337 members, so that 1185 were members of no society at all. The interests of the profession, he believed, could best be furthered by united action, and in the matters of discipline it was of the highest importance that the profession should act through one central body. The sad cases of professional misconduct of the last few years, of trusts broken, of great names tarnished, and the shocks upon the public confidence which they had caused, would have done only little to modify men's adverse opinion about them as a body, or to make them trust in them more than formerly. It was just because they felt that they were bound to show publicly that they appreciated to the full the gravity of such cases, and their desire to do all in their power to prevent their recurrence, that they ought, as a profession, to take every means in their power to prevent the possibility of such sad failures. If the public could be assured that every solicitor was a member of a society directed in its principles and practice by a large representative council, whose position and standing were a guarantee of the highest standard of integrity, a larger measure of confidence would, he thought, be extended to the professsion than at present.

Dr Barty (Secretary) submitted the accounts of the Society, which showed that the free assets at the end of the year amounted to £334, 14s. The accounts were unanimously approved of.

The President said that they had every reason to congratulate themselves on the passing of the Sheriff Courts Act. The report of the Council referring to the passing of the Act was in the following terms:—

"The Council have to congratulate the Society on the passing into law of this Bill. They have to remind the Society that an extension of the jurisdiction of Sheriff Courts, improvements in the forms of process and procedure, and a consolidation of the many statutes affecting Sheriff Courts have been objects for which the Council have earnestly striven for many years. Mr Spens, of Glasgow, during his tenure of office as councillor, vice-president, and president, devoted much time and ability to advocating these reforms, and ultimately Lord Balfour of Burleigh appointed a Departmental Commission to inquire and report as to the following matters:—(1) The forms of writs and pleadings, and the rules of procedure in the civil Courts of the Sheriff; (2) the forms of writs and the rules of procedure in the criminal Courts of the Sheriff; (3) the procedure for review of and appeals from decrees, interlocutors, and orders in the civil Courts of the Sheriff, and sentences in the criminal Courts of the Sheriff; (4) the constitution of and rules of procedure in arbitrations either at common law or under the Lands Clauses Act and other statutes. The first chairman of the Commission was Lord Dunedin, and he was succeeded by Mr Scott Dickson, K.C., the then Lord Advocate. The Commission was entirely non-political, Mr Ure, M.P., and other gentlemen of Liberal politics being members. The Commission reported in October 1904, and although their recommendations did not include all the reforms which this Society advocated,

the report was received with much acceptance. In consequence of the change of Government, delay took place in getting a Bill following on the report prepared and approved of. Three years ago Sheriff Fyfe, of Glasgow, whose experience of Sheriff Court procedure is unsurpassed, took the initiative in having a committee representative of the legal profession in Scotland appointed to frame a Bill. This Society was fully represented in this committee, and the draft Bill which was framed was generally approved of by the annual meeting of the Society held at Dumfries in the autumn of 1905. Thereafter the Bill was submitted to the present Lord Advocate, Mr Shaw, in the hope that it might form the basis of a Government Bill. His Lordship was good enough to take a personal interest in the subject, and the Bill, which is now an Act, was introduced into the House of Commons at the beginning of Session 1906, and was printed and circulated. Sheriff Fyfe's committee received from the Law Societies and many individual agents suggestions for the amendment of the Bill, which were fully considered by the committee, and many of these the Lord Advocate approved of and accepted. The Council are not prepared to affirm that the Bill is perfect and incapable of improvement. On the contrary, it is probable that many suggestions with regard to its provisions may still be made. This is only what must be anticipated in so long and complicated a Bill. But the Council are satisfied, notwithstanding any errors or omissions which may be pointed out, that the new Act will be received by the members of the Society with the utmost satisfaction. The members of this Society are deeply indebted to the Lord Advocate, and also to Lord Balfour of Burleigh, whose support of the Bill in the House of Lords was invaluable. The Council trust that it is satisfactory to his Lordship that the Commission which he himself nominated while Secretary for Scotland has now resulted in a very important Act being passed into law which gives effect to the main recommendations of the Commission. It is almost unnecessary to add that the whole profession in Scotland are under a very deep debt of gratitude to Sheriff Fyfe for his able and prolonged labours in furthering the promotion of the Bill."

Mr Stewart, Elgin, called attention to the great grievance that existed in Scotland in consequence of the paucity of sheriff-officers, and suggested that the Society should seek to get an Act passed to give powers to solicitors to serve charges of payment and to give powers to licensed auctioneers to carry out poindings. It was unanimously agreed to remit the matter back to the Council.

The President stated that the Royal Commission on Registration of Titles had not as yet made any arrangement for holding meetings for the hearing of evidence, but the witnesses nominated by the Society had prepared their evidence and were ready to give it at any time.

Mr Glen, Greenock, moved that the Society approve of the steps already taken by the Council in regard to the whole question of the unification of the profession and the cognate subjects referred to in the Report, and that it be remitted to the Council to take such steps in the matter as they think proper to further the objects in view, and to report. Mr Glen's motion, seconded by Mr Brown, was unanimously adopted.

A paper by Mr R. W. Renton, Procurator-Fiscal of Mid-Lothian, dealing with the Criminal Procedure Bill, was read. It was unanimously agreed to approve generally of the Bill, and to remit it to the Council for further consideration.

Votes of thanks were given to the President for his conduct in the chair, and also to the Dean and Faculty of Solicitors of Inverness-shire for the most hospitable welcome accorded to members.

The Late Alexander Innes Shand, Esq., Advocate.—By the death of Mr Alexander Innes Shand, which took place at Edenbridge, Kent, on 20th September, the Faculty of Advocates has lost a distinguished member. Mr Shand, who was the youngest son of Mr William Shand of Arnhall, was admitted to the Faculty in November 1864. Before his call he had served his time in a W.S. office, with a view to entering that branch of the legal profession, and had afterwards spent a dozen years in sport and Continental travel. After putting on his gown he only spent about a year in the Parliament House. His practice did not extend beyond a few formal motions and the like, and the life was not congenial. "I might have held out longer," he writes, "but for the sense of living under the microscope, and being constrained to be hypocritical in spite of yourself. Every one knew and talked about what everybody else did. If you put the foot in a stirrup it was a professional scandal; in common prudence you had to sneak out of the stable-yard and head for the beautiful country by back streets." So Shand went to London, and began his long and successful career of letters. As a young man he wrote for the "Saturday Review," the "Pall Mall Gazette," and "Blackwood"; to the last he was for many years a regular contributor. His literary output is remarkable not only for its amount and its quality, but for its extraordinary variety. Besides magazine articles, he produced some five-and-twenty printed volumes. These include many books on sport, among others the volume on "Shooting" in the Haddon Hall Library, and the beautiful volume "Mountain, Stream, and Covert," published in 1897; several biographies, the most notable being that of General Sir Edward Hamley; three three-volume novels, and numerous volumes of travel-pictures and personal reminiscences. His last book, "Soldiers of Fortune in Camp and Court," was issued by Messrs Archibald Constable & Co. only a few days before his death. Perhaps the book by which he will be best remembered is "Days of the Past" (1905), in which he has preserved a vivid picture of Edinburgh in the sixties, the Edinburgh of Lord Neaves and Dean Ramsay, Hill Burton and John Blackwood,

Candlish and Cunningham and Guthrie. He was a notable contributor to that honourable tradition of letters which still endures in the Parliament House.

The Late David Duncan, Esq., Advocate.—A well-known figure in the legal circles of Edinburgh has been removed by the death, which took place on the 4th inst., of Mr David Duncan, senior partner of Messrs Maconochie, Duncan & Hare, W.S., 10 Hill Street. Mr Duncan was seventy-eight years of age. He qualified as an advocate after serving in the office of Mr Thomas Ranken, S.S.C., and subsequently in that of Messrs Menzies & Maconochie. He joined the Scottish Bar in 1855; but two years later became associated with the late Mr R. B. Maconochie in the firm of Maconochie, Duncan & Hare. He was a prizeman in the law classes, and assisted in editing one of the editions of Menzies' "Conveyancing." From 1883 he acted as Clerk of Lieutenancy for Midlothian.

The Late H. H. Inglis, Esq., W.S.—The death took place on the 6th inst. of Mr Harry Herbert Inglis, sole partner of the firm of Inglis & Allan, W.S. Mr Inglis was the younger surviving son of Lord President Inglis. He took little part in public life, but in his own circle of acquaintance he was recognised as an able and shrewd man of business. Born in Edinburgh some sixty years ago, Mr H. H. Inglis attended the law classes at Edinburgh University, and was admitted a member of the Society of Writers to Her Majesty's Signet in 1873. He was clerk to the Ministers' Widows' Fund of the Church of Scotland, in which office he succeeded his uncle, and at one time his partner, Mr Harry Maxwell Inglis, and between them the uncle and nephew must have held the appointment for about eighty years. Mr Inglis had been ailing for some time, being troubled with a heart affection, but he was able to attend to his business to within a few days of his death.

The Late J. Norval Murray, Esq., Town Clerk of Irvine.—On the 6th inst. Mr John Norval Murray, town clerk of Irvine, died at his residence, "Bonita," after a lengthened illness. After spending some years in the office of Messrs Morton, Neilson & Smart, W.S., Edinburgh, Mr Murray went to Irvine. There he was for many years deputy to his uncle, Mr James Dickie, the late town clerk. On his death, less than two years ago, Mr Murray was appointed to the vacancy, but owing to ill-health was only able to personally conduct the duties for a short time, and the week before his death the Town Council agreed to give him a further leave of absence for six months. Mr Murray was a partner in the firm of Murray, Gillies & Wilson, and amongst the positions he filled were Procurator-Fiscal in the Justice of Peace Court, secretary to the Harbour Trust, Irvine Savings Bank, the local branch of the Lifeboat Institution, Irvine Golf Club and Burns Club.

The Late Nenion Elliot, Esq., S.S.C.—The death took place at his residence in Edinburgh on the 7th September of Mr Nenion Elliot, S.S.C., at the age of 73. From 1878 to June 1905 he held the office of Clerk and Extractor to the Court of Teinds. A portrait and biographical sketch of Mr Elliot appeared in the "Scots Law Times," Vol. XIII. p. 41.

The Late Robert Wilson, Esq., Procurator-Fiscal, Hamilton.—Mr Robert Wilson, Procurator-Fiscal, Hamilton Sheriff Court, died at his residence, Auchincairn, Hamilton, on 20th September. A native of Lanark, he began his career in the Sheriff-Clerk's office there, and afterwards held the appointment of Sheriff-Clerk Depute in Hamilton, and also in Glasgow. In 1889, on the death of Mr J. A. Dykes, P.F., Hamilton, Mr Wilson was appointed to the vacancy.

The Late Alexander Cowan, Esq., Solicitor, Annan.—Much regret was felt in Dumfriesshire on the announcement of the death on 21st September of Mr Alexander Cowan, partner of the firm of Murray, Little & Cowan, solicitors, Annan. Mr Cowan, who was a native of Maxwelltown, was admitted a solicitor in 1899. He was held in high esteem by his professional brethren and by the public.

The Late P. F. W. Edington, Esq., Writer, Glasgow.—Mr P. F. W. Edington, writer, Glasgow, died there on the 2nd September after an illness of some weeks' duration. He was admitted a solicitor in 1898. He was an enthusiastic Volunteer, took a keen interest in rifle shooting, and was frequently a competitor at the National Rifle Association Meetings at Bisley.

The Late William Wright, Esq., Sheriff-Clerk Depute of Lanarkshire.—The death took place on 28th August of Mr Wright, Sheriff-Clerk Depute of Lanarkshire. Mr Wright, who had been in failing health for some time, was over seventy years of age. He had more than forty years' experience in the work of the Commissary and Sheriff-Clerk offices, and was recognised as an able official well versed in the work of his department.

The Late Donald Fisher, Esq., Writer, Glasgow.—Mr Donald Fisher died in Glasgow on 31st August at the advanced age of eighty-five. A native of Inveraray, he went at the age of eighteen to Greenock, and after some years of legal training there entered the office of the late Mr Logie. In that office he very soon became a partner, the firm name being Logie & Fisher. He was a member of several public bodies in Glasgow, and was well known as an active supporter of the United Free Church. He continued to take a keen interest in the affairs of his native burgh, and last year its Town Council conferred on him the honour of the freedom of the burgh.

The Late Mr James Smith.—Among the habitués of the Parliament House who have passed away since the summer vacation began, none will be more missed than Mr James Smith, the well-known reporter in the Court for the "Dundee Advertiser." He had not been in his usual vigour since an illness about eighteen months ago, but his health had improved and his death was somewhat sudden. Mr James Smith was the oldest press reporter, with perhaps one exception, among those now in the Court of Session. He was a native of Montrose, and at an early age became connected with the "Dundee Advertiser." Later on he obtained a situation on the "Bombay Gazette," and it was in the Indian Courts of Justice that he obtained his first insight into the difficulties and responsibilities of law reporting. At the expiry of his three years' engagement he returned to this country, visiting on the way Egypt and Palestine. For a number of years he was shorthand writer in the office of Messrs Murray, Beith & Murray, W.S., and confidential clerk to Mr Donald Beith. About the year 1880 Mr Smith became once more attached to the "Dundee Advertiser," this time as the Court of Session reporter for the paper. That position fitted well in with the work in the Court with which he became so intimately identified. Agents who had known him in Messrs Murray, Beith & Murray's readily employed him to take advisings, evidence on commissions in arbitrations and jury trials, and the discussions in important actions in Court, and the extent to which he was thus employed for a long period of years was a criterion of the care and accuracy with which he performed his work. His business tact and easy manner readily commended him to agents, and when business cares were set aside his company was appreciated on account of his sociability and geniality, and his fund of anecdote and humour. Few men were better known in Edinburgh than Mr Smith, for not only in the Court and in his general work as a pressman was he prominent, but as a Freemason and as the official reporter for Grand Lodge, he was known for many years by members of the craft in all ranks of society.

DECISIONS IN THE ENGLISH COURTS.

Kunski v. *Kunski.*

Husband and Wife—Separation—*Held* that a wife was entitled to a decree of judicial separation on the ground of cruelty committed by her husband at a time when the spouses were living separate under a deed of voluntary separation.—P. D. and A. Div. (Bucknill, J.).—16*th June* 1907.

Nicholson v. *Piper.*

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), Sched. I. (12).—Decision of the Court of Appeal (*ante*, Vol. XIV. p. 159) *affirmed.*—House of Lords (Earl of Halsbury, Lord James of Hereford, Lord Robertson and Lord Atkinson).—18*th June* 1907.

Ystradyfodwg and Pontypridd Main Sewerage Board v. *Bensted.*

Revenue—Income Tax—Income Tax Act 1842 (5 & 6 Vict. cap. 35), Sched. A., Rules 1 and 3.—Decision of the Court of Appeal (*ante*, Vol. XIV. p. 136) *affirmed.*—House of Lords (Earl of Halsbury, Lord James of Hereford, Lord Robertson and Lord Atkinson).—19*th June* 1907.

Samuel v. *Pazolt.*

Statute—Moneylenders Act 1900 (63 & 64 Vict. cap. 51), sect. 1.—*Held* that the question whether a bargain was harsh and unconscionable in the sense of the Act was one of fact for the jury.—K.B. Div. (Ridley, J.).—19*th June* 1907.

Pacific Steam Navigation Co. v. *Pugh & Son.*

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 4.—The plaintiffs' steamer was being coaled at a quay from trucks which were hauled to the ship's side by horses belonging to the defenders, under a contract with the defenders for that purpose. The driver of a horse, who was in the employment of the defenders, was injured, and he claimed compensation from the plaintiffs as the undertakers in the sense of the Act, and was awarded a sum. The plaintiffs claimed indemnity from the defenders. *Held* that the defenders were liable.—Court of Appeal (Vaughan-Williams, Fletcher Moulton and Buckley, L.JJ.).—18*th June* 1907.

The King v. *Marsham. Ex parte Chamberlain.*

Statute—Motor Car Act 1903 (3 Edw. VII. cap. 36), sect. 4 (1) (*c*).—*Held* that it was not obligatory on a magistrate to endorse on a licence a first conviction for driving at an excessive speed in a royal park, the speed being

fixed under the Parks Regulation Act 1872.—K.B. Div. (Lord Alverstone, C.J., Darling and A. T. Lawrence, JJ.).—19*th June* 1907.

Price v. *The Metropolitan House Investment and Agency Co. Ltd.*

Principal and Agent—Commission.—An agent employed for the sale of property did not inform his principal of a fact known to him bearing on the value of the property. He also obtained a secret profit. *Held* that he was not entitled to claim commission from his principal, and must account for any commission he had otherwise received.—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes and Kennedy, L.J.).—20*th June* 1907.

Electromobile Co. Ltd. v. *British Electromobile Co. Ltd.*

Company—Name—Trade Name.—*Held* that the name of the defendant company was not calculated to induce the belief that the business carried on by the defendants was the same as that of the plaintiffs, and injunction to restrain them carrying on business under that name *refused.* —Chan. Div. (Warrington, J.). — 20*th June* 1907.

Harrogate Corporation v. *Mackay.*

Statute—Waterworks Clauses Act 1863 (26 & 27 Vict. cap. 93), sect. 12.—*Held* that a supply of water to a medical practitioner for washing a motor car, which he used in his professional practice, was not a supply for business purposes within the meaning of the above section, and therefore was not a supply for other than domestic purposes within the meaning of a local Act.—K.B. Div. (Lord Alverstone, C.J., Darling and A. T. Lawrence, JJ.).—20*th June* 1907.

Senior v. *Fountains & Burnley Ltd.*

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), Sched. I., sect. 1 (*a*)—Dependant.—A workman at the time of his death was receiving contributions from three of his sons, who were working, towards the family expenses. *Held* that his wife was nevertheless wholly dependent on her husband's earnings.—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes and Kennedy, L.J.).—20*th June* 1907.

In re an Arbitration between Coleman's Depositaries Ltd. and the Life and Health Assurance Association.

Insurance—Accident.—Where a covering note was given on entering into an accident insurance contract and the policy containing the conditions of the contract was not issued to the insured till some time afterwards, *held* that in the absence of proof of knowledge of a condition on the part of the insured, that condition did not attach to a risk occurring before the delivery of the policy.—Court of Appeal (Vaughan-Williams, Fletcher Moulton and Buckley, L.JJ.).—19*th June* 1907.

Clement Talbot Ltd. v. *Wilson.*

Patent—Infringement.—The defendant infringed a patent of the plaintiffs for certain accessories for a motor car by using a car fitted with them. *Held* that the measure of damages to the plaintiffs was the difference in values between the car without the accessories and with them.—Chan. Div. (Kekewich, J.).—20*th June* 1907.

In re Birmingham Small Arms Co. Ltd.

Trade Mark — Trade Marks Act 1905 (5 Edw. VII. cap. 15), sect. 24.—*Held* that the above section did not apply in a case where a manufacturer, having registered a trade mark in respect of one class of goods, applied for registration of the same trade mark in respect of goods of another class.—Chan. Div. (Kekewich, J.).—25*th June* 1907.

Lancashire and Cheshire Coal Association and Richard Evans & Co. v. *London and North-Western Railway Co. and Lancashire and Yorkshire Railway Co.*

Railway—Rates.—It was provided by the Railway Rates Acts of two railway companies that in the case of the conveyance of goods for a short distance a rate might be charged as for a certain minimum distance, "provided that where merchandise is conveyed by the company partly on the railway and partly on the railway of any other company, the railway and the railway of such other company shall for the purpose of reckoning such short distance be considered as one railway." *Held* that the word "conveyed" in the proviso meant actually conveyed, not contracted to be conveyed, and that where goods were conveyed under a contract with one company over the lines of and by the two companies for less than the minimum distance on each, but more than the minimum on both together, two minimum rates might be charged.—Court of Appeal (Vaughan-Williams, Fletcher Moulton and Buckley, L.JJ.).—25*th June* 1907.

In re an Arbitration between Carpenter and Others and Mayor, etc. of Bristol.

Word — "Officer" — Local Government Act 1888 (51 & 52 Vict. cap. 41), sect. 100. —*Held* that a firm of solicitors who were regularly employed to do legal work for a Board of

Guardians, but did not receive an appointment for a period of time, nor were paid by salary, were not officers of the Board in the sense of the above section.—Court of Appeal (Vaughan-Williams, Fletcher Moulton and Buckley, L.JJ.).—21*st June* 1907.

James Nelson & Sons Ltd. v. *Nelson Line (Liverpool) Ltd.*

In re an Arbitration between James Nelson & Sons Ltd. and Nelson Line (Liverpool) Ltd.

Ship — Charter-party. — A charter-party proceeded on the narrative that the owners were to supply a two-weekly service from the River Plate to Liverpool, and provided "seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading. . . . For each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of £20." *Held* that there did not require to be fourteen days between the commencement of the lay-days for loading one vessel and the commencement of the lay-days for loading the next vessel; that where Sundays or holidays were utilised for loading, these days were not excepted in reckoning the lay-days; and that where one or more clear days were saved by completing the loading on a Saturday, the following Sunday was not to be reckoned as one of the days saved, although the ship was thereby enabled to save that day in sailing.—Court of Appeal (Vaughan-Williams, Fletcher Moulton and Buckley, L.JJ.).—25*th June* 1907.

In re Midland Carriage and Wagon Co.

Company—Reduction of Capital—Where a company had been formed under the Act 7 & 8 Vict. cap. 110, and subsequently registered under the Companies Act 1862, the Court, on the petition of the company, the company being at the time in a flourishing condition, made an order *confirming* the reduction of capital as regards a liability on shares which could only be called up in the event of and for the purpose of winding up, and *cancelled* certain preference shares which had been redeemed.—Chan. Div. (Warrington, J.).—2*nd July* 1907.

In re The Winter German Opera Ltd.

Statute — Preferential Payments in Bankruptcy Act 1888 (51 & 52 Vict. cap. 62), sect. 1 (1) (*b*).—Operatic artistes were employed by the above company under agreements which provided that the artistes should have a certain minimum number of appearances during the engagement at so much for each appearance, and should not take part in any other public or private performance during the period. *Held* that they were entitled to a preference on the liquidation of the company as being "servants" who were paid "wages or salary for services rendered." — Chan. Div. (Warrington, J.).—2*nd July* 1907.

Cooper v. *Blakiston.*

Revenue—Income Tax—Income Tax Act 1842 (16 & 17 Vict. cap. 34), sect. 146, Rule 1, Sched. E.—Decision of Bray, J. (*ante*, Vol. XIV. p. 148), *reversed*.—Court of Appeal (Lord Alverstone, C.J., Fletcher Moulton and Buckley, L.JJ.)—3*rd July* 1907.

The "Oravia."

Ship—Collision.—Decision of the Court of Appeal (*supra*, p. 12) *affirmed*.—House of Lords (Lord Loreburn, L.C., Lord Ashbourne, Lord Macnaghten, Lord James of Hereford, and Lord Atkinson).—3*rd July* 1907.

Barrett v. *Associated Newspapers Ltd.*

Slander — Verbal Injury.— In an action against the proprietors of a newspaper which stated that the plaintiff's house was haunted, *held* that the plaintiff, having failed to prove special damage, was not entitled to a verdict.—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes and Kennedy, L.J.)—4*th July* 1907.

Young v. *Hoffman Manufacturing Co. Ltd.*

Master and Servant—Fellow-Workman. —*Held* that the legal doctrine of fellow-workman does not suffer any modification in a case where the injured workman is a boy of fifteen years of age.—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes and Kennedy, L.JJ.).—4*th July* 1907.

In re an Application for Registration by Compagnie Industrielle des Pétroles, and in re Price's Patent Candle Company's Trade Mark.

Trade Mark — Registration — Trade Marks Act 1905 (5 Edw. VII. cap. 15), sects. 9, 11.—In an application for registration of the word "motricine" as a trade mark for a petrol spirit used for motor cars, the word "motorine" being already on the register as a trade mark for a lubricating oil used for motor cars, *held* that, the applicants having failed to prove that the word "motricine" was not calculated to deceive, the application should be refused. *Held* also that the word "motorine," not being a word having "direct reference to the character or quality of the goods" so denominated, was not bad as a trade mark and ought not to be excluded from the register.—Chan. Div. (Warrington, J.).—5*th July* 1907.

Oceanic Steamship Co. v. *Faber.*

Insurance—Marine.—Decision of Walton, J. (*ante*, Vol. XIV. p. 38), *affirmed*.—Court of Appeal (Lord Alverstone, C.J., Fletcher Moulton and Buckley, L.JJ.).—*5th July* 1907.

LAW LIBRARY.

BOOK NOTICES.

Employers' Liability to their Servants at Common Law and Under the Employers' Liability Act 1880 *and the Workmen's Compensation Act* 1906. *By C. Y. C. Dawbarn, M.A., Barrister-at-Law, Inner Temple and Northern Circuit. Third Edition. With Notes on the Canadian Law by A. C. Forster Boulton, M.P., of the Inner Temple, South-Eastern Circuit, and Osgoode Hall, Toronto, Barrister-at-Law. London: Sweet & Maxwell Ltd.* *Price* 21*s.*

Mr Dawbarn's "Employers' Liability" has grown from the most modest dimensions to be a volume of imposing dignity. The present edition contains a noteworthy feature in the Canadian Notes by Mr Forster Boulton; and although these may not be of great value in Scotland, it is just possible they might on occasion help to enlighten some mysterious problem.

The most important part of the work is the treatment of the new Workmen's Compensation Act. Mr Dawbarn collates the clauses under various heads, shewing what is necessary to establish a right to compensation, what defences are open to the respondent, on whom he can lay the whole or part of the burden, how the compensation is assessed, etc. His method is open to the objection that it involves much reprinting of sections as they may bear upon several heads, and the bulk of the volume is largely due to this and to the two hundred pages taken up with rules, forms and statutes. But the arrangement is certainly as useful as it is novel; and it is calculated to save much wandering to and fro throughout the Statute in an uncertain dread of missing some provision which has a bearing on the matter in hand.

For the rest, Mr Dawbarn does not comment with much amplitude on the sections; his citation of authority is somewhat meagre, and does not always shew equal care in the matter of accuracy. The case of *Haworth* v. *Andrew Knowles & Sons (Limited) Accident Society* (19 T.L.R. 658), for example, did not, as Mr Dawbarn has it, interpret the third section of the 1897 Act, but turned solely on the construction of the rules of the society. But the book is one of the most helpful which the Act has yet brought forth, and will secure an honoured place in the class of "literature" (if one may use that word in such a connection) to which it belongs.

A Digest of Leading Cases on the Regulations for Preventing Collisions at Sea, with an Appendix containing the Regulations of 1897, 1884, 1880, *and* 1863; *Excerpt from the Report of Trinity House Committee in* 1901, *and Notes. By David Wright Smith, M.A., B.L., Solicitor, Glasgow, Member of the Faculty of Procurators in Glasgow. Edinburgh: T. & A. Constable*, 1907. *Price* 5*s.*

This volume, while written primarily for shipowners and shipmasters, deserves a hearty welcome also from members of the legal profession interested in shipping law. The Regulations for Preventing Collisions at Sea, both those at present in force, and the earlier codes so far as these remain of practical utility, are printed in full in the Appendix. The bulk of the volume is devoted to a digest of the series of leading cases in which these regulations have been discussed and interpreted. A large number of cases are dealt with. The digesting has been very well done. The salient facts on which the decisions turned are sufficiently narrated, the judgment of the Court is concisely and clearly stated, and frequently the important paragraphs from the judges' opinions are quoted in full. The cases include many from the Supreme Court of the United States.

Practice of the Scottish Poor Law. By George A. Mackay, of the Local Government Board for Scotland. Edinburgh: William Green & Sons, 1907. *Price* 5*s.*

While other works, such as that of Mr Graham on Poor Law, deal with the more purely legal aspect of Poor Law administration, Mr Mackay's book will be found to contain a review of our system of Poor Law administration and practice which will form a very useful adjunct to the more elaborate treatise. After a short historical introduction Mr Mackay explains the constitution and functions of Parish Councils, the duties of their officials, including the inspectors of poor, collectors, clerks, auditors and medical officers. He deals with their revenue and powers of assessment, and with the functions of the Local Government Board. The Scottish Lunacy system, the Administration of Poor Relief and of Poorhouses, are all discussed, and there is a chapter on possible administrative reforms. The book bears on every page indications of a very thorough practical knowledge of the subject, and it is one which will be widely used by members and officials of Parish Councils and others employed in the administration of the Poor Law.

Encyclopædia of the Laws of England, with Forms and Precedents by the most eminent Legal Authorities. Second Edition, Revised and Enlarged. Vol. V.: Dominican Republic to Factories and Workshops. Vol. VI.: Factors' Act to Hypotheque. Edinburgh: William Green & Sons, 1907.

Price 21*s. net per vol.*

What has been said in previous numbers as to the excellence of the earlier volumes of the second edition of this encyclopædia applies equally to the volumes now before us. The editors have been fortunate in securing in so many instances the original writer of the article to bring his contribution down to date, and where the work of revision is done by a new writer it is placed in most competent hands. The article by Mr Ruegg, K.C., on Employers' Liability contains a very carefully considered commentary on the Workmen's Compensation Act of 1906; and another article which deserves special notice for its exhaustive, clear and well-arranged treatment of its subject is that on Excise by Sir Francis Gore, Solicitor to the Inland Revenue, and Mr G. H. Dennis, Assistant Solicitor of Customs. The editors and publishers are to be congratulated on the rapidity with which the volumes are being issued.

An Epitome of Constitutional Law and Cases. By W. H. Hastings Kelke, M.A., of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell Ltd. *Price* 6*s.*

A Students' Manual of Constitutional Law may be a digest of one of the standard works on the subject, prepared for examination purposes, or it may have a place in a library as a book to be read for the pleasure of reading it. The present volume escapes falling under the first of these descriptions, but it hardly attains to the latter. It is offered as an introduction to Dicey and Anson. But it is up to date—the recent Norfolk Peerage case even being cited in the text—and it contains an interesting chapter on Colonial constitutions. The subject-matter of the manual is of course a very extensive one, and it is difficult in the circumstances to cover the ground and yet make a readable book; but it was surely unnecessary to mar the work by a constant omission of the definite article, not to speak of the use of initials when the words for which they stand (such as Privy Council) would occupy little space. The book, however, will be found worthy of a place on the shelves of a student of constitutional law.

A Practical Guide to the Death Duties and to the Preparation of Death-Duty Accounts. By Charles Beatty, Solicitor, of the Estate Duty Office, Somerset House. London: Effingham Wilson. *Price* 4*s.*

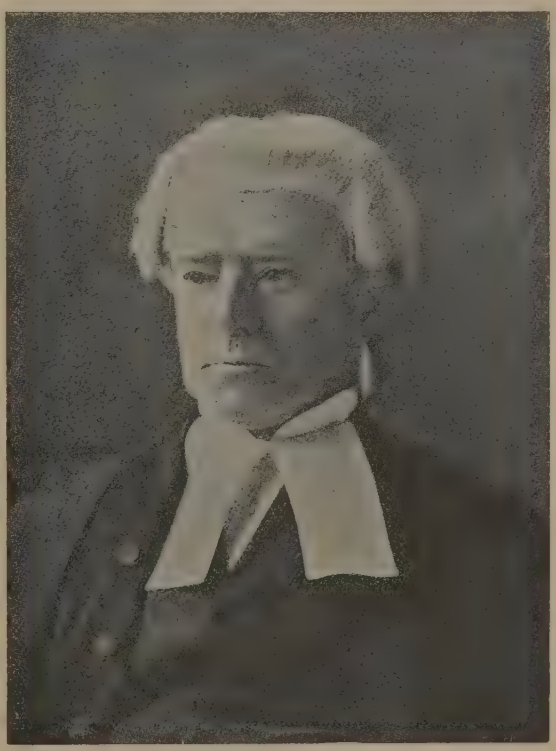
This is the latest addition to Mr Wilson's well-known series of legal "handy books." It deals with the most inhuman topic in the realm of legal literature, a subject properly abused by all right-thinking citizens. One therefore fears lest he should confuse the subject with the writer, and be wanting in justice to the author of a treatise on the death duties. Mr Beatty writes on his subject as though he loved it. He even ventures—so beautifully simple does the whole matter appear to his mind—to tabulate the Finance Acts in less than four pages. His method—a general outline of the system, followed by chapters on Estate Duty, Settlement Estate Duty, Legacy Duty, and Succession Duty—is suited to a presentation of the subject in its most instructive form, and the author has achieved his object in this respect. A citation of the leading cases on the subject assists to make the book admirably suitable for the purpose it is intended to serve.

The Workmen's Compensation Act 1906, *with Notes, and Rules and Regulations under the Act. By W. Addington Willis, LL.B., of the Inner Temple and the North-Eastern Circuit, Barrister-at-Law; being the Tenth Edition of Willis's Workmen's Compensation Acts. Butterworth & Co.; Shaw & Sons*, 1907. *Price* 5*s. net.*

The appearance of another edition of this textbook—the ninth edition was published last February—shews that it has early established itself as one of the very best of the minor treatises on the subject. The principal difference is that the present volume contains in an appendix the Workmen's Compensation Rules, a number of statutory Orders and Regulations applicable to England which have been made by the Secretary of State and the Chief Registrar of Friendly Societies, and a Treasury order regulating fees in County Courts. But apart from that there have been added to the notes a number of recent decisions under the old Acts, such as *Williams* v. *Vauxhall Coal Co.*, *Nicholson* v. *Piper*, and *Darlington* v. *Roscoe & Sons*, most of which are of the first importance. A book such as this does not profess to contain all that is to be said on the Act with which it deals, or even to deal fully with the cases under the previous Acts, which are still of value. But to the ordinary practitioner, who wishes a concise and clear statement with a reference to the principal cases, it is invaluable. For such purposes the scope and method of the work are admirable. The new edition maintains a well-deserved reputation, and it will be found, particularly in England, a readily accessible and trustworthy guide to the statute.

The Late LORD BRAMPTON.

This eminent English judge, "most reverend for his stretched-out life," died on 6th October in the ninety-first year of his age. Certainly the dates in his busy career carry us far back into the nineteenth century. It is thirty-one years since he ascended the Bench (1876); nine years since he retired from it (1898). Sixty-four years have gone by since he was called to the Bar (by the Society of the Middle Temple); and forty-nine since he "took silk." For more than half a century his name has been better known to the general public in England than that of any other lawyer. His personality—his idiosyncrasies and even his limitations—seized hold of the imagination of the man in the street in a way which one almost requires to be a Londoner, or at least an Englishman, to comprehend. Your cabman, your "coster," your railway porter, your racing man, your legion of daily travellers in suburban trains—all these had an interest in and an admiration for Sir Henry Hawkins which has not been accorded to judges more eminent and pleaders more able. His vigorous intellect and forceful character appealed to them—and these qualities were shown in many a *cause célèbre* in which they took the passionate interest of sensation-lovers.



Lord Brampton was not a great judge. He was not, for example, a Sir George Jessel. Nevertheless he had many judicial qualities which gained him the admiration of practitioners. He was a strong man in chambers, and always a strong man in throwing off the fetters of technicality when these seemed to be at variance with sound sense or to hamper justice. On facts he was quick and effective. As a judge in criminal cases Sir Henry had a high reputation. His knowledge of criminal law was exceptionally thorough; and while by many his punishments were considered too severe, by those best qualified to judge they were deemed to be only discriminating and just.

Lord Brampton was the son of a lawyer, Mr John Hawkins, solicitor at Hitchin in Hertfordshire. He was born in that town on 14th September 1817, and he was educated at Bedford School. For some years he practised "the now extinct science" of special pleading below the Bar. Called in 1843, he joined the Home Circuit. At first his success was slow and meagre; and there is no more interesting passage in his "Reminiscences" than that in which he describes the anxious waiting of these early days, his hope and his despair; and the joy with which he received his first fee. But though slowly, his success came surely, and he attained to a very large junior practice. It was in 1858 that he was promoted to be a Q.C., and his professional success as a silk was no less remarkable. He was raised to the Bench in November 1876, being first appointed to the Queen's Bench Division, and subsequently transferred to the Exchequer Division. In 1898 Sir Henry Hawkins retired at the end of the Michaelmas sittings, after twenty-two years' service. On his retiring he was raised to the peerage under the title of Baron Brampton of Brampton, in the county of Huntingdon. Thereafter, for over two years he took part in the judicial work of the House of Lords; but he did not sit on the Judicial Committee of the Privy Council. On the only occasion on which he stood as a parliamentary candidate (in the Liberal interest, and for Barnstaple, in 1865) he was at the bottom of the poll!

Lord Brampton was twice married. There

were no children of either marriage, and the peerage becomes extinct.

Lord Stormonth-Darling, who was absent from Court last week, was able to take his seat in the Second Division on Tuesday, and the sittings of the Extra Division commenced on that day. That Court was occupied on Tuesday and part of Wednesday in the hearing of a reclaiming note against a judgment of Lord Salvesen in the case in which certain lady graduates of the Scotch universities claim the right to exercise the Parliamentary franchise in the university constituencies. The case was taken to avizandum.

SCOTTISH LEGAL APPOINTMENTS.

His Majesty has been pleased, upon the recommendation of the Secretary for Scotland, to approve the appointment of Mr Andrew John Young, advocate, as Sheriff-Substitute of the Sheriffdom of Aberdeen, Kincardine and Banff, in place of Mr Duncan Robertson, deceased; and of Mr Edwin Adam, LL.B., advocate, as Principal Clerk of Session in Edinburgh, in place of Mr Charles Tennant Couper, who has resigned.

The appointment of Mr Young to be Sheriff-Substitute at Aberdeen has been received with great satisfaction in the Parliament House. Mr Young's position at the Bar and his long service as Counsel for the Inland Revenue well justify the preferment which, had it not been for the chances of politics, would have come to him long ago, and he is in every way well qualified as a lawyer to maintain the high standard which the administration of justice in the Sheriff Court of Aberdeen has long enjoyed. A portrait and biographical notice of Mr Young will appear in our next issue.

Mr Edwin Adam has been the recipient of hearty congratulations from his many friends in the Parliament House and in a wider circle on his appointment to the important position of Principal Clerk of Session in the First Division. Mr Adam, who is a son of the late Mr Stephen Adam, wool merchant, and a member of a family well known in Edinburgh and Leith, was born in 1862. He was educated at the Edinburgh Academy and at the Universities of Edinburgh and Leipzic. After graduating as M.A. and LL.B., and serving for a time as Parliament House Clerk with the firm of Morton, Neilson & Smart, W.S. (now Morton, Smart, Macdonald & Prosser), he was in 1885 admitted to the Faculty of Advocates. In the next year he published a very useful collection of Acts of Sederunt, bringing down to date the older collections issued by Mr Alexander. He acted as a reporter for the "Scots Law Times" for the first nine years of its existence, and, since 1893, as the editor and reporter of the official reports of the High Court of Justiciary. There are five volumes of "Adam's Reports." It is interesting to note that both his immediate predecessors in the Principal Clerkship, Mr Couper and Mr Archibald Broun, were also in their day editors of the Justiciary Reports. On the formation of Sir Henry Campbell Bannerman's government in the end of 1905 Mr Edwin Adam was appointed by the Lord Advocate one of the Advocates-Depute. His work in the Crown Office was characterised by care, ability and sound judgment. But Mr Adam is more widely known as a politician. A strong and convinced Liberal, he has made a careful study of politics, and has done much service to his party both as a speaker and a writer. He contested the Central Division of Glasgow in 1895 and the West Division of Edinburgh in 1900. He is the author of a volume entitled "Land Values and Taxation," and his evidence on the subject of the Taxation of Feu-Duties contained a very luminous exposition of the views of those who think with him on that controversy.

The Lord Advocate has filled several legal vacancies which have followed upon the appointment of Mr A. J. Young to be Sheriff-Substitute at Aberdeen, and Mr Edwin Adam to be Principal Clerk of Session. Mr William Thomson, M.A., LL.B., advocate, has been appointed to the office of Advocate-Depute vacated by the promotion of Mr Edwin Adam. Mr A. A. Grainger Stewart, M.A., LL.B., has been appointed Extra Advocate-Depute on the Western Circuit at Glasgow, his appointment to take place at the beginning of next month. Mr W. Lyon Mackenzie has been appointed to the office of Advocate-Depute in the Sheriff Court. Mr William Findlay, M.A., LL.B., has been appointed Counsel for the Crown as *ultimus hæres*. That position has been vacated by Mr Grainger Stewart. No announcement has yet been made as to the vacancy in the office of Standing Counsel for the Inland Revenue caused by the appointment of Mr A. J. Young to be Sheriff-Substitute at Aberdeen.

PRESENTATION TO SHERIFF SIR DAVID BRAND.

Sir David Brand, Sheriff of Ayrshire, was on Monday entertained by the Ayr Faculty of Solicitors at a cake and wine banquet in the Station Hotel, Ayr, and presented with a congratulatory address, enclosed in a silver casket, on the occasion of his having had the honour of knighthood conferred on him. Mr Archibald Brakenridge, solicitor, Cumnock, Dean of Faculty, presided.

The address, which was presented by Mr

Brakenridge, stated that Sheriff Brand throughout his long and honourable connection with the county of Ayr as Sheriff, an office he had filled for more than twenty years, had earned and enjoyed the confidence of the public, and during that time good feeling and cordial co-operation had distinguished in a prominent degree his relationship to the members of the Faculty. The members acknowledged with gratitude the kindly and beneficial interest he had uniformly manifested in all matters affecting their interests as a body of practising solicitors.

The Dean, in presenting the address, said their guest, after being educated at Glasgow, Edinburgh, and Heidelberg, had been admitted to the Faculty of Advocates in 1864, and by his acknowledged abilities and perseverance attained an extensive practice at the Bar. In the year 1880 he was appointed an Advocate-Depute, a position which he held till 1885, when he was appointed Sheriff-Depute of the important county of Ayr. In 1886 he was appointed the first Chairman of the Crofters Commission. He was also appointed Chairman of the Royal Commission on Highlands and Islands, 1890, and a Commissioner under the Congested Districts (Scotland) Act 1897. Sir David Brand early earned, and after an experience of twenty-two years he still retained, the affection and esteem, the confidence and gratitude, of all the members of Faculty, which he secured by his professional learning and ability, by the soundness of his judgments, and by the kindly interest and attention which he had uniformly given to all matters brought under his notice affecting the status and interests of the local Bar.

Sir David Brand, in replying, said the address filled his mind with the most stirring emotions and feelings of gratitude. The numerous and pressing judicial and administrative duties which had been placed upon him had been fulfilled not only with the greatest friendship between the Sheriff-Substitutes and the Sheriff, but also between the Bar and the Bench. In the county of Ayr, and in the relations he had mentioned, this friendliness had prevailed and increased to the utmost, and each party had done their best to carry out their duties to the end of reaching harmonious feeling and impartial justice. No county in Scotland had done more to enrich the Scottish Bar from the days of Lord-President Blair and Lord Alloway onwards, and he doubted not that in the future the sons of the law would flourish and increase in number. So long as he could work at their side so long would he endeavour to reach the point at which they all aimed, and at least he would try to do his cripple best. If there was one city in the empire which profited more than another by the town of Ayr, it was the city of Glasgow. It had appropriated and reaped advantage from the talent of Ayrshire. There was hardly a department of human effort in Glasgow which did not owe much of its strength and force to the county of Ayr. Concluding, the Sheriff said long might the county of Ayr flourish and grow rich, long might the town of Ayr prosper, with its life renewed by the rebuilding of the Auld Brig, and long might the Faculty of Solicitors prosecute the learned profession to which they belonged.

THE COUNTY OF EAST LOTHIAN.*

To the traveller by rail or motor car intent on getting from Berwick to Edinburgh as quickly as possible, East Lothian appears to be merely one vast market garden. It is really one of the most interesting counties in Scotland, and though its only lake, beautiful as it is, is artificial, the charms of sea and moor and woodland, of the winding Tyne and of the glens and ravines on its eastern borders, give East Lothian a distinction unsuspected by those who know it only as the home of high farming. In nearly every parish old churches and ruined castles teach history. It is a land of ancient prosperity and of valiant deeds.

Mr Green tells us that his book is neither a history nor a guide-book. It has, however, a quality which many histories and most guide-books lack: it is eminently readable. If in the matter of history it is professedly incomplete, it is accurate, and though no special research has been undertaken, the recognised authorities have been consulted and summarised with lucidity and intelligence. It may not be a guide-book, but no traveller in East Lothian and no East Lothian man ought to be without it. Few Scotsmen indeed will fail to learn something from its pages. The Glasgow man, for instance, will learn that his patron saint came from the near neighbourhood of the home of Mr Balfour. St Mungo's mother was the daughter of the king who gave his name to Lothian, while the Princess Thenew's memory is perpetuated in the odd name of the central station of the Glasgow and South-Western Railway, itself derived from the adjacent church. St Oswald, whose daughter founded the vanished church of "St Ann's upon Dunbar sands," has given his name to a ravine near which both the battles of Dunbar were fought. St Baldred of course is East Lothian's own peculiar saint, and from his days down to those of Dr Brown of Haddington, who knew thirteen languages, the county has a long succession of divines and prophets. John Knox, Principal Robertson, one of the greatest of historians, Robert Blair and John Hume, show how varied in their tastes and achievements the ecclesiastics of East Lothian were.

The carelessness of our ancestors and the

* *East Lothian.* By Charles E. Green. Edinburgh and London, 1907: W. Green & Sons.

depredations of English invaders (more especially Cromwell) have deprived East Lothian of many of its historic monuments—most notable, perhaps, was the vanished palace of the great house of Seton; but though there is no Melrose and no Dryburgh, as Roxburghshire and Berwickshire can boast, it has at least two ancient churches which have suffered at the hands neither of the invader nor of the restorer—Whitekirk and Dunglass; while Tantallon and a large number of smaller seats of strength shew how well and truly our forbears builded. This excellent book is made most attractive by plans, portraits, copies of old engravings and reproductions of modern photographs. R. F. B.

Mr Henry J. Ferguson, S.S.C., late of Edinburgh, has been admitted at Wellington by Sir Robert Stout, Chief Justice, as a Solicitor of the Supreme Court of New Zealand.

The firm of Maconochie, Duncan & Hare, W.S., in which the late Mr David Duncan, advocate, was a partner along with Mr J. H. Sang and Mr A. W. Hog, and the firm of Adam & Sang, W.S., in which Mr Sang was sole partner, will now be carried on by Mr Sang and Mr Hog under the firm name of Maconochie, Duncan & Hare, W.S., at 10 Hill Street, Edinburgh.

Faculty of Advocates.—A meeting of the Faculty of Advocates was held on Wednesday — the Dean of Faculty (Mr William Campbell, K.C.) in the chair. The Chrystie bursary of £18 a year, tenable for four years at the University of Edinburgh, which is in the gift of the Faculty, was awarded to Mr Alfred Ernest Warr, The Manse, Roseneath. A committee was appointed to consider and report on the Criminal Procedure and Summary Jurisdiction (Scotland) Bill.

Law Agents' Examinations.—The quarterly examination in law was held in Edinburgh last week. Fifty-one candidates presented themselves for examination. Forty-six of these were examined in all the subjects, and nineteen passed. Five graduates in law (LL.B. or B.L.) were examined in Court Procedure, and three passed. The following is the official list of the gentlemen who passed the examination in law:—Thomas James Addly, George Cairns, Nathaniel Henry Cosh, Arthur Joseph Cubberley, William Drysdale, George Dundas, William Fyfe, James Gill, William Grant, John Wishart Henderson, M.A., B.L., Robert Cumming Thomson Mair, M.A., B.L., James Campbell Morrice, William David Reid, Thomas Park Riddell, M.A., LL.B., William Melvin Ross, George James Sheriff, Herbert Shield, John Mollison Spink, Robert Forrest Steel, John Archibald Vicars, James Wells.

INTRODUCTORY LECTURE BY PROFESSOR IRVINE AT ABERDEEN.

Professor Irvine, the successor to Sheriff Kennedy in the occupancy of the Chair of Law at the University of Aberdeen, gave his inaugural lecture in the Portrait Gallery, Marischal College, on Monday. Principal Lang presided, and a large number of gentlemen connected with the legal profession were present.

Principal Lang, in introducing Professor Irvine, said it was only like yesterday—though it was in 1901—since he introduced Neill John Downie Kennedy to the Faculty and Chair of Law. They had parted with him with deep regret, congratulating him on his appointment to the Sheriffship of Renfrew and Bute, but feeling that a very able teacher, wise administrator, and genial friend, had been taken from them. Men went and came, but the law went on for ever. He now had the happiness of welcoming one who in all respects was a fit and proper successor to Sheriff Kennedy, and he might add to the venerable friend who still was spared to them, and long might he be spared—Emeritus Professor Dove Wilson. Of Professor Irvine in his presence it would be unbecoming of him (Principal Lang), as it was superfluous for him, to say much. Professor Irvine would protest—"Let me be tried by the future, let my students, my University, the legal profession, and the community of Aberdeen judge me by their experience of me in the chair, at the Senatus, and in the city—in the meantime no certificates." And yet, without overstepping the limits of good taste, it remained for him on behalf of the University Court and Senatus to express the assurance that Mr Irvine would amply justify the expectations that were based on his University record, on his professional practice at the Bar, on his work as law reporter, compiler, and author, and on the services that he had rendered as lecturer on civil law in the University of Glasgow. Professor Irvine did not speak to them that day as a complete stranger in a strange land. The lamented death of Sheriff Robertson had given him a foretaste of Aberdeen, at all events, of those aspects of it, not the most graceful or delightful, which were contemplated by the judge who presided in the Sheriff Court. No doubt what Professor Irvine had seen and heard would be useful to him in the work which he now undertook. He now passed into a serener atmosphere; "strive and thrive" was their word to him. He asked Professor Irvine to begin the labours of that honourable position to which he had been called.

Professor Irvine, who was cordially received, said:—It is with a deep sense of responsibility that I take up the work of Professor of Law in this University. The Chair of Law in Aberdeen has a long and illustrious history, and—not to

go further back than my two immediate predecessors in the occupancy of the chair—I am well aware that it is no easy task to prove a worthy successor to men of the distinction of Dr Dove Wilson and Sheriff Kennedy. Dr Dove Wilson was called to the chair after a long experience in judicial work. He had also contributed to the literature of the law of Scotland a treatise which all Scots lawyers know from their professional experience to be one of the most practically useful Scottish law books published during the last century. During his tenure of the chair his researches in the historical development of our law have made his name familiar to many far beyond the limits of Scotland. No less conspicuous than his attainments as a scholar and a lawyer has been his untiring zeal in the advancement of every good cause—educational and professional, civic and public. Mr Kennedy came to this chair fresh from the dust and tumult of the forensic arena. He brought with him a wide experience in the practice of law, a rich and varied learning, lightly borne, a happy faculty of picturesque speech and winsome humour. These gifts he used freely in the service of the University. His appointment to the Sheriffship of Renfrew and Bute—an appointment ratified with singularly unanimous approval by the legal profession in Scotland—meant a great loss to this University. Our good wishes go forth to him in his new office, and we look forward with confidence to his having, in the judicial sphere, a long career of useful public service. To their successors in this chair these two distinguished men have handed down a standard of reputation and achievement inspiring but not easy to emulate.

It is usual, I believe, on an occasion of this sort for the neophyte professor to select a topic with a designation more or less sonorous, and connected more or less remotely with the subject of the chair. I prefer—for I think it may be more useful—to put aside more ambitious topics, and to say something of the special work of this chair and of the relation of that work to the University and to the legal profession in Scotland. A notable feature—perhaps the most notable feature—of this chair is that it includes both Roman law and Scots law. On its Roman law side, the work of the chair forms part of the curriculum both in the Faculty of Arts and in the Faculty of Law, for in the Scottish universities Roman law is a qualifying course for a degree in arts as well as for the degrees in law. This double aspect—this twofold function—of Roman law in the scheme of university studies is highly significant. It means that the study of Roman law is recognised not merely as forming part of a strictly professional training, but also as forming part of a liberal education, that is, as furnishing in itself an intellectual and moral discipline. The value of Roman law as a purely educative subject has been fully recognised in the universities of Western Europe from the time of the Renaissance—that great intellectual movement to which most of our older universities owe their existence. Its value for this purpose is to-day accepted with almost equal fulness by the more modern universities both in England and in the United States. For the same reason, too, the Civil Service Commissioners—a severely practical body—select it as one of the subjects wherewith to test the education equipment of candidates for the Indian Civil Service and the more responsible positions in the home service. Further, Roman law has an intimate connection with most of the standard departments of the Arts curriculum. Thus, as regards classics—without a knowledge of Roman law, the genius of Rome and much of her literature can be understood only imperfectly. After all, Rome's great gift to the world was not her literature but her law. As regards history and economics, the law of Rome has played so large a part in making modern Europe and in moulding the fundamental institutions of Western civilisation that some knowledge of it is necessary to every serious student of political and economic development. The fact that it has filled so large a space in human history is undoubtedly a main reason for the zeal and enthusiasm devoted to its study by modern scholars and for the place it holds in modern education.

As regards its relation to moral philosophy and ethical science, the law of Rome achieved its perfection chiefly through the influence of that great ethical conception known to the Roman lawyers as *jus naturalis*—and the *jus naturalis* was, in substance, simply the application of the ethical doctrines of the Stoic philosophy to practical life. The close relation of law to ethics—a relation which the Roman lawyers never forgot—was, indeed, the secret of the greatness of the law of Rome, and has been, in no small measure, the reason of its permanent influence. The relation of Roman law to these and other departments of the Arts Faculty is a tempting theme for discourse. I trust that this side of the work of this chair will not be lost sight of, and that, to a greater extent than hitherto, Roman law may win for itself a place—a real and genuine place—in the Arts curriculum of the University. At the same time the main work, the special sphere and function, of this chair—both in Roman law and in Scots law—is, and must always be, the training of lawyers. In the Faculty of Law the University holds itself out as affording an efficient and systematic education in law—such an education as is adapted to prepare and equip a man for the work of a professional lawyer. While a University Faculty of Law does not exist solely for the purpose of professional training, the great majority of the students in such a faculty must always be men who are

preparing to enter some branch of the legal profession.

For the purpose of professional training, the combination of Roman law and Scots law in a single chair is not inappropriate. Our Scots law is a direct descendant of Roman law. In the words of the late Lord President Inglis, "Roman law is the rock out of which Scots law has been hewn." The divisions and categories of our Scots law, most of our fundamental principles, many of our most important rules and maxims, most of our legal terminology, are taken directly from Roman law. So intimately related are the two systems, that from the point of view of a Scots lawyer the two subjects are not really separate. When a student, with a knowledge of Roman law, comes to the study of Scots law, he finds himself already familiar with its legal methods and general principles, and for centuries the voice of Scots lawyers has been unanimous in pronouncing the study of Roman law essential to a thorough understanding of the law of Scotland. As regards Scots law itself, it is necessary for the student to keep always in mind that University teaching constitutes only a part—an important part—but still only a part of his professional training. There are many things in which a student of law must minister to himself. There is much which he can learn only in the school of professional experience and practice. It is not within the walls of a University that a great lawyer can be made. The study of law is the work of a lifetime.

The relation of University teaching of law to the practice of law is, indeed, simply the relation of a science to an art. All that a university professes to do is to treat the general doctrines of law and legal methods: to expound succinctly the main rules; to aid the student to master principle, and study the reason of the rules; to train him in the analysis of complicated facts so that he may be able to cast aside irrelevancies and seize on the legal principle underlying the facts. As to the details, the styles, the forms of process, the matters of practice, the most efficient education in these things must always be found in the office, or the court, or the consulting room. For students of law as well as for teachers, it is all-important to keep in touch with professional life. Do not let the walls of the university shut us off from the life and movement of practice. If the Faculty of Law in this university is to develop and perform its functions efficiently it must co-relate itself with its legal environment, and I trust that the relation between this Faculty and the legal profession in the city will always be that closest of relations—the relation of mutual helpfulness. The close association between the Scottish universities and the learned professions has been an unmixed benefit to both. It has kept the universities in sympathy with actual work-a-day life and it has broadened the basis and strengthened the fibre of the profession. In recent years there has been a remarkable advance in public opinion as to the standard of professional training and qualification required in public servants of every kind. A striking illustration of this tendency is found in the new regulations for the training of teachers, whereby a definite course of professional study is prescribed for intending teachers, and the whole system of training is brought into close association with the work of the universities. In the profession of law—as in the Church and medicine—it has been well recognised for many centuries in Scotland that a course of university study is on the whole the most effective preparation for professional work. In this respect—as in many others—Scottish lawyers have followed the system of legal education universally practised on the Continent. In England and the United States—for reasons into which I need not enter—legal education was for many years regarded as falling outwith the sphere of the universities. Of course, very many of the most eminent English lawyers, from Blackstone downwards, were university men, but the rank and file of English lawyers, and particularly of English solicitors, were not educated at a university. During the last thirty or forty years, however, a resolute effort has been made, both in England and the United States, to remedy this state of matters. As a result of this remarkable movement—which is simply another illustration of the advance in public opinion as to the standard of professional requirements—the English universities, old and new—now provide a wide range of instruction in law, and it is not too much to say that the professional education of English lawyers is rapidly being reorganised on a broad and deep academic basis.

After referring to the development of university teaching in law in the United States, and to the necessity for a fuller law curriculum in Aberdeen University, Professor Irvine proceeded:—

To the community at large, as well as to the University, it is important that the Faculty of Law should be enabled to furnish a full curriculum of legal education. In proportion as society becomes more organised and more civilised, the scope of law constantly increases—extensively and intensively. The range of subjects dealt with and regulated by law grows in extent, and at the same time the law itself becomes more intricate and complex. As a consequence, the part played by lawyers in the community, and the functions of lawyers in the daily life of the citizens, extends year by year. An ignorant or dishonest lawyer is a public danger. It is, then, a matter of interest in the community at large that lawyers—no less than doctors or teachers—should be properly trained for the performance of their duties. If the proper training of lawyers is a matter of importance in the public interest, it is certainly not less urgent from the point of

view of the legal profession. The profession of law is a calling, not a craft. "*Namque colimus justitiam.*" The functions of the members of the profession vary. There are judges, there are counsel, there are solicitors, and there are many engaged in administrative work. But we are all members of one body.

The profession is a great unity, inheriting high traditions and organised to serve high public ends. From time immemorial, in all countries, it has been the duty of the profession to protect itself and the public from incompetent and vicious practitioners. To attain this object no better or more efficient means can be desired under present conditions than a careful provision for the training of, and the maintenance of, a high standard of education among its new members. I do not wish to exaggerate the value of university teaching. A university cannot give a man common sense, or tact, or self-possession, or that sympathy with and knowledge of men essential to a lawyer. But it can teach him the principles of law, widen his outlook, and strengthen his powers of exact reasoning and clear statement. Further, experience shows—and in this experience is our safest guide—that trained intelligence, the faculties developed by university discipline, tell more and more effectively as a man rises in the profession. To the judges, or the busy counsel, or the lawyer advising on large and delicate affairs, his university training is more useful than it is to the clerk who books the office letters. I trust, too, that it can be said that a sound university education in law develops a man's moral as well as his intellectual qualities. His ideals are heightened; he comes to realise, and to feel, something of the inspiration of the great traditions of the profession. These high ideals, these great traditions, are, indeed, from the moral point of view, one of the most valuable bequests of Roman jurisprudence. "*Est quidem res sanctissima civilis sapientia.*" The almost sacred character of the "*professio juris*"—a theme on which the Roman lawyers loved to dwell—is not so much present to our minds in these modern days, though the idea survives in the fact that the legal profession—like the Church and the Army—is traditionally under stricter rules of honour and conduct than other citizens. But another great Roman conception—the conception that the legal profession is an organisation whose chief end and purpose is not private gain but the public weal and the service of the State, still remains with us. Let us who are members, or are preparing to be members, of the legal profession in Scotland, so act that we shall merit the memorable meed of praise bestowed by a Roman emperor on the lawyers of Rome—"They, too, fight for the Empire."

LAW LIBRARY.

BOOK NOTICES.

The Sheriff Court Code (Civil Procedure), being The Sheriff Courts (Scotland) Act 1907 *(with Notes explanatory of the origin and inter-relation of the enactments and Procedure Rules), and an Appendix of Forms. By Thomas Alexander Fyfe, one of the Sheriffs-Substitute of Lanarkshire at Glasgow. Glasgow and Edinburgh,* 1907: *William Hodge & Co. Price* 16*s. net.*

It is in every way appropriate that a work on The Sheriff Courts (Scotland) Act 1907 should come from the pen of Sheriff Fyfe. A judge of recognised ability and wide experience, he has for many years taken a leading part in the movement for Sheriff Court reform which has culminated in the passing into law of the Act of last session with a new code of rules for regulating and symplifying Procedure and forms of Process in the Sheriff Court. Mr Fyfe's book commences with an interesting introduction tracing the development of the Sheriff Court system and the powers and duties of the Sheriff. Then follows the text of the new Act, printed in large clear type and with numerous notes, both to the sections of the Act itself and to the sections of the schedule containing the rules of Procedure. These notes will be found very useful, as they indicate the alterations made under the new Act and give cross references to the rules and to the sections of former Acts which stand unrepealed. Mr Fyfe has printed also the report of the Departmental Committee on Sheriff Court Procedure upon which in the main the new Act is based, and the work concludes with a selection of illustrative forms of initial writs as shortened and simplified under the Procedure rules. An Appendix contains the section of Sheriff Court statutes still operative, and there is a satisfactory index. The book, which extends to 223 pages, is not of course intended in any way to cover the ground of Mr Dove Wilson's book on Sheriff Court Practice or of Sheriff Lees' collection of Sheriff Court Styles, and naturally there are no references to decided cases. Doubtless sections of the new code will be open to construction, and in a future edition Mr Fyfe may have to amplify his notes by referring to decisions as to the meaning of the provisions of the Act. With the possible exception of the report of the Departmental Committee, which is now more or less of academic interest, the book is one which every practitioner in or official connected with the Sheriff Courts of Scotland should read from cover to cover.

The Law Relating to Covenants in Restraint of Trade. Second Edition. By Joseph Bridges Matthews and Herbert M. Adler,

M.A., LL.M., both of the Inner Temple and Oxford Circuit, Barristers-at-Law. London, 1907: *Sweet & Maxwell Ltd.*
Price 7s. 6d.

The special branch of law with which this book deals is examined by the authors with great care and minuteness, and their treatment of the subject shows a thorough appreciation of the legal principles which have been discussed in detail in many of the cases on restraint of trade. Naturally much space is devoted to an examination of the judgments in the case of *Nordenfelt* v. *Maxim Nordenfelt* in the House of Lords [1894], A.C. 535, the leading case on the subject, where much of the previous case law was reviewed. In addition to a general treatise the book contains a "Digest of all the cases from 1711 to the present time," arranged in chronological order, and also tables showing at a glance what covenants in restraint of trade have been held valid and what invalid. So far as we have observed, only two Scots cases are cited—the one incidentally, *Ballachulish Slate Quarries* v. *Grant*, 1903, 5 F. 1105—and *Stewart* v. *Stewart*, 1899, 1 F. 1158, which finds a place in the digest. This latter case (where a photographer who had undertaken not to start work as a photographer within twenty miles of Elgin in consideration of a loan of £5 was held bound by the contract) is regarded by the learned authors as wrongly decided. The book does not contain any reference to two other cases also reported in Vol. I. of Fraser, *The Dumbarton Steamboat Co.* v. *Macfarlane*, and *Williams & Son* v. *Fairbairn*. So far as English decisions are concerned the digest seems to be exhaustive.

Private Legislation (Scotland) Reports. Vol. VI. By D. Oswald Dykes, M.A., LL.B., and John W. More, M.A. Edin., B.A. Oxon., Advocates, and A. Beveridge, Parliamentary Solicitor. Session 1906. *Edinburgh & London: William Green & Sons.* *Price 15s. net.*

This issue of the Private Legislation Reports, Vol. VI. of the series, is the second volume for which Messrs Dykes, More and Beveridge are responsible. Eleven Provisional Orders are reported in the volume, and many points of importance are dealt with. It contains 90 pages as against 52 in Vol. V., and the reports are in every way satisfactory.

Forms and Precedents for the use of Accountants. Prepared by Specialists in each Department under the General Editorship of George Lisle, C.A. F.F.A. Vol. II.: Landlord and Tenant to Writings in re Mercatoria. Edinburgh and London: William Green & Sons, 1907. *Price 20s. net.*

This volume completes the Forms and Precedents for the use of Accountants issued as a companion series to the Encyclopædia of Accounting. Under such headings as Landlord and Tenant (which contains forms of leases here and in England), Liquidators' Accounts, Local Authorities' Loans in England and Scotland, Parish Council Accounting, Partnership, Probate and Letters of Administration, Revenue Accounts, Sequestrations, Stamp Duty, and Underwriting, are to be found a large number of specimen accounts and well-considered styles with a variety of useful explanatory notes. The "Forms and Precedents," along with the Encyclopædia, will find a place on the bookshelves of many men of business as well as on those of accountants and lawyers.

An Outline of the Law of Joint Stock Companies for the Use of Students. By H. P. Macmillan, M.A., LL.B., Advocate. Edinburgh: Andrew Baxendine, 1907.
Price 3s. 6d. net.

In 1901 Mr Macmillan delivered a course of lectures under the auspices of the Institute of Bankers in Scotland on the subject of the Companies Act of 1900. Lectures on that subject naturally involved a general view of the Law of Companies in order to explain the modifications made by the Act. The lectures have to some extent been remodelled on revision prior to publication, and the volume now issued contains a complete, though of course only a general, survey of Company Law. It is written in the lucid style which characterises Mr Macmillan's pleadings both verbal and written, and shows great discrimination in the choice of points worthy to be discussed in a book which professes to be an outline of its subject. It is an admirable book for students, and we are not surprised to notice that the Institute of Bankers have chosen it as a text-book.

The Parliament House Book, 1907–8. *Eighty-third Publication. Edinburgh: William Green & Sons.* *Price 7s. 6d.*

The new issue of the Parliament House Book has as usual appeared at the commencement of the winter session. The Parliament House Book requires no introduction to the legal profession in Scotland, as it has long been recognised as a most complete and valuable book of legal reference. The legislation of last session has added a considerable amount of new matter to this year's issue, and the general information contained in the volume has been thoroughly brought down to date.

A. J. YOUNG, Esq., Advocate,

Sheriff-Substitute of Aberdeen, Kincardine and Banff.

The subject of our portrait this week is Mr Andrew John Young, who has taken up his duties as Sheriff-Substitute and has received a very gratifying and hearty welcome from the legal profession and the public in the city and county of Aberdeen. Mr Young, who is a son of the late Mr William Young, Solicitor and Banker, Auchterarder, and for many years Commissary Clerk of the County of Perth, was educated at the Perth Academy and at the University of Edinburgh, where he graduated as Master of Arts. In 1868 he was admitted to the Faculty of Advocates. He soon proved himself a capable counsel. His written pleadings were careful and concise, and in Court he was known as a lucid and forcible debater, a skilful cross-examiner, and a telling jury pleader. As he held the office of Junior Counsel for a public department he was practically precluded from "taking silk," but he was frequently employed as a Senior, and in that capacity he appeared in recent years, in many well-known cases both in the Civil and the Criminal Courts. In 1886 Mr Young was appointed (in succession to Mr Campbell Lorimer, who became an Advocate-Depute) Counsel to the Inland Revenue. As the holder of that office it fell to him to conduct a large (and in recent years an increasing) number of important cases in all branches of Revenue Law. Successive law officers of the Crown much relied on his thorough knowledge of the statute and case law of the intricate subject of taxation.

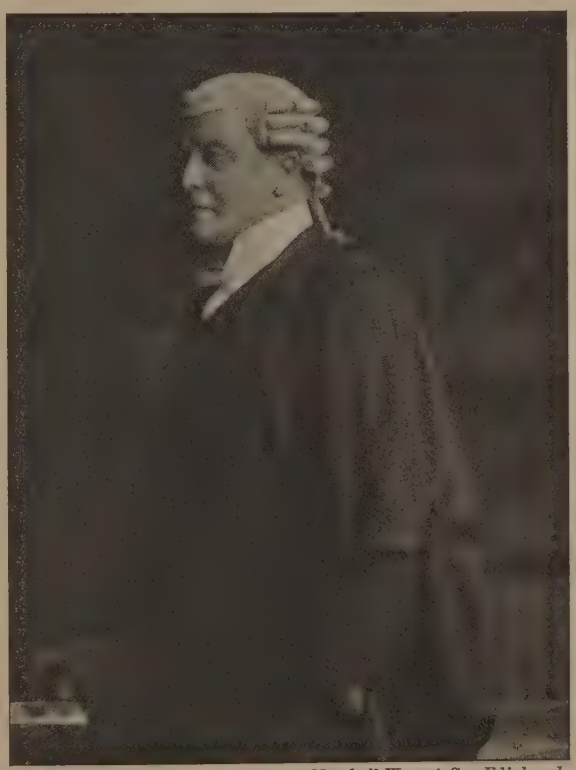


Photo by] [*Marshall Wane & Co., Edinburgh.*

Mr Young has been widely known as a Liberal, and has for many years been an active supporter of his party.

Sheriff Young was on Friday, 25th October, introduced to the Bar at Aberdeen by Sheriff-Principal Crawford, K.C. There was a large attendance of the profession and of the public. Sheriff Begg, Lord Provost Sir Alexander Lyon, the City Treasurer, the Magistrates, the Town Clerk, and Town Clerk Depute, were seated on the right of Sheriff Crawford. On the left were Professor Irvine (who has been acting as Interim Sheriff-Substitute), Colonel Innes (the father of the Faculty of Advocates), Hon. Sheriffs-Substitute Douglass Duncan, James Duguid, Henry Peterkin, and James Murray.

Sheriff Young having presented his commission, Sheriff Crawford ordered it to be read. This was done by Dr Littlejohn, Sheriff-Clerk, the audience standing. The commission was then ordered to be engrossed.

Sheriff Crawford said—In addressing a legal audience it is superfluous for me to introduce Mr Young. He is known to you all, and to many of you personally, as a lawyer of ripe experience in the practice of his profession and a man of ability. He has, for a good many years, held the office of Standing Counsel to the Inland Revenue, a post which could not be conferred upon anybody but a sound and able lawyer—and during the term of his tenure of that office, with the growth of the business of the country the importance of it has considerably increased. Now he has come to us at Aberdeen, followed by the warm good wishes of his contemporaries in Parliament House, who are sorry to take leave of a very popular figure there. Here, I doubt

not, he will speedily make friends also, and he will find a sphere—a very full and varied sphere—of congenial work. I shall not presume to say more about Mr Young's legal qualifications, nor shall I pretend to speak to him as a judge when he is only putting on his harness. This I know, that no man could come here with a more strenuous resolve than he to maintain the high standard of those who have gone before him in the office which he is to occupy—or better qualified, in my mind, to continue those satisfactory and happy relations which subsist between the Bench and the Bar here. And now, in the presence of the Bar, in the presence of the Lord Provost and Magistrates of the city, in the presence of my friend the father of the Scottish Bar, I heartily bid him welcome here, and request him to take his seat on the Bench.

Sheriff Young then took his place on the Bench.

Sheriff Henderson Begg said—I need not say that I concur entirely in every word you have said in regard to my old friend Mr Young. It gives me peculiar pleasure to welcome him as my colleague here, and to renew the happy relations which endured between us when we were both at the Bar. I have not the least doubt he will prove a worthy successor even to the distinguished judge who has now left us.

Mr James Ross, President of the Society of Advocates—In name of the Society of Advocates, I desire on behalf of the members of that Society to offer to Sheriff Young a most cordial welcome to Aberdeen, and to assure his Lordship of their loyal and hearty co-operation and assistance in the conduct of the business of this Court. I do think that hitherto we have been exceptionally fortunate in Aberdeen in getting Sheriffs of conspicuous ability, and when we consider the reputation of Sheriff Young and the high position he has occupied at the Scottish Bar, the members of our Society feel assured of the continuance of the high order of ability and talent with which the judicial business of the north-eastern counties of Scotland has been conducted.

Mr John Craigen, President of the Society of Solicitors—It gives me very great pleasure to have the opportunity on behalf of the Society of Solicitors to join with your Lordship, the Sheriff-Principal, and my friend Mr Ross, in offering to Sheriff Young our cordial congratulations on his appointment, and a hearty welcome to the city of Aberdeen. It will be readily acknowledged, as my friend Mr Ross has said, that Aberdeen has been exceedingly fortunate in its Sheriffs, who have invariably been eminent and distinguished men of sound judgment and high judicial capacity; and knowing as we do the distinction which Sheriff Young has achieved as an advocate, and his reputation as an able and accomplished lawyer of wide experience, we readily recognise in him a worthy successor of the best traditions of the Bench.

Lord Provost Sir Alexander Lyon said—Sheriff Young, on behalf of the Magistrates and the members of the Town Council and the whole of the citizens of Aberdeen, I offer you a very hearty welcome to the city of Aberdeen. When my friend on my left, Sheriff Begg, came here first I noted that he said he had left with very considerable regret his many kind friends in the West. I have no doubt you, sir, have left many kind friends in the South; but I trust you will come amongst a class of people who will no less be friends to you in the future. Perhaps the Aberdonians are colder at first, but I am quite sure, with the reputation you bring to Aberdeen, that our hearts will warm towards you, and to-day, on behalf of the different bodies I represent, I give you a very hearty welcome to Aberdeen.

Sheriff Young, who had a most cordial reception, said—My Lords and gentlemen, I have to thank you with all my heart for the warm welcome extended to me, and for the kind words used in my favour—words which I think are due rather to the gracious sympathy of my well-wishers than to my deserts. I will only say this, that I am not without some true sense of the responsibilities attaching to the duties which I have to discharge in so important a Sheriffdom, and there is present in my mind also a full consciousness of the difficulty there may be in filling the place of one for whose loss there has been general regret and sorrow. The late Mr Robertson had an individuality of his own—and possessing a clear insight and strong common sense, achieved a remarkable success among you, and has left behind him a record of work well and faithfully done. If coming now I have any confidence and courage in entering upon the duties of my position, it is just because I can rely on receiving every assistance from my old friend and esteemed colleague, Sheriff Begg, as well as from the experienced officials of the Court. I know from the highest quarters and on the most eminent authority that I can depend—and this is a great deal to say, more than I can tell—upon the excellent help from the lawyers practising at this Bar, holding as they do an established reputation for learning and ability. Again I thank you, my Lords and gentlemen, for the extreme kindness of your reception, and I trust that our relations to one another will always be of the best.

The Court then adjourned.

The Inaugural Address of the ninety-third session of the Scots Law Society will be delivered by the Hon. Lord Guthrie in the Conveyancing and History Class Room, University, on Monday, 4th November, at 8.30 p.m. The Right Hon. Thomas Shaw, K.C., M.P., Lord Advocate, will preside. The subject of address is "The Treatment of Criminals in Scotland."

The New Principal Clerk of Session.—Mr Edwin Adam presented his commission as Principal Clerk to the Lord President and the Judges of the First Division on Tuesday morning. The Lord Advocate and a large number of members of the Bar were present. In accordance with practice, Mr Adam underwent his trials, which consisted in drafting an interlocutor on a case which was advised. The proposed interlocutor was approved by the Court. Thereafter the Lord President administered the oath and welcomed Mr Adam to his place at the table.

DECISIONS IN THE ENGLISH COURTS.

Kruger & Co. Ltd. v. *Moel Tryvan Ship Co. Ltd.*

Ship — Bill of Lading — Reparation — Negligence.—Decision of the Court of Appeal (*ante*, Vol. XIV. p. 172) *affirmed*.—House of Lords (Lord Loreburn, L.C., Earl of Halsbury, Lord James of Hereford, and Lord Atkinson).—4*th July* 1907.

Boussod, Valadon & Co. v. *Marchant.*

Trade Name—"Goupil Gallery."—The plaintiffs were successors of Goupil, and as such were entitled to call their picture-selling premises by the name of the "Goupil Gallery," and to restrain others from using the name. They entered into an agreement with the defendant by which they sold the furniture and fittings in their premises to him and appointed him sole agent for them in the United Kingdom.—*Held* that in the circumstances the plaintiffs were not entitled to restrain the defendant from using the name "Goupil Gallery" in connection with the business carried on by him.—Chan. Div. (Parker, J.)—8*th July* 1907.

"The Langdale."

Ship—Collision—Limitation of Liability.—*Held* that sect. 69 of the Merchant Shipping Act 1906 (6 Edw. VII. cap. 48) was not retrospective.—P. D. and A. Div. (Bargrave Deane, J.).—8*th July* 1907.

A QUESTION OF APPORTIONMENT.

By Charles Milne, Esq., M.A., LL.B., Advocate.

Difficult questions sometimes arise when a dividend or bonus has to be apportioned between a liferenter and a fiar. In regard to one point in particular the law on the subject is uncertain, viz., as to what is the exact period referred to in sect. 5 of the Apportionment Act 1870, in respect of which an apportionment should be made. The existence of this uncertainty as to the proper period results in a highly unsatisfactory state of affairs, since some business men adopt one system of apportionment while others adopt a different system, and the relative interests of liferenter and fiar are differently affected according to which system is adopted. The second and fifth sections of the Apportionment Act 1870 are as follows:—

§ 2. "From and after the passing of this Act, all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly;" and

§ 5. ". . . . The word 'dividends' includes (besides dividends strictly so-called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made; but the said word 'dividend' does not include payments in the nature of a return or reimbursement of capital."

The point arises in connection with the words "and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made." Let us take a concrete case. A company pays its dividends half-yearly in the usual way; and suppose, for example, that at a meeting on 3rd April 1903 a dividend was declared "for half year ending 28th February 1903, payable 16th April 1903." Suppose further that a person who in virtue of a liferent was entitled to the dividends died on 30th November 1902. In a question of apportionment of the dividend between the representatives of the liferenter and the fiar, is the half year to be considered as the six months ending 28th February, or the six months ending 16th April? In the former case the proportion of the dividend falling to the fiar will be a proportion corresponding to the period from 30th November 1902 to 28th February 1903; in the latter case his

share will correspond to the longer period from 30th November 1902 to 16th April 1903. Now the words of the statute seem quite unequivocal. It is the "period for or in respect of which" the payment is made, which in the case figured above seems to be the six months ending 28th February 1903, the last day of the half year during which the dividend was declared to have been earned. There has, however, never been any judicial decision on the point either in England or in Scotland since the passing of the Apportionment Act 1870, although a similar question was expressly raised and argued in two English cases, *Hartley* v. *Allen*, 27 L.J. Ch. 621, and *Maxwell, In re*, 32 L.J. Ch. 333; but, be it noted, the decisions in both these cases proceeded on an interpretation of sect. 2 of the earlier Apportionment Act of 1834, 4 & 5 Will. IV. c. 22, which says:—

> ". . . . He or she (*i.e.* the liferenter, etc.) . . . . shall be entitled to a proportion of such rents, annuities, pensions, dividends, ... according to the time which shall have elapsed from the commencement or last period of payment thereof, respectively (as the case may be) . . . ."

In the case of *Maxwell, In re*, Vice-Chancellor Wood observed:—

> "The period is to be calculated from the time when the dividend became payable, and not the time when the profits were earned, for that is the course which the Vice-Chancellor (Kindersley, in *Hartley's* case) followed, and I can see no other which could be pursued under the Act of Parliament. . . . The Act of Parliament is express, saying that it should be according to the time that should have elapsed since the last period of payment, and one sees the difficulties which one would be exposed to in any other way of looking at it, because the Act has reference to payments which become due at fixed periods. Whatever is payable in respect of dividend is not due until the meeting has declared that it shall become due and payable. Therefore the apportionment must be made with reference to the last payment and without reference to the year when the profits may be said to have been earned; and there is good reason for that, for though the company might make their account of the profits earned in the last year, it would be most improper in them, if they had a large sum in hand, and knew that there was a large demand coming (as, for instance, in the case of the vast frauds which were perpetrated on the Great Northern Railway Company) to declare any dividend, notwithstanding that the previous year had been one of great profit. It is all in the breast of the directors who have to manage the concerns of the company; and the dividend can only be payable at the period when it is declared to be due and payable."

On the other hand, in the case of *Griffith, In re Carr* v. *Griffith*, 12 Chan. Div. 655, in 1879, and therefore under the Apportionment Act 1870, an apportionment was ordered to take place where the last day of the period of earning was taken as fixing the duration of the period of increment, but the only question at issue in this case was whether a certain bonus was or was not subject to apportionment. There was no dispute as to the period of increment during which the apportionment was to take place if the Act should be held to apply, for all the parties seem to have assumed that the last day of the period of earning fixed the duration of the period of increment. The same assumption was made by both parties in the special case *Macpherson's Trs.* v. *Macpherson*, 15 S.L.T. 153, in June of this year, but here again the question was whether the Act did or did not apply. In this case it was held that the Act did not apply and that there should be no apportionment.

This way of fixing the period of increment is in accordance with a strict interpretation of sect. 5, but the practice is very general, in Scotland at any rate, of taking the day when the dividend was payable as the last day of the period of increment. From a practical point of view this latter method has much to recommend it, for it is only when the dividend is payable and the shareholder can cash his dividend warrant that the dividend really becomes part of his income; and moreover, an apportionment according to what seems now to be the legal method must often be exceedingly difficult. Indeed in some cases it would be impossible; for example, in a case where the apportionment has been delayed for some years, and no information can be obtained as to what was the exact period during which the dividend was declared to have been earned.

In conclusion, it may be noted that in those cases where the operation of the Apportionment Act is excluded by the terms of the will, "what a tenant for life is to take under an ordinary bequest of shares is what is declared as dividends or bonuses in the shape of dividends during the lifetime of that tenant for life" (per Lindley, L.J., in *Armitage, In re Armitage* v. *Garnett* [1893], 3 Ch. 337, page 346), and that although the dividend or bonus is declared to have been partly earned during a period before the liferent came into existence (*Hopkins' Trusts, In re*, 1874, L.R. 18 Eq. 696). This rule is not directly connected with a question as to the interpretation of the Apportionment Act, but it should be observed that in these cases the period of earning is disregarded, and the crucial factor in determining who has a right to the dividend is held to be the date of payment.

J. A. ROBERTSON-DURHAM, Esq., C.A.,

President of the Society of Accountants in Edinburgh.

Mr Robertson-Durham well deserves the honour which his brethren have done him in electing him President of the Society of Accountants in Edinburgh. He stands in the first rank of his profession; and his services are much sought after by lawyers and by the public. His commanding figure is frequently seen in the Parliament House. He is usually a witness, on one side or other, in cases where an expert skilled in accounting is required, and it is no easy matter for the cross-examiner to shake his testimony either by direct attack or by inducing him in an unguarded moment to make dangerous admissions. He has been appointed Liquidator of many Companies and Factor on many estates. He is frequently nominated as Reporter by the Court, and he enjoys in a marked degree the confidence of the Judges.

Mr James Alexander Robertson-Durham, who was born in 1848, is a son of the late Mr Alexander Weir Robertson, C.A., one of the active originators and first members of the Edinburgh Society of Chartered Accountants. He was educated at the Edinburgh Academy, and after serving a five years' apprenticeship to his father he was, in December 1869, admitted a member of the Chartered Accountants' Society. He is also a Fellow of the Faculty of Actuaries. In 1870 he became a partner in his father's firm. That business has since that date been conducted under the firm name of A. & J. Robertson, C.A., and among Mr Robertson-Durham's present partners is his son, Mr A. W. Robertson-Durham.

Among the many appointments which Mr Robertson-Durham holds are those of Auditor and Accountant of the Church of Scotland; Auditor of the Commercial Bank of Scotland; Auditor of the North of Scotland Bank; Auditor of the Scottish Life Assurance Company, and Manager of the Scottish Reversionary Company Ltd. He is a Director of the English and Scottish Law Life Assurance Association. Mr Robertson-Durham was for several years one of the Professional Examiners of his Society, and, since the Board was instituted, he has been a member of the General Examining Board of Chartered Accountants in Scotland. He is a Trustee of the Chartered Accountants Widows' Fund. In 1899 he succeeded to the estates of Boghead and Foulshiels, in the county of Linlithgow, and assumed, as required, his great-grandfather's name of "Durham."

Mr Robertson-Durham has very many interests beyond his professional work. He is a golfer of repute, and was for many years a familiar figure on the links which surround Gullane, where he used to reside in summer. Now he devotes his leisure largely to agricultural pursuits on his own property. His home farm is run on scientific principles, and experiments in arboriculture are being conducted on his estate. He is a keen sportsman and an excellent shot.

He is a member of the Royal Company of Archers, the King's Bodyguard for Scotland. He is also a Justice of the Peace for the counties of Linlithgow and Haddington, and the county of the city of Edinburgh.

Faculty of Advocates.—Mr C. M. Aitchison, M.A., LL.B., and Mr P. F. Hamilton Grierson, B.A., were on 1st inst. admitted to the Faculty of Advocates.

Business in the House of Lords.—There are now nineteen causes standing for hearing. Of these three, are from Scotland and sixteen from England. The following are the Scotch Appeals, with their order in the Roll:—2. *United Collieries Ltd.* v. *Muir & Co. Ltd.;* 13. *Weir* v. *Crum Brown;* 19. *Black* v. *Scottish Temperance Life Assurance Co. Ltd.*

A sitting of the High Court of Justiciary was held in Glasgow on Tuesday and Wednesday. Lord Low and Lord Pearson were the presiding Judges. Mr William Thomson (who made his first appearance as an Advocate-Depute) prosecuted in the Old Court, assisted by Mr Dunbar. Mr Munro, assisted by Mr Oswald Dykes, prosecuted in the New Court. There were six cases, involving six persons.

The Second Division has for the time removed its sittings from the Second Division Court-room to the Justiciary Court. This will enable the work of the erection of the new building above the enrolling-room, and adjoining the Second Division Court-room, to be gone on with without delay. Very rapid progress is now being made with the alterations in the Advocates' Library, rendered necessary by the extension of the Outer House Courts. The Library is at present closed to the public, but it is hoped that it may be re-opened early in the new year.

The sittings of the Extra Division were brought to a conclusion last Saturday. The Act of Sederunt appointing the sittings directed the Extra Division to sit from 15th October to 2nd November. Owing to the indisposition of Lord Stormonth-Darling, the Third Division was not formed till the 22nd October, and its sittings extended only to a fortnight. Six cases were heard—most of them at considerable length—and of these three are still at avizandum. Though the Extra Division has not made much difference numerically to the state of the rolls, some heavy cases have been disposed of. On the other hand in the First Division a large number of cases have been heard and the roll has thus been materially shortened. In the Second Division the progress has been comparatively slow. No announcement has been made as to any further sittings of the Extra Division, but it is understood that that Court will sit again after Christmas should the state of the Inner House Rolls render it necessary.

Mr J. W. E. Steedman, solicitor, Edinburgh, and Mr John Richardson, solicitor there, have entered into partnership, and will carry on business as solicitors at 56 Frederick Street, Edinburgh, under the firm name of Steedman & Richardson. Mr Steedman received his training with Messrs Davidson & Shirley, Writers, Lanark, Messrs Mackenzie, Innes & Logan, W.S., and Messrs Guild & Guild, W.S.; and Mr Richardson with Messrs Lyle & Wallace, solicitors and town clerks, North Berwick, Mr W. Croft Gray, S.S.C., and Messrs Inglis, Orr & Bruce, W.S.

THE SCOTS LAW SOCIETY.

Lord Guthrie and the Treatment of Criminals.

The Lord Advocate on the Probation System.

The inaugural address of the 93rd session of the University of Edinburgh Scots Law Society was delivered by Lord Guthrie in the Conveyancing and History Classroom of the University on Monday, on "The Treatment of Criminals in Scotland." The Lord Advocate (Mr Thomas Shaw, K.C., M.P.) presided over a large attendance, which included Lord Salvesen, the Solicitor-General (Mr Ure, K.C., M.P.), Sheriff Johnston, K.C., Sheriff Chisholm, K.C., Mr G. L. Crole, K.C., Clerk of Justiciary, Mr G. Watt, K.C., Mr Crabb Watt, K.C., the Crown Agent (Mr W. S. Haldane, W.S.), and Colonel M'Hardy, C.B., Chairman of the Prison Commissioners.

Lord Guthrie said—In 1901 Sir Robert Anderson, Assistant Commissioner of Police in London, wrote an article in the "Nineteenth Century," titled "Our Absurd System of Punishing Crime." Last month he published "Criminals and Crime," in which identical views are repeated, with ample illustrations from his vast experience. In that same year, 1901, the "Juridical Review" contained an article by me, titled "Our Punishment of Crime—An Admitted Failure." Subsequent observation in the Sheriff Court and in the Court of Justiciary, visits to prisons, and reading reports by Prison Commissioners, and works by criminologists and criminals, have only confirmed the opinions expressed in my article. Experts and amateurs in short agree that we are annually expending immense sums in connection with the treatment of criminals and getting less than no value for our money. The present system no doubt punishes in a haphazard way; but it fails either to deter or to reform; it is costly to the State; it injures the dependants of criminals by depriving them of their bread-winners; and as to the criminals themselves it sends them out less able and less willing to live respectably than when they entered. The indictment of expert and amateur is thus a heavy one. But by neither is blame attached to prison authorities, commissioners, governors, doctors, chaplains or warders. They do their best to

accomplish the impossible, to bring satisfactory results out of a system founded on unsound principles.

Nor do I ignore, as I think Sir Robert Anderson sometimes does, the wise legislative changes of recent years, dealing with first offenders and with the establishment of State and County Inebriates' Reformatories.

I am equally alive to the wise if cautious changes made by the Prison Commissioners before and since 1901 at their own hand. Pupil children are no longer to be seen in our prisons, and the day will soon come when minors will be as conspicuously absent. Efforts are made to find work, and, if possible, interesting work for every prisoner. The crank and the treadmill, the handcuffs and the dark cell, are gone for ever. There is increasing realisation of the fact in human nature that rewards are a more powerful incentive to good order and hard work than punishments. Gratuities payable on liberation are earned by work. Cell windows have been enlarged, in many cases doubled. There are prison libraries, available for good conduct. In the cells small mirrors and simple coloured prints have lately been hung. There is an effort now not to destroy, but to conserve, individuality and self-respect. The close-cropped hair and identical shaving of the men is gone; before meals they get time to tidy themselves and to wash. Each winter lectures, with or without the magic lantern, are delivered in the larger prisons. Lastly, instead of a cold and carefully restricted access to those heroic people who undertake that most difficult of all religious and benevolent work, prison visiting, they receive a cordial and sympathetic welcome.

These changes have led to warnings from the supporters of the old school. But in every case, instead of discipline being prejudiced, it has been made easier, and there has been no case of a return to the previous system. All honour to the Prison Commissioners. But they are trying to work, and to encourage others to work, on reformatory lines in places built for purposes of punishment. Consider that picturesque enormity, the Calton Jail.

I don't know more statesmanlike documents than the Prison Commissioners' annual reports. They are thoroughly alive to the evils of the present system, while loyal to the duties they are appointed to perform. In the great work of reform we would like to see the Scotch prison authorities put in a position by Parliament and the Treasury to lead the way, so that our procedure in Scotch prisons may be as superior to the procedure in English prisons as our procedure in Scotch Criminal Courts, Inferior and Supreme, is superior to the procedure south of the Border.

Do not let us be prejudiced against schemes of reform because made in America, nor because some prison reformers expect from them impossible results, and have lent themselves to fantastic experiments. There is no risk of our ever enlivening our prisoners, as is done in one American prison, by admitting crowds of visitors to gaze at them, even although, as in that prison, we could charge each visitor a quarter dollar.

It is easy to reply to all this by the cheap sneer that the new views will render prisons too comfortable. People, it seems to be suggested, once in, will not wish to leave. Such a reply betokens complete ignorance, *first*, of what the new views are; and *second*, of what prison life is at its best possible.

What, then, exactly is the system which experts think effete? As already indicated, it is based primarily on two principles, punishment and deterrence. Sin has been committed, it is said; the laws of God and man have been broken, and the culprit must expiate his offence by suffering the loss of life, limb, liberty or property. And further, he must be so dealt with that he will not be likely to repeat the offences; and in any case, all others must be deterred, as the old Scots indictment ran, "from committing the like crimes in all time coming." According to this view, it was rather the crime than the criminal that had to be regarded in the question of punishment. Not so very long ago certain crimes necessarily implied death, and to the gallows all went, despite the circumstance of youth, provocation, or partially deficient intelligence, which now receive such great weight. The first of these principles is abandoned in theory, although not in practice. Whether the Deity punishes for punishment's sake, is a question for theologians. Laymen agree that such mode of dealing with mortals is not for their fellow mortals. The other principle, that of deterrence, is manifestly founded on common sense, and must always receive effect.

But, besides deterrence, we have two other principles to consider and apply: first, the duty of the State to deprive the unreformed, and still more the unreformable, of liberty; and second, its duty, or at least its right, to reform. The present system was not designed to give effect to either of those principles. Cold-blooded experts, in the interests of the State, and warm-hearted philanthropists, in the interests of the criminals, are both agreed they ought to be given effect to. But neither public nor Parliamentary opinion is yet sufficiently enlightened to pass the necessary statutes, and give the necessary funds.

When a man is fined rather than jailed the reason must be because, in the case of statutory offences, the Legislature, and, in common law charges, the judge, thinks the case will be adequately met by a money penalty. If so, and if the man is at the moment unable to pay, why not give him time? It is ludicrous to ask a drunk and disorderly, who has put into the publican's pockets the money which belonged of right to his wife and children, to pay a fine.

Why not give him time to earn the money and pay the fine? Why hale him straight away to prison?

But the most serious aspect of short sentences remains behind. Out of the 58,000 cases of imprisonment in 1906, about 12,000 are for first offences, of which the immense proportion are short sentences. Like all short sentences, they are too short to expel the taste for drink, or to give time for educational or moral training, or to teach a trade; they are too short and too painless either to punish or to deter, and they are too short for benefit to the country, by removing dangerous people for a substantial period. The Departmental Committee on Scotch Prisons of 1900 said: "If short sentences cannot be worked for the improvement of the prisoner" (and they thought they could not), "they cannot, on the other hand, be said to act as a deterrent." But worse than all that, they affix that prison brand for which, as with Esau, there is generally no place of repentance found, though sought carefully with tears. "After being in prison," said Margaret Ward, a Glasgow convict, giving evidence before a Government Commissioner, "after being in prison, I did not care though I never was out of it. Once put in prison, character is gone."

If the ranks of criminals are to be depleted, the supply must be stopped at the fountainhead. One shudders to think what the state of matters in our streets and our prisons would have been but for the work of reformatories and of industrial schools, the State-aided, State-filled, and State-inspected representatives of those voluntary ragged schools, about whose history and work my earliest home memories have made me more of an expert and less of an amateur than I am about prisons.

And now for long sentences. Major Griffiths, a great authority, has said that there are only two classes in our jails—those who should never have been in, and those who should never be out. Of course, the saying has the defects as well as the merits of an epigram. Under present conditions, the saying, in both its parts, is not far from the truth. Indeed, as far as the unreformable are concerned, the saying will always hold good. But if it is meant to assert that under no possible system can places of detention be used for reformatory purposes, then I join issue with Major Griffiths.

Consider first the proved unreformable. I mean the habitual or professional criminal, the man who alternates between prison life and the life of a thief, with negligible spells of casual work, the man who makes crime a trade to live by, and who is an active agency in training others to crime.

Henry Marchant, sentenced some years ago at the Clerkenwell Sessions, was an instance. He had previously had sentences of ten years and seven years. The eminent judge who tried the case thus addressed him:—"You are a most dangerous man, from whom the public require to be protected." This address led up to a sentence of five years' penal servitude. Logically one would have expected either a life sentence to follow, or at least, what the Americans call the indeterminate sentence, meaning a sentence of permanent detention, unless and until the prison committee think the man deserves another chance.

If the country, on the view that the power would be too great to put into the hands of a prison committee without some check, would not stand a bare indeterminate sentence, then it could be coupled with a high maximum limit. In a case like Marchant's, a sentence of a comparatively short definite period is merely a lame conclusion. We do not allow a small-pox patient, so long as the disease is on him, to go at large among the community. But at the end of it the man goes free, even if he is known to be more determined than before to resume his previous career, to live by his wits, not his work, and to prey and teach others to prey, without ceasing, on the public.

You may ask, Why do not the Judges of the High Court of Justiciary, with the absolute discretion which the Crown commits to us, sentence all proved habituals for life? The first answer is that public opinion would not support us, even if the indeterminate sentence were qualified by a maximum limit. The second answer is that we are seldom in a position to know whether an old hand is or is not a professional criminal. A mere list of previous convictions, possibly with lengthened intervals between the liberations and convictions, does not prove it.

But there is a third answer, obvious to everyone who knows what penal servitude for life, or even for a long period of years, means.

Substantial sympathy with it, knowledge of the crushing severity of penal servitude, prevents the long sentences which would otherwise be given. Negro slavery was compatible with much that made life worth living; so is the lot of thousands of Siberian exiles. Ask the question of any of our convicts, and you will get but one reply.

Why should the present system continue? It is not punishment we want; we want only to keep the country safe to live in. For that purpose we need, *first*, reformatory establishments for the reclaimable. In these, the whole treatment of the prisoner, physical, mental, moral and religious, from the moment he enters, will be directed to fit him to retain the situation which will be found for him on discharge. He will have the chance, the first he may ever have had, through education, reading, and moral and religious instruction, to acquire some control over his criminal nature, and to form tastes and

habits and ambitions and views of life which may ultimately make a man of him.

Second, we want places for the permanent detention of irreclaimables. If these lost men and women are kept from doing harm to the lives and property of the lieges, I do not see why their "condition" might not be so ameliorated that judges might not hesitate, as they would do now, to impose that indeterminate sentence to which I have referred, a condition which would not trangress the golden maxim, "All unnecessary pain is cruelty."

To sum up, short sentences, sufficient to affix the indelible prison brand, but insufficient to punish, or deter or reform, or keep out of harm's way long enough to justify the expense, will cease. Sentences long enough and hard enough to deter will continue, under such conditions as will afford time and opportunity to reform. But the subjects of these long sentences will be divided into two classes, which may in some cases become interchangeable — the reclaimable and the irreclaimable, the casual and the habitual or professional. The reclaimable will receive a sentence long enough to enable them to be fitted for a fresh start; and a fresh start, at home or abroad, will be procured for them by the State or by voluntary agencies. The irreclaimable will be detained unless and until they prove that they no longer deserve the name.

But whatever results may be achieved by that system of prison management, the coming of which our Prison Commissioners are doing so much to hasten, it will, at all events, be a system defensible in principle. It will have nothing to do with mere punishment as an aid in itself. If it does not reform, it will deter. It will increase the safety of our lives and property, and, finally, it will not involve the expenditure of immense sums of money in making men and women less fit, physically, mentally, morally, and less willing to live God-fearing, self-respecting lives.

I cannot close without saying that, important as these questions are, they are, after all, new details, symptoms which leave the disease untouched. If crime is to be effectually checked in this country, if the stream of 12000 new cases every year is to be dried up, then the country must be prepared, as it is not yet prepared, to deal drastically with two problems: first, how to prevent the crime which results directly or indirectly from the use, or, if some prefer it, the abuse, of intoxicants; and second, how to remove the children from the influence of the criminal and the drunkard. The chairman of the Scotch Prison Commissioners has said deliberately: "There is no crime to speak of at all in Scotland. It is all a question of whisky. The day may come," Colonel M'Hardy added, "when all but a few of our prisons may become inebriate reformatories."

I say nothing about the absolute importance of the questions which separate Unionist from Liberal, Unionist from Unionist, and Liberal from Liberal, or of those which divide Protestantism into so many denominations. But I express my deliberate conviction when I say that, looking to the interests of this country, material, moral, religious, these great political and sectarian problems are but trifles in comparison with the drink problem, and its train of poverty, vice, disease, insanity and crime.

The Lord Advocate and the Probation of Offenders Act.

The Lord Advocate, in moving a vote of thanks to Lord Guthrie, said:—The address was in all respects according to my own way of thinking. I have been working in that direction in public life for many years, and I am sure that neither his Lordship nor any of you gentlemen will omit to note the latest product of Parliament upon this very topic. Some of you belonging to the old school may think Lord Guthrie's views revolutionary. They are nothing of the sort. Parliament as at present constituted is imbued with the same feelings. Allow me to say that in Parliament itself we have had a most remarkable experience. Were I in a Parliamentary assembly I should command the assent of all shades of opinion to this, that no greater prison reformer has ever impressed his views more consciously and more vividly upon the mind of Parliament itself than the late Michael Davitt. He had gone through in its most savage form terms of penal servitude; he had preserved the enormous faculty of retentive memory and literary power; and he presented the fruits of his experience mostly in discussions upon prison reform to Parliament in such a way as vividly to impress the mind and alter the policy of the nation. I think it right, now that he is gone after a stormy life, to record that in his favour as the opinion of all parties in the State. Last session this Parliament, crowded as it was with public work, was engaged upon a little Bill emanating from the Home Office, and added to and tacked upon by the Scottish Office. It was called "The Probation of Offenders Act 1907." You will be surprised to know that they have just hit exactly the point of Lord Guthrie's address. There could be no greater service to the public on this head of social reform than insisting on attention to the beginnings of a career of crime, and the purpose of the Probation of Offenders Act was to seize all possible cases of beginnings of crime, lift them out of the hard and fast category where the punishment, and the punishment alone, was made, as it were, to fit the crime, and hand them over to some authority which would impose some new test in this situation, and which would give a humane touch of helpfulness and foresight, and which might retrieve the man in danger of being a criminal from a life of crime. So you will find that there are guardians

appointed to take charge of the offender who is under probation, and those guardians have to look at the thing, which never in the history of the British Parliament was expressed, I think, so philosophically as actually to consider all the surroundings of the case, the very heredity of the criminal, the situation occurring in the way of temptation that surrounded him, and so to guard the position that the magistrate would, taking all these things into account, be able, although there was guilt, actually to dismiss the charge against the man, and if he did not dismiss him, at all events to put this person, probably young, under probation in the charge of probation officers set up by the local authorities. The case of the criminal never was treated either by a magistrate, a judge, or prison officer, or Parliament in this broad view that there was to be a record had of his character, of his antecedents, of his age, of his health, or of his mental condition. You will be surprised to know also that this very idea of Lord Guthrie's has been not only carried out in that particular of attending to the beginnings, but it has been carried out by this Parliament in attending to the future career and life of those criminals, because the probation officers have actually deputed to them by Parliament this extraordinary duty to advise, to assist, to befriend the prisoner and, when necessary, to endeavour to find him suitable employment. If it were worth nothing else than that statute, it would have been worth while serving fifteen years in Parliament. I had the honour of drawing the Scottish clauses. The whole of the carrying out of this statute will depend upon the co-operation and in some respects the initiative and power of imagination and energy of the local authorities, burghal and county, in Scotland; and I make this public appeal to them that for the humane objects of this statute they will do all they can by the appointment of sympathetic and humane probationary officers—being guaranteed that the necessary funds will be provided out of the regular sources of taxation—so as to assist Parliament in this great work to which it has set its hand.

Lord Salvesen, in seconding, said the prevalence, or supposed prevalence, of crime in Scotland was, he thought, due more to the excellent system of public prosecution that they had, and of which their chairman was the distinguished head, than to any exceptional wickedness on the part of Scotsmen.

The vote of thanks was cordially awarded.

The subject of the portrait in our next issue will be:—

The Late William Fletcher, Esq., W.S.

The Royal Commission on Registration of Title in Scotland will meet to hear evidence on Thursday and Friday next week in the S.S.C. Library, Edinburgh.

DECISIONS IN THE ENGLISH COURTS.

Wylie v. *Povah.*

Insurance—Marine—Total Loss.—The plaintiffs purchased a cargo which was "expected to arrive per sailer . . . . and to discharge . . . . August, September, October, 1905, shipment." The contract contained the clause: "In case of non-arrival, this contract to be void, and should the vessel, from any unforeseen circumstances, be prevented from delivering the whole of the cargo originally shipped, this contract to be void as regards the undelivered portion." The plaintiffs entered into a contract of insurance on profits with the defendants, and the policy provided:—"Warranted free from all average and without benefit of salvage, but to pay a loss on such portion as does not reach its destination." The ship in which the cargo was became a total loss; but part of the cargo was subsequently transhipped and reached its destination in March, the evidence showing that it was no use to the plaintiffs unless it reached them by January. *Held* that the plaintiffs were not entitled to claim on the policy for a total loss of profits, but only for a loss on that portion which did not reach its destination.—K.B. Div. (Pickford, J.).—*5th July* 1907.

Attorney-General v. *Mersey Railway Company.*

Railway Company — Powers — Omnibus Traffic.—Decision of the Court of Appeal (*ante*, Vol. XIV. p. 136) *reversed*.—House of Lords (Lord Loreburn, L.C., Lord Ashbourne, Lord Macnaghten, Lord James of Hereford, and Lord Atkinson).—*9th July* 1907.

Eden v. *North-Eastern Railway Company.*

Railway—Compensation for Minerals—Railway Clauses Act 1845 (8 & 9 Vict. cap. 20, sect. 78).—Decision of the Court of Appeal (*ante*, Vol. XIV. p. 148) *reversed*.—House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, and Lord Atkinson).—*9th July* 1907.

Kleinwort, Sons & Co. v. *Dunlop Rubber Co.*

Payment — Repetition. — The appellants made advances to K on rubber purchased by him. K sold a parcel of rubber and directed the purchasers, the respondents, to pay the price to B, who had made similar advances to them.

The respondents, by mistake, paid to the appellants, who in good faith received it, and placed it to K's account with them. They subsequently allowed K to overdraw his account beyond an agreed sum. The jury in this case held, however, that they had not altered their position with regard to K to their disadvantage on account of this payment. *Held* that the appellants were bound to repay the amount to the respondents.—House of Lords (Lord Loreburn, L.C., Lord James of Hereford, and Lord Atkinson).—16*th July* 1907.

Assicurazioni Generali de Trieste v. *Empress Assurance Corporation Ltd.*

Insurance—Marine.—The defendants insured certain shipments of lumber belonging to B. & Co., to whom they gave an open cover, under which B. & Co. were entitled to declare interests by a number of vessels, excluding the vessels of M. T. & Co. The defendants reinsured with the plaintiffs to the extent of one-half of their interests. The defendants paid certain losses under their insurance to B. & Co., including losses by two vessels belonging to M. T. & Co., and recovered the shares under their reinsurance with the plaintiffs. The defendants thereafter, on becoming aware of the facts, sued B. & Co. for damages on the ground of misrepresentations by which they were induced to pay on the losses by the vessels belonging to M. T. & Co., and recovered. This action was at the instance of the plaintiffs for repayment of the shares which they had paid of these losses. *Held* that they were entitled to recover, but that the defendants were entitled to deduct the costs of the former action against B. & Co., which they had been unable to recover from B. & Co. owing to their costs in that action being taxed as between party and party.—K.B. Div. (Pickford, J.).—16*th July* 1907.

Winans v. *The King.*

Revenue—Estate Duty.—*Held* that foreign bonds which were dealt with for money on the Stock Exchange and elsewhere were liable to estate duty when in this country at the date of death.—K.B. Div. (Bray, J.).—16*th July* 1907.

Maritime Insurance Co. Ltd. v. *Alianza Insurance Co. of Santander.*

Insurance—Marine.—A policy of reinsurance was effected on a ship "whilst at port or ports, place or places in New Caledonia." A loss occurred while the ship was on her voyage to New Caledonia and was passing through the barrier reef of New Caledonia, distant about ten miles from the mainland.—*Held* that it was not covered by the policy of reinsurance.—K.B. Div. (Walton, J.).—17*th July* 1907.

Furniss v. *Cambridge Daily News Ltd.*

Slander — Privilege — Newspaper. — A newspaper published a report that the defendant had been convicted of an offence under the Fertilisers and Feeding Stuffs Act 1893 by having issued an invoice as to the quality of manure sold by him "which he knew to be false." The words quoted were not in the summons served on the plaintiff, who had not appeared and was convicted in absence. The words were not part of the charge, but were taken by the reporter from a copy of the charge-sheet which had been shown to him. They were not read out in Court.—*Held* that as they were not part of the proceedings in Court, the publication was not privileged.—Court of Appeal (Cozens-Hardy M.R., Sir Gorell Barnes, P., and Kennedy, L.J.).—18*th July* 1907.

Cooper v. *Rose.*

Revenue—Inhabited House Duty.—The appellant was owner of premises consisting of a dwelling house with other buildings, viz. loose boxes and other erections for the breeding and rearing of horses. The dwelling-house was occupied by his stud groom in virtue of his contract of service, and the appellant paid house duty in respect of the premises. The stud groom was paid a weekly wage, and was dismissable on a week's notice. An agreement was then entered into between the appellant and his stud groom by which the latter's wages were increased by a sum about equivalent to the rates, etc., effeiring to the dwelling-house, and he became tenant of the house, his tenancy being determinable on three months' notice. The agreement was found to be for the purpose of escaping the house duty. —*Held* that the rights of the parties being in fact regulated by the agreement, it was of no consequence that it was entered into for the purpose of escaping the duty, and that the appellant was not liable therefore.—K.B. Div. (Bray, J.). —18*th July* 1907.

Attorney-General v. *Sutcliffe.*

Statute—Aliens Act 1905 (5 Edw. VII. cap. 13, sect. 4 (2).—An alien came to this country as a stowaway, his presence on board the ship not being known until the ship had sailed from a port to this country. On arrival he was prosecuted and sentenced under the Merchant Shipping Act 1894, sect. 237, and an order for his expulsion was made under the Aliens Act 1905.—*Held* that the master of the ship in which he came was liable for the expenses of the Crown in reference to his deportation.—K.B. Div. (Bray, J.)—19*th July* 1907.

Attorney-General v. *Yorkshire (Woollen District) Electric Tramways Ltd.*

Revenue — Excise. — *Held* that ordinary tramway cars used on tramway lines which ran along the public roads, and propelled by electricity on the overhead system, the lines being constructed under the Light Railways Act 1896, were not liable to excise duty as being within the definition of carriage in the Customs and Inland Revenue Act 1888.—K.B. Div. (Bray, J.).—19*th July* 1907.

In re Bulawayo Market and Offices Co. Ltd.

Company—Powers.—*Held* that it was not *ultra vires* of a company to pass a special resolution that the company should have no directors and that the sole management should be entrusted to another limited company. — Chan. Div. (Warrington, J.).—23*rd July* 1907.

Philip v. *Pennell.*

Property—Letters.—*Held* that authority given by the subject of a biography to the writers to write his biography did not imply authority to publish letters written by him which might come into their possession. *Held* also that the possessors of letters might use them for the purpose of obtaining information to enable them to compile a biography of the writer of the letters, and so to portray his life and character, although they might not publish the letters.—Chan. Div. (Kekewich, J.).—24*th July* 1907.

Tate v. *Fullbrook.*

Copyright — Dramatic Sketch.—*Opinion* that a dramatic sketch within the meaning of the Copyright Acts might exist, although it contained no words, but only an idea or plot *plus* the manual and physical actions.—K.B. Div. (Phillimore, J.)—25*th July* 1907.

Summers & Co. Ltd. v. *Boyce and Kinmond & Co.*

Master and Servant — Inducing Breach of Contract.—B. had been in the service of S. & Co. under a contract which provided that he should not at any time divulge or make known any of the trusts, secrets, accounts or dealings relating to their business. He left, and entered the service of K. & Co., to whom he communicated a list of S. & Co.'s customers in the district where he had travelled for them, and the terms on which they did business. He had also in his possession certain memorandum books in which were lists of the names of such customers and particulars of business done with them by S. & Co. *Held* that B. had committed a breach of his contract with S. & Co., that K. & Co. had induced the breach, and that both were liable to injunction, and for damages; also that the memorandum books must be delivered up to S. & Co.—Chan. Div. (Swinfen Eady, J.).—26*th July* 1907.

The "Charlotte."

Jurisdiction — Admiralty — Lis Alibi Pendens.—*Held* that the Court of Admiralty in England had jurisdiction to entertain an action against the owners of a vessel, at the instance of the cargo-owners, for damages in respect of a collision, although an action was proceeding in Norway, the country to which both ships belonged, at the instance of the master, who by Norwegian law was entitled to represent the interests of the cargo-owners.—P.D. and A. Div. (Bargrave Deane, J.).—27*th July* 1907.

Board of Trade v. *Baxter.*
The "Scarsdale."

Ship — Seaman — Wages.—Decision of the Court of Appeal (*ante*, Vol. XIII. p. 164) *affirmed.*—House of Lords (Lord Loreburn, L.C., Lord James of Hereford, Lord Atkinson and Lord Collins).—29*th July* 1907.

Palace Shipping Co. v. *Caine.*

Ship—Seaman—Wages.—Decision of the Court of Appeal (*ante*, Vol. XIV. p. 159) *affirmed.*—House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Robertson and Lord Atkinson).—29*th July* 1907.

The King v. *The Governor of Brixton Prison. Ex parte Calberla.*

Criminal Law—Extradition.—C was convicted in Germany of certain offences of an extraditable character, and was sentenced to imprisonment. During the running of the sentence he was transferred to a hospital on account of illness; and he was thereafter discharged because further imprisonment caused apprehension of imminent danger to his life. An order was subsequently made calling on him to enter on imprisonment in order to complete his sentence. *Held* that he was liable to extradition.—K.B. Div. (Lord Alverstone, C.J., Darling and Phillimore, JJ.).—30*th July* 1907.

The London General Investment Trust Ltd. v. *The Russian Petroleum and Liquid Fuel Co. Ltd.*

Company—Debentures.—A company issued debentures for £500,000, £100,000 of which were held by B. S. & Co. as security for a loan of £150,000. Part of the loan was paid up and another £500 was borrowed. The rest of the loan was then paid up. *Held* that when the loan in security of which the debentures were held was paid up the debentures issued in respect thereof were dead and could not be used as security for a new loan.—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes and Kennedy, L.J.).—31*st July* 1907.

The Late WILLIAM FLETCHER, Esq.,

Writer to the Signet.

Much regret was felt in legal and other circles on the announcement of the death, from appendicitis, of Mr William Fletcher, Writer to the Signet, which occurred on Thursday, 7th November, at his country residence, Coul-na-coile, Kingussie. He had been married so recently as 12th October last, and had gone to Kingussie to spend his honeymoon.

Mr Fletcher was born on 12th June 1861 in Elgin, and was educated there. After serving an apprenticeship in the office of Messrs Forsyth & Stewart, Solicitors, Elgin, he came to Edinburgh in 1881 and entered the office of Messrs T. & R. B. Ranken, W.S. He was admitted a Writer to the Signet in 1887, and in 1888 was appointed Resident Secretary in Edinburgh of the City of Glasgow Life Assurance Company, a position which he held until December 1898. Returning to the more active pursuit of law, he in 1899 formed, along with Mr A. C. Baillie, the firm of Fletcher & Baillie, W.S., of which he was a partner at the time of his death.

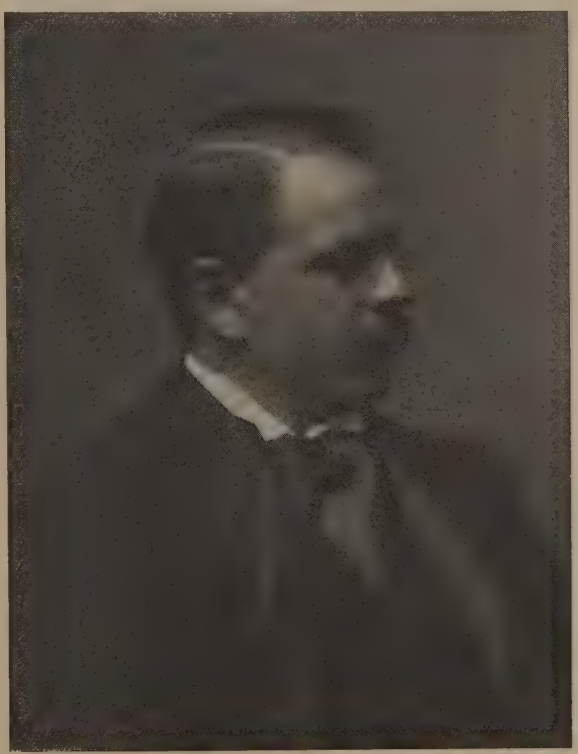


Photo by] [*W. Crooke, Edinburgh.*

Mr Fletcher was held in high esteem in his profession, while his shrewdness, resourcefulness, and business capacity, combined with great tact and urbanity, rendered him a much appreciated adviser by a wide circle of clients.

Mr Fletcher was greatly interested in Church and other religious work, and had for many years taken an active and leading part in St George's United Free Church, Edinburgh, of which he was an elder, and Clerk to its Deacons' Court. He had a great appreciation of Nature and everything artistic He was passionately fond and had a great knowledge of horticulture, and probably was seen at his best in his garden at Coul-na-coile. In private life he was much engaged in quiet and active benevolence and beneficence, and displayed a courteous, unselfish, and winning manner, which made him a prime favourite wherever he went and endeared him greatly to his many friends. Much sympathy is felt for Mrs Fletcher.

In consequence of the sitting of the Royal Commission on Registration of Title in Scotland, the Lord President was absent from the First Division on Thursday and Friday.

Lord Salvesen has within the last few days made in two cases an important suggestion for the simplification of procedure. In both cases the defenders, when the cases were in the Adjustment Roll, intimated that they intended to raise counter actions. Lord Salvesen suggested to counsel that it was useless to incur the expense and the delay necessitated by the raising of a counter action, and proposed that a minute should be signed and lodged in process in which the parties should consent to the question which would have been raised in the counter action being disposed of in the original process, and empowering the Court, should the judgment lead to that result, to grant decree for payment of a sum due to the defender. The first case in which the point arose was a count, reckoning and payment, where the defender alleged that on an accounting between the parties the balance was in his favour. The second was a shipping case, where the question was whether the pursuers' or the defenders' ship was at fault and therefore liable in damages for a collision. The suggestion made by Lord Salvesen and adopted by the parties is on the lines of the rule laid

down in sect. 55 of Sched. I of the Sheriff Court (Scotland) Act 1907, which is to the following effect: "Where a defender pleads a counter claim it shall suffice that he state the same in his defences, and the Sheriff may thereafter deal with it as if it had been stated in a substantive action, and may grant decree for it in whole or in part, or for the difference between it and the claim sued on." The suggestion made by Lord Salvesen could, of course, be given effect to only of consent of parties. Any simplification of process which avoids delay and reduces the cost of litigations is in the interests of the profession as well as the public. Might the Judges of the Court of Session not be given, by Act of Sederunt, the same power in this matter as the Sheriffs now have?

The Royal Commission on Registration of Title met on Thursday and Friday in the Hall of the S.S.C. Library, Parliament House, for the purpose of receiving evidence, Lord Dunedin being Chairman. The other Commissioners present were Mr W. J. Dundas, W.S.; Mr Smith Clark, Keeper of the Register of Sasines; Mr Munro Ferguson, M.P.; Mr Brickdale, of the Land Registry, London; Sheriff Kennedy, and Mr John Prosser, W.S., with Mr Umpherston, advocate, as Secretary. This is the first occasion on which evidence has been taken by the Commission. The witnesses examined were Mr G. D. Ballingall, W.S., and Dr Murray, Glasgow, on behalf of the Incorporated Society of Law Agents in Scotland; Mr Lennox Sellar, of the Town Clerk's Office, Glasgow, on behalf of the Glasgow Corporation; Mr R. B. Shearer, on behalf of a Conference of Delegates of Town Councils and County Councils in Scotland; and Mr Thomas M. Stewart, writer, Glasgow, on behalf of the Glasgow Landlords Association. Dr Murray appeared also on behalf of the Faculty of Procurators of Glasgow. The next meeting of the Commission will be held in London on Monday 2nd December, when the evidence of some English witnesses will be taken.

Juridical Society of Edinburgh.—The annual meeting of the Juridical Society of Edinburgh was held on Wednesday evening in the Society's chambers, Charlotte Square. Office-bearers for the ensuing year were elected as follows:—President, Mr A. S. Pringle, advocate; Treasurer, Mr W. Cowan, W.S.; Librarian, Mr D. Chapel, advocate; Secretary, Mr W. Dunbar, advocate.

The King's Birthday Honour List.—The list of honours issued on the occasion of His Majesty's Birthday contains the names of very few members of the legal profession; and of the lawyers who are honoured, none are connected with Scotland. The knighthood conferred upon Mr Francis Beaufort Palmer, the well-known author of "Palmer's Company Precedents" and other books on Company Law, will be received with satisfaction by the profession. Mr Palmer, who was called to the Bar at the Inner Temple in 1873, has a very large practice as a Company draughtsman, and has given a great deal of assistance to the Government in the matter of Company legislation Mr John Irving Courtenay, another of the new knights, is also a barrister, having been called in 1861. Knighthoods have also been conferred upon Mr Charles Moss, Chief Justice of Ontario, Mr Robert E. Matheson, Registrar-General for Ireland, and Mr Frank Crisp, a London solicitor. Mr W. E. Davidson, C.B., K.C., Legal Adviser to the Foreign Office, who has been made a K.C.M.G., was called to the Bar by the Society of the Inner Temple in 1879.

The firm of J. M. & J. Watt & Boyd, solicitors, Winton Buildings, Ayr, of which Mr James Watt and Mr John Boyd were the sole partners, has been dissolved of mutual consent. Mr Watt will carry on practice at Wellington Chambers, Ayr, under the firm name of J. M. & J. Watt, and Mr Boyd will carry on practice at Winton Buildings, Ayr, in his own name.

The co-partnery of Fletcher & Baillie, W.S., having been dissolved by the death of Mr William Fletcher, W.S., on 7th inst., Mr Augustus C. Baillie has assumed Mr T. J. Carlyle Gifford, LL.B., W.S., as a partner, and the business will be carried on under the firm name of Baillie & Gifford, W.S. Mr Gifford has been trained in the office of Messrs W. & J. Cook, W.S.

The subject of the portrait in our next issue will be:—

The Late John A. Stewart, Esq.,
Solicitor, Perth.

LAW LIBRARY.

BOOK NOTICES.

The Law of Stamp Duties on Written Instruments. By P. J. Hamilton Grierson, B.A. Oxon., Advocate, Solicitor for Scotland to the Board of Inland Revenue. New Edition, revised and in part rewritten. Edinburgh: William Green & Sons, 1907. *Price* 15*s. net.*

Mr Hamilton Grierson is the author of several legal works of practical utility, and the contributor of a number of important articles to the Encyclopædia of the Law of Scotland. His edition of Dickson on Evidence, his Index of Cases Commented On, and the first edition of his work on the Law of Stamp Duties, are all widely used in the profession. The new edition of the last

mentioned work, issued nine years after the first edition, will receive a very cordial welcome. Mr Grierson's duties as Solicitor of Inland Revenue give him a very practical knowledge of the subject with which he is dealing, and he has not hesitated to state his own opinion on a number of points which have not come before the Court for judicial decision. The book commences with a general introduction dealing with the construction of Taxing Acts, general rules as to Stamp Duties, alteration of Instruments, and proceedings for recovery of Duties and Penalties. Then follows the Stamp Act of 1891, each section amply annotated. The notes contain an exhaustive citation of the numerous decisions on sections of the Act, the import of every case being sufficiently though concisely explained. The sections of later Acts, dealing with Stamps, including the Finance Act of 1907, are then dealt with, and there are a number of appendices setting forth the duties imposed by Acts other than Stamp Acts, special exemptions in statutes not otherwise relating to Stamp Duties, Stamp Acts prior to 1891, and other matters. The book is an excellent piece of work, and is equipped with a full and well-arranged index.

The Yearly Supreme Court Practice, 1908, *being the Judicature Acts and Rules* 1873 *to* 1907, *and other Statutes and Orders relating to the Practice of the Supreme Court, with the Appellate Practice of the House of Lords. With Practical Notes by M. Muir Mackenzie, B.A., one of the Official Referees of the Supreme Court, Bencher of the Middle Temple; T. Willes Chitty, of the Inner Temple, Barrister-at-Law, a Master of the Supreme Court; S. G. Lushington, M.A., B.C.L., of the Inner Temple, Barrister-at Law; and John Charles Fox, a Master of the Supreme Court (Chancery Division), assisted by R. E. Ross, LL.B., of the Central Office, and Others. In Two Volumes. London: Butterworth & Co.*, 1908. *Price* 25*s.*

The practice of the English Courts is regulated by numerous statutes and by a voluminous code of Rules. The "Yearly Practice" dealing with these enactments is an invaluable book of reference for the practitioner. The number of decisions on questions arising under the Rules of the Supreme Court is enormous, and the amount of information contained in the present work cannot easily be overestimated. The index of cases alone occupies 200 pages. Care has been taken to eliminate references to such decisions as have been reversed or otherwise rendered obsolete, but every reported case of practical importance bearing on the present practice of the English Courts has been referred to in the notes. The first volume contains the Rules and Orders printed in large type at the top of each page, while the notes to each Rule are printed below in a smaller though perfectly clear and legible type. Catch words in heavy type direct the reader easily to the decisions on any particular word or phrase in the Order or Rule under discussion. This edition incorporates the Rules issued in August of this year, and notes the cases decided down to that month. Volume II. deals in the same manner with the various Acts of Parliament now known by the short title of the Judicature Acts, with the Arbitration Act and with a number of miscellaneous Acts. The Appendices to the Rules in the Supreme Court, containing forms of various kinds, are also given. There is an excellent Index, which for convenience is printed at the end of each volume, and extends to nearly three hundred pages. Exclusive of the Index and Table of Cases there are nearly two thousand pages in the two volumes. The very numerous notes have in the present edition been carefully revised and to a large extent rewritten, enlarged, and rearranged, and nothing has been left undone to make the book a complete and reliable guide to the lawyer practising in the Courts.

Colonial Laws and Courts, with a Sketch of the Legal Systems of the World and Tables of Conditions of Appeal to the Privy Council. Edited by Alexander Wood Renton, of Gray's Inn, Barrister-at-Law, Puisne Justice of the Supreme Court of Ceylon, formerly Judge of the Supreme Court of Mauritius, and George Grenville Phillimore, B.C.L., of the Middle Temple, Barrister-at-Law. London: Sweet & Maxwell Ltd.; Stevens & Sons Ltd.; 1907. *Price* 15*s.*

This book, which is a reprint of the first volume of the new edition of Burge's "Commentaries on Colonial and Foreign Laws," has now been issued separately, as it is felt by the editors that it will appeal to a wider public than the remainder of that work. In this estimate the opinion of those responsible for its publication will be endorsed by every scientific student of law. The object of this volume is to describe generally the character of the different systems which underly the jurisprudence of the legal world, and their relations to the present laws of the British dominions. Such a comprehensive basis is necessary for any book which deals with the whole body of British colonial law, for the Empire has adopted and developed on its native lines the systems in vogue in each country where it has planted the Union Jack. Further, the work traces the outlines of the existing juridicial constitutions of these dominions, and also considers the position of those tribunals which have been established in lands not strictly British in the exercise of exterritorial jurisdiction or otherwise. It will thus be seen that the book is of

interest both to the student of Comparative Jurisprudence and to the practitioner who seeks to discover the basis of the legal system in vogue in any particular colony. Many changes have occurred and much development has taken place since Mr Burge published his great work in 1838. India has been added to the Empire, South Africa has been developed, Canada and Australia have been federated, and immense strides have been made in the codification of law everywhere in the British dominions. The period which has elapsed has also witnessed a great development in the conception of the principles of Private International Law. The successive chapters of the book deal with the broad principles upon which the laws of the different colonies and dependencies now stand, and constitute not only a work interesting in itself, but indispensable as an introduction to the larger treatise of which it forms part. The tabulated statement appended, shewing the conditions of appeal to the Judicial Committee of the Privy Council, not only from the colonies, but from other places where powers and jurisdiction have been acquired by the Crown, whether by treaty, grant or usage, and regulated under the Foreign Jurisdiction Act or otherwise, is of immense practical utility.

Leading Cases on the Law of Evidence, with Notes. By Ernest Cockle, of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell Ltd., 1907. *Price* 7*s.* 6*d.*

The object of this book is to give an outline of the main principles of the Law of Evidence in England. This is done by selecting from the ordinary reports two or three of the leading cases on each branch of the subject. A short report is given of each selected case, eliminating points not applicable to the question of evidence decided, and stating the facts at a length adequate to make the grounds of the decision on evidence intelligible. The book does not contain sufficient detail to be of much use to the practitioner, nor is it the sort of outline of its subject which would appeal to the student preparing for examination. It is nevertheless an interesting contribution to legal literature. The cases are systematically arranged and have been selected with discrimination, and the origin and grounds of many now well-recognised principles of the law of evidence may be traced in its pages.

An Epitome of Real Property Law, for the Use of Students. By W. H. Hastings Kelke, of Lincoln's Inn, Barrister-at-Law. Fourth Edition. By the Author and Adam Partington. London: Sweet & Maxwell Ltd., 1907. *Price* 6*s.*

The popularity and usefulness of this book is indicated by its having reached its fourth edition within fifteen years of its first publication. It contains a succinct statement of the general principles of English Real Property Law, and is specially designed for the purposes of students preparing for examination.

Report of the Twenty-ninth Annual Meeting of the American Bar Association, 1906. *In Two Volumes. Philadelphia: Dando Printing and Publishing Company.*

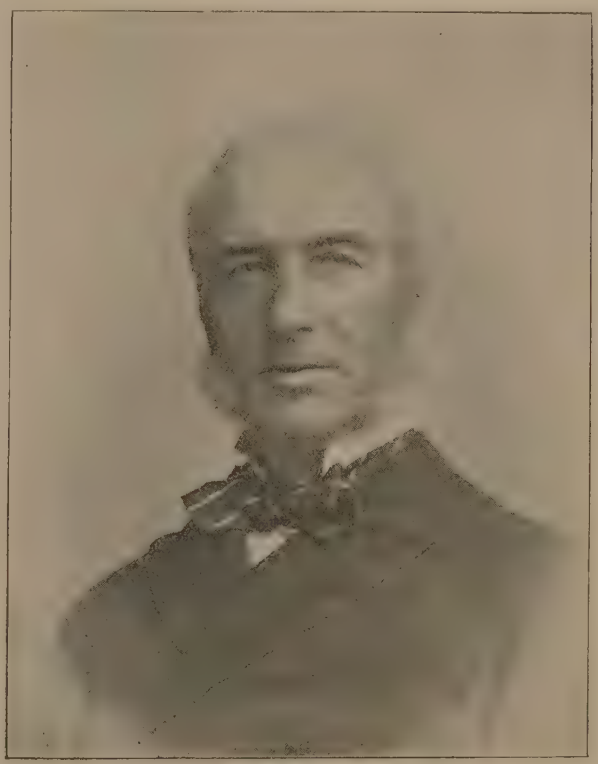
The American Bar Association continues to flourish. Its membership has increased, as has also the size of its Transactions, which are this year for the first time published in two volumes. The Association appoints a large number of Committees to consider a great variety of subjects, and the reports of these Committees, along with the discussions to which the reports give rise, are set forth at length in the transactions. Law Reform, Legal Education, Professional Ethics, Uniformity of Laws in the different States, Prison Discipline, Trusts, and the position of American Insurance Companies, are among the subjects of interest discussed. The address of the President contains a summary of noteworthy changes in State and Congressional Legislation during the year.

The Juridical Review. Vol. XIX. Part 3. *October* 1907. *Edinburgh: William Green & Sons.*

This part of the Juridical Review, which is now issued under the editorship of Mr John Chisholm, K.C., contains a number of articles of more than usual merit. The place of honour is given to a sketch of Lord Young, from the pen of Lord Guthrie, which will be read with great interest. Some of the obituary notices of the late judge did him scant justice, and omitted little that could be said by way of criticism. Lord Guthrie writes from the standpoint of a friend and admirer, but his estimate of Lord Young's work is discriminating, and eminently judicial in its tone. The article is illustrated by two portraits of Lord Young (in 1873 and in 1903) and by a reproduction of the well-known picture of "The Lord President's Breakfast in 1865," in which Lord Young appears as Solicitor-General. Sheriff Lees contributes an excellent article on the New Sheriff Courts Act; Mr Charteris deals with "The Second Peace Conference"; and there is a paper by Mr J. S. Mackay, advocate, in which he criticises, with much originality and ability, certain decisions on "Gifts of Liferent under Powers of Apportionment."

The Late JAMES AULDJO JAMIESON, Esq., Writer to the Signet.

Mr James Auldjo Jamieson, W.S., died somewhat suddenly at his London residence on 14th November at the age of seventy-five. Through failing health Mr Jamieson had been for some years partially, and for more than a year wholly, retired from active business. His death, therefore, causes no blank in the working world of the law. None the less is it a striking and sorrowful event to those who recal the great position which for many years he held in the profession.



More than fifty years ago two young Aberdonians, sons of a local doctor, came to Edinburgh to push their fortunes in the professional world. The elder brother, George, chose accounting, the younger, James, the solicitor branch of the legal profession. Both brothers soon attained to the foremost positions in their respective callings. A few years ago George suddenly passed away in the plenitude of his activity and influence as the head of the accounting profession in Scotland. By contrast the younger brother, after being for twenty years the real as well as the nominal head of the largest legal business in Scotland, has gradually slipped from public, or rather from professional (for he never was much in public) view, and his end disturbs no business arrangements, causes no vacancy in professional life. The contrast is typical of the men. George was constantly in the public eye, busy with politics, municipal affairs, church matters, economics, agriculture and other interests, assertive, and, when he thought it necessary, pugnacious. James, though not without his quiet interest in public affairs, took no part in public life, his voice was never heard upon the platform, he penned no letters to the papers. In business hours he was rarely out of his office; to the general public of Edinburgh he was unknown by sight. Many business men to whom his name was as familiar as that of Mr Balfour or Mr Asher, and who had engaged in much correspondence, negotiation, or litigation with his firm, had never, to their knowledge, seen him. His power and capacity were fully recognised, his influence was felt to be greater even than that of his less reticent brother; but, except to a very narrow circle of intimates, he remained to the professional world always a man of mystery behind the scenes.

Mr Jamieson's apprenticeship as a W.S. was served in the office of Messrs Dundas & Wilson, and there he gained that insight into the high finance of estate management upon a large scale which stood him in such good stead in after years and his skilful manipulation of which did so much to aggrandise the firm of Tods, Murray & Jamieson, which he joined in 1867. To that business he did not, as some suppose, bring the name of Jamieson. Another Jamieson had already given the firm that part of its now long-familiar name. When Mr Jamieson joined the firm its head was the late Mr T. G. Murray, father of the present Lord Justice-General, a man of business who, if he did not possess the more brilliant qualities of his distinguished son, was amply endowed with all the solid ones, and who for many years occupied the very foremost position in the Edinburgh professional world. Mr Murray, like Mr George Auldjo Jamieson, was a man of affairs with interests outside the law, and the combination between him and Mr James

Jamieson, devoted solely to his profession, was an exceedingly powerful one. Mr Murray's prominent position in the public eye and his known resources inspired confidence, and whenever other interests drew him away, he knew that his assiduous partner was there to do the work as well as he could do it himself. Mr Murray had perhaps more ready shrewdness than Mr Jamieson, but Mr Jamieson had more business imagination. Mr Murray was somewhat slow of apprehension when a matter was new to him, but he had the instinct of ready resource. Mr Jamieson was nimble of apprehension, but not so quick of resource, though perhaps, in the end, he was quite as resourceful. Mr Murray was dexterous in handling a difficulty, Mr Jamieson far-seeing in planning a campaign. Mr Murray's personality attracted business, Mr Jamieson grasped it.

Mr Murray had been Crown Agent under the Conservative Government in 1868, and when the party returned to power in 1874 it was expected that he would resume that office, but he preferred to stand aside in favour of his junior partner, and Mr Jamieson was appointed. He held the office until 1880, and when his party returned to power for a few months in 1885–6 he was again appointed. When, after a brief spell of office, the Government of Mr Gladstone fell in the summer of 1886, Mr Jamieson declined to return to the Crown Office. Regular attendance there for a short time every forenoon and attendance at trials in the High Court he found to be irksome and to interfere too much with his own office work. All things considered, however, there are few men who would have let £1200 a year go by. In these days it was etiquette for the Crown Agent to appear at trials in what even then had long since ceased to be morning dress. Mr Jamieson was perhaps more in the public eye in this capacity than in any other. He sat in the Justiciary Court behind Crown Counsel through the Chantrelle and the City Bank trials.

Perhaps the most dramatic and successful episode in the professional career of Mr Jamieson was his overthrow of the late Mr Padwick. Under the control of the latter, the vast heritage of the House of Hamilton was rapidly slipping away. Mr Jamieson, whose firm were the family agents, and who was in the confidence of the late Duke's mother, Princess Marie of Baden, intervened with great courage and at great professional risk. The result, as is now well known, has been the restoration of the fortunes of the ducal house, whose affairs for twenty years remained mainly under Mr Jamieson's personal direction and control. To the same family he rendered signal service in the steps which were taken to secure the rights of Lady Mary Hamilton and her son, Prince Louis, when her marriage with the Prince of Monaco was annulled by the Pope.

With a staff so large as that of Messrs Tods, Murray & Jamieson it necessarily happens that a very large number of those engaged in legal work in Edinburgh and the provinces at one time or another passed through the office. All such have a keen recollection of Mr Jamieson's industry, power, and benignity. No office sent so many ex-pupils to the Bar, and the large process business made it an excellent school. Mr Jamieson himself, however, was content to learn what had taken place when his assistants returned from the Parliament House. Only on very rare occasions did he deem it necessary to put in a personal appearance there.

Mr Jamieson was the Agent of the Bank of Scotland, a Director of the Scottish Widows' Insurance Company, and also of the most successful of American Investment Companies; but beyond these his interests and his work lay entirely within the four walls of his own room. The legal equilibrium has shifted during the last thirty years. The decay of both the absolute and the relative value of country land, the vast development of our commercial system and the great increase in company work and company promotion, have driven those solicitors who take the leading place more out into the open. There are still doubtless men of weight who seldom leave their chambers, but they are not now popularly regarded as of so much account, because there are so many able and influential men accessible in the market-place. The quiet man behind the scenes will doubtless still long remain with us; but it is unlikely that any practising lawyer will ever again build up so great a reputation so unobtrusively as did Mr James Auldjo Jamieson. C. N. J.

Two Seven Judge cases have been heard this week, and occupied both Divisions on Tuesday and part of Wednesday. One of these (the action at the instance of the widow of the late Mr Black, M.P.) raised the question of the proper form of issue and the scope of the enquiry where defenders in an action of damages admit liability but plead that the damages claimed are excessive. Different views were taken on this subject by Lord Guthrie, whose interlocutor was under appeal before the Seven Judges, and by Lord Johnston, whose opinion in a case which has since been settled, was reported along with *Black's* case in our issue of 9th November. *Black's* case was taken to avizandum. Among the reports issued this week are several of more than usual interest and importance. These include two decisions of the Extra Division—one as to the Parliamentary franchise for lady graduates, and the other as to the liability of innkeepers—and a decision of the First Division in a petition for recal of arrestments, where the subject arrested was a ship in course of construction.

The portrait of the late Mr Stewart, Perth, is held over till next issue.

THE EDINBURGH UNIVERSITY COURT.

RESIGNATION OF LORD STORMONTH-DARLING.

At a meeting of the University Court held on Monday the following Minute was approved in regard to the resignation of Lord Stormonth-Darling of the office of Chancellor's Assessor.

"The University Court have with much regret received the intimation that Lord Stormonth-Darling has resigned the office of Chancellor's Assessor. The connection of Lord Stormonth-Darling with the University extends over a period of more than forty years. In 1864 he graduated as Master of Arts, and afterwards pursued his studies in the Faculty of Law. In 1887 he was appointed by the Marquis of Lothian Rector's Assessor on the University Court, and continued to hold that office under three subsequent Rectors. In 1888 he was elected to represent the University in conjunction with the University of St Andrews in the House of Commons. In the following year he took, as Solicitor-General, an active part along with Lord Advocate Robertson in carrying through the House of Commons the Universities (Scotland) Act of 1889. Lord Stormonth-Darling resigned his seat in Parliament on being raised to the Bench, and in 1895 the Senatus conferred on him the Degree of Doctor of Laws. In 1900 he was elected by the University Court a Curator of Patronage. In 1901 the Chancellor, Mr Arthur James Balfour, appointed him to be Chancellor's Assessor on the Court. As a member of the Court for about twenty years, Lord Stormonth-Darling has borne his full share in the administration of the affairs of the University, and the Court feel deeply the loss which they will sustain by the severance of his connection with them. They recognise with thankfulness the benefit reaped by the University from his experience in public life and in the conduct of affairs. In the multiform range of subjects, administrative, financial, and educational, which the Court have to consider and dispose of, they have greatly relied on Lord Stormonth-Darling's liberality of thought, soundness of judgment, and mastery of form; and they would state that the charm of his personality and the consideration which he gave to the opinions of his colleagues contributed in no small measure to the progress and dispatch of business. The Court would express the hope that Lord Stormonth-Darling will long continue to discharge the onerous duties associated with the Bench of which he is so valued a member."

Mr N. J. K. Cochran Patrick, LL.B., advocate, has been appointed by the Edinburgh University Court Examiner in Scots Law, Conveyancing and Forensic Medicine.

The firm of Traquair, Dickson & M'Laren has been dissolved as at 11th November 1907 by the retiral therefrom of Mr William Traquair, one of the partners. The business of the firm will be carried on by Mr William Traquair Dickson on his own account, under the old firm name of Traquair, Dickson & M'Laren.

DECISIONS IN THE ENGLISH COURTS.

Attorney-General v. *Duke of Richmond.*

Revenue—Estate Duty.—The late Duke of Richmond executed a disentail of certain estates in Scotland; and for that purpose it was necessary for him to get the consents of the two next heirs, who were the present Duke and his son. The interests of these heirs were accordingly valued and bonds given over the estates for the amounts, viz., £415,000 and £287,000. The present Duke and his son then assigned these bonds to trustees, who were directed, *inter alia*, to pay the annual interest to the present Duke. Bonds were from time to time granted by the late Duke to the present Duke for balances of interest due, and at the death of the former these amounted to £88,000. The late Duke subsequently executed a testamentary *mortis causa* deed by which the estates were entailed on practically the same series of heirs. It was found that all the documents were genuine instruments intended to have full operation, without any reservation of any kind, but that the motive which actuated the late Duke in taking the steps which he did was to diminish the estate duty payable at his death. *Held* that the incumbrances were created by the late Duke *bona fide* for full consideration in money or money's worth wholly for his use or benefit, and that no estate duty was payable in respect of the sums contained therein.—K.B. Div. (Bray, J.).—30*th July* 1907.

Wilson v. *Carnley.*

Contract—Illegal—Public Policy.—*Held* that a promise to marry was not void on the ground of public policy, the promise being to marry after the death of the man's wife, who was then living, and it being known to the woman that the man was married at the time.—K.B. Div. (Lord Coleridge, Commissioner.).—31*st July* 1907.

Davis v. *Phillips, Mills & Co.*

Sale—Payment—Sale of Goods Act 1893 (56 & 57 Vict. cap. 71), sect. 4 (1).—The plaintiff raised this action of damages for non-delivery of goods which he alleged he had bought from the defendant and had paid for by cheque,

the value of the goods being above £10. The defendants returned the plaintiff's cheque immediately on receipt, and denied that the contract had been completed. *Held* that the receipt of the cheque was not payment, and that the completion of the contract had not been proved.—K.B. Div. (Channell, J.).—15*th October* 1907.

Macbeth v. *North and South Wales Bank.*

Bill of Exchange—Cheque—Bills of Exchange Act 1882 (45 & 46 Vict. cap. 61), sect. 7 (3).—The plaintiff granted a cheque payable to T. A. Kerr or order, being induced to do so by the false and fraudulent representations of I and W, who told him that they had arranged to purchase 5000 shares in White's Carriage Co. from Kerr. The plaintiff's cheque was presented to the defendants with the endorsement of Kerr's name forged by W, and they paid the amount to W. The plaintiff received certificates for 5000 shares in the company, W having got the secretary to issue certificates which he had no right to issue; but whenever the plaintiff heard of the forged endorsement, he repudiated the transaction. T. A. Kerr was an existing person, but W and I had never agreed to purchase shares in the company from him. In an action against the defendants for the amount of the cheque, *held* that Kerr was not a fictitious or non-existing person in the sense of sect. 7 (3) of the Bills of Exchange Act, and that the plaintiff was entitled to recover.—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—16*th October* 1907.

Craig v. *Dowding.*

Patent — Patents, Designs and Trade Marks Act 1883 (46 & 47 Vict. cap. 57), sect. 32.—The defendant wrote a letter to a customer of the plaintiff in which he said, "The article being sold and advertised by you is regarded as an infringement. We therefore request you to cease advertising and selling the articles in question." *Held* that this was a threat within the meaning of the above section; and that the plaintiff was entitled to an injunction unless the defendant brought a *bona fide* action for protection of her patent.—Chan. Div. (Kekewich, J.).—16*th October* 1907.

Davis v. *Mayor, etc. of Bromley.*

Reparation—Negligence—Local Government.—*Held* that no action of damages would lie against a local authority for refusal to sanction a drainage plan, even although malice was averred, the local authority having a discretion to sanction or not.—Court of Appeal (Vaughan Williams, L.J., Sir Gorell Barnes, P., and Bigham, J.).—17*th October* 1907.

Pyman v. *Marten.*

Insurance — Marine. — Decision of Phillimore, J. (*ante*, Vol. XIV. p. 95), *affirmed*.—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—17*th October* 1907.

In Re Discoverers Finance Corporation Ltd.

Company—Liquidation—Rectification of Register.—The holder of shares in a company, some time before the company went into liquidation, transferred his shares to another person. This was done in order to escape the liability on the shares. There was no contract of sale between the parties; there was no consideration; and the transferee looked to the transferor to indemnify him from any loss he might suffer. *Held* that the name of the transferor ought to be placed on the list of contributors.—Chan. Div. (Parker, J.).—17*th October* 1907.

The "Aristocrat."

Ship—Collision.—Where a collision occurred and one ship had failed to give the signal required by the regulations to shew that she was altering her course, *held* that that ship must be found to have been in fault unless she could shew that the collision would have occurred although her signal had been given.—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.)—22*nd October* 1907.

Greenwood v. *Greenwood.*

Master and Servant—Employers' Liability Act 1880 (43 and 44 Vict. cap. 42), sect. 1 (1).—The plaintiff was injured by a machine while in the employment of the defendant. In an action under the Employers' Liability Act 1880, the County Court judge found that the machine was properly made and not insufficiently fenced, but that it was a dangerous machine to be worked by an inexperienced person like the plaintiff, and that the defendant ought to have instructed him in its use and did not do so. The County Court judge therefore gave decree for the plaintiff. *Held* that the fault found did not constitute a defect in the machinery in the sense of the Act.—K.B. Div. (Phillimore and Walton, JJ.). — 25*th October* 1907.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 1 (4).—An action under the Employers' Liability Act 1880 was brought in the County Court and decree was given for the plaintiff. On appeal to the Divisional Court this was reversed and the defendant found not liable. On application for assessment of compensation, *held* that the County Court was the Court in which the compensation should be assessed.—K.B. Div. (Phillimore and Walton, JJ.).—25*th October* 1907.

The Late JOHN A. STEWART, Esq., Solicitor, Perth.

In legal and political circles much regret has been caused by the announcement of the death of Mr John A. Stewart, solicitor, Perth, which occurred on 9th inst., after an operation. For some time past the deceased had not been in very robust health, but his indisposition was not considered serious, and his death came as a great shock to all those who knew him.

Mr Stewart was a native of Rannoch, and was born in the year 1864. He was educated at the village school and at Sharp's Institution, Perth. On leaving school he entered the office of the late Mr John Stewart, solicitor, Perth, with whom he served his apprenticeship. Thereafter he proceeded to Edinburgh to attend the law classes, and was for some years in the office of the late Mr Gregor M'Gregor, S.S.C. In 1888 he qualified as a law agent, and soon afterwards returned to Perth and was assumed as a partner by his former master. In 1891 the partnership was dissolved and Mr Stewart started business on his own account. He soon acquired a large number of clients, and at the time of his death, in addition to a large conveyancing and trust business, he had one of the best practices in Perth Sheriff Court. By his industry and ability he attained a very high position as a pleader, and by his genial and courteous manner he won the esteem and affection of his professional brethren. Mr Stewart was also engaged in several important litigations in the Court of Session, including the Dunkeld right-of-way case, in which he acted as agent for the public. On questions arising under the Poor Law he was recognised as an authority, and he held the appointment of Law Agent to several Parish Councils. For a number of years he was Honorary Secretary to the Society of Solicitors for the City and County of Perth.

In political circles Mr Stewart was very well known. He was a keen Liberal and took an active interest in political work, in connection with which he held various appointments. He was Secretary of the Perth and West Perthshire Liberal Associations, and also Liberal Agent for the city of Perth and for the Western Division of Perthshire.

An enthusiastic Highlander and a keen Gaelic scholar, Mr Stewart took a great interest in Celtic folklore, and devoted much of his spare time to the preservation of the Gaelic language. For many years he was Chief of the Perth Gaelic Society—the success of which was largely due to his enthusiasm. Of a bright and cheerful disposition, he was much respected and liked by all classes of the community, and his early death will be much mourned by a wide circle of friends. He is survived by a widow and two young children.

The case of *Barclay Curle & Co.* v. *Sir James Laing & Sons*, which was reported in our issue of last week, was heard and decided in the House of Lords on Monday. The House, after hearing an argument confined to the question whether the property in the ships had passed, dismissed the appeal. The rapidity of the proceedings in this case constitutes a record. The arrestment which gave rise to the petition was executed on 29th October; the petition for recal was presented on 1st November; answers were lodged on 4th November: the case was transferred from the Single Bills to the Summar Roll in the First Division on 5th November, and a hearing occupying the whole of that day took place. Judgment was given by the First Division on 7th November,

a petition of appeal was presented within a week; cases were lodged with great expedition, and the hearing before the House of Lords took place and the judgment of the House was given on the 25th November. Though there was in this case, which was initiated by an Inner House petition, no preliminary Outer House procedure, it is certainly very remarkable that it should have been possible to obtain the judgment of the ultimate Court of Appeal within a month of the cause of action arising.

Appointment of Junior Counsel for the Treasury.—The Lords Commissioners of His Majesty's Treasury have appointed Mr Robert Munro to be Standing Junior Counsel of the Inland Revenue Department of Scotland in room of Mr A. J. Young, appointed Sheriff-Substitute at Aberdeen. A portrait and biographical notice of Mr Munro will appear in an early issue of the "Scots Law Times."

Society of Advocates in Aberdeen.—The annual meeting of this Society was held on 26th inst., Mr James Ross, President, in the chair. Mr Ross was re-elected President, and Mr F. T. Garden, Treasurer, for the ensuing year.

The Late Mr Justice Kekewich.

The death took place, after a very short illness, on Friday, 22nd inst., of the Right Honourable Sir Arthur Kekewich, Senior Judge of the Chancery Division. He had been in Court till within a few days of his death, and it was not generally known that he was seriously ill. Sir Arthur Kekewich, who was in his seventy-sixth year, was the second son of Mr Samuel Trehawke Kekewich of Peamore, Exeter, who was for many years M.P. for Exeter and South Devon. He was educated at Eton, and thence went to Balliol, where he obtained a second class in Mathematical Moderations in the first list issued in 1852, a first class in the Final Classical Schools at Michaelmas 1853, together with Lord Goschen, and a second class in Mathematics at Easter 1854. In the latter year he was elected to a Fellowship at Exeter, following by three years precisely in the footsteps of the late Lord Justice Chitty. In 1858 he was called to the Bar at Lincoln's Inn, and in the same year he was married to a daughter of Mr James William Freshfield, the well-known solicitor. Thus success was assured at the outset, and in the course of a few years he became standing Junior Counsel to the Bank of England, his leader in that capacity being the late Lord-Justice Cotton. His quickness of apprehension and a certain fluency of speech were an advantage to him as a stuff gownsman, but in later years rather a source of weakness. For many years he enjoyed one of the largest junior practices at the Equity Bar. In May 1877 he became a Q.C. He was a West Country Tory of an old Tory stock, and he fought two elections, though he was each time at the bottom of the poll. Mr Justice Kekewich was a good lawyer and a man of great ability, though he never ranked as a great judge. He was too apt to arrive at a conclusion before hearing both sides of a question. His opinions, especially on facts, were occasionally prolix, and he was not unfrequently reversed in the Court of Appeal. But he was a careful, courteous judge, and was personally held in high esteem by the profession. He had been a Judge of the Chancery Division since 1886, and was created a Privy Councillor last year.

On Saturday morning in the Court of Appeal the Master of the Rolls, in presence of the whole of the Judges of the Chancery Division and a large Bar, said they all recognised Mr Justice Kekewich's industry and his devotion to the public service, and they all regretted his untimely death. Mr Eve, K.C., on behalf of the Bar, generally associated himself with the Master of the Rolls' remarks.

LAW LIBRARY.

BOOK NOTICES.

The Law affecting Foreigners in Egypt as the Result of the Capitulations, with an Account of their Origin and Development. By James Harry Scott, B.A., LL.M., Advocate, Lecturer at the Khedivial School of Law, Cairo. Edinburgh: William Green & Sons, 1907. Price 15s. net.

"The Capitulations," under which foreigners alone in former times acquired any rights at all in the Near East, are defined in Mr Scott's excellent work as "grants of special privileges extended to foreign merchants while trading in the territories of the granter." They were granted to stranger nations, not only under the Mahommedan Sultans, but also by the Byzantine Emperors and again under the short-lived Frankish Kingdom of Jerusalem. Mr Scott in this book, which is so well written that it gives real pleasure to the reader, and which is of no mean historic value, traces the growth of the Capitulations in the East, and especially in Egypt, which naturally attracted Western trade until its commerce was destroyed by the opening of the Cape route. The author gives an interesting account of the trade of Egypt from the twelfth to the sixteenth century. A Capitulation was granted by the Khalif of Egypt in 1154 (and confirmed in 1173 by Saladin) to the Republic of Pisa, and another was given to the State of Florence in 1422. After the commencement of the Ottoman Empire the Capitulations became much more political than the former commercial protections, and by 1580 France had obtained commercial supremacy

over all other foreigners. Master Anthony Jenkinson was the first known Englishman to obtain a "privilege" from the "Sultan Solymann the Great Turke" in 1553, and, in spite of French opposition, the first Capitulation was granted to England in 1580. The usual favours in these early grants of privilege were: Safety, a special quarter or "Funduk," that the foreigners should be judged by their consul according to the law of their country, that they should succeed to property by their own laws, and to have exemptions from taxes; and these favours they bought from time to time as "Amurath to Amurath" succeeded. It is interesting to notice, however, that the Christian King of Sicily, Frederick II., granted, like the Eastern rulers, permission in 1230 to a Saracen prince to appoint a Mohammedan Consul in Corsica.

The original Turkish and Egyptian Capitulations have been modified by the reforms in the Turkish Empire known as the "Tanzimat." These included mixed courts, codes promulgated, laws of nationality being defined, and more recognition being granted to non-Western communities and religions. In 1841 the *firman* of the Sultan gave the Pashalik of Egypt to Mohammed Aly with the consent of the Powers, and succeeding *firmans* make it clear that Egypt is still a province of Turkey, though it "has acquired a degree of autonomy which approaches independence." With this quasi-dependence came the influx of foreigners, the interference of the British in 1883, and their continued occupation and its legal necessities. The chief privileges secured to foreigners in Egypt under the old Capitulations are summarised by Mr Scott into six heads: (1) Residence and commerce; (2) religious toleration; (3) inviolability of domicile; (4) exemption from taxes, other than Custom dues; (5) right to apply national law to successions; (6) immunity from local jurisdiction and laws. The last of these is naturally very much the most important, but the history of each is fully discussed. Four of the first privileges are so much superseded by other enactments or customs that the Capitulations are almost useless, but inviolability of domicile still rests upon them. The privileges of jurisdiction and legislation and the complicated history of the consular courts is narrated at length. From the favours shown from 1841 to 1867, the position of foreigners in Egypt was one of almost absolute immunity from the local law, but in 1876 this evil was considerably modified when a mixed court was created. The difficulties with regard to legislation were not then at an end, for confusion reigned until mixed codes were hastily drafted and approved by the Powers. The difficulties of these—for deciding cases arising between foreigners and natives, including the thorny cases of marriage, and between foreigners of different nations—can be imagined; and we are glad that the mixed blend of French and Moslem rules still gives the judge power to refer to the "droit naturel" or to the rules of equity where the code is either "silent or obscure." Mr Scott describes the changes in Egyptian legislation which have taken place since then, and ends with an enquiry into the direction in which further changes will move. That the Capitulations have almost served their time seems from this excellent account likely enough, but we agree with the author that they cannot be allowed to vanish until a sufficient legal guarantee for the rights of foreigners in Egypt has fully taken their place.

A Commentary on the Workmen's Compensation Act 1906. *By Francis A. Umpherston, M.A., Advocate, Author of the "Law of Master and Servant"; with Comparative Tables of the Workmen's Compensation Acts* 1897, 1900, *and* 1906, *and Acts of Sederunt, arranged by J. Hossell Henderson, M.A., LL.B., Advocate. Edinburgh: William Green & Sons*, 1907. *Price* 12*s. net.*

No Act of Parliament has given rise to a greater number of legal controversies than the Workmen's Compensation Act of 1897. Almost every clause in that Act contained expressions susceptible of different construction, and diverse views were taken by various Courts on a large number of the questions which arose. The Act of last year gets rid of a number of points which gave rise to difficulties under the earlier statute, and happily, therefore, many of the decisions under the 1897 Act are rendered obsolete. But, on the other hand, the new Act re-enacts many of the old rules and makes use of language of the old Act, the meaning of which has in course of time been conclusively interpreted by the Courts of Law. Mr Umpherston in his Commentary has of course discarded all cases which are no longer of use. But the number of surviving authorities is still very large. The notes which are appended to each section of the new Act contain references to and quotations from the judgments in all the cases which discuss language or enactments either repeated or modified in the new Act. What is "accident"? What is meant by "arising out of and in the course of"? What is "serious and wilful misconduct"? What is covered by "on, or in, or about"? What are "average weekly earnings"? These are all questions—but by no means all the questions—on which reference may still be usefully made to the old decisions. Mr Umpherston's treatment of the rules laid down in the decided cases will be found to be concise, lucid, and masterly, and his Commentary on the Act will be largely used and much appreciated by both branches of the profession. He tells us that it has not been his object either to suggest puzzles or to answer them. But wherever any question has been authoritatively dealt with by the Courts,

either here or in England, the decision will be found noted in the appropriate places in the book.

Mr Hossell Henderson has rendered excellent service in the preparation of the Comparative Tables of the Acts and Acts of Sederunt. The corresponding sections of the 1897 Act and the 1906 Act are printed on opposite pages. In the old Act those portions which are omitted from the Act of 1906 are printed in italics, and in the print of the Act of 1906 the portions that are new are distinguished in the same way. The same treatment is applied to the two Acts of Sederunt. The various Statutory Rules and Orders which have been issued under the Act of 1906 are printed in Part IV. of the book. There is a well-arranged index. It is no small ground for satisfaction that on this Act, which applies to the United Kingdom, no Scots lawyer need consult an English treatise, but that all may rely on finding everything of use on the subject in a Scots Text Book.

An Epitome of the Law affecting Marine Insurance. By Lawrence Duckworth, of the Middle Temple, Barrister-at-Law. Second Edition. London: Effingham Wilson, 1907. *Price* 3*s.* 6*d. net.*

The first edition of this book was published six years ago, but the passing of the Marine Insurance Act 1906 has made it necessary to bring the treatise up to date. The law affecting this class of contract is expounded with care and accuracy, and the decisions are clearly explained. A new chapter has been added dealing with cases decided since the former edition. The Act of 1906, which codifies the law relating to the subject, is printed as an Appendix. There is also a clear and full index. The book may be recommended as of use not only to lawyers, but to all whose business brings them into touch with this branch of mercantile law.

The Law and Practice of Divorce. By G. L. Hardy, of the Inner Temple and South-Eastern Circuit, Barrister-at-Law. London: Effingham Wilson, 1907. *Price* 5*s. net.*

This book is written to supply "a succinct inexpensive text-book on the Laws and Practice in Divorce, suitable for use by students and in the offices of solicitors." The object of the writer has, we think, been fully accomplished. The work is divided into two sections. The first deals with the law of matrimonial causes, and indicates shortly the grounds on which divorce or separation can be obtained in England, and also what evidence is admissible and what is required. The second part deals with the practice in an eminently practical way, and the appendices contain statutes, rules, and various forms. There is an extensive citation of authority, and the book will be found to be a useful and trustworthy guide to the subject.

The Law of Married Women's Contracts. By M. R. Emanuel, M.A., B.C.L., of the Inner Temple, Barrister-at-Law. London: Butterworth & Co., 1907. *Price* 7*s.* 6*d.*

Interest in the subject discussed in this treatise has been increased by the arguments in the various Courts, ending in the House of Lords, in the case of *Paquin* v. *Beauclerk*, decided last year. Difficult questions frequently arise as to whether a wife is acting without the authority of her husband and therefore does not bind him by the contract she has made, or whether a wife is acting as agent for her husband and is accordingly not herself bound. There have been numerous decisions as to what are "necessaries," and there is much law both on the liability of the husband and on that of the wife. Mr Emanuel has collected all the English authorities on the subject of Married Women's Contracts—and they are very numerous—and lays down a series of general principles and rules set out as much as possible in the actual words of the judges. The book is very complete, and is well written and well arranged. The English Married Women's Property Acts are printed in an Appendix.

Tebbs' A.B.C. County Court Practice. By Herbert L. Tebbs, of Gray's Inn and the North-Eastern Circuit, Barrister-at-Law. London: Butterworth & Co., 1907. *Price* 10*s.*

This is a concise guide to the practice of the County Courts in England. It consists of, first, a digest in which each subject is dealt with in alphabetical order, and second, an appendix containing the full text of the County Courts Acts and Rules. Information on any point of practice, and on any of the subjects, which are arranged under well-selected headings in the Digest, can be obtained with great facility in the book. No pains have been spared to ensure completeness and accuracy.

Waterston's Edinburgh Diaries for 1908.

Messrs George Waterston & Sons have now issued a very large variety of diaries for next year. One or other of the many forms in which the diaries are produced will be found to suit the tastes and requirements of every class. The needs of the legal profession are amply attended to. The Scots Law Diary, in pocket form, is replete with information useful to the practitioner, while his needs for his office and desk are catered for in the various editions of the "Accountants' and Solicitors' Diary." Tablet diaries, diaries combined with blotting pads, and diaries encased in pocket books, may also be obtained. The calendars, postal rates, lists of public officers, and many miscellaneous items of official information prefixed to the diaries, render them of exceptional utility.

WILLIAM THOMSON, Esq., Advocate.

Mr William Thomson, whose portrait we publish this week, was recently appointed an Advocate-Depute in succession to Mr Edwin Adam, now Principal Clerk of Session.

Mr Thomson, who is a son of the late Bailie Thomson, merchant, Dundee, was born there forty-two years ago. He was educated at the Dundee High School and at the Universities of Edinburgh and Paris. In the former he graduated as Master of Arts in 1886, and as Bachelor of Laws in 1889. His career in the Law Faculty was one of great distinction. He took his degree with honours, and was first prizeman in Scots Law, Criminal Law, Conveyancing, and Medical Jurisprudence. In Civil Law he obtained the fourth place. The Dickson Travelling Fellowship was awarded to him in 1890, and in that year he studied in the University of Paris. He afterwards acted as Assistant to the Professors of Scots Law and Conveyancing in Edinburgh.

Mr Thomson was the junior of the seventeen gentlemen who were admitted to the Faculty of Advocates in the year 1890, and as no less than twenty-three admissions had taken place in 1889, he commenced his professional career among very many competitors. But he quickly became known in the Parliament House. Hard-headed, painstaking, resourceful and cautious, he has made a reputation both as a jury pleader and in the Divisions, and he has for many years enjoyed a very large junior practice. He holds retainers for several County, Parish and Town Councils, and, till he accepted his new office, he often appeared for the accused in trials for murder and other serious crimes.

Like his immediate senior among the Deputes —Mr A. M. Anderson—Mr Thomson was a candidate for Parliamentary honours at the recent General Election. He contested the Wick Burghs, and, against a powerful opponent, came within measurable distance of winning the seat for his party. He has done much other political work, and is an effective platform speaker.

Mr Thomson devotes his leisure hours to golf, and on the links of Carnoustie and Barnton he is known as a useful player.

The Lord President has been in London part of this week presiding over a three days' sitting of the Royal Commission on Registration of Title in Scotland. A number of witnesses were examined. The other Judges of the First Division have been sitting as a Court of Justiciary, and a long roll of cases has been heard. On Thursday a case was debated before a Full Bench consisting of the eight Judges of the Inner House. After sitting for three weeks in the Justiciary Court, the Second Division has returned to its own Court-room. It was found that the noise made by the builders was heard quite as distinctly in the Justiciary Court-room as in the Second Division, and the ventilation in the Justiciary Court is far from satisfactory.—During the absence of the Second Division from their Court-room it was occupied almost every day by one or other of the Lords Ordinary.

Court of Session—Christmas Recess.—The Lords have resolved to adjourn the Court from Saturday the 21st day of December next to Saturday the 4th day of January 1908 inclusive, and have appointed Tuesday the 31st day of December to be box-day in the recess. The sittings of the First and Second Divisions for

the trial of civil causes by jury, in the ensuing Christmas recess, will commence on Monday the 23rd day of December next, at 10 A.M.

The Governor of the State of Texas has appointed Mr Chilton L. Addison Smith, W.S., Edinburgh, a Commissioner for that State in Scotland.

Society of Solicitors in the Supreme Courts.—At a stated general meeting of the Society of Solicitors in the Supreme Courts of Scotland, held on the 5th inst., the following appointments were made for the ensuing year:—Reporter on the *probabilis causa* of Applicants for Admission to Poor's Roll, Mr Thomas J. Cochrane; Agents for Poor in Civil Causes, Messrs James More, Dall, and Peter Weir; Agents for Poor in Criminal Causes, Messrs Robert Gray, M.A., LL.B., and John M'Clure Brodie, B.L.; Commissioners to adjust the rate of interest on heritable securities, Messrs Charles Ritchie and R. Addison Smith; representative to the Board of Management of the Royal Infirmary in terms of the Act 33 & 34 Vict. cap. 48, Mr A. Scott Ireland. Mr Robert Miller, M.A., LL.B., was admitted a member of the Society.

THE JURIDICAL RESULTS OF THE HAGUE CONFERENCE.

By T. Baty, D.C.L., LL.D., Barrister-at-Law, one of the Hon. General Secretaries of the International Law Association.

Although the wide-reaching results which were hoped for in various quarters have not been secured by the Peace Conference which separated last October, its deliberations have not been altogether unfruitful. In this it resembles the Conference—now belonging to ancient history—which the Emperor Alexander convened at Brussels in 1874. From that Conference, which met, like the present, under the shadow of a great war recently concluded, much was hoped. It was to inaugurate an era of universal humanity, if not of universal peace. All it effected was to adopt a convention about lawful combatants, and to prohibit certain savage methods of warfare and the use of explosive bullets. But no one denies that this was useful work.

In such a restricted sphere the activity of the Hague diplomatists has been commendable. Their *First Committee*, which was concerned with Arbitration, has elaborated two new tribunals, and (a more valuable work) has regularised and cleared up the procedure of those Inquiry Commissions which proved so useful in the Dogger Bank incident. The *Second Committee* (on Land Warfare) has done something to supplement, though not much to secure the enforcement of, the rules dealing with the anomalous situation of territory in hostile occupation. The *Third Committee* (Sea Warfare), after much difficulty, adopted a series of rules dealing with mines as a means of warfare, and agreed upon a set of rules regulating (very inconclusively) the vexed question of the *quantum* of assistance and shelter which may be given to a belligerent's war-vessels by a neutral. Lastly, the *Fourth Committee* (also on Naval Warfare) dealt in a tentative fashion with the position of merchantmen and their crews.

The work of the First Committee does not call for much comment from the juridical point of view. It was attempted to classify disputes according as they present a purely legal character or involve wider considerations, and to refer the former class to obligatory arbitration. As was pointed out by the German plenipotentiary, no such classification can be made, for it is impossible to say that the most commonplace topic may not occasionally raise moral, and therefore political, issues, which cannot be settled by a legal decision. The few questions on which a few nations did agree as proper for obligatory arbitation were utterly insignificant, and one can hardly imagine their ever leading to war: only an empty recommendation resulted from the discussion. One of the new Courts, to which reference has been made, was erected as the result of Russian and American proposals, which apparently aimed at the subjection of the nations to the decrees of a select body of jurists. The ostensible reason assigned for the erection of a new Court when there already existed an old one, was that the old one had no cohesion, the tribunal being selected for each case *ad hoc*; consequently it had no continuity and no *esprit de corps*. But the entire Conference revolted against giving unlimited supremacy to a permanent bench of five lawyers, and the question then resolved itself into the amount of representation which each nation was to have in a Court of twenty or thirty. It was eventually left open, and it is permissible to believe that the old tribunal and not this cumbrous Areopagus, if ever it is formed, will remain the effective body. As to the Drago doctrine, the Conference adopted a resolution which virtually makes arbitration obligatory in the case of money claims arising *ex contractu*. Belgium, Roumania and Switzerland, with Sweden and Venezuela (an odd companion for Belgium in this connection), declined to accept this as sufficient, feeling that it gave an implied sanction to the employment of force for a money-debt when once converted into a judgment-debt.

The First Committee is also responsible for what may variously be regarded as the most brilliant or the most fatuous work of the Conference—the creation of an International Prize Court. Brazil and Turkey flatly declined to have anything to do with it. The notion of making a nation's representation on the Court a function of three variables, one of

which is its naval strength, is a curious notion for a Peace Conference which has made the diminution of naval expenses a subject of solemn exhortation. The Conference quietly puts a substantial premium with one hand into the pockets of the nations at which it points the finger of warning with the other. Professor Holland and others have called attention to the serious danger of entrusting the determination of the many open questions of prize law to a Court which is not unlikely to be influenced by doctrinaire speculations. And there is certain to be a powerful agitation against the ratification of such a convention by Great Britain.

Of the Second Committee's (land warfare) proposals, the only important ones which survived were those preventing the requisitioning of neutrals' rolling stock (subject to an Argentine reserve), and defining the conditions under which a neutral subject can be properly treated, on account of his pronounced hostility, as a belligerent. The latter provides that he must not be worse treated than a true belligerent, and thereby seems to abrogate the old rule under which neutrals accepting letters of marque were harshly regarded. In not defining what are "acts of hostility" the article opens a wide door to abuses. The Haytian delegate pertinently enquired, would a neutral journalist become "hostile" if he violently attacked the belligerent in the press? The provision of supplies to a belligerent is actually made a hostile act, and thus every contrabandist may in future be an enemy!

The Fourth Committee accomplished very little. On the broad questions of neutrality, which were its main occupation, it did nothing. The British proposal to abolish contraband, though widely accepted (among others, by Austria), was not adopted. It was urged by Lord Reay in a speech of singular clearness and force. A meeting of its supporters was subsequently convened, at which the principle was rather abruptly propounded for definite acceptance by those present. It is difficult not to agree with the criticism that this step was a "frontal attack," which rather tended to retard than to forward the eventual adoption of the principle. In minor matters, this Committee set its seal of approval on the exemption of fishing-boats and scientific expeditions from capture, and secured the proper authorisation of converted mercantile cruisers. And it takes one long step in advance, in making the crews of merchantmen no longer liable to be made prisoners. The crews of warships are now sufficiently specialised to make this a safe course. The belligerent is further fortified by being allowed to take the parole of the men liberated. As to the possibility of commissioning vessels abroad or at sea, nothing could be settled. The Committee approved, without enforcing, the usual concession of liberty to hostile merchant vessels to depart within a limited time, and the principle that ships at sea when war breaks out should be allowed to reach port in safety.

In the Third Committee irreconcilable views displayed themselves on almost every controverted subject. On that of the conditions under which a belligerent warship can be admitted to asylum and hospitality in a neutral port the Conference came to the lame conclusion to adopt the twenty-four hours rule, *provided* that each nation may legislate for the matter as suits itself. This course of appearing to lay down a rule, whilst in reality leaving matters where they were, is eminently characteristic of the whole proceedings. The convention on this point remains unsigned by Great Britain. It is inaccurate to say that this Committee came to no conclusion on the subject of floating mines. Its conclusions were: (1) To prohibit floating mines which do not automatically become harmless in one hour; (2) to prohibit moored contact mines which do not become harmless when they break away from their moorings; (3) to prohibit the use of torpedoes which do not become harmless when they have run their course; (4) to prohibit the employment of mines for the obstruction of commerce; (5) to enforce the duty of warning neutrals against moored contact mines ("as far as military exigencies permit"—which may mean anything), and of rendering them harmless ("as far as possible") after a limited time: particularly after the end of a war. What was not effected was the eminently proper prohibition of laying mines at all in the high seas. And it should be remarked that a nation which does not know how to make its mines innocuous is thereby expressly released from the obligation to do so, and is virtually absolved from the restrictions laid down. So that here again the Conference, in adopting the proposals of the Committee, does very much less than it seems to do at first sight.

We should add that the bringing of prizes into neutral ports (usually considered improper) was seriously, and with good reason, considered by the Third Committee as a matter which might fairly be legalised. The recent extraordinary claim of Russia to destroy neutral prizes—a thing hitherto unheard of—makes it well worth considering the advisability of relaxing the strictness of neutral duty in this respect. If a country cannot take her prizes into a neutral port, she will sink them—that is, if she is at liberty to do so; and the Conference was inclined to say she might.

Here we have its very worst and most dangerous feature. The Conference has been the occasion of Great Britain's taking part in the discussion, as of open questions, of matters which she ought never for a moment to have admitted as proper subjects of discussion at all. If we really mean to contend that our neutral passenger ships and cargo ships are never, under any circum-

stances, to be sent to the bottom by a belligerent cruiser for its own convenience, it is fatal to discuss the matter as one we are not sure of. And so with regard to other vital questions of maritime law. It is impossible to doubt that by consenting to discuss our position as one with regard to which we stand open to conviction, we have seriously, and perhaps irreparably, impaired it.

DECISIONS IN THE ENGLISH COURTS.

Shepheard v. *Bray.*

Company — Director — Liability.—Case reported *ante*, Vol. XIV. p. 64, *settled* after appeal, the action being *dismissed*, and the order of the Court below *reversed*.—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—21*st October* 1907.

Newman v. *A. & S. Gatti.*

Contract — Construction — Theatrical Artiste.—A contract was entered into between the plaintiff and the defendants, under which the plaintiff was engaged in the defendants' theatre for the run of a certain piece to understudy the principal actress. *Held*, on the evidence, that the plaintiff was not entitled to take the part of the principal actress in the latter's absence, but was only bound to do so if requested. —Court of Appeal (Vaughan Williams, L.J., Sir Gorell Barnes, P., and Bigham, J.).—22*nd October* 1907.

James v. *The Institute of Chartered Accountants.*

Club—Expulsion of Member.—The plaintiff was a member of the defendant society, one of whose rules provided that if a member did not pay his annual subscription within six months from the time when it was due he would be liable to be excluded from membership of the society by a resolution of the committee of the society, the member having first had an opportunity of being heard. The plaintiff forgot to pay his subscription when it was due, and five notices were sent to him by post, including notice that a meeting of committee was about to be held at which a resolution dealing with his membership would be considered. These notices were not received by the plaintiff, owing to the fact that he had changed his address and had not intimated his new address to the society, and the notices were therefore returned to the defendants through the dead letter office. *Held* that the rule as to the member to be excluded having an opportunity of being heard had been complied with, and that the plaintiff's exclusion from the society was in accordance with the rules. — Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—29*th October* 1907.

Attorney-General v. *Mayor, etc. of Brighton.*

Statute—Shop Hours Act 1904 (4 Edw. VII. cap. 31), sect. 1.—When a local authority had completed their part in making a closing order under the above Act, and the order had been sent to the Home Office for approval and confirmation, *held* that an action for injunction against the local authority proceeding with the order and expending the ratepayers' money in so doing was incompetent. *Opinion* that an order for closing hairdressers' shops for an afternoon on one day in the week without regulating the hours of closing on other days was not *ultra vires* or unreasonable.—Chan. Div. (Joyce, J.).—31*st October* 1907.

In re Orlebar. Wynter v. *Orlebar.*

Revenue—Estate Duty.—*Held* that where a power of appointment was exercised in a will the estate duty, in the absence of any direction to the contrary, was payable out of the general personal estate and not out of the appointed fund.—Chan. Div. (Neville, J.).—2*nd November* 1907.

United States Shipping Co. v. *Empress Assurance Corporation.*

Insurance—Marine.—Decision of Channell, J. (*ante*, Vol. XIV. p. 136) *affirmed*.—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—4*th November* 1907.

Dibdin v. *Skirrow.*

Ferry—Extent of Right—Interference. —Decision of Neville, J. (*ante*, Vol. XIV. p. 179) *affirmed*.—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—5*th November* 1907.

In re Dover Coalfield Extension Ltd.

Company — Director — Remuneration— Trust.—One company acquired shares in another company, and a director of the first company was appointed a director of the second, the qualifying shares being transferred from the first company to the director, and the director executing a declaration of trust in favour of that company. The first company went into liquidation, and the liquidator claimed on behalf of the creditors the remuneration which the director had received from the second company. *Held* that the remuneration was not received on behalf of the first company or as profit on their property, and that the director was entitled to retain it.—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—7*th November* 1907.

ROBERT MUNRO, Esq.,

ADVOCATE.

The position of Junior Counsel to the Treasury is one of great importance. There is no class of cases more intricate or requiring more delicate handling than those which emanate from the Inland Revenue Department. As time goes on the number of these cases appears to increase rather than to diminish, and, considering the relative size of the two countries, Scotland contributes a larger proportion than England to the bulk of Tax Cases. In the selection of Mr Munro for the office rendered vacant by the resignation of Sheriff Young, an appointment has been made excellent alike in the interests of the Department concerned and of the Court of Exchequer. Mr Munro is singularly well qualified to deal with a difficult subject, and to explain with clearness the perplexing details of the Revenue Acts so frequently framed on the principle of legislation by reference.

Born in 1868, at the Free Church Manse of Alness, Ross-shire, Mr Munro is a son of the late Rev. A. R. Munro, M.A., for many years minister of that charge. He was educated privately, then at Aberdeen Grammar School, and later at the University of Edinburgh, where he graduated as Master of Arts and Bachelor of Laws. His academic career was a distinguished one. Among the many honours which he obtained was the Forensic Prize. He was Secretary, and afterwards President, of the Students' Representative Council, and also of the Edinburgh University Liberal Association.

After leaving the University he went to London, and for about a year acted as Official Receiver in Bankruptcy under the Board of Trade. He there gained an insight into Commercial Law and business which has since stood him in good stead.

In 1893 he returned to Scotland, and in November of that year was admitted to the Faculty of Advocates. Since then he has had a large and ever-increasing practice, and he is universally recognised as a counsel of great ability.

On the formation of the present Government he was appointed Sheriff Court Depute, and a year later Extra Advocate-Depute on the Western Circuit. The latter appointment he held till November of the present year.

THE RIGHT HON. CHARLES SCOTT DICKSON, K.C., Lord Advocate in the late Administration, has, in reply to an invitation by Conservatives and Liberal Unionists, intimated his willingness to become Unionist candidate for the Central Division of Glasgow at the next election. Mr Dickson represented Bridgeton Division of Glasgow from 1900 to 1905. Mr James Avon Clyde, K.C., Solicitor-General in the late administration, has been adopted as prospective Unionist candidate for the West Division of Edinburgh. Mr Clyde unsuccessfully contested Clackmannan and Kinross at the last election.

THE list of jury causes for trial at the ensuing sittings has been issued. There are nine cases in the First Division and five in the Second.

BUSINESS IN THE HOUSE OF LORDS.—There are still ten causes standing for hearing. Of these, three are from Scotland, and they stand as follows in the Roll:—1. *United Collieries Limited* v. *Robert Muir & Co.*; 3. *Weir* v. *Crum Brown*; 8. *Cameron* v. *Young*.

Society of Writers to His Majesty's Signet.—The following gentlemen have been admitted members of the Society of Writers to the Signet:—William Thorburn Blackwood, LL.B., 2 Bellevue Crescent; Andrew Henry Cowan Lamb, LL.B., 1 Western Terrace; David Mackenzie, LL.B., 1 Atholl Place, Perth; George Frederick Graham Smith, 12 Belgrave Place; Alan Graham Thomson, 21 Chester Street; George Muir Thornton, LL.B., Grange Park; Frederick Lewis Maitland Tod, 23 Lennox Street; Ernest Maclagan Wedderburn, LL.B., 6 Succoth Gardens.

The trial took place on the 10th inst. at Airdrie, before Sheriff Glegg and a jury, of Frederick Ekeval, the engine-driver of the train which met with an accident on 30th September at Sunnyside Station, Coatbridge, by which one passenger was killed and fifty injured. The charge was one of culpable homicide, and the case has excited much public interest. The jury returned a verdict of not proven. Mr Lyon Mackenzie, who prosecuted, made his first appearance as Advocate-Depute in the Sheriff Court.

NEW ENGLISH JUDGE.

It is officially announced that the King has been pleased to appoint Mr Henry Trelawney Eve, K.C., to be one of the Justices of the High Court of Justice, Chancery Division, in place of the late Right Hon. Mr Justice Kekewich.

The new Judge, who was born in 1856, was called to the Bar in 1881. He practised on the Chancery side and became a Queen's Counsel in 1895. He was elected a Bencher of Lincoln's Inn in 1899. Both as Junior and Leader he had a very large practice. A Liberal in politics, he has represented the Ashburton Division of Devon since 1904.

LANARKSHIRE SHERIFF COURT.

COURT ARRANGEMENTS.

In view of the new Sheriff Court Act coming into force on 1st January, several alterations are being made in the arrangement of the Courts and business generally at the County Buildings. Amongst these it may be noted that in each week there will be four sittings of the Small-Debt Court—viz., on Monday, Tuesday, Wednesday, and Thursday—instead of only three days as at present. In the months of July, August, and September, however, there will be only three sittings, viz., on Monday, Wednesday, and Thursday. As regards the Ordinary Court, which at present is held on Tuesday, Wednesday, Thursday, and Friday, there will be an additional Court on Monday, probably presided over by Sheriff Mackenzie, who at present sits, as a rule, daily in the Summary Court, but who, after the new Act comes into force, will share the Ordinary and Summary work with the other Sheriff-Substitutes. The Ordinary Courts will, it is presumed, continue to be taken by Sheriffs Balfour, Boyd, Fyfe and Davidson on Tuesday, Wednesday, Thursday and Friday respectively as heretofore. The Summary work will be taken in rotation by the resident Sheriff-Substitutes, along with Sheriff Scott Moncrieff and Sheriff Glegg, and other arrangements are being made for, as far as may be, an equal allocation of judicial work among the Sheriff-Substitutes.

Mr M. Boyd Auld, writer and notary public, 29 St Vincent Place, Glasgow, has assumed as a partner Mr Angus Mackenzie, writer, sole partner of the firm of James Smith and Son & Mackenzie, writers, Glasgow. The combined businesses will be carried on at the above address under the firm name of M. Boyd Auld & Mackenzie. Before taking over the business of James Smith & Son two years ago, Mr Mackenzie was for six years managing clerk to Messrs R. & J. M. Hill, Brown & Co., writers, Glasgow.

The Late G. Wemyss Renton, Esq., Solicitor, Kirkcaldy.—We regret to record the death of Mr G. Wemyss Renton, which took place on the 9th inst. at his residence in Kirkcaldy. Mr Renton was a son of the late Rev. John Renton, United Presbyterian minister at Auchtermuchty, and among his brothers are Mr Justice Renton, of the High Court of Ceylon, and Mr R. W. Renton, Procurator-Fiscal in Edinburgh. Mr Renton commenced business in Kirkcaldy about eighteen years ago, and was one of the best known and most respected lawyers in Fife. He acted as agent for the Liberals in West Fife, and he was Secretary of the Society of Procurators of the Central District of Fife.

MARRIAGE OF THE LORD CHANCELLOR.

The marriage of Lord Loreburn to Miss Violet Elizabeth Hicks Beach, eldest daughter of Mr W. F. Hicks Beach, of Witcombe Park, Gloucestershire, took place at the Chapel of St Stephen, Westminster Hall, on Tuesday, 3rd inst. The officiating clergy were the Bishop of London, assisted by the Archdeacon of Westminster and Canon Henson, rector of St Margaret's, Westminster. Lord Loreburn was attended by Lord Granard, Master of the Horse, as best man. Among those present in the

chapel, in addition to the Lord Chancellor's colleagues in the Cabinet, were Lord Halsbury, Lord Alverstone, Lord James of Hereford, Lord Selby, Mr Justice A. T. Lawrence, Mr Lyttelton, K.C., M.P., Sir George Lewis, Sir W. E. Davidson, K.C., Mr E. S. Hope, C.B., Registrar of the Privy Council, and Sir Kenneth Muir Mackenzie. Of the wedding gifts, the members of the Cabinet gave a Queen Anne inkstand and candlesticks; the Judges of the Supreme Court, a set of nine silver Elizabethan bowls; the Benchers of the Inner Temple, a silver tray; and the judicial members of the House of Lords, silver inkstand and candlesticks. It is understood that there is to be a presentation later from the House of Lords. Lord Loreburn is the only Lord Chancellor who has been married during his term of office.

The Inner Temple, the Benchers of which have given the Lord Chancellor a large silver salver for a wedding present, numbers (says the Law Journal) the Speakers of both Houses of Parliament among its members. Mr Lowther, like Lord Loreburn, is a Bencher of the Inner Temple. The same distinction belonged to the Inn when Lord Halsbury and Mr Gully were in office. Yet another coincidence exalts the Inner Temple above the other Inns. Both the Law Officers of the Crown belong to it. Two or three years ago Lincoln's Inn had a far larger number of judges among its members than any other Inn. The Inner Temple has now ousted it from this proud position. Fourteen judges, including Lord Alverstone, Lord Macnaghten, Sir Herbert Cozens-Hardy, and Lords Justices Vaughan Williams, Farwell, Buckley, and Kennedy, belong to Lincoln's Inn; fourteen, including Lord Loreburn, Lord Halsbury, Lord Atkinson, and Sir Gorell Barnes, belong to the Inner Temple. The Middle Temple is only half as fortunate; but seven judges, including Lord Collins, Lord Robertson, and Lord Justice Moulton, belong to it. Gray's Inn has not a single High Court judge among its members.

DECISIONS IN THE ENGLISH COURTS.

Normandy v. *Ind, Coope & Co. Ltd.*

Company—Special Resolution—Notice.—A notice was sent to the shareholders of a company calling a meeting for the purpose of approving new regulations, and it was stated that a copy of the regulations would be sent on application being made. In order to make these regulations valid a special resolution was necessary. The new regulations provided for payment of a pension to the managing director, for increasing the fees of the directors, for appointing certain persons to be directors for life, for indemnity to the directors for what they did in office, and gave power to the directors to borrow a large sum of money. *Opinion* that the notice of the business to be transacted was not sufficient, and that resolutions passed at the meeting and confirmed at a later meeting were not valid.—25*th October* 1907.

Company — Director — Powers. — Among the objects of a company stated in its memorandum of association was "to provide for the welfare of persons in the employment of the company . . . . by granting pensions." The articles of association authorised the directors to exercise all the powers of the company except such as were expressly reserved to the company in general meeting; but they provided that the remuneration of the directors should be a stated sum, and that the company might from time to time grant an additional remuneration. *Opinion* that an agreement by the directors to pay an annuity to the managing director on his retirement was *ultra vires* of the directors, although the company might enter into such an agreement.

Company—Shareholders—Title to Sue.—*Held* that a shareholder of a company had no title to sue an action for a declaration that certain meetings called for the purpose of substituting new articles of association for the old ones were not properly convened, that the resolutions passed thereat were not duly passed, and that an agreement entered into by the directors was *ultra vires*.—Chan. Div. (Kekewich, J.).—7*th November* 1907.

Lewis & Lewis v. *Durnford.*

Contract—Restraint of Trade.—A clerk to a firm of solicitors bound himself, in the event of his service coming to an end, not to act for any person who was or had been within five years previously a client of the firm. He left and began business on his own account; and on three occasions he acted for persons who had during the five years previous to his leaving been clients of the firm.—*Held* that the stipulation was not wider than was reasonably necessary for the protection of his previous employers' business, and that they were entitled to an injunction against him.—Chan. Div. (Swinfen Eady, J.).—8*th November* 1907.

Rawsthorne v. *Rowley.*

Trust—Trustee—Liability.—Where a lady on her marriage transferred a certain security to a trustee to hold for certain trust purposes, *held* that, in the absence of circumstances giving rise to suspicion, there was no duty on the trustee

to make an examination of the security or to enquire into the solvency of the debtor.—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—*9th November* 1907.

Mansell v. *Grifin.*

School — Schoolmaster — Corporal Punishment.—*Opinions* (*per curiam*) that the right of giving corporal punishment to a pupil is not confined to a headmaster, but, in the absence of evidence to shew a limitation of the power, a responsible teacher of a class is entitled to administer moderate punishment. — K.B. Div. (Phillimore and Walton, JJ.). — *9th November* 1907.

In re Nelson & Co. Ltd.

Company—Liquidation—Life Assurance Claims.—A company engaged in the business of selling tea offered pensions to purchasers who should become widows, subject to certain conditions. The company went into liquidation, and at the date of liquidation there was a large number of widows who had claims for pensions under their contracts, and there were also purchasers of tea who were fulfilling the qualifying conditions. The company had, under the Life Assurance Companies Act 1870, deposited in Court a sum of £20,000, and under their articles of association a proportion of their profits had been annually set aside to meet pension claims. *Held* that the sum deposited in Court and the accumulated profits must be applied to meet the claims of pensioners and customers, and that pensioners were entitled in the distribution to a preference over customers.—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—*12th November* 1907.

Storey v. *Fulham Steel Works Co.*

Master and Servant — Termination of Contract—Illness.—Decision of Channell, J. (*ante*, Vol. XIV. p. 186), *affirmed.*—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—*14th November* 1907.

Wade v. *Robert Arthur Theatres Co. Ltd.*

Contract—Construction.—A contract was entered into between the plaintiff and the defenders by which the plaintiff was engaged for "principal part in pantomime required at a salary of £130 per week first year, £140 per week second year, £150 per week third year, ... with the option, in consideration of this engagement, of retaining his services on the same terms and conditions as set forth in this agreement for the following pantomime season." *Held* that the option might be exercised by the defenders on payment of the same salary as was agreed to be paid for the third year.—Chan. Div. (Parker, J.).—*14th November* 1907.

Emanuel and Others v. *Symon.*

International Law—Foreign Judgment—Enforcement.—Decision of Channell, J. (*ante*, Vol. XIV. p. 135), *reversed.*—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—*15th November* 1907.

Bristol United Breweries Ltd. v. *Abbot.*

Company — Debentures.— Before the commencement of the Companies Act 1900, a company created debentures and executed a trust deed by which they conveyed certain heritable property to trustees to secure the debentures, the trustees having power to sell part of the property and reinvest the proceeds. The trustees, after 1st January 1901, sold part of the property and reinvested the proceeds in heritable property. *Held* that it was unnecessary to register the deed of conveyance, as it did not create a charge within the meaning of sect. 14 of the Companies Act 1900.—Chan. Div. (Parker, J.).—*15th November* 1907.

Ogden v. *Ogden.*

International Law — Marriage — Validity.—Decision of Bargrave Deane, J. (*ante*, Vol. XIV. p. 148), *affirmed.*—Court of Appeal (Cozens-Hardy, M.R., Sir Gorell Barnes, P., and Kennedy, L.J.).—*18th November* 1907.

Cleverly v. *Gas-Light and Coke Co.*

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), Sched. I. (1) (a).—A workman received injury by accident which resulted in tumours and incapacity for work. His employers agreed to pay him a weekly sum during incapacity. Some time afterwards he died, and in an arbitration between his employers and his dependants the arbitrator found that death was due to disease and not to the accident, but that the employers were estopped from denying that death was due to the accident by reason of the agreement. *Held* that the agreement did not operate as an estoppel, and that compensation was not payable. —House of Lords (Lord Loreburn, L.C., Earl of Halsbury, Lord Macnaghten and Lord Atkinson). —*18th November* 1907.

Heard v. *Stuart.*

Lease—Construction.—A lease of certain premises provided that the tenant should keep the premises in good and substantial repair and condition, and not make any addition or alteration to the buildings nor alter their external appearance. He let the end wall of the premises as a bill-posting stance to a company, and there was evidence that the use of it for this purpose was injurious to the wall. *Held* that he had committed a breach of both the above conditions of the lease.—Chan. Div. (Joyce, J.).—*19th November* 1907.

The Late HECTOR SUTHERLAND, Esq., Solicitor, Wick.

Many, not only in the legal profession, but beyond it, will learn with deep regret of the death of Mr Hector Sutherland, Town Clerk of Wick, at the comparatively early age of fifty-one. Born at Wick and educated there, Mr Sutherland commenced his law apprenticeship while a mere boy, and while still under twenty, came to Edinburgh to attend the law classes at the University. He proved himself an excellent student, gaining distinction not only in Scots Law and Conveyancing, but in Medical Jurisprudence and Moral Philosophy. He at the same time was a Parliament House assistant in a busy office, and fought through some of the most notable litigations of those days. He was also an active member of the Scots Law Society, in which he was the contemporary and personal friend of many men who have since risen to eminence in the legal profession. But the anxiety to begin practice on his own account drew him away from Edinburgh to his native town in 1879, shortly after he had qualified as a solicitor. Thereafter his meetings with his former Edinburgh companions were comparatively rare, though many of them doubtless retain pleasant memories of his genial and interesting personality. He rapidly built up a good practice at Wick, and his local popularity was indicated by the fact that in 1885, at the early age of twenty-nine, he was appointed Town Clerk of Wick, being then the youngest Town Clerk in Scotland. Prior to receiving this appointment he had entered into partnership with Mr W. Paterson Smith, solicitor, Wick, as whose apprentice he had commenced the study of law.

In 1893 he formed the firm of Hector Sutherland & Green, which subsisted till his death, by taking into partnership Mr G. A. O. Green, solicitor. In addition to the Town Clerkship he held many appointments as agent for public bodies and local trusts. He also for many years acted as local agent for the Duke of Portland, and as Liberal Unionist agent for the County of Caithness. His firm also acted as law agents for Sir Arthur Bignold, M.P. for the Northern Burghs, while his partner acts as that gentleman's election agent. From the institution of the Liberal Unionist party he was one of its most ardent supporters.

Mr Sutherland was a shrewd and reliable adviser, and a keen and resourceful agent in conducting litigation. He was a skilful debater, and his knowledge of law was extensive. He did not, however, confine his attention to law. In educational matters he took a profound interest, and for about twenty years, down to the time of his death, he was a member of the Wick School Board. He used to say that "a good education was the working man's best legacy to his family," and he was an earnest advocate of higher education. A man of pronounced literary tastes, he was widely read both in classical and modern literature.

In private life he was of quiet and unassuming manner, and kindly and genial disposition. His friendly aid will be much missed, not only by charitable institutions but by the poor whom he unostentatiously befriended.

He never caught the craze for golf. A quiet game at bowls was his chief recreation. In earlier days he enjoyed nothing better than a walking excursion along the interesting cliffs of the Caithness coast.

His death from hemorrhage of the lung took

place with almost tragic suddenness, for, though he had been far from well for a considerable time, he was at business on the day preceding his death.

In expressing the deep regret of the Bench and Bar, Sheriff Stuart, at the first sitting of the Sheriff Court after the sad event, aptly observed of him: "A man of high sense of honour, Mr Sutherland, besides the essentials of an ample knowledge of law and a wide knowledge of human nature, possessed a certain humour of his own,—a most useful and delightful gift, which served often to lighten the seriousness of our judicial work."

It has already been proposed by some of Mr Sutherland's friends that his memory and the memory of his work in the cause of education should be perpetuated by founding a "Hector Sutherland" prize in connection with the Wick Academy, where he received his general education. There could be no more suitable memorial of him. J. F. M'L.

In the correspondence (which appears in another column) between the Lord Advocate and the Secretary of the Incorporated Society of Law Agents as to the Sheriff Courts Act of last year, the Society conveyed to his Lordship their thanks for his services in securing the passing of that Act. In his reply the Lord Advocate calls the attention of the profession to the Criminal Procedure and Summary Jurisdiction (Scotland) Bill, which was introduced towards the close of last session. His Lordship is anxious that the Criminal Procedure in the Sheriff Courts should be simplified, and that in that branch of practice the machinery of the Courts of Ordinary Jurisdiction should be made as efficient as it is in civil practice. He invites the assistance of the profession by way of suggestion or amendment to the Bill of last year, which will be reintroduced next session. The main objects of the Bill are thus set forth in the memorandum which was issued with it last year: "This Bill is designed to reduce to order summary criminal procedure in Scotland, in regard to which certain confusion prevails, to extend the jurisdiction and powers of the Sheriff in summary criminal cases, and to effect some amendments on the Criminal Procedure (Scotland) Act 1887. The main purpose of the Bill is to provide a uniform and simple system of procedure applicable to summary criminal courts in Scotland, and practically to consolidate the existing provisions contained in various statutes bearing on the subject. It also proposes to make an extension of the present summary powers of the Sheriff. The Bill is largely a consolidation of the existing provisions of the Summary Jurisdiction (Scotland) Acts 1864 and 1881, in Local and General Police Acts, and in a number of other Acts bearing on summary procedure. Provisions which have proved useful, but which at present are only available in certain Courts, have been made generally applicable, while provisions which have proved incumbrances have been dispensed with. In addition, the existing procedure has been amended on the following general lines, viz.: 1st, Simplification; 2nd, the extension of the summary powers of the Sheriff, more especially with the view of meeting the case of accused persons who have established a criminal record; 3rd, the amendment of the procedure as to evidence in certain cases, so as to obviate expense; 4th, a new and more equitable scale of imprisonment for non-payment of fines; 5th, a less cumbrous and more prompt and efficacious mode of review; 6th, opportunity has also been taken to amend the Criminal Procedure (Scotland) Act 1887, in directions which experience has shown to be, and supervening legislation has rendered, desirable." The Faculty of Advocates at its meeting on Thursday received a report from a Committee appointed to consider the Bill, and, in view of the importance of the subject, continued the discussion till a special meeting to be held early in January. The Lord Advocate points out that if amendments are to be suggested that should be done early, and the other legal bodies which have the Bill under consideration will therefore probably express their views upon it without delay.

The case of the *Aberdeen Steam Trawling Co. Ltd.* v. *Gill*, which we report this week, is the first case under the Workman's Compensation Act 1906 which has been decided in the Court of Session. The Second Division have reversed the decision of the Sheriff-Substitute. The English Courts have already had several difficult points under the new Act before them. It seems not improbable that the new statute may produce nearly as large a crop of litigation as its predecessor. 256 cases under the Act of 1897 have been reported in the "Scots Law Times" up to 14th December 1907. The following analysis shows how these cases are distributed over the last ten years:

Vol. VI., 1898-99,	10.	Vol. XI., 1903-04,	35.
,, VII., 1899-1900,	39.	,, XII., 1904-05,	28.
,, VIII., 1900-01,	22.	,, XIII., 1905-06,	23.
,, IX., 1901-02,	22.	,, XIV., 1906-07,	30.
,, X., 1902-03,	34.	,, XV., 1907-08,	13.

Faculty of Advocates.—A meeting of the Faculty of Advocates was held on Thursday, 19th December, the Dean of Faculty, Mr William Campbell, K.C., presiding. Sir Ludovic Grant was appointed the representative of the Faculty on the Royal Infirmary Board for the ensuing year. Mr Middleton Rettie, K.C., and Mr Christopher N. Johnston, K.C., were appointed managers of the Craigcrook Mortification. The Report of a Committee on the Criminal Procedure and Summary Jurisdiction (Scotland) Bill was presented by Mr John Cowan, Convener of the Committee, and was continued for further consideration.

THE LAW OF PUBLIC AUDIT.

By H. Burn Murdoch, B.A., LL.B.,
Advocate and Barrister-at-Law.

The vast and increasing sums which are annually spent by local public bodies render good management indispensable. Rightly or wrongly, there is frequent distrust in the minds of the public concerning the prudence of its councillors; sometimes even improper dealings are hinted at. The only cure for this state of matters is a complete and open reckoning between the public and those who manage its affairs: a regular, independent audit is needed, in the interests both of ratepayers and councillors.

A private firm employs an auditor solely to check the bookkeeping of its cashier, but with a public body, in theory at least, the case is different. The Council's own dealings should be examined. A joint Parliamentary Committee reported in 1903 "that it should be made clear, by statute or regulation, that the duties of those entrusted with the audit of local accounts are not confined to mere certification of figures." The Local Government (Scotland) Act of 1889 was the first general establishment of an independent supervisory audit, which, with careful detail, it prescribed for County Councils (including their District Committees) by sects. 68–70. The Secretary for Scotland appoints the auditor and orders a surcharge in cases where the auditor has reported "that any payment is in his opinion contrary to law and should be disallowed, or that any sum which in his opinion ought to have been, is not brought into account by any person." The Secretary for Scotland may abstain from penalising a technical illegality if the circumstances "make it fair and equitable that the disallowance or surcharge should not be made." This meets the case of honest mistake. If a surcharge is imposed, it falls upon the persons who have actually made the illegal payments; those, for instance, who signed the cheque (*Maclachlan*, 1899, 6 S.L.T. p. 384). A county auditor can demand the production of "all books . . . . and other documents and papers which he may deem necessary," and may require any person holding or accountable for the same to appear at the audit and to make a signed declaration as to their correctness. Refusal to obey the auditor may be punished by fine not exceeding forty shillings, recoverable summarily, while a person who knowingly makes a false declaration is liable to the penalties of perjury. It is the auditor's statutory duty to recover sums involved in a surcharge from the individuals who are responsible, and the Council must reimburse him for his expenses and time. For seven days before the audit, the date of which is fixed by the auditor, all the accounts and other documents are to be kept at the County Council office, open to the inspection of all ratepayers. A ratepayer may state objections himself and be present at the audit to support them, but these opportunities are seldom used. Finally, the Council must print and publish an abstract of the accounts as audited, and also the auditor's report in cases where a surcharge has been made.

Five years later, the Local Government (Scotland) Act 1894, sect. 36, extended the accounts and audit rules of the 1889 Act to Parish Councils also. The Local Government Board was made the central authority over Parish Councils, and was given power to make various regulations. All parish auditors now work under a uniform system prescribed by the Board.

The Town Councils Act of 1900 established a precise but imperfect law of audit for the generality of Scottish burghs. The Secretary for Scotland appoints an independent auditor (sect. 94), to whom the Council must deliver their accounts and books. The auditor is to make a special report "if it appears to him expedient," or if he finds "that any statutory or other requirement with respect to the repayment or extinction of debt has not been observed, or that any debt is not being duly repaid" (sect. 95). Any special report by the auditor is to be read at a meeting of the Council (sect. 96), but it does not appear that anyone is bound to pay attention to it, although it is to be printed with the abstract of accounts and copies may be bought at a reasonable charge by persons assessed or electors. Any dissatisfied ratepayer or elector may complain by petition to the Sheriff, within three months after the special meeting referred to. This is subject to the same right of appeal as in ordinary actions in the Sheriff Court. The ratepayers do not, in fact, exercise their privilege.

Sect. 109 of the Town Councils Act 1900 permitted the five largest towns of Scotland to avoid the new general law (thus repeating the exemption of the Burgh Police Act 1892). They were given power, by their own resolution passed within the ensuing twelve months, to declare inapplicable to themselves any part of certain important divisions of the Act, including "Accounts and Corporate Property," and at the same time to save from the general repeal the corresponding portions of the existing law as it applied to them. Edinburgh, Glasgow, Aberdeen and Dundee promptly seized the opportunity. The wording of sect. 109, and the manner in which these cities exercised their power, suggest a material doubt as to the validity of their resolutions, but this question has not yet been raised. In the recent case of *Eadie and Others* v. *Magistrates of Glasgow* (15 S.L.T. pp. 379 and 612), it was not argued that the resolution of Glasgow was ineffectual, and the only matters of decision were points of procedure under the revived sections of the old Acts. These are the Royal Burghs (Scotland) Acts of 1822 (sects. 1–4, 9 and 10) and 1833 (sects. 24 and 32). The citations are 3 Geo. IV. c. 91, and 3 & 4 Will. IV. c. 76. In these the word audit is not even mentioned.

The provisions as to the making up of accounts are disconnected and conflicting. The only check on expenditure provided applies to the Common Good, and gives a limited right of complaint by three burgesses to the "Barons of the Court of Exchequer." In the event of a well-founded complaint, it is not explained what is to happen. In short, if the four great towns have validly evaded the Town Councils Act scheme of audit, they have revived nothing equivalent.

The District Lunacy Boards also have no legal audit. The Lunacy Act 1857, and the series of amending Acts, were silent on the subject. The important central control of the General Board of Lunacy for Scotland is administrative and not financial.

There are many quasi-public departments, such as Water Trusts and Gas Commissions, in a still less defined position. Each depends upon a set of private Acts peculiar to itself. Thus the law of public audit in Scotland is in a chaotic state, and plainly requires a general measure of revision.

EARLY SCOTTISH PRINTED BOOKS IN THE ADVOCATES' LIBRARY.

The fourth of the winter course of lectures arranged by the Edinburgh Typographia was delivered on the evening of Monday, 16th December, in the Reference Department of the Edinburgh Public Library, by Mr W. K. Dickson, Keeper of the Advocates' Library, the subject being "The Advocates' Library, with special reference to the collection of early Scottish printed books." Treasurer Harrison, Chairman of the Public Library Committee, occupied the chair. The lecturer described the foundation of the Library by the Faculty in the 17th century; its propitious start under the Deanship of Sir George Mackenzie, the "bloody Mackenzie" of Covenanting tradition; its encouragement by the Court as "a thing useful and expedient for the College of Justice and profitable for the whole nation"; its narrow escape from destruction by fire in 1700; the privileges granted to it by the Copyright Act of Queen Anne; and its great expansion under the Keepership of Thomas Ruddiman and David Hume. Its more recent history was briefly sketched, and a short account was given of some of its more interesting contents, the illuminated manuscripts, the royal letters and other historical documents, and the fine specimens of early printing. The lecturer then described in some detail the early days of printing in Scotland, giving an account of the introduction of the art in the time of James IV. by Walter Chepman, a prominent Edinburgh citizen, who found the capital for the enterprise, and Andro Myllar, who was the working partner, and who imported from France "ane prent, and expert men to use the samyne," and describing the work of their immediate successors, numerous specimens of whose productions are preserved in the Library. A series of illustrative lantern slides was exhibited. Several slides were shown illustrating the famous "Porteous of Noblenes" volume, the series of poetical pieces printed by Chepman and Myllar at the Southgait Press in 1508, the first-fruits of the Scottish press, of which the Library possesses the only known copy. Among other volumes illustrated were the Aberdeen Breviary, compiled by Bishop William Elphinstone and printed in 1510, of which only four copies are known; the Acts of James V., printed by Thomas Davidson in 1541–2, of which only two copies are known; Bellenden's Croniklis of Scotland; Archbishop Hamilton's Catechism, issued on the eve of the Reformation; and the Book of Common Prayer issued by the authority of Charles I., the introduction of which into St Giles's in 1637 brought about the famous riot which is associated with the name of Jenny Geddes, and which started the Civil War.

The firm of Buchanan & Bennett, civil engineers, 12 Hill Street, Edinburgh, of which John Buchanan, C.E., and James Bower Bennett, C.E., were the sole partners, has been dissolved as at 30th November 1907, of mutual consent. The former partners will carry on separate businesses as civil engineers, Mr Buchanan at 12 Hill Street, Edinburgh, and Mr Bennett at 42 Frederick Street, Edinburgh.

THE INCORPORATED SOCIETY OF LAW AGENTS AND THE LORD ADVOCATE.

The following correspondence has passed between the Secretary of the Incorporated Society of Law Agents and the Lord Advocate.

The Secretary, Incorporated Society of Law Agents in Scotland, to the Right Honourable the Lord Advocate, Advocate's Chambers, Parliament Square, Edinburgh.

Dunblane, 12*th November* 1907.

My Lord,—I have the honour of informing you that the Incorporated Society of Law Agents have unanimously resolved to convey to you their respectful thanks for your Lordship's most successful efforts in passing through Parliament the Sheriff Court (Scotland) Act of 1907, and to assure you that the whole profession in Scotland feel that they are under a deep debt of gratitude to your Lordship for securing the passing of a measure which has been urgently desired for many years.—I am, my Lord, your most obedient servant,

(Sgd.) J. W. Barty, LL.D.

The Right Honourable the Lord Advocate to the Secretary, Incorporated Society of Law Agents in Scotland.

Lord Advocate's Chambers, Edinburgh,
5th December 1907.

Dear Dr Barty,—I had the honour of duly receiving your recent letter conveying to me the thanks of the Incorporated Society of Law Agents in reference to the passing through Parliament of the Sheriff Courts (Scotland) Act. I accept with much pleasure the assurance of the gratitude of the profession which you are good enough to express. So far as the harmonious co-operation of all interests and parties are concerned, no statute could have a better chance of success and usefulness.

May I venture to add that after the conclusion of our labours on the civil side of procedure, it would be desirable that the structure should be completed, and that the other side of the legal reform in which you have taken such a deep and helpful interest—viz. the Criminal Procedure and Summary Jurisdiction (Scotland) Bill—should be passed into law? Nothing would give me greater pleasure than that this should be done also as the result of a similar co-operation in public and professional quarters, so that the removal of so many evils which experience has shewn to be clamant in Scotland in this department may be accomplished, and we may together see the Bill placed upon the Statute Book. In this connection I may point out that one of the serious risks run by last year's measure arose from the late arrival of suggested amendments. I am not sure that it is sufficiently understood how dependent in technical measures of that character Parliament is upon the contributions made by skilled experience, and how regrettable it is when these contributions cannot be harvested because they have been sown too late. It was with this in view that I ventured to ask the House of Commons to give a first reading of the Bill last session. It has been circulated throughout the country, and I may express to you the hope that before the ensuing meeting of Parliament I may be favoured with such views and opinions as may assist either in shape or substance the new measure. To yourself personally I stand already indebted; indeed I do so to such an extent that I hardly think that further amendments will be of a far-reaching character; yet, such as they are, I trust that I may ask the favour of your Society putting them forward at an early day.—Yours very faithfully,

(Sgd.) Tho. Shaw.

J. W. Barty, Esq., LL.D., Dunblane.

DECISIONS IN THE ENGLISH COURTS.

Boussod, Valadon & Co. v. *Marchant.*

Trade Name — "Goupil Gallery." — Decision of Parker, J. (*supra*, p. 87), *affirmed.*—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—*20th November* 1907.

Clifford v. *Timms.*

Partnership — Dissolution — "Professional Misconduct."—Decision of the Court of Appeal (*supra*, p. 60), *affirmed.*—House of Lords (Lord Loreburn, L.C., Earl of Halsbury, Lord Macnaghten and Lord Atkinson).—*20th November* 1907.

Nelson Line (Liverpool) Ltd. v.
James Nelson & Sons Ltd.

Ship — Charter-party. — Decision of the Court of Appeal (*ante*, Vol. XIV. p. 187), *affirmed.*—House of Lords (Lord Loreburn, L.C., Earl of Halsbury, Lord Macnaghten and Lord Atkinson).—*21st November* 1907.

Oppenheimer v. *Attenborough & Son.*

Agent and Principal—Powers of Mercantile Agent—Factors Act 1889 (52 & 53 Vict. cap. 45), sect. 2. — Decision of Channell, J. (*ante*, Vol. XIV. p. 152), *affirmed.*—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—*21st November* 1907.

In re Collyer. Collyer v. *Back.*

Will — Construction — "Unmarried." — The testatrix was at the time of making her will a widow. She was survived by one daughter. By her will she gave the income of her residuary estate in trust for her daughter for her life, and after her death in trust for her (the testatrix's) brother for life, and after his death it was to be held in trust for "all and every the person or persons who would have been entitled thereto, and in the same shares and proportions, as the same would have been distributable under the statutes for the distribution of intestate's estate if I had died intestate and unmarried." *Held* that the word "unmarried" meant "never having been married" and not "being without a husband at the time of death." — Chan. Div. (Swinfen Eady, J.).—*21st November* 1907.

Leonis Steamship Co. Ltd. v. *Joseph Rank Ltd.*

Ship — Charter-party — Demurrage.—Decision of Channell, J. (*ante*, Vol. XIV. p. 158), *reversed.*—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—*21st November* 1907.

De La Bere v. *C. Arthur Pearson Ltd.*

Reparation—Damages.—Decision of Lord Alverstone, C.J. (*ante*, Vol. XIV. p. 172), *affirmed.*—Court of Appeal (Vaughan Williams, L.J., Sir Gorell Barnes, P., and Bigham, J.).—22*nd November* 1907.

Mayor, etc. of Tenby v. *Mason.*

Local Government—Borough Council—Meetings.—*Held* that the meetings of a borough council did not require to be held in public, and that the council were entitled to exclude any person they pleased from their meetings, and injunction granted against a member of the public whom the plaintiffs had chosen to exclude from their meetings.—Chan. Div. (Kekewich, J.).—22*nd November* 1907.

London Transport Co. Ltd. v. *Bessler, Waechter & Co. Ltd.*

Ship — Charter - party.— Decision of Channell, J. (*ante*, Vol. XIV. p. 172), *reversed.*—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—25*th November* 1907.

In re Wagstaff. Wagstaff v. *Jalland.*

Will — Construction.—Decision of Kekewich, J. (*supra*, p. 30), *affirmed.*—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—25*th November* 1907.

In re The Application of the United States Playing Card Co.

Trade Mark—Registration.—*Held* that it was not a fatal objection to an application to register what was claimed to be a trade mark that the subject-matter of the application was capable of being registered as a design.—Chan. Div. (Swinfen Eady, J.).—26*th November* 1907.

Commissioners of Inland Revenue v. *Maple & Co. (Paris) Ltd.*

Revenue—Stamp Duty—Conveyance on Sale—Stamp Act 1891 (54 & 55 Vict. cap. 39), sects. 14 (4), 54.—Decision of the Court of Appeal (*ante*, Vol. XIV. p. 95) *reversed.*—House of Lords (Lord Ashbourne, Lord Macnaghten, Lord James of Hereford and Lord Atkinson).—27*th November* 1907.

Lowry v. *Sheffield Coal Co. Ltd.*

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 1 (1).—It was part of the contract of employment of a collier that he should go for his wages to the employers' pay office. He left off work at five o'clock a.m. and at 12.30 p.m. he was injured while he was proceeding along a railway line which ran through the employers' works in order to reach the pay office and lift his wages. *Held* that he was injured in the course of his employment.—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—27*th November* 1907.

Kung v. *Methuen.*

Insurance—Marine.—Decision of Channell, J. (*ante*, Vol. XIV. p. 128), *affirmed.*—Court of Appeal (Vaughan Williams, L.J., Sir Gorell Barnes, P., and Bigham, J.)—29*th November* 1907.

West Leigh Colliery Co. Ltd. v. *Tunnicliffe & Hampson Ltd.*

Mines and Minerals—Support—Injury by Subsidence — Measure of Damages. — Decision of Court of Appeal (*ante*, Vol. XIV. p. 32) *reversed*, and Decision of Swinfen Eady, J. (*ante*, Vol. XIII. p. 77), *restored.*—House of Lords (Lord Loreburn, L.C., Lord Ashbourne, Lord Macnaghten, Lord James of Hereford and Lord Atkinson).—2*nd December* 1907.

Leslie v. *Leslie.*

Husband and Wife—Judicial Separation —Aliment.—A wife having obtained a decree of judicial separation against her husband, the Court refused to fix any amount of aliment to be paid to her while she was serving a term of penal servitude.—Prob. Div. and Adm. Div. (Bargrave Deane, J.).—2*nd December* 1907.

LAW LIBRARY.

BOOK NOTICES.

Notable Scottish Trials: Trial of Deacon Brodie. Edited by William Roughead, Writer to the Signet. Glasgow and Edinburgh: William Hodge & Co., 1907. *Price* 5*s.*

Notable Scottish Trials: Trial of James Stewart (the Appin Murder). Edited by David N. Mackay, Writer, Glasgow. Glasgow and Edinburgh: William Hodge & Co., 1907. *Price* 5*s.*

These two volumes in the Notable Scottish Trial series take the reader much further back in history than any of the former volumes of the series. The trials of Madeline Smith, Chantrelle, Pritchard, and the Glasgow Bank Directors are all within living memory, and all illustrate Scottish criminal procedure much as it is at the present time. The present volumes deal with history of the 18th century. The trial of James Stewart in 1752 is full of reminiscences of the Rebellion of '45. That of Deacon Brodie in 1788 throws an interesting light on the manners and customs of the capital of Scotland more than a hundred years ago. The records of both trials contain the names of the most eminent judges and counsel of the day. Both were

keenly contested, and in both cases the Crown succeeded and the death sentence followed. But on the case of Stewart the verdict of history is that the charge was not proven, and that the trial is a blot on our judicial records, while in Brodie's case there never was any reasonable doubt of his guilt, and little exception can be taken to the mode of his trial. Stewart was convicted on circumstantial evidence of the murder of Campbell of Glenure. But, even had the evidence been much stronger than it was, a trial of a Stewart for the murder of a Campbell, conducted at Inveraray, presided over by a Lord Justice-General who was a Duke of Argyll (and who created a precedent by sitting at a criminal trial on circuit), with two Campbells among the counsel for the Crown, and eleven Campbells among the fifteen jurymen, did not give the accused much chance of justice. Mr Andrew Lang has said of the proceedings: "James Stewart was, to speak plain words, judicially murdered. . . . Political necessities and clan hatred killed him," and his view is assented to by most other writers who have dealt with the subject. The Lord Advocate, Mr Grant, afterwards Lord Prestongrange — whose appearance on circuit was, like that of the Lord Justice-General, unprecedented — was supported by four juniors, James Erskine, afterwards a Baron of Exchequer; Robert Campbell; John Campbell, afterwards Lord Stonefield; and Simon Fraser, Master of Lovat. For the defence there appeared Thomas Miller, afterwards Lord President; George Brown, afterwards Lord Coalstoun, and two others. After long speeches on objections to the relevancy (of which the book contains verbatim reports), the objections were repelled and evidence was led. The trial commenced at 6 a.m. on 22nd September, and continued without intermission till 7 a.m. on 24th September. The Lord Advocate spoke for the prosecution, and Mr Brown replied in a long speech, delivered in the early hours of the Sunday morning. There was no summing up, and the jury, on Monday 25th September, returned a verdict of guilty. Anyone reading the speech of the Lord Justice-General in passing sentence will have but little doubt that his political bias unfitted him to preside at this trial.

Deacon Brodie, who was tried in Edinburgh in 1788, thirty-six years later, was a cabinetmaker, Deacon of the Wrights, a member of the Town Council, and a rogue of the first water. Well-known and respected in the community, he was all the time living a double life, associating with thieves and gamblers. He took part in several successful burglaries the perpetrators of which escaped detection; but one of his partners, in an attempt to rob the Excise Office, turned King's evidence, and the Deacon, who had fled to London and thence to Holland, was there arrested, and after extradition proceedings was brought back to Edinburgh to stand his trial. There were five judges on the Bench. Lord Braxfield presided. Whatever may have been his severity in other cases, his charge to the jury contains a perfectly fair review of the evidence, though it states his own opinion in very definite terms. The other judges were Lord Hailes, Lord Eskgrove, Lord Stonefield, and Lord Swinton. The Lord Advocate, Ilay Campbell, afterwards Lord President, the Solicitor-General, Robert Dundas, afterwards Lord Chief Baron, William Tait, and James Wolff Murray, afterwards Lord Cringletie, appeared for the Crown. Brodie had the good fortune to be defended by the Dean of Faculty, the Hon. Henry Erskine, who had with him Alexander Wright and Charles Hay, afterwards Lord Newton, whose famous portrait by Raeburn hangs in the National Gallery. George Smith, the other accused, was represented by George Clerk, afterwards Lord Eldin, then a comparatively young counsel, and by Robert Hamilton, afterwards a Clerk of Session. Mr Clerk's speech is interesting for a passage of arms between him and Lord Braxfield. He contended that the jury were to judge of the law as well as the facts. A scene ensued, in which Clerk refused to go on with his speech unless allowed to do so in his own way. The Justice-Clerk called on Erskine to address the jury on behalf of Brodie. This the Dean declined to do, and the Justice-Clerk proposed to commence his charge when Clerk started to his feet, shook his fist at the Bench, and said, "Hang my client if your daur, my Lord, without hearing me in his defence." The judges thereupon retired to the robing room for consultation, but in a little while returned and asked Clerk to continue his address. Henry Erskine's eloquent speech, in which he skilfully deplored that unhappy itch for gambling which had led to the downfall of his client, and in which he vigorously attacked the credibility of the principal witness for the Crown, will be read with interest as an example of the forensic skill of one of the most brilliant ornaments of the Scottish Bar. The editors of both of these volumes have left nothing undone to make their books attractive. All that is to be said about the trials, and those who took part in them, has been carefully collected, and is narrated in a most interesting way. The many illustrations which both volumes contain add much to their charm.

Encyclopædia of the Laws of England, with Forms and Precedents by the Most Eminent Legal Authorities. Second Edition, Revised and Enlarged. Vol. VII. Ice to Landlord and Tenant. Edinburgh: William Green & Sons, 1907. *Price* 21*s.*

The editors and publishers of the second edition of the Encyclopædia of the Laws of England deserve commendation both on account of the rapidity with which the new edition is being

issued and also of the thoroughness with which the work is being carried through. Mr Justice Wood Renton and Mr Max A. Robertson have again been fortunate in having secured the services of many of the original contributors to revise their articles. Sir William Anson, Mr Craies, Professor Holland, Mr Burney, one of the Masters of the Supreme Court, Sir Howard Elphinstone, Mr de Colyar, K.C., Mr Blake Odgers, K.C., and Mr Foa, whose names are all familiar to the profession, have themselves revised their contributions. Among the more notable of the articles in this volume are those dealing with Income Tax, International Law, Infants, Justice of the Peace, and Landlord and Tenant.

The Companies Act 1907. *Annotated by D. G. Hemmant, of the Inner Temple, Barrister-at-Law, with Notes on Practice, by Herbert W. Jordan, Company Registration Agent. London: Jordan & Sons Ltd.*, 1907.

Price 2*s.* 6*d. net.*

The provisions of the Companies Act 1907 impose a number of new restrictions and obligations on joint-stock companies, whether existing before the passing of the Act or registered since its date. Mr Hemmant, who has already done useful work in annotating the new Table A which was issued last year, has supplied a series of practical comments on the various sections of the Act of the present year. Reference is made to many cases which have a bearing on the provisions of the new Act, or which shewed the necessity for amending the previous law. The book also deals with the Companies Act 1900. Sect. 37 of the 1907 Act, which contains a definition of "Private Company," calls for careful consideration, as its requirements must be complied with if it is desired to avoid some of the obligations imposed upon public companies.

A Practical Guide to the Death Duties and to the Preparation of Death Duty Accounts. By Charles Beatty, Solicitor of the Estate Duty Office, Somerset House. Second Edition. London: Effingham Wilson, 1907.

Price 4*s.*

The second edition of this handbook (which originally appeared in 1905, and has been enlarged and revised) contains notes of a practical kind for the use of solicitors on Estate Duty, Settlement Estate Duty, Legacy Duty, and Succession Duty. It also includes a number of forms relating to the various duties chargeable. While it does not profess to be a complete treatise, and refers to a few only of the decided cases on the subject, it lays down clearly the general rules under which the death duties are imposed. The Death Duties portion of the Finance Acts 1894 to 1907 are printed in an Appendix.

The Land Registry Fiasco, The Reign of King Stork. By J. S. Rubinstein. London: Sweet & Maxwell Ltd., 1907. *Price* 6*d.*

In this pamphlet Mr Rubinstein, a London solicitor, states the case against the Registration System as it has been in operation for a number of years in London and elsewhere in England. He comments on the recent appointment of a Royal Commission to enquire into Registration of Title in Scotland, and objects somewhat violently to Mr Brickdale, the Registrar of the Land Registry, having been nominated one of the Commissioners. Mr Rubinstein has been examined as a witness before that Commission, and has doubtless laid his views fully before the Commissioners. He has apparently made a careful and prolonged study of the subject, and condemns the Land Registry system as being complicated, unsatisfactory and expensive. It would have been better had he devoted less of his space in this pamphlet to attacking Mr Brickdale, and if he had moderated the tone in which he discusses the whole subject.

A New Guide to the Bar, containing the most Recent Regulations and Examination Papers, and a Critical Essay on the Present Condition of the Bar of England. By LL.B., Barrister-at-Law. Third Edition. London: Sweet & Maxwell Ltd., 1907.

Price 5*s.*

Apart from the Critical Essay with which this work begins, it will be found to contain all the information necessary to guide aspirants to the English Bar. The regulations of the various Inns of Court and of the Council of Legal Education are set forth at length, and there are a number of specimen examination papers recently set at Bar Examinations, both preliminary and in law. But if the future barrister reads the introductory chapter on the general view of the English Bar before he has paid his fees he will probably think better of it and select some other occupation. The learned author says: "At the present time there are only two ways by which a really satisfactory income can be obtained at the Bar: firstly, by influence; secondly, by a miracle." He also refers to the journalistic work which is done by so many English barristers in the years when they are waiting for briefs, and to "coaching," by which others attempt to eke out a livelihood, and he gives a warning as to the exaggerated view of the public of the incomes of the average King's Counsel or Stuff Gownsman. Perhaps the highest compliment which he pays to the work of barristers is when, in discussing their journalistic labours, he asks, "What would become of the London daily press and its morning issues if, some fine night, the Inns of Court were visited with the doom of Sodom and Gomorrha?"

THE LORD PRESIDENTS.

XIV.—SIR GEORGE LOCKHART OF CARNWATH.

In the series of portraits of the Lord Presidents which have already appeared in the "Scots Law Times," all the Presidents of the Court from Lord Stair onwards have been represented. Lord Stair was twice Lord President, from 1671 to 1681, when he was deprived of office, and from 1689 till his death in 1695. During the period between his first and second Presidentships there were three occupants of the Presidential chair—Sir George Gordon of Haddo, 1681–82, Sir David Falconer of Newton, 1682–86, and Sir George Lockhart of Carnwath, 1686–89. The third of these is the subject of our portrait this week.

Sir George Lockhart, the second son of Sir James Lockhart of Lee, a Senator of the College of Justice and for a time Lord Justice-Clerk, was born about 1630. He was admitted to the Faculty of Advocates in 1656, and two years later was nominated "Advocate to the Protector." This early promotion he owed to his brother, the distinguished Sir William Lockhart, who was one of Cromwell's staunchest supporters, and was married to his niece. In 1658 George Lockhart was appointed Sheriff of Lanark, and he represented that county in the English Parliament 1658–1659. On the Restoration he was re-admitted as an advocate, having previously taken the oath of allegiance to King Charles. In 1663 his connection with the Protector had been so completely forgiven that the King honoured him with a Knighthood.

He was elected Dean of Faculty in 1672, an honour richly deserved by his learning and intellectual powers. Sir George Mackenzie, one of his most distinguished contemporaries at the Bar, speaks most highly of his talents. Burnet declares him to have been the greatest lawyer and ablest pleader ever known in any nation, and Lauder of Fountainhall thus describes his oratorical gifts:—"He did so charm, and with his tongue draw us all after him by the ears in a pleasant gaping amazement and constraint, that the wonderfull effects of Orpheus' harp in moving the stones seems not impossible to ane orator on the stupidest spirit."

When he was Dean he became involved in a controversy which for a time practically led to a cessation of business in the Court of Session. He claimed the right, on behalf of a client, to appeal from the Court to Parliament — a claim which was much resented by the King. Lockhart was ordered to appear before the Court and explain why he had advised his client that he had such a right of appeal. Any advocates who refused to disown the appeals were threatened with deprivation. On 23rd June 1674 a meeting of Faculty took place, with the result that the Advocates supported the Dean, and when he had been debarred by the Court he left the house followed by practically every member of Faculty. One group migrated to Haddington with Sir George, while others resided at Linlithgow, and no attention was paid to threatening proclamations issued by the Court from time to time. Ultimately, after proceedings against the members of Faculty had been raised before the Privy Council, Sir George Mackenzie intervened and persuaded many of his brethren to yield the point in dispute. Lockhart and a few more remained

obdurate for a time, but finally joined in the general submission. Lockhart was readmitted as an Advocate on 28th January 1676. Thereafter he appeared in many of the important Covenanting prosecutions, generally for the defence.

In 1685 he became Lord President, and in the next year was made a member of the Privy Council and a Commissioner of the Exchequer. When he was head of the Court he was frequently consulted by King James II. on affairs of state. What his ultimate position towards the Prince of Orange might have been, has been frequently questioned, but he did not live to see the new government finally settled. On Sunday, 31st March 1689, he was shot in the High Street of Edinburgh, by John Chiesley of Dalry, against whom he had shortly before given a decision. The crime was a premeditated act of revenge, and the President had received warning of Chiesley's intention. Lockhart died almost instantaneously, and his assailant was caught "red handed." Chiesley was tortured, to discover if he had any accomplices in the crime. At his trial he confessed his guilt and gloried in the act. He was sentenced to be carried on a hurdle to the Market Cross on Wednesday, 3rd April, and there, between the hours of two and four of the afternoon, to have his right hand cut off alive, and then to be hanged upon a gibbet, with the pistol about his neck with which he committed the murder, his body to be hung in chains between Leith and Edinburgh, his right hand fixed on to the West Port, and his moveable goods to be confiscated.

The portrait of Sir George Lockhart which we reproduce with this notice is from the painting which hangs in the Parliament House.

The year 1907 will be remembered as a somewhat eventful one in the annals of the legal profession in Scotland. This is not because of changes on the Bench or the filling of many legal appointments, but from the passing of measures calculated to improve the efficiency both of the Supreme and the Inferior Courts. The Act of Sederunt of 20th March 1907 has done much to simplify procedure and is the most important effort to deal with that subject since the Court of Session Act of 1868. The Sheriff Courts Act 1907 is still more important to the Inferior Courts, and affects also the Supreme Court in extending the jurisdiction of the former and removing from the latter certain classes of cases scarcely of sufficient importance for the Courts of Session. The abolition of the Debts Recovery Court, the institution to a limited extent of jury trial in civil causes in the Sheriff Court, and the conferring on the Sheriff of a jurisdiction in actions of separation and aliment, are all provisions of great importance. The Probation of Offenders Act introduces new procedure calculated to prevent those who have been guilty of one offence from joining the ranks of the habitual criminal. Both in Scotland and in England efforts have been made to deal with the arrears of business in the Courts of Appeal. The institution of the Extra Division in Scotland, and the arrangement by which the Inner House sat in three Divisions of three judges each, has been a successful experiment, and has had the effect of considerably reducing the arrears in both the First and the Second Division. In the Court of Appeal in England the arrears were even more serious than in Scotland. The Lord Chancellor proposed early in the year to pass an Act allowing the Court of Appeal to sit with two judges only, and in that way provide three Courts to work off the heavy rolls. This proposal, which would have impaired the prestige and authority of the Court of Appeal, was not insisted in, but a third Court was established in which the Lord Chancellor, Lord Halsbury, Lord Alverstone, Sir Gorell Barnes and Mr Justice Bigham acted from time to time as judges, and in this way the arrears in the Court of Appeal have been practically cleared off. Another change affecting the profession in England has been the alteration of the dates of the Long Vacation, which has not been shortened, but which now commences on the 1st instead of the 12th of August. There has been only one change on the Bench of the Court of Session during the past year, and that an unexpected one. Lord Kyllachy resigned in January last, and was succeeded by Lord Guthrie. There have been few changes among the Sheriffs and Sheriff-Substitutes. Among the former the vacancies caused by the death of Sir John Cheyne and the elevation of Lord Guthrie were filled by the appointments of Mr J. A. Reid and Mr N. J. D. Kennedy. The only new Sheriff-Substitute is Mr A. J. Young, who succeeded the late Mr Duncan Robertson at Aberdeen. Mr Edwin Adam has succeeded Mr C. T. Couper as Principal Clerk of Session, Mr Swinton Paterson was appointed in room of the late Mr Duncan Antonio, Clerk of the Bills, and Mr Smith Clark has taken the place of the late Mr Hope Finlay as Keeper of the Register of Sasines. A curious feature of 1907 is that for the first time since the institution of Queen's Counsel in 1897, a year has elapsed without any members of the junior Bar taking silk. The death roll during the year has been exceptionally heavy. Scotland has lost Lord Young, while in England Lord Davey, Lord Brampton, Lord Field, and Mr Justice Kekewich have passed away. The Faculty of Advocates has lost many of its older members. Mr Robert Taylor, the Father of the Faculty, admitted in 1836; Lord Young; Sir John Cheyne, for many years Vice-Dean; Mr Alexander Innes Shand; Mr Charles Rampini, an ex-Sheriff of Dumfriesshire; Mr P. A. Spiers, formerly Sheriff-Substitute at Jedburgh; Mr A. Erskine Murray, formerly Sheriff-Substitute in Glasgow; Mr David Duncan; Mr Duncan Robertson, and Mr George Moncrieff, are

included in the death roll. The Society of Writers to the Signet has lost Sir Charles Logan, a former Deputy-Keeper and Crown Agent, and Mr James Auldjo Jamieson, also a former Crown Agent, Mr Alexander Howe, and Mr Hope Finlay; while among the Solicitors in the Supreme Courts who have died are Mr J. L. Boyd, Mr Peacock Edwards, Mr Marcus Brown, Mr J. Otto M'Queen of Aberdeen, and Mr Nenion Elliot, late Clerk of Teinds. The deaths have also been recorded of Mr William Shaw, Writer, Glasgow, Mr James Don of Brechin, and Mr Charles M'Kie, Sheriff-Clerk of Dumfries.

FACULTY OF ADVOCATES.

The Criminal Procedure Bill.

A meeting of Faculty was held in the Library on Wednesday, 8th inst., Mr J. A. Fleming, K.C., Vice-Dean, in the Chair. The Faculty approved of the Report of the Committee on the Criminal Procedure and Summary Jurisdiction (Scotland) Bill.

The Committee consisted of Mr R. F. L. Blackburn, K.C., Mr T. B. Morison, K.C., Mr Dugald M'Kechnie, Mr J. C. Guy, Mr A. M. Anderson, Mr John Cowan, Convener, and Mr M. P. Fraser.

The report was to the following effect :—

"The main purpose of this Bill is to simplify the law regulating Summary Criminal Procedure in Scotland, and it effects this purpose partly by consolidating, and partly by amending, existing law. It proposes to repeal the following Acts: The Circuit Courts (Scotland) Act 1828, sects. 18, 19, 20; The Summary Jurisdiction (Scotland) Acts 1864 and 1881; and the Summary Prosecutions Appeals (Scotland) Act 1875, and to substitute in lieu of the provisions contained in these Acts a new code to regulate summary criminal procedure. This new code of procedure is by Clause 4 of the Bill made applicable to all Courts possessed of summary criminal jurisdiction. The special rules of procedure contained in various private Acts of Parliament, and applicable to various cities and burghs, will thus be superseded, and uniformity of procedure in criminal cases will be secured throughout Scotland. The code contained in the Bill consists largely of a re-enactment of the provisions contained in the Acts repealed, but these provisions have in many instances been amended, and in addition the Bill contains other provisions; some of them novel, others introduced from various private municipal Acts. The principal results which will follow from these amendments and introductions are: (1) The old and somewhat cumbrous forms of complaint will disappear, and more convenient forms will take their place; (2) the present scale of imprisonment for non-payment of a fine or penalty, contained in sect. 6 of the Summary Jurisdiction (Scotland) Act 1881, will be abolished, and a new and more equitable scale contained in Clause 45 of the Bill will take its place; (3) much greater facilities will exist for obtaining review by means of a Stated Case, and this without prejudice to the other methods of review at present competent.

"In addition to simplifying summary procedure, it is proposed by means of the Bill to amend the Criminal Procedure (Scotland) Act 1887, to some extent, and to introduce certain minor alterations in procedure by indictment. The Bill also proposes to confer additional powers upon Sheriffs when sitting in a Court of Summary Jurisdiction.

"The Committee, speaking generally, approve of the objects of the Bill, of the methods adopted for carrying out its objects, and of the manner in which it is drafted. They consider, however, that the attention of the Faculty should be specially called to certain clauses of the Bill, either because of the novelty of the provisions contained therein, or because they seem to the Committee to be objectionable, or capable of being improved upon. These clauses are hereinafter referred to under headings similar to those contained in the Bill."

The report then examined the various clauses of the Bill in detail, and made a number of suggestions for amendment in certain respects, including the following :—

Definitions.

Clause 2. This clause, *inter alia*, provides that "county shall include any district of a county for which a separate Procurator-Fiscal is appointed." There is no other definition of "county" or "district of a county" contained in the Bill. The Committee suggest that the definition contained in the Bill should be deleted, and the following substituted :— "County" shall extent to the limits within which a Sheriff has jurisdiction in criminal matters whether by statute or at common law, and shall include "district of a county." "District of a county" shall mean any part of a county in which a separate Court is held and for which a separate Procurator-Fiscal is appointed. . . . .

Application of the Act.

(*Clauses* 4 to 8.)

Clause 5 provides :—

The jurisdiction and powers of all courts of summary criminal jurisdiction, except in so far as the same may be altered or modified by this Act, shall remain as at present, and the justice of peace court and justices of the peace, and also any judge of police or burgh magistrate, shall, without prejudice to any other or wider powers conferred by statute, have within their respective jurisdictions the same jurisdiction and powers as police magistrates under the Burgh Police (Scotland) Act 1892, or any Act amending that Act.

The Committee consider this clause too vague, and are of opinion that the latter part of the clause, beginning "and the justice of peace court," should be

deleted. They suggest that the powers of Magistrates and Justices of Peace when trying common law offences should be set forth in detail.

Clause 6. This clause provides that certain sections of the Criminal Procedure Act 1887 shall be applicable to summary procedure. These sections are already all made applicable to summary procedure by section 71 of the Criminal Procedure Act. That section also provides that sections 66 and 67 of the Criminal Procedure Act shall be applicable to summary procedure. These two sections are properly omitted from the enumeration in this clause. Section 66 dealt with the proving of previous convictions, but in terms which were inapplicable to summary procedure. Section 67 taken along with section 71 provided that previous convictions should be kept from the knowledge of the Court until the case was decided. This was impossible in summary procedure. In view of the difference between this clause and section 71 of the Criminal Procedure Act, the Committee suggest that that section be specially repealed.

Clause 8. This clause, *inter alia*, provides that sentences may be signed either by the Judge or by the Clerk of Court. The Committee consider that sentences should invariably be signed by the Judge. They understand that the only reason suggested for this proposed alteration in what has been a well-established practice in Summary Courts, is to economise the time of the presiding Judge. The Committee consider that the abbreviated forms of sentence provided in Schedule D are by themselves amply sufficient to meet this point. They suggest that the words "and sentences" should be inserted between the words "search" and "shall" in line 21, and that the words "and sentences" between "orders" in line 22 and "may" in line 23 should be deleted.

Boundaries of Jurisdiction.

(*Clause* 9.)

This clause provides for the case of offences committed close to the boundaries of the jurisdiction of two or more Courts, and for the case of offences committed in the course of a journey by road, railway or water, and for the case of offences committed in different jurisdictions. The clause seems well drawn, and the only amendment the Committee have to suggest is the insertion of the word "railway" between the words "road" and "river" in line 21.

Extension of Powers of Sheriff.

(*Clauses* 10 to 14.)

Clause 10. This clause defines the maximum punishments which may be imposed by the Sheriff upon a person convicted summarily of a common law offence. It, *inter alia*, empowers him to pass sentence of three months' imprisonment, with or without hard labour. The Committee approve of this extension of the Sheriff's power. The clause concludes as follows:—"The total period of imprisonment imposed under this section shall not exceed three months, unless where several charges from several counties are embraced in one complaint, when the imprisonment may exceed three, but not exceed six months." The Committee fail to see why the Sheriff should be empowered to pass a heavier sentence because offences happen to have been committed in different counties. They recommend the deletion of these words.

Clause 11 provides:—

Where a person is charged with any offence inferring dishonest appropriation of property, or attempt thereat, and such person has been at least twice previously convicted of any such offence, or where a person is charged with any offence inferring personal violence aggravated by at least two previous convictions of any offence inferring personal violence, he may on summary conviction by the sheriff be sentenced to imprisonment for any period not exceeding six months with or without hard labour. If the prosecutor desires to take advantage of the provisions of this section he shall add to the charge the words "whereby the accused is liable to imprisonment for any period not exceeding six months." This section shall not apply to offences of such a serious character as to be suitable only for trial by indictment.

The Committee approve of this additional power being given to Sheriffs. They suggest that the last sentence of the clause should be deleted, as unnecessary. . . .

Procedure at Trial.

(*Clauses* 26 to 40.)

If the Bill is passed as it stands one result will be that an accused, brought before the Court on a warrant of apprehension, will be deprived of his right to demand an adjournment of forty-eight hours. The Committee consider that this right should be retained, and suggest that a clause similar to section 11 of the Summary Procedure Act 1864 should be inserted immediately after Clause 20.

Clause 26, *inter alia*, provides:—"At the first calling of the case, when the accused is present, the charge, or the substance thereof, shall, unless a copy has been previously served upon him, be read to him, and he shall thereupon be required to plead in common form." The Committee consider that in any case the accused when placed at the bar should be verbally informed of the charge against him, and suggest the deletion of the words "unless a copy has been previously served upon him."

Clause 27. This clause provides for the amendment of the complaint, and farther provides that if the Court is of opinion that the accused may be in any way prejudiced in his defence on the merits of the case, it "may" grant such adjournment as may seem just. The Committee are of opinion that in such circumstances the accused should be entitled to demand an adjournment, and suggest that the word "shall" should be substituted for the word "may" in line 2.

Clause 28 provides:—

Where the accused pleads guilty to the charge or to such part thereof as may be accepted by the prosecutor, his plea shall be recorded, but it shall not be necessary for the accused to sign his plea, and the Court shall thereafter pronounce sentence at the same or any adjourned diet.

The Committee are of opinion that signature of a plea of guilty by the accused should not be dispensed with. They suggest that the words "but it shall not be necessary for the accused to sign his plea" should be deleted, and that the words "signed by the accused, or, if he is unable to write, by the Judge or Clerk of Court, and" should be inserted before the word "recorded" in line 7.

Clause 31. This clause provides for libelling and proving previous convictions in a manner somewhat similar to the method presently employed in procedure by indictment.

Clause 33. This clause, *inter alia*, empowers the Court to go, along with the accused and his law agent, and the prosecutor, to the house of any witness who is unable to attend the Court on account of age, illness, or absence from the country, for the purpose of taking his evidence. The Committee consider this clause unworkable, and suggest its deletion.

Clause 38 provides :—

In the trial of any case in a justice of peace court, if the justices are equally divided in opinion as to the accused's guilt, the charge or part thereof on which such division of opinion exists shall be found not proven.

The Committee consider that if an accused person has satisfied half of his judges that he is innocent he should be entitled to a verdict of not guilty. They suggest that the words "the charge or part thereof on which such division of opinion exists shall be found not proven" should be deleted, and the following words substituted : "the accused shall be found not guilty in respect of such charge."

Conviction and Sentence.

(*Clauses* 41 to 57.)

Clause 41. This clause empowers a Court of Summary Jurisdiction to mitigate penalties imposed by Act of Parliament in various ways. The enumeration of the ways in which penalties may be mitigated is, in view of the Probation of Offenders Act 1907, incomplete, and the Committee suggest that the words "in addition to the powers already conferred by Act of Parliament" should be inserted between the words "have" and "the" in line 5.

Clause 43 provides :—

The Court may in its discretion, if such course appears to meet the justice of the case, dismiss with an admonition any person found guilty of a statutory or common law offence.

The Committee approve of this clause.

Clause 45. This clause regulates the amount of imprisonment which may be awarded in the event of non-payment of a penalty or fine. It also, *inter alia*, provides that "If in any sentence or extract sentence the period of imprisonment inserted in default of payment of any penalty or of caution being found is in excess of that competent under this Act, such period of imprisonment shall be held as being reduced to the maximum period under this Act applicable to such default, and the Clerk of Court shall have power to correct such sentence and extract accordingly." The Committee consider that this portion of the clause should be deleted. In any event they consider that a sentence should only be altered by the Judge who has pronounced it. It appears to them undesirable to authorise a Clerk of Court to alter a sentence because in his opinion it is outwith the Judge's power to pronounce it. . . .

Clause 51, *inter alia*, provides :—

Every sentence under this Act, unless where otherwise provided for, shall be pronounced in open court in presence of the accused, but it shall not be necessary that such sentence be written out or signed in presence of the accused. The signature, either of the presiding judge or of the clerk of court, at the end of the record of the proceedings of each day, shall be sufficient to authenticate all the minutes of procedure, and proceedings taken on that day.

The Committee, in commenting on Clause 8, have already indicated their opinion that sentences should be signed only by the Judge who pronounces them. They suggest that the last sentence above quoted should be deleted from this clause, and that the words "provided that such sentences shall be signed by the presiding Judge upon the day on which such sentence is pronounced" should be inserted in lieu thereof.

Clause 52. This clause provides that the finding "guilty as libelled" shall apply to statutory as well as common law crimes. It also provides : "It shall not be necessary to set forth in any finding or sentence the mode or alternative mode in which the contravention was committed, although alternative modes are libelled in the complaint." The Committee suggest that these words should be deleted from the clause. It seems to them essential that the accused should know precisely what he was convicted of. In view of the definition of "offence" contained in the Bill, they suggest that the word "crime" in line 22 should be deleted, and the word "offence" substituted therefor.

Clause 53 provides : "It shall be competent to correct any error in the minutes of procedure or in the extract of any sentence or order, and such correction shall be sufficiently authenticated by the initials of the Clerk of Court." The Committee consider that this clause should be deleted, or if it is allowed to stand some indication should be given as to the person who is entitled to make the alteration, and also as to the time within which it must be made.

General.—Section 23 of the Summary Procedure Act 1864 provides, *inter alia*, for sentences running consecutively in certain circumstances. The Committee suggest that a similar clause should be inserted in this Bill.

Review.

(*Clauses* 58 to 75.)

Clause 58 provides :—

On the final determination of any cause brought under this Act, either party to the cause may, notwithstanding any provision in any Act of Parliament excluding other methods of review, make application to the court to state a case for the opinion of the High Court of Justiciary, and it shall thereupon be competent to bring under the review of the High Court by stated case—

(1) *The relevancy of the complaint ;*
(2) *Irregularities in procedure ;*
(3) *Any alleged error of the court in point of law ;*
(4) *The sentence imposed if of undue severity ; and*
(5) *Generally any matter which may at present be competently reviewed by suspension or appeal under the Act* 20 *Geo. II. c.* 43 *or otherwise ;*

but providing that review on the merits shall only be competent where such review is permitted by the statute under which proceedings have been taken and a note of the evidence has been preserved.

No provision is made in the Bill for the purpose of compelling a magistrate to state a case. The Committee suggest that the first five lines of the clause should be deleted, and the following substituted :—"On the final determination of any cause brought under this Act, any party to the cause shall, on application being made therefor and subject to the conditions hereinafter provided, be entitled to have a case stated by the Court for the opinion of the High Court of Justiciary. It shall be." They also suggest that the word "advocation" should be inserted between the word "suspension" and the word "or" in line 12.

Clause 59 provides that an appeal may be taken at the time when judgment is pronounced or within five

days thereafter. The Committee suggest that the words "application to have a case stated shall be made" should be substituted for the words "such appeal may be taken" occurring in line 20 of the clause. . . .

Clause 61. This clause empowers the Court to grant interim liberation to an appellant who is in custody, on such conditions as it may think fit. An appellant, if dissatisfied with the decision of the inferior Court on the question of interim liberation, may appeal to the High Court. The Committee approve of this clause.

Clause 62. Upon the assumption that their suggestion regarding caution is adopted, the Committee suggest that this clause should be altered as follows: —"The Clerk of Court, unless consignation or caution has been ordered in terms of sect. 60, shall, within ten days from the application for a Stated Case, prepare a draft Stated Case, and shall within the said period send the said draft to the appellant or his agent, and a duplicate thereof to the respondent or his agent, and such case shall be framed as nearly as may be in the form contained in Schedule F annexed to this Act. Where consignation or caution has been ordered, the said period of ten days shall run from the date on which consignation is made or caution found. When an appeal has been taken against the said order to make consignation or to find caution, the said period of ten days shall run from the date of the final determination of the appeal, unless on appeal the order to make consignation or to find caution has been affirmed, in which case the said period shall run from the date on which consignation is made or caution found."

Clause 63. The Committee suggest that the words "within fourteen days" should be inserted between the words "adjustment" and "the" in line 28.

Clause 64. The Committee suggest that this clause should be altered as follows: — Insert between "taken" and "and" in line 32, "or by the Clerk of Court," and between "shall" and "transmit" in the same line, "on payment of his fees for preparing the case."

Clause 65. The Committee suggest that this clause should be deleted and the following substituted:— "The appellant, within five days of receiving notice from the Clerk of Court that the case has been signed, shall pay the Clerk's fees for preparing the same, and failing such payment he shall be held to have abandoned his appeal." . . . .

Clause 75. This clause, *inter alia*, provides that suspensions must be brought within one month of the date of conviction or sentence. The Committee suggest that the period should be three months.

In concluding their remarks upon the subject of review, the Committee suggest that provisions should be inserted in the Bill for the purpose of enabling an accused convicted before a Sheriff and Jury to appeal to the High Court upon the ground that the Sheriff has misdirected the Jury upon points of law.

Amendment of Criminal Procedure Act 1887.

(*Clauses* 76 to 78.)

Clause 76. This clause, *inter alia*, dispenses with the necessity of taking a declaration from the accused if, on being brought before the Sheriff, he or his agent intimates that he does not desire to emit a declaration. The Committee consider that the fact of this intimation having been made should be recorded, and suggest that the words "such intimation shall be recorded" should be inserted between the words "charge" and "it" in line 38. . . .

Forms.

The Committee approve of the forms contained in the various schedules appended to the Act. . . .

JOHN COWAN,
Convener.

DISSENT.

I dissent from the report on two small points: —

(*a*) *Clause* 28. This clause provides that where the accused pleads guilty it shall not be necessary for him to sign his plea. At present, under the Edinburgh Police Acts, an accused person in the Police Courts of Edinburgh pleading guilty does not require to sign his plea, and so far as I know no miscarriage of justice has resulted from the exercise of this provision. The Glasgow Police Acts make, I understand, the same provision for Glasgow. The present Bill proposes to extend the Edinburgh and Glasgow powers to all Summary Courts. I should not object to matters in this respect remaining as they are, but the Committee's proposal would not only prevent such extension, but would, standing Clause 4 of the Bill, make the Police Courts of Edinburgh and Glasgow revert to the old practice of requiring signed pleas. No one who knows the work of a city Police Court would ever suggest this. I have seen more than one hundred persons charged as drunk and incapable pass the bar of the Police Court on a single morning. The provision for taking their pleas without the trouble and annoyance to them, the magistrate, and the clerk, and the consequent waste of much time, should not be abolished.

(*b*) *Clause* 38. I think the clause in the Bill is properly expressed so long as the verdict or finding of "not proven" is competent. Where the two justices differ as between "guilty" and "not proven," the Committee think that both justices should be considered to be wrong, and the finding should be entered up as "not guilty," even although neither of the two justices could affirm that finding.

JOHN C. GUY.

Members of the legal profession have learned with much regret that on account of the state of his health Lord Pearson has been obliged to apply for leave of absence for six months. Prior to the rising of the Court for the Christmas recess, his Lordship was not feeling well, and was advised to take a complete rest for a time. As his Lordship had been in constant attendance in Court, the news of his illness was quite unexpected. It appears, however, that on several occasions when other Judges were absent, and when the Inner House was sitting in three Divisions, his Lordship had attended in his place in Court when he was far from fit for the work. The result of this has been to make a period of rest quite necessary. His Lordship has left Edinburgh, and intends to spend the winter in Egypt. Leave of absence for six months means that Lord Pearson will probably not resume his official duties till after the summer recess, which extends from the middle of July to

the middle of October. One result of his Lordship's absence is that any further sittings of the Extra Division—if such should be necessary — will have to be postponed till after Lord Pearson's return. No Judge has had a better record of constant attendance in Court than Lord Pearson during the eleven years since his appointment. His long tenure, extending over eight and a half years, of the position of Lord Ordinary on the Bills gave him an undue share of anxious judicial work, and he never spared himself in the performance of his duties. It is hoped that his well-deserved rest will restore him completely to his usual health.

A SITTING of the High Court of Justiciary took place in Glasgow on 26th and 27th December. Lord Stormonth-Darling and Lord Dundas were the presiding Judges. Mr Wm. Thomson, A.-D., assisted by Mr Hendry, prosecuted in the Old Court, and Mr Grainger Stewart, assisted by Mr Macdiarmid, in the New. There were eleven cases involving fifteen persons.

THE DEBTS RECOVERY COURT.—Presiding in Glasgow Debts Recovery Court on 23rd December, Sheriff Scott Moncrieff referred to the changes brought about by the new Sheriff Court Procedure Act, and said that that was the last sitting which would be held of the Debts Recovery Court, which expired on 31st December. As a legal institution that Court was not, perhaps, very ancient; yet it extended beyond the memory of almost every one now practising within those buildings and the lifetime of the vast majority of the present Bar. It was said never to have been a popular Court, and in fact the number of cases annually called had remained very much the same, in spite of the increase of business in other departments and the great increase of population. Yet it seemed a Court well suited for a commercial community, as affording a cheap and speedy method of settling mercantile disputes. It had always appeared to him that its main defect lay in its connection with that ancient statute which created the triennial prescription. Had the Act been extended so as to cover all the cases which could be raised under the Small Debt Act, and provision made for the proper remuneration of agents in cases of appeal, that would have greatly added to its usefulness. While they wished, he was sure, all success to the new procedure, they parted, not without some feelings of sentiment, with their old friend the Debts Recovery Act

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THE LATE ALEXANDER ERSKINE MURRAY, ESQ., ADVOCATE.—We regret to record the death, which took place at his residence at Parkstone, near Bournemouth, on 17th December, of Mr Alexander Erskine Murray, who for thirty-six years was one of the Sheriff-Substitutes of Lanarkshire. Mr Murray was a son of the Hon. James Erskine Murray, advocate, and a grandson of the seventh Lord Elibank. His mother was a daughter of the late Mr James Erskine of Aberdona, from whom he inherited the well-known Alva Collection of portraits, cabinets and papers. Mr Murray was born in 1832. His father, who practised for a time at the Australian Bar, was in 1843 killed in an encounter with pirates in Borneo. Spending the early years of his boyhood in Australia, he came to Scotland and was educated at the Edinburgh Academy, King's College, Aberdeen, and at the University of Edinburgh. As a student he distinguished himself greatly, both at Aberdeen and Edinburgh. At King's College he was first in the senior Humanity class, and at Edinburgh he was first in Aytoun's class of Rhetoric and Belles Lettres, and second in the Conveyancing class. For some years he was employed in the office of Messrs Walker & Melville, W.S. In 1856 he was admitted to the Faculty of Advocates, among others who joined the Bar in that year being Lord M'Laren and Lord Kinnear. In his early years at the Parliament House he acted as a law reporter for newspapers, and in 1860 officiated as an interim Sheriff-Substitute at Glasgow and at Falkirk. At the end of 1861 he was appointed a Sheriff-Substitute at Glasgow. He ultimately became senior Sheriff-Substitute, and retired in 1897. During his long period of official work in Glasgow he maintained the highest reputation as a judge, and was one of the most esteemed and best-known men in the West of Scotland. His resignation was much regretted by his colleagues, by the legal profession, and by the public.

Before he left the western city to take up his residence in Edinburgh, the legal profession in Glasgow united to do him honour, and to express appreciation of his personal qualities and judicial work. At a representative gathering, he was the recipient of a presentation, accompanied by gifts for Mrs Erskine Murray. In making the presentation the Dean of the Faculty of Procurators, Dr Murray, said that Mr Erskine Murray's work had been constant and exacting, but he had faced it resolutely, and had given his time and energies to it ungrudgingly. Every case that came before him was thoroughly and exhaustively considered and disposed of in its turn and without delay. That a British judge is impartial goes without saying, but a perfectly impartial judge may not always be without bias. He may have views as to the law, as to the existence of custom, as to the value of certain kinds of evidence, which give a set to his opinions. Sheriff Murray, he said, was not only absolutely impartial, he had also a perfectly open mind. He heard every argument, he considered every piece of evidence, before he allowed himself to come to any decision. No part of the duties of a judge was more delicate and required greater tact than the ascertainment of the facts of a

case. On questions of fact Sheriff Murray had a singularly accurate judgment, and in this particular branch he thought that Mr Sheriff Murray was about as perfect as could be.

Mr Erskine Murray resided in Edinburgh from 1897 till about two years ago, when, compelled to seek a more genial climate, he migrated to Dorset. He was for many years an elder of the Free Church in Glasgow, and later a member of the congregation of St Andrew's United Free Church in Edinburgh. He is survived by a widow, three sons and a daughter.

The Late W. J. N. Liddall, Esq., Advocate.—The death took place on 27th December at Findatie, Kinross, of Mr William J. N. Liddall, advocate, of Navitie and Findatie, and of 26 Great King Street, Edinburgh. Mr Liddall, who was born in 1853, was a distinguished scholar. In 1870 he was Dux of the Edinburgh Academy. He entered the University of Glasgow, and in 1873 was awarded the Greek Blackstone Prize. Later he matriculated in the University of Edinburgh, and among the honours which he gained there were Dr Muir's Prize for Sanscrit (1876), Medal in the Advanced Greek Class (1877), and the Greek Travelling Scholarship (1879). He graduated as M.A. of Edinburgh and as B.A. London. Mr Liddall was admitted to the Faculty of Advocates in 1879. He was never in large practice, and his name appears in the reports more frequently as litigant than as counsel. He fought questions in connection with his properties both in Kinross and in Edinburgh. But though he was not in regular practice, he maintained his connection with the Parliament House and with Scots law. He was an honorary Sheriff-Substitute of Fife and Kinross, and he acted on several occasions as an interim Sheriff-Substitute. He was a candidate for the Chair of Celtic Languages and Literature in Edinburgh University when that Chair was founded in 1882. For three years from 1897 he sat as a member of the Edinburgh School Board, where he took a special interest in the financial policy of the Board. He was the author of a volume entitled "Place-names in Fife and Kinross," published by Messrs Wm. Green & Sons in 1896.

The Late James Campbell, Esq., Sheriff-Clerk of Caithness.—We regret to record the death, which took place at Wick on 29th December, of Mr James Campbell, Sheriff-Clerk of Caithness. For more than two years Mr Campbell had been in indifferent health, and he succumbed to the effects of a chill which he sustained some few weeks before his death. A native of Caithness, Mr Campbell was born in 1856. At the age of seventeen he entered the office of Mr Robert Maclachlan, who was then Sheriff-Clerk of Caithness, and after serving for some years as Depute, he succeeded, on Mr Maclachlan's death, to the vacant office. Mr Campbell held also the public appointments of Auditor of Court and Clerk of Lieutenancy. In his earlier life he was an active Volunteer, and held a commission in the local rifle corps. For many years he acted as Honorary Secretary to the Wick branch of the National Lifeboat Institution, in which he was keenly interested. As a public servant who came much in contact with all classes, Mr Campbell was held in high esteem, and not least by the legal profession, by whom his accurate and courteous discharge of his official duties was justly appreciated. In private life Mr Campbell's death, at the early age of 51, will be deplored by a large circle of friends whom his genial and kindly nature had gathered round him. Mr Campbell leaves a widow and family.

Golden Wedding of Sheriff Mackenzie of Dornoch.—Sheriff and Mrs Mackenzie, in celebration of their golden wedding, gave a reception and ball in the Royal Hotel, Tain, on the 23rd December, to about one hundred guests. Sheriff Mackenzie, who is in his 77th year, was married fifty years ago to his cousin, a daughter of the late William Mackenzie of Holme, Inverness. An interesting feature of the evening was the presentations to the Sheriff and Mrs Mackenzie from the staff of Tain Royal Academy, the Bar of Dornoch, Sutherland ladies and gentlemen, and Ross-shire ladies and gentlemen. Sheriff Mackenzie, who is the senior judge in His Majesty's dominions, was appointed Sheriff-Substitute at Dornoch in 1859.

Mr J. Duncan Millar, M.A., LL.B., advocate, has been selected as Liberal candidate for the St Andrews Burghs.

Mr Archibald Hamilton, Solicitor and N.P., has assumed Mr James Ballantine, M.A., LL.B., as a partner. The business will in future be carried on at 131 West Regent Street, Glasgow, under the firm name of Archibald Hamilton & Ballantine. Mr Ballantine served his apprenticeship with Mr John Pairman, S.S.C., Edinburgh, and qualified as a law agent in 1896. Since qualifying, he has been in the employment of Messrs Borland, King, Shaw & Co., writers, Glasgow, acting latterly as principal clerk to the late Mr William Shaw, senior partner of the firm, and also as Mr Shaw's assistant in connection with the class of Mercantile Law in the University of Glasgow.

CHARLES H. BROWN, ESQ.,

ADVOCATE.

Few men at the Bar have more friends among their brethren than Charles Herbert Brown. He touches life at many points, and has the pleasant gift of using all his interests to get in touch with men. The goodwill of the fireplace is with him, yet does not exclude the closer intimacy of special friends.

Mr Brown, who is the son of an eminent Scottish banker, was born in Glasgow in 1868. He was educated at Rossall and at Glasgow University, where he graduated as LL.B. in 1893. Two years later he was called to the Bar, having served his apprenticeship in the office of the late Professor Roberton, and gained some additional experience with Messrs Ronald & Ritchie in Edinburgh. He has served upon several committees of the Faculty of Advocates, and is presently one of the reporters upon *probabilis causa*.

Mr Brown acted upon the editorial staff of the recently issued Scots Digest. In 1902 he was appointed a reporter for the "Scots Law Times," and after a year's work in the Second Division, which his increasing practice began to render too exacting, was appointed to discharge the less arduous office of reporter in the Outer House. Although his practice has gone on consistently increasing, Mr Brown continued to act as reporter till the beginning of the present year. He has now too large a practice to allow of his retaining his appointment, and has been forced to sever a connection with the paper which resulted in a series of lucid and incisive reports.

As a pleader Mr Brown has special gifts of clearness and force of statement. He is an excellent lawyer, and while insisting upon a complete delivery of his brief, he never fails to secure the attention of the Bench. In politics he is a Conservative, and has done his full share of platform and general work.

As a social entertainer of chosen friends, Mr Brown is perhaps without a rival. His happy choice of subject and mastery of technique give to his interpretations the fine flavour of mirth and scholarly address. As the former pupil of the present editor of "Punch," Mr Brown shows his breeding by wide knowledge of the literature of humour. He is in particular a profound Gilbertian, but lays this writer under less frequent contribution than others of whose work the rendering has not in the same measure been canonised.

Mr Brown is fond of travel, and has seen much of the world, both within and beyond Europe. He has an excellent history in games, and ambitious projects in golf.

THE FEBRUARY WEEK ADJOURNMENT OF THE COURT OF SESSION. — A notice has been issued stating that the Lords, under the authority of the 4th section of the Court of Session Act 1868, resolve to adjourn the Court from Saturday the 8th to Saturday the 15th February next inclusive.

THE First Division did not sit on Wednesday. Lord Kinnear was attending a meeting of the Church Commission, and as Lord Stormonth-Darling was, through indisposition, absent from the Second Division, no judge was available to sit with the Lord President and Lord M'Laren to make up a quorum in the First Division.

FACULTY OF ADVOCATES.

The anniversary meeting of the Faculty of Advocates was held on 15th January in the Advocates' Library—the Vice-Dean, Mr J. A. Fleming, K.C., presiding. The Faculty Officers for the year were appointed as follows: Dean of Faculty, Mr William Campbell, K.C.; Vice-Dean, Mr J. A. Fleming, K.C.; Treasurer, Mr A. A. Grainger Stewart; Keeper of the Library, Mr W. K. Dickson; Auditor, Mr P. A. Blair, C.A. Mr C. H. Brown and Mr A. J. Alison were appointed Reporters on *Probabilis Causa Litigandi*, and the following gentlemen were appointed Counsel for the Poor:—Mr L. H. Strain, Mr J. Hossell Henderson, Mr J. A. Christie, Mr C. A. Macpherson, Mr F. C. Thomson, Mr J. L. Wark. The reports of various Committees were presented and approved.

THE LIBRARY.

Mr James Clark presented the report of the Curators of the Library, with which was incorporated the report of the Keeper of the Library for the year 1907. The Keeper's report contained the following items:—

Accessions.—The following is a list of the accessions to the Library in 1907:—

Volumes received per London Agent, 8395; direct from Publishers, 640; and by Purchase and Presentation, 550; amounting to	9,585
Parliamentary Bills and Papers	1,935
Pamphlets	3,494
Parts and Volumes of Periodicals, per London Agent, 18,835; direct from Publishers, 5400; and by Purchase, 1240	25,475
Volumes and Pieces of Music	3,228
Ordnance and other Maps	2,068
Total number of items received	45,785

The following table gives the number of items received into the Library during the last ten years:—

In 1898	42,654	
In 1899	40,804	decrease, 1850
In 1900	41,811	increase, 1007
In 1901	43,856	„ 2045
In 1902	42,819	decrease, 1037
In 1903	47,243	increase, 4424
In 1904	43,273	decrease, 3970
In 1905	45,956	increase, 2683
In 1906	45,676	decrease, 280
In 1907	45,785	increase, 109
Total in 10 years,	439,877	

Library Extension.—The alterations on the buildings of the Parliament House which are at present being carried out by H.M. Office of Works, the plans of which were submitted to and approved by the Faculty on 7th February 1907, include a considerable alteration of and addition to the premises occupied by the Library.

Donations.—Among the donations may be noted a rare French engraved portrait of David Hume, presented by Sir John Batty Tuke; a copy of the fine illustrated catalogue of the pictures in the collection of Mr J. Pierpont Morgan, in three volumes, compiled by Mr Lockett Agnew, presented by Mr Morgan; and a valuable collection of seventeenth-century pamphlets, presented by an anonymous American donor.

Manuscripts.—The calendaring of the mediæval manuscripts in the Library by Miss Catherine R. Borland has been continued during the year. Miss Borland has completed the examination and description of the Biblical, liturgical, and other theological manuscripts, the books of Decretals and other books of Canon and Civil Law, and the ecclesiastical records and chartularies. She is now working on the collection of mediæval poems and romances. Her Research Scholarship has been renewed for another year, so that the Library will have the benefit of her work until October next.

The collection of early manuscript maps of Scotland by Timothy Pont, Robert and James Gordon, and John Adair has been entirely rearranged, mounted, and re-bound. These maps were in an unsatisfactory condition, and at my request Mr C. G. Cash, F.R.S.G.S., who has made a special study of early Scottish cartography, reported on their condition and on what treatment of them seemed desirable. In consequence of this report the maps were carefully dismounted, arranged according to their authorship, inlaid when necessary, and remounted on linen. They have now been re-bound in three volumes. A detailed descriptive catalogue of them was prepared by Mr Cash, and was printed in the "Scottish Geographical Magazine" for November 1907, accompanied by an account of the recent examination and rearrangement of the maps. The thanks of the Curators have been conveyed to Mr Cash for his valuable services to the Library in this matter.

The cataloguing of the Gaelic manuscripts was interrupted in the early part of the year by the illness of Professor Mackinnon, but has proceeded steadily since the Long Vacation. Professor Mackinnon hopes soon to be able to print an instalment of his catalogue.

An annotated hand-list of the Northern manuscripts, based upon the Latin catalogue which was compiled by Mr T. G. Repp about 1830, has been prepared by Miss Barclay.

A certain amount of binding and repairing has been done to some of the older manuscripts, including the rebinding of the Rosslyn Missal, which was in a precarious condition.

Cataloguing and Placing of Printed Books.—All books and pamphlets received during the year have been catalogued, and the catalogue

slips have been incorporated, and all books and pamphlets have been placed, with the exception of those reserved for exhibition in the Reading Room, those in circulation as new books, and a certain number of those allocated to Room L, from which all the books have been temporarily removed

A hand-list of books printed in Scotland down to 1640, copies of which are in the Library, has been prepared.

Exhibition of Books and MSS.—A selection of books and manuscripts was exhibited in the Laigh Parliament House up to the beginning of the Long Vacation. During the winter session this exhibition has been temporarily discontinued in consequence of the exclusion of the public from the Library. Two new double desk cases have been provided out of the sum given last year for this purpose by the Dean of Faculty, and a further selection of objects will be placed on exhibition as soon as it is possible to re-admit the public.

THE CHALMERS HOSPITAL.

Mr C. H. Brown presented the Report by the directors of the Chalmers Hospital. The report, which contained the following statistics was approved.

The number of patients treated during the year was :—

In the Public or Free Wards		386
In the Private Wards, paying Board		222
In all		608
Whereof were Surgical Cases	366	
„ Medical „	242	
		608
The daily average number in the House was		35·71
Total operations		339
The number of Outdoor Patients treated in the Waiting-room and Surgery was		3535
Whereof Surgical Cases	3075	
„ Medical „	460	
		3535
Operations under general anæsthesia in Outdoor Patient department		156
Dressings in ditto		16,373

The Books and Accounts for the year have been examined by the Auditor, and a copy of his Report is appended to the Abstract of Accounts.

The ordinary income for the year amounted to	£3517	18	7
and the ordinary expenditure to	3102	2	0
leaving a surplus of	£415	16	7
During the year the Directors made certain alterations and additions which were found to be necessary in the kitchen premises at a cost of	181	9	6
reducing this surplus to	£234	7	1

The Directors request the trustees to allow them the whole revenue of the Trust for the year 1908.

The Directors desire to express thanks to the many friends who have during the year made donations of money, game, flowers, books, and magazines; also to those who have responded to the appeal for old clothing for the use of poor patients on leaving the Hospital. The Directors renew the appeal, and desire to remind members that the Matron will be glad to send for parcels on receipt of a postcard.

The Directors have pleasure in acknowledging the valuable services of the Surgical, Medical, and Nursing Staff, and they must also express their indebtedness to the clergymen of St Cuthbert's Church for their services on Sundays, which are greatly appreciated by the patients and staff of the Hospital.

They have to record with great regret the death of Sir Patrick Heron Watson, who was associated with the active work of the Hospital for forty years. They have also to record with great regret the death of Sir John Cheyne. This occasioned a vacancy in the Directorate, which was filled up by the appointment of Mr C. H. Brown.

THE LATEST ENCYCLOPÆDIA.

There appears to be no limit to the energy and versatility of Mr C. E. Green. A Scotch law publisher, he has not only issued practically all the most notable modern works on Scots Law, but he has also published "The Encyclopædia of the Lrws of England," and has undertaken the reprinting of the whole series of English Reports prior to 1865. He has published an "Encyclopædia of Medicine" and an "Encyclopædia of Accounting," and only the other day he appeared as author of an interesting work on the County of East Lothian. Now he is acting in the dual capacity of publisher and joint-editor of an "Encyclopædia of Agriculture," which is to be completed in four large volumes.* The volume before us is the first instalment of that work, which promises to be of very great value to all farmers in Scotland and England, and also to everyone else interested in farming, whether as landlords, land agents, or otherwise. The book presents in an easily accessible form all the practical information which can usefully be conveyed by book. It is very well got up, and most of the live-stock articles are illustrated by very good photographs. The articles are contributed by well-known authorities in the agricultural world, and their names are a guarantee that the articles are the product of real knowledge and experience. Among those who contribute to the present volume are Sir Herbert Maxwell, Mr Jesse Collings, the Rev. Dr Gillespie of Mouswald, Sir Richard Cooper, Mr John Clay

* "Encyclopædia of Agriculture." In 4 vols. Vol. I.: Aberdeen-Angus Cattle to Drains. Edinburgh: William Green & Sons, 1907. Price 20s.

of Chicago, Principals Wrightson and Percival, and Professors Hamilton, Cossar Ewart, Long, Lloyd, Penberthy, Drummond and Malden. Dealing with the book from a legal point of view, there are articles on the Agricultural Holdings Acts, Allotments, Arbitration, Copyholds, and the Law of Distress in England. The somewhat complicated provisions of the Agricultural Holdings Acts are very clearly set out and explained, and particular attention is directed to the Agricultural Holdings Act 1906, which is of great importance at the present time. There is also a full discussion of the Law of Distress for Rent in England, which sets forth clearly and accurately that difficult subject. The article on Aberdeen-Angus cattle is a particularly good one, and gives a history of the progress of that very successful breed—a progress which should form an incentive to all stock farmers to keep the best stock they can, and to go on improving that stock as much as possible. It is well illustrated by two very good photographs of an Aberdeen-Angus bull and cow. The Scottish breed of draught-horses is not forgotten, and the article on Clydesdales traces what is known of the early history of the breed, and gives an interesting account of many famous horses and their successes in the showyard. The various lines of descent are clearly worked out, and the names of the best-known breeders are given, as also some interesting particulars about prices. The article on Ayrshire cattle, which is also illustrated by two good photographs, will prove of great interest to any one interested in the dairy. It contains some very instructive information about the milking qualities of Ayrshire cows, and confirms their widely-known reputation as good milkers. The advice as to feeding and management of dairy cows given in this article is thoroughly practical, and deserves to be carefully read by any one keeping dairy cows. Scotland's two famous breeds of sheep, the Blackfaced and the Cheviot, are fully and ably dealt with, and here again the photographs are particularly good. In particular, the Cheviot ram shown in the photograph looks a sheep conspicuous alike for his fine fleece of wool and his qualities as a first-class mutton sheep. The Devon cattle and the Devon Longwool sheep, which are influential breeds much thought of in the West of England, are shortly and accurately dealt with, and there is also an interesting article on the Border-Leicester sheep. The dairy also receives full attention in various instructive articles which deal with butter and the making of Cheddar cheese, both English and Scotch. There is also a very good article on cream-separators. Calf-rearing and cow-keeping are each dealt with in a way which deserves careful attention, and there is also some very valuable information on veterinary subjects. The article upon abortion in cattle is one which should be very carefully studied by everyone who keeps cows, as it treats very fully and explicitly of the subject, and sets forth the foreign and colonial views thereon, as also the remedies which have been found successful in various cases. Careful treatment and attention seems all that is necessary for the successful application of such remedies; and having regard to the very serious losses which are caused by the disease, no trouble would appear to be too much to get rid of it. Another article which should be mastered by every farmer is that upon anthrax. The risk to human life involved in skinning an animal which has died of this dread disease is so great that every stock owner or person in charge of stock should have it brought home to him as much as possible. There are useful articles upon Basic Slag and Bone Manures, and the article upon Bacon Curing will be read with interest by all who keep and kill their own pigs. There is a long and useful dissertation on Buildings for the Farm, and this contains many practical hints, and is illustrated by sets of plans adapted to various classes of farms. Nor are Cottages for the Farm forgotten, and here again the plans are a distinct feature. In this connection it is interesting to note the divergences between the Scotch and the English cottages. Altogether the book is one of sterling value, and is a mine of useful practical information presented in a very readable form. T. H. W.

Mr Robert Campbell, procurator and chief assistant to the late Mr John A. Stewart, solicitor, Perth, and Mr John Campbell, procurator and assistant to Messrs Condie, Mackenzie & Co., W.S., Perth, have acquired the business of the late Mr John A. Stewart, which they are to carry on at Clydesdale Bank Buildings, 5 St John Street, Perth, under the name of John A. Stewart & Campbell.

Aberdeen Property and Income Tax Commissioners. Appointment of Clerk.—The Aberdeen Property and Income Tax Commissioners met on Friday, 10th inst., at the office, 27 King Street, for the purpose of appointing a clerk in succession to the late Mr J. W. Robson. Mr J. C. Bennett, advocate, was unanimously appointed to the vacant office. It is understood that the applications for the vacant office were numerous, and that after deliberating for about an hour the Commissioners unanimously resolved to appoint Mr Bennett, who was summoned to the meeting, and accepted office. The remuneration of the office is about £600, out of which the clerk has to provide his office staff. Mr Bennett, who is the proprietor of the estate of Allathan, was a member of the Commission previous to being appointed clerk.

At a meeting of the trustees of the Church of Scotland Ministers' Widows' Fund, held on 14th inst., Mr F. P. Milligan, W.S., was appointed clerk and law agent in room of the late Mr H. H. Inglis, W.S.

The Late DAVID PATRICK, Esq.,

Solicitor, Hamilton.

We regret to record the death of Mr David Patrick, Solicitor and Honorary Sheriff-Substitute at Hamilton, which took place at his residence there on Wednesday, 15th January. Till within a few days of his death he had been going about his work as usual, and the sad news came as a great shock to the community of Hamilton, where he was most highly esteemed.

A native of Hamilton, Mr Patrick was born there sixty-eight years ago. He was educated at Hamilton Academy and at the Universities of Glasgow and Edinburgh, and received his legal training in the office of Messrs Moncrieff, Paterson, Forbes & Barr, Writers, Glasgow. In 1865 he joined the firm of Aikman & Keith in his native town, and on the death of Mr William Aikman two years later the present well-known firm of Keith & Patrick was formed. When the Clydesdale Bank opened a branch in Hamilton in 1867, Mr Patrick was appointed agent, a position which he occupied with great diligence and unswerving fidelity, until illness laid him aside a few days ago. He was also assessor for Income Tax and Inhabitated House Duties for the Middle Ward of Lanarkshire, an office which now devolves on the Surveyor of Taxes in terms of Act of Parliament. In 1889 he was appointed, along with Mr Robert Weir, Joint Procurator-Fiscal of the Justice of Peace Court for the Hamilton District.

For many years Mr Patrick was Dean of the Hamilton Society of Solicitors, an appointment which he resigned in 1893 on receiving his commission as an Honorary Sheriff-Substitute of Lanarkshire. In this judicial capacity he did much excellent work both in the Civil and Criminal Courts. A member of Council of the Incorporated Society of Law Agents in Scotland since its incorporation, he was one of those named in the Royal Charter, and he has served for two years as vice-president of the Society.

Mr Patrick served the Burgh of Hamilton for several years in the capacity of Town Councillor and Magistrate. He entered the Council in the early eighties, and about the middle of that decade was raised to the magistracy, from which he retired in 1893. Interested in educational affairs, he was one of the first members of the Burgh School Board after the passing of the Education Act in 1872. Mr Patrick, in early days, was associated with the Volunteer movement, and for a period was Captain of the Bothwell Company. In private life he had many friends.

Before proceeding with the business of the Hamilton Sheriff Court on the 17th inst. Sheriff Thomson said:—Dean of Faculty and gentlemen of the Bar, the ever busy hand of death has taken from us this week a much respected member of our Bar and an Honorary Sheriff-Substitute of this Court. Deeply indeed do we deplore the loss of Mr David Patrick. For forty years he was a busy practitioner in Hamilton, and in legal and business circles, not only here but throughout the whole West of Scotland, he was ever highly esteemed and universally trusted. Personally, I feel unable to give adequate expression to my profound regret that this most kind and esteemed friend has passed away never to return, and that I shall see his face no more, nor ever receive again his genial, kindly greetings; but I feel that many now present, who have known him for longer than I

have been privileged to do, will understand, and share my sorrow at his loss. He was an excellent type of the thoroughly trusted family solicitor; a shrewd, cautious, and friendly adviser, having the real interest of his clients ever at heart, and I have no doubt these qualities materially contributed to the eminent position which his firm of Keith & Patrick now occupies in the West of Scotland. His high standing in the legal profession fully justified his promotion to the various official positions which he filled during his long career, and in them all he acted firmly, wisely, and conscientiously, and to the great satisfaction of the community. I need not dwell specially on his work as an Honorary Sheriff-Substitute, for all present here to-day know how well he discharged the duties of the office. It is pleasant to think that he has two sons to perpetuate his name and carry on his career in our profession. I fear his death may have been hastened by the distressing suspense and anxiety which he and his wife and family have been sustaining during the past few months as to the fate of a much-beloved son at sea. The circumstance must still more deeply evoke our sympathy with them in this period of anxiety and bereavement, and I know that the Bar joins with me in tendering to them in this dark hour our tenderest and sincerest sympathy.

Mr William Stodart, Dean of Hamilton Society of Solicitors, said:—On behalf of the members of the Bar I desire to associate myself with your Lordship's remarks. We all deplore the sudden and unexpected loss which this Court and the whole district has suffered from the removal by death of a life so useful and so public-spirited as that of Mr Patrick. Many of us remember him as an able and careful practitioner at this Bar, and as an active member of our Society, and for many years our Dean, and latterly as one of the Hon. Sheriff-Substitutes of this county. And we all know what a life of usefulness in various walks he has left behind him. We desire to concur in the eloquent tribute which your Lordship has paid to his memory, and that our feelings may be added to those which your Lordship has expressed.

The subject of the portrait in our next issue will be:—

The Late Sir John Lawson Walton, K.C., M.P., Attorney-General for England.

The Late Sir David Brand, Advocate, Sheriff of Ayrshire.—It is with great regret that we record the death of Sir David Brand, which took place at his residence in Edinburgh on Wednesday morning. The learned Sheriff had been in delicate health for some time back, but during last year his health had somewhat improved. He had been Sheriff of Ayr since 1885, and in October of last year he received a congratulatory address from the members of the local Bar in his sheriffdom, in which they expressed their sense of his judicial and public services to the county. He acted as Chairman of the Crofters Commission since the passing of the Crofters Act, and since 1897 as a member of the Congested Districts Board. His important work on the Crofters Commission was very fittingly recognised when, in June last, he received the honour of knighthood from His Majesty. On that occasion his portrait, along with a biographical sketch, appeared in our columns. [S.L.T., 6th July 1907, Vol. XV. p. 41.]

Referring to his death, the "Glasgow Herald" says: "It is by his work in connection with the Crofters and Deer Forests Commissions that Sir David Brand's name will be long and gratefully remembered, particularly in the Highlands. The Crofters Commission came into existence in 1886. He was its first and only chairman. It was directed to amend the tenure of land by crofters in the Highlands and Islands of Scotland. The counties brought under the Act were Argyll, Inverness, Ross and Cromarty, Sutherland, Caithness, Orkney and Shetland, and the first duty of the Commissioners was to ascertain what parishes within these counties were crofting parishes within the meaning of the Crofters Holdings (Scotland) Act; that is to say, parishes wherein there were in 1886, or had been within eighty years prior thereto, holdings consisting of arable land held with a right of pasturage in common with others, and in which there then were tenants of holdings from year to year who resided on their holdings, the annual rent of which did not exceed £30 in money. There were 163 civil parishes in the seven counties to which the Act applied. The Commissioners determined that of these 151 were crofting parishes. Every such determination was confirmed by the Secretary for Scotland from time to time, so that there are only twelve parishes in the whole of these counties which have not been determined to be crofting parishes up to the present time. From the commencement of their labours in October 1886 till the end of December 1887 they fixed fair rents for 1767 holdings. The old rents of these amounted to £12,457, and the fair rents fixed amounted to £8617, being a reduction of £3840 per annum, or of nearly 31 per cent. The arrears dealt with in connection with those applications amounted to £23,533. Of the total, the sum of £14,418 was cancelled, or 61·283 per cent. On account of the large number of applications that came in at the instance both of landlords and crofters, the amending Act of 1888 was passed. It enabled the Commissioners to delegate their powers to any one of their number, assisted by two assessors. Thus from the beginning of 1889 the Commissioners were able to hold three separate Courts simultaneously,

and to get through a large amount of work. In the first year of the three Courts fair rents were fixed in 3425 cases. The old rents of these amounted to £16,162, and the fair rents were established at £11,453, the reductions in the aggregate averaging over 29 per cent. The arrears dealt with in that year amounted to £36,050, of which £23,063 was cancelled, or nearly 64 per cent. Up to December 31, 1906, the Crofters Commission had fixed fair rents in 20,732 cases, and had conducted revaluations in 3428 cases of enlargement of holdings. They had also considered 412 miscellaneous cases and 1191 appeals under the Act of 1891, making a total of 25,763 cases. The number of inspections before disposing of these various cases was 19,123. They had also to dispose of 102 applications to sist proceedings for removal in respect of non-payment of rent, 706 applications to prohibit the sale of effects on holdings for the same cause, and 244 applications under the Crofter Commission Grazing Regulation Act. The extent of land dealt with in fair rent applications was 204,477 acres in individual occupancy; and 1,420,968 acres in common occupancy."

LONDON LETTER.

Temple, 22*nd January* 1908.

The Court of Appeal has made great progress during the past term in the reduction of the mass of arrears which had accumulated almost to the point of scandal. One heavy species of work which has clogged the machinery of the Court is the Workmen's Compensation business. The scheme of the original Act was to avoid litigation; and to this end, besides euphoniously labelling County Court proceedings "arbitration," the Workmen's Compensation Acts provide that appeals, instead of lying (like those in all other cases) to the King's Bench, and thence to the Court of Appeal and House of Lords, shall go direct to the Court of Appeal. Consequently, the latter Court is thronged with business which would otherwise be left to the numerous Judges of the King's Bench Division, with possible assistance from the Chancery side. The result has been congestion. Drastic steps were needed to meet the case, which was made worse by the illness of Lord-Justice Farwell, and the frequent absences of Lord-Justice V. Williams on his duties as Chairman of the Welsh Church Commission. The remedy of constituting Courts consisting of two judges is now little resorted to, except as an emergency measure. It depends on the consent of litigants, and is not popular. Consequently, for the first time in its history, the Court adopted the expedient of sitting in three full Divisions. As there are only six ordinary judges of the Court (the Master of the Rolls and five Lord-Justices), outside assistance was necessary. Again for the first time in its history, the Court of Appeal presented some approximation to its ideal as Lord Selborne conceived it, when it was to have been a final Court, staffed by the high judicial officers who have actually been mere ornamental members of it. The Lord Chancellor has had enough to do in Parliament and in the House of Lords. The Lord Chief-Justice and the President of the Admiralty Division have sunk into the routine of their Courts of first instance. But last term, all three of these high officers were busy presiding in three branches of the Appeal Court. Towards the end of term, Lord Halsbury found time from his literary labours (your readers will by this time have seen the first volume of his "Encyclopædia of English Law," designed to replace the venerable "Abridgements" of Viner and Bacon) to come to their relief. Since Lord Herschell's lamented death there has been no ex-Chancellor available until now. The most remarkable step, however, was one recommended in these columns some months ago. Judges of first instance can be called upon to sit in the Court of Appeal, provided they are not withdrawn from the Chancery or Admiralty Division, and not from the King's Bench Division during the time of the spring and summer circuits. Under this provision, the Appeal Court was strengthened by the temporary inclusion of Mr Justice Bigham. It is freely stated that this is only the prelude to an elevation which would meet with much general approval. The Admiralty President's place in his own Division was temporarily filled by Mr Justice Bucknill.

Among the *causes célèbres* of the term was the trial of Wood at the Central Criminal Court, which greatly enhanced the reputation of judge and counsel (Mr Justice Grantham, Sir Charles Mathews, and Mr Marshall Hall, K.C.). The regretted death of the Right Hon. Sir A. Kekewich gave occasion for a suggestion that his successor might be attached to the King's Bench, instead of to the Chancery Division, which has been well abreast of its work ever since it has had six judges instead of five. Nine years ago, its arrears were so considerable that Mr Justice Bigham was requisitioned to reduce them; and the present writer well remembers the flurry which the rapid methods of the new judge caused in the haunts of equity. Cases which the leisurely Chancery lawyer had anticipated would "become active" in a space to be counted by months, suddenly showed signs of an activity which might be called volcanic. This was a temporary measure, which was superseded by the appointment of a sixth judge. Since then it has been possible for the Chancery judges to be grouped in pairs, each pair having a common set of officials, and taking respectively witness cases and other business in turns. The practical convenience of this arrangement is such, that

the suggestion to go back to the old system of five judges was received with little or no favour. A Chancery barrister was duly appointed, in the person of Mr Eve, K.C., and it is safe to say that no more popular appointment could have been made. It is probable that no one ever saw Mr Justice Eve out of temper. He is not only placid, but full of abounding vitality and good humour. It was never necessary in a Chancery action which raised keen contests of fact, to "take in" a common lawyer to cross-examine, if Mr Eve had already been retained: he would have made a great reputation with juries if fate had not settled him on the Chancery side.

A remarkable case has been decided by the Privy Council on the obligations of aliens who continue to reside in this country after the outbreak of war with their own. It puts these obligations a great deal higher than has hitherto ever been suggested. Their allegiance to the Crown is, of course, local, and depends solely upon the fact that they are actually within its dominions by their own will and consent. It has been said that such a local allegiance nevertheless binds them, to the extent of preventing them from afterwards going back to help their own country if once they take advantage of the permission (now generally accorded them) to stay. But it seems never to have been imagined that, if their own sovereign actually conquers the territory where they live, displacing the local sovereign, their temporary and local allegiance to the latter still continues. Such a position is, indeed, historically untenable. For under conceptions of warfare not two centuries old, the conqueror became the actual sovereign even of the natural-born subjects of his enemy living in the conquered country. The sovereignty of their old master vanished. Much more did his authority vanish over the conqueror's own subjects. Yet in *De Jager* v. *Attorney-General of Natal* (1907, A.C. 326), an unfortunate Boer, living in Natal, was sent to jail for five years and fined £5000 for submitting to the demand of his own country for his services when the Transvaal forces occupied the district of the colony where he was settled. What could he do? one asks. Unless permission to remain after the outbreak of war amounts to naturalisation (and in *Lynch's* case it was laid down that it is treason to get naturalised in an enemy's state), it seems obvious that when the whole reason of local allegiance (the power of the local sovereign) is gone, the duty of allegiance to the natural sovereign must supersede it. Their Lordships say in their advice that, unless all persons in the country are bound in the same way as natural-born subjects, the modern practice of allowing enemies to remain within its limits would be too dangerous to be continued. It does not appear to have occurred to them that, on the contrary hypothesis, it will become too dangerous and dubious a privilege to be of much advantage to the persons to whom it is so graciously accorded. They will become subject to the liabilities of two conflicting allegiances, and entitled to the benefits of neither. For certainly the local sovereign cannot complain of their ill-treatment by their own state.

The composition of the Court of Criminal Appeal has been made public. Besides the Lord Chief Justice, the list includes the names of Justices Channell, Lawrance, Lawrence, Phillimore, Darling, Ridley, Pickford and Walton. Three will be a quorum, but the number must be odd. It is difficult to predict how far the Court will go in reviewing the decisions of juries who have studied the demeanour of the witnesses at first hand. Much, it may be conjectured, will depend on the view of the judge who tried the case, if it should be disclosed. Otherwise all precedent points to the conclusion that the jury's verdict will be set aside in very few instances.

The Limited Partnerships Act 1907, which introduces the principle, which Sir F. Pollock has so long advocated, of partnerships *en commandite* does not appear likely to be taken much advantage of Limited partnerships will involve almost as much trouble to form as limited companies, and they will give far less protection. The objects they are designed to subserve can almost as well be attained by loans to the partners, under the protection of Bovill's Act; and altogether, the business community is not attracted by the prospect which the Legislature has kindly spread before them.

The death of Sir J. Lawson Walton, the Attorney-General, is on all hands deeply deplored. With tragic suddenness it deprived the profession of a justly admired and honoured leader. The "silver-tongued" eloquence of the late Attorney was the least factor among the attributes that endeared him to those who knew him. The Solicitor-General who is thus marked out for promotion (for it can hardly be thought that he will relinquish the prospect of the Chancellorship in favour of the Home Office, as has been irresponsibly suggested) is Sir W. S. Robson, K.C. He is Member for South Shields, and the name of the Recorder of that town, Mr Atherley-Jones, K.C., who had a record majority at the General Election, is mentioned as that of a likely successor in the office, Mr R. Isaacs being also a popular favourite for the post in question.

NEW SCOTTISH KING'S COUNSEL.

The King has been pleased, by warrants under His Majesty's Royal Sign Manual, to direct letters patent to be passed under the Seal appointed to be kept and made use of in place of the Great Seal of Scotland, granting the rank and dignity of Counsel to His Majesty to James Clark, Esq., and Edwin Adam, Esq., members of the Scottish Bar.

Mr James Clark was admitted to the Faculty in 1883, and is well known both in the Parliament House and in the City of Edinburgh, where he has devoted much time and energy to various branches of public work. He has taken a great interest in the affairs of the Faculty of Advocates, having served on numerous Committees and acted as a Curator of the Library. Mr Clark has always maintained his reputation as a pleader of conspicuous ability and a well-read lawyer. In 1906 he edited a new edition of Lord Fraser's book on Parent and Child, which has been recognised as an excellent piece of work, and he contributed some of the best articles which appeared in Green's Encyclopædia of Scots Law. Since 1905 he has sat as a member of the Edinburgh School Board. He is Chairman of the Directors of the Royal Hospital for Sick Children, and he is Colonel of the 9th V.B. (Hrs.) R.S., and a member of the recently appointed County Association of the City of Edinburgh under the Territorial Forces Act. A Unionist in politics, he has frequently been asked to stand for Parliament, but has always declined the honour. A portrait and biographical sketch of Mr Clark appeared in the "Scots Law Times," Vol. VII. p. 141.

Mr Edwin Adam, who has also received the honour, is the Principal Clerk of Session in the First Division. His portrait appeared in the "Scots Law Times," Vol. IX. p. 73, and the details of his more recent work and legal appointments were referred to in these columns when his appointment as Principal Clerk was announced at the beginning of the present session.

THE LATE FRANCIS GEORGE, ESQ., SOLICITOR, BANFF.—Our readers will have heard with much regret of the death of Mr Francis George, County Clerk of Banffshire, which occurred on Friday, 17th January, as the result of a cold caught in the last week of 1907. He was born at Monquhitter nearly sixty-five years ago, and spent his youth at Turriff, where he went to the Public School, and had the good fortune to come under the influence of Mr G. Ogilvie, afterwards well known as the headmaster of George Watson's College in Edinburgh. Mr George obtained his legal training in the office of Mr William Barclay, solicitor, Banff, and afterwards at Edinburgh University, where he took a distinguished place in all his classes. Returning to Banff in 1867, he became a member of the Society of Solicitors, and entered upon a career of great public utility which terminated only with his death. He held a very large number of public offices. In 1875 he entered the Town Council, and two years later was appointed Dean of Guild. In 1879 he became a Bailie, retiring a year later on his appointment as Clerk for the Police Commissioners. From 1880 to 1900 he was Procurator-Fiscal; in 1900 he became Town-Clerk of Banff, and for the last seventeen years of his life he acted as County Clerk for the county of Banffshire. In the exercise of his many duties, Mr George inspired, in all who came in contact with him, a great respect for his ability and untiring energy. The municipal work of Banff owes much to him, and it was mainly owing to his efforts that the great improvement of the water supply was carried through. Mr George dies regretted by a large circle of friends, and much sympathy is felt for his widow and family.

JUBILEE OF THE STEWARTRY SHERIFF-CLERK.—On 10th January Mr William Nicholson, Sheriff-Clerk of the Stewartry of Kirkcudbright, completed his fiftieth year as Depute and Sheriff Clerk. Mr Nicholson, among his other offices, holds those of Clerk of the Peace, Clerk of the Lieutenancy, and Clerk to the Southern, Northern, and Western District Committees of the County Council. Mr and Mrs Nicholson celebrated their golden wedding recently, and were the recipients of many handsome presents. Before commencing the business of the Court, Sheriff Napier congratulated Mr Nicholson upon the happy circumstance, and said that, as one who had worked along with him there for more than seven years, he sincerely expressed the hope that Mr Nicholson would be long spared to occupy his present position. In the evening Mr Nicholson was entertained to dinner by the members of the Faculty, of whom there was a large attendance.

THE HEARING OF MOTIONS FOR NEW TRIALS.—On Thursday, 22nd January, counsel moved, in Single Bills, on an application for a new trial, that the usual first order be pronounced fixing a day for the hearing in the Summar Roll. The Lord President intimated that in future, on counsel applying for a new trial, a preference would be given to such hearings, and that they would be heard almost at once. His Lordship indicated that counsel would have been heard upon the motion in question upon the following day, but in view of the fact that this was a new regulation, and that counsel were not prepared to proceed on so short notice, the hearing was fixed for early next week.

NEW ACT OF SEDERUNT.

The following Act of Sederunt has been passed providing the manner of advertising petitions for extension of term of Patents under the 18th section of the Patents and Designs Act 1907.

EDINBURGH, 11*th January* 1908.

The Lords of Council and Session, considering that by section 18, sub-section (1) of the Patents and Designs Act 1907 it is provided that a patentee may, after advertising in manner provided by Rules of the Supreme Court his intention to do so, present to the

Court a petition praying that his patent may be extended for a further term; that by section 94 of said Act it is, *inter alia*, provided that in the application of the Act to Scotland the provisions of the Act conferring a special jurisdiction on the Court as defined by the Act shall not, except so far as the jurisdiction extends, affect the jurisdiction of any Court in Scotland in any proceedings relating to patents or to designs, and with reference to any such proceedings the term "the Court" shall mean any Lord Ordinary of the Court of Session, and the term "Court of Appeal" shall mean either Division of that Court; and further, that the expression "the Court" shall, in reference to proceedings in Scotland for the extension of the time of a patent, mean such Lord Ordinary; and further provides that the expression "Rules of the Supreme Court" shall, except in section 92 of the Act, mean Act of Sederunt: and considering that it is expedient to prescribe the manner in which a patentee desirous of presenting a petition for the extension of the term of his patent to the Court in Scotland shall advertise his intention to do so:

THEREFORE the said lords do ENACT and DECLARE that a party intending to apply by petition under section 18 of the said Patents and Designs Act 1907 shall advertise his intention to do so twice in each of the *Edinburgh Gazette* and the *London Gazette*, and once in each of the *Scotsman* and *The Times* newspapers.

In such advertisements the applicant shall state the object of his petition, the name of the Lord Ordinary to whom the petition is to be presented, and the date on which it is to be so presented. He shall also give notice therein that any person desirous of objecting to the granting of the petition must within fourteen days after said date give written intimation to the Clerk of Court to such Lord Ordinary, that he intends to lodge objections.

And the Lords APPOINT this Act of Sederunt to be entered in the Books of Sederunt, and to be printed and published in common form.

DUNEDIN, *I.P.D.*

DECISIONS IN THE ENGLISH COURTS.

Johnson v. *Clark.*

PROPERTY — MORTGAGE — LOCAL CUSTOM.—*Held* that a local custom by which a married woman might, with her husband's consent, mortgage a life interest in lands which she had under her father's will, without being separately examined, was invalid to avoid the contract, as being unreasonable. *Observed* that "a custom to be valid must be such that, in the opinion of a trained lawyer, it is consistent, or, at any rate, not inconsistent, with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system. Thus a custom which is for the advantage of an industry or trade may be good, although it bear hardly on the individual; while, on the other hand, a custom which is for the advantage of the individual only and is prejudicial to the public, or a class of the public, is bad; for the common law, in principle, imposes obligations on the individual for the benefit of the public, and not on the public for the benefit of the individual."—Chan. Div. (Parker, J.)—28*th November* 1907.

The "Europa."

SHIP—SEAWORTHINESS.—*Held* that when a vessel was unseaworthy at the commencement of a voyage, the unseaworthiness, although it was the breach of a condition precedent, did not void the whole contract as in a question with the holder of a bill of lading and render the shipowner a common carrier for that voyage, but that the holder of the bill of lading must shew that any damage he suffered was due to the particular matter in respect of which the vessel was unseaworthy.—Prob., Div. and A. Div. (Bucknill and Bargrave Deane, JJ.).—3*rd December* 1907.

Pickford's Ltd. v. *London and North-Western Railway Company.*

RAILWAY—RATES.—Decision of the Railway and Canal Commission (*supra*, p. 40) *affirmed.*—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—3*rd December* 1907.

Samuel Brothers Ltd. v. *Whetherly.*

CONTRACT — LIABILITY — VOLUNTEERS. — Decision of Walton, J. (*ante*, Vol. XIV. p. 179), *affirmed.*—Court of Appeal (Earl of Halsbury, Sir Gorell Barnes, P., and Bigham, J.).—4*th December* 1907.

LAW LIBRARY.

BOOK NOTICES.

The Acts Relating to the Income Tax. By the late Stephen Dowell, M.A. Sixth Edition, Revised, Altered, and Considerably Enlarged. By John Edwin Piper, LL.B. (Lond.), of the Middle Temple, Barrister-at-Law, Assistant Solicitor of Inland Revenue. London: Butterworth & Co., 1908. *Price* 21*s. net.*

It is five years since Mr Piper issued the fifth edition of this work, the first for which he was responsible as editor. Since then there has been made annually a considerable addition to the case law on the subject, and the provisions of the Finance Act of last year, introducing the modified rate on earned income where the total income of the taxpayer does not exceed £2000, have made an important modification on the existing law. A new edition was therefore doubly necessary. Mr Dowell's book has for many years deservedly held the reputation of the most authoritative work on the subject. It is in constant use. Indeed, in Income Tax cases the Court is generally referred to the page in

"Dowell" where the sections under discussion are dealt with. Of the new edition it need only be said that great care has been taken to make it completely accurate and up to date. One criticism, however, applicable to Scottish cases, must be mentioned. In cases in the English Courts, references are given to all series of reports. In dealing with the Scotch cases there is frequently a reference to the "Scottish Law Reporter" only. There should of course be a reference to all three series of reports, but at any rate the citation in Rettie, Fraser, or the Session Cases should always be given. The want of this causes serious inconvenience, and we trust that in any future edition the editor will insert the proper citation of decisions in the Scots Courts.

The Law relating to the Transactions of Moneylenders and Borrowers. By G. Grenville Alabaster, of the Inner Temple and Western Circuit, Barrister-at-Law. London: Stevens & Sons, Ltd., 1908. *Price* 6*s.*

Moneylenders and their ways have of late been much before the public. Mr Labouchere, in a recently issued supplement to "Truth," gave a long list of persons carrying on that trade, adding their real names, with short notes couched in very strong language on their character and methods of doing business. Parliament dealt with the question in 1901, when an Act, following on a report of select committee appointed in 1897, was passed placing moneylenders under certain restrictions and regulations. Besides ordering registration and the filing of certain particulars in regard to all moneylenders, the Act provided that where proceedings were taken in any Court by a moneylender for the recovery of money lent, "and there is evidence which satisfies the Court that the interest charged . . . . is excessive . . . . and that the transaction is harsh and unconscionable, the Court may reopen the transaction and take an account between the moneylender and the person sued . . . . and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due." The interpretation of the powers conferred on the Court by this section has been found far from easy, and various views have been taken by different judges as to its meaning. In the earlier cases under the Act the tendency of the decisions seemed rather to favour the contentions of the moneylenders. It was argued that, however excessive the interest, there must be something more to render a transaction harsh and unconscionable. A more liberal interpretation was given to the Act in the recent case of *Samuel* v. *Newbold*, 1906, A.C. 467, where Lord James said that excessive interest might itself be sufficient to render a contract harsh and unconscionable, and that the burden was upon the moneylender in such a case to justify the transaction. Mr Alabaster has dealt with his subject very fully. He has analysed and quoted from the cases in a most satisfactory way, and so far as the English Courts are concerned his book contains the whole law on the subject. There have been a few cases in the Outer House in Scotland, and these are not referred to, but in none of them has the Act been dealt with in the same detail as in the English cases. We cordially recommend Mr Alabaster's book to our readers.

Principles of Company Law. By Alfred F. Topham, LL.M., of Lincoln's Inn, Barrister-at-Law. Second Edition. London: Butterworth & Co., 1908. *Price* 7*s.* 6*d.*

In this little book, which is written mainly for the use of students, the leading principles of the law of Joint Stock Companies under the Companies Acts 1862 to 1907 are clearly and shortly explained. The arrangement of the book is logical, the citation of authorities is sufficient and up to date. For instance, in the chapter on Memorandum of Association, we notice a reference to the application by the Cyclists' Touring Club to alter its memorandum ([1907], 1. Ch. 269). In an appendix there is printed the text of Revised Table A, issued in 1906, and of the Companies Act of last year.

Where to Look for your Law, as set out in the latest Legal Text Books, with dates of latest Authorities. London: Stevens & Sons, Ltd., 1907. *Price* 1*s.*

To get the right book on a subject is often half the battle, and this work will certainly be of great assistance in that direction. It takes the form of a subject catalogue of English Law Books, and extends to over 100 pages. The date of the last edition of each book mentioned is given, and where no special book exists on a subject the reader is referred to a more general work where it is dealt with. So far as England is concerned, the catalogue of law books seems very complete. Scottish, Irish, Colonial and Foreign law are referred to at the end of the book. The list of Scots Law Books is very far from complete, and the omissions are somewhat startling. The Lord Justice-Clerk's Criminal Law, Professor Ranken's Landownership, Mr Mackay's Manual of Practice, Mr Graham Stewart's book on Diligence, Mr Dove Wilson's Sheriff Court Practice, Professor Bell's Lectures on Conveyancing, and Lord Stair's Institutions are among the books which are omitted. This criticism, however,

is very limited in its application. We think it would add to the usefulness of the work if in any future edition the published price of the books mentioned were given.

Encyclopædia of the Laws of England, with Forms and Precedents by the most eminent Legal Authorities. Second Edition, revised and enlarged. Vol. VIII. Land-man to Maritime Territory. Edinburgh: William Green & Sons, 1907. *Price* 21*s.*

Very recently we noticed the seventh volume of this Encyclopædia, and the eighth, which brings the work half way to completion, was issued at the end of last month. Among the more important contributions to this volume are the articles on the Land Clauses Acts, by Mr Craies; Licensing, by Mr Woodcock; Life Insurance, by Mr Fitzgerald, K.C.; Local Government, by Mr Blake Odgers, K.C.; Lunacy, by Mr Kerly, revised by Mr Wood Renton; and Marine Insurance and Maritime Lien, by Mr G. G. Phillimore. A large number of the articles have Forms and Precedents appended to them.

Student's Guide to Roman Law (Justinian and Gaius). By Dalzell Chalmers, of the Inner Temple, Barrister-at-Law, Law and Modern History Tripos, Cambridge, and L. H. Barnes, B.A., of Christ Church, Oxford, and the Inner Temple, Barrister-at-Law. London: Butterworth & Co., 1907.
Price 7*s.* 6*d.*

This volume aims at giving in concise and simple form the essential principles of the Roman Law as expounded in the Institutes of Gaius and Justinian, along with a certain amount of information from other sources, and an occasional reference to English parallels. Such a book is at once humble and ambitious: humble in that it seeks to provide the beginner with an introduction to the subject; ambitious because of the difficulty of being brief without sacrifice of interest or lucidity. The authors have achieved their end with no small measure of success. Their work is careful and business-like, always to the point, and nearly always clear and unambiguous. Interest, however, has been unduly disregarded in the Introduction, which summarises in twenty short pages the history of Roman law from the earliest times. This is the least useful part of the book, being not only necessarily dogmatic, but rather unnecessarily bald, and too fragmentary to be followed with understanding by a beginner. The epitome of Justinian, and that of Gaius, which follows it, are more successful, albeit capable of improvement here and there. The account of correality and solidarity, for example, is over-concise, and would hardly enable a novice to grasp the somewhat difficult distinction between the two. Again, the subject of "diligentia" is set forth in a manner positively misleading, for the uninitiated would gather that a higher standard was applied to a specially careful man than to one whose usual degree of care was only average. A little expansion in parts would remove blemishes without adding materially to the bulk of the volume. But such shortcomings are only occasional. On the whole, the book is clear and trustworthy, and should prove useful to students.

Law for the Million. By a Practical Lawyer. A Legal Handbook. London: Simpkin, Marshall & Co., Ltd., 1907. *Price* 1*s.*

The millions for whom this book is written will be found outside rather than within the legal profession. "Ignorantia juris nemenem excusat," and the information which this handbook contains will doubtless be of use to many citizens. It is not likely, however, seriously to lessen the number of occasions on which the prudent layman will apply to the skilled lawyer for professional advice.

The Juridical Review. Vol. XIX. No. 4. *Edinburgh: William Green & Sons*, 1908.
Price 3*s.* 6*d.*

Among the contributors to the concluding part of the current volume of the Juridical Review are Lord Guthrie, Mr G. W. Wilton, Mr Louttit Laing, Mr Alexander Taylor, Mr Addison Smith, and Mr David Chapel, advocates, and Mr A. H. Charteris and Mr W. W. Learmonth. The first place in the part is very properly given to Mr Wilton's article on the author of the well-known treatise on the Law of Sale. In the varied and adventurous career of Mr Benjamin, Mr Wilton has chosen a most interesting subject. He has spared no pains either in collecting materials from all available sources, or in the grouping of the interesting facts—many of them never recounted before—which are the result of his investigations. The article attains a very high standard of merit, and will give pleasure to many readers. A portrait of Mr Benjamin forms the frontispiece of the part. Mr Chapel deals in an interesting way with the two recent cases (*Lord Polwarth* v. *North British Railway Co.*, and *Whitehouse* v. *Pickett*) dealing with the liabilities of common carriers and of innkeepers respectively, and Mr Laing discusses the Act setting up a Court of Criminal Appeal in England.

The Late SIR JOHN LAWSON WALTON, K.C., M.P.,

Attorney-General for England.

The subject of our portrait this week is Sir John Lawson Walton, the Attorney-General, whose much regretted death took place at his London residence on Saturday, 18th January. In his death the legal profession, the House of Commons, and the country have sustained a great loss, and one which will be felt all the more keenly because the great lawyer has died before attaining to the high judicial honours in which the career of the official leader of the Bar — either here or in England — usually culminates. No Attorney-General has died in office since Sir William Follett, who died in 1845, and whose statue is to be found in Westminster Abbey. In Scotland the last Lord Advocate who died while holding that position was Sir James Stewart, whose death took place, during his second term of office, in 1713.

Photo by] [*Elliott & Fry.*

John Lawson Walton, who was born in Ceylon in 1852, was the son of a well-known Wesleyan missionary. He was educated in England at the Merchant Taylors' School in Lancashire, and later at London University, where he took high honours in Law though he never became a graduate. After serving his articles in the office of a firm of solicitors in London, he abandoned that branch of the profession and entered as a student at the Inner Temple. There he won the position of first prizeman in Common Law, and devoted the hundred guineas which he so obtained to securing a place as pupil in the chambers of Mr Jeune, afterwards the distinguished President of the Probate, Divorce and Admiralty Division. He was called to the Bar in 1877, and soon achieved success. In one of his early cases he defended at Newcastle Assizes the King of the Gipsies, who was charged with wilful murder. Mr Justice Manisty, who summed up in favour of the major charge, described the case as the worst he had ever known, and Walton won no little credit when he induced the jury to bring in a verdict of manslaughter. Those interested in the turf may remember the case of *Wood* v. *Cox*, in which he distinguished himself as counsel for the defender as junior to Sir Charles Russell.

In 1890 he became a Queen's Counsel. Among others who took silk along with him were two of his colleagues in the present Government—Mr Asquith and Mr Haldane. As a leader he at once took a high place. He was very prominently brought before the public as counsel for the plaintiff in the action for defamation in which Mrs Kitson was awarded £12,000 of damages against Dr Playfair, a distinguished physician. From that time he was in the very front rank, and his name appeared in most of the *causes célèbres*. The Hartopp, the Constantinidi and the Cowley divorce cases, and the Whittaker Wright trial are among his cases best known to the public; but he was equally eminent as a leader in the more purely legal controversies which are of greater interest to the profession. He was seen at his best in such cases as *Allen* v. *Flood*, *Janson* v. *The Driefontein Consolidated Mines*, *The Queen* v. *The Justices of Kent*, and the recent Revenue cases against the Duke of Richmond and Gordon. A man of fine presence, dignified and courteous in his manner, fair in argument, and with a conspicuous gift of eloquence, he had the essential natural qualifications of a great advocate, and he early earned—

and maintained throughout his whole career—the confidence of the Bench and the respect of his brethren at the Bar.

It was in 1892 that Mr Lawson Walton first sought Parliamentary honours. In that year he was adopted as Liberal candidate for Battersea, but retired in favour of Mr John Burns, and contested Central Leeds against Mr Gerald Balfour; but he was unsuccessful. Later in the same year he was elected for South Leeds, a constituency which he continued to represent till his death. He was a successful Parliamentarian, and during last session he gained great credit by the manner in which he piloted the Criminal Appeal Act and the Public Trustee Act through the House of Commons. He was appointed Attorney-General on the formation of the Liberal Government in 1905.

In the course of his remarks in the King's Bench Division on Monday, 20th January, Mr Justice Grantham, referring to the death of the Attorney-General, said: "For many years there was no one more regularly in all the leading cases, and no one in whom the public had such confidence. I am able to speak with singular sincerity and singular knowledge of him as a Queen's Counsel, and subsequently as a King's Counsel, because I happened to be on circuit when he last went circuit as a junior, and again when he went as Queen's Counsel, and, I think, the two circuits prior to his attaining 'silk,' when he was one of what we would call the heavy juniors. He was one of the most respected juniors in the profession, and had a very large practice on the North-Eastern Circuit. The time came when it was thought desirable he should take 'silk.' He took it, and in his first circuit he had a very fair share of the work; rather more than a junior 'silk' obtains as a rule. But he made his name so rapidly as a leader by the judgment he showed in the conduct of his cases that by the next circuit he had obtained the lead on that circuit, and the work from that time rolled in. Whether on circuit or in London, there was no member of the Bar who was more highly respected by his professional brethren and the public and the judges than Sir John Lawson Walton. We trusted him, and that is the great thing, and that is the main element of success in a man. The judges always trusted him, and knew that nothing would preclude him in his professional work and labour from upholding the position and honour of his clients. He never overstepped the boundary which, as a high-minded counsel, he always set before himself as the limit to which he might go in advocating the claim of his client."

The Solicitor-General, Sir William Robson, said: "I have to thank your Lordship for the sympathetic words you have uttered on the death of our leader. The news of his sudden death, as your Lordship says, has been received with sincere and universal sorrow. During the comparatively short time he filled the office of Attorney-General he performed his duties with sincerity and distinction. He maintained his high position, and he will always be remembered by the English Bar as one of its most accomplished chiefs. You have spoken of his great intellectual gifts. We all know them, but perhaps our thoughts are turned more naturally to his unfailing courtesy and charm of manner. He never lost those great characteristics. I think it has been said of him by some writer in the Press that he was always master of himself. Those who went circuit with him knew how complete that mastery was. No doubt during the last few years he felt the strain of a great practice at the Bar. That particular side of his work was not increased, but very substantially diminished, in the office to which he succeeded, but any relief he might have had in that respect was perhaps lost in the great additional strain that fell upon his time and health from the active interest he took both in professional and public affairs. The strain told upon his health, but never seemed to tell upon his temper or control under the most trying conditions. In the most strenuous combat, and under the most trying conditions, he always remained what we at the Bar shall ever remember him as—an artist in speech and a man of courteous and kindly manners to everyone with whom he came into contact, professionally and personally."

The subject of the portrait next week will be:—

The Late Dr John Dove Wilson.

THE ENGLISH LAW OFFICERS.

It is announced that Sir William Snowden Robson, K.C., M.P., has been appointed Attorney-General, and Mr S. T. Evans, K.C., M.P., has been appointed Solicitor-General.

THE ATTORNEY-GENERAL.

Sir William S. Robson, who has been Solicitor-General since the formation of the present Government, was born in 1852, and is a son of the late Mr Robert Robson, J.P., Newcastle. He was educated privately and at Gonville and Caius College, Cambridge. Called to the Bar in 1880, at the Inner Temple, he joined the North-Eastern circuit, to which his predecessor, Sir John Lawson Walton, also belonged. He took silk in 1892, and was appointed Recorder of Newcastle-upon-Tyne in 1895. In 1900 he became a Bencher of the Inner Temple. At the Bar Sir W. Robson had a distinguished career as a pleader, and was an authority on the law of patents. He entered Parliament as member for the Bow and Bromley division of Tower Hamlets in 1885, but lost the seat in the following year. He was,

however, elected member for South Shields in 1895, and has represented that contituency ever since. As a private member he succeeded in getting a measure passed for raising the school age of half-timers. Sir William Robson has established a solid reputation as a Parliamentarian and has rendered valuable service to his party in Parliamentary debate.

THE SOLICITOR-GENERAL.

Mr Samuel Thomas Evans is forty-eight years of age, and is the only son of Mr John Evans, of Skewen, near Neath. He was educated at Swansea Collegiate School and Aberystwith University College, and graduated at London University. He became a solicitor in the year 1883, but in 1891 was called to the Bar at the Middle Temple, and became a K.C. in 1901. Mr Evans has represented his present constituency, Mid-Glamorgan, since 1890. He was appointed Recorder of Swansea in 1906, and was returned unopposed at the bye-election caused by this appointment, and also at the General Election of 1905. In the House of Commons Mr Evans early won his spurs as a debater in the days when he and the present President of the Board of Trade made the running for the Welsh party in the House; and both there and at the Bar his nimbleness of mind and ready wit have made him a valuable coadjutor.

THE LAW OF PUBLIC AUDIT AND THE LARGER BURGHS.

By H. Burn Murdoch, B.A., LL.B.,
Advocate and Barrister-at-Law.

In a recent article dealing with the audit of public bodies generally throughout Scotland, reference was made to the uncertain position of the "larger burghs" upon this matter, When the Town Councils Act of 1900 laid down a code of general application, it provided by sect. 109 that "notwithstanding anything in this Act contained it shall be in the power of the Town Council of any of" [Edinburgh, Glasgow, Aberdeen, Dundee and Greenock] "by a resolution passed at any time within twelve months after the passing of this Act, to declare that any sections or subsections of this Act relating to . . . . accounts and corporate property specified in such resolution shall not be applicable to such burgh, and that in lieu thereof the corresponding sections or subsections (if any) of an Act or Acts applying to such burgh repealed by this Act, which section or subsections shall be specified in the resolution, shall, notwithstanding such repeal, remain in force or revive within the burgh."

All the above-mentioned burghs except Greenock have made wide use of the power conferred. Each Town Council passed its own resolution in its own words, and only in the case of Dundee was an attempt made to shew how the old law revived "corresponds" to the rejected sections of the 1900 Act. Although these resolutions when published in the "Edinburgh Gazette" are invested with the force of statute, Glasgow has actually passed and published two resolutions, and it is doubtful whether the second, which purports to revive an additional section by way of afterthought, can derive any force from the words of the Act authorising "a" resolution. The second resolution expressed this further revival to be in lieu of sect. 90, already declared inapplicable, but Aberdeen, which also rejected sect. 90, made no corresponding revival.

There are three notable sections of the 1900 Act unanimously rejected by these four towns, containing important provisions not corresponding to anything that has been revived. These are sections 94 (Appointment of independent Auditor), 95 (Accounts to be delivered to him), and 96 (Procedure open to dissatisfied ratepayers). It may be argued that to this extent the resolutions of the four towns are *ultra vires*, and that rejection was possible only to the extent that corresponding provisions already existed. This view seems to have been taken in an opinion, published some time ago in the daily press, given by Mr Balfour Browne, K.C., at the instance of certain Glasgow ratepayers, in connection with the recent case of *Eadie and Others* v. *Magistrates of Glasgow*, 15 S.L.T. pp. 379, 612.

But the words "if any" in brackets in sect. 109 admit the reading that the authority to reject the 1900 Act was not so limited, but only that a duty was imposed of reviving old corresponding law so far as that did exist. As a matter of fact, the schedule of repealed acts thus made locally revivable contains no provision at all relating to audits or auditors. There is, however, one section (34) of the Burgh Reform Act 1833 that provides a fixed penalty, recoverable by any person aggrieved from magistrates and others wilfully disobeying the provisions of that Act: these prescribe, *inter alia*, the making up of complete accounts. As the only procedure of complaint actually revived by Glasgow and the other towns apparently relates to the Common Good accounts alone, it would seem that here there is a "corresponding" section which the resolutions have omitted to revive.

Should any part of a resolution be held invalid in future proceedings, there will be further doubt whether the invalidity does not extend to the whole of the resolution, as it would not in that event conform exactly to the description "resolution passed under this section" on which statutory force is bestowed. At all events, the invalidity might affect the whole of that part relating to accounts and corporate property. The result of this would be that the four larger burghs would come under the 1900 Act rules of audit, falling into line in this respect with the general Scottish reform.

This would seem almost desirable. The fragmentary portions of the 1822 and 1833 Acts which were considered in *Eadie* (*supra*), on the supposition that they still applied to Glasgow, are neither clear nor effective. Even should the narrow right of complaint reveal any non-justified expenditure, apparently the liability could not be attached to the individuals responsible. In *Eadie* certain town councillors wished to disclaim the defence, but were refused permission on the ground that they were in Court officially as representing the Corporation and not as individuals.

The questions raised in that case left the legality of the resolutions unconsidered: it is possible that they are invalid in whole or part for the reasons above stated. Further, at least one piece of law commented on in the judgment of the Court, the Glasgow Municipal Act 1879, sect. 10, seems plainly to have been repealed, although this point was not brought out. The Town Councils Act 1903, sect. 8, provided that, subject to 1900, sect. 109, the sections of 1900 "relating to accounts and corporate property shall apply and have effect in all burghs within the meaning of that Act; and subject as aforesaid, *all portions of local Acts inconsistent with or dealing with the same matters as the said sections are hereby repealed.*"

Now the 1879 Act, sect. 10, is a portion of a local Act and deals with accounts; it is not preserved by anything contained in the Act of 1900, sect. 109. This repeal seems to have far-reaching consequences that have been completely overlooked. In these larger burghs much finance is at present administered in terms of local Acts dealing with accounts which were, to all appearance, repealed in 1903. In fact, the position of the larger burghs is made doubly unsatisfactory owing to its total uncertainty. They especially stand in need of an amending Act dealing with accounts and audit.

The Duty of Agents to Return Process.—When a case which was on the Summar Roll of the First Division this week was called for hearing on Wednesday, 29th inst., it appeared that the agent for one of the parties had not returned productions in the case. These had been borrowed by him on 29th December. The agent was not personally present in Court. The Lord President, addressing counsel for the party, said: "Surely it is a dereliction of the first duty of an agent to hold back borrowed productions when the case is on the roll, and these may be required at any moment. Tell your agent he must attend personally and give any explanation he may have to give."

For some years after the order was instituted in 1897 difficulties arose in Scotland as to the recommendations made—or not made—for the dignity of King's Counsel. The matter was the subject of discussion at several meetings of Faculty. Recently, however, little or nothing has been heard on the subject, and the dignity has been conferred practically on all who have applied for it. But at the English Bar the position at present seems to be similar to what was generally felt in the Parliament House at the time referred to. The "Daily Telegraph" says: "Confidently expected before the beginning of term by a large number of aspiring juniors, the list of new 'silks' has not yet appeared. Whether the Lord Chancellor will, in the near future, enable some or any of the parties interested to write K.C. after their names is in doubt. Rumour credits him with on opinion that the number of leaders at the Bar has increased, is increasing, and ought to be diminished. That there are more than enough to do the work, whether common law or Chancery, is sufficiently clear, for there are plenty of unemployed among them; but of late years this consideration has not prevented the conferring of the rank upon worthy applicants. It would be a misfortune if there were a return to the ancient system, under which silk gowns were treated as priceless gifts, to be distributed with jealous nicety at long intervals."

DECISIONS IN THE ENGLISH COURTS.

Rhonnda Urban District Council v. *Taff Vale Railway Company.*

Railway—Railway Clauses Act 1845 (8 & 9 Vict. cap. 20), sects. 50, 51.—A railway company's private Act, passed in 1836, prescribed the width of a bridge to be built across their line as not less that fifteen feet. Sects. 50 and 51 of the Railway Clauses Act 1845 made provisions as to the width of bridges, but sect. 1 of that Act stated that the Act was to apply to every railway which should, by an Act which should thereafter be passed, be authorised to be constructed; and all the clauses and provisions of the 1845 Act, save so far as they should be expressly varied or excepted by such Act, should apply to the undertaking thereby authorised. The railway was constructed under an Act passed in 1846, which incorporated the provisions of the Act of 1836 except such as were inconsistent with the Railways Clauses Act, and incorporated the provisions of the Railways Clauses Act except so far as they were inconsistent with the provisions thereinafter mentioned. *Held* that the provision of the 1836 Act was the provision regulating the width of the bridge in question, and not the different provisions in sects. 50 and 51 of the Railways Clauses Act. *Held* also that the word "bridge" did not include the approaches to the bridge. — Court of Appeal (Vaughan Williams, L.J., Sir Gorell Barnes, P., and Bigham, J.).—*3rd December* 1907.

The Late JOHN DOVE WILSON, Esq., LL.D., Advocate.

Though John Dove Wilson had for some years withdrawn from active public and academic life, his interest in legal science was so little abated and his wise counsels remained so available, that his death has impressed the University and the city of Aberdeen, and all branches of the profession which he adorned, with a sense of loss almost as keen as if he had fallen in harness.

A man of strong brain and with a love of study, he became, early in life, an acute and profound lawyer. His powers as an advocate had only begun to develop when, in his fourth year at the Bar, he was appointed Sheriff - Substitute. Stonehaven allowed him the leisure which, as he employed it, made him a great jurist. It is literally true of him that he grew old learning and thinking. Probably no Scottish lawyer excelled him in critical knowledge of leading systems of law, ancient and modern.

The law of Germany he studied in his University days at Berlin, even to the procedure and practice of its courts. When the German Code of 1900 was published, he went through it as carefully as if he were about to begin practice in Berlin. With the Code Napoleon and the Italian Code of 1882 he was scarcely less familiar. In mercantile law he kept his knowledge abreast of statute and case law of the United States, as well as of the United Kingdom, even after he had retired from the Bench and from his chair. He was keenly interested in the beginnings of shipping law, traceable in Khammurabi's recently discovered code—of a venerable antiquity when Moses was in his ark of bulrushes.

Aberdeen has been fortunate in its local judges, but no one occupied the Bench with more dignity and distinction than Sheriff Dove Wilson, or left it amidst so many tributes of respect and honour from the profession and the community. He enjoyed the confidence of the local Bar, of his colleagues, and of the Court of Session; indeed, his judgments stood the test of appeal so successfully that appeals became rare, either on facts or on law. Perhaps his judicial faculty was seen at its strongest in dealing with a confused mass of conflicting authorities. His method was to examine the origin of the conflict, to trace the limits of the theories on which the decisions were severally based, and to find the solution in "redding the marches" between them, by the aid of first principles.

In the University of Aberdeen he will long be remembered and, I hope, commemorated, as the second founder of its Faculty of Law. Roman Law had ceased to be taught from the chair which was established in 1505 to teach it. He revived its best traditions of the sixteenth and seventeenth centuries, and gave, by his work and personality, a new standing and importance to the study of law. In many ways, and with all his strength, he wrought for the University both during and after his term of office. He enriched its library by a gift of the most valuable books in his collection of foreign and ancient law. As a teacher he was plain, lucid, and convincing; he taught principles, not details, but principles illustrated by a choice of leading cases. His respect for institutional writers never prevented him from pointing out their errors, with his reasons. His large study of jurisprudence, both analytic and historical, made him an effective critic.

Mr Dove Wilson did much service of the highest kind in many departments—all of it

bearing the stamp of his individuality. His "Sheriff Court Practice" is now classic. As a member of Departmental Commissions, particularly in connection with habitual offenders and inebriates, his aid was much appreciated. He had a hand in drafting several of the codifying statutes, particularly the Bills of Exchange Act of 1882. For many years he was a member of the Board of Examiners of Law Agents. As an examiner on that Board, and in the University, he was, notwithstanding his fairness and geniality, rather feared by candidates who depended less on intelligent study than on expert coaching in answers to expected questions. It may be added that he strongly advocated the reform of the degree of B.L. desired by Edinburgh and Aberdeen, and the inclusion of the History of Scots Law among the optional degree subjects. In whatever concerned the city of Aberdeen he took a public-spirited interest. Latterly he became prominent in political associations, and added to his great reasoning powers a fervid eloquence which his legal admirers had scarcely supposed him to possess.

By his contributions to the "Juridical Review," the "Law Quarterly," the "Yale Law Journal," and other legal journals, and by his lectures at Yale University on the Storrs Foundation (a compliment conferred on no other Scots lawyer), he was widely known and renowned as an eminent scholar and jurist. Whatever he did reached the highest standard of excellence, and revealed his capacity. His articles, like his judgments, were models of clear statement, compact reasoning, comprehensive grasp, expressed in felicitous, sometimes pungent, language. In style and perhaps method he was influenced by the study of Ihering. But his work always left the impression of power in reserve, and of abundant knowledge, which, like some veins of gold, became richer as one went deeper.

For one task, yet unattempted, his studies and his inclinations specially fitted him. He often regretted that no one had taken in hand a history of the rise and progress of the law of Scotland. In his view the influence of the Roman law in the early period had been somewhat under-rated, and the Scandinavian sources had been scarcely suggested; certainly, except by himself, not explored. Of the relations between the law of Scotland and the teaching of law in the French Universities, specially Orleans and Bourges, during the sixteenth and seventeenth centuries, he had made an elaborate study. For example, he vindicated the claims of Cujas not merely as the greatest of the Civilians, but as having exercised much influence over the development of feudal law by his lectures and his disciples, many of whom, like Craig, became teachers or advocates in Scotland. The Sheriff Court at Aberdeen, which, partly through its connection with the University, had, in the days before the Union, developed law and procedure on characteristic lines, invited him to historical enquiry. No one was so well equipped for work of this kind, and no one would have more powerfully developed one of his favourite texts—law as the bond of states and the great civiliser of mankind. But of these studies, as of his lectures, it is to be feared that no record remains for publication.

If his academic friends chiefly regret that he left no adequate monument of his strength and accomplishments as an author, others, thinking of his fine judicial mind and unique knowledge of the laws of so many countries, cannot but feel that the judicial sphere in which he moved was too narrow for his powers. Men of smaller abilities have been raised to the Judicial Committee of the Privy Council—"Time and chance happen to all." But no man, in every circle to which he became known, received more sincere respect and honour, and his reputation may rest on the excellence of his judicial and academical work. No one so fully exemplified the aphorism of Lord Bacon which he used to quote: reading made him a full man, conference a ready man, and writing an exact man. N. J. D. K.

In opening the Class of Scots Law at Aberdeen University on Monday, 27th January, Professor Irvine said:—

"As we were leaving this class-room on Friday, we were met by the announcement of the death at San Remo of Dr Dove Wilson, who for a period of ten years occupied the Chair of Law in this University. To the members of the University, to the citizens of Aberdeen, and to many far beyond these limits, the announcement came fraught with a keen sense of personal loss. Before being called to this Chair Dr Dove Wilson had a long experience of judicial work in the Sheriff Court, and in that capacity had gained a high reputation. He had also made notable contributions to Scots legal literature, and in particular his treatise on Sheriff Court Practice had taken its place as a standard work.

"He thus entered on the duties of the Chair equipped with a sound knowledge of legal principles, a familiarity with practical details, and a wide experience of human nature. His work as a teacher of law was very congenial; he had a high conception of the duties of his office; and by universal admission his success as a Professor was not less marked than had been his success as a Judge. He possessed, indeed, many qualities fitted to adorn the Chair. His colleagues with one consent bear witness to his helpfulness and loyalty. His former students testify with a rare unanimity to his power of lucid and accurate exposition, his faculty for illuminating dry details, his scrupulous thoroughness, and his unfailing kindliness. They speak, too, of his constant efforts to keep them in touch with the practical side of law, and to secure that they

should never lose sight of the responsibilities which they would have to face in professional life.

"During his occupancy of the Chair his published studies in the development of Scots Law and its relation to Roman Law and modern legal systems won for him wide recognition and made his name known—as the names of few Scots lawyers become known — in England, in the United States, and on the Continent. His investigations in the sources and history of our law—a work to which he gave much time—were always guided by useful ends and directed to illustrate and explain the law of to-day. In his studies there was no unpractical vagueness: his knowledge was always an instrument ready for use.

"His tenure of this Chair will be memorable from the fact that to him was due the revival of the study of Roman Law in the University. This he himself regarded—perhaps rightly—as his most valuable service to the University and to the legal profession. It was characteristic of the man and his methods that, before beginning this work, he went to Leipsic, and there with the aid of two great masters of Roman Law, Windscheid and Sohm, made himself acquainted with the best methods of teaching the subject. In his letter resigning the Chair, he stated that two other objects lay near his heart—the extension of the law curriculum and the provision of more practical teaching in law. As regards the former he has been taken from us at a time when we are not without hope that the extension of our law curriculum is on the eve of being accomplished. As regards the latter, we now have at our disposal in our law library the means of making the teaching more practical, and he would, I think, have approved the effort being made this session to avail ourselves of this equipment and to supplement the system of lectures by less formal but not less profitable instruction in matters of practice. After his retirement his interest in the welfare of our Law Faculty in no wise abated, and was never more conspicuous than on the last occasion I saw him —on the day before he left for San Remo. None of his work was done easily or lightly. *Nil sine labore*—a favourite maxim of one of England's greatest lawyers—might have been his motto. He leaves a record of strenuous work, of unflinching faithfulness to duty and of high achievement: and it is not unfitting that in this place we, who have entered into the fruits of his labours, should pay him a tribute of respect and affection."

The hearing of two Seven Judge cases took place in the First Division Court Room on Tuesday and part of Wednesday of this week. In the absence of Lord Pearson and of Lord Low, who has been indisposed for a few days, Lord Guthrie attended in the Inner House to complete the Court of Seven Judges. Lord Mackenzie has been absent from Court all this week in consequence of a sitting of the High Court at Aberdeen, where the calendar is a very heavy one. There has thus been this week considerably less business than usual in the Court of Session. The Court adjourns to-day for the February week vacation.

The Senatus Academicus of the University of Edinburgh have resolved to confer the degree of Doctor of Laws upon the Right Hon. Thomas Shaw, K.C., M.P., Lord Advocate, and upon Sir James Balfour Paul, advocate, Lyon King of Arms.

Mr R. F. L. Blackburn, K.C., one of the Advocates Depute under the late administration, has been invited and has consented to contest the county of Forfar in the Unionist interest at the next election.

Mr William Stodart, Dean of the Hamilton Society of Solicitors, and Mr Duncan C. Barr, Chamberlain, Hamilton Estates Offices, have been appointed Honorary Sheriff-Substitutes of the county of Lanark.

The names of Messrs John Neill, Hugh William Walker, and George Macdonald have been added to the list of Honorary Sheriffs-Substitute at Greenock. Mr Macdonald retired a few days ago from the office of Dean of the Faculty of Procurators of Greenock.

Legal Appointment for a Member of the Scottish Bar.—We are informed that Mr James Adamson, M.A., LL.B., advocate, has been appointed Dean of the Faculty of Law at the Victoria College, Wellington, in the Dominion of New Zealand. Mr Adamson, who was admitted to the Faculty of Advocates in 1896, was educated at Forfar and at the University of Edinburgh, where he graduated M.A. (1893) and LL.B., with distinction, 1896. He acted as assistant to the Professor of Scots Law in 1895–96. Mr Adamson was a distinguished law student, gaining first prizes in Public Constitutional History, Civil Law (two), Scots Law (two). The Professor of Scots Law, Mr Rankine, wrote of his class-work: "I beg to congratulate you on the best paper I have ever had the pleasure to examine." Since his admission to the Faculty Mr Adamson has enjoyed a considerable practice, and he is known as a well-read lawyer and sound adviser. He leaves the country early this month, and takes with him to his new appointment the best wishes of his brethren in the Parliament House.

Churches (Scotland) Act Commission.—Mr John Prosser, W.S., has been appointed to act as an Assistant Commissioner for the adjustment of Orders of Allocation.

We regret to learn of the illness of Sheriff Mackenzie, Sheriff-Substitute at Kilmarnock, which has compelled him to apply to the Secretary for Scotland for a month's leave of absence. The first public intimation that Sheriff Mackenzie was indisposed was the announcement made in the newspapers that he was unable to preside at the annual dinner of the Kilmarnock Burns Club on 27th ult. and propose "The Immortal Memory." We understand that he has been suffering from an attack of influenza, from which however he is, we are glad to know, recovering.

The Secretary of State for Scotland has appointed Mr A. J. Louttit-Laing, advocate, to act as interim Sheriff-Substitute at Kilmarnock during Sheriff Mackenzie's absence. Mr Laing has had some previous experience of Sheriff Court work, as last summer he was appointed by Sheriff Reid, K.C., Sheriff of Ross and Cromarty and Sutherland, to act as Sheriff-Substitute at Stornoway during the absence through ill health of Sheriff Squair. Mr Laing's present appointment is of general interest as being the first which has been made under the powers conferred on the Secretary for Scotland by sect. 16 of the Sheriff Court (Scotland) Act 1907. "This section," says Sheriff Fyfe in his recent book on the Act, "was not in any of the older Acts. A Sheriff-Substitute who was laid aside by illness was dependent upon the goodwill of his Sheriff to nominate as an interim or Honorary Substitute a suitable person to temporarily take his place, but the attendant expense had to be borne by the Sheriff-Substitute personally. This section removes this anomaly of thirty years' standing, and places a Scotch Sheriff-Substitute in this matter on the same footing as an English County Court Judge and other Crown officials." The remuneration of the interim Sheriff-Substitute is paid by the Treasury.

The Late William Strachan, Esq., Sheriff-Clerk of Linlithgowshire. — Mr William Strachan, Sheriff-Clerk of Linlithgowshire, died at his residence, Holywood, Bo'ness, on 31st January, after an illness of a day's duration. On Thursday he was at Linlithgow as usual attending to his official duties. After his return to Bo'ness, and while engaged in business with some callers in the evening, he was seized with hæmorrhage of the brain, and never rallied. Mr Strachan was born at Holywood, Dumfriesshire, sixty-one years ago. Apprenticed to the law in Dumfries, he was admitted a law agent in 1873. For some years he devoted his attention to criminal law, and held the appointment of Assistant Procurator-Fiscal at Linlithgow under the late Mr W. H. Henderson. Later he began business in Bo'ness, where he practised for about twelve years, returning in 1890 to Linlithgow, to join Mr Henderson as his partner. He was secretary to the Linlithgowshire Conservative Association, for which he did excellent work as agent and organiser during several elections, and on the death of Mr Ferguson in 1898 he was appointed Sheriff-Clerk of Linlithgowshire, relinquishing at the same time his private practice. He also held at his death the offices of Clerk to the Justices and the Income Tax Commissioners. While in practice in Bo'ness he took an active part in municipal work, being a member of the Burgh Commission for some years. Mr Strachan was of an exceptionally quiet and retiring disposition, and spent a large portion of his time in his grounds at Holywood. He was a member of Bo'ness Parish Church, of which for many years he was session-clerk.

Law Agents' Examination Results. — The results of the half-yearly examinations in general knowledge, which were held lately in Edinburgh, Glasgow, Aberdeen, and Dundee, have now been intimated to the candidates. For the first examination in general knowledge 108 candidates entered. Forty have passed or been found qualified in all the subjects, and 36 have satisfied the examiners or been found qualified by leaving or other accepted certificates in two subjects. For the second examination in general knowledge 170 candidates presented themselves. Of these 69 have passed in one subject, 28 in two, 14 in three, and 2 in four subjects. The papers of the candidates of this examination were as follows:—Mathematics, 29, passed 11; logic, 58, passed 45; Latin, 82, passed 41; Greek, 4, passed 3; French, 55, passed 27; German, 3, passed 3; Italian, 1, passed 0; book-keeping, 82, passed 52. The quarterly examination in law was held in Edinburgh last week, when 54 candidates presented themselves for examination. Forty-six of these were examined in all the subjects, and 24 passed. Eight graduates in law (LL.B. and B.L.) were examined in Court Procedure, and 8 passed. The following is the official list of those who have passed the examination in law:—John Angus, Herbert Taylor Ballantyne, John Keith Barclay, James Wilson Blyth, Robert Browning, M.A., LL.B.; James Martin Clapperton, B.L.; Percival Humphreys Dunne, William Chapman Forbes, John Donaldson Garvie, junior, Walter Henderson, M.A., LL.B.; James Houston, Walter Hubbard, LL.B.; Robert Andrew Hutchon, Robert Andrew Logan, David Brown Mungo, James Campbell MacGregor, LL.B.; John Mackenzie, John M'Killop, Donald M'Kinnon, junior, James Semple MacKintosh, B.L.; Kenneth Gilbert Maclachlan, Archibald Pow, James Robertson, John Edwards Percival Robertson, John Murray Scrimgeour, M.A., LL.B.; Benjamin Sibbald, Alexander Marshall Stewart, M.A.; James Charles Stewart, John Swan, David Robertson Tod, Alexander Lyle Watt, Alexander Maclean Wilkie.

J. CAMPBELL LORIMER, Esq., K.C.,

SHERIFF OF AYRSHIRE.

Mr Campbell Lorimer has received many hearty congratulations from members of both branches of the legal profession and a warm welcome from his brethren on the bench of the Sheriff Court on his appointment to be Sheriff of Ayrshire. Mr Lorimer has, through the chances of politics, had to wait long for judicial promotion. He was admitted to the Faculty of Advocates in 1866, and though junior Sheriff in order of appointment he has only two seniors at the Bar among his colleagues as Sheriffs - Principal. His sheriffship is, however, by no means his first official appointment. He was Standing Counsel for the Inland Revenue — an appointment which does not change with the Government—from 1882 to 1886, but he resigned that office to become an Advocate - Depute. He was succeeded in the Revenue by Mr Young, who remained in that position for twenty-one years. The Liberal Government went out of office a few months after Mr Lorimer became Depute. He was reappointed in 1892, and held office till 1895. When Lord Balfour of Burleigh carried through the measure establishing Local Provisional Order Enquiries in Scotland he appointed Mr Campbell Lorimer to be his senior Parliamentary Counsel. Mr Lorimer thus shares with the late Lord Kinross and with Lord Guthrie (whom the Conservatives made a Sheriff) the distinction of being selected for legal promotion by his political opponents.

Mr Campbell Lorimer, who is a son of the late Rev. John Gordon Lorimer of Glasgow, was born there in 1841. He was educated at Glasgow Academy and at Glasgow University, where he graduated as M.A. His legal studies were prosecuted at the University of Edinburgh, where he graduated as LL.B. Having served his apprenticeship to the law in the office of Messrs Bannatynes & Kirkwood, writers, Glasgow, he was called to the Scottish Bar in 1866.

Mr Lorimer is known as an accomplished and able counsel, and is well versed in all branches of law. He was junior counsel for the liquidators of the City of Glasgow Bank, and since then has been pre-eminent as a company lawyer. He was appointed a King's Counsel in 1903. He is the author of an Outline of the Law of Joint Stock Companies, a Commentary on the Finance Act of 1894, and the Introduction and Notes on the Law of Scotland, in Lord Lindley's book on Partnership. He is a member of the Court of the University of Edinburgh, and the Chairman of the Century Insurance Company. A prominent member of the United Free Church, he took an active part in the affairs of that body both before and after the Union.

Mr Campbell Lorimer presented his commission at Ayr Sheriff Court on 13th inst., and was introduced to, and welcomed by, the Bar. Among those present were Sheriff Shairp, Mr W. S. N. Patrick, Sheriff-Clerk; Mr P. Fraser Mackenna, Procurator-Fiscal for the county; Mr Archibald Brakenridge, Dean of the Ayr Faculty of Solicitors, and a large number of members of Faculty; Mr R. A. Oswald of Auchincruive, Convener of Ayrshire; Provost Allan, and many others. After the new Sheriff had presented his commission to Sheriff Shairp, Sheriff Shairp said he had the very pleasing duty to discharge of offering to Sheriff Lorimer a welcome as Sheriff-Principal of that important county. They desired to offer to him their

sincere congratulations on his appointment as Sheriff of a county which had so much interest connected with it, historical and otherwise, as the county of Ayr. And they desired to congratulate themselves on receiving as Sheriff a gentleman of established reputation in a profession like theirs, one who had mature experience, a writer of reputation on legal subjects, and one who held important and responsible legal position in past days under the Crown. He was sure from what he knew of him that Sheriff Lorimer might be counted upon to do his utmost to maintain and strengthen the hearty and harmonious relations which were the traditions of Bench and Bar in Ayrshire. Mr Brakenridge said it was his high privilege on behalf of his professional brethren most respectfully to extend to Sheriff Lorimer very cordial welcome, and to offer their hearty congratulations upon the honour that had been conferred upon him—the appointment of Sheriff-Principal of that important county. He might be permitted to say with sincerity that their congratulations were enhanced by the fact that his Lordship's professional learning, and his reputation as a writer of authority, would enable him to discharge the duties of his high office with satisfaction and success. He had been deputed by the members of the Bar to assure his Lordship that he might at all times rely upon receiving their loyal and hearty co-operation and assistance. Mr Mackenna, on behalf of the officials, Mr Oswald on behalf of Ayrshire County Council, and Provost Allan on behalf of Ayr Town Council, also briefly extended a welcome to Sheriff Lorimer. Sheriff Lorimer said he had to return his most hearty thanks to the local Bar, to the County Council, and to Ayr Town Council, for the most cordial reception which they had accorded to him. It would ill become him to take his seat there without referring to the person who had preceded him, his friend Sir David Brand. Sheriff Brand had held the office of Sheriff-Principal for twenty-two years, and they did not need to be told how he had discharged the onerous duties of his office, being a sound lawyer, and versed in all that was necessary to make him a competent judge of that important county. He (Sheriff Lorimer) came among them, not with qualities such as Sheriff Brand had possessed, but with a few shreds of legal knowledge and legal experience which, he trusted, might be of use in the discharge of his duties. He came at an interesting time, when a new Sheriff Courts Act had just come into operation. That Act would require to be studied by him and them. They all started fair, because no one had as yet had any experience of the working of the Act; and they would see how, by their joint industry and wisdom, they could make this Act work so as to be of the greatest benefit to the county.

The Court of Session resumed its sittings on Tuesday after the February blank week. All the Judges were present, except Lord Pearson and Lord Johnston, who is absent on account of indisposition. We regret to learn that it is unlikely that Lord Johnston will be able to be back in Court for a period of at least three weeks. A sitting of the Land Valuation Appeal Court has been held this week. Lord Low and Lord Dundas were the presiding Judges. Lord Low and Lord Dundas will also preside at a sitting of the High Court of Justiciary in Glasgow on Tuesday and Wednesday of next week.

A sitting of the High Court of Justiciary took place in Aberdeen on 4th, 5th, 6th, and 7th February. Lord Mackenzie was the presiding Judge, and Mr Anderson, A.-D., assisted by Mr Millar Craig, prosecuted. There were seven cases involving twelve persons, and including three charges of murder. Four full days were required for the disposal of the calendar, which was heavier than on any occasion in Aberdeen during the last fifty years or so. Two of the four days were occupied with what had come to be known as the Lhanbryde murder. In this case Joseph Hume was charged with the murder of John Smith at Lhanbryde, near Elgin, in September last. The prisoner was defended by Mr Moncrieff and Mr Dallas. The jury, after an absence of an hour, returned a unanimous verdict of guilty, and sentence of death followed. This was the first death sentence in Aberdeen since 1865. Of the other two murder charges, one was disposed of by giving effect to a plea of insanity in bar of trial, and the other was, on the conclusion of the evidence, reduced to a charge of culpable homicide, in accordance with which a verdict was returned.

The Lord Chancellor (says the Law Journal), after a delay that has provoked a good deal of criticism, has added fifteen members of the Bar to the ranks of His Majesty's Counsel. Inasmuch as the names of 251 King's Counsel appear in the current "Law List," it cannot be asserted that the number of King's Counsel is so insufficient as to create an urgent demand for an addition to their ranks; but the obvious reluctance of Lord Loreburn to bestow the honour of "silk" is certainly not in keeping with the policy of his predecessors in office, and, in view of the fact that a large proportion of the King's Counsel whose names appear in the "Law List" are not practising members of the profession, is not altogether easy to understand. The new list of King's Counsel will, for the most part, command the approval of the Bar, but the absence of one or two names from it has created not a little surprise. A member of the North-Eastern Circuit, whose application for "silk"

has not been granted, had claims to the honour which were certainly not inferior to many of those which have been recognised.

Scottish Legal Appointments.—A vacancy having occurred in the office of Senior Counsel to the Secretary for Scotland for the purposes of the Private Legislation Procedure (Scotland) Act 1899, through the appointment of Mr J. Campbell Lorimer, K.C., to be Sheriff of Ayrshire, Mr Sinclair has appointed Mr P. F. Wood, advocate (the present junior counsel), to be senior counsel, and Mr John Harvey, advocate, to be junior counsel under the Act. Mr Wood, who holds the degrees of M.A. and B.C.L. of Oxford, and M.A. and LL.B. of Edinburgh, was called to the Scottish Bar in 1884 and to the English Bar in the same year. He has been junior counsel since 1900, when the Act came into operation. Mr Wood is lecturer on Administrative Law in the University of Edinburgh. Mr Harvey holds the degrees of B.A. Oxford and M.A. LL.B. Edinburgh, and was admitted to the Faculty of Advocates in 1892. He is lecturer on Procedure and Evidence in the University of Edinburgh, and is a reporter on the staff of the "Session Cases."

Age Limit for Scottish Sheriffs. — In the House of Commons on the 13th inst. Mr Watt (Glasgow, College) asked the Lord Advocate whether there was any age limit for Sheriffs and Sheriffs-Substitute in Scotland; if so, what was that limit, and how many were there now receiving salaries who had been granted extension; and, if not, will he introduce legislation to put this branch of the service on an equality with others, where compulsory retirement was enforced? *The Lord Advocate.*—The answer to the first part of the question is in the negative, which supersedes the second branch of my hon. friend's enquiry. The answer to the third part is also in the negative.

Registration of Title.—The Royal Commission on Registration of Title in Scotland met on the 1st inst. in the hall of the S.S.C. Library, Parliament House, Edinburgh. The Commissioners present were:—Lord Dunedin (chairman), Mr W. J. Dundas, C.S.; Mr J. Smith Clark, Keeper of the Register of Sasines, Edinburgh; Sheriff Kennedy, Mr C. F. Brickdale, of the Land Registry, London; Mr John Prosser, W.S.; and Mr F. A. Umpherston, advocate, secretary. The following witnesses were examined:—Mr James Annan, town clerk of Lanark, as representing the town-clerks of royal burghs having burgh registers; Mr James Glen, solicitor, Greenock, representing the Convention of Royal Burghs; Mr Richard Brown, solicitor, Glasgow, also representing the Convention of Royal Burghs.

NEW ENGLISH KING'S COUNSEL.

The dignity of Counsel to His Majesty has been conferred upon fifteen members of the English Bar. Mr Charles Tyrrell Giles was called to the Bar at the Inner Temple in 1874, and is a member of the Western Circuit. He sat in Parliament as a Conservative from 1900 to 1905. He previously practised at the Parliamentary Bar. Sir Thomas Raleigh, K.C.S.I., was born in Edinburgh in 1850, and is a son of the late Mr Samuel Raleigh, manager of the Scottish Widows' Fund. He was Registrar of the Privy Council from 1896 to 1899, and Legal Member of the Viceroy's Council from 1899 to 1904. Mr Arthur William Bairstow was called to the Bar at the Inner Temple in 1878, and has practised at Leeds. Mr Leslie de Gruyther was called to the Bar at the Middle Temple in 1885. For thirteen years he practised at Lucknow, and since his return to this country has been largely engaged in Indian Appeals before the Privy Council. Mr Lewis Thomas was called to the Bar at Lincoln's Inn in 1885, and has had a large practice on the Common Law side. Mr George Ranken Askwith was called to the Bar at the Inner Temple in 1886. He was a counsel in the Parnell Enquiry and in the Anglo-Venezuelan Boundary Arbitration. He has acted as Crown Counsel in Peerage cases, and has been appointed arbitrator in a large number of trade disputes. Mr Lloyd George recently appointed him Secretary to the Board of Trade. Mr James John Carfitt was called to the Bar at the Inner Temple in 1887, and is a member of the Midland Circuit. He has acted as Junior Counsel for the Post Office, and his name is remembered as a cricketer of some renown. Mr Ernest Wynne Martelli, a member of the Chancery Bar, was called at Lincoln's Inn in 1888, and has been engaged in many leading cases. Mr Clement M. Bailhache, who practises largely in the Commercial Court, was called to the Bar at the Middle Temple in 1889, having previously been a solicitor. The Hon. Frank Russell, the fourth son of Lord Russell of Killowen, was called to the Bar at Lincoln's Inn in 1893, and has practised on the Chancery side. Mr Edward Alfred Mitchell-Innes, a son of Mr Gilbert Mitchell-Innes, was born at Edinburgh in 1863, and was called to the Bar at the Middle Temple in 1894. He has had a large practice, and has been engaged in many notable criminal trials. Mr Alexander Grant, who was called to the Bar at the Inner Temple in 1874, has been a leading practitioner in the Palatine Court of Lancaster. He unsuccessfully contested a seat in the Liberal interest at last General Election. Mr Edward George Hemmerde, M.P., was called to the Bar at the Inner Temple in 1897. He is a Liberal, and he unsuccessfully contested Winchester in 1900 and Shrewsbury at the last General Election. He was elected for East Denbighshire in August 1906. He has been engaged in many notable

cases, and lately was admitted to the Jamaica Bar in order to take part in the recent heavy fire insurance litigation there. Mr John Allsebrook Simon, M.P., is thirty-four years of age, and was admitted to the Bar at the Inner Temple in 1899. He has had a large practice at the Common Law Bar and before the Privy Council and the Railway Commission. He was junior counsel for the British Government in the Alaska Boundary Arbitration. He sits as a Liberal for the Walthamstow Division of Essex. Mr Frederick Edwin Smith, M.P., has received the dignity of King's Counsel at an exceptionally early age, having been called to the Bar at the Inner Temple so recently as 1899, some six months later than Mr Simon. With the exception of the late Mr Benjamin and Sir Edward Carson, no member of the Bar has ever obtained silk within so short a period of his call. Mr Smith, who is a Unionist and a Tariff Reformer, was elected for the Waltham Division in 1906, and has obtained a reputation of a high order as a Parliamentarian. He has written on International Law, and has enjoyed an extensive junior practice.

Mr R. Henderson Smith, solicitor, has commenced the practice of his profession at 32 Gray Street, Broughty Ferry. His experience has been gained in the offices of Messrs Young & Kennaway, W.S., Auchterarder; Messrs Hope, Todd & Kirk, W.S., Edinburgh; and Messrs Reid, Johnston & Co., solicitors, Dundee.

Mr Forbes T. Wallace, S.S.C. and notary public, intimates that he has dissolved partnership with Mr John T. Watson and that he will in future carry on business as a law agent and conveyancer at the British Linen Bank Buildings, Leven, in his own name and for his own behoof. He will continue to act as joint agent at Leven of the British Linen Bank in conjunction with Mr William Badger, presently sub-agent at Kirkcaldy, who will in future be associated with him in the bank agency.

Mr John T. Watson, solicitor and notary public, intimates that he has dissolved partnership with Mr Forbes T. Wallace, and that he will in future carry on business as a law agent and conveyancer in his own name, and for his own behoof—in the meantime at Mitchell Street, Leven, where he has secured temporary premises.

The Late Sir William Nicoll.—By the death of Sir William Nicoll, which took place on the 5th inst. at his residence, Roydon, Corstorphine, the Faculty of Advocates has lost one of its members who has brought credit to the Scottish Bar by his services in the field of Colonial judicial work. Sir William Nicoll, who had been Chief Justice of Lagos since 1902, returned to this country in ill health in June of last year. He was advised not to risk a further term of work in the trying climate of Lagos, and resigned his judgeship in December. He appeared to be recovering his health, and was looking forward to returning to the Parliament House, but a chill brought on a relapse which proved fatal. He was born in 1860 in Forfar, and was educated at Forfar Academy, where he was Latin medalist and prize-winner in mathematics. He graduated M.A. at Edinburgh University in 1879 and LL.B. in 1882. He was First Prizeman in Scots Law and Forensic Prizeman in 1882. He was called to the Bar in the same year, and practised in the Parliament House until 1888, when he accepted the appointment of Stipendiary Magistrate for British Guiana. He held other appointments in the colony until 1897, when he was appointed Queen's Advocate for the colony of Lagos. In the same year he became a Puisne Judge of Gold Coast Colony, and from 1902 he was Chief Justice of Lagos. His conscientious hard work, and his many sterling qualities, earned for Sir William Nicoll the high esteem of the communities over which he acted as judge. He gained universel popularity. His death, occurring, as it did, when he had all but completed his full term of Colonial service, is greatly regretted, and much sympathy is expressed with Lady Nicoll in her bereavement. A portrait and biographical notice of Sir William Nicoll appeared in the "Scots Law Times," Vol. XIV. p. 85.

The Late J. D. G. Dalrymple, Esq., of Woodhead, Kirkintilloch.—The death took place, in a nursing home in Glasgow, on the 8th inst., of Mr J. D. G. Dalrymple of Woodhead, Kirkintilloch, and Meiklewood, Stirling. Mr Dalrymple, who was in his 58th year, was a son of a former Kirkintilloch minister, the Rev. Mr Duncan of St David's Parish Church. He succeeded his uncle as laird of Woodhead some six years ago, previous to which time he was a member of the firm of Duncan & Morrison, writers, Glasgow. On coming into the estate he added Dalrymple to his name. He was a devoted archæologist, a member for a long time and President for a term of Glasgow Archæological Society, and the most recent evidence of his interest in the subject was the endowment of an annual Lectureship, the lectures just having been concluded by Professor Bosanquet of Liverpool. He also served on several public bodies in Kirkintilloch and Gargunnock, being at the time of his death chief magistrate of the old Town Council of Kirkintilloch, which body he was endeavouring amicably to get merged in the more modern Town Council.

The Late William Skinner, Esq., Solicitor, Edinburgh.—A familiar figure has been removed from the Parliament House by the death of Mr William Skinner at the age of sixty-nine. Mr Skinner was born at Glen Newton, Falkland,

and received his early education and legal training in Cupar, Fife. After spending a few years in Dundee he went north to Elgin, where in 1863 he qualified as a solicitor. Besides carrying on an active private business, he held the appointment of Depute Procurator-Fiscal for Elginshire. From Elgin he removed to Turriff, and after practising there for some time he came to Edinburgh, where he has been settled for the past twenty-five years. On coming to Edinburgh he entered the employment of the firm of Henderson & Clark, W.S., and on the dissolution of that firm in 1898 he remained with Mr Thomas Henderson, W.S. Mr Skinner took a keen interest in politics, and until recently held office in the city of Edinburgh Eastern Division Conservative Association. He was a member of the Church of Scotland, and at one time took an active part in the work of the Church Defence Association.

THE LATE JOHN MACDONALD, ESQ., SOLICITOR AND BANK AGENT, BUCKIE.—We regret to record the death of Mr John Macdonald, agent for the Town and County Bank at Buckie, which took place at the age of sixty-seven, on the 12th inst. Mr Macdonald studied law in Glasgow, and there held an appointment in the City of Glasgow Bank. About forty years ago he was appointed agent of that bank in Buckie, and on its liquidation he received a similar position in the service of the Town and County Bank. In many ways he did much for the town, and was instrumental in gaining for it its present railway and steamboat facilities. The public offices Mr Macdonald filled were numerous. He was Clerk to Rathven School Board, Burgh Collector, Cluny Harbour treasurer, Justice of the Peace Fiscal, and a director of the Gas Company, while latterly he was appointed an Hon. Sheriff-Substitute for Banffshire. Mr Macdonald was a typical Highlander, with a keen love of the Gaelic language, which he could speak with great fluency.

DECISIONS IN THE ENGLISH COURTS.

Rhonndha Urban District Council acting by The Rhonndha Tramways Company Ltd. v. *Taff Vale Railway Company.*

TRAMWAY—TRAMWAYS ACT 1870 (33 & 34 VICT. CAP. 78), SECT. 30.—*Held* that section 30 of the Tramways Act 1870 authorised a tramway company worked by overhead electric traction to enter upon the lands of a railway company and alter the position of telegraph wires belonging to the railway company in order that the tramway company might comply with the regulations of the Board of Trade with respect to the position of their own wires. — K.B. Div. (Bray, J.).—*4th December* 1907.

Beswick v. *Smith.*

SLANDER—INNUENDO.—The former employer of a commercial traveller circulated among his customers cards with the words: "H. B. is no longer in our employ. Please give him no order, or give him any money on our account." *Held* that the words were not capable of bearing an innuendo which was defamatory. — Court of Appeal (Earl of Halsbury, Gorell Barnes, P., and Bigham, J.).—*5th December* 1907.

Ponsolle v. *Weber.*

STOCK EXCHANGE—DEFAULTER.—The plaintiff, who was not a member of the stock exchange, obtained from the defendant, who was a jobber and a member of the stock exchange, a loan on the security of some shares, the contract being made on behalf of the plaintiff by a firm of stockbrokers who were members. It was a condition that the shares should be sold for the next settling day. The defendant made a contract for their sale with another firm of stockbrokers who were members of the stock exchange, and who were also acting, although he did not know this, on behalf of the plaintiff. The defendant only knew that they were acting for an undisclosed principal. The plaintiff failed to repay the loan or to put his agents in funds to purchase according to agreement. On subsequent realisation of the shares, in accordance with power given by the stock exchange rules, the defendant made a large profit. In an action for an accounting, *held* that the plaintiff was not bound by the rules of the stock exchange with reference to defaulters, and that the defendant must account for his profit.—Chan. Div. (Neville, J.).—*5th December* 1907.

Williams v. *Midland Railway Co.*

RAILWAY—CARRIAGE—RAILWAY AND CANAL TRAFFIC ACT 1854 (17 & 18 VICT. CAP. 31), SECT. 7.—Decision of Walton, J. (*ante*, Vol. XIV. p. 162), *reversed*.—Court of Appeal (Earl of Halsbury, Gorell Barnes, P., and Bigham, J.).—*9th December* 1907.

New Zealand Shipping Co. Ltd. v. *Stephens.*

REVENUE—INCOME TAX—INCOME TAX ACT 1853 (17 & 18 VICT. CAP. 34), SECT. 2, SCHED. D.—Decision of Bray, J. (*ante*, Vol. XIV. p. 158), *affirmed*.—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.). — *9th December* 1907.

Hargreaves v. *Spackman.*

STATUTE—SALE OF FOOD AND DRUGS ACT 1875 (38 & 39 VICT. CAP. 63), SECT. 25.—*Held* that a warranty, to be valid under the above section, must be from the vendor to the person putting it forward.—K.B. Div. (Channell, Bray and Sutton, JJ.).—*9th December* 1907.

Glenie v. *Tucker & Bruce Smith.*

Bill of Exchange — Indorsement.—Decision of A. T. Lawrence, J. (*supra*, p. 60), *affirmed.*—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—11*th December* 1907.

Johnston v. *Mew, Langton & Co.*

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), Sched. II., sects. 8 and 10.—Decision of the Divisional Court (*supra*, p. 60) *affirmed.*—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—11*th December* 1907.

Curtice v. *London City and Midland Bank.*

Bank—Cheque—Countermand—Bill of Exchange — Bills of Exchange Act 1882 (45 & 46 Vict. cap. 61), sect. 75.—Decision of the Divisional Court (*supra*, p. 60) *reversed.*—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—11*th December* 1907.

Spiers v. *Hunt.*

Contract—Illegal—Public Policy.—*Held* that a promise by a married man to marry a woman after his wife's death, the woman knowing that he was married, was illegal, as contrary to public policy, and would not be enforced.—K.B. Div. (Phillimore, J.).—12*th December* 1907.

Collins v. *Simpson Steamship Company.*

Ship—Seaman—Wages—Merchant Shipping Act 1894 (57 & 58 Vict. cap. 60), sect. 158.—Decision of Sutton, J. (*ante*, Vol. XIV. p. 171), *reversed* in so far as he found that the seamen were entitled to wages down to the date of judgment, the Court *holding* that there had been a loss of the ship in the sense of section 158 of the above Act when the ship was destroyed by explosion, and that the seamen were only entitled to wages to that date.—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—12*th December* 1907.

Yuill & Company v. *Scott-Robson.*

Contract—Sale—Construction.—Decision of Channell, J. (*ante*, Vol. XIV. p. 162), *affirmed.*—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—13*th December* 1907.

Cremins v. *Guest, Keen & Nettlefold.*

Workmen's Compensation Act 1906 (3 Edw. VII. cap. 58), sect. 1—"In the Course of the Employment."—A large number of the workmen at a colliery lived at a place about six miles distant, and they were conveyed to and from the colliery by a train composed of waggons belonging to the employers, but on a line belonging to and engined by a railway company. The terminus of the train was a platform erected by the employers on ground belonging to the railway company at a distance of a quarter of a mile from the colliery. The workmen were conveyed free of charge. The County Court judge found as a fact that it was an implied term of the contract of service that the workmen should be so conveyed. A workman, on his road home from his work, was killed while on the platform waiting for the train, by being pushed on to the line and run over. *Held* that the accident occurred "in the course of" the employment.—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—13*th December* 1907.

Bennett & Co. v. *J. & A. Brown.*

Ship — Demurrage. — A charter-party provided that the vessel should sail to Valparaiso and there discharge at a certain rate, "delay by . . . . storms, surf, weather . . . . not to count in the time for . . . . discharging." The cargo was to be taken delivery of "at the average rate of 250 tons per weather working day (Sundays and holidays excepted) with ten days allowed on demurrage." The vessel discharged into lighters which discharged the cargo on the beach. In a claim for demurrage it was proved that there was a custom at the port of Valparaiso by which the port captain declared what were surf days; but it was also proved that the discharge of the vessel had been continued on certain days which had been so declared to be surf days, although on these days the discharge of the lighters on the beach had been delayed by the surf. *Held* that the custom did not override the provision of the charter-party as to "weather working days," which meant days on which the work of discharge was not prevented by bad weather, but that the delay occasioned by the surf must be deducted from the time for which demurrage was payable.—K.B. Div. (Walton, J.)—13*th December* 1907.

Perry v. *Wright.*

Cain v. *Leyland & Co.*

Bailey v. *Kenworthy Ltd.*

Gough v. *Crawshay Bros., Cyfartha, Ltd.*

Workmen's Compensation Act 1906 (6 Edw. VII. cap. 58), Sched. I. (1), (2)—Average Weekly Earnings.—A casual dock labourer was injured after working for two days for his then employers; he had no regular employment, but worked some days for one firm and some days for another. The County Court judge found that among dock labourers there were no definite grades, but that the men formed themselves into grades of good and bad, the former

earning double the amount of the latter; that the applicant was a man of poor physique and did not stick to his work. He therefore placed him in the lower of these two classes, and awarded compensation on the basis of the earnings of that class. *Held* that he had misdirected himself; that he ought to decide whether dock labourers formed a distinct grade, and if so, what were the average wages in the grade; that he was not bound to take those average wages as the basis of his award, though he must have regard thereto.

A casual shipwright met with an accident on the day on which he began work with the respondents. The County Court judge found that a casual shipwright was not in the same grade as a regular shipwright, and that the earnings of the former were much less than those of the latter; and he awarded compensation based on the average earnings of a casual shipwright. *Held* that he had not misdirected himself.

An operative cottonspinner had been in the same employment for more than twelve months prior to his accident. During those twelve months there were stoppages (*a*) by reason of a canal having burst its banks, (*b*) during a week when all the mills in the town were closed, (*c*) by reason of accidents to machinery, and (*d*) on bank holidays. The County Court judge divided the earnings for the twelve months by 52, to find the average weekly wages. *Held* that he ought to have divided by the number of weeks or portion of weeks during which the applicant was not unavoidably absent from work.

A collier was injured, and an agreement was entered into with his employers as to compensation, under which he returned to work, having partially recovered. He was then employed in light work carrying batteries, and he was paid compensation in proportion to the difference between his wages so earned and his former wages as a collier. While employed at this light work he was fatally injured. *Held* that the grade in which he was employed must be taken as that in which he was at the time of his death, viz. carrying batteries, and that the compensation paid to him while so employed was no part of his earnings.

Observed (per Cozens-Hardy, M.R.) that the grade in which a workman is employed at the time of his death "refers to the particular rank in the industrial hierarchy occupied by the workman, and not to his greater or less excellence in that rank. It is a question of fact whether there is any grade to which the workman belongs, and it is likewise a question of fact what is the average weekly amount earned in any particular grade. If there is no grade, an estimate must nevertheless be made. . . . Having found that the man has a particular grade, and what are the average wages in that grade, there is no obligation to adopt those average wages as the basis of compensation. The personal element then comes in. It will still be open to consider whether the individual workman is an average man, or is above or below an average man."—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—13*th December* 1907.

Electromobile Co. Ltd. v. *British Electromobile Co. Ltd. and Others.*

Trade Name—Company—Name.—Decision of Warrington, J. (*supra*, p. 73), *affirmed.*—Court of Appeal (Earl of Halsbury, Vaughan Williams, L.J., and Bigham, J.).—16*th December* 1907.

Parkin v. *South Hetton Coal Co. Ltd.*

Master and Servant—Wages.—Decision of the Divisional Court (*supra*, p. 24) *affirmed.*—Court of Appeal (Lord Alverstone, C.J., Sir Gorell Barnes, P., and Buckley, L.J.).—16*th December* 1907.

National Phonograph Co. Ltd. v. *Edison-Bell Consolidated Phonograph Co. Ltd.*

Contract—Inducing Breach—Remedy.—Decision of Joyce, J. (*ante*, Vol. XIV. p. 158), *reversed.*—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—18*th December* 1907.

Andersen v. *Marten.*

Insurance—Marine.—Decision of Channell, J. (*supra*, p. 40), *affirmed.*—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.).—18*th December* 1907.

Cairn Line of Steamships Ltd. v. *Corporation of Trinity House.*

Ship—Light Dues—Merchant Shipping Act 1894 (57 & 58 Vict. cap. 60), sect. 85.—Decision of Bray, J. (*supra*, p. 11), *affirmed.*—Court of Appeal (Lord Alverstone, C.J., Sir Gorell Barnes, P., and Buckley, L.J.).—18*th December* 1907.

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BOOK NOTICES.

The Law and Practice relating to the Formation of Companies (Limited by Shares) under the Companies Acts 1862 *to* 1907, *with an Appendix of Forms and Precedents. Third Edition. By Vale Nicolas, of the Middle Temple, Barrister-at-Law, and W. F. Lawrence, M.A., of the Middle Temple, Barrister-at-Law. London: Butterworth & Co.*, 1908. *Price* 17*s.* 6*d. net.*

This is already the third edition of Mr Vale Nicolas' book upon the formation of com-

panies limited by shares, which was first published in 1903. This is in itself a tribute to the excellence of the work, which is well written, admirably arranged, and exhaustive of the phase of company law with which it deals. The selection of a particular stage in a company's history for treatment was a happy idea, the more so from the fact that company law has become so cumbrous and complicated; and the stage selected, *i.e.* from the inception of the company to its commencement of business, is one of peculiar importance. Although this edition has been completed before the Companies Act of last year has come fully into operation, that statute has been printed with comments in Part II. of the book, so that the work is quite up to date in the law relating to company formation. This is all the more important as several of the provisions of last year's Company Act have special relation to the inception stage, *e.g.* the requirement of a statement in lieu of prospectus from all companies other than private companies, which are therein defined for the first time. The collection of forms and precedents in the third part of the book is sure to prove useful to practitioners; and the citation of case law throughout the book is full, every case being cited with its date. The book is got up in a handsome form worthy of the excellent work of its authors.

The Annual Digest of all the Reported Decisions of the Superior Courts, including a Selection from the Scottish and Irish, with a Collection of Cases Followed, Distinguished, Explained, Commented on, Overruled, or Questioned, and References to the Statutes passed during the year 1907. *By John Mews, Barrister-at-Law. London: Sweet & Maxwell Ltd.; Stevens & Sons Ltd.*, 1908. *Price* 15*s.*

Not the least of the merits of this most excellent of digests is the punctuality with which it is published. The part for 1907 was issued in the end of January 1908. As usual, Mr Mews has been eminently successful in formulating the clear and sufficient statements of the import of decisions which his rubrics contain. The classification of subjects and the arrangement of the book is on the lines which Mr Mews has made familiar to the profession. The present volume makes the tenth annual edition which has appeared since the publication of Mr Mews' great "Digest of English Case Law," and we venture to express the hope that from these ten volumes there may be compiled a digest for the period 1898 to 1907, which would be a welcome supplement to those who use the larger work.

The Yearly County Court Practice 1908, *founded on Archbold's County Court Practice and Pitt Lewis's County Court Practice. By the late G. Pitt Lewis, K.C., and Sir C. Arnold White, Chief Justice of Madras.* 1908 *Edition. By His Honour Judge Woodfall and E. H. Tindal Atkinson, B.A., of the Middle Temple, Barrister-at-Law. London: Butterworth & Co.; Shaw & Sons*, 1908. *Price* 25*s.*

This work is designed to provide for the practitioner in the County Courts of England what the "Yearly Practice of the Supreme Court" provides for barristers and solicitors practising in the High Court. One part of the work contains the same class of information as is supplied in Scotland in the Parliament House Book, but its scope is wider, and in the annotations to the County Court Rules the book becomes to all intents a Manual of Practice in these Courts. The book is issued in two volumes, which are bound together. Volume I. deals with the general practice of the County Courts and Volume II. with the enactments which confer jurisdiction on these Courts in special matters. The Workmen's Compensation Acts occupy, as is natural, a good deal of space in the book. There is a special section devoted to the subject of costs and fees, and another which contains forms, statutory and otherwise, in use in County Courts.

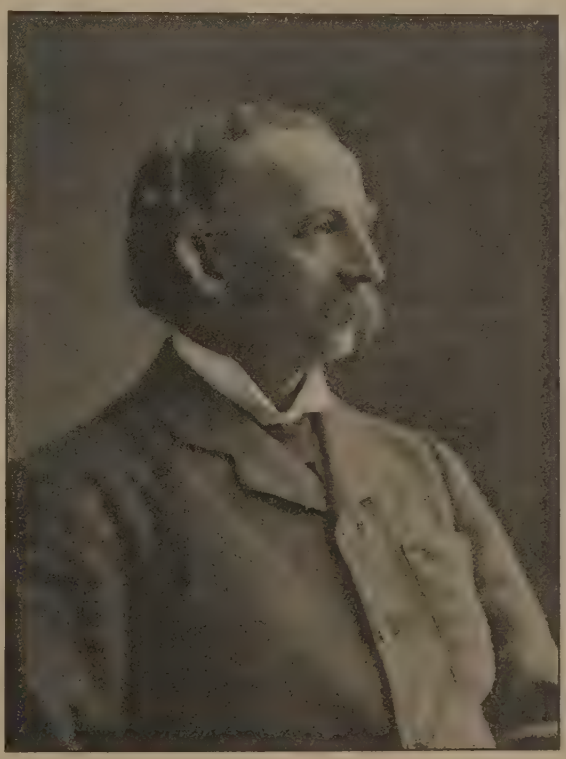
Manual of Small Debt Procedure. By Alfred A. Hurry, LL.B. Edinburgh: William Green & Sons, 1908. *Price* 4*s. net.*

Mr Hurry has produced an eminently useful little book on the procedure in the Small Debt Court. He expresses the view that a codification of the various Acts dealing with the Court would be an advantage, and with that view we agree. To find all the provisions which now regulate the procedure in the Court, one must refer to the Acts of 1837, 1853, 1889, and to the Sheriff Courts Act of last year. Mr Hurry has not attempted to quote in full the various clauses of the Acts which he mentions. He gives the gist, and in the essential parts follows the sections *in ipsissimis verbis*. We find his narration of the effect of the sections very accurate, and his citation of authorities is sufficient both as to details and in the number of cases cited. The extension of the limit in the Small Debt Court from £12 to £20 will add largely to the number of cases which will be tried in it, and a general and well-arranged view of the procedure of the Court will accordingly be very welcome at this time. Though it is not a code, Mr Hurry's book might well form the groundwork on which a codification of the whole system might be based.

GEORGE SMYTHE DUNDAS, Esq.,

Sheriff-Substitute of Berwickshire.

For twenty-two years Mr G. S. Dundas has acted as the local Sheriff of Berwickshire. During that long period he has built up for himself the repute of a sound and painstaking judge, and has earned the confidence and esteem of the community. He is noted for a sturdy independence of thought and opinion; in the words of his oath, he has certainly shewn neither "fear nor favour, affection nor ill-will." And in his district he is, besides, a useful citizen, a popular man; and, be it added, a keen and capable sportsman.



Not only twenty-two, but thirty-two years have elapsed since Mr Dundas shook the dust of Parliament House from off his feet. He was born in 1842, and educated at Trinity College, Glenalmond, and at Exeter College, Oxford, where he took his degree in 1865. In 1867 he was admitted a member of the Faculty of Advocates. In that year also were admitted Lord Robertson, Lord Stormonth-Darling, Sir James Gibson Craig, and Sheriff Lees. In 1876 Mr Dundas obtained an appointment in the legal department of the Inland Revenue. This post he resigned in 1880, on being appointed Sheriff-Substitute of Argyllshire at Campbeltown. From Argyll he was transferred to Berwickshire in 1886.

Mr Dundas married, in 1876, Georgina Lockhart, daughter of Professor George Ross, who occupied the Scots Law Chair in Edinburgh University.

The Lord Justice-General received the members of the Bar at his residence in Rothesay Terrace on the evening of Wednesday, 20th inst. There was a large attendance.

This week has been a very quiet week in the Court of Session. The First Division has been engaged in the hearing of one case—the litigation as to the office of Standard Bearer to His Majesty,—and on Tuesday and Wednesday there were only three Judges sitting in the Outer House. Lord Dundas was in Glasgow and Lord Johnston is unable to be in Court.

We are glad to learn that the health of Lord Johnston has considerably improved. His Lordship will not, we understand, return to Court till the Summer Session, but will proceed, as soon as his doctors allow him, to an English or foreign watering-place.

A sitting of the High Court took place in Glasgow on Tuesday and Wednesday. Lord Low and Lord Dundas were the presiding Judges. Mr William Thomson, assisted by Mr Harper Orr, prosecuted in the Old Court, and Mr Grainger Stewart, assisted by Mr A. Maitland, in the New Court. There were in all eleven cases involving thirteen prisoners. In the Old Court there was a charge of murder, but the jury returned a verdict of not proven. Mr Scott Brown and Mr Graham Robertson defended the accused. In the New Court the principal case was that in which two prisoners were charged with theft of money from a safe and an assault, by stabbing to the danger of life, on a young lady engaged as a typewriter in an office in Bath Street, Glasgow. The circumstances of the assault and the mystery in which the whole affair was involved excited great interest in Glasgow, and the progress of the trial was watched by a large audience which completely filled the Court-room. The prisoners were defended by Mr Paton and Mr Carmont, and

after a trial lasting over nine hours the jury returned a verdict of guilty against both prisoners. Lord Dundas sentenced the prisoners to periods of ten and twelve years' penal servitude respectively.

Court of Session Notices.—The sittings of the First and Second Divisions of the Court of Session for the trial of civil causes by jury in the ensuing vacation will commence on Saturday, 21st March, and notice of trial must be given on or before Monday, 2nd March. 2nd and 30th April have been appointed to be the Box-days in the ensuing vacation. The Lord Ordinary officiating on the Bills will sit in Court on Wednesday, 8th April, and Wednesday, 6th May, for the disposal of motions and other business falling under the 93rd section of The Court of Session Act, 1868, and the 10th section of the Act of Sederunt of 20th March 1907; and rolls will be taken up on Monday, 6th April, and Monday, 4th May.

The Late Ebenezer Morrison, Esq., Town Clerk of Bridge of Allan.—The death of Mr Ebenezer Morrison, town clerk of Bridge of Allan, and the oldest member of the local Faculty of solicitors, took place at Allan Park, Stirling, on Monday night. When Bridge of Allan was formed into a burgh in 1870, Mr Morrison was appointed Town Clerk, and from that time he has held the position. On the completion of thirty-five years' service two years ago he was made the recipient of an illuminated address from the Town Council, in recognition of his untiring labours in the interests of the burgh and of the community generally. Mr Morrison, who was a most capable lawyer, acted as factor for the Westerton estate, and he was also a partner of the firm of Messrs Morrison & Taylor, solicitors, Stirling. Mr Morrison in his younger days was a prominent cricketer with the Stirling County Club, and was also an enthusiastic Volunteer, being one of the first to join the local corps when formed, and he was a keen golfer and curler. In politics he was a Conservative, and he was a member of the Episcopal Church. Mr Morrison was in his eightieth year, and was admitted a solicitor in 1853.

The Late Alex. Cumming, Esq., Town Clerk of Nairn.—Mr Alex. Cumming, solicitor and town clerk of Nairn, a partner of the firm of Messrs Laing & Cumming, solicitors, died suddenly on Wednesday at Nairn, after an illness of a few days. He was a native of Forfar, being a son of the Rev. Alex. Cumming, senior minister of the West U.F. Church, Forfar. After serving his apprenticeship in Forfar, he entered the office of Messrs Philip Laing & Co., S.S.C., Edinburgh For several years he was assistant to the town clerk of Dunfermline, and prior to his appointment as town clerk in June 1904 he acted as depute town clerk to the late Mr Laing. Though Mr Cumming was still a young man, his legal services were much sought after. He was agent of the Aberdeen Town and County Bank, and in that and other capacities he was recognised as an able and trustworthy official, and his death in the prime of life is much regretted.

Among the reports issued this week is the case of *Montgomerie & Co.* v. *The Burgh of Haddington*, which was decided in the House of Lords on the 21st inst. So far as we are aware there is at present no Scotch Appeal standing for hearing in the House, and the history of the *Haddington* case well illustrates how thoroughly Lord Loreburn has dealt with the question of arrears in the Court over which he presides. There are now no arrears, and appeals are heard practically as soon as the cases for the appellants and respondents are completed and lodged. In the recent case of *Barclay Curle & Co.* the appeal was heard within three weeks of the date of the decision in the First Division, but that case was given special facilities. In the *Haddington* case, however, the appeal has been taken in its ordinary order, and a judgment pronounced by the Second Division on 13th November has now been affirmed.

Another notable feature of recent decisions in the House of Lords is the brevity of the opinions delivered by the learned and noble Lords. The volume of the Session Cases for 1907 which has just been concluded is the largest which has appeared for many years, and the Court of Session Reports extend to 1369 pages. Eight House of Lords Appeals are reported in the volume, and these occupy only 19 pages of print. In "VIII. Fraser" there were eleven Scotch appeals reported in 47 pages of print. In "VII. Fraser" thirteen appeals in 134 pages of print, but this included a report of the Free Church case, which extended to 76 pages. In "VI. Fraser" eight appeals were reported, covering 38 pages, and in "V. Fraser" six, extending to 30 pages. In the period 1888 to 1898, covered by volumes 16 to 25 of Rettie, there was an average of 10·9 Scottish appeals in each year, and an average of 79 pages of House of Lords reports in each volume. While recently the opinions in the House of Lords have been exceedingly brief, the tendency of opinions in the Court of Session is rather the other way. The present volume of the "Scots Law Times" promises to be larger than any of its predecessors. It covers part of the period dealt with in "1907 Session Cases," which, as already stated, is a very large volume, and the sittings of the Extra Division has no doubt added slightly to the number of cases reported. But the main cause of the increased bulk of the volume is the number of lengthy opinions delivered both in the Inner and in the Outer House.

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BOOK NOTICES.

Principles and Practice of the Law of Libel and Slander. By Hugh Fraser, M.A., LL.D., of the Inner Temple and Northern Circuit, Barrister-at-Law. London: Butterworth & Co. *Price* 15*s.*

This is the fourth edition of a work which is recognised in England as the stand-by of common law practitioners on the subject with which it deals. The suggestions on the conduct of civil actions and the forms and precedents have been considerably enlarged, and the reputation which the book has acquired will certainly be enhanced by the thorough revision which it has undergone. Of course it is an English work, and therefore it can hardly be recommended to Scots lawyers except as furnishing contrasts with the law of Scotland in the departments of criminal libel, damages, etc. But where the Scots lawyer has to find out the difference between the laws of the two countries and illustrations of the English rules, the treatise is an excellent one, sound in its propositions and clear in its deductions as well as exhaustive in its quotations of judicial *dicta*, and on the whole preferable, on account of its brevity, to Dr Odgers' masterly work. While it is naturally of slender utility to the Scots lawyer, we cannot help thinking that even the English lawyer might have had his knowledge of principles enriched by a judicious citation of Scots authorities on the subjects, *inter alia*, of privilege, malice, and justifiable comment; but so far as we can find, the reference to Scots cases is confined to the very few slander cases which have found their way from the Court of Session to the House of Lords. The arrangement of the book has not been altered in any essential particular, and it remains a good example of what type and printing can do to help the workaday lawyer in his business.

Handbook on the Formation, Management and Winding-Up of Joint Stock Companies. By F. Gore Brown, M.A., K.C., and William Jordan, Company Registration and Parliamentary Agent. 28th Edition. London: Jordan & Sons Ltd., 1908.

Price 7*s.* 6*d. net.*

As a practical guide to those interested in the formation and management of Joint Stock Companies this handbook (which now extends to over six hundred pages) has acquired great and well-deserved popularity. The 27th edition, published in February of last year, was twice reprinted, and this, the 28th edition, appeared last month. The book has been translated into French and published in Paris, and an edition with notes on South African Company Law has been published in Cape Town. The special feature of this edition is, of course, an incorporation of the provisions of the Companies Act of 1907. The definite recognition of Private Companies, the creation of many new rules giving greater publicity to the financial position of Public Companies, the compulsory registration of certain particulars by foreign companies, the new provisions in regard to Debentures, and the new rights conferred upon creditors in cases of voluntary liquidation, are among the important amendments of Company Law effected by the present Act. Mr Gore Brown expresses a view, with which all company lawyers will cordially agree, in favour of the consolidation of the Companies Acts into one statute. Till that is done, the practitioner cannot afford to be without some reliable guide, like the present, to the labyrinth of statutory provisions affecting Joint Stock Companies.

DECISIONS IN THE ENGLISH COURTS.

Horton v. *Colwyn Bay Urban District Council.*

LANDS CLAUSES ACT — COMPENSATION — PUBLIC HEALTH ACT 1875 (38 & 39 VICT. CAP. 55), SECT. 308.—Decision of Bigham, J. (*ante*, Vol. XIV. p. 128), *affirmed.*—Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.).—18*th December* 1907.

The "Bruxellesville."

SHIP—COLLISION.—A vessel injured by collision with another through the fault of the latter put into a near port and was temporarily repaired, there being no facilities there for making a complete repair. She then set out for her port of destination; but the temporary repairs had been insufficient, and she foundered. *Held* that the vessel in fault was not liable for the foundering of the damaged vessel.—P. D. and A. Div. (Bucknill, J.).—18*th December* 1907.

The Anglo-Algerian Steamship Co. (1906) *Ltd.* v. *The Houlder Line Ltd.*

REPARATION — DAMAGES — REMOTENESS.—The defendants' ship when entering a dock collided with and damaged the dock gate owing to negligence on the part of those in charge of her. On the three following days the dock gates were open as usual for the passage of ships, but for three days thereafter they were closed for repairs. When they were closed, a ship belonging to the plaintiffs arrived to take on board a cargo which was lying ready to load, and could not get in. There was no other place in the harbour where she could load her cargo,

and the dock was one which any vessel was entitled to enter on payment of the dues. The ship was delayed for two and a half days. *Held* that the plaintiffs were not entitled to damages from the defendants in respect of the loss caused by the delay, such loss not being directly due to the negligent injury to the dock gate.—K.B. Div. (Walton, J.).—18*th December* 1907.

In the matter of an Arbitration between the Rhondda Tramways Co. and the Taff Vale Railway Co.

Tramway—Tramways Act 1870 (33 & 34 Vict. cap. 78), sect. 30.—Decision of Bray, J. (*supra*, p. 157), *affirmed*.—Court of Appeal (Lord Alverstone, C.J., Sir Gorell Barnes, P., and Buckley, L.JJ.).—19*th December* 1907.

Anglo-American Oil Co. v. *Manning.*

Master and Servant—Criminal Offence of Servant—Master's Liability.—A servant employed to sell oil from a cart, and supplied by his employers with correct measures, fraudulently substituted an incorrect measure for his own purposes. *Held* that the employers were not liable for an offence under sect. 25 of the Weights and Measures Act 1878 in respect they had an incorrect measure in their possession.—K.B. Div. (Channell, Bray and Sutton, JJ.).—19*th December* 1907.

In the Matter of an Arbitration between Lucas and the Chesterfield Gas and Water Board.

Lands Clauses Act — Compensation. — A Water Board took land compulsorily for laying their pipes. *Held* that in assessing compensation the arbiter was entitled to take into consideration the fact that the land taken was part of lands which were naturally peculiarly adapted for the construction of a reservoir, although no person could construct a reservoir there without obtaining Parliamentary powers and compulsorily interfering with the line of pipes belonging to the Water Board. — K.B. Div. (Bray, J.). — 20*th December* 1907.

Millar & Lang Ltd. v. *Polak.*

Copyright—"Drawings."—An art publisher designed drawings which were pictorial, or pictorial with words added, or words alone in a distinctive form. Dies of these were engraved, from which were struck reproductions, principally in gold leaf, which were then gummed on cards. *Held* that they were "drawings" capable of registration under the Fine Arts Copyright Act 1862.

Assignation—Validity. — A company was formed to take over the business of M., which was that of a fine art publisher. The company was called M. & L. Ltd., and was registered on 3rd March. On 1st March M. executed an assignment of copyright to M. & L. Ltd. in accordance with an agreement to that effect with a trustee for the company. After incorporation the company adopted the agreement which was followed by the assignment. *Held* that the right in the copyright had been validly transferred to the company.—Chan. Div. (Neville, J.). —20*th December* 1907.

Kettlewell v. *Refuge Assurance Co. Ltd.*

Principal and Agent—Fraud of Agent—Liability of Principal. — Decision of the Divisional Court (*supra*, p. 36), *affirmed*.—Court of Appeal (Lord Alverstone, C.J., Sir Gorell Barnes, P., and Buckley, L.J.).—20*th December* 1907.

In re Beard.

The Reversionary and General Securities Co. Ltd. v. *Hall.*

Beard v. *Hall.*

Will — Condition — Validity — Public Policy.—*Held* that a condition to a bequest in a will forfeiting the gift in the event of the devisee entering the naval or military service of the country was invalid as contrary to public policy. —Chan. Div. (Swinfen Eady, J.).—21*st December* 1907.

Scarpy v. *Holland.*

Copyright—Musical Composition.—*Held* that the owner under international copyright of the exclusive right of public performance of musical compositions must, in order to retain his right in this country, print in the English language on the title-page of every published copy the notice required by sect. 1 of the Copyright (Musical Compositions) Act 1882.—Chan. Div. (Neville, J.)—21*st December* 1907.

Bond v. *Wilson & Sons.*

Master and Servant—Master's Duty to Servant.—A cab-driver in the employment of a firm of cab-hirers took out his master's cab on a Saturday night in the usual course. The horse returned with the cab to the stable at a later hour, but it had previously returned alone when it had been left unattended, and there was nothing about it or the cab or harness to suggest that an accident had occurred. One of the employers went to a public-house to see if the driver was there, but found the house shut, and made no further enquiry. Next day the cab-driver was found in a position which suggested that he had fallen off the cab, and he subsequently died without having sufficiently recovered to give an account of what had happened. In an action for damages against the employers, *held* that they had not neglected any duty incumbent on them to institute enquiries.—K.B. Div. (Phillimore and Walton, JJ.). —11*th January* 1908.

THOMAS CALLANDER WADE, Esq.,

M.A., LL.B., Solicitor, Falkirk.

The Sheriffs at Falkirk have always been fortunate in having a local Bar above the average in capacity, hard-headedness and industry; and Mr Wade, whose portrait we publish this week, is one of the most forcible and successful pleaders among its members. Born some forty years ago at Falkirk, where his father, the late Rev. George Wade, was a United Presbyterian minister, Mr Wade was educated at the Royal High School and University of Edinburgh. He had a distinguished academical career, and was a Vans Dunlop scholar. His professional training was acquired in the offices of Messrs Russell & Aitken, Falkirk, and a number of well-known Edinburgh firms. In 1898 he joined Messrs Gibson at Falkirk, when their two businesses were amalgamated, and the present partnership of T. & T. Gibson & Wade, W.S., was formed. In an increasing business he finds ample scope for absorbing interest, and his logical mind and retentive memory could not well find a more fitting and congenial sphere.

He was lately appointed one of the examiners for the LL.B. degree in Civil Law, Public Law, and Constitutional Law and History in the University of Edinburgh—an appointment which is rarely given to country practitioners.

Mr Wade has had many and various hobbies. The study of Britain's command of the sea has given place to a keen ardour for German language and literature, and that to a craving for knowledge of the dialects of lowland Scotland. And to each in turn he has applied himself with that thoroughness which those who only know him in business would expect. He may not be a dungeon of learning on any of the subjects which he attacks, but one finds in him a great fund of information on many subjects.

In his recreation Mr Wade has been more versatile than successful. He loves to scan the world from a bicycle; and it is immaterial whether the road takes him by the cliffs of Moher or the banks of the Rhine. What he craves is to be always moving onwards. In his youth he was a footballer by no means to be despised, but his golf is not above reproach.

The Late Henry Cairns, Esq., W.S.

We regret to announce the death of Mr Henry Cairns, W.S., senior partner of Messrs Cairns, M'Intosh & Morton, W.S., a highly respected member of the profession, who died at 27 Buckingham Terrace, Edinburgh, on Saturday, 29th ult. His health had been failing for some time, but he was able to be at business ten days before his death. A son of the late Mr George Cairns, solicitor at law, he was born in Edinburgh in 1831. After serving his apprenticeship with Mr Walter Jollie, W.S., of the firm of Jollie, Strong & Henry, W.S., and attending the law classes at Edinburgh University, he was admitted a member of the W.S. Society in 1854. He then became a partner of the firm of G. & H. Cairns, and since that time has been actively engaged in business. In 1876 he assumed as partners Mr James M'Intosh, S.S.C., now Auditor of the Court of Session, and Mr William Morton, W.S. He was a Commissioner of the W.S. Society. He is survived by his widow, his son, Mr George Morton Cairns, B.A. Oxon, and a daughter.

ACTIONS OF SEPARATION AND ALIMENT IN THE SHERIFF COURT.

The Sheriff Courts (Scotland) Act 1907, with modesty and truth, does not describe itself as a code. Its self-chosen designation is "an Act to regulate and amend the laws and practice relating to the civil procedure in Sheriff Courts in Scotland, and for other purposes." Some of its admirers, however, make a higher claim for it. The learned author of the only work which hitherto has appeared on the subject has (with something akin to maternal partiality, perhaps) described it as "The Sheriff Courts *Code*—Civil." We fear that the popular conception of a code will certainly not be satisfied with any compilation so incomplete that one must consult extraneous enactments and many decisions in order to make good its omissions. Such a code at least is not what your Parliamentary candidate means when he promises you the whole of the law of Scotland in a code which may be carried in your waistcoat pocket, with the accompanying extinction of all lawyers. And beyond doubt this statute is not "self-contained."

The fifth section of the Act extends the jurisdiction of the Sheriffs to, *inter alia*, "(2) Actions of aliment or of separation and aliment, and for regulating the custody of children." Then the Act provides (in a Schedule) Rules of Procedure, and requires (sect. 39) procedure in all civil causes to be conform to these—"subject to the provisions of any Act of Parliament in force after the passing of this Act."

Until the passing of the Act the actions affecting *status*, and known as consistorial (including "Actions of Separation *a mensa et thoro*") could be brought only in the Court of Session (11 Geo. IV. and 1 W. IV. c. 69, sect. 33). Actions of aliment could be brought in the Sheriff Court (*ibid.*, sect. 32). The Sheriff might entertain actions arising out of rights incident to *status*, where an interim arrangement was necessary but where the right itself was not in question (or even in a few cases where it was), as in actions for aliment by a wife where she was living apart; but where there was no contract of separation and no legal separation, the Sheriff could only award interim aliment. Also as regards the custody of children, the Sheriff's jurisdiction extended only to an order *ad interim*.

In the Court of Session it is not competent to pronounce a decree in favour of the pursuer in any consistorial action, whether or not appearance is entered for the defender, "until the grounds of action shall be substantiated by sufficient evidence" (11 Geo. IV. and Will. IV. c. 69). The question has arisen whether, in extending to the Sheriff Courts jurisdiction in actions of separation and aliment, the Legislature intended that this requirement as to proof even in undefended actions should apply. The statute itself is silent on the subject. Moreover, the only procedure provided for by its rules for undefended cases does not admit of proof being led. In all other respects, presumably, an action of this class will follow Sheriff Court procedure, and not that of the Court of Session. Why should it differ in this respect? Does the provision of sect. 36 of the Act of 1830 (referred to), requiring a proof in all these cases, now apply to the Sheriff Court? It begins by laying a duty on "the Lord Ordinary" to administer the oath of calumny in all actions of divorce; and continues, *in the same sentence*, to require proof in all consistorial actions even when undefended. Possibly the proviso at the beginning of sect. 39 of the new Act quoted above may be intended to provide for just such a case: the procedure rules are to apply, "subject to the provision of any Act of Parliament in force after the passing" of the Act. Rightly or wrongly, it has already been held in several cases, arising in different Sheriff Courts throughout the country, that proof is required even where the action is undefended. So far as we know, there has not as yet been a case in which the contrary view has been taken.

The point, however, justifies the modest title of the Act, and is an illustration of the truth of the criticism that, as it stands, the statute falls far short of a code. It may approach somewhat nearer to such a character when the Court of Session has had time to rectify by Act of Sederunt some of the inevitable omissions and errors of the rules. J. C.

THE SOCIETY OF SOLICITORS IN THE SUPREME COURT AND THE REGISTRATION OF TITLE.

The Society of Solicitors in the Supreme Courts of Scotland at a meeting on Tuesday discussed a report by the Council on the question of registration of title, into which a Royal Commission, under the presidency of Lord Dunedin, is enquiring.

The report stated that in any system of registration of title which might be introduced into Scotland it would be necessary to see, first, that it was limited to what the name imported, namely, a registration of title, and that it did not upset our law of land rights; second, that adequate provision was made for identifying the property easily and readily; and third, that adequate provision was made for easily and readily ascertaining (*a*) the pecuniary or other burdens affecting the subjects, and (*b*) the conditions, restrictions, and limitations which affected them. Keeping these requirements in view, the Council were of opinion that the methods of registration of title in use in other countries so far as known to them were unsuitable for Scotland. The Council were also of opinion that the introduction of the Australian or

English methods would introduce confusion and uncertainty into their system of land rights, that it would seriously interfere with and impair the existing laws regulating these, and that it would seriously and injuriously affect the feeling of security which the public had in regard to the disclosure of burdens, conditions, and restrictions affecting the land, and also thereby operate to diminish the value of land. The Council were informed that certain experiments had been made in the office of the Register of Sasines with the view of seeing whether it would be practicable to institute a satisfactory system of registration of title in Scotland. Through the courtesy of Lord Dunedin, a deputation had had an opportunity of inspecting the experiments. The Council regarded these experiments as of great interest, and likely to be of value as removing the question of the practicability and usefulness of a system of registration of title in Scotland from the region of speculation merely, and subjecting it to a practical test by a specially skilled staff. The direction in which these experiments pointed was that of a development of the Search Sheet system—the institution of a new register founded on the principle of the Search Sheet, which it would supersede. In the sheet of this new register relating to each property, would be entered the writs affecting it, deleting in red ink the entry of any deeds therein which might cease to affect it, and making also a cross reference to the entry therein of the deed affecting the change. Under the register to be instituted the sheet or special register of each property would therefore contain three things, namely—the description of the property, the statement of the burdens, conditions, and restrictions, if any, affecting it, with a reference to a recorded deed containing these, and an entry of the different deeds affecting the subjects. The certificate would consist of a transcript of the register. When a sale took place the transfer would be lodged at the office along with the certificate, and after being examined would be entered in the sheet or register, and a copy of the entry put on the certificate and authenticated and the certificate handed back to the purchaser, and the purchaser's title would then be guaranteed by the State. In the case of a lender a similar but separate certificate would be given to the bondholder. So far as could be gathered, the experiments pointed to the change, if any, being made in the direction merely of a register of title, leaving questions of boundaries, mutual walls, etc., and powers of owners to be settled when they arose just as had been done under the present system.

The meeting adopted the recommendation of the Council, which was that the Society should express its disapproval of the idea of introducing into Scotland the methods of registration of title at present existing in Australia and in some parts of England, and should reserve its opinion as to introducing any system of registration of title into Scotland until full details of the scheme or method proposed were furnished.

PARLIAMENTARY.

The Age of Scottish Sheriffs.

In the House of Commons on 26th February, Mr Watt (Glasgow, College) asked the Lord Advocate if, in future appointments of Sheriffs and Sheriff-Substitutes in Scotland, he would make it a condition that retirement should take place at a certain age, and if he would say how many Sheriffs and Sheriff-Substitutes there were in Scotland at present administering justice who were over seventy years of age?

The Lord Advocate said that the tenure of office of Sheriff and Sheriff-Substitute was regulated by statute, and any change in the terms of appointment would require legislative sanction. He had no power to impose the condition mentioned in the question, and he had no official knowledge of the age of these Sheriffs.

Mr Watt.—Is the right hon. gentleman ready to bring in legislation to remedy this evil?

The Lord Advocate.—No.

Scottish Solicitors' and Advocates' Taxes.

Mr Watt (L., Glasgow College), on the 4th inst., asked the Chancellor of the Exchequer whether he was aware that an annual exaction of £6, 6s. was imposed by the Government on solicitors in Scotland, while advocates at the Scottish Bar had the privilege of compounding by a single payment; and whether he would allow the advantage of a single payment to solicitors, or have the annual fee abrogated or substantially reduced.

The Chancellor of the Exchequer (Mr Asquith).—There is no analogy between the two duties referred to. The solicitors' certificate duty was imposed upon the certificate which a solicitor is required by law to take out for each year that he continued to practise. The duty paid by the advocates was not a composition for an annual payment, but was a tax upon the admission of a person as an advocate at the Bar. The duty charged on a solicitor's certificate was the same in Scotland as in the other parts of the United Kingdom—viz. £9 for a person practising in the capital, and £6 in other cases. These charges did not appear to him to be excessive.

Scots Law Society.—At a meeting of the Scots Law Society held on Monday evening the following office-bearers were elected for the ensuing session:—Presidents, Mr David Chapel, M.A., LL.B., advocate, Mr R. S. Brown, solicitor, and Mr John Richardson, solicitor; secretary, Mr Richard A. Spaven, solicitor, 29 Queen Street, Edinburgh; treasurer, Mr A. E. S. Thomson, M.A., LL.B., solicitor, 50 George Street, Edinburgh.

Mr Norman Stewart Main, M.A., LL.B., Greenpark, Linlithgow, has been admitted a law agent by the Lords of Council and Session.

An Old Custom at Peebleshire Fiars Court. —At the Fiars Court at Peebles it has been the custom to ballot for six guineas allowed towards the expenses of witnesses, of whom there are a score, six successful witnesses getting a guinea each. At the Court on Monday, Mr William Gibson, West Bold, objected, and asked if the custom did not savour of gambling, and whether it would not be better to divide the six guineas equally among the witnesses. He had been a witness for eight-and-twenty years, and never a guinea had come to him. He was supported by Mr Laidlaw, another witness. Sheriff Orphoot, who presided, said the system of dividing the six guineas among the witnesses was of very old standing, and while he gave no opinion upon the objection raised, he would adhere to the system on the simple ground that it had been a continuous practice for sixty or eighty years. He was not, of his own hand, going to alter it; but if Mr Gibson thought fit to lay the matter before the Sheriff-Principal, it was quite possible he might consider it, and introduce another system.

Town-Clerkship of Wick. — A meeting of Wick Town Council was held on Wednesday to appoint a town-clerk, the office having been rendered vacant by the death of Mr Hector Sutherland. Provost Ross presided. There were twenty-three applications for the office, including two local men. Treasurer Mackenzie moved the appointment of Alexander Bruce, solicitor, Wick, and Mr Nicholson seconded. Bailie Harper proposed Mr Green, solicitor, Wick, and Mr Geddes seconded. On a vote being taken, eight voted for Bruce and six for Green. Mr Bruce is a partner of the firm of Leith & Bruce, and is Depute Procurator-Fiscal. Mr Green was, for several years prior to the amalgamation of Wick and Pulteneytown, town-clerk of Pulteneytown.

DECISIONS IN THE ENGLISH COURTS.

Zick v. *London United Tramways Ltd.*

Lands Clauses Act—Compensation.—The mortgagees in possession of a property received notice to treat from the defendants after they had granted a lease of the property to S for three years. During the currency of the lease an arrangement was entered into by which S surrendered the lease and the mortgagees granted a new lease to the plaintiff for three years. The defendants entered on possession of the property under their notice two years after the lease to S had been granted, S and the plaintiff being all along ignorant of the fact that a notice to treat had been served. *Held* that the plaintiff was entitled to compensation in respect of the un expired period of the original lease.—K.B. Div. (Jelf, J.).—13*th January* 1908.

Craig v. *Dowding.*

Patent — Patents, Designs and Trade Marks Act 1883 (46 & 47 Vict. cap. 57), sect. 32.—Decision of Kekewich, J. (*supra*, p. 104), *affirmed quoad* the finding as to the letter being a "threat," but *reversed* in so far as he held that an action which had been raised and discontinued was not a *bona fide* action in which the validity of the patent or infringement could have been tried.—Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.).—15*th January* 1908.

LAW LIBRARY.

BOOK NOTICES.

The Scottish Law List and Legal Directory for 1908. *Edinburgh: T. C. & E. C. Jack,* 1908. *Price* 9*s.*

This is the sixty-first annual issue of the "Scottish Index Juridicus," better known as the "Scottish Law List," which is compiled from official sources. It contains lists of the judges and officers of the various Courts of Justice in Scotland, lists of the Faculty of Advocates, of the various Societies of the Solicitor branch of the profession, along with a complete list of the certificated practitioners in Scotland, arranged according to the towns in which they practise. Other useful features of the work are the list of landowners' agents, the list of liquidators of companies, and an insurance directory. The accuracy of the information contained in the book is beyond doubt, and the various lists are printed in large, clear type.

The Law of Private Trading Partnership, Including the Limited Partnership Act 1907. *By James Walter Small, Esq., LL.D., of the Inner Temple, Barrister-at-Law. New and Revised Edition. London: Effingham Wilson,* 1908. *Price* 1*s.* 6*d.*

The general principles of the law of Partnership are, within moderate compass, very clearly set forth in Mr Smith's little book. It is one of the most popular of the "Legal Handy Books" issued by Effingham Wilson, and is now in its thirtieth thousand. The chapter explaining the Limited Partnership Act of last year is the most important part of the new matter in the present edition.

The Court of Session will rise on Friday next for the Spring vacation. The number of jury trials outstanding for the sittings is not large in either Division, and the sittings will probably be concluded within a week of the rising of the Court. A considerable portion of the time of the Divisions this week has been occupied in the hearing of two Seven Judge cases and in advisings which included advisings in two other Seven Judge cases in which the hearings took place recently. The arrears of work in both Divisions have to some extent been decreased since October.

The trial of Alexander B. Forrester and William Forrester in what is known as a "long-firm" fraud case, which had been heard before the Lord Justice-Clerk and a jury in the High Court, was concluded on Monday last. The trial, which commenced on the 2nd March, lasted seven days and is one of the longest in the modern records of the High Court. The trial of the Pattisons for fraud in 1901 lasted nine days, that of Monson lasted ten days, and that of the City of Glasgow Bank Directors twelve days. In the Forrester case the Solicitor-General, who had with him Mr Orr and Mr William Thomson, advocates-depute, conducted the prosecution, while the prisoners were defended by Mr John Wilson, K.C., and Mr Aitcheson. The indictment, with the schedules, list of productions and witnesses, extended to thirty-seven pages of print, and the figures and details of the evidence were very complicated. There were over a hundred witnesses on the Crown list, and a large number were called for the defence. The Solicitor-General, in addressing the jury on Monday, spoke for almost two hours, and dealt in detail with the complicated evidence, including a large number of dates and figures, without referring to a single note. At the end of his speech there was applause in Court, which was of course instantly suppressed. Applause of that sort is not infrequently heard when the counsel for the prisoner sits down, but it is almost unprecedented in the case of the prosecutor. The jury, after a short absence, found both the prisoners guilty, and sentences of four and three years' penal servitude respectively were pronounced. The result of the prosecution and the sentences imposed will have a very salutary effect. The starting of a limited liability company to facilitate the frauds, and the carefully kept business books which made their detection difficult, were among the notable features of the methods employed by the Forresters.

Lord Johnston, who is, we are glad to know, progressing favourably, left Edinburgh for Bath on Friday of last week.

Lectureship on Commercial Law in the University of Edinburgh. — We understand that the University Court of the University of Edinburgh has decided to found a lectureship on Commercial Law. This, it is expected, may ultimately lead to the establishment of a Chair of Commercial Law, but meantime the lectureship will be in the same position as the other lectureships in the Faculty of Law, except that the proposed remuneration is £400 as against £150, which is the salary attached to the other lectureships. The position is one of great importance, and already the names of several eminently suitable candidates are mentioned. The Court has not yet issued any advertisement intimating the foundation of the lectureship and inviting applications, but as the lectures will commence next winter session the announcement will probably not be long delayed.

THE REPORT OF THE ROYAL COMMISSION ON LIGHTHOUSE ADMINISTRATION.

That the cost of lighting our coasts should be defrayed out of dues levied on shipping and not out of national funds, has long been a grievance with shipowners, and in their endeavour to bring about a happier state of affairs they have not been sparing in denunciation of the Lighthouse Boards and most of their works. No Government hitherto has seen its way to abolish the light dues, but Departmental and other inquiries into the constitution and methods of the General Lighthouse Authorities have been numerous, the results of the latest being embodied in the Report of the Royal Commission on Lighthouse Administration which was appointed in August 1906. In view of the intimate connection which has always existed between the Scottish Lighthouse Board and the Parliament House, it may be of interest to notice shortly the conclusions arrived at in the Report.

The Commissioners of Northern Lighthouses were first constituted by Act of Parliament in 1786, and were established in their present form in 1854. The Board is composed of the following twenty-five members:—The Lord Advocate; the Solicitor-General; the Lord Provosts of Edinburgh, Glasgow, Aberdeen, and Dundee; the Provosts of Inverness, Campbeltown, Greenock and Leith; the Eldest Bailies of Edinburgh and Glasgow; and the Sheriffs of the Lothians, Lanark, Renfrew, Argyll, Inverness, Ross, Caithness, Aberdeen, Ayr, Fife, Forfar, Dumfries, and Berwick. As the Board meets frequently, the active members are of necessity residents in or near Edinburgh, and as the municipal members have as a rule but a short term of office, the administrative responsibility practically rests on the Sheriffs.

In England the lighthouses are administered by the thirteen acting Elder Brethren of the Trinity House of Deptford Strond, who are all retired officers of the Royal Navy or Mercantile Marine; and in Ireland by the Commissioners of Irish Lights, consisting of five *ex officio* members belonging to the Corporation of Dublin, and of seventeen others who are co-opted and who require no special qualifications.

The Scottish and Irish Commissioners give their services gratuitously, while a sum of £7000 is distributed annually in salaries among the Elder Brethren.

In financial matters the three Boards are strictly controlled by the Board of Trade as trustees of the General Lighthouse Fund, and with that Department also rests the ultimate decision respecting all proposals for new seamarks. In the discharge of the latter duty the Board of Trade has had the assistance since 1900 of an advisory committee of shipowners and others, with whom the Lighthouse Authorities meet in conference once a year in London. In certain matters the Scottish and Irish Boards are subject to the control of the Trinity House, to which all proposals for new works must be submitted for approval—an appeal, however, lying to the Board of Trade.

In all other respects, the entire responsibility of administering their respective services rests with the general authorities, and the difference in their methods is thus described in the Report:

"The paid Board of Experts, the Trinity House, identify themselves much more closely and much more continuously with the daily details of the lighthouse service, both ashore and afloat, than do the other two authorities, whose members are unpaid and are seldom experts. Moreover, on the Scottish and Irish Boards only a relatively small proportion of the whole number of Commissioners can be said to take a continuously active share in the work. The regular attendants at Board and Committee meetings are all residents in the immediate neighbourhood of Edinburgh and Dublin. It belongs to the very nature of the case that the position of the Scottish and Irish Commissioners is practically that of a Board of Directors which entrusts the whole of the routine work of administration to a General Manager, reserving to itself only a financial supervision, the decisions on matters of policy, and an ultimate general control. Such a system may be highly efficient. It certainly has proved efficient in the case of the Scottish Board, most of whose active members form a homogeneous body of trained professional men, occupying important posts under the Crown. But its success must depend in very large measure on the character and competence of the chief official of the Board, in particular of the Secretary, on whom the duties of General Manager devolve."

To pass to the results of the enquiry, it may be stated generally that no radical defect has been disclosed in either the constitution or administration of the three authorities. It is not pretended that, if a system of lighthouse administration for the United Kingdom were being constructed for the first time, the present lines would be followed, but it appeared to the Royal Commission to be "injudicious to cast into the melting-pot of legislation authorities which, venerable though they be, have done, and are still doing, good service to the country, and a system which, albeit evolved many years ago, has yet, in the main, worked reasonably well." The want of an expert nautical element on the Scottish and Irish Boards is thought to be a weakness, but it is considered that the undue size of these Boards, which had also been commented on, is neutralised by the fact that the members who do attend are those who take a genuine interest and pleasure in their work.

On the question of efficiency the result of the evidence is that the lighting of our coasts is at least as good as that of any other country, and with reference to the charges of extravagance, the Report states:

"On the whole, the conclusion we have come to is that the kind of criticisms to which the Lighthouse Authorities may be open on the score of defective economy in administration are such as would probably apply to any public body undertaking similar duties. There was certainly no clear evidence of any specific extravagance which was either material or continuous; and we are disposed to believe that the three Boards are alive to the importance of economy, and sincerely anxious to study it in every way, though in some cases long-established custom and routine may constitute an obstacle and danger to rigid economy. If any distinction is to be made between the different authorities in this matter, we think the superiority lies with the Commissioners of Northern Lighthouses."

As regards two of the authorities the following footnote on the same page has a more dubious sound:

"An exhaustive analysis, prepared by Admiral Henderson and appended to this Report, of the detailed particulars furnished by each General Lighthouse Authority respecting the lighthouses under its charge, yields results which certainly appear to require the most serious examination alike by the Trinity House and the Commissioners of Irish Lights of their administrative system, services and appliances."

The Report concludes with certain recommendations, the most important of which are thus summarised:

(1) The institution of a system of retirement with pension for the Acting Elder Brethren of the Trinity House.

(2) The assignment of an Elder Brother of the Trinity House to act as Assessor to the Scottish and Irish Boards respectively.

(3) The setting up of a new Lighthouse Committee for the United Kingdom in place of the existing Advisory Committee, but with a more established position and a wider scope of activity, to be composed of representatives of the Board of Trade, the Admiralty, the three General Lighthouse Authorities, shipowners, underwriters and cargo-owners.

The Report states that it would be an understood thing that no proposal for a new sea-mark which had failed to obtain the approval of a majority of this Committee should receive the sanction of the Board of Trade.

(4) Abolition or disuse of the statutory control exercised by the Trinity House over the Commissioners of Northern Lighthouses and the Commissioners of Irish Lights.

The Report is signed by all the members of the Commission, but the Irish representative, Mr M. A. Ennis, appends some interesting reservations. He considers that the standard of efficiency reached by the Commissioners of Northern Lighthouses compares favourably with that of the other two Boards, and while agreeing that the absence of an expert nautical element is a disadvantage, is of opinion that the absence of a commercial element may be a source of weakness to a highly expert nautical body such as the Trinity House, "whose business methods do not appear to me to be quite as efficient as those of the sister authorities, especially of the Commissioners of Northern Lighthouses." To the proposal to set up a new Committee devoid of statutory powers Mr Ennis is strongly opposed, and forecasts the probable results by reference to the Advisory Committee's method of dealing with the proposals of the Commissioners of Northern Lighthouses, "who are probably the most practical and efficient of the lighthouse authorities. . . . The creation of a Lighthouse Committee on the basis suggested in the Report appears to me to be calculated to deprive the Commissioners of Northern Lighthouses and the Commissioners of Irish Lights of the semi-independent position which they have hitherto enjoyed, and by depriving them of right of appeal to the Board of Trade, to reduce them to a condition of absolute dependence upon the Lighthouse Committee, which would become in effect a new supreme authority."

On the whole, the Report is interesting, but hardly convincing. In view of the seemingly admitted superiority of the Scottish Board there is an apparent lack of logic in the suggested method of strengthening it, while the hard things Mr Ennis has to say of the proposed Lighthouse Committee are not improbably well deserved.

THE SCOTS LAW SOCIETY.

The ninety-third annual dinner of the Scots Law Society was held on the evening of Saturday last, in the Princes Street Station Hotel, Edinburgh, Lord Dunedin, Lord Justice-General, presiding over a company of about one hundred. The croupiers were Mr J. Bayne, solicitor, and Mr G. D. Valentine, advocate; and among others present were Lord Guthrie, Mr C. Scott Dickson, K.C.; Sheriff Chisholm, K.C.; Sheriff M'Lennan, K.C.; Mr J. B. Sutherland, S.S.C.; Mr J. M'Intosh, Auditor of the Court of Session; Mr E. P. Thomson, Extractor of the Court of Session, and others.

After the loyal toasts were given by the Chairman—

Mr Scott Dickson proposed "The Imperial Forces." He said they all quite recognised that at this time one part of our forces was passing through a very great change, but he was convinced they were all agreed that it was a happy omen that all parties in the State had determined to give that change their loyal support, to secure if possible that we should have the best return for our money and for the services which those engaged in the Imperial Forces were called on to give us. He coupled with the toast the name of their militant brother the Admiral of the Pentland Firth.

Sheriff M'Lennan, K.C., in reply, said that as Vice-Admiral of the Northern Seas he could assure them he had had no communication whatever, private or otherwise, from the German Emperor. He could further assure them there was no risk whatever of the Pentland squadron being reduced by a single ship. Mentioning that the new territorial force came into being on 1st April, Sheriff M'Lennan said they must give to Mr Haldane the credit of having the first qualification of a great soldier—unlimited courage—otherwise he would never have chosen such a day for the creation of his new force.

Lord Dunedin then submitted the toast of "The Scots Law Society." He said the Society as such in its everyday life was a society of young men, and he did not know he could wish it anything better than it should keep its characteristic by remembering that it was the Scots Law Society. There was a time not so very long ago when Scots law was rather at a discount. He did not know if they remembered—probably it was brought to his own mind by the impending oppression of the jury trials—that there was a time when it was not thought they could even conduct a jury trial in Scotland, and that accordingly when civil jury trial was introduced it was not supposed there was a single judge on the bench could manage it, and an English lawyer was appointed in order to be Chief Commissioner. That was a period of great decadence in the first, second, third, and fourth decades of the last century. As he found out during the last week, even the

Standard-Bearer did not go to the Coronation, and he had also a sad remembrance of some youthful experience of Glasgow conveyancing, when everything began, "This indenture witnesses." He was pleased to say these days were past. If the pendulum was swinging, it might swing a little far the other way. He certainly had not at present been convinced by the Gaelic magazine which was sent to him, and which proposed that no official should be hereafter elected who did not know Gaelic. It was well to remember that they were present that evening as a body of people who represented the Scots law, and he was bound to say such experience as he had shewed him they had nothing to fear in comparison with any other system. In other words, he thought the great merit of our system had been to shew a capacity for elasticity which, he believed, was not shared by any other system in the world. He did not think they got full measure of that elasticity or the power of applying it in future developments, if they should rise to such places as needed the power, if they were not well grounded in what after all was our own system. He hoped they would always keep before them the fair fame of Scots law and Scots legal establishment, because he was not sure that in these latter days it might not from some unexpected quarters be threatened.

Mr G. D. Valentine replied.

Sheriff Chisholm, in proposing the health of the extraordinary and honorary members of the Society, said he was sure these members would all hasten to acknowledge their indebtedness to the Society, and to express their appreciation of the usefulness in their career of the training they got in the Society. The present members, on their part, had every reason to be proud of those who had gone before them in the fighting ranks.

Lord Guthrie, in replying, said the Society ought to be doing something very shortly in connection with the recording of their own history. He wished to make a suggestion for their consideration. A Society of this kind ought to have a written history, and why should not the centenary be celebrated by the publication of a history of the Society? Such a history would contain a list of the members, an account of the Society, and other interesting details, with, he hoped, portraits — including, of course, extraordinary and honorary members. In connection with the portraits they might have to consider a very serious question that was suggested to him the previous day. He read not only the "Record" of the United Free Church, but also that of the Free Church, and he read in this month's Free Church "Record"—and he sent it to Lord Ardwall for his edification and Sunday reading—a letter which objected to ministers wearing gowns. The letter stated: "There is neither good taste nor common-sense about it. Surely it is more comely to appear in the pulpit as formed by the Creator?" They might apply the same argument to judges and their gowns, so that the question might have to be considerd in connection with the portraits in the Society's history.

Mr J. B. Sutherland proposed the toast of "Kindred Societies." He spoke of the usefulness of such societies in training young men, in the mimic controversies which they fought in the societies, for the more important controversies and warfare which they had to wage when they entered into the wider sphere of action.

Mr John Maxwell acknowledged the toast on behalf of the Glasgow Legal and Speculative Society.

Mr C. Maitland Smith, President of the Edinburgh Chartered Accountant Student Society, who also replied, said he trusted the two Societies would continue to aid one another by such methods as their joint debates and mock trials.

The health of the Chairman was afterwards proposed by Mr J. Kinmont, S.S.C.

In the course of the evening a number of songs were given by members of the company.

EDINBURGH LEGAL DISPENSARY.

The ninth annual meeting of the subscribers and friends of the Edinburgh Legal Dispensary was held in the Goold Hall on Tuesday afternoon—Mr G. M. Paul, D.K.S., presiding. Mr J. P. Coldstream, W.S., submitted the annual Report, which set forth that during the year the number of clients attending the Dispensary was 920, as against 848 in the previous year, while there were 1381 consultations, as against 1194. The average attendance for each night was 26·57, as against 23·41. The largest attendance for the year on a single night was 38, as against 40. In addition to the consultations, the advising lawyers had written about 500 letters and held about 200 outside interviews. Of the clients during the year 339 were men and 581 were women. There were 920 clients, and the cases embraced 203 relating to husband and wife, 170 to parent and child, 31 to master and servant, 116 to landlord and tenant, 135 to debt, 49 to succession, and 56 to damages for personal injury. There were 293 cases remitted to the agents for the poor during the year, as against 206. The Police Court defensor had appeared for 170 accused persons, as against 278 in the previous year. Viewed from every standpoint, the report, said Mr Coldstream, was a very encouraging one. It had been a record year with them. So large had the attendance become they had been obliged to open another room. Their Police Court defensor was the first official of the kind. Other municipalities seemed inclined to take that matter up, and Dundee had appointed their defensor a permanent official. He urged upon the Lord Provost of Edinburgh the advis-

ability of seeing that Edinburgh in this matter might follow the example of Dundee, and appoint their officer a permanent official of the Town Council. He believed it would pay. Ladies, though they had been allowed to study law at the Universities and take degrees, were unfortunately still debarred from practising for remuneration, but he was glad to think that in the near future the Courts would see their way, and legal bodies also, to admit ladies to their ranks. Until that was done he hoped ladies who were now studying law in the University would go down to help them in the Canongate. It was work peculiarly well fitted for ladies, as they had a very large number of women as clients. The chairman moved, and the Rev. George Laing seconded, the adoption of the report. The Lord Provost, in submitting a motion commending the Society to the sympathy and support of the citizens, said he had learned that the services of the Society's defensor were of the greatest service to the poor, and even to the Magistrates. Mr David Paulin, F.F.A., seconded, and the motion was carried, as was also another submitted by Sheriff Gillespie, by which the directors and office-bearers were reappointed.

The firms of Marshall & Inglis, 145 St Vincent Street, Glasgow, and Carrick & Glen, 194 St Vincent Street, Glasgow, of which Mr David Inglis and Mr James Glen have respectively been, for a number of years, the sole partners, have been amalgamated. Messrs Inglis & Glen will in future carry on business together as Writers, at 26 Bothwell Street, Glasgow, under the style of Inglis, Glen & Co.

Faculty of Advocates.—A meeting of the Faculty of Advocates was held on 5th inst., the Dean of Faculty, Mr William Campbell, K.C., in the chair. A Committee was appointed to consider and report on the Children's Bill 1908. Mr N. J. K. Cochran-Patrick was appointed as representative of the Faculty on the Council of the Scottish Branch of Queen Victoria's Jubilee Institute for Nurses, in room of Lord Guthrie, who has resigned.

DECISIONS IN THE ENGLISH COURTS.

Cooper v. *Ogden.*

Election Law—Vote—Validity.—On a voting paper a cross was placed opposite the words "ballot paper" and immediately above the spaces left blank for voting. The cross extended to a small degree into the blank space opposite the name of the candidate which was first on the paper. *Held* that it was a good vote in favour of that candidate.

On a voting paper containing the names of two candidates a cross was placed opposite the name of one and a diagonal line opposite the name of another. *Held* that it was a good vote in favour of the candidate opposite whose name the cross was placed.

In the space opposite the name of a candidate on a voting paper was a mark apparently made by a pencil of which the lead had broken, leaving only an impression. *Held* that it was a good vote.—K.B. Div. (Bigham and Phillimore, JJ.)—13*th January* 1908.

Oettinger and Others v. *Cohn.*

Revenue—Stamp Duty—Stamp Act 1891 (54 & 55 Vict. cap. 39), sect. 33.—*Held* that a promissory note written in the United Kingdom and payable at sight was liable to an *ad valorem* duty.—K.B. Div. (Channell, J.).—16*th January* 1908.

S v. *S.*

Husband and Wife—Nullity of Marriage—Evidence.—Where a wife repelled all advances towards consummating the marriage, insisted on always occuping a separate bed, about eighteen months after the marriage left her husband and declined to return to him, and refused to permit a medical examination, *held* that the Court ought to draw an inference of impotency.—P.D. and A. Div. (Gorell Barnes, P.).—16*th January* 1908.

ACT OF SEDERUNT Regulating the Fees Payable in the Sheriff Courts of Scotland, and Prescribing the Form of Books of Account to be Kept by Sheriff Clerks.

Edinburgh, *7th March* 1908.

The Lords of Council and Session, in pursuance of the power vested in them by sect. 2 of the Courts of Law Fees (Scotland) Act 1895, and sect. 40 of the Sheriff Courts (Scotland) Act 1907, do enact that on and after the first day of April 1908 the Act of Sederunt of 20th December 1898, and so much of the two Acts of Sederunt of 7th July 1904, and of the Act of Sederunt of 26th June 1907, as relates to fees payable in the Sheriff Courts of Scotland, shall be and are by this Act repealed; and in lieu thereof it is hereby enacted:

1. On and after the first day of April 1908 Sheriff Clerks shall be entitled to charge the fees specified in the tables hereto annexed in place of the fees hitherto chargeable by them, and no other or higher fees shall be charged by them, nor shall any addition be made thereto in respect of postage or otherwise.

2. Sheriff Clerks shall be responsible for the collection of all fees specified in the tables, and it shall be their duty to refuse to receive any paper chargeable with a fee, or to transmit any service or petition for completion of title for extract, or to allow any marking of an appeal, or other

marking to be made in respect of which a fee is payable, unless the appropriate fee has been paid; and it shall further be their duty, when a fee is declared payable prior to any particular step being taken in a process, and such fee has not been paid by either party, to call the attention of the Sheriff to the matter; and the Sheriff, unless the fee is thereupon paid, shall proceed with the case as if the party by whom the unpaid fee is payable were absent or in default.

3. The fee in sect. 1 of Part I. shall cover extract. The *ad valorem* fees in sect. 3 of Part I. shall cover all proceedings, including correspondence, but not including petitions for appointment of executor, for restriction of caution, or for special warrants. The fee in sect. 6 of Part II. shall cover all proceedings including extract, but not including appeal. The fees in sects. 7 to 18 inclusive and 27 to 32 inclusive of Part II. shall cover all proceedings including, in bankruptcy cases, the necessary extracts and abbreviates for the Accountant of Court and other Government Departments. The fees in sects. 19 and 20 of Part II. shall cover all proceedings including extract, but not including stated case. The fees in sects. 21 to 26 inclusive of Part II. shall cover all proceedings, except appeal or stated case, in any action or proceeding for which special fees are not provided elsewhere. In criminal cases at the instance of a private prosecutor, when more persons than one are proceeded against in one complaint, the fee shall cover one extract conviction of order in respect of each person.

Any subsequent extracts or copies required shall be charged under sect. 4 of Part I., or sect. 1 of Part II. In litigated commissary, service of heirs, and bankruptcy cases, the same fees shall be charged as for similar business in the ordinary Sheriff Court.

When a small debt case is remitted to the ordinary roll, the parties shall pay fees as for an ordinary action, under deduction of any fees already paid.

4. No fees shall be payable in the first instance by any officer of the Crown in proceedings the expenses of which are payable by the Crown. When, however, such officer is found entitled to expenses, the Court fees shall be included and decerned for.

5. No fees shall be payable in cases of *cessio bonorum*; in cases under the Workmen's Compensation Act, except stated cases or applications for reference to a medical referee; on applications under sect. 5 of the Dogs Act 1906; on applications for relief under the Poor Laws; on petition for leave to sue *in forma pauperis*; or on applications under the Acts for Registration of Births, Deaths and Marriages, except those for registration of irregular marriages, or for warrant to record legitimation *per subsequens matrimonium*.

Parties allowed to sue or defend *in forma pauperis* shall be exempted from payment of fees in the first instance; but when they are found entitled to expenses, the Court fees shall be included and decerned for. Any party or agent recovering any of the said expenses shall be bound to account therefor *pro rata* to the Sheriff Clerk.

At any time not exceeding six months after the close of the year of office of an agent for the poor, he shall prepare a list of the "Poor" cases in which he acted, showing the amount recovered by him, or by the parties represented by him, in each case. He shall then sign said list as a certificate of its correctness, and shall send the same to the Sheriff Clerk, along with a remittance for the Court fees recovered by him. From time to time thereafter he shall remit to the Sheriff Clerk the proper proportion of any further expenses recovered by him.

6. The Books of Account to be kept by Sheriff Clerks shall be in the form of the schedules hereto annexed.

7. Bar Officers and the Macer of the Sheriff Court of Chancery shall be entitled to charge for their services the fees specified as "Bar Officers' Fees" in the tables hereto annexed.

8. In this Act and relative tables the following words shall include the meanings undermentioned:—

"Defender," "Compearer," and "Party," shall, respectively, include a set of Defenders, Compearers, and Parties with the same interest, for whom one First Paper has been lodged.

"Writ" and "Paper" shall include Inventory of Personal Estate, Summons, Petition, Application, Appeal bringing an Action into the Sheriff Court, Precept of Arrestment on a Liquid Document of Debt, Note of Objections, Notice of Appearance, Answers, Defences, Statement in writing, or other written Pleading, in a cause or proceeding.

"Decree" in sect. 26 of Part II. shall include Licence, Appointment, Discharge, Certificate of Registration of a Club, or other written statement of the Sheriff's decision in any proceeding under sect. 21 of Part II.

"Appeal" shall include the transfer of an action to the Court of Session at the instance of a party.

"Sheet" shall mean 250 words or part thereof.

"Sheriff" shall include Sheriff-Substitute.

"Sheriff Clerk" shall include Commissary Clerk of Edinburgh, Sheriff Clerk of Chancery, and Sheriff Clerk Depute.

And the Lords APPOINT this Act and the annexed Tables and Schedules to be inserted in the Books of Sederunt, and to be printed and published in common form.

DUNEDIN, *I.P.D.*

TABLE OF FEES FOR THE SHERIFF CLERKS OF SCOTLAND.

A.—*Fees to be Collected by Sheriff Clerks and Accounted for to the King's and Lord Treasurer's Remembrancer.*

Part I.—Commissary Proceedings.

1. Petition for appointment of executor	£0	10	0
2. Petition for restriction of caution or for special warrant	0	5	0
3. Receiving and examining inventory of personal estate—			
a. Gross estate sworn not to exceed £500—			
When the amount of the estate which may be confirmed does not exceed £20	0	5	0
Exceeds £20, 5s. for the first £20, and 1s. for each £10 or part of £10 thereafter, maximum fee 15s.			
b. Gross estate not sworn not to exceed £500—			
When the amount of the estate which may be confirmed—			
(1) Does not exceed £500	1	10	0
(2) Exceeds £500 and does not exceed £1000	2	10	0
(3) Exceeds £1000 and does not exceed £20,000, £2, 10s. for the first £1000, and 10s. for each £1000 or part of £1000 thereafter.			
(4) Exceeds £20,000 and does not exceed £100,000, £12 for the first £20,000, and 10s. for each £5000 or part of £5000 thereafter.			
(5) Exceeds £100,000, £20 for the first £100,000, and 10s. for each £10,000 or part of £10,000 thereafter.			
c. Additional and corrective inventories and eiks shall be charged at the above rates on the additional estate which may be confirmed.			
d. Where it is declared that confirmation is not required, fees at half the *ad valorem* rate shall be charged on receiving the inventory. If confirmation should subsequently be required, the remaining half of the fees shall then be charged.			
4. Extracting or copying, per sheet	0	1	0
5. Single search, to include inspection—			
Within five years from date of search	0	1	0
Beyond „ „	0	2	6
6. *a.* Certifying English or Irish probates or letters of administration—			
Gross estate sworn not to exceed £500	0	2	6
Other estates	0	15	0
b. Sealing probates or letters of administration under the Colonial Probates Act 1892—			
Gross estate sworn not to exceed £500	0	15	0
Other estates, 15s., and fees at half the *ad valorem* rate in sect 3 *b*.			

Part II.—Sheriff Court Proceedings.

General (applicable to all business under Part II.).

1. Recording, extracting, or copying, per sheet	£0	1	0
2. Single search, to include inspection, per hour	0	1	0
3. Inspection by a Trade Protection Society or Trade Publication, of Protests, Act books, and Court Rolls—			
Weekly for three months (payable in advance)	0	10	0
Twice weekly for three months do.	1	0	0
4. Appeal to Sheriff, Court of Session, or Court of Justiciary	0	5	0
5. Stated case	1	10	0

Small Debt, and Summary Removings under sect. 38 of the Sheriff Courts (Scotland) Act 1907.

6. Summons, petition, or sist for rehearing	0	3	0

Bankruptcy Proceedings.

7. Petition for sequestration of estates or conversion from a cessio	1	0	0
8. Act and warrant of trustee	0	15	0
9. Writing examination of bankrupt or minute of meeting, per sheet	0	2	0
10. Petition for trustee's discharge	0	10	0
11. Petition for bankrupt's discharge, or application for approval of composition or deed of arrangement	0	15	0
12. Request to act in aid of English Court of Bankruptcy	0	5	0

Service of Heirs.

13. Petition for general or special service or completion of title, or note for a Crown or Prince's charter, writ or precept	2	0	0
14. Proceedings for choosing curators, giving up inventories of minor's effects, or following on a brieve from Chancery	1	0	0

Proceedings under the Act for Registration of Births, Deaths and Marriages.

15. Petition for registration of an irregular marriage or for warrant to record legitimation *per subsequens matrimonium*	0	5	0

Summary Proceedings under the Poor Laws.

16. Any application or first paper except an application for relief	0	5	0

Proceedings under the Lunacy Acts.

17. Any petition or first paper except as otherwise chargeable under Table B	0	5	0

Inferior Courts Judgment Extension Act.

18. Any proceeding	0	5	0

Summary Jurisdiction Acts.

19. Complaint	0	5	0

Workmen's Compensation Act.

20. Application for reference to a medical referee	0	5	0

Ordinary and Miscellaneous.

21. Initial writ in any proceeding for which no special fee is provided elsewhere.	0	5	0
22. First paper, reponing, or attendance to state a defence, each defender or compearer	0	5	0

23. Closing of the record, each party	£0	5	0
24. Proof, each party	0	5	0
25. Application for jury trial	1	0	0
26. Extract of decree	0	5	0
27. Caveat, to be in operation for one month	0	2	0
28. Sealing up repositories or the like, per hour	0	5	0
29. Summary warrant for recovery of rates	0	5	0
30. Subscription of roll of law agents (each county)	0	5	0
31. Recording protest of a bill or promissory note	0	5	0
32. Lodging each set of plans or other Parliamentary deposit	1	0	0

B.—*Fees to be collected by Sheriff Clerks, and accounted for as mentioned below.*

Inspections of Printed Abridgments, etc., sent to Sheriff Clerks, under 31 & 32 Vict. cap. 64.

(To be accounted for to the Lord Clerk Register's Department.)

I.—For Inspection of the Printed Abridgments and Indexes of the Register of Sasines (General and Particular) in County arrangement, and of the Printed Minutes and Indexes of each County Division of the General Register of Sasines, there shall be charged the following Fees, viz.:

1. For any period of not more than one year, a fee of 2s.
2. For any period extending from one year to ten years inclusive, a fee of 4s.
3. For any period extending from eleven to forty years inclusive, a fee of 10s.
4. For periods exceeding forty years, a further fee at the same rate as the preceding.

II.—For Inspection of the Indexes of the Register of Abbreviates of Adjudications and the Register of Inhibitions there shall be charged the following Fees, viz.:

1. For any period of not more than one year, a fee of 2s.
2. For any period extending from one year to ten years inclusive, a fee of 4s.
3. For any period extending from eleven to forty years inclusive, a fee of 10s.
4. For periods exceeding forty years, a further fee at the same rate as the preceding.

Proceedings under the Lunacy Acts.

(To be accounted for to the General Board of Lunacy.)

1. For order of admission granted by the Sheriff into a public or district asylum of a lunatic not being a pauper	£0	5	0
2. For similar order for a pauper lunatic	0	2	6

Chancery Extracts.

Sheriff Clerks, other than the Sheriff Clerk of Chancery, shall as heretofore collect and account for to the Director of Chancery the fees of Extracts coming from his Department.

C.—*Bar Officers' Fees.*

1. For each summons and sist in the Small Debt Court, and for each summary removing and rehearing	0	0	1
2. For proceedings under the Summary Jurisdiction Acts 1864 and 1881—			
For whole proceedings if proof led	0	1	0
For whole proceedings if proof not led	0	0	6
3. For each leading writ initiating a civil action or proceeding in any other department of the Sheriff Court	0	1	0
4. For attending each examination of bankrupt or witness in bankruptcy	0	2	6
5. For attending proofs other than those under the Small Debt and Summary Jurisdiction Acts, per hour	0	1	0

(Payable in the first instance by the parties equally.)

6. Fee to the Macer of the Sheriff Court of Chancery for each petition carried through therein	0	2	0

SCHEDULE A.—COMMISSARY FEES.

Sheriff Clerk's Office.

Date.	Description.	Name of Deceased.	Agent.	Fees.	Daily Totals.
				£ s. d.	£ s. d.

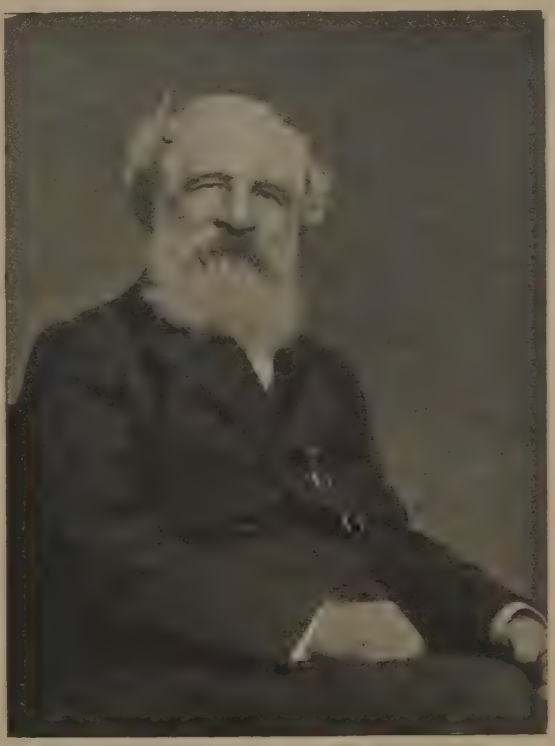
SCHEDULE B.—SHERIFF COURT FEES.

Sheriff Clerk's Office.

Date.	Paper, etc.	Register and Number.	Name of Case.	Agent.	Small Debt Fees.	Fees for Cases in "A" Register.	Fees for other Business.	Daily Totals.	Remarks.
					£ s. d.	£ s. d.	£ s. d.	£ s. d.	

The Late Sir JAMES MARWICK, LL.D.

We much regret to record the death of Sir James Marwick, which took place at his residence in Glasgow on Tuesday evening. Sir James, who was in his eighty-second year, retired from the position of Town-Clerk of Glasgow, which he had held for over thirty-one years, in December 1903. Before taking office in Glasgow he occupied for thirteen years the position of Town-Clerk of Edinburgh. He was one of the senior members of the S.S.C. Society, having been admitted in 1858.



A sketch of Sir James Marwick's career appeared in our issue of 7th June 1902, and it is unnecessary here to recapitulate his great services to the municipality of Glasgow, or his excellent work in historical research in the records of Edinburgh and Glasgow, and in many other fields of antiquarian interest.

On his resignation he received many public manifestations of the high esteem in which he was held by all classes of the community in the second city of the Empire. His bust was placed, by public subscription, in the Art Galleries in Kelvingrove Museum, and a replica was presented to Lady Marwick. Sir John Ure Primrose, in making the presentation, fittingly referred to the common desire to testify admiration, love, and attachment to one who had served Glasgow so long, and who in his every act had commanded the confidence and respect of his fellows.

Sir James Marwick has died full of years and honours. His work as a public servant will long be remembered. In private life the charm of his manner, the variety of his interests, and his upright, manly, and genial character, made him many friends who now mourn his loss.

The Court of Session rose on Friday for the spring vacation, and the last of the jury trials at the sittings was concluded on Tuesday. A group of Provisional Order Inquiries are to be held in one of the Court Rooms at the end of this month, but otherwise there will practically be no business in the Parliament House till the meeting of the Court in May. During the vacation—when they can make as much noise as they please without disturbing the Court—the contractors employed by the Board of Works will make special efforts to complete certain sections of the new buildings. It is not, however, proposed to make any alterations on the existing Bars of the Lords Ordinary till the rising of the Court in July.

Faculty of Advocates.—Mr William Harrison Kirkland, LL.B. Edin., has been admitted a member of the Faculty of Advocates.

The late J. P. Campbell, Esq., Solicitor, Edinburgh.—The death took place on 21st inst. of Mr James Paterson Campbell, solicitor, at his residence in Mayfield Road, Edinburgh. Mr Campbell was only about a week ill, and the end came very suddenly. He was the elder son of the Rev. John Campbell, long a well-known missionary of the United Presbyterian Church at Lucea, Jamaica. He was sent to this country early in life, and educated for the legal profession, serving for a considerable time in the office of Messrs Millar, Robson & Innes, W.S. On passing as law agent, he was for some time a partner with Mr J. Stewart Galletly, S.S.C. When Lord M'Laren was raised to the Bench, Mr Campbell was made his clerk, an office which he has held ever since. Mr Campbell was of a very genial nature, and remarkable for his courtesy and kindness to all with whom he was

brought in contact. He was a keen golfer, and was seen at his best on the golf links. Mr Campbell was in his fifty-sixth year, and will be very much missed, both in the Parliament House and by a wide circle of friends, to whom his personal qualities very much endeared him.

LONDON LETTER.

Temple, 20*th March* 1908.

International lawyers in London are anxious to know whether Glasgow supports Liverpool in its desire to abolish the right of capture of enemies' property at sea. The principle which would add to the rule established by the Declaration of Paris, "Free ships, free goods," the sweeping addendum, "Enemy ships, free goods," is not usually regarded as a particularly conservative doctrine. It has generally been advocated by pacificists and politicians of the Manchester school. Among its conspicuous advocates at the present day is the Lord Chancellor, who, shortly before assuming office, addressed an exhaustive letter to the London "Times," in which he strongly recommended the change. Opinions vary very much as to the precise utility of the liberty of capture to a belligerent. If, as seems desirable, his rights of capturing contraband are severely cut down to objects which are obviously warlike, it may be of supreme value to him to possess the power of at any rate capturing his enemies' own floating goods which he wishes to intercept, without being bound by such restrictions. But this object might be attained by conceding to him the power of capturing his enemy's goods if he can prove that they were really intended for warlike purposes (much as he can, under certain circumstances, capture neutral goods of particular categories now). At the same time, there is no doubt that the new principle would cut down a strong belligerent's powers. On the other hand, it would prevent all interference with our trade if we were at war, and would render convoy, patrol, and national insurance unnecessary. Our ships could come and go without fear of predatory Alabamas; whilst, if we lost for a time, or altogether, the command of the sea, the difference to commerce would be incalculable. The last argument is not so strong as it looks: for an enemy who had command of the sea would inevitably institute a blockade; and it is not proposed to do away with that process. On the whole, the Foreign Secretary did not smile on the proposal; and the House of Commons appeared to assent to his cautious attitude.

Probably you have noted the curious decision in the Lords, by which a transfer by a French document executed in Paris of goods situate there from one English company to another, was held to require a British stamp as on a conveyance (*Inland Revenue Commissioners* v. *Maple & Co.* (*Paris*) *Ltd.*, L.R. [1908] A.C. 22). This decision of Lord Macnaghten's (in which Lords Ashbourne, James and Atkinson concurred) reversed the finding of Lords Justices Farwell and Moulton (Lord Collins dissenting). It seems to proceed on the ground that the consideration for the transfer was the allotment of shares in the vendee company, and that to enable this purpose to be carried out the conveyance had to be filed with the registrar of companies in London. The Stamps Act 1891 (sect. 14, sub-sect. 4) says that an instrument "relating to" something to be done in the United Kingdom "shall not be available for any purpose" unless stamped. "The reckless breadth of this definition," said Lord Justice Moulton, L.R. [1907] 2 K.B. 846, must not be read as extending the requirements of the statute, but only as imposing an additional disability on the documents which are carefully particularised, as requiring to be stamped, in other sections of the Act. "The whole world," said his Lordship, "would every hour be drawing up invalid documents and incurring penalties by tens of thousands," because in some way they "related to" things to be done in England, unless the fundamental principle is observed, that in construing fiscal acts they must be read as applying to the country itself and not to the world outside. The Lords, however, adhered to the wider construction, and held that the duty was payable.

It is announced that the International Law Association has been invited by various influential legal bodies in Hungary to hold its 25th conference from 22nd to 25th September next in Buda-Pesth, and that the invitation has been accepted. His Excellency Dr Anton Günther, Royal Minister of State for Justice, has expressed his willingness to accept the position of Honorary President, and the President of the Association (Mr Justice Phillimore) is also expected to be present at the meeting. Great interest is excited in Hungary by the proposed gathering, and extensive preparations are being made for the function by a Reception Committee, of which the British consul, Dr Ignaz Brüll, C.M.G., who has so long been a prominent figure in the life of Buda-Pesth, is an active member. The subjects for discussion will include the topics of the Unification of the Law of Bills of Exchange, the Sale of Goods in its international aspect, Double Taxation, Court Procedure, Extradition, and other interesting problems.

Parliament has before this been the scene of personal hostilities between its members. The memorable fracas which marked the progress through the House of Commons of the Home Rule Bill was not so many years ago. The chronicler has now to record a regrettable incident of the same sort between two of His Majesty's Counsel, in the Court where the Railway and Canal Commission was engaged in

hearing the important application for the virtual amalgamation of the Great Central and Great Northern Railways. Whether the same reason as was alleged for the Parliamentary scuffle—the crowding necessitated by the inadequate seating accommodation—was the cause of the recent incident or not is not stated. Had the members of the tribunal been actually present in Court, the affair would have worn a much more serious aspect; but, like a good Scotsman, Sir Robert Finlay meanwhile intervened and restored peace. The Commission is clearly a Court, having (in England) the powers of the old Court of Common Pleas; and since 1888 it has had by statute the position of a Court of Record, which carries with it the power to commit for contempt. It is a contempt to strike anyone in a superior Court of Record, and the Commission answers this description, for although it used to be subject to "prohibition" by the High Court (*South-Eastern Railway* v. *Railway Commissioners*, 1881, L.R. 6 Q.B. 586), this liability has now been removed by the statute of 1888 (sect. 17, sub-sect. 6), and the Court has in terms been invested with all the powers of a superior Court.

The Vinerian scholarship (the blue ribbon of the legal world at Oxford) has just been awarded to Mr W. F. Greene. Mr Greene is a fellow of All Souls, a Craven and Hertford scholar. Like many other promising lawyers, he never took the Jurisprudence B.A., but secured a first class in *Literæ Humaniores*.

DECISIONS IN THE ENGLISH COURTS.

Ex parte Emmanuel Hospital.

Lands Clauses Act—Deposited Money—Brokerage.—When two sums of unequal amount which had been deposited under the Lands Clauses Act by two different railway companies had to be paid out, *held* that the broker's commission on selling these two funds before payment out of Court should be borne by the two companies equally.—Chan. Div. (Eve, J.).—22*nd January* 1908.

Burgis and Others v. *Constantine.*

Ship—Shares.—The plaintiffs transferred their shares in a ship, of which Hine Brothers were managers, to Wilfrid Hine in order that he might transfer them to a company to be formed. Wilfrid Hine was registered as owner of the shares. He then signed at the request of his son, who was in the employment of Hine Brothers, a blank form of mortgage, his son having undertaken to mortgage the shares to the defendant for a loan to the firm. The defendant's agent filled in the blank form, the advance was given, and the defendant registered his mortgage. In an action to have the register rectified by expunging the mortgage, *held* that, the mortgage form having been signed blank, the mortgage was a nullity; but that, the plaintiffs having transferred their shares to Wilfrid Hine that he might deal with them, and Wilfrid Hine having dealt with them, the plaintiffs were entitled to an equitable charge on the shares to the extent of the unpaid balance of the advance. —K.B. Div. (Bigham, J.).—23*rd January* 1908.

Bottomley v. *Brougham.*

Slander—Privilege.—*Held* that a report presented to the Court by the official receiver under the Companies (Winding Up) Act 1890 was absolutely privileged.—K.B. Div. (Channell, J.).—24*th January* 1908.

In re T. H. Saunders & Co. Ltd.

Company—Register.—*Held* that a company in registering the executors of a deceased member were not entitled, in opposition to the wishes of such executors, to insert on the register the qualification that they were registered as executors. *Opinion* that the executors were also entitled to have their names placed on the register in any order they pleased.—Chan. Div. (Warrington, J.).—24*th January* 1908.

LAW LIBRARY.

BOOK NOTICES.

Criminal Appeal and Evidence. By N. W. Sibley, LL.M., Trin. H. Camb. and B.A. Lond., Barrister-at-Law of Lincoln's Inn. London: T. Fisher Unwin. Sweet & Maxwell Ltd., 1908. *Price* 15*s. net.*

This book contains a wealth of information on the subject of Criminal Appeal. Mr Sibley has made most exhaustive researches into the history of English Criminal Law, and has noticed, explained, and commented on almost all the cases in which controversies have arisen as to the correctness of the verdict or the inclusion of improper and the exclusion of proper evidence. Convictions obtained on purely circumstancial evidence, cases of mistaken identity, conflict of evidence of different sets of witnesses, are exemplified in many of the cases cited. The author has also collected, from charges to grand juries, speeches in Parliament, evidence before Royal Commissions, and many other miscellaneous sources, the views on the subject of Criminal Appeal of many of the

great English lawyers of the last two centuries. Chapters are devoted to the Royal Prerogative of Mercy, to compensation in cases of wrongful conviction, and to the recent case of George Edalji. There is a critical essay on the Criminal Appeal Act of last year, in which the views of those who opposed as well as of those in favour of the Act are very fairly set forth. The Act itself is printed in an Appendix, and there are notes in which the criminal systems of other countries are explained. The success of the new system of criminal appeal will largely rest on the way in which the Act is administered. The number of appeals will depend upon whether the new Court takes the view that appeals should only be allowed as an exceptional remedy, or shews a general willingness to reconsider questions of fact or law arising in the course of criminal trials. The Act does not apply to Scotland, and the Scottish system is therefore left as it is. There is no appeal from the decision of a jury in the High Court or from a ruling on evidence of a single Justiciary judge presiding at a criminal case. In the old days two or more judges sat together at criminal trials and considered jointly any questions as to admissibility of evidence that might arise. Though there is no appeal from the ruling of a Justiciary judge, it is thought that it would still be open to counsel to request a judge presiding alone at a criminal trial to reserve any question of law arising for the decision of a fuller Bench of the High Court. That procedure, even if it be competent, would not afford any remedy in cases where the jury had taken a wrong view of the evidence, and the majority of cases where criminal appeal is required are not cases turning on the ruling of a judge.

The Master Mariner's Legal Guide. By Albert Saunders, Solicitor, of the Supreme Court. Second Edition. London: Effingham Wilson, 1908. *Price* 10*s.* 6*d. net.*

This is a handy volume for the shipmaster's use, giving him, under headings alphabetically arranged, a *précis* of the law as it stands. The first edition of the work was published in 1903, and a new edition has been necessitated, principally by the amendments made by the Merchant Shipping Act of 1906 on the Act of 1894. The author has, however, taken the opportunity to incorporate in his Guide the effects on the master mariner's province of the Aliens Act of 1905, and the maritime extension in the Workmen's Compensation Act of 1906. The matter of the book is well arranged, and its information concisely put; and we have no doubt that Mr Saunders' work will be of great assistance to those for whom he has written it. At the same time, we are not prepared to go the whole way with the author when he says that it will be quite impossible for the master to understand the provisions of the Merchant Shipping Act of 1906 without the aid of this Guide!

A Treatise on the Law relating to the Devolution of Real Estate on Death, under Part I. of the Land Transfer Act 1897, *and the Administration of Assets, Real and Personal. By the late Leopold George Gordon Robbins (late Reader in Equity to the Inns of Court), and Frederic Trentham Maw, both of Lincoln's Inn, Barristers-at-Law. Fourth Edition. By Frederic Trentham Maw. London: Butterworth & Co.*, 1908. *Price* 15*s. net.*

It is now seven years since Mr Maw issued the third edition of this work in its enlarged form, incorporating the subject of the devolution of real estate, which had been previously separately treated by the late Mr L. G. G. Robbins, in a work embracing the whole law relating to real and personal assets. The general arrangement of the subject-matter adopted in the previous edition remains unchanged, but in several chapters considerable alterations and additions have been made by the author. Chapter IV., "Of the Devolution of Real Estate," has been almost entirely rewritten, and Chapter IX., which treats of the payments of debts by the personal representatives, has been remodelled in keeping with the latest decisions upon the construction of Hinde Palmer's Act (32 & 33 Vict. cap. 46), and particularly the decision of the Court of Appeal in *Re Samson, Robbins* v. *Alexander* (1906), 2 Ch. 584, in which it was held that the Act was intended to abolish the distinction between specialty creditors and simple contract creditors claiming upon the estate, and to produce equality of distribution in the administration of the estate by the personal representative.

During the interval which has elapsed since the previous edition was issued a number of important decisions have been given by the Courts upon the construction of Part I. of the Land Transfer Act 1897, and sect. 10 of the Judicature Act 1875, and these, along with the recent decisions on the incidence of the various death duties, are discussed by the author and incorporated into the text.

The work deals with a very intricate and difficult branch of the law, and the author, by the arrangement and treatment adopted by him, has done much to simplify the subject for the ordinary practitioner. The present edition shows traces of great care and industry in its preparation, and will be welcomed by the profession as a most useful addition to the text books dealing with this branch of the law. An exhaustive table of the numerous cases and statutes bearing upon the subject is included in the volume.

THE SCOTS LAW TIMES REPORTS

VOLUME XV

1907-8

Edinburgh

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and The Right Hon. Lord PEARSON.

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SCOTS LAW TIMES

REPORTS

VOL. XV. 1907-8

REPORTED BY

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AND A. MAITLAND, Esq., B.A., LL.B., Advocates.

REPORTS

House of Lords.

Murray's Trustees v. Trustees for St Margaret's Convent.

HOUSE OF LORDS.

(*Earl of Halsbury, Lords James, Robertson and Atkinson.*)

1. Murray's Trustees v. Trustees for St Margaret's Convent.

Property — Servitude — Construction — Building Restrictions—Contract between Adjoining Feuars to Secure Amenity — "Building of an Unseemly Description"—Flatted Tenements.

(*Appeal against an Interlocutor of the First Division* (*The Lord President* (*Lord Dunedin*), *Lords M'Laren, Kinnear and Pearson*) *in part reversing an Interlocutor of Lord Ardwall.*)

(*Reported ante, Vol. XIV. p.* 307, 8 F. 1109.)

Murray's Trustees appealed.

The House, without calling on counsel for the Respondents, dismissed the appeal with expenses.

The Earl of Halsbury.—My Lords, the question in this case is certainly reduced to a very simple one, and that is whether your Lordships are able to give a definite legal meaning to the restrictive words of this covenant. I confess I have been looking in vain for some definite guide as to what is suggested to be the real meaning. Both the learned counsel who have addressed your Lordships have, I think, failed to give any definite meaning to the words. What may reasonably be "seemly" appears to be a question rather of the personal conduct of the individuals engaged than any characteristic of the building which is supposed to be itself an infraction of the covenant that has been entered into.

I really do not feel it necessary to say any more about the matter except that I concur with the judgment of the Court of Session, and I think the appeal should be dismissed. I am wholly unable to follow the reasoning which alters the applicability of such words as are used here into some definite meaning which a Court can enforce. I am not aware of anything which will give in the ordinary use of language such an effect to these words as to render that meaning capable of being enforced.

For these reasons I move your Lordships that the appeal be dismissed with costs.

Lord James of Hereford.—My Lords, I concur.

Lord Robertson.—My Lords, I think this is a very clear case, but the law on this subject of servitudes affecting real property is one which requires delicacy of statement, and I shall most usefully express my opinion by saying that I entirely concur in the whole of the judgment of Lord Kinnear.

Lord Atkinson.—My Lords, I concur. I think the judgment of the Court of Session was right. —13*th May* 1907.

Counsel for Appellants, Scott Dickson, K.C., Constable; Agents, Blair & Cadell, W.S., Edinburgh; Martin & Leslie, London.—Counsel for Respondents, The Dean of Faculty (*Campbell, K.C.*), *Chree; Agents, W. Considine, S.S.C., Edinburgh; John Kennedy, W.S., Westminster.*

BILL CHAMBER.

(*Lord Salvesen.*)

2. Mackintosh (Jamieson's Trustee) *v.* Leslie.

Right in Security—Heritable—Ex Facie Absolute Disposition — Amount of Indebtedness in Dispute—Counter-claim the Subject of a Pending Action—Sale of Security Subjects by Creditor—Interdict of Sale—Circumstances where Interdict Refused.

The facts and circumstances of this case are sufficiently set forth in the Opinion of the Lord Ordinary.

Lord Salvesen.—In this case the complainer, who is the trustee on the insolvent estates of William Jamieson, junior, architect and surveyor in Lerwick, seeks interdict against the respondent selling a plot of ground on which the complainer's author has erected some unfinished villas. Interim interdict was granted on caution, but answers have now been lodged, and the respondent maintains that he is entitled to have the Note refused *de plano*.

The circumstances are these. The respondent is the *ex facie* absolute owner of the subjects in question. He admits, however, that they were disponed to him in security of repayment of all advances and other debts due by the said William Jamieson to him. The amount of indebtedness is in dispute; but there is no doubt that sums to the extent of over £800 were advanced by the respondent, and the main difference between the parties relates to a counter-claim which is now the subject of an action at the complainer's instance against the respondent. To the extent of £25 the respondent admits his indebtedness to the complainer. If the amount of the indebtedness could be agreed upon, the complainer would apparently be quite willing to pay the amount due, on the respondent conveying to him the security subjects. The parties have, however, failed to adjust the amount; and the two offers which the complainer makes in Stat. 8 have not been accepted. On the other hand, the respondent is perfectly willing to re-convey the subjects if the amount at which he states Jamieson's indebtedness to him is paid, leaving over for settlement in the pending litigation any counter-claims for which he may be liable.

The first plea in law for the complainer implies that the threatened sale is wrongous and unwarrantable, but I find no statement to support the plea, nor do I see anything to suggest that the complainer is exceeding his rights. The owner of property has the right to sell it when and to whom he pleases. If the respondent holds it only in security, he is of course liable to account for any surplus; and he must also see that the property is adequately advertised before a public sale takes place, so that it may not be sold below its value. It is not said, however, that the respondent is proceeding in any unwarrantable fashion; and although the complainer says that he apprehends loss if the property is sold by the respondent, he does not state how that loss apprehended will arise. The complainer's counsel maintained that the respondent had only right to sell the subjects for the sum that was actually due, and had no right of sale until that sum had been ascertained. Their argument is plainly fallacious. The respondent's right to sell is absolute, just as his right of property is *ex facie* absolute; and it appears to me absurd to say that a man cannot realise a security subject until he has agreed with the debtor as to the precise state of accounts between them.

The complainer further argued that, in respect of the offers which he had made, it was oppressive on the part of the respondent to persist in his intention to sell. I do not agree. The respondent is entitled to payment of his debt out of the proceeds of the property he holds, and is not bound to accept security, however good, that it will be paid. If the complainer wishes to stop the sale, all he has got to do is to pay the respondent the amount of his claim, under deduction of the admitted set-off. If this constitutes an overpayment, the respondent will of course have to refund the surplus when the complainer's claim is liquidated in the pending action.

I shall accordingly recal the interim interdict already granted, and refuse the Note, with expenses to the respondent.—11*th May* 1907.

Counsel for Complainer, D. P. Fleming; Agents, Clark & Macdonald, S.S.C.—Agent for Respondent, W. Kinniburgh Morton, S.S.C.

J. W. F.

OUTER HOUSE.

(*Lord Dundas.*)

3. Pollock, Whyte & Waddell *v.* The Old Park Forge Limited.

I. DILIGENCE—ARRESTMENTS JURISDICTIONIS FUNDANDÆ CAUSA—ERROR IN DESIGNATION OF DEFENDERS IN WARRANT, EXECUTION AND SCHEDULE OF ARRESTMENT—CIRCUMSTANCES IN WHICH ARRESTMENT WAS HELD VALID.

II. DILIGENCE — ARRESTMENT JURISDICTIONIS FUNDANDÆ CAUSA—SUBJECT ARRESTED THE PROCEEDS OF A CHEQUE HANDED BY PURSUERS' AGENT TO DEFENDERS' AGENTS IN DISCHARGE OF CLAIMS UNDER FORMER ACTION BETWEEN THE PARTIES—ARRESTMENT USED IN HANDS OF DEFENDERS' AGENTS AFTER CHEQUE HAD BEEN HONOURED BY DRAWERS' BANK, BUT BEFORE INTIMATION OF ITS ACCEPTANCE HAD BEEN MADE TO PAYEES' BANK OR TO PAYEE—PERSONAL BAR TO PURSUERS FROM USING ARRESTMENTS — CIRCUMSTANCES IN WHICH ARRESTMENT WAS HELD VALID.

In this action the pursuers, engineers in Paisley, sued the Old Park Forge Ltd., registered under the Companies Acts and carrying on business in Sheffield, for the sum of £30, 12s. 6d. in name of damage alleged to have been suffered by the pursuers in consequence of the defenders' breach of contract. Arrestments *jurisdictionis fundandæ causa* were used by the pursuers in the hands of Messrs T. & W. Walker & Laird,

Outer House. *Lord Dundas.*

Pollock, Whyte & Waddell v. The Old Park Forge Limited.

a firm of writers in Paisley, who were acting for the defenders in a litigation between the present parties in the Debts Recovery Court there, in which litigation the present pursuers had been unsuccessful. The warrant, execution and schedule of the said arrestment purported to arrest in the hands of the said firm the sum of £60, more or less, due and addebted by them to the "Old Park Forge Company Limited."

The defenders challenged the validity of these arrestments to found jurisdiction against them upon two grounds, and made averments to the effect that (1) the defenders' Company was designated in the schedule of arrestment as "The Old Park Forge Company Limited," whereas their proper designation was "The Old Park Forge Limited." (2) The only sums due to the defenders in the hands of the arrestees were the proceeds of a cheque for £43, 8s. 6d., which had been handed to the arrestees by the pursuers' agent in discharge of defenders' claims under the said debts recovery action; and the arrestments had been used by the pursuers' agent after the said cheque had been honoured by the drawers' bank but before intimation of its acceptance had been made either to the arrestees' bank, through which it had been passed, or to the arrestees. The details of this transaction are fully set forth in the Lord Ordinary's note *infra*.

The defenders pleaded:—

1. The defenders being domiciled in England, and the arrestments founded on by the pursuers being ineffectual to arrest funds belonging to the defenders in respect that they are not named in the warrant, execution or schedule thereof, the action should be dismissed.

2. The pursuers being personally barred from arresting the proceeds of their cheque for £43, 8s. 6d. for the purpose of founding jurisdiction against the defenders, and T. & W. Walker & Laird being otherwise unindebted to the defenders at the date when the arrestments were used, the action should be dismissed.

An argument upon these preliminary pleas was heard in the Procedure Roll on 21st January 1907, before the Lord Probationer (Guthrie), and on 22nd January the Lord Ordinary issued an interlocutor *repelling* the first plea in law for the defenders, and allowing the parties a proof of their averments as to the alleged arrestment *jurisdictionis fundandæ causa*.

Lord Dundas.—The pursuers here maintain that the defenders, the Old Park Forge Ltd., carrying on business at Sheffield, have been duly subjected to the jurisdiction of this Court by an arrestment laid on by the pursuers, *jurisdictionis fundandæ causa*. The defenders state two pleas as against the validity of the arrestment. The first of these is based upon the fact that in the schedule of arrestment and execution thereof the defenders are designed as "The Old Park Forge Company Limited," their true designation being "The Old Park Forge Limited." My opinion, agreeing with that which was expressed by the Lord Probationer (Guthrie) yesterday, is that this plea is ill-founded, and must be repelled. It is a purely technical one. It is admitted that no Company exists bearing the designation of "The Old Park Forge Company Limited"; and indeed it would be scarcely possible that that should have been the case, looking to the provisions of sect. 20 of the Companies Act 1862. Nor is it suggested that there was any risk of misapprehension in the matter, or that any one was, or could have been, misled by the technical error in description. But Mr Cowan very properly made reference to authorities, of which the case of *Henderson's Trs.*, 1831, 9 S. 618, was probably the most favourable to his contention. The blundered description there was "Sibbalds Brothers," which should have been "Sibbalds Brothers & Co." I do not, however, think that this case is an authority for Mr Cowan's contention. *Henderson's* case was commented on and distinguished by Lord Kincairney in a decision—*Hannan*, 1897—which is not contained in the reports, but is set forth in Mr Graham Stewart's work on the Law of Diligence at p. 849. I am content to adopt Lord Kincairney's reasoning in that case, and his distinction of *Henderson*, particularly upon the ground that the error there occurred in the description of the names of the arrestees. The second plea for the defenders cannot, as counsel were agreed in admitting, be safely disposed of without some enquiry into the facts, and I must therefore allow a proof as regards these. I was reluctant to run the risk of having hereafter to allow a second proof upon the merits of the case, looking to the small amount which is at stake in the action. But counsel for both parties declined to consent to an allowance of proof which should include the whole matters raised upon the Record; and I must follow the well-established rule that "it is only in very exceptional circumstances"—which I cannot say here exist—"that the proof on the question of jurisdiction should be reserved until the proof on the merits is taken" (*Tancred, Arrol & Co.*, 1890, 17 R. 514).—22*nd January* 1907.

Proof was led on 15th March 1907.

A summary of the evidence and of the argument and authorities quoted for the defenders is given in the Lord Ordinary's Note *infra*.

The Lord Ordinary *repelled* the second plea in law for the defenders.

Lord Dundas.—The foundation of jurisdiction in these Courts against a foreigner by arrestments used for that purpose is a recognised part of our legal system. But the doctrine is not viewed with favour by the Court. In a recent case it was

characterised by Lord-Justice Clerk (Moncreiff) as "a fiction which ought not to be stretched" (*Baines* v. *Tait*, 1879, 6 R. 846 at p. 850). I confess that it is with some reluctance that I find myself constrained to sustain the jurisdiction in this case.

The pursuers are a firm of engineers at Johnstone. The defenders are a limited company, carrying on business at Sheffield. It appears that on 24th October 1905 the pursuers ordered certain forgings from the defenders, the price of which became due on 10th December 1905. The pursuers did not then pay the price, and the defenders, on 8th May 1906, proceeded to sue them for it in the Debts Recovery Court at Paisley; and on 14th June 1906 obtained decree for the amount, £32, 9s. 4d., with £9, 1s. 10d. of expenses. The pursuers still failed to make payment, and the defenders gave them a charge on 4th July 1906, which was followed by an execution of poinding on 23rd July 1906 (No. 31 of process). The agents employed by the defenders in connection with these proceedings—and with these only—were Messrs T. & W. Walker & Laird, Writers, Paisley. On 25th July 1906, the pursuers' agent, Mr Cameron, called upon Mr Laird, adjusted with him the amount due,—viz. £43, 8s. 6d.,—and tendered in payment thereof a cheque drawn by the pursuers upon the Gallowgate branch in Glasgow of the Royal Bank of Scotland. Mr Laird declined to withdraw his diligence, or to give a receipt for the money, until the cheque should be duly honoured, and instructed that no entries in regard to it should be made in his firm's books. Subject to these safeguards, he sent the cheque next day through his bank—the National Bank at Paisley—for collection. The cheque was "specially presented" by the Head Office in Glasgow of the National Bank to the bank in Gallowgate between one and two o'clock on the 27th. The effect of this was, as is explained by Mr Waddell, the accountant of the latter bank, that "the National Bank would at once get credit for the amount." Mr Smith, the accountant in the Paisley branch of the National Bank, further explains that "directly the head office of our bank is apprised of the fact that a cheque has been met in Glasgow, our branch will be credited at the head office with the amount of the cheque, but we would not receive information till the following day. They would credit us in what we call our Sundries Account. That would be done directly the head office had been informed that the cheque had been met at the head office in Glasgow during business hours." In point of fact, neither the Paisley branch of the National Bank nor Messrs Walker & Laird knew the fate of the cheque until the 28th. But the pursuers' agent, Mr Cameron, acted with extraordinary vigilance and promptitude. He telephoned on 27th July to the Gallowgate branch bank; ascertained that the cheque had been honoured; and immediately sent a messenger-at-arms to Paisley, who arrested, in Walker & Laird's hands, "the sum of £60, more or less, due and addebted by them to the 'Old Park Forge Co. Ltd.'" It was argued for the defenders that this arrestment truly attached nothing; because on the afternoon of July 27th, neither the Paisley bank nor Walker & Laird knew the fate of the cheque; and if the said bank had, on that day, given cash to Walker & Laird, they would have done so, not as against the cheque, but upon the faith of their customers' credit; and it was further maintained that the defenders could not have insisted upon payment from Walker & Laird until the money had been actually received by the latter, or by their bank —*i.e.* the 28th. I am afraid that one must go rather by the facts of the case than by the parties' knowledge of these at the time. Now, when the arrestment was used, it appears that the Paisley branch was already duly credited in the Sundries Account at head office in Glasgow with the cheque for Walker & Laird, and that the latter had a fund of credit for behoof of the defenders. Mr Smith says: "Supposing we had been informed by wire or telephone that the cheque had been met, we would at once on demand have paid Walker & Laird the amount of the cheque or credited them with the amount, and that quite apart from their being in good credit with us as customers." Now, before four o'clock on the afternoon of the 27th—when the arrestment was used—the National Bank, who had been charged by Messrs Walker & Laird with the duty of collecting this cheque for them, had in fact collected it, and did, as I think, hold the money for Messrs Walker & Laird. In these circumstances, though the case is a narrow one, I consider that the arrestment was—(apart from any question of personal bar)—validly laid on. But Mr Cowan for the defenders pressed upon me, with ability and force, a further argument to the effect that assuming that any other creditor of the defenders could validly have used arrestment as was here done, the pursuers were personally barred from doing so. There is, I take it, no doubt that a particular creditor may —in special circumstances, or by his own actings —be so barred (see, *e.g.*, *Campbell*, 1858, 21 D. 63—Lord Wood's opinion).

Thus, where an arrestment was used in *mala fide*, and so as to be of the nature of a "trick," the Court refused to allow the arrester to take benefit from it (*Rintoul*, 1862, 1 Macp. 137). Similarly, when a vessel had been illegally and forcibly brought into Greenock Harbour, and arrestments were then used by the persons who had so brought her, it was held that the latter could not be permitted to derive advantage from their own illegal actings (*Carlberg*, 1877, 5 R. 390, affd. 1878, *ib.* [H.L.] 217, and 3 App. Cas. 1322). Again, in the case of *Graeme's Trs.*, 1888, 15 R. 691, the antenuptial marriage

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contract of a Scots lady who married a German conveyed all her estate, including *acquirenda*, to trustees of whom her brother was one. In 1886 a testatrix died, leaving a legacy to the lady. The trustees, including the brother, failed to intimate the marriage contract to the testamentary trustee of the testatrix. In 1887 the brother was sequestrated, and his trustee arrested the legacy in the hands of the said testamentary trustee in respect of a debt alleged to be due by the brother to his sister. The arrestment was held to be invalid, because the brother would not have been entitled to take advantage of his own negligence in failing to intimate the marriage contract; and his trustee had no higher right in the matter than the bankrupt. The defenders' counsel also founded upon *Trowsdale's Tr.*, 1870, 9 Macp. 88, where an unsuccessful attempt was made to arrest documents belonging to the foreign defenders, which had been brought to Scotland for the special purpose of being examined by the arrester; who, after having been ordered by the Sheriff to return them to the defenders in England, placed them in the hands of the defenders' Scots agents, and arrested them in their hands, *jurisdictionis fundandæ causa*. Mr Cowan strove hard to bring the present case within the doctrine of which the decisions to which I have referred are well-known illustrations. He urged that the situation was one of the pursuers' own making; that the pursuers having refused payment of a debt justly due by them to the defenders, the latter were obliged to resort to the Scots Court at Paisley, and to employ Scots agents to conduct their action; and that the pursuers, having, even after decree and diligence, failed to pay their debt, tendered a cheque at the last hour, with the intention of arresting its proceeds immediately afterwards, so as to found jurisdiction against the defender. This course of conduct was, Mr Cowan maintained, whether illegal or not, of a tricky and vexatious character, and such as the Court would not permit the pursuers to take benefit by. He pointed in this connection to the pursuers' Answer 2 to the defenders' Statement of Facts, where it is "admitted that the pursuers did not pay, as they intended to raise the present action." The pursuers' counsel, however, say that the answer quoted, when fairly read in connection with the answer to the immediately preceding article, is deprived of any sinister suggestion. However this may be, I do not see my way to holding that the arrestment in question was illegally used, or that the pursuers are barred by their actings from maintaining its validity. I cannot avoid the impression that Mr Cameron, when he tendered the cheque on July 25th, had it in view to arrest the money, if he could do so, in Walker & Laird's hands, as he succeeded in doing. But though the point is not without difficulty, and though such action savours, to my mind, of sharpness, I can hardly say that it amounts to such *mala fides* or "trickery" as to operate as a bar. I must therefore repel the second plea in law for the defenders, and allow the parties a proof before answer upon the merits of this unfortunate dispute. The defenders' first plea was repelled on 23rd January 1907, for the reasons explained in my opinion relative to the interlocutor of that date. As the present interlocutor is pronounced in vacation, I shall reserve all questions of expenses.—21*st March* 1907.

Counsel for Pursuers, Munro, J. A. Christie; Agents, St Clair Swanson & Manson, W.S.—Counsel for Defenders, Cowan; Agents, Campbell & Smith, S.S.C. W. A. R.

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(*Earl of Halsbury, Lords James, Robertson and Atkinson.*)

4. M'Dougall *v.* Nisbet.

Neilson *v.* R. B. Wilson & Company.

Burgh—Street—Building Regulations—Width of Street—Glasgow Buildings Regulations Act 1900 (63 & 64 Vict. cap. cl.), sect. 20—J. & D. Hamilton and Others v. Nisbet (ante, Vol. XIV. p. 951) Followed.

Appeals against Interlocutors of the First Division of the Court of Session (*The Lord President*, (*Lord Kinross*), *Lords Adam, M'Laren and Kinnear.*)

(*Reported ante, Vol. XII. pp.* 430 *and* 433; 7 F. *pp.* 55 *and* 60.)

Counsel for the Appellants in both these cases appeared at the Bar of the House of Lords and stated that the cases raised questions in regard to the widening of Glasgow streets, and that the decisions in them had been overruled by the more recent decisions in the cases of *J. & D. Hamilton and Others* v. *Nisbet* and *The Caledonian Railway Co.* v. *Corporation of Glasgow and Another*, the judgment of Seven Judges in which cases had been sustained by the House on 13th March last (XIV. S.L.T. p. 951). Parties were agreed that the appeals should be sustained and the Interlocutors of the Dean of Guild of Glasgow and of the First Division be reversed, with costs.

Counsel for the Respondents concurred.

The House *sustained* the appeals and *recalled* the Interlocutors of the First Division.—13*th May* 1907.

Counsel for Appellants, Morison, K.C.; Agents, Webster, Will & Co., S.S.C.; Grahames, Currey & Spens, Westminster.—Counsel for Respondents, M. P. Fraser; Agents, Campbell & Smith, S.S.C.; Martin & Leslie, London.

OUTER HOUSE.

(*Lord Johnston.*)

5. The Lord Advocate *v.* Balfour.

Crown—Salmon Fishing—Salmon and Sea Trout Fishing in Orkney — Udal Law—Salmon Fishing not a Separate Tenement in Orkney, and Held not to be Inter Regalia.

This was an action at the instance of the Lord Advocate on behalf of the Crown and the Commissioners of Woods, Forests, and Land Revenues, against Colonel James William Balfour of Balfour and Trenabie in the county of Orkney, to have it declared "that the whole salmon trout fishings, sea trout fishings, and the fishings for all other migratory salmonidæ in the loch and burn of Kirbister, in the parish of Orphir," Orkney, belonged to the Crown "*jure coronæ*, and form part of the hereditary revenues of the Crown in Scotland," and that the defender had no right to take the same, and should be interdicted from so doing.

After a statement of the law under which the defender and his authors had acquired and held their land, viz., the udal law applicable to the Orkney islands, the defender pleaded: (1) All parties not called; (2) No title to sue; (3) Pursuer's averments irrelevant; (4) The right of fishing for sea trout not being *inter regalia*, the defender should be assoilzied from the conclusion of the Summons relating to sea trout . . . .; (6) *Separatim*, in any event the defender is entitled to absolvitor in respect that his lands are expressly declared in the infeftments thereof to be udal lands.

After the case was first argued the Lord Ordinary *appointed* the case to be further heard on the question whether salmon fishings in Orkney are *inter regalia*, and *ordained* the defender to lodge in process his titles to the land abutting on the Kirbister Burn.

Lord Johnston.—This action has been avowedly raised to test the question of the Crown's general right to the sea trout fishings of Orkney as *inter regalia*.

It is brought against Colonel Balfour of Balfour and Trenabie, and the particular fishings attacked are those of the loch and burn of Kirbister. The plea was taken that as there were other proprietors interested in the lands *ex adverso* of the loch of Kirbister, all parties were not called. I understand that it was admitted that this was the case, and as the Crown did not think it necessary for the trial of the question at issue to call the other proprietors, the Summons has been dismissed so far as regards the loch, so as to confine it to the burn fishings.

Now in order that the Crown should succeed, these three questions must be answered, the first two in the affirmative and the third in the negative.

First. Are the salmon fishings in Orkney *inter regalia* as they are on the mainland of Scotland?

Second. Are salmon trout, sea trout, and the other smaller migratory salmonidæ, salmon in the eye of the common law of Scotland to the effect that they, as salmon, are *inter regalia*?

Third. Has Colonel Balfour an express title to salmon fishings or a title on which to prescribe clothed with possession, which would defeat the Crown's claim, assuming it otherwise good?

The first two of these questions really arise on the defender's plea of no title to sue. That plea the defender is entitled to have disposed of before going into the question of his own right, whether express or by prescription.

The question is a perfectly legitimate one for the Crown to raise, and I have no concern with the particular value of the individual fishings. But as it is a test question, and Colonel Balfour has been selected as the champion of Orcadian fishing rights, I am bound, in fairness to him, to consider the matter of expense and of convenience in the conduct of the case.

Having directed my attention to these matters, I have come to the conclusion that the question whether "sea trout" are "salmon" in the eye of the common law is not one which could be satisfactorily determined without proof. Admittedly the question is novel. As a matter of impression I am inclined to think that "sea trout" are "salmon" in the eye of the common law. But before I could judicially so determine, I must have a judicial knowledge of points of natural history, and of custom, which I could only obtain by proof. That the whole migratory salmonidæ are protected by statute (if, as I think, this is the case) is not conclusive, but would be only an element in the proof. I have a strong impression that the general practice has been, both by inclusive and exclusive possession, to interpret the Crown's direct and the subject's derivative right of salmon fishing as a right also of sea trout fishing. But I may be wrong. And anyway I could not reach this result judicially except on proof. This proof would be a difficult and expensive one, and I would not feel justified in saddling Colonel Balfour with the trouble and expense, and neither would the Crown wish to do so, unless I thought the proof essential to the determination of the question at issue—which, so far as we are presently concerned, is limited to the title to sue. Now, while I am aware that there is a generally well founded objection to taking up questions piecemeal, I think that the circumstances here override that objection. If the commom law of Scotland in the matter of salmon fishings does not apply to Orkney, it is evidently immaterial to Colonel Balfour whether in the

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eye of the common law of Scotland salmon is equivalent to salmonidæ or not. Accordingly I think I am justified in dividing the case in the matter of the title to sue into two, and requiring the Crown to show, first, that salmon fishings in Orkney are *inter regalia*, as they are in the mainland of Scotland, leaving out the question whether the term salmon in the common law of Scotland is restrictive or general and equivalent to salmonidæ.

On the former of these questions I have had substantially no argument. In the debate before me, attention was directed entirely, or almost entirely, to the second question whether "salmon" included "salmonidæ," which it was maintained (contrary to my opinion) that I could determine on authority without proof. I propose, therefore, to direct the case to be put out for further argument on the question which I have indicated.

But the Crown concluded by a demand that Colonel Balfour should produce his titles. In Answer 2 he makes such reference to them that I should have expected them to be produced. Apparently that has not been so. Now until the pursuer has established his title to sue, the defender cannot, as a rule, be called on to produce his titles. Were the object of the call to ascertain what his right by title to fishings or to prescribe fishings was, I would sustain this position on the part of Colonel Balfour. But in the special circumstances of the case I do not think that the question on which I desiderate argument could be satisfactorily or exhaustively dealt with without an examination of Colonel Balfour's titles as evidencing, in his particular case, as an instance, the nature of the original title, and the history of its progress, whether as udal or feudal.

Modern lawyers are not familiar with Orkney titles, and I feel that it would probably aid me to appreciate the general argument on the salmon fishing rights of Orkney if I saw the form in which Colonel Balfour's title stood and could trace its passage from udal to feudal so far as it has undergone that change. It is quite possible that something may turn upon the terms of the feudalisation. And it must be remembered that so far as feudalised the Crown is the superior, and that it is therefore the superior who is calling for the titles.—17*th October* 1905.

A further hearing and argument having taken place, the Lord Ordinary *sustained* the defender's second and fourth pleas, and *assoilzied* him from the conclusions of the Summons.

Lord Johnston.—Referring to my judgment of 17th October 1905, I have had a further and learned and interesting argument on the question whether salmon fishings in Orkney are *inter regalia*. If they are not, then *a fortiori* sea trout fishing is not *inter regalia*, and the defender's second and fourth pleas fall to be sustained.

In the present aspect of it the case is practically a supplement to *Commissioners of Woods and Forests* v. *Gammell*, 1851, 13 D. 854 and 1859, 3 Macq. App. 419. Prior to *Gammell's* case it was settled law that the right of salmon fishing in the rivers of Scotland was a separate heritable tenement, which was vested in the Crown as a patrimonial and beneficial right, and remained with the Crown unless expressly or constructively granted out to the subject. The Court in *Gammell's* case, accepting this as the law applicable to the rivers of Scotland, found that it extended also to the shores of the open sea round the coasts of Scotland. In the present case the Crown seeks to extend the doctrine merely to the rivers of Orkney, for though a particular river is selected, the case is admittedly a test case. But I think that I am justified in saying that the case is practically a supplement of *Gammell's*, because there it was demonstrated that there can be no distinction maintained in principle between the rivers and sea shores of Scotland in the matter of salmon fishings. If, therefore, the Crown can extend the doctrine to the rivers of Orkney, it must, *pari ratione*, extend to the seashore also.

It aids, I think, in forming a judgment in this case to consider the reasoning, historical and otherwise, on which the judgment in *Gammell's* case proceeds.

The established doctrine as to the Crown's rights in salmon fishings is part of the feudal law of Scotland. Neither the feudal law in general nor the law of salmon fishings in particular came to us as a systematic code. The Court in *Gammell's* case, 13 D. at page 863, refer to a date "when the law was more completely matured," which necessarily implies that the law had been developed or matured gradually. And the difficulty of tracing the steps and dates of this development or maturing, forms one of the difficulties of applying the common law of Scotland to Orkney. One thing is certain, that the general feudal system and law were applied to Scotland before the special and incidental branch of it which dealt with salmon fishings was developed. It is also certain that the application of the feudal law, even to Scotland, was a gradual process—that it held sway in the Lowlands long before it was fully recognised in the Highlands—that the exchange of the broadsword for the sheepskin as the title to land was not completely effected even on the mainland of Scotland, except by a gradual process, and within historic, and, personally I believe, within comparatively recent times. And if the development and application of the Scottish feudal system was gradual, the "maturing" of the law of salmon fishings was so also.

Further, while the feudal system was introduced into most European countries about the

same time as into Scotland, nowhere except in Scotland has there been this peculiar incident of rights in salmon fishings engrafted on it. It is not essential to the feudal law, but a peculiarity of the Scottish feudal law.

The steps in the development of the law seem to have been these. Traces of the introduction of the feudal system are to be found apparently before the Norman conquest of England. At any rate by the time of Bruce and the English Wars, or the end of the thirteenth century, it was the law of that part of Scotland which had come under the domain of anything like systematic law; and the great feature of the system, "that it invested the sovereign with the character of original and supreme proprietor of all land subject to his dominion" (Menzies, 1st edition, p. 490), was necessarily adopted with it. On that fiction the whole feudal land law of Scotland rests, and has been developed, even to the days of modern statutory conveyancing.

Next in course of development of the feudal land law came the principle that "no right in lands which is by our feudal customs appropriated to the sovereign, and therefore goes by the name of *regale*, is presumed to be conveyed by the charter unless it is expressed" (Erskine, II. 6, 13). These "are truly parts and pertinents of lands, and as such would naturally go to the vassal by his charter, if they had not been by our feudal customs appropriated to the sovereign, and so understood to be excepted from the grant" (Erskine, II. 6, 13).

And, lastly, the right of salmon fishing is one of those heritable rights which, though naturally a pertinent, our feudal customs have recognised as appropriated to the Crown, and not to pass by Crown grant unless contained therein expressly or constructively—in other words, it is a *separatum tenementum*.

The first of these steps is a *fictio juris*; the second and third are customary developments in the course of the maturing of the law. When they were fully accepted I cannot say. And why the last of them was accepted, authorities differ. But from the series of statutes of the Scots Parliament, referred to, *e.g.*, in *Earl of Kintore* v. *Forbes*, 1826, 4 S. 641, it is clear that salmon fishing was at a very early date, even so early as William the Lion, regarded in Scotland as of exceptional value; and though these statutes are concerned with the regulation and protection of, and not the property in, salmon fishings, I think that it must be accepted that the law as affecting the property in salmon fishings was during the same period maturing. When the right of salmon fishing definitely received the attribute of a separate tenement I cannot tell. I can only say that by 1606 the law had so completely matured that Craig, who published his "Jus Feudale" in that year, wrote (I. 16, 24): "Salmonum piscatio apud nos inter regalia numeratur, neque cuiquam hodie concessa videtur, nisi specialis ejus in concessione mentio fiat." The use of the word "hodie" is noticeable. But from titles which have come under my notice, I cannot but think that the law had reached that point a considerable time before Craig wrote.

Now in Orkney we have the same thing in miniature, with this difference, that we know that Orkney had a system of law which preceded the advent of the feudal system, and know what that system of law was, which is more than can be said of Scotland. In Orkney we have every stage of the growth of the law, but more recent in date, and even so not yet complete and matured. We have the Orcadian land law, which preceded the feudal, not indeed in *viridi observantia*, but still maintaining itself against the encroachment of the feudal. We have, in fact, the history of Scotland repeated, but not completed. The feudal system in matter of title is only in course of supplanting the Orcadian land law. It applies to many estates and parts of estates, but it does not apply universally over the islands.

Accordingly, the questions which I have to solve are these:

What is the law of Orkney in the matter of salmon fishing, irrespective of feudal considerations?

How has that law been affected by the connection of the islands with Scotland?

Has the gradual feudalisation of titles drawn with it as an incident the Scots law of salmon fishing?

It is, however, I think, necessary, before attempting to dispose of these particular questions, to consider first the history of Orkney as it bears upon them.

The history of Orkney, as it affects the relation of the Crown to the islands of Orkney, and the position of the Crown as the fountain of feudal right, is rendered obscure by the many changes and transactions which have taken place between 1468 and the present day. Orkney was, prior to 1468, part of the kingdom of Norway. But the law of Norway was not feudal. The lands of the islands were not held on feudal, but on udal tenure. Title did not emanate from the Crown, and there was no room for the fiction that the Crown was the original proprietor of all land subject to its dominion. The scat was of the nature of a land tax, and not of a reddendo. Besides the Crown, which possibly had some lands in property, as well as rights to scat and other dues, there were three sets of proprietors, the earl, the bishop, and the udallers. Both earl and bishop had lands as well as rights to dues out of lands. But neither the Crown, nor the earl, nor the bishop had any rights as feudal superior, except, it may be, by convention, for it is not certain that the earls, latterly of Norman stock, may not have, even before 1468, commenced the introduction of the

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feudal system of title by inducing udallers, for security and protection's sake, to take *quasi* feudal titles from them in some cases. In 1468 King James III. of Scotland married Margaret, daughter of King Christian I. of Norway, and received with her a dowry of 60,000 florins, and in security of 50,000 thereof not paid down, received in pledge "omnes et singulas, terras nostras insularum Orcadensium cum omnibus et singulis juribus, servicis, et justis suis pertinentiis" (Peterkin's Rentals, App. p. 11 foot, and Scots Acts, 1471, c. 4, Th. II. 187). This hypothecation, never redeemed, is the source of the Crown rights in Orkney. Its nature and circumstances preclude recourse to the feudal fiction. Shortly after the impignoration the Crown acquired the earldom and all that went with it from William Sinclair, the last Norwegian earl, by the Contract of Excambion of 1471, giving therefor lands on the mainland of Scotland; and on 20th February 1471 the Earldom of Orkney and Lordship of Shetland was united to the Crown with parliamentary sanction (Th. II. 102). But this only placed the Crown in the shoes of the earl, as it was already, so long as the hypothecation continued, in those of the King of Norway. Yet so early as 1490 the Crown is found granting a charter in feudal form with a tenendas, and with a reddendo in masses, etc., erecting the bishopric into a free regality (Peterkin, App. p. 14). Among the pertinents are included *piscationibus*.

What happened between 1471 and 1540 I do not know, but in the latter year, 1540, cap. 19, Th. II. 360, "the lands and lordship of Orkney and Shetland and the isles pertaining thereto and their pertinents" are contained in a general Act of Annexation to the Crown. But from 1562 to the beginning of the seventeenth century the earldom was held by Earls Robert and Patrick Stewart, an illegitimate branch of the Stewart family, and if they did not also hold the bishopric, they held some rights relating to it.

Between 1612 and 1615 a series of transactions took place which bring things nearer to modern times. The family of Arnot of Berswick appear to have acquired the right of Earl Patrick, probably by wadset, and, in September 1612, King James VI. acquired from Sir John Arnot and his sons for 300,000 pounds Scots "Sundry lands, isles, and others specified in the same contract, lying within the bounds of Orkney and Zetland." See the ratification of this contract, 1612, cap. 14, Th. IV. 480. Following on this was the annexation of the same year, found in 1612, cap. 15, Th. IV. 481. The subjects annexed were "the lands, isles, skerries, holms, mylns, multures, fishings, annual rents, and others whatsomever as well specified as generally after mentioned," and then followed an enumeration of lands and isles within the Sheriffdom of Orkney said to be held by Sir John Arnot of the Crown, and to have been resigned in the hands of the Crown *ad perpetuam remanentium*. But there followed a general clause, "together with all and whatsomever other lands, &c. . . . fishings as well in fresh as salt water and other rights and duties whatsomever pertaining to the said earldom of Orkney and lordship of Zetland," with pertinents and heritable jurisdictions, "together also with all and sundry other privileges, immunities and liberties whatsomever contained and expressed in the infeftment made and given to Patrick, Earl of Orkney, of the said Earldom and lordship." The Act further provided for the annexation in advance of similar lands and rights, should the King acquire them, from James, Bishop of Orkney. This Act was followed by 1612, cap. 16, Th. IV. 482, which appointed a commission to transact with the bishop. This appointment apparently resulted in a disentanglement, by way of excambion or otherwise, of the earldom and the bishopric. For in Peterkin's Rentals, App. p. 31, there is found a charter of mortification, of date October 4th, 1614, giving, mortifying, and confirming to the bishop certain definite property. I believe that if the defender's titles require to be examined, the definitions in this writ are of importance; but at present it is only necessary to note that one set of lands, in the parishes of Holme, Orphir, Stromness, South Sandwrek, North Sandwrek, Schapinsay, Walls and Hoy, are conveyed without reference to fishings, while another set of lands, in the parish of St Olav, are conveyed *cum piscariis salmonum aliorumque piscium*. Then follows a tenendas and a blench reddendo.

Now this transaction does not appear to me to indicate a vesting in the Crown of the whole lands of Orkney, even *nomine superioritatis*, but only what was formerly in Earl William Sinclair, afterwards in the Crown, afterwards in Earls Robert and Patrick Stewart, and finally in the Arnots, with what change in detail may have been made by arrangement with the bishop. But it does indicate that the Crown assumed to deal feudally, not only with what came into its hands patrimonially, but in such a transaction as that with the bishop, and in doing so applied the feudal conveyancing of Scotland to Orkney estates, and even dealt with salmon fishings as they would have been dealt with in Scotland.

There are only three other episodes which need be mentioned.

First, the wadset of the earldom and all that it carried to the Earl of Morton in 1643, confirmed 1644, cap. 246, Th. VI., Part I. 228, and renewed to Viscount Grandison, a trustee for the Morton family, by 1662, cap. 46, Th. VII. 398, by both of which Acts, the one during the Commonwealth, the other after the Restoration, the earldom was dissolved from the Crown.

Second, the reduction of the Grandison-Morton title, at the instance of the King's Advocate, in

1669, M. 7857, and the confirmation by Parliament of the reduction, 1669, cap. 19, Th. VII. 566.

Third, the rehabilitation of the Morton Grant by charter of 12th February 1707, accompanied by the Acts 1707, cap. 9 and 46, Th. XI. 429 and 471, dissolving the earldom from the Crown, and ratifying the charter. The Morton rights passed to the Zetland family in 1766, with whom they remain.

I believe that I should add that at the abolition of Episcopacy, anything that remained of the bishopric and its lands devolved on the Crown, and that certain of these lands have since been given out to be held in feu of the Crown, but I cannot lay my hands on authority for this statement.

Returning now to the three questions which I think require to be considered.

In the first place, by the udal law, or law of Orkney, as it stood in 1468, and as it stands now, except so far as innovated upon, the Crown was not presumed by any *fictio juris* to have been the original proprietor of the whole territory of the islands. Therefore, even if salmon fishing is to be regarded as a separate tenement by udal law, of which there is not the slightest suggestion, there is no room for the presumption that the property in salmon fishings belongs to the Crown unless specially or constructively granted out. The reasoning regarding foreshores on which the judgment of the Court rests in *Smith* v. *Lerwick Harbour Trs.*, 1903, 5 F. 680, applies with equal force to the present question. Hence if this Summons had commenced with a general declarator, as did *Gammell's*, that all the salmon fishings in the rivers and round the coasts of Orkney, so far as not granted out, belong to the Crown *jure coronæ*, and form part of its hereditary revenues, it must have failed.

But the present action is limited to the fishings in the Kirbister burn in the parish of Orphir, and these particular fishings are said to belong to the Crown *jure coronæ*, and to be part of its hereditary revenues. The conception of *jus coronæ* involves, I think, general and not special considerations, and when the general proposition cannot be maintained, it is difficult at first sight to conceive of any good ground for the particular. But the position is not, I imagine, so simple as it looks.

In the second place, how has the Orcadian law in the matter of salmon fishings been affected by the connection of the islands with Scotland? I have examined the history of that connection with perhaps too great minuteness, and I think that the examination shows that the Crown derived its rights in Orkney in a definite and historic manner, which precludes the idea or fiction that the Crown is the fountain of all land rights and the paramount superior, that it has dealt with the earldom and the bishopric in feudal form, and that, as the earldom and the bishopric comprised not merely customary duties from lands, but the property of certain lands, these have been held for a very long period on feudal tenure, and under titles which sometimes make mention of fishings.

It may be added that for the convenience of transmission, and probably at first with a view to greater security of title, certain lands and estates in Orkney, which pertained neither to earldom nor to bishopric, have been feudalised in matter of title by their udal owners. Although it is necessary carefully to distinguish between proper feudalisation by acceptance of a Crown grant, which involves at least the fiction of a prior vesting in the Crown to admit of the re-grant, and the mere use of feudal forms when there has been no real interposition of the Crown (*Beatton* v. *Gaudie*, 1832, 10 S. 286; *Rendall* v. *Robertson*, 1836, 15 S. 265).

The results of the enquiry sufficiently demonstrate that nothing has occurred since 1468 which amounts to a general acceptance in Orkney of the Scots feudal system, and still less of its customary incidents.

But, in the third place, has the gradual feudalisation of estates in the matter of title, whether this has occurred through the medium of earldom or bishopric, or in particular instances of private udal properties, drawn with it as an incident the Scots law of salmon fishing? It certainly cannot be maintained that the partial adoption of the feudal system in matter of tenure has so affected the whole of the Orkneys as to bring those parts which have not yet been feudalised under the Scots law of salmon fishing rights. Can it, then, apply to all estates now held on feudal tenure, while it does not apply to those still held as udal? Looking to the origin of the Scots law of salmon fishing, there is something anomalous in the idea that it could apply runrig over the islands, according as the title to lands has or has not been feudalised. And I do not think that this is a necessary consequence of such feudalisation as has taken place in Orkney. I think that the tenure may be adopted without the adoption of an incident of Scots feudal law, not essential to the tenure and peculiar to the particular feudal system of Scotland. It must, I think, be admitted that the feudal system was first adopted in Scotland, and that the particular law of salmon fishings was afterwards engrafted on it, and necessarily so, for it is peculiar to Scotland. I do not find it difficult in the circumstances to reach the conclusion that the Scots feudal system has been adopted *sparsim* in Orkney, in matter of tenure, or as a means of conveyancing, but that the peculiar Scots law of salmon fishings has not been thereby made applicable to those parts of Orkney only which have been feudalised.

If in Scotland it required feudal custom to render that *regale*, and to appropriate it to the sovereign, which is naturally a part and pertinent of land, and as such would naturally go to the

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vassal by his charter (Erskine, II. 6, 13 and 15), where there is no such feudal custom such natural part and pertinent must, I think, remain a part and pertinent, as apparently it does in other countries than Scotland.

I do not ignore the fact that in some grants the Crown has expressly included fishings. But I cannot in this, which was doubtless the act of the Scottish conveyancer, find proof that the feudal customs of Orkney had raised these fishings into a separate tenement and *jus regale*, or that had these words not occurred in the charters the Crown could have prevented, by process of law, its vassals taking salmon, within the bounds of their lands.

It is, I think, sufficient proof that no such custom has arisen, even in those parts of Orkney where title has been feudalised, that no instance has been given by the Crown, where during the four centuries and a half that Orkney has been under its sway the Crown has vindicated its alleged right. The Crown does not allege that it has fished or let fishings, or has interfered to prevent those not deriving right from it from fishing. It is in vain, therefore, I think, to contend that the feudal custom of Scotland has become that of Orkney.

In fact one, and probably the most potent, reason for the growth of the custom in Scotland, viz., the value of the fishings, has not existed in Orkney. The fishings have been of little or no value hitherto, and the present is the first known assertion of the alleged right on the part of the Crown.

I have abstained from referring to the defender's titles, though they illustrate the situation, as to do so is unnecessary for my judgment.

I shall sustain the second and fourth pleas for the defender and assoilzie him from the conclusions of the Summons, with expenses.—*8th April* 1907.

Counsel for Pursuer, Solicitor-General (Ure, K.C.), Pitman; Agent, Thomas Carmichael, S.S.C.—Counsel for Defender, C. N. Johnston, K.C., Macphail; Agents, Hamilton, Kinnear & Beatson, W.S. R. S. B.

FIRST DIVISION.

(*Lords M'Laren, Kinnear and Pearson.*)

6. Love *v.* Love.

JURISDICTION—QUESTION RELATING TO HERITABLE ESTATE IN SCOTLAND—HUSBAND'S RIGHT OF ADMINISTRATION—CLAIM BY WIFE THAT HERITABLE SECURITIES BELONG TO HER EXCLUSIVE OF HUSBAND'S RIGHT OF ADMINISTRATION—SCOTS COURTS HAVE JURISDICTION IN RESPECT QUESTION RELATES TO SCOTS HERITAGE.

Reclaiming Note against Interlocutor of Lord Dundas.

This action was brought by Mrs Margaret Marshall or Love against Andrew Love, her husband, for declarator that the sums of money contained in three bonds and dispositions in security over Scots heritage belonged, to the extent of one-half, to the pursuer, exclusive of the defender's *jus mariti* and right of administration.

The bonds in question were dated 9th July 1883, 4th March 1889, and 14th May 1902, and stood in the names of the pursuer and her sister jointly. The pursuer had succeeded under her father's trust disposition and settlement to a legacy of £1000 from which her husband's *jus mariti* and right of administration were expressly excluded. It was admitted that the two earlier of the three bonds in question were to the extent of one-half investments of the pursuer's legacy. The pursuer averred that the third bond to the extent of one-half was an investment of part of her legacy; the defender averred that this half of the sum in the bond represented money which he had remitted to his wife for investment on his own behalf.

The defender averred that he was resident in India. He pleaded, *inter alia*: "(1) No jurisdiction."

The arguments and the authorities referred to sufficiently appear from the judgment of the Lord Ordinary.

On 2nd March 1907 the Lord Ordinary pronounced an interlocutor whereby he, *inter alia*, repelled the plea of "No jurisdiction."

Lord Dundas.—The pursuer, a married woman, seeks declarator that certain bonds and dispositions in security, described in the Summons, so far as she has right thereto, belong to her, exclusive of the right of administration of her husband, who is the compearing defender; and that she is entitled, without his consent, "to discharge or assign and to grant all necessary deeds in connection with the said bonds and dispositions in security, sums of money therein contained, and lands therein described." The compearing defender maintains the negative of these propositions. But he states a preliminary defence which requires consideration. It appears from the pursuer's pleadings that the parties were married on 6th August 1902; that on 17th October 1902 the defender "returned to India, to a situation which he had held previous to the marriage"; and that, "with the exception of the two months after the marriage, and the six months in 1906 when he was home on leave of absence, the pursuer's husband had been continuously resident in India since the date of the marriage." The defender is described in the Summons as "chief engineer, s.s. *Hassara*, B.I.E. Club, 4A Ravelin Street, Bombay, India." He explains (Ans. 1) that he is "resident in India. He is a marine engineer, sailing from and to various ports in India, and has his headquarters at Bombay." The defender pleads—"1. No jurisdiction." His counsel argued that, in this state of the pleadings, I ought to sustain this plea *de plano*, and dismiss the action. The plea, as stated—though it has passed muster in various reported cases—is not, I think, in point of form a plea in law at all, because it does not amount

to a proposition in law. But the defender's counsel contended that his client, being resident in India, was *eo ipso* outwith the jurisdiction of this Court. He referred to the *dicta* of Lord Kyllachy in *Buchan*, 1905, 7 F. 917, at p. 922—that "apart from the ownership of heritage in Scotland, or arrestment *jurisdictionis fundandæ causa*, residence, and not domicile, is what in ordinary actions determines the jurisdiction"; and in *Tasker*, 1905, 8 F. 45, at p. 51—that "the only domicile to be regarded in ordinary civil actions is the ordinary forensic domicile—the domicile held to be constituted by forty days' residence,—and so held, as Erskine explains, 'by custom, and in order to prevent disputes.'" I do not think that the wide general question which was the subject of Lord Kyllachy's observations in these cases is here raised for consideration or decision. In the first place, the defender's averments are not, in my judgment, sufficiently specific to raise it, even if the pursuer's somewhat gratuitous contributions on the subject are prayed in aid. The defender's Record contains no substantive averment that he is not subject to the jurisdiction of this Court; nor any definite statement as to the character or quality of his residence in India, or other facts from which an inference might be drawn that the jurisdiction of the Scots Courts is ousted. I would have given the defender's counsel an opportunity of amending his Record, if I had not formed an opinion adverse to his plea upon grounds other than want of specification in his averments upon this matter. It appears to me that the questions in dispute in this case relate essentially to Scots heritage. The bonds and dispositions in security are heritable; and there is a dispute as to the title necessary for their discharge, or for the transfer of the lands contained in them. The pursuer claims that she is entitled to deal with these heritable subjects apart from her husband's curatorial right of administration. The defender, on the other hand, maintains that he is entitled to exercise this right. The question so raised is admittedly one of Scots law; and it can, in my opinion, be determined only by the Court in Scotland. I am not aware of any decision expressly determining the point under consideration. The case of *Ashburton*, 1892, 20 R. 187, is instructive but not conclusive. It was there decided that the defender, a foreigner, being infeft in Scotland, Scots land under a bond and disposition in security, was subject to the jurisdiction of the Scots Court in all actions relating to the lands contained in the security; and also that, being a trustee in a Scots trust including Scots heritage, he was subject to the jurisdiction of the Scots Courts in all actions relating to the trust and the trust estate, and therefore in an action in which this Court had to determine whether the trust still subsisted or had been brought to an end. In the present case, the defender is not infeft in Scots heritage. But that fact is not, in my judgment, material. The dispute is none the less one as to the right of administration and transference of Scots heritage, and must therefore, as I think, be determined by the Scots Courts, and by them only. If these views are correct, they afford sufficient ground for repelling the defender's plea of "no jurisdiction." The pursuer's counsel referred to the correspondence, which is produced, as providing a further basis for this decision. It appears from the letters—see especially that of the defender's law agent dated 31st July 1906 — that the defender, when he was in Scotland in that year, took up the firm position of declining "to sign any documents until fully advised as to the reasons for changes in said investments," and of withholding his consent "to the money being invested in such a way that it will be placed beyond his right of administration." At the same time, the defender's agent stated, with reference to Mrs Love's intention of raising an action in this Court to have it found that her husband's consent to such deeds was unnecessary, that "my client instructs me to accept service on his behalf of any such action, and to defend it. He is about to leave this country for India, but has left his address with me, where I can communicate with him." It is not necessary for me to pronounce a decided opinion as to the effect of the letters. It is sufficient to say that the actings of the defender and his authorised law agent seem to me to come very near, if they do not amount, to a prorogation of the jurisdiction of this Court. No separate argument was submitted in support of the defender's second plea in law, and I shall therefore repel it.

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Love v. Love.

When one comes to the merits of the case, the course is plain enough. The pursuer avers that her father, Mr Marshall, who died in 1890, by his trust settlement left a legacy to her of £1000, payable on her attaining the age of twenty-five, which should be expressly exclusive of the *jus mariti* and right of administration of any husband she might marry; that, at the date of his death, her father held the bonds (first) and (second) respectively described in the Summons; and that his trustees did not realise these bonds, but by arrangement with the pursuer, who was then unmarried, made up title to them, and assigned them to her, in *pro tanto* satisfaction of her legacy. In regard to these bonds, the defender's counsel frankly, and I think properly, admitted that upon the merits of the case he could state no defence to the pursuer's demand; and I shall therefore grant decree of declarator as concluded for, so far as they are concerned. The pursuer further avers that, when the balance of her legacy was paid over to her by her father's trustees, she invested it in a share, viz. £200, of the bond (third) described in the Summons. This statement is denied by the defender; and he goes on to aver that the £200 so invested by the pursuer was money which he had remitted to her before the marriage to be invested by her on his behalf. Counsel for the parties were agreed that there must be a proof upon this part of the case, and I shall allow one accordingly.

The defender *reclaimed*.

The Court, without calling on counsel for the respondent, *adhered* to the interlocutor of the Lord Ordinary.

Lord M'Laren said that the possession of heritable estate in Scotland was a good ground for subjecting a party to the jurisdiction of the Scots Courts even in cases where the question did not relate to the heritage. Here the question related to Scots heritage—the right to the proceeds of a heritable bond. Such bonds were still heritable except *quoad* succession. The Courts of Scotland therefore had jurisdiction because they alone could effectually determine the question raised.

Lord Kinnear and *Lord Pearson* concurred.—19*th March* 1907.

Counsel for Reclaimer, Macmillan, J. Macdonald; Agent, T. M. Pole, Solicitor.—Counsel for Respondent, M'Clure, K.C., D. Anderson; Agents, Macpherson & Mackay, S.S.C.

J. S. M.,
for A. M.

2nd Div.

James Nimmo & Company Limited v. Fisher.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Low.*)

7. James Nimmo & Company Limited *v.* Fisher.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), Sched. 1 (12)—Payment during Incapacity—Workman in Right of Agreement Registered under Act Earning with Same Employers as before Accident (1) Lower Wages, and (2) Higher Wages than before Accident—Charge on Registered Agreement—Offer to pay Difference for Period of Lower Wages—Suspension of Charge—Beath & Keay v. Ness (1903, 6 F. 168) Followed.

Reclaiming Note against an Interlocutor of Lord Mackenzie.

(*Reported ante, Vol. XIV. p.* 808.)

The facts of the case appear from the previous report.

The Respondent (Alexander Fisher) *reclaimed*, and *argued*: Under the registered agreement the respondent was entitled to receive compensation at the agreed on rate, (13s. 3d. per week) until the weekly payment was reviewed by the Sheriff (Workmen's Compensation Act, 1897, Sched. 1 (12), and 2 (14); *Steel*, 1902, 5 F. 244; *Pumpherston Oil Co.*, 1903, 5 F. 963). He was accordingly entitled to payment at this rate up till 18th October 1906, which was the amount charged for. The judgment of the Sheriff, which took effect from 18th October 1906, made the question of the amount of compensation payable prior to that date *res judicata*.

Argued for the Complainers: The judgment of the Sheriff decided nothing as to the amount of the compensation payable prior to its date. The workman was only entitled to compensation "during incapacity," and could never claim such sum as, together with the wages which he was earning, amounted to more than the wage which he was earning at the time of the accident (Workmen's Compensation Act 1897, Sched. 1 (*b*) and 2; *Beath & Keay*, 1903, 6 F. 168).

The Court *pronounced* the following interlocutor: ". . . . Find that the compensation due to the respondent was payable only during his incapacity; and further, in respect of his refusal to accept the complainers' offer of £5, 18s. 9d., adhere to the said interlocutor reclaimed against, and decern."

Lord Stormonth-Darling.—The Lord Ordinary has sustained the reasons of suspension, and has suspended the charge on the ground, as explained in his opinion, that the principle of *Beath & Keay* v. *Ness*, 6 F. 168, decided in this Division, applies to and rules this case. In that I agree with him. I think it impossible to read that judgment without seeing that the principle upon which it proceeds is that compensation is only payable during incapacity, and in respect of incapacity. If there is a practical admission on the part of the workman that incapacity has ceased, then he cannot claim compensation in respect of incapacity. It is not necessary to say more. But I think it would be desirable to vary the interlocutor reclaimed against by laying our judgment partly on the offer of the employers referred to in Article 5 of the Complainers' Statement of Facts, and the workman's refusal of that offer. With that alteration I am in favour of adhering to the Lord Ordinary's interlocutor.

Lord Low.—I am of the same opinion. I think this case is ruled by the judgment in *Beath & Keay* v. *Ness*, 6 F. 168, which, I may be allowed to say, seems to me to have been a very well considered and sound judgment. The only difference which was suggested was that here there had been an application to the Sheriff for review. I do not think that is any real distinction, for all that the Sheriff did was to find that the workman's incapacity had partially ceased, and to reduce his compensation to 1s. per week. The reduction only took effect as from the date of the Sheriff's judgment, and the question as to what was due prior to that date was not affected by the judgment. I therefore think that, with the alterations suggested by Lord Stormonth-Darling, the judgment of the Lord Ordinary should be affirmed.

The Lord Justice-Clerk.—I agree. I think that the present case is ruled by the decision in *Beath & Keay* v. *Ness*, 6 F. 168, with which I entirely concur.—14*th May* 1907.

Counsel for Reclaimer, R. L. Orr, K.C., A. Moncrieff; Agents, Simpson & Marwick, W.S.—Counsel for Respondents, Horne, Strain; Agents, W. & J. Burness, W.S. J. H. H.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

8. Kerr *v.* Hood and Others.

Education — School Board — Election—Nomination — Returning Officer — Rejection by Returning Officer of Nomination Papers — Action to Reduce Decision of Returning Officer.

I. Jurisdiction of Court of Session—Finality of Returning Officer's Decision—General Order of Scottish Education Department ultra vires Quoad

Finality of Decision — Education (Scotland) Act 1878 (41 & 42 Vict. cap. 78), sect. 27, and Schedule.

II. Competency of Action of Reduction—Elections (Scotland) Corrupt and Illegal Practices Act 1890 (53 & 54 Vict. cap. 55), sect. 30.

Reclaiming Note against an Interlocutor of Lord Johnston.

(*Reported ante, Vol. XIV. p.* 823.)

The facts of the case appear from the previous report.

The Defenders *reclaimed*, and *argued*: (1) Under the Order of the Education Department, the decision of the returning officer was final and not subject to review at all. This Order was passed under and in virtue of the Education (Scotland) Act 1872, sects. 3, 14, and Sched. B, and the Education (Scotland) Act 1878, sects. 26, 27, and Schedule (*Bone*, 1886, 13 R. 768; *Hodge*, 1897, 35 S.L.R. 634). (2) In any event this was not the proper process in which to review the decision of the returning officer. The only method was a petition to the Sheriff under the Corrupt Practices Act 1890, sects. 30 and 53.

Argued for the Pursuer: (1) The Order of the Education Department did not exclude the jurisdiction of the Court, and if intended to have that effect, it was *ultra vires*: *cf. Duncan*, 1892, 19 R. 594; Corrupt Practices Act 1890, sect. 44. (2) An action of reduction was a competent method of review. The Corrupt Practices Act 1890, sect. 30, provided for an appeal to the Sheriff only on certain specified grounds, and was not applicable to the present case.

No argument was offered by either party on the pleas of "no title to sue" and "all parties not called," or on the question of the relevancy of the averments of malice.

The Court *adhered*.

The Lord Justice-Clerk.—I think this case has been exceedingly well argued, but after having listened carefully to the arguments placed before us I am unable to say that the Lord Ordinary has gone wrong in the decision at which he arrived.

It is merely a decision affecting preliminary pleas. In the first place, the argument of the reclaimer is that there is no jurisdiction in this Court. Now I think it will be agreed on all hands that the jurisdiction of this Court can only be excluded by statutory enactment, and that words to exclude the jurisdiction of this Court and the ordinary Courts of the country, whatever they may be, must be clear and unambiguous. Now we have been referred to no such words in any Act of Parliament. The whole argument of the Dean of Faculty and Mr Chree has been that no definite words exclusive of the Court's jurisdiction having been used in any Act of Parliament, such an exclusion was to be inferred. In the first place, it is said that there is no jurisdiction because the returning officer has been made final on the question whether a nomination is, or is not, valid. I entirely agree with the Lord Ordinary in holding that that is not a deliverance or regulation that the Education Department were entitled to make if thereby it was intended to exclude the ordinary jurisdiction of the Courts of the country, and therefore, when the defenders found on the words that the decision of the returning officer shall be final, I should hold that these words were of no effect whatever. I can hardly believe that the Education Department intended anything of the kind. I think it perfectly possible that what was intended to be done was simply to declare that the returning officer's decision should be final on such a matter as this in the sense that nothing should be done by anyone to stop the election during its course. Whether the Department had power to do that or not I do not say, but I say that would be a reasonable exercise of their power if they had the power. Of course it is better, if a point of that sort arises during the election, that it should be disposed of then and there by some officer, and that the election should go on. It may be a question after the election has taken place whether the election should be set aside. If nothing has happened that should make it necessary to set it aside, all is well; if something has happened to make it invalid it does not matter that the election has proceeded to a conclusion.

It is said also that the action is incompetent on the ground that if any relief is competent at all it could only be had by petition to the Sheriff. I have looked at the Act of Parliament and the sections referred to, and am decidedly with the Lord Ordinary in holding that these clauses do not affect such a case as this. There is jurisdiction given to the Sheriff for certain purposes, but not in all circumstances in which an election might come before this Court for consideration.

The defenders plead that there is no title to sue, but there was no argument on that point submitted to us, nor was there to the Lord Ordinary. Then it is said that all parties are not called, and on that I agree with the Lord Ordinary, and I think the decision in which he came to the conclusion to enquire into the facts was the right one in the circumstances. I think, therefore, that we should adhere to his interlocutor.

Lord Stormonth-Darling.—I agree with your Lordship in the chair, and with the Lord Ordinary. It seems to me that the Lord Ordinary's very careful opinion completely covers the ground.

The importance of the case undoubtedly lies in the first and second preliminary pleas, the first being a plea to the jurisdiction of this

2nd Div. Court, and the second to the competency of the action on the ground, as your Lordship has explained, that the only remedy open to the pursuer was an election petition to the Sheriff. I think the Lord Ordinary has acted quite rightly in repelling both these pleas, and indeed in repelling all the four preliminary pleas for the defenders and reserving the 5th for discussion on the merits.

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Lord Stormonth-Darling.

On the first of these I do not desire to add anything to what your Lordship has said, except to say that it is always exceedingly difficult to exclude the jurisdiction of the Supreme Court in matters where such exclusion does not rest upon an express enactment of the legislature. Especially is it difficult to hold that the legislature has deputed to anybody else to declare that the jurisdiction of the Supreme Court is excluded. The only attempt here to show that it has been excluded is by saying that the legislature deputed to the Scotch Education Department to make regulations for the conduct of the election, and that one of the regulations made by the Department was that the decision—any decision—of a returning officer should be final. Now, there may be convenience in directing that the decision of the returning officer shall be final for certain purposes and to certain effects, but that cannot be held to extend to a finality which shall have the effect of excluding the jurisdiction of this Court. I think Mr Spens was quite well founded when he said that you cannot assume that the right of the lieges to resort to the Supreme Court is taken away by anything short of very express and clear enactment, or (which is the same thing) by implication so plain as to be *luce clarius*.

So far as the case depends on the Corrupt and Illegal Practices Act of 1890, I think the matter stands as your Lordship has put it. The intention of that Act, I think, very clearly was by the combined effect of sect. 2 and sect. 30 to put School Board elections on the same footing as other elections, not being Parliamentary, and to make the same regulations apply to them all. So reading the Act, petitions about the election of a School Board are to take the ordinary form of an election petition before the Sheriff. That is all quite right, but that is only in certain prescribed and defined cases—the cases set out in sect. 30, which cover, be it observed, all the normal grounds for challenging any of the elections to which the Act relates. That leaves any case not falling under these four heads to rest on the ordinary law, which, if I am right so far, left it open to this Court to deal with any objection to an election based on grounds other than those specified in sect. 30. This view is confirmed, as the Lord Ordinary points out, by sect. 36 and by sect. 44, both of which contemplate a decision of this Court upon questions arising as to such elections. On the whole matter I entirely agree with your Lordship and the Lord Ordinary, and think it unnecessary to say more.

Lord Low.—I am of the same opinion.

Lord Ardwall.—I am of the same opinion. I do not think it admits of doubt that this Court is competent to entertain actions for reduction of any documents or proceedings unless reduction is excluded by the nature of the documents or proceedings themselves, or by statutory enactment.

Now, there is nothing in the nature of the documents or proceedings here to exclude reduction. But it has been argued that the jurisdiction of the Court is excluded by statutory enactment, and in this way. It is said that power is given by statute to the Education Department to make regulations for School Board elections, and in the second place it is said that by the Order issued by the Board on 2nd October 1905, the returning officer's decision on the validity of any nomination of candidates for the School Board is made final. Now if the Order had merely provided that the returning officer should decide as to the validity of nominations, I do not think any objection could be taken to that. But the question is whether the words which follow, to the effect that such decision shall be final, are *ultra vires* or *intra vires* of the Education Department. Now that depends on the meaning to be attached to these words "shall be final." If they possibly only mean, as suggested by your Lordship in the chair, that the returning officer is to decide for the purpose of getting through with the election, and till the election is over, whether a nomination is valid or not, I think that might be a very proper regulation for the Board of Education to make. But if they mean that the decision of the returning officer is to be final to the effect of excluding the Courts of law, I think that *ultra vires*, for the reasons so lucidly stated by the Lord Ordinary, and particularly upon the ground which is set forth at the part of his opinion where he says—"Were it to receive the effect claimed for it, it would preclude all enquiry into the conduct of a returning officer, in the matter of a nomination, however grossly incompetent, or biased, or even corrupt such conduct may have been." Now here it is alleged that the conduct of the returning officer was unfair and malicious. Whether that allegation is true or not remains to be seen; but in view of the possibility of such cases arising, it would be a serious thing indeed if it were to be held that it was in the power of a returning officer finally to determine whether a person was to be refused a right of being placed in the list of candidates or not just as he chose to decide, it might be under the influence of many motives or it might be perfectly *bona fide*, but on grounds quite unfounded in point of law. If that is the meaning of the finality clause here, I

do not think it can be held that it is a clause which the Education Department were entitled to enact.

With regard to the second point, I concur in what has been said by your Lordships. The Act of 1890 being a general Act applicable to various kinds of elections, it really was intended to reserve cases arising on the most common grounds of objection in such elections to be dealt with in an election petition before the Sheriff, and to leave cases arising on any other competent ground to be dealt with under the common law remedy of reduction. I may say that I quite concur with Lord Kincairney's opinion in the case of *Hodge v. School Board of Ballingry*, 35 S.L.R. 634.—16*th May* 1907.

Counsel for Reclaimers, Dean of Faculty (Campbell, K.C.), Chree; Agents, Morton, Smart, Macdonald & Prosser, W.S.—Counsel for Respondent, G. Watt, K.C., Spens; Agents, Bryson & Grant, S.S.C. J. H. H.

HIGH COURT OF JUSTICIARY.

Circuit Court at Glasgow.

(*Lord Salvesen.*)

9. H.M. Advocate *v.* Kennedy.

High Court of Justiciary — H.M. Advocate v. Kennedy.

Justiciary Cases—Murder—Evidence—Malice—Proof of Previous Threats and Acts by the Accused—Notice—Criminal Procedure Act 1887 (50 & 51 Vict. cap. 35), sect. 8.

Charles Kennedy was indicted at the instance of His Majesty's Advocate on the charge "that on 9th March 1907, in the house occupied by you in Meadowhead Road, Craigneuk, Wishaw, you did assault Christina Loudon or Kennedy, your wife, and did apply a lighted newspaper to the clothing then worn by her, and set fire to the same, whereby she was severely burned on the legs and body, and died on said date, and you did thus murder her."

The accused pleaded not guilty, and was tried before Lord Salvesen at the Circuit Court in Glasgow on 9th May 1907.

In the course of the trial the Advocate-Depute proposed to question a witness as to previous threats uttered, and acts of violence offered to the deceased by the panel, whereupon counsel for the panel objected that as notice had not been given in the indictment or otherwise, evidence as to the panel's acts or statements prior to a period of fourteen days before the date of the occurrence of the crime charged was inadmissible. Counsel cited Macdonald's Criminal Law (3rd ed.), p. 469; *Robertson*, 1 Broun 152 at 173. The Advocate-Depute referred to sect. 8 of the Criminal Procedure Act 1887, which makes it unnecessary to put the word "maliciously" in the indictment, and maintained that such evidence was competent.

Lord Salvesen.—I have no hesitation in repelling the objection. Since the passing of the Criminal Procedure Act of 1887 there is no absolute rule limiting the evidence of facts and statements relevant to show previous malice on the part of the accused to a period of fourteen days previous to the date of the crime charged. It is no longer necessary to libel malice in the indictment, and the practice for many years has been in favour of allowing without notice evidence of any facts which have a bearing on the motive of the accused. The weight which the jury will attach to such evidence will of course depend on the interval of time which has elapsed between the date of the alleged threats and the crime, and the Court will not permit evidence to be led of threats or conduct which, from their remoteness in time or otherwise, cannot reasonably be supposed to have any connection with the crime charged.

Evidence was then led of threats to burn the deceased, uttered by the panel towards her, and acts of violence offered to her by him six months before the date of the crime charged.

The jury found the panel guilty of culpable homicide, and sentence of fifteen years' penal servitude was pronounced.—9*th May* 1907.

Counsel for the Crown, T. B. Morison, K.C., A.-D., S. A. Gillon; Agent, W. S. Haldane, W.S., Crown Agent.—Counsel for the Panel, R. C. Henderson; Agent, G. N. Pomphrey, Solicitor, Wishaw. F. A. U.

BILL CHAMBER.

(*Lord Dundas.*)

10. Brodie (Steven's Judicial Factor).

Judicial Factor — Special Powers — Powers Granted to Invest Funds, being Proceeds of Sale of Heritage and Held as Surrogatum therefor, in Purchase of Other Heritage, and to Borrow on Security of Heritage to be so Acquired.

This was an application by a judicial factor craving the special powers detailed below. The Note presented to the Court by the factor contained a narrative to the following effect.

On 6th June 1899 James Mortimer Brodie, accountant, Port-Glasgow, was appointed judicial factor on the estate of the late William Steven, mariner, Port-Glasgow. On 15th February 1907 the judicial factor presented the following report to the Accountant of Court.

. . . . . .

BILL CHAMBER. *Lord Dundas.*

Brodie (Steven's Judicial Factor).

"From the last account of charge and discharge of the judicial factor's intromissions it will be seen that the factory estate at the close of that account—30th June 1906—amounted to £827, 15s. 11d., invested in bonds over certain heritable subjects in Greenock, with the exception of a sum of £77, 15s. 11d. on deposit-receipt. It will also be seen from that account that the annual income derived from the estate during the last year amounted to £26, 10s. 8d., which, being divided among the four surviving liferenters entitled thereto, represented to each, after paying current expenses, the small sum of £6, 2s. 7d.

"At the date of the judicial factor's appointment the factory estate consisted entirely of heritable property situated in Port-Glasgow, the income derived from which was about double that derived from the estate as at present invested. The heritable property being, however, some two hundred years old, and in a poor and dilapidated condition, a heavy expenditure would have been required, which the estate was not in a position to meet, to put it into a sanitary condition, had this been ordered by the sanitary authorities as the alternative of closing it up. In the petition for the appointment of the judicial factor power was accordingly craved to sell the heritable property, the price to be treated as a surrogatum therefor. The power of sale craved was granted, and the sale subsequently carried through. Since then the capital of the estate has stood invested in the heritable bonds above referred to.

"In consequence of the estate standing invested in heritable bonds instead of, as originally, in heritable property, the income derived therefrom has, as before pointed out, been very considerably diminished, the loss to each of the four beneficiaries being about £6 a year. The beneficiaries are all working people—one of them being almost entirely dependent on the share he receives from the estate—and they not unnaturally consider it a hardship that by the present method of investing the estate this loss should have to be sustained by them.

"In these circumstances the judicial factor is desirous of restoring the estate to its original condition, and, by so doing, increasing the income to be derived therefrom. He accordingly proposes to call up the existing bonds as at Whitsunday next, 1907, and, with the sanction of the Court, to reinvest the proceeds in the purchase of the heritable property mentioned below in manner following.

"*I. Reinvestment of Capital.*

"Purchase of property situated at 21 Clunebraefoot, Port-Glasgow, which is entirely new and finished in a first-class manner, and fully let.

Purchase price,	£1400	0	0
Deduct bond proposed to be taken over same at 3¾ per cent.,	900	0	0
Sum proposed to be invested by factor in above property,	£500	0	0
Amount proposed to be lent on heritable security at 4 per cent.,	275	0	0
Balance of factory funds to be available for expenses of application to Court, and expenses connected with purchase of property and preparation of bond,	52	15	11
Total factory funds,	£827	15	11

II. Annual Income derived from Reinvestment of Funds.

Balance payable from rental account of property proposed to be purchased, as per separate statement,	£37	9	5
Interest from new bond at 4 per cent.,	£11	0	0
	£48	9	5
Annual income of factory estate as at present invested, as per last account of charge and discharge,	26	10	8
Net annual increase to beneficiaries by reinvestment of funds as proposed,	£21	18	9

"The judicial factor would accordingly respectfully request the Accountant of Court to report whether, in his opinion, powers should be granted to him to reinvest the factory estate in the manner above mentioned."

The Accountant of Court, having considered the said report, remitted to an architect to value and report upon the subjects proposed to be bought. The architect reported favourably of the property. The Accountant of Court estimated the increase of income which would be available to the liferenters from the proposed purchase at £23, 13s. per annum. He reported in the following terms:—

"The powers craved are:—

1. To purchase said subjects at No. 21 Clunebraefoot, Port-Glasgow, at the price of £1400 sterling; and
2. To borrow on security of same a sum of £900 sterling.

"The Accountant refers to the cases of *Gilray*, 18th May 1876, 3 R. 619, and *Watt*, 1856, 18 D. 652.

"The reinvestment proposed by the judicial factor being beneficial to the liferenters and not prejudicial to the interests of the fiars, the Accountant is of opinion that the powers craved by the judicial factor may be granted, but reports the matter for the consideration of the Court."

The judicial factor thereupon presented this Note to the Court, craving the special powers above referred to.

The Lord Ordinary officiating on the Bills *granted* the powers craved.—*26th April* 1907.

Counsel for the Judicial Factor, Sandeman; Agent, Wm. B. Rainnie, S.S.C. W. A. R.

SHERIFF COURT.

(*Sheriff-Substitute Guy at Edinburgh.*)

11. Magistrates of Edinburgh *v.* Thomson.

BANKRUPTCY — SEQUESTRATION — PETITION AGAINST TRUSTEE FOR ACCOUNTING AND REPLACING FUNDS—COMPETENCY—BANKRUPTCY ACT 1856, SECT. 86—MALVERSATION—BURGH ASSESSMENTS — EDINBURGH AND MUNICIPAL POLICE (AMENDMENT) ACT 1891, SECT. 71.

The 86th section of the Bankruptcy Act 1856 (19 & 20 Vict. cap. 79) provides: "The judicial factor, the trustee, and commissioners shall be

amenable to the Lord Ordinary and to the Sheriff, although resident beyond the territory of the Sheriff, at the instance of any party interested, to account for their intromissions and management, by petition served on them; and in case it shall appear that such application ought not to have been made, the party complained of shall be entitled to his full expenses, to be either retained out of the funds, or recovered from the party complaining, as the Lord Ordinary or the Sheriff shall direct."

This was a petition at the instance of the Magistrates of the City of Edinburgh and George Gunn, Collector of Police Assessments for the said city, against E. J. M. Thomson, C.A., Edinburgh, trustee on the sequestrated estate of Mrs Reid, as such trustee and as an individual, in which the pursuers craved the Court "to ordain the defender to produce a full account of his intromissions as trustee foresaid with the funds and estate of the said Mrs Mary Williamson Reid, from the date of the sequestration of said estate on 19th April 1904 to the present date, by which account the amount available for distribution among the creditors of the said Mrs Mary Williamson Reid according to their several rights may be ascertained; and to ordain him to pay such amount as may be so ascertained, or any balance thereof, into bank for behoof of the said sequestrated estate, in order that the same may be available for distribution among the said creditors, according to their several rights and interests; and in particular, to find on said accounting that the defender is bound to credit the said sequestrated estate with the sum of £153, 19s. 3d., specified in the Condescendence hereto annexed, and to ordain him to credit the said sequestrated estate with said sum in said accounting as if said sum had been recovered and retained by him as part of the funds of the said sequestrated estate for division amongst the creditors of the bankrupt according to their several rights and interest, subject always to payment of necessary charges and commission to the trustee, in terms of the bankruptcy statute, and to find the defender liable in expenses."

The estate of Mrs Reid was sequestrated on 19th April 1904. At that date she was the tenant of certain hotel premises, and the burgh assessments due in respect of her occupation of the premises for the year ending 15th May 1904, which became payable on 11th November 1903, had not been paid. The said assessments (together with the statutory penalty) amounted to £18, 19s. 2d., and an affidavit and claim for the same were lodged in the sequestration on 7th June 1904.

On 14th May 1904 the household furniture of the bankrupt was sold by the defender by private bargain for the sum of £231, 2s. 11d. The defender averred that of this sum he received £80, the balance having been paid to the landlord of the premises, being the rent due to him, and for which rent the furniture was liable to his hypothec.

No dividends were paid and no deliverances were pronounced in the sequestration, as the funds available for division among the preferable creditors were insufficient; and the defender averred that after paying the expenses of the sequestration and administration there were not funds in his hands to enable him to pay the assessments.

The pursuers maintained that they were entitled to have their claim adjudicated on, and to a deliverance ranking them. They also averred that provided the claims of the creditors were ranked according to their rights and interests under the bankruptcy statute, the funds were sufficient to pay them their preferable claim, and that the defender had failed to administer the funds of the estate according to law; and, in particular, they averred that the payment of rent and interest (amounting to £153, 19s. 3d.) to the landlord while the assessments remained unpaid was illegal and erroneous, as their claim for assessments was preferable to all claims of a private nature in virtue of the Edinburgh and Municipal Police (Amendment) Act 1891, sect. 71, which enacts that "All rates and assessments imposed under the Edinburgh Municipal and Police Acts shall, in the case of bankruptcy, insolvency, or liquidation, be a preferable claim to all debts of a private nature, due by the person or persons assessed, or by the person or persons liable in such rates and assessments."

The defender pleaded, *inter alia*: "(1) The petition in the present circumstances is incompetent and unnecessary." On the question of the competency of the petition the following cases were cited: *Bell* v. *Gow*, 1862, 1 M. 84; *Burt* v. *Bell*, 1863, 1 M. 382; *Henderson* v. *Henderson's Tr.*, 1882, 10 R. 188; *M'Adam* v. *Martin's Tr.*, 1884, 12 R. 358; *Craig* v. *Mitchell*, 1895, II. S.L.T. 488, III. S.L.T. 20; and *Duke* v. *More*, 1903, 6 F. 190.

The Sheriff-Substitute (Guy) held that the petition was competent.

Sheriff Guy.—The only question which I am at present called upon to decide is whether the present proceeding is competent. I think it is, but I am not to be held at this stage as expressing the opinion that all the craves of the petition can be competently given effect to. It was argued to me that the 86th section of the Bankruptcy (Scotland) Act did not apply to such a case as the pursuers set forth. It was said that their remedy was in the sequestration. In a sense that is true, but in the sense that this remedy is in the sequestration. The 86th section is not applicable to provide a means of review of the trustee's actions where the Bankruptcy Acts provide a definite mode of review. But

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the defender could not suggest any such mode of review that the pursuers could have adopted in the present case. Nor could the pursuers have raised a direct action. That would have presented the same situation as was presented in *Craig* v. *Mitchell* (*Coull's Tr.*), decided by Lord Wellwood on 12th March 1895 (2 S.L.T. 488; affd. 3 S.L.T. 20). In that case Lord Wellwood said that "the pursuer might have applied to the Lord Ordinary or the Sheriff under sect. 86 of the Bankrupty Act of 1856 by petition calling upon the defender to account for his intromissions and management." That is precisely what the pursuers are now doing. The circumstances averred by the pursuers seem to me to bring the present case under the wide interpretation of malversation in office figured by Lords Adam and Kinnear in the case of *Duke* v. *More*, 8th December 1903, 6 F. 190.—26*th September* 1906.

Counsel for Pursuers, W. J. Robertson; Agents, W. & W. Saunders, S.S.C.—Counsel for Defender, Morton; Agent, R. J. Calver, S.S.C.

SHERIFF COURT.

(*Sheriff-Substitute Robertson at Aberdeen.*)

12. Murray *v.* Watt's Executors.

JURISDICTION—SHERIFF—DECLARATOR THAT WILL IS VOID FROM UNCERTAINTY—SHERIFF COURT (SCOTLAND) ACT 1877, SECT. 8 (2).

This was an action concluding for declarator that a clause in a will was void from uncertainty, that the deceased died intestate, and that the pursuer, being the next of kin, was entitled to an accounting and payment. The defenders pleaded that the action was incompetent in the Sheriff Court. The Sheriff-Substitute repelled this plea and added the following Note, which sufficiently states the facts.

Sheriff Robertson.—The question here is raised in the following circumstances. The late Miss Margaret Watt died at Inverurie on 26th May 1906. She left a last will and testament nominating the defenders in this action as her executors. The third purpose of her will was in the following terms:—"I direct and empower the said Alexander Smith and William Stewart, and the survivor of them, as executors and executor foresaid, as soon as possible after my death to divide, apportion and pay over the residue and remainder of my estate between and among such charitable, religious and other purposes (including relief to any of my poor relations) as they may select and approve of."

The pursuer here is one of, if not the only, next of kin, and she claims that this clause is void from uncertainty, and that deceased therefore died intestate, so far as the residue of her estate is concerned, and that she (pursuer) is entitled to an accounting from defenders and to payment of the amount brought out.

There seems little doubt that pursuer's contention is sound, and defenders hardly dispute it; indeed, they have obtained the Dean of Faculty's opinion that this purpose is void; but they consider that they are entitled to judicial authority before parting with the money.

They proposed a Special Case, but the pursuer's agent would not agree on the ground of expense, and pursuer eventually brought this action. I do not suppose I should have any difficulty or doubt in disposing of the action, if I am entitled to consider it, but defenders object, and plead that the action is incompetent in the Sheriff Court. Defenders' argument briefly is that to declare this provision void from uncertainty would be an exercise of *nobile officium* which can only be exercised by the Court of Session (*vide* Mackay, Prac., I. 211). Pursuer answers that this is not really an exercise of *nobile officium*, and that it falls directly under the category of cases to which the jurisdiction of the Sheriff Court was extended by sect. 8, sub-sect. 2, of the Sheriff Court Act of 1877, *i.e.* "actions of declarator for the purpose of determining any question relating to the property in, or right of succession to, moveables" where the value is under £1000, as it here admittedly is. Giving the matter my best consideration, I am of opinion that this action falls under this category, and that I have jurisdiction. This is not in the position of a charitable trust whose object requires to be declared and a scheme settled for its administration; in a sense completing the will of the testator and supplying his omissions. All I am asked to do is to apply the law as settled in prior cases, and find in accordance with it that the clause of residue is void from uncertainty, in the same way as if void from want of signature, and that therefore the next of kin must succeed.

As I have said, I think this is within my jurisdiction under the section of the Act quoted, and I therefore repel defenders' first plea in law. —26*th February* 1907.

Agent for Pursuer, Charles Smith, Solicitor (*J. & J. S. Watt*).—*Agent for Defenders, John Munro, Solicitor.*

OUTER HOUSE.

(*Lord Johnston.*)

13. Gilliland *v.* County Council of Ayr and Others.

I. Lease—Tenant's Interests Under Lease—Landlord with Power of Resumption—Local Authority—Acquisition by Local Authority of Part of Subjects Leased by Agreement with Landlord—Tenant's Interests Must Also be Acquired, if not by Agreement, by Provisional Order—Public Health Act 1897 (60 & 61 Vict. cap. 38), sects. 103, 144, and 145.

II. Public Authorities Protection Act 1893 (56 & 57 Vict. cap. 61), sect. 1—Public Health Act 1897 (60 & 61 Vict. cap. 38), sect. 166—Limitation of Period within which Actions may be Brought—Erection of Works by Local Authority upon Land Leased to Tenant—Delay by Tenant in Bringing Action to Protect his Rights Beyond Period of Limitation—Held that Limitation in Acts Did Not Apply.

This was an action at the instance of Thomas Gilliland, farmer, Haughyett, Mauchline, against the County Council of Ayr as the local authority of the said county within the meaning of the Public Health (Scotland) Act 1897, and the Kilmarnock District Committee of the said County Council as local authority for the Kilmarnock district for certain other purposes under the said Act, to have it declared (*a*) that the pursuer was tenant of the farm of Haughyett, Mauchline, under a lease dated March and April 1906, following upon missives dated August and October 1903, entered into between him and the trustees of the late Sir Claud Alexander of Ballochmyle, for the period of nineteen years from the separation of the crop of the year 1903 as regards the arable land, and from Whitsunday 1904 as regards the houses, of the said farm; (*b*) that in the subjects leased to him there was included a certain plot or area of ground disponed by the said trustees to the defenders by disposition dated January 1906, and also certain other portions of ground over which a servitude was granted by the said disposition; (*c*) that the pursuer was entitled as tenant to the exclusive possession of the subjects leased; (*d*) that the defenders had no lawful right to interfere with the pursuer in his use and possession of the subjects, except in so far as they may acquire right by contract with the pursuer or by the due exercise of any of the powers conferred on them as local authorities; (*e*) that the defenders had at present no right or title to occupy any portion of the subjects let to him, or to have erected thereon any sewage tank or other drainage works, or to enter on the lands let to him; (*f*) that any rights conferred upon the defenders by the said disposition granted in their favour by the trustees were subject to the pursuer's right to possess and enjoy the whole subjects let to him during the whole currency of the lease.

The action further concluded for interdict and removal of the works erected on the ground of which pursuer was tenant, for restoration of the ground to its former state, and for damages; and alternatively to the conclusions for interdict, removing, restoration, and payment, it sought declarator further (*a*) that the defenders had entered upon the said lands and erected a sewage tank, and had thereby interfered with the pursuer in the use and enjoyment of the lands; and that having done so, the defenders were bound, as a condition of being allowed to continue in the possession and occupation of the lands during the pursuer's tenancy under his lease, to make compensation to the pursuer for the value of his interest in the land so taken, and for all damage done; and (*b*) that the defenders were bound to take steps for ascertainment of the compensation due, and to pay the same.

The facts of the case and contentions of parties appear from the Lord Ordinary's Note.

The pursuer pleaded, *inter alia*: "(1) The averments of the defenders being irrelevant to support their pleas, the defences ought to be repelled."

The defenders pleaded, *inter alia*: "(3) In respect of the provisions of the Public Health Act 1897 and the Public Authorities Protection Act 1893, the action is barred."

The following authorities were quoted at the discussion: *Trotter* v. *Torrance*, 1891, 18 R. 848; *Sinclair* v. *Lanark Middle Ward Committee*, 1907, S.C. 285; *Stevenson* v. *North British Railway Co.*, 1901, 4 F. 224; *Peddie* v. *Brown*, 1857, 3 Macq. 65; *Solway Junction Railway Co.* v. *Jackson*, 1874, 1 R. 831; *Fleming* v. *Newport Railway Co.*, 1883, 10 R. (H.L.) 30 (at 36); *Jobson* v. *Edgware Railway Co.*, 1866, 35 Beavan 480; *Marshall*, 1896, 24 R. 139; *Duncan* v. *Magistrates of Hamilton*, 1902, 5 F. 160; *Lanarkshire Upper Ward* v. *Airdrie Water Trustees*, 1906, 8 F. 777; *Mitchell* v. *Magistrates of Aberdeen*, 1893, 20 R. 253; *Midland Railway Co.*, 1883, 11 Q.B.D. 788; *Cree*, 1899, 1 Q.B. 693.

The Lord Ordinary *repelled* the third plea in law for the defenders, and *sustained* the first plea in law for the pursuer, and *found* and *declared* in terms of the declaratory conclusions of the Summons.

Lord Johnston. — The pursuer, Thomas Gilliland, by a series of letters, No. 6 of process, which amounted to complete and valid missives of let, the last of them being dated 24th October 1903, became tenant for nineteen years, under the trustees of Sir Claud Alexander of Ballochmyle, of the farm of Haughyett, and entered

Outer House. *Lord Johnston.*

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thereto and possessed the same from Martinmas 1903 as to the land, and Whitsunday 1904 as to the houses and grass. He possessed for the first two or three years under these missives, but it was a condition thereof that he should "enter into a formal lease in the terms recently introduced for use on the estate."

One of these terms was a power of resumption in favour of the landlords, to be afterwards mentioned. It is averred that this was not brought to pursuer's notice at the time the contract was entered into, and was not within his contemplation. But as it entered the formal lease, afterwards granted and accepted, the averment cannot be regarded.

While the negotiations for this lease were proceeding, the landlords' agents, on 1st October 1903 (No. 18 of process) received an informal hint from a Mr Bain that the Kilmarnock District Committee would in all probability be applying to them for land on Haughyett for filtration purposes in connection with Mauchline drainage scheme. What relation to the Committee Mr Bain held I do not know, but the information he gave had no effect on the landlords' negotiations with the pursuers.

Thereafter the Kilmarnock District Committee did enter on negotiations with the Ballochmyle trustees for between two and three roods of ground on Haughyett for the site of sewage purification tanks, and for a wayleave or servitude for a pipe track. The full correspondence is not produced, but the following is shown from the letters which have been referred to. (1) On 27th June 1904 the clerk to the Committee wrote: "The Committee understand the tenant holds from year to year, and upon that footing they will pay his claims, either as these may be amicably adjusted, or as they may be settled by arbitration after the work is completed and the amount of damage can be ascertained." (2) This mistake was corrected by the landlords' agents, who wrote on 13th July 1904, *inter alia*, "Haughyett is let on lease." But it appears to me that the explanation did not penetrate into the minds of the Committee or their advisers, and that they continued to the end persuaded that they were dealing with land which was only let from year to year, and not subject to a current lease, and I am satisfied that this is the cause of the awkward situation which has been created. But for this the pursuer had no responsibility. (3) These negotiations resulted in an agreement between the Ballochmyle trustees and the Committee being come to in February 1905, and on the 8th of that month the landlords' agents wrote: "Your clients may now take possession and proceed with the works." In the correspondence which resulted in this agreement there was a general reference to tenant's claims to be undertaken by the Committee, but these, as far as I can find, were only referred to as "all damage of any kind which may be sustained by our clients or their tenants in the construction and maintenance of the works." From this I gather that the landlords' agents did not, any more than the Committee and their clerk, appreciate the pursuer's position and right as tenant under lease.

Apparently the District Committee did enter into possession of the ground shortly after 8th February 1905, and they say that they completed their works on 5th February 1906.

The disposition from the Ballochmyle trustees to the Committee is dated 23rd December 1905 and 10th January 1906 and recorded 26th January 1906, but the formal lease between the trustees and the pursuer was not executed till 7th and 10th March and 4th April 1906. Though he did not oppose the Committee taking possession and executing their works, the pursuer did, on 27th November 1905, in course of correspondence, lodge with the Committee's clerk a claim, No. 15 of process, which fully disclosed the fact that he claimed on the footing of a tenancy having seventeen and a half years to run. This position he has consistently maintained. On the other hand, the Committee, who are defenders in the case, have maintained the attitude on which they appear to me to have negotiated with the landlords and subsequently to have acted, that the pursuer was only a yearly tenant and to be treated as such. I found my view that this attitude was adopted under error, upon the consideration that it was adopted before the Committee knew anything of the landlords' power of resumption. Until April 1906 they knew nothing of this power, as the formal lease was not in existence till then, and was only exhibited to them on the 11th of that month. But they now maintain that the pursuer's position was, so far as they were concerned, made that of a yearly tenant, or rather tenant at will, by reason of the landlords' power of resumption, on making compensation as adjusted by arbitration; and that for any compensation the pursuer may be entitled to, he has consequently to look to his landlords and not to them. They may be entitled to maintain this plea, but it was not in the minds of either of the parties concerned at the date of the agreement come to.

In the disposition of December 1905, January 1906, by the Ballochmyle trustees to the District Committee, No. 8 of process, it is declared that the latter "shall indemnify the tenant or occupier of said lands for all loss of crop and surface or other damages which they may have already sustained or may sustain, by or through the operations in constructing said proprietors' works, etc.; and further, shall recompense and make good to us and our foresaids, and the tenants or occupiers foresaid, any damage that may arise" from these operations or the repair thereof. This clearly does not contemplate the compensation of the pursuer for his interest in the lands, etc., taken.

Again, in the formal lease by the Ballochmyle

trustees to the pursuer, there are these two important clauses:

1st. "As also reserving to the proprietor power to resume any part or parts of the farm for building, feuing, quarrying, letting on long lease, *or any other purpose*, and to make roads and ditches on the lands hereby let, and to straighten or alter marches, and, in doing so, to add to or decrease the extent of the farm."

2nd. "Reserving always to the tenant his claim for damages or compensation against the County Council of Ayrshire or the Kilmarnock District Committee in connection with the land taken by them for sewage tank and other works relating thereto."

I shall revert immediately to the first of these clauses. As regards the second, it obviously contemplates the pursuer's claim from a different point of view from that on which the clause in the District Committee's disposition is drawn. And this, I conclude, arises from the fact that his agent had a hand in framing the one deed, while the Committee's agent was the draughtsman of the other. But the clause, though from another point of view it may be important, has no materiality to the present question, for, as between the pursuer and defenders, it could not give the former claims which he had not otherwise, nor was it required to give him claims which he had otherwise. Now in these circumstances the present action has been raised really to determine whether the pursuer remained after 8th February 1905, or at any rate after the 26th January 1906, when the District Committee's disposition was recorded, tenant of the land acquired by him on a nineteen years' lease with a number of years still to run, and whether, consequently, he should have been dealt with and compensated on that footing, or whether he was, at one or other of these dates, dispossessed and left without claim except for surface and other damages occasioned by the construction of the works. The complexity of the situation created by the irregular action of the landlords and the District Committee has compelled the pursuer to a complex form of action to attain his remedy. But I think that the above question lies at the root of the case, and that if it is determined the case will admit of a simpler solution than at first sight seems possible.

I think that I am entitled to take it from the Record, in conjunction with the documents and correspondence referred to and incorporated therein (and the parties' argument solicited a decision if possible without proof)—

1st, That the landlords had no power to resume the land in question except under the clause in the lease above quoted;

2nd, That they never did resume the land in question, unless *impliedly* by their action in dealing with the District Committee in consenting to the Committee taking possession and in granting them a title.

First, then, what is the interpretation of the claim of resumption? I pass over, meantime, the fact that it gives no right to resume for pipe tracks, wayleaves or servitudes. Does it give right to resume for the purpose of transferring to a company or local authority with compulsory powers? It expressly says for building, feuing, quarrying, or long leasing. All these are common and well-recognised estate purposes. It adds, or for "any other purpose," but according to a well-known canon of construction, such general purpose must be *ejusdem generis* with the particular purposes enumerated. And I cannot regard the execution of a public work, either of a commercial character, as a railway, or of a municipal character, such as sewage works, as *ejusdem generis* with the ordinary estate purposes enumerated. I am supported in this view when I find that the purpose cannot be attained without granting, in conjunction with right to the land, rights of servitude which in no possible view does the clause contemplate. The case is very similar to that of *Johnson* v. *Edgware, etc. Railway Co.*, 1866, 35 Beav. 480, 35 L.J. Ch. 322, and in nothing more than in this, that, as there, the fact that the railway was coming through the land, so here the fact that the local authority would require the land was known to the landlords when the respective leases were granted. I refer to Lord Romilly's judgment, the reasoning in which I adopt, as I think it in large part applicable to the present case. I am unable to bring the case within the decision in *Middle Ward of Lanark* v. *Marshall*, 1896, 24 R. 139. The case is not well reported, for the report does not give any indication of how or where the landlord resumed possession. But it was admitted that he had resumed, and competently resumed, and on that footing he paid, and the tenants accepted the compensation provided by the leases. In these circumstances it was held that the tenants' claim was entirely against their landlord under the lease, and that they had no claim against a local authority who had feued the resumed land from the landlord.

Second. Having regard to the manner in which the landlords and the local authority acted here, it falls to consider the position in which the local authority stood. They had, under the Public Health Act 1897, sect. 103, powers to construct sewers, and under that section sewers include all works necessary for the disposal or treatment of sewage. They had, therefore, statutory powers to execute the works which they have constructed on the Ballochmyle lands leased to the pursuer. For the purpose of sect. 103, they had power under sect. 144 to acquire land in terms of the Lands Clauses Act, and that "whether by agreement or otherwise." But for the meaning of "otherwise" reference must be made to sect. 145. They have acquired from the landlords by agreement. But they could only acquire their interest in the lands,

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and that was an interest subject to the interest of the pursuer—subject to his current lease for nineteen years. If they could not acquire his interest by agreement (and they never tried), they were compelled to resort to a provisional order under sect. 145. That section covers the rights, not merely of owners, but of lessees and occupiers. Their acquisition by agreement from the landlords does not relegate the tenant to a claim under the 164th section (the equivalent of the 116th section of the 1867 Act), as in the *Peterhead* case, 1880, 7 R. 536.

I do not think that the District Committee can be put in any better position than if it be assumed that they had statutory powers under a private Act, and had acquired lands from the proprietor under their compulsory powers, it matters not whether by agreement or by putting in force their compulsory powers and going to arbitration. The statutory taking by the local authority is not equivalent to resumption by the landlord under the lease. Taking by the local authority was not the thing contemplated by the clause of resumption (see *Solway Junction Railway Co.* v. *Jackson*, 1874, 1 R. 831, and Lord Watson's comment thereon in *Fleming* v. *Newport Railway Co.*, 1883, 10 R. (H.L.) at p. 36).

I cannot hold that the provisions of the Public Health Act 1897, sect. 166, or of the Public Authorities Protection Act 1893, are applicable to the present case, and I shall therefore repel the defenders' third plea in law, and that being so, I think that I am in a position generally to sustain the first plea for the pursuer, at least as regards the declaratory conclusion of the Summons.

But as regards the operative conclusion there is some difficulty owing to the actings of parties, The defenders have been allowed to take possession and to complete their works. I think that the correspondence shows that the statement of Cond. 10 in the first half of page 17 of the Record is very probably justified, and it is quite clear that the defenders have all along been willing to compensate the pursuer on the footing of a yearly tenancy. If it be found that they are bound to compensate him on the footing of a nineteen years' lease, I cannot assume that they will decline to enter into arbitration, as if they had taken under compulsory powers, to which the pursuer consents. If they do decline, though I do not consider the pursuers' alternative conclusion workable or even competent, I think, notwithstanding, that there is a very simple *compulsitor*. They cannot now be interdicted, but they can be ordained to remove. I do not find that difficulty which the learned Dean of Faculty represented that the judgment in *Graham* v. *Magistrates of Kirkcaldy*, 9 R. (H.L.) 91, interposed. I am not proposing to impose on the pursuer an equitable compensation for his legal rights, though I think, in the public interest, I might do so. He desires such equitable compensation. I am giving the defenders the opportunity, with the pursuer's consent, to make such equitable compensation, and if they do not like to take that opportunity, they must submit to the legal consequence.

In order that the defenders may have an opportunity of taking my judgment to review if so advised, I shall limit my decree to the declaratory conclusion.—23*rd May* 1907.

Counsel for Pursuer, J. R. Christie; Agents, Sang & Moffat, S.S.C.—Counsel for Defenders, Dean of Faculty (Campbell, K.C.), Munro; Agents, Macpherson & Mackay, S.S.C. R. S. B.

OUTER HOUSE.

(*Lord Salvesen.*)

14. Logan *v.* S. & E. Moore Limited.

PROCESS — PRINTING — FAILURE TO LODGE PRINTS — EXCEPTION OF "GOOD CAUSE"—ACTIONS TRANSMITTED FROM SHERIFF COURT UNDER EMPLOYERS' LIABILITY ACT — EMPLOYERS' LIABILITY ACT 1880 (43 & 44 VICT. CAP. 42), SECT. 6—SHERIFF COURTS ACT 1877 (40 & 41 VICT. CAP. 50), SECT. 9—COURT OF SESSION ACT 1868 (31 & 32 VICT. CAP. 100), SECT. 26.

Sect. 6 of the Employers' Liability Act provides as follows:—

"(1) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed.

. . . . . .

In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, sect. 9 of the Sheriff Courts (Scotland) Act 1877."

. . . . . .

Sect. 9 of the Sheriff Courts (Scotland) Act provides as follows:—

". . . . (1.) If a defender shall at any time before an interlocutor closing the record is pronounced in the action, or within six days after such an interlocutor shall have been pronounced, lodge a note in the process in the following or similar terms: that is to say—

"The defender prays that the process may be transmitted to the Court of Session.

[Signed by the defender or his law agent.]

"[Date.]

"it shall be the duty of the Sheriff-Clerk forthwith to transmit the process to the Keeper of the Rolls of the First Division of the Court of Session, who shall, under the directions of the Lord President of the Court, mark on the petition the Division and the Lord Ordinary before whom it shall depend, and shall transmit the process to the depute-clerk officiating at the bar of such Lord Ordinary; and the process having been so transmitted, shall thereafter proceed before

the Court of Session as nearly as may be as if it had been raised in that Court."

Sect. 26 of the Court of Session Act of 1868 provides as follows:—

"If no motion for revisal is made as above provided, or if such motion is refused, or after the lapse of the period within which the revised pleadings fall to be lodged where a revisal has been allowed or ordered, the pursuer shall cause the pleadings which are to form the record to be printed, and shall within eight days from the lodging of the defences or revised pleadings, as the case may be, deliver two printer's proofs thereof to the agent or to each of the agents of the other parties, and also to the clerk to the process, who shall transmit the same to the Lord Ordinary, and the Lord Ordinary shall direct the cause to be put to the roll for a day not less than four days and not more than six days thereafter: and upon such day the Lord Ordinary shall require the parties then to adjust their pleadings, and shall close the record: Provided that, if the pursuer shall fail to deliver the printer's proofs as aforesaid, the defender may enrol the cause, and move for decree of absolvitor by default, which decree the Lord Ordinary shall grant unless the pursuer shall show good cause to the contrary: . . . ."

An action of damages at common law and under the Employers' Liability Act was raised in the Sheriff Court, transmitted to the Court of Session, and marked by the Keeper of the Rolls to Lord Salvesen on 9th May 1907. Prints of the Open Record were not lodged until 20th May. The defenders enrolled the cause before the Lord Ordinary, and moved for decree by default on the ground that the pursuer's agent had failed to lodge prints in terms of the 26th section of the Court of Session Act 1868.

The pursuer opposed the motion on the ground (1) that the said section did not apply to actions originating in the Sheriff Court and transmitted from that Court to the Court of Session; and (2) that in not printing within eight days after the date of transmission, the pursuer relied on a judgment of Lord Ardwall (which is not reported) giving effect to his first contention, and that this was "good cause" within the meaning of the said 26th section.

The Lord Ordinary *refused* the motion. His Lordship *held* (1) that, following Lord Ardwall's judgment, the 26th section of the Act of 1868 did not apply to an action originating in the Sheriff Court, and that if the pursuer delayed in printing the Record, it was open to the defenders in such action to enrol the cause, and move for an order on the pursuer to print; (2) that even if sect. 26 did apply, he would have been prepared to hold that the pursuer's failure to print came within the exception of "good cause" in the section, in respect that there was a prior judgment of Lord Ardwall refusing a similar motion.—23*rd May* 1907.

Counsel for Pursuer, Steedman; Agent, Alex. F. Fraser, Solicitor.—Counsel for Defenders, G. Watt, K.C., Horne; Agents, Anderson & Chisholm. J. W. F.

BILL CHAMBER.

(*Lord Guthrie.*)

Bill Chamber. *Lord Guthrie.*

Gardiner Baird.

15. Gardiner Baird.

Liferent and Fee—Capital or Income—Price of Entailed Estate—Price Invested in Debenture Stocks between Dividends—Apportionment of Accrued Dividend Carried by Stocks at Date of Investment—Held that the Apportionment Act 1870 (33 & 34 Vict., cap. 35) Did Not Apply.

Sir William Gardiner Baird disentailed and sold certain lands for the sum of £19,000, which was duly consigned in the Bank of Scotland in terms of the Entail (Scotland) Act 1882.

On Sir William's petition part of the money was invested at the sight of the Court in the name of trustees in certain railway stocks, chiefly debenture stocks.

When, in obedience to the remit in an interlocutor of the Lord Ordinary on the Bills of 3rd July 1906, the reporter, Mr George Dunlop, W.S., Edinburgh, was revising the deed of declaration of trust which the trustees were ordered to execute in connection with the investment, the question of apportionment arose.

The reporter reported that some of the stocks were at the date of purchase carrying accrued interest, and expressed the opinion that the first dividend should be apportioned between income and capital, and only the portion effeiring to the period subsequent to purchase should be treated as income and paid to the petitioner.

The reporter referred to the following cases:—*Donaldson*, 1851, 14 D. 165; *Cameron*, 1873, 1 R. 21. In *Cameron* he said the principle of the apportionment of dividends between income and capital is clearly laid down. He stated that in his opinion the petitioner would be receiving double interest if he were held entitled to the proportion of dividends earned by stocks during a period when the funds entailed for his behoof were not invested in them. He quoted sect. 27 of the Entail (Scotland) Act of 1882, which is as follows: "The price of an entailed estate or any part thereof sold under the provision of this Act shall be entailed estate within the meaning of this Act"; and argued that this price must be treated exactly as if it were entailed land and the capital of the fund accordingly kept absolutely intact, but subject, of course, to such fluctuations as might take place in the Stock Exchange prices of the securities. He further said that the Apportionment Act would be applicable at the termination of the first liferent, and he considered that the same principle should be applied at the initiation of the trust. That so far as his information went it was the general practice in trusts for liferent beneficiaries which are administered in Scotland, and audited

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by professional auditors, to make an apportionment between capital and income of the first dividend received after the purchase of stocks.

The petitioner, on the other hand, *argued* that the Apportionment Acts do not apply in a case of this kind, and referred to *Scholefield* v. *Redfern*, 1863, 2 Drury and Small 173, and *Clarke*, 1881, L.R. 18, Ch. D. 160. He contended that the Apportionment Act of 1870 only applies where there is a determination of interest, limited or otherwise, between the dates when the periodical payments in the nature of income become due, and that there had been no change or determination of interest in this case. He admitted that if the stock had been bought cum. div. within the settling period when the dividend fell to be paid, then it would have fallen to be restored wholly to capital, but argued that if the stock be bought, as here, two or three months before the declaration of dividend, it is impossible to say what proportion of the price is applicable to such dividend (*Donaldson* v. *Donaldson's Trs.*, 1851, 14 D. 165; *Bulkeley* v. *Stephens*, 1896, 2 Ch. 241).

Further, the interlocutor of 3rd July 1906 was in these terms: "Authorises the said trustees to pay the income or annual produce of the funds so invested to the petitioner for his own use and behoof during his life, and after his death to the heirs of entail in their order who would have been entitled to succeed to the said lands of Damside and Factor's Park under the foresaid deed of entail. Appoints the said trustees . . . . to set aside in each year and place to the credit of a sinking fund to be opened and kept in their name such portion of the income of the India 3½ per cent. stock . . . . as shall be sufficient to provide against loss of capital on redemption. . . ."

By this interlocutor no authority or direction was given to the trustees to treat any portion of the income, except in the case of the India stock, as applicable to capital; and under the interlocutors they have no alternative but to pay the dividends as collected to the petitioner, subject to the creation of a sinking fund in connection with the India stock.

Assuming that apportionment was made, the sum apportioned to capital would have to be invested, and it would be necessary to apportion between capital and income the first dividend received on such investment. This operation would have to be carried on *ad infinitum*, so that the principle could not be carried to its logical conclusion.

The Lord Ordinary on the Bills *upheld* the petitioner's contentions, and pronounced the following interlocutor:—"Finds that the first dividends received on the securities specified in the schedule appended to the said interim report are not subject to apportionment between capital and income, but fall to be paid wholly to the petitioner for his own use and behoof, the first dividend on the India 3½ per cent. stock specified in the said schedule being subject to the direction with regard to a sinking fund contained in the interlocutor of 3rd July 1906, and directs Mr Dunlop to adjust the declaration of trust referred to in the interlocutor of 3rd July and 3rd October 1906, in accordance with these findings: *quoad ultra*, continues the petition."—21*st March* 1907.

Counsel for Petitioner, Cullen, K.C., Carnegie; Agents, Tods, Murray & Jamieson, W.S.

C. H. B.

OUTER HOUSE.

(*Lord Dundas.*)

16. Colvile's Trustees *v.* Marindin and Others.

I. Succession — Destination — Construction — Resulting Intestacy—Bequest to Certain Liferentrices and to the Heir of Entail in Possession of the Lands of A at the time of Expiry of Last Liferent—Entail of Lands of A Found Invalid and Lands Disentailed and Tailzied Destination Evacuated After Opening of Succession but Before Expiry of Last Liferent—Person who, but for said Disentail and Evacuation, Would Have Been Such Heir of Entail in Possession, Held Not Entitled to Succeed.

II. Heritable and Moveable — Heir at Law—Bequest of Heritable Bond—Succession Opening Prior to Titles to Land Consolidation Act 1868 (31 & 32 Vict. cap. 101)—Character of Succession and Heir at Law to be Ascertained as at Opening of Succession—Bond Found Heritable.

III. Rights in Security—Heritable Bond—Extinction Confusione—Succession of Fee Simple Proprietor of Security Lands to Fee of Bond Burdened with Certain Liferents—Circumstances in Which it was Held that Fee of Debt was Not Extinguished Confusione.

The facts of this case and the contentions of the various parties to it appear sufficiently from the Lord Ordinary's Opinion, which is in the following terms:—

Lord Dundas.—The fund *in medio* in this action of multiplepoinding is a sum of £4500, contained in a bond and disposition in security, dated 17th May 1830, granted by the late Andrew Colvile in favour of the late John Blackburn of Killearn. By the said bond, certain lands called Muirside, now forming part of the estate of Crombie and Craigflower, were conveyed in security for the repayment of the said sum of £4500. Mr

Blackburn was duly infeft; and on 2nd August 1834 he conveyed the said lands and all his right and interest under the said bond and disposition in security to Miss Margaret Blackburn and her heirs and assignees. Miss Blackburn was duty infeft. By disposition, assignation and settlement, dated 24th August 1841, on the narrative that she had resolved to settle the destination and right of succession of the said sum of money and heritable security for the same in the event of her death, Miss Blackburn disponed and conveyed the lands of Muirside, and her whole right and interest to and under the said bond and disposition in security, to and in favour of her grand-nieces, daughters of the said Andrew Colvile, her nephew *nominatim*, equally among them, or such of them as should survive her and be unmarried; and to the survivors or survivor of them in liferent, during all the days of their lifetime and remaining unmarried, as said was, for their liferent use only, and after the marriage or death of all of them, then to and in favour of the heir of entail who might be in possession of the estate of Crombie and Craigflower at the marriage or death of all the daughters of the said Andrew Colvile. At the date of this deed Muirside was entailed upon the same series of heirs as Crombie and Craigflower, although this fact appears to have been unknown to the framer of the deed. Miss Blackburn died on 10th February 1842, and the liferentrices were thereafter duly infeft as such. The income of the said sum of £4500 was regularly paid to such of them as were entitled to it until 2nd August 1905, when Miss Isalen Mary Colvile, the last surviving daughter of Andrew Colvile, died. At the date of Miss Blackburn's death, her nephew, the said Andrew Colvile, was heir of entail in possession of the entailed estates of Crombie and Craigflower, including Muirside. He died in 1856, and was succeeded by his eldest son, Sir James William Colvile, who completed his title as heir of entail, and died on 6th December 1880. Sir James was succeeded by his brother, Eden Colvile, who made up title in due form. On 31st March 1881 Eden Colvile raised an action of declarator in the Court of Session to have it declared that the three deeds of entail under which he held the estates of Crombie and Craigflower (including Muirside) were invalid and ineffectual as regarded the whole prohibitory, irritant and resolutive clauses therein, and that he was entitled to deal with the estates as unlimited fiar thereof. In this action the pursuer obtained decree from the Lord Ordinary (Curriehill) and the Second Division. The case is reported (*Colvile* v. *Marindin*, 1881, 8 R. 937). Eden Colvile died on 2nd April 1893, leaving a trust disposition of his whole estates, heritable and moveable, in favour of trustees, who are now represented by the pursuers and real raisers of this action. By the said trust disposition Eden Colvile evacuated the previous tailzied destination of Crombie and Craigflower. In these circumstances, competing claims are made to the sum of £4500 contained in the said bond and disposition in security.

It will be convenient to consider first the claim No. 15 of process for Captain Arthur Henry Marindin, the person who, but for the disentail of the estates of Crombie and Craigflower and the subsequent evacuation of the tailzied destination, would have been the heir of entail in possession at the date of the death of the last liferentrix. I am of opinion that this claim is ill-founded, and must be repelled. It seems to me impossible, as matter of construction, to hold that Captain Marindin was, or is, "after the marriage or death of all of them" (*i.e.* the liferentrices) " . . . . the heir of entail . . . . in possession of the estate of Crombie and Craigflower . . . ." I think that possession of the entailed estate was a condition of the succession. I should have reached this conclusion apart from authority; but such aid as may be derived from reported cases seems to me to strengthen the view which I take. Thus in *Inglis* v. *Gillanders*, 1894, 22 R. 266; affd. 1895, *ibid.* (H.L.) 51, the portion of the destination specially considered was "to the heir in possession of Highfield under the entail thereof for the time, and (*i.e.* whom failing) to the other heirs-substitute in said entail in the order set down in said entail successively." Highfield had been disentailed and the tailzied destination evacuated. It was held in regard to the "first branch" above quoted, that (in the words of Lord Watson (22 R. (H.L.) at p. 55)), "it is obvious that, since the disentail of Highfield, the substitution has become void, because there can be no heir answering the description." The "second branch," however, was held to import no condition of possession; all that was requisite being the character of an heir-substitute designated in the deed of entail. The first branch of the destination in that case appears to me to bear a very strong resemblance to that now under consideration. In the immediately succeeding case of *Schank*, 1895, 22 R. 845, the words were "the heirs of entail who may in succession and for the time be in possession, or have right to be in possession, of the entailed estate of X, under and in virtue of the deed of entail." The ground of judgment was thus summarised by Lord Trayner: "It is the essential quality of the person claiming the liferent that he shall be in possession or be entitled to the possession of the entailed lands. The defender does not, and no other person now can, possess that quality, for the entail is no longer in existence." The recent decision in *Mackenzie's Trs.*, 1907, S.C. 139,—a complicated case, involving scrutiny of a variety of documents,—seems to have turned ultimately upon a differentiation of the phrase "the heir entitled to succeed under the said deed of entail," occurring in a

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codicil,—from the language of the testator's principal deed, which was "the heir succeeding to "said estates under the said deed of entail." I was also referred to, but need not comment upon, the cases of *Fenton Livingstone*, 1899, 1 F. 831, and *Davidson*, 1906, 14 S.L.T. 337. For the reasons which I have stated, I am of opinion that the claim for Captain Marindin must be repelled. At the date of the death of the last surviving liferentrix, neither he nor any one else could fulfil the condition—upon which, in my judgment, the right of succession depended—of being heir of entail in possession of Crombie and Craigflower.

If this view is correct, it seems to follow that intestacy resulted. But a controversy is raised between the parties who claim to represent, on the one hand, Miss Blackburn's heir at law, and on the other hand, her heirs *in mobilibus*. The first of these claims is made by the trustees of Sir James William Colvile. They state that Miss Blackburn's heir in heritage at her decease was her nephew Andrew Wedderburn Colvile, who died in 1856, without having made up a title to the bond. On his death the right to make up title thereto passed to his son, Sir James William Colvile, who survived until 1880. His trustees maintain that, in virtue of the Conveyancing (Scotland) Act 1874 (37 & 38 Vict. c. 94), sect. 9, a personal right to the bond vested in Sir James, and passed upon his death to them, under and in terms of his trust disposition and settlement. On the other hand, the fund *in medio* is claimed by the next of kin and representatives *in mobilibus* of Miss Blackburn. Their plea in law is that "the testatrix having postponed vesting of the fund *in medio* until the termination of the liferent, and the destination having then failed, the claimants, as her next of kin and heirs *in mobilibus*, are entitled to be ranked and preferred to said fund in terms of their claim." Of the opposing contentions thus raised I prefer the former. It is, I apprehend, settled law—at all events since the decision in *Lord* v. *Colvin*, 1865, 3 M. 1083—that in a case, as this is, of resulting intestacy, the heir must be looked for as at the time of the testator's death, and not as at the date when it became certain that none of the contingencies could happen, by the occurrence of which intestacy would have been prevented. Nor do I see any reason to doubt that the quality and character of the succession must be ascertained as at the date of the death of the testatrix. This view appears to me to be in accordance with the language of sect. 117 of the Titles to Land Consolidation (Scotland) Act 1868 (31 & 32 Vict. c. 101), and the cases of *Brown*, 1870, 8 M. 439, and *Cunningham*, 1889, 17 R. 218. If that is so, I take it that the right to make up title to the bond, which was heritable at Miss Blackburn's death, passed to her heir at law; and that—unless the argument for Miss Kathleen Marindin, which I must presently notice, is well founded—the fee of the money is now vested in Sir James Colvile's trustees. Counsel for the next of kin referred me to a great number of authorities, amongst the best known of which are *Ferguson*, 1875, 2 R. 627; *Maule*, 1876, 3 R. 831; *Cumstie*, 1876, 3 R. 921; and *Tristram*, 1894, 22 R. 121. It is perhaps sufficient to say that none of these cases, nor the doctrine of fiduciary fee with which they are mainly concerned, appears to me to have any application to the present case; and that, even upon a contrary assumption, I do not understand how these claimants could take benefit from the application of the doctrine referred to. Subject, therefore, to the argument next to be considered, Sir James Colvile's trustees are, in my opinion, entitled to prevail in the competition.

I must now deal with the views submitted on behalf of Miss Kathleen Marindin. These are, as I shall afterwards point out, introduced into the case in a very singular manner; but they were made the subject of an able and earnest debate, which deserves attention, and is not unattended with difficulty. Miss Marindin is the person presently entitled to the free annual income of the estate of the late Eden Colvile, held by his trustees, the pursuers and real raisers, which includes the lands of Muirside. She has, therefore, an interest to maintain, as she does, that the bond in question has been extinguished *confusione*. The theory of her contention is that, on the death of the last liferentrix and the failure of a fiar, the bequest fell into intestacy of Miss Blackburn; that in 1874, when the Conveyancing Act, above referred to, became law, the rights of debtor and creditor respectively in the said bond concurred in the person of Sir James Colvile; and that confusion accordingly operated, at all events so as to extinguish the fee of the £4500 debt. As regards the debtor side of the matter, it is pointed out (I think fairly enough) that although in 1874 the entail of Muirside subsisted, and was not known to be invalid, it was truly so from the passing, and under the operation, of the Rutherfurd Act, particularly sect. 43 thereof, and that Sir James was, therefore, from his succession in 1856 onwards, *de facto* proprietor in fee simple of the lands. When, however, one comes to consider Sir James Colvile's position as creditor in the bond, the matter becomes more difficult. It is not easy to affirm that he was in the full right of credit, looking to the active subsistence of the liferents, and to the fact that at their termination there might have been an heir of entail in possession of Crombie and Craigflower other than Sir James himself. I know of no authority which governs this rather perplexing state of matters. It seems to me to be by no means clear that a right of credit of so contingent a kind is sufficient to invest its temporary holder with the character of creditor in a question of

confusion. But, however that may be, I do not think, regarding the matter upon principle, that it would be possible to hold that the fee of this debt could be extinguished *confusione* in 1874, consistently with the right of the liferentrices to draw interest upon it, as they in fact did, for thirty years thereafter. It was maintained that Miss Blackburn could not legally or effectually make her bequest in the way she did; and that the liferentrices, in spite of their infeftment, had really no right to the interest of the money, at all events after 1874, when the fee was, according to the argument, extinguished by confusion. But these views, which were not supported by reference to authority, appear to me to be unsound. Miss Blackburn's mode of destination was unusual and inconvenient; but I do not think that it was illegal or ineffectual. I was referred to the case of *Love*, 1863, 2 M. 22, especially to certain *dicta* therein. Lord Neaves said (p. 31): "When any one is *pleno jure* the ultimate debtor and creditor in the same debt without relief, that situation in general amounts to confusion, and extinguishes the debt. It may be that other parties are interested in the debt, as where an heir-portioner, being the joint creditor in an heritable debt, succeeds as heir to the debtor, or *vice versa*. The result in that case is that the right is *pro rata* extinguished. It is difficult to see why a similar rule should not apply to a case of liferent and fee." The Lord Justice-Clerk (Inglis), at p. 32, added: "I participate strongly in the doubts suggested by Lord Neaves, whether the right to this third" (of the bond) "was not extinguished *confusione*." I fully acknowledge the great weight which must attach to any words which fell from these eminent judges. The *dicta*, however, were purely *obiter*, and were doubted by Lords Cowan and Benholme (p. 30). Further, it is permissible to observe that the illustration of joint interest suggested by Lord Neaves appears to be very different in its nature from that of liferent and fee, and that his Lordship does not explain the effect of the application of the doctrine of *confusio* to the right of the liferenter. If the obligation for the payment of the principal has been finally extinguished, it is hard to see how the right of the liferenter, duly infeft, could possibly continue to subsist. It may also be noted that though the facts in *Love* v. *Storie* are not very clear from the report, there was in that case an existing fiar, definitely named, which so far distinguishes it from the present case. Upon the best consideration which I am able to give to the argument for Miss Marindin, I am of opinion that it fails, because it appears to me that her counsel cannot successfully maintain that Sir James Colvile was, in Lord Neaves' words, "*pleno jure* the ultimate debtor and creditor" in the debt in question. In my judgment, therefore, the claim of Sir James Colvile's trustees must be sustained, subject, of course, to their granting a valid discharge in favour of the real raisers. In these circumstances, it is not necessary to consider in what manner or to what extent it would have been possible, as the pleadings in this action stand, to give effect to the argument for Miss Marindin. The document (No. 16 of pro.) in which it is contained is certainly framed in a remarkable manner. It appears to be of a hybrid character. It is headed (inaccurately, as I think), "Objections to the Condescendence of the Fund *in medio*"; the principal pleas in law attached to it are directed to establish the incompetency of the action and the absence of double distress, upon the theory that confusion having operated, there is truly no fund in the hands of the real raisers; and it contains an "alternative" claim to be ranked and preferred to a portion of the fund *in medio* which *ex hypothesi* does not exist. This is not, in my judgment, a legitimate mode of pleading; but, as the suit is a friendly one, a way out of the difficulty might probably have been arrived at.—25*th May* 1907.

Outer House. *Lord Dundas.*

Colvile's Trustees v. Marindin and Others.

Counsel for Kathleen Mary Marindin, Blackburn, K.C., Leadbetter; Agents, M'Kenzie & Black, W.S.—Counsel for Arthur Henry Marindin, M'Phail, Maitland; Agents, Murray, Beith & Murray, W.S.—Counsel for Sir James Colvile's Trustees, Dean of Faculty (Campbell, K.C.), Lord Kinross; Agent, Hon. J. M. Balfour, W.S.—Counsel for Edith Mary Marindin and Others, M'Lennan, K.C., Mercer; Agent, David Campbell, S.S.C. W. A. R.

OUTER HOUSE.

(*Lord Salvesen.*)

17. Ross & Marshall *v.* Owners and Master of S.S. "Davaar."

I. Shipping Law — Salvage — Attempted Towage — Salving Ship Disabled during Operation — Remuneration — Salving Ship held Entitled to Award though Her Efforts were Practically Unavailing—The "Melpomene," 1873, L.R. 4, Adm. and Ec. 129, followed.

II. Shipping Law—Salvage—Award under £300—Expenses of Action—Certificate — Merchant Shipping Act 1894 (57 & 58 Vict. cap. 60), sect. 547.

The pursuers were the owners of the steam lighter "Sealight," and in this action they claimed from the owners and master of the s.s. "Davaar" the sum of £500 as remuneration for salvage services and compensation for damages sustained by their vessel in rendering said services. The Lord Ordinary allowed a proof.

The facts of the case as proved, and the contentions of the parties, sufficiently appear from

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the Opinion of the Lord Ordinary, who gave decree in favour of the pursuers for the sum of £80.

Lord Salvesen.—On 23rd October 1906 the steamship "Davaar," belonging to the defenders, was on her usual coasting voyage to Campbeltown. She had just called at Saddel Bay, where the ferry boat had come out to meet her, when it was found that, through some unexplained reason, her rudder was lost. The master of the "Davaar" was first apprised of this occurrence by the boatman, who shouted out to him to let go his anchor. With the southerly wind which was then prevailing there was no safe anchorage in Saddel Bay; and accordingly the master set his engines full speed astern. The "Davaar" has a right-handed propeller, which implies that, when she is moving astern, she will proceed on a curve from starboard to port. I am prepared to hold on the evidence that this was a wise manœuvre, as the vessel's head was then pointing south-west, and the curve which she would necessarily make in moving astern would tend to bring her further from the land. According to the evidence of those on board, her engines were kept reversed full speed for about twenty minutes, at the end of which period she was a mile from the nearest shore, and was heading in a northerly direction.

A screw steamer without steering power cannot be navigated into port without assistance. The master of the "Davaar" realised this, and instructed the boatman at Saddel Bay at once to telegraph for a tug. Notwithstanding this precaution, as there was a strong southerly wind blowing and a choppy sea from the south, the master thought it desirable to obtain immediate assistance. Accordingly the usual signals of distress were hoisted, and several rockets discharged. These signals were observed by the "Sealight," a steam lighter belonging to the pursuers, which had shortly before left Campbeltown on a voyage up the Clyde, and she at once proceeded to the "Davaar's" assistance. The "Sealight" had no cargo on board, and was drawing four feet of water forward and eight feet aft; and, although more than a usually powerful ship of her class, was not adapted for towage purposes. On going alongside some conversation took place between the two masters, the upshot of which was that, at the "Davaar's" request, the "Sealight" undertook to tow her to Lochranza. A strong manilla hawser seven inches in diameter was passed on board; and the "Sealight" proceeded to tow the "Davaar" for a period of time variously estimated at from twenty minutes to three-quarters of an hour. At the end of that period the hawser suddenly parted, with the result that one of the bolts in the "Sealight's" engine snapped, and the "Sealight" was herself disabled. She accordingly proceeded under sail to Lochranza, where some temporary repairs were executed on her engines. The "Davaar" also hoisted sail; and in spite of the want of her rudder she was able after several hours to manœuvre into a safe anchorage near Port Cranaig, about four miles north of Saddel Bay. From this position she was assisted into port by the tugs that had been sent in response to the telegram already referred to.

In these somewhat peculiar circumstances the "Sealight" claims remuneration as for salvage services, and, if I could accept the evidence of her master and mate as to the respective positions of the "Davaar" at the beginning and end of the towage, she would, undoubtedly, be entitled to such remuneration. According to them the "Davaar" was lying with her head pointing to the south only 200 or 300 yards from a lee shore, and, but for the services of the "Sealight," would in all probability have drifted on to the rocky coast at Saddel Bay. They further state that, after towing for three-quarters of an hour, the "Sealight" left the "Davaar" with her head pointing to the north and well clear of the shore. The other two members of the crew of the "Sealight" were not examined; and the case therefore rests entirely on the evidence of the master and mate. It is absolutely contradicted by the officers and some of the passengers of the "Davaar," and also by two independent witnesses — the boatmen, who rowed after the "Davaar," and who had the best means of observing her position. According to these witnesses — whose evidence I accept — the "Davaar" was a mile or a mile and a quarter from the nearest land, and was in no immediate danger.

There is the same conflict as to what took place while the two vessels were connected by means of the hawser. On the one hand the officers and passengers on the "Davaar" say that the "Sealight" was quite unable to tow her, and that, in point of fact, the "Davaar" was not moved to any appreciable extent by the efforts of the "Sealight." On the other hand, the master and engineer of the "Sealight" say that the towage was proceeding satisfactorily until the hawser snapped. The real evidence appears to me all to be in favour of the latter view. "The "Sealight" is proved to have been capable of towing a larger vessel than the "Davaar" in calm water; and I am satisfied that, with the wind and the sea behind her, she could have brought the "Davaar" to Lochranza if no accident had occurred. No doubt the pace would have been a very slow one, probably not exceeding three knots an hour; for the light condition of the "Sealight" was against her rendering efficient service as a tug. That she did move the "Davaar" through the water is, I think, further proved by the fact that the "Davaar" sheered from side to side. In order to correct the sheer the master of the "Davaar," at least on one

occasion, without warning to the tug, reversed his engines full speed astern; and I have no doubt that this was what caused the hawser to part. The exact time during which the "Sealight" continued to tow probably did not exceed half an hour, and during that time the "Davaar" was not, I think, towed more than from one to two knots; and her position, so far as danger was concerned, was practically the same as when she was first taken in tow. It is a condition of an award, as for salvage, that the services have contributed, in some degree, to the saving of property. In my judgment this cannot be affirmed of the services in the present case. The "Davaar" would have been in no worse position if she had never been taken in tow at all.

It does not, however, follow that the owners of the "Sealight" are not entitled to some remuneration for what they did, or at all events to compensation for the damage which they suffered. Had the "Davaar" been utterly lost, no such claim could have arisen, however serious the injuries which have been sustained by the vessel attempting to render salvage services. Here, however, the property was ultimately saved; and there is thus an ample fund out of which to award remuneration. I was referred to various authorities, of which that most in point is the "*Melpomene*," L.R. 1873, 4 Adm. and Ec. 129. In that case Sir Robert Phillimore said, "Where a vessel makes a signal of distress, and another goes out with the *bona fide* intention of assisting that distress, and, as far as she can, does so, and some accident occurs which prevents her services being as effectual as she intended them to be, and no blame attaches to her, she ought not to go wholly unrewarded." This carefully guarded proposition which the learned judge laid down as stating a principle for future guidance, appears to me to be consistent with good sense and equity; and I am prepared to follow it. It is admittedly applicable to the circumstances of the present case; and, accordingly, involves my allowing some remuneration to the "Sealight" for her services or attempted services. The case of the "*Melpomene*" appears not to have been followed by Mr Justice Butt in two cases—the "*Cheerful*," 11 P.D. 3, and the "*Benlavig*," 14 P.D. 3. In the latter case, however, the learned judge reached the same result by a somewhat different road; for he did award remuneration to a vessel for towing another, although the tug left the tow in a more dangerous position than she was in when she was taken in tow. The reasoning upon which he did so, however, is to my mind not satisfactory. He adopted the plaintiffs' alternative argument that they were entitled to be paid a reasonable sum for having fulfilled the contract entered into by them, namely, to attempt to tow the "Benlavig" to Gibraltar. On reading the facts of the case, there seems to have been no other kind of agreement to tow than what always takes place when an offer to salve is accepted by a ship in distress. Whether a port of destination is named or not, there is no contract except that implied in the services being accepted by the disabled ship involving—as such acceptance does—remuneration to the salvor in the event of the services proving ultimately successful. I accordingly prefer the principle on which Sir Robert Phillimore proceeded; but even if the alternative principle of Mr Justice Butt were sound, it is equally applicable here, for the "Sealight" contracted to attempt to tow the "Davaar" to Lochranza, just as much as the "Vester" contracted to attempt to tow the "Benlavig" to Gibraltar.

In considering the amount to be awarded, I think I am entitled to take into consideration the damage which the "Sealight" suffered. That she did sustain some damage is, I think, plain. The crank-bolt of the low-pressure engine was broken through; and this is an indication of the strain to which the engines of the "Sealight" must have been subjected. Some expense and delay occurred in getting the crank-bolt replaced, which could only be done at Greenock. The "Sealight" was surveyed in November by two engineers, Mr Nicol and Mr Cairns, who found that the crank-shaft was bent. It is, of course, possible that this was not the result of the accident, as the survey did not take place immediately after the vessel's arrival in Greenock, as it ought to have done; but the evidence of the engineer convinces me that this injury must have been coincident with the snapping of the bolt which disabled the engines. This was the only thing that was discovered in November; and although, according to the experts, the vessel should not have been continued in her service until the crank-shaft had been put right, she continued running until April, when the pursuers had her put on a slip and overhauled. Various other defects were then found to exist in the engines, which the pursuers attribute to the accident during the towage. I am not prepared to hold that those other defects were due to the accident. Indeed I think, as regards some of them, that it has been proved that they were of old standing; and practically what pursuers are attempting, in this case, is to get the engines, which had been running for twelve years, overhauled and repaired at the expense of the defenders. The materials for estimating the cost of repairing the bent crank-shaft and replacing the bolt have not been put before me in a satisfactory form. Sitting as a jury I estimate the cost of repairing the engines, so far as due to the accident during the attempted towage, at £20; and although the estimates of the pursuers' witnesses are much higher, I cannot see why these small repairs should not have been executed in five days, which, at £6 a day, would add £30 to the loss which the pursuers sustained. In addition, I think they are entitled to charge a survey fee of £10, 10s., and a slip fee of the

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same amount; making the total damage which they sustained, in their well-meant effort to tow the "Davaar," £71. I do not add to this anything by way of remuneration for the towage actually effected, as I think that was so inappreciable as scarcely to admit of having a pecuniary value attached to it. But it is fair to allow a small sum to cover the trouble to which the pursuers were necessarily put in having their vessel surveyed and repaired. I propose, accordingly, to find the pursuers entitled to a sum of £80 to compensate them for the damage which they sustained in attempting to tow the "Davaar" at her request.

I may add that, apart from the principles that Sir Robert Phillimore laid down on which I propose to act, there is another ground on which the same results might well be reached, and that is, that the snapping of the hawser was due to negligent navigation on the part of the master of the "Davaar." I could understand him, if he wished to bring his ship into line with the tug, putting the engines slow astern; but I think it was unseamanlike, without any warning to the tug, to put them full speed astern, with the result that so great a strain was put on the manilla hawser as to snap it. The "Davaar" is a vessel whose engines are able to propel her at thirteen knots an hour; and it is obvious that, even when then they are going astern, they would move the vessel much more rapidly backwards than the "Sealight" was able to propel her forwards. I do not, however, attribute to the master of the "Davaar" the deliberate intention of snapping the rope, and so freeing himself from the "Sealight"; although I have an impression that he was not sorry to be quit of a tug which was likely to consume so long a time in the proposed towage to Lochranza.

Counsel for the pursuers thereafter moved the Lord Ordinary to grant a certificate in terms of sect. 547, sub-sect. 2, of the Merchant Shipping Act 1894, which provides as follows:—

"Subject as aforesaid, disputes as to salvage shall be determined by the High Court in England or Ireland, or in Scotland the Court of Session; but if the claimant does not recover in such Court in Great Britain more than £300 . . . . he shall not be entitled to recover any costs, charges, or expenses incurred by him in the prosecution of his claim, unless the Court before which the case is tried certify that the case is a fit one to be tried otherwise than summarily in manner provided by this Act. . . ."

The same section also provides that where a dispute is to be determined summarily in Scotland it shall be referred to and determined in the Sheriff Court.

The motion was opposed by the defenders, on the ground that the claim for salvage should not have been made in the Court of Session.

The cases of "*The Fenix*" (1855), Swa. 13, and *Lawson* v. *Grangemouth Dockyard Co.*, 1888, 15 R. 753, were referred to in the debate.

The Lord Ordinary *granted* the certificate asked.

Lord Salvesen.—In my opinion this is a case where I ought to grant a certificate. I quite assent to the passage that has been quoted from Dr Lushington's opinion as regulating the matter in the ordinary case. But I think that the exceptions that he refers to apply—at all events one of them applies—to the present case. This was not an ordinary action of salvage in which the only question, or the main question, between the parties was the one of amount. It was a case of a very peculiar nature, which involved a question of law that has not hitherto come up for consideration in the Courts in Scotland. Now that, I think, makes this case a special case, and, without saying that there may not be various other reasons on which a certificate might be granted, some of which might apply here—as, for instance, the fact that there was a very great conflict of testimony, and therefore a difficult question of fact to solve—I think it is sufficient to say that I grant the certificate because the action involved a legal question which made the case one eminently suited for the Supreme Court, and not at all suited for decision by the summary tribunal which is the only alternative that the statute provides. I shall accordingly grant a certificate in terms of sect. 547, sub-sect. 2, of the Merchant Shipping Act.—21*st May* 1907.

Counsel for Pursuers, Hunter, K.C., Sandeman; Agent, William B. Rainnie, S.S.C.—Counsel for Defenders, Aitken, K.C., Spens; Agents, Murray, Beith & Murray, W.S. J. W. F.

OUTER HOUSE.

(*Lord Mackenzie.*)

18. Robertson *v.* Thomas's Limited.

I. Master and Servant — Reparation — Meaning of "Workman" under Employers' Liability Act 1880 (43 & 44 Vict. cap. 42), sect. 8, and Employers and Workmen Act 1875 (38 & 39 Vict. cap. 90), sect. 10.

II. Reparation — Master and Servant — Limited Company—Liability of Company at Common Law for Breach of Ordinary Duties of Master: (*a*) Plant in Disrepair; (*b*) Vicious Horse.

This was an action of damages at common law and under the Employers' Liability Act at the instance of a vanman against a limited company. The injuries complained of were sustained through one of the defenders' horses having bolted while being driven by the pursuer. The pursuer averred: "The pursuer's injuries were

due to the fault of the defenders in respect that they carelessly and negligently supplied a horse which was inherently vicious. . . . Said horse was well known to the defenders, who personally superintended their said business, to be of a vicious and dangerous character.

The pursuer proposed an issue with damages scheduled under the Act and at common law. The defenders *argued* that the pursuer was not entitled to an issue under the Act in respect he was not a workman thereunder, and was not entitled to an issue at common law in respect that there was no averment of personal fault (*Yarmouth* v. *France*, 1887, 19 Q.B.D. 647; *Cook* v. *North Metropolitan Tramways Company*, 1887, 18 Q.B.D. 683; *Morgan* v. *London General Omnibus Company*, 1884, 13 Q.B.D. 832; *Bound* v. *Lawrence* [1892], 1 Q.B. 226; *Smith* v. *Associated Omnibus Co. Ltd.*, 1907, 23 T.L.R. 381).

The Lord Ordinary *approved* of the issue.

Lord Mackenzie.—I am of opinion that the pursuer has stated a relevant case under the Employers' Liability Act 1880. It was not disputed that the averments in Cond. 4 are relevant to infer liability under the statute if the pursuer was engaged in an employment to which the Employers' Liability Act applies. The pursuer describes himself as a vanman, and states that on the day the accident occurred he was ordered by his foreman to take charge of one of the defenders' horses and to deliver some furniture in one of their vans. That, in my opinion, is a sufficient averment. It may or may not turn out, after the evidence has been led, that the pursuer is a workman within the meaning of sect. 8 of the Employers' Liability Act and sect. 10 of the Employer and Workmen Act of 1875. The averment is such, however, that facts may well be established under it which will bring the case within the principle of the decision in *Yarmouth* v. *France*, 19 Q.B.D. p. 647.

The case sought to be made at common law creates more difficulty. An employer is not liable at common law if he takes due care to engage competent servants, to supply sufficient plant, and to ensure a proper system of working. It is here alleged that the defenders supplied insufficient plant in so far as (1) the toe-board for the driver's seat on the van was broken and defective, and (2) that the horse was inherently vicious.

I do not think the averments as regards the toe-board amount to failure to supply sufficient plant. They appear to me to mean that the plant, though originally sufficient, was allowed to get out of order and was not repaired. The duty of looking after this part of the plant was, however, a matter that the defenders were quite entitled to delegate to a servant, and fault on the part of their servant in regard to such a matter, though it may infer liability under the Act, cannot do so at common law.

The case as regards the horse appears to me to be different. The horse was part of the defenders' plant. If the defenders supplied a vicious horse, then they failed to provide sufficient plant. Inasmuch, however, as no employer guarantees his plant to be sufficient, they will only be liable if the insufficient plant was supplied owing to negligence. One of the pursuer's averments in Cond. 3 I have difficulty in following. It is this: "Said horse was well known to the defenders, who personally superintend their business, to be of a vicious and dangerous character." When one looks to see who the defenders are it appears they are Thomas's Limited, described as an incorporated company. The pursuer, however, goes on to say defenders were careless and negligent in supplying such a horse for the purposes of their trade. The fact that the defenders are a company will of course not put them in a better position than if the defender was an individual. If the fault was in regard to a matter which an individual employer was bound personally to look after, the employer will be liable at common law though the fault was the fault of an employee. No employer can delegate what is part of his duty as master. Illustrations of this are contained in the cases of *Macdonald* v. *Wyllie & Son*, 1898, 1 F. 339; *M'Mullen* v. *Newhouse Coal Co.*, 1896, 23 R. 759; and the principle is enunciated in *Wright* v. *Dunlop & Co. Ltd.*, 1893, 20 R. 363. Therefore, in my opinion, if there was a failure to provide sufficient plant, and this was due to negligence, albeit the negligence of an employee, the defenders will be liable at common law.

I am accordingly of opinion that the proposed issue should be approved.—28*th May* 1907.

Counsel for Pursuer, Garson; Agents, Oliphant & Murray, W.S.—Counsel for Defenders, Mair; Agents, Macpherson & Mackay, S.S.C.

A. M. H.

OUTER HOUSE.

(*Lord Guthrie.*)

19. Graham *v.* Graham.

Husband and Wife—Marriage—Nullity—Husband Insane at Time of Marriage and Incapable of Consent—Decree Granted.

This was an undefended action by a wife for decree of declarator of nullity of her marriage with the defender, on the ground that he was insane at the date of the marriage, and incapable of understanding the nature of marriage or of giving his consent thereto.

The following facts were proved by the pursuer:—That the marriage took place on 23rd March 1894. That the defender, shortly before the marriage, became excited and depressed, and

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subject to delusions as to the action of his relatives regarding the marriage, and as to occurrences at the brick works where he was employed as an engineman to within a week of the marriage, and again a few days after it. That after the marriage the defender behaved in a wild and excited manner, thought he was being poisoned, and threatened to commit suicide. That before the marriage the defender's conduct had been so peculiar that he was often spoken of as "daft." That nineteen days after the marriage—that is, on 11th April 1894—the defender absconded, and when caught was taken to Larbert Asylum on 29th May 1894, where he has ever since been confined as a dangerous lunatic. That the marriage had never been consummated.

The Lord Ordinary *granted* decree as craved.

Lord Guthrie.—The pursuer seeks declarator of nullity of the marriage between her and the defender celebrated on 23rd March 1894, on the ground that at the time the defender was insane and incapable of understanding the nature of marriage and of giving his consent thereto. The defender was certified insane on 11th April 1894—that is, nineteen days after marriage. He absconded, and when caught was taken to Larbert Asylum on 29th May 1894, where he has been ever since as a dangerous lunatic—his mental condition being pronounced hopeless. I think the pursuer has made out her case. Whether it would have been sufficient to establish insanity of any kind at the time of marriage, or whether it is not also necessary to show absence of consent in the sense of incapacity to understand the nature and effect of the contract of marriage, I do not require to consider. The defender is proved, in my opinion, not only to have shewn the ordinary symptoms of insanity immediately prior to the marriage—delusions, loss of self-control, perverted affections and threatened suicide; but it is sufficiently proved that the result of his mental condition was to render him incapable of a rational comprehension of or consent to the contract into which he was entering. I therefore grant decree.—28*th May* 1907.

Counsel for Pursuer, Bartholomew; Agent, William Henry Hamilton, S.S.C. C. H. B.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear, and Pearson.)

20. The Accountant of Court.

JUDICIAL FACTOR—JUDICIAL FACTORS (SCOTLAND) ACT 1880 (43 & 44 VICT. CAP. 4), SECT. 4, SUB-SECT. 7—RULE OF COURT—FACTORS APPOINTED BY SHERIFFS IN COMMISSARY COURTS FOR PURPOSE OF CONFIRMING TO ESTATES OF INTESTATES WHO HAVE LEFT NO REPRESENTATIVES, OR WHOSE REPRESENTATIVES ARE IN MINORITY, ARE SUBJECT TO ACCOUNTANT OF COURT.

This was a report by the Accountant of Court for a rule under the Judicial Factors (Scotland) Act 1880, sect. 4 (7), which provides as follows:—

"It shall be the duty of the Accountant, when it appears to him that there is a diversity of judgment or practice in proceedings in judicial factories in the Sheriff Courts which it would be important to put an end to, to report the same to the First Division of the Court of Session, specifying the proceedings in which such diversity appeared, and asking for a rule to be laid down to secure uniformity of judgment or practice in such proceedings, and the Court shall consider such report, and if they shall see fit, shall lay down such a rule accordingly, which rule the several Sheriffs and their Substitutes shall be bound to observe."

The report set forth, *inter alia*:—

The Accountant of Court begs to report that in 1896 he first became aware, through a special remit by Sheriff Thoms, that, throughout the sheriffdoms, appointments of judicial factors were made which were not reported to him, and had not therefore come under his supervision.

These were appointments made in the Commissary Courts for the purpose of confirming to the estates of intestate persons who had left no representatives, or whose children were in minority.

After getting an opinion from the then Solicitor-General that these appointments fell under his supervision, the Accountant called upon the Sheriff Clerks to intimate all such appointments to him. This order was complied with, and there have been reported to date 148 such appointments (78 of which came from Glasgow). These have been annually supervised by the Accountant, and in several cases discharges granted at close on Report by him in the usual way.

In the Sheriff Court of Lanarkshire, at Glasgow, Alexander Rankine was in February 1902 appointed "factor for Christina M'Intyre, who is in minority, and John M'Intyre, Helen M'Intyre, and Duncan M'Intyre, who are in pupillarity." This was duly intimated to the Accountant. An inventory was lodged, and annual accounts subsequently audited up to 5th September 1906, when the estate was exhausted.

In November 1906 the usual petition for discharge was presented, which was refused by the Sheriff, on the ground that it was an application as executor-dative and not as factor.

In the Sheriff Court of Lanarkshire at Glasgow, John Meikle was in June 1903 appointed factor for Catherine Meikle, James Meikle, and John Meikle, children of the deceased James Meikle, mason, Glasgow. An inventory and annual accounts were duly lodged.

In November 1906, the cautioner having died, the Accountant issued a requisition to find new caution, and he received a letter from the factor that the Sheriff-Clerk declined to issue a new bond of caution "in respect he held the Accountant had no right of supervision over factories of this nature."

In the Sheriff Court of Forfarshire at Forfar, George G. Milne, grain merchant, Montrose, was in September 1898 appointed factor for the two pupil

sons of the deceased Mrs Jane Mitchell, Montrose. An inventory and accounts were duly lodged, and the factor lodged with the Accountant a note for Special Powers. On the Accountant's report being laid before the Sheriff, he found "that it was incompetent to grant the authority craved, and refused the crave of the note."

In the Sheriff Courts of Aberdeenshire, Ayrshire, etc., no such questions have been raised, and accounts are lodged and discharges granted in the usual way.

There being thus diversity of judgment and practice in proceeding in regard to these judicial factors, the Accountant craves your Lordships, in terms of sect 4, sub-sect. 7, of the Judicial Factors Act 1880, for a rule deciding whether factors appointed under these conditions fall under his supervision.

Sect. 6 of the Judicial Factors (Scotland) Act 1889, is as follows:—

"In addition to the factors specified in the recited Act of 1849, the Accountant shall superintend the conduct of all other factors and persons already appointed or to be appointed by the Court of Session, or any of the Lords Ordinary in the said Court, or by any of the Sheriffs or Sheriff-Substitutes in the several Sheriff Courts in Scotland, to hold, administer, or protect any property or funds belonging to persons or estates in Scotland; and all such factors and others shall be and hereby are made subject to the provisions affecting judicial factors of the said recited Act of 1849, and of any Acts amending the same, or in terms of the Judicial Factors (Scotland) Act 1880, and of any Acts of Sederunt made in terms of said Acts; and the Accountant shall see that they duly observe all rules and regulations affecting them for the time: provided that nothing in this section contained shall be held to apply to executors-dative. . . ."

Counsel for the reporter referred to the following authorities:—Alexander's Practice of Commissary Courts, p. 54; *Johnstone* v. *Lowden*, 1838, 16 S. 541; *Johnstone's Exr.* v. *Dobie*, 1907, S.C. 31; *Accountant of Court*, 1893, 20 R. 571.

The Court issued the following interlocutor:—

"The Lords of Council and Session (First Division), in pursuance of the powers vested in them by sect. 4, sub-sect. 7, of the Judicial Factors (Scotland) Act 1880, upon a Report made to them by the Accountant of Court, boxed on 16th March 1907, direct and appoint that Factors appointed by Sheriffs or Sheriff-Substitutes for the purpose of confirming to the estates of intestate persons who have left no representative, or whose representatives are in pupillarity or minority, shall fall under the supervision of the Accountant of Court, and shall be subject to the provisions of sect. 6 of the Judicial Factors (Scotland) Act 1889."

The Lord President.—This is a report by the Accountant of Court made in terms of sect. 4, sub-sect. 7, of the Judicial Factors (Scotland) Act 1880, asking the Court to lay down a rule to ensure a similarity of practice in the various sheriff courts in a matter pertaining to judicial factors; and the question in controversy which has been raised in practice is, whether the judicial factors who are appointed in the sheriff courts, sitting as Commissary Courts, with a view to taking the position of executor-dative on the estates which fall to minors, are, or are not, subject to the jurisdiction of the Accountant of Court.

I need scarcely remind your Lordships that though the practice of appointing factors is partially statutory, and partially also a common law practice, the question of the jurisdiction of the Accountant of Court is here a statutory matter, for he is an official created with certain duties, and his duties are laid down in the statute; and the matter comes finally to be nothing more or less than simply what is the proper construction of the 6th section of the Factors (Scotland) Act 1889. That section is in these terms: "In addition to the factors specified in the recited Act of 1849, the Accountant shall superintend the conduct of all other factors and persons already appointed or to be appointed by the Court of Session, or any of the Lords Ordinary in the said Court, or by any of the Sheriffs or Sheriff-Substitutes in the several Sheriff Courts in Scotland," and all such persons are made subject to the provisions applying to judicial factors; and then comes a proviso providing "that nothing in this section contained shall be held to apply to executors-dative."

The learned Sheriff-Substitutes who have held that such factors as I have mentioned are not subject to the jurisdiction of the Accountant of Court have gone on somewhat different views; both of them have expressed a doubt whether a factor of this sort falls within the category of the persons recited in sect. 6, and one of them, whether or not that may be so, thinks that this class of factors falls clearly within the proviso in sect. 6. Now it is material to notice that this is evidently an attempt of the Legislature to solve still further than was solved in 1849 the whole question of *Quis custodiet ipsos custodes*, and so far as one may take the import of the section concerned, I think there is evinced a desire that factors in general should be put under the very salutary jurisdiction of the Accountant of Court. The factors here in question are certainly factors, and they are certainly appointed by the Sheriff or Sheriff-Substitute, and the only point is whether they are appointed in the Sheriff Court in Scotland. I have no doubt these factors are appointed in the Sheriff Court, because before 1880 the jurisdiction of the Commissary Court in Scotland had been transferred to the Sheriff Court. The next point for consideration is whether such an appointment of a judicial factor in the Sheriff Court, with a view to his becoming executor, falls within the proviso "that nothing in this section contained shall be held to apply to executors-dative"; and the first thing I ask myself is, Why was that proviso put in? Owing to the wide terms of the principal clause, which is not limited to

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factors, I do not think the answer is doubtful. If the first clause had only said "factors," there would have been no necessity to put this in. But the clause is not limited to "factors," but goes on to specify "any person appointed to protect any property or funds situated in Scotland." Now that is such very wide language that it might have been supposed to pull in executors-dative. Executors-dative are persons appointed to protect and administer property, and therefore the proviso was put in for the very good reason, pointed out by Lord M'Laren, that there is not the same reason to supervise an executor-dative as a factor, because the executor-dative is looking after his own interests, and is there as a person connected with the estate. When, however, you come to factors appointed to take the position of executors-dative to minors, there is great reason for subjecting them to the scrutiny of the Accountant of Court. The factors in question may have to administer for many years, and there is just the same reason for subjecting them as any other factor to the scrutiny of the Court. There is always a bond of caution in one case as in the other, but years may go and the cautioner may die and in the end it may be found that the factor has not been administering the estate as he ought. It was to check that that the whole system of supervision by the Accountant of Court was devised, and the underlying reason is as strong in the one case as in the other.

I therefore come clearly to the opinion that the fact that the person who is a factor afterwards becomes executor-dative does not make any difference, and that the fact that he is appointed as executor-dative does not take away the generality that as a factor he is under the jurisdiction of the Accountant of Court.

Lord M'Laren.—I agree.

Lord Kinnear.—I am of the same opinion, and think that the learned Sheriffs who have taken a different view have failed to observe the very obvious distinction between persons decerned and confirmed executor-dative in their own rights, and persons so confirmed merely as factor for pupils or minors. If that distinction is kept in view, then I think the construction of the statute your Lordship has explained becomes perfectly reasonable. There can be no reason to suppose that the Legislature intended to deprive pupils or minors of the protection of a factor which is given to others.

Lord Pearson.—I concur.—16*th May* 1907.

Counsel for Reporter, Pitman; Agent, Thomas Carmichael, S.S.C. A. M.

FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear, and Pearson.*)

21. Krupp and Another *v.* John Menzies Limited.

Evidence—Written Contract—Alleged Clerical Error—Document Explicit and Unambiguous — Proof of Averments of Clerical Error Allowed.

(*Reported ante, Vol. XIV. p.* 12.)

Reclaiming Note against an Interlocutor of Lord Dundas.

The facts of the case appear from the prv ious report.

The defenders *reclaimed.*

The Reclaiming Note was put out for hearing on 24th January 1907. During the course of the hearing, the Court, at the request of counsel for the reclaimers, postponed the hearing to allow the reclaimers to put in a Minute of Amendment. Counsel for the reclaimers were subsequently permitted to amend on payment of £21 of expenses.

The Record as amended contained the following averments by the defenders, *inter alia* :—

The agreement is referred to. Explained that the words "one-fifth part" were inserted in the agreement by a clerical error instead of the words "five per cent.," and that the pursuers are well aware of this fact. On or about 1st October 1900 the pursuers had a meeting with the defenders' managing director and law agent at the office of the latter in Edinburgh. At this meeting terms were discussed for a proposed agreement between the pursuers and defenders relating to the appointment of the pursuers as manager and housekeeper respectively of the defenders' new hotel, which was shortly to be opened at Mallaig, for which posts the pursuers had already applied to the defenders. The conditions of service were fully explained and detailed to the pursuers at the said meeting. These conditions were similar to those in the existing agreement between the defenders and Mr Rusterholz, the manager of the Palace Hotel, Inverness, and his wife. The said hotel also belongs to the defenders, and the pursuers were already familiar with the conditions in the said agreement. The conditions explained to the pursuers at the said meeting were agreed to by them. As regards salary, the same salary as was paid to Mr Rusterholz and his wife, viz., £200 per annum, was offered to and was accepted by the pursuers. As regards a share of profits, it was explained to the pursuers that Mr Rusterholz received a bonus of 10 per cent. One-half of such bonus, viz., £5 per cent. of the net annual profits of the business of the hotel, was offered to the pursuers, and this they agreed to accept. The smaller rate was fixed because of the larger earning capacity of the Mallaig business through the liquor turnover during the winter months. It was further arranged that the defenders' law agent should prepare and send the pursuers a draft of the agreement. On or about

13th October 1900 the defenders' law agent had a meeting with the pursuer Mr Krupp at Banavie Hotel, Inverness-shire, which also belongs to the defenders. At that meeting the pursuer Mr Krupp requested the defenders' law agent to allocate in the agreement one-half of the salary of £200 agreed upon to him, and the other half to the pursuer Mrs Krupp. To this the defenders' law agent agreed on behalf of the defenders. The defenders' law agent, on returning to town, proceeded to have the draft agreement framed on the terms arranged. The only changes which fell to be made on the draft agreement, as compared with the agreement with Mr Rusterholz and his wife, were (1) the allocation of one-half of the salary to each of the pursuers; (2) the substitution of 5 per cent. of the annual profits instead of 10 per cent. "Ten per cent." in the agreement with Mr Rusterholz was expressed as "one-tenth part of the net annual profits." A clerk was directed to draft the agreement on that footing. He was provided with the agreement with Mr Rusterholz for his assistance, and was directed to give effect to the alterations aforesaid, his instructions being as regards the share of profits to give half the share received by Mr Rusterholz under his agreement to the pursuers under theirs. The said clerk by inadvertence inserted the words "one-fifth part" instead of the words "five per cent.," or its equivalent "one-twentieth part," being an erroneous calculation on his part of one-half of a tenth.

The case was put out for further hearing on 16th May 1907, when the following authorities were referred to:—Dickson on Evidence, Vol. II., 1041; Taylor on Evidence, 1140; *Carricks* v. *Saunders*, 1850, 12 D. 812; *Glasgow Feuing and Building Co. Ltd.* v. *Watson's Trs.*, 1887, 14 R. 610; *Stewart's Trs.* v. *Hart*, 1875, 3 R. 192; *Marquess of Queensberry* v. *Scottish Union Insurance Co.*, 1839, 1 D. 1203, affid. 1 Bell's App. 183; *Harris* v. *Pepperell*, 1867, 5 Eq. 1; *Manser* v. *Bach*, 1848, 6 Hare 443; *Garrard* v. *Frankel*, 1862, 30 Beavan 445.

The Court *recalled* the Lord Ordinary's interlocutor and remitted to the Lord Ordinary to allow the parties a proof before answer of their respective averments, the defenders to lead in the proof, and to proceed.

The Lord President.—My Lords, I quite agree with the words of Lord President Boyle in the case of *Carricks* v. *Saunders*, 12 D. 812, which has been cited to us, that it is a very delicate matter to interfere with a written contract expressed in clear terms, and that parole proof should not be rashly allowed in such a case. But there are cases in which it would be truly a disgrace to any system of jurisprudence if there was no way available of rectifying what would otherwise be a gross injustice. I do not prejudge this case, but take it on the averments of the defenders. According to these averments, the pursuers, Mr and Mrs Krupp, were by their contract, in addition to a *cumulo* salary of £200 per annum, to receive a proportion of the net profits earned by the hotel at Mallaig which they were to manage for the defenders, viz. 5 per cent. This condition was similar to that in an agreement existing between the manager of the Palace Hotel, Inverness, and the defenders, save that in the case of Inverness the proportion of profits coming to the manager was 10 per cent. This difference was explained to the pursuer as being based on the fact that the gross receipts at Mallaig were larger. The Inverness agreement was given to a clerk, that from it he might draft the agreement with the pursuers, and he was instructed to follow the Inverness agreement, but to halve the percentage of the profits. This clerk somewhat carelessly miscalculated one-fifth as a half of 10 per cent., and inserted that figure in the agreement between the pursuers and the defenders, in place of 5 per cent.

The error remained undiscovered by either party, and the pursuers received a share of the profits on a 5 per cent. basis until the parties eventually quarrelled as to the amount due. Then the pursuers demanded a settlement on the basis of 20 per cent. or one-fifth of the net profit as the proportion allotted to them under the agreement. My Lords, this case seems to me to have nothing to do with the avoidance or re-formation of the contract. The only question is whether proof is admissible that a document, which in ordinary circumstances would be held to express the intentions of the parties, does not in fact do so.

I am clearly of opinion that proof should be allowed.

Lord M'Laren.—It may be kept in view that it is a condition of the pursuers' case that neither party was under error as to the terms of the contract intended. That being so, we are not at all in the region of rescinding or re-forming a written contract where one of the parties has been led into error by the fault or negligence of the other party.

What it is proposed to prove is that the fraction, one-fifth was inserted in the agreement in place of 5 per cent., the true quantity. This was either a clerical or an arithmetical error, and is *prima facie* subject to correction. We know, for example, that a misnomer is always subject to correction, for on proof of the true name of the person or thing, effect is always given to that proof. Then in deeds of conveyance arithmetical errors are subject to correction when it appears on the face of the deed that they are arithmetical errors. In such cases we do not vary the terms of the contract at all, but merely seek to give expression to the true contract as agreed to by the parties.

While I have a strong opinion that such a power of correction is inherent in the Supreme Court, the first step in the operation evidently is to ascertain the facts of the case and the considerations raised by these facts. I concur with your Lordship that proof should be allowed.

1st Div.

Krupp and Another v. John Menzies Ltd.

Lord Kinnear.

Lord Kinnear.—I am clearly of the same opinion.

Lord Pearson concurred.—16*th May* 1907.

Counsel for Reclaimers, The Dean of Faculty (Campbell, K.C.), Morton; Agent, John A. Tweedie, Solicitor.—Counsel for Respondents, M'Lennan, K.C., Mercer; Agent, D. Maclean, Solicitor. A. M.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Pearson.*)

22. Thomas Nelson & Sons *v.* The Dundee East Coast Shipping Company Limited.

Ship — Charter-party — Construction—Ship "Expected Ready to Load" About Certain Date — Obligation to Proceed Thereafter to Port of Lading "With All Convenient Speed"—Subsequent Charter-parties Entered Into by Shipowners Preventing Fulfilment of Obligation—Cancellation Clause—Breach of Contract—Damages.

Reclaiming Note against an Interlocutor of Lord Ardwall.

This was an action at the instance of Thomas Nelson & Sons, publishers, Edinburgh, against the Dundee East Coast Shipping Co. Ltd., for damages for breach of a contract contained in a charter-party entered into between the parties, by failure to provide a ship by the day stipulated. The terms of the charter-party sufficiently appear from the opinion of the Lord President.

Proof was led before the Lord Ordinary. In the course of cross-examination, David Nicol, one of the defenders, made the following admissions:—

"The charter was of the 'Alice,' with an option entitling us to substitute the 'Douglas.' It was expected to be ready to load about the 3rd of March. *Q.* Two days afterwards, didn't you charter the 'Alice' to carry potatoes from Dundee to Penzance? *A.* Yes. *Q.* Expected ready on Tuesday 7th March? *A.* Yes. *Q.* That charter made it impossible for the 'Alice' to fulfil the charter with the Nelsons? *A.* Yes. We chartered the 'Douglas' on 2nd March, due to load on the 7th from the Tees to Chatham. *Q.* That made it impossible for the 'Douglas' to fulfil the charter with the Messrs Nelson? *A.* Yes. Before concluding that charter we telephoned to Messrs Cairns about when Messrs Nelson would be ready to load, and they said the cargo would not be ready for shipment before the 9th or 10th of March. *Q.* Having got that information, that the bargain with you and Messrs Nelson was to load on the 9th or 10th, you at once chartered the 'Douglas' in such a way as to make it impossible that she could load the cargo? *A.* No, she would be down on the 13th. *Q.* That is not the 9th or 10th. *A.* We gave no guarantee that she would be there before the 9th or 10th.

"*By the Court.*—*Q.* Did you enter into a charter as regards the 'Douglas' which made it impossible for her to be there on the 9th or 10th of March? *A.* Yes."

The circumstances of the case otherwise sufficiently appear from the Opinions of the Lord Ordinary and the Lord President.

The Lord Ordinary *decerned* against the defenders, and assessed the damages at £33, 3s. 2d.

Lord Ardwall.—This is an action of damages for breach of a contract of charter-party entered into between the pursuers of the one part, and Messrs R. Cairns & Co. as agents for the defenders, of the other part.

It will assist in construing the charter-party to advert to the circumstances under which it was entered into.

In February 1905 the pursuers, in view of the facts that they were in course of printing and publishing a new encyclopædia in conjunction with Messrs Harmsworth, of London, which was a work of an important character, and was expected to have a large sale, and that they had other material to send to London from time to time, thought that they would try what is called in the evidence the "experiment" of sending these goods by a small steam vessel chartered for the purpose. They accordingly applied to Messrs R. Cairns & Co., shipbrokers in Leith, to furnish them with a vessel. The negotiations were carried out to a certain extent by telephone, and on 14th February 1905 Messrs R. Cairns & Co. made an offer of a "steamer 230 deadweight, loading 3/10 March, for £90, for cargo of paper in bales, Leith to London, cargo to be loaded in two days and discharged in two days." The pursuers on 15th February accepted the offer, and this passage occurs in their letter: "We hereby accept your offer of steamer to carry 230 tons, loading March 9th and 10th, and discharging in two days in port of London." The said letter further said: "It must be clearly understood that the ship must be put in a suitable condition for receiving a cargo of printed paper," and on 16th February (for it seems that the 16th is the proper date and not the 15th as in the document itself) the charter-party of which No. 6 of process is a copy was executed by the parties. Referring to that document, it is to be noticed in the first place that the vessel is stated to be expected to be ready to load about the 3rd March 1905, the words "3rd March 1905" being in writing. Further down the charter-party, and forming part of the printed form, this clause occurs: "In the event of misrepresentation regarding steamer's size or position or of any mishap entailing delay in arrival at port of loading beyond seven days of her expected readiness, charterers to have the option of cancelling this charter." I have no doubt, reading these two passages together, that on a sound construction of the charter-party, it provides for the vessel being at Leith (which, in another part of the charter-party is stipulated as the port of loading) at latest on the 10th

of March. I have little doubt that the 3rd of March was written in as the expected date of readiness with the view of bringing the period of seven days in the printed clause, already quoted, to an end by the 10th of March. This is just what might have been expected after Messrs Cairns had received Messrs Nelson's letter, stating that the loading would take place on the 9th and 10th of March. A cancellation clause of the kind above quoted is frequently inserted in charter-parties in order to entitle a charterer, without fear of future questions, to cancel the contract on the occurrence of a specified event, whatever the cause of that event happening might have been, so as to prevent all questions afterwards arising as to his right to cancel, or his possible liability for damage for improperly cancelling the contract. But the clause has also this importance in the present case, that I think it makes it plain that the 10th of March was to be the latest date on which the steamer was to be put at the disposal of the charterers. The clause does not appear to me to derogate from the right of the pursuers to claim damages on account of the vessel not being forward by the 10th March, because what usually follows on the cancellation of a contract when either party has a right to cancel, is that the party cancelling has his full right to claim such damage as he may sustain in consequence of the contract being cancelled, it being, of course, his duty to diminish that damage as much as possible. Apart from the terms of the charter-party, I think it clear that the parties, in point of fact, knew well enough that what was in contemplation was loading on the 9th and 10th of March, and that it was important that the goods should be in London in time (see Messrs Cairns' letter to the pursuers, of 24th February 1905), and there seems little doubt, upon the evidence, that Messrs Cairns & Co., with whom alone the pursuers transacted, knew that the pursuers, for business reasons, required the cargo to be in London on Monday the 13th of March. It is explained very fully in the evidence both of Mr Rintoul and Mr George M. Brown how important it was that the first number of the Encyclopædia should arrive in London by that day, and how very anxious they were that no risks should be run regarding that number being in the hands of all retail dealers by the promised day of publication.

The steamship chartered under the charter-party was called the "Alice," and this clause was added—"That the owners have the option of substituting the s.s. 'Douglas' (sister ship)," and, as above explained, in my view the contract between the parties, as contained in the charter-party, was that one or other of these vessels should be placed at the disposal of the pursuers for loading not later than the morning of the 10th of March, and I think I may add that it was within the contemplation of the parties, if not so expressed or implied in the charter-party, that she should be so placed on the morning of Thursday, March 9th. There can be no doubt that this contract was broken, whichever of these days is taken. On 25th February the pursuers notified Messrs Cairns that they would be ready to load either of the vessels, beginning on the morning of Thursday 9th March, and on 8th March the pursuers telegraphed to Messrs Cairns to ask the earliest date when the "Alice" or "Douglas" could load at Leith. To this, upon 8th March, Messrs Cairns replied that the "Douglas" was expected to be ready at Leith on Wednesday the 14th, or Thursday the 15th March, the "Alice" about the 20th of March, and then they went on to say that another vessel, the "Marion," might now be ready at Leith on Saturday 11th March at noon. It appears from the evidence of the defenders themselves that, having apparently got offers of various other voyages for the "Alice" and "Douglas," they paid no attention to having either of these vessels at Leith on the 9th or 10th of March. The "Alice" was at Dundee on the 7th of March, but had to undergo repairs, and did not leave Dundee until the 11th of March, and apparently by this time the defenders had chartered her to take a cargo of potatoes to Penzance, but in no view could she have been at Leith before the 13th. With regard to the "Douglas," she arrived in Dundee on the 28th of February, and in order to fill up time she was sent with a cargo of potatoes to Wisbech, and then the defenders took a charter-party from Stockton-on-Tees to Chatham, so that neither of these vessels was ever even tendered to the pursuers on or before the 10th of March. There is accordingly no doubt in my mind that the contract was broken, but it is said that the defenders tendered the pursuers the "Marion." If the pursuers had accepted that vessel, there would have been a new contract, and the pursuers were not bound to enter into such. On 9th March, however, the pursuers wrote the Messrs Cairns that they must send some of their goods by one of the regular steamers from Granton to London, and hoped that they may be able to accept their suggestion to send the remainder of the goods by the "Marion." But on the same day Messrs Cairns wrote, saying that the defenders had written to them, stating that they "would only put in 'Marion,' provided free of any stipulation or condition as to payment of difference of freight, etc., on parcel to be sent by liner, and later state that they are now fixing vessel for other business, in view of the position you have taken up." I am of opinion that this was not an offer which the pursuers were bound to accept, as in my view they were entitled, upon neither of the chartered vessels being forward on the 10th, to ship the goods that required to be in London on Monday by a liner, and to charge the extra expense against the defenders. Curiously enough, the pursuers afterwards chartered the "Marion" from a broker other than Cairns, and, as it turned out, she did not arrive in Leith till Saturday the 11th of March at 6 a.m., started loading the pursuers' cargo on Tuesday the 14th of March, but, owing to bad weather, did not reach London till Saturday, the 18th March, at 10.15 p.m., and did not get the discharge of her cargo finished till Monday the 20th of March at 5 p.m. It is suggested, however, that if the pursuers had accepted the offer of the "Marion" at once from the defenders through Messrs Cairns, they might have got her off by the morning of Sunday the 12th, so as to reach London on the 14th; but I may observe that this is only hypothetical, and I do not think it relevant, for the reason I have already stated, that the offer of the "Marion" was made subject to a condition which the pursuers were entitled to reject. The defence stated in Article 4, that the "Marion" was ultimately chartered on the footing that no claims were to be made in respect of the breach of charter of the "Alice" and "Douglas," is disproved. The pursuers in that matter were not represented by Messrs Henry & Macgregor as their agents; on the contrary, they chartered the vessel from them as principals, and paid them a higher rate than the defenders had charged to Henry & Macgregor. I make no comment upon the position of the latter firm in the matter, as it does not concern the present question.

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The defenders having failed to put either the "Alice" or the "Douglas" at the pursuers' disposal on 10th March, and it being perfectly evident, from the information communicated to the pursuers by the Messrs Cairns, that neither of these vessels could be at Leith in time to carry the pursuers' cargo to London by the time required, they formally intimated to Messrs Cairns, on the 10th of March, that, as they had failed to provide a steamer in terms of the charter-party, they had been forced to make other arrangements, and held them liable in damages. That the pursuers had a right to cancel the contract as they did by this letter is, as I have said, clear from the charter-party; and the next question is, What damages are due? With regard to that matter, I am of opinion that the pursuers were entitled, in the circumstances, to send the first consignment of the Encyclopædia to London by the Granton steamer, so as to be sure of its arriving on Monday the 13th. I do not think they were bound to run any risk with regard to this consignment. If they had, and more damage had followed, it might have been a much more serious matter for the defenders, and I may refer to the case recently decided in the House of Lords (*Ströms Bruks Aktie Bolag* v. *Hutchison*, L.R. 1905, A.C. 515) as an illustration of the nature of the damages that may be incurred in consequence of a breach of a charter-party.

[His Lordship assessed the damages at £33, 3s. 2d.]

The Defenders *reclaimed*, and *argued*: The breach of contract of which the reclaimers were accused was that of failing to provide a vessel by 10th March. But the charter-party imposed no obligation to provide a ship by the 10th, and was drawn up on the assumption that no ship might be ready on that date. The cancellation clause was the important clause in the charter-party. Its effect was not to give a warranty that a ship would be ready on the 10th, but simply to give the respondents a right to cancel the contract if no ship was ready. The respondents exercised the right to cancel, and that was an end of the matter and no right to damages emerged (*Buttercase and Geddie's Trs.* v. *Geddie*, 1897, 24 R. 1128; *Bentsen* v. *Taylor, Sons & Co.* [1893], 2 Q.B. 274).

Argued for Respondents: The obligation undertaken in the charter-party was to "sail and proceed with all convenient speed" after the ship was ready, which was expected to be on 3rd March. The cancellation clause applied only to the case of "mishap," *e.g.* weather, preventing the ship being ready by 10th March. The breach of contract consisted in the reclaimers by their own act having made it impossible to fulfil the obligation in the charter-party. It was not a question of the cancellation clause at all, as it was not a "mishap" but a deliberate act. The construction of the charter-party for which the reclaimers contended amounted to this, that they should provide a vessel or not just as suited them best.

The Court *adhered*.

The Lord President.—My Lords, this is an action of damages for breach of a contract of charter-party entered into between the pursuers, who are a firm of publishers in Edinburgh, and a firm of shipowners in Dundee, and the question turns on the true meaning of the charter-party. That charter-party provides: "It is this day mutually agreed between Messrs R. Cairns & Co., Leith, agents of the s.s. 'Alice' . . . . now trading and expected ready to load about 3rd March 1905, and T. Nelson & Sons, Parkside Works, Edinburgh, freighters, that the said ship . . . . shall with all convenient speed sail and proceed to a customary loading berth or berths as ordered at Leith," and there load a cargo of paper in bales, and being so loaded shall proceed with her cargo to London. The charter-party further provides:—"In the event of misrepresentation regarding steamer's size or position, or of any mishap entailing delay in arrival at port of loading, beyond seven days of her expected readiness, charterers to have the option of cancelling this charter." I ought to mention this other clause: "Owners to have the option of substituting their s.s. 'Douglas' (sister ship)." Now what happened was this. By the 10th of March neither the "Alice" nor the "Douglas" was tendered, and as Messrs Nelson were under contract to send on paper which was urgently required in London, they shipped part of it by the ordinary line of steamers, and sent on the remainder by another boat which by chance happened to belong to the same firm of shipowners. The damage sued for is the difference of freight between that of the "Alice" and that charged by the ordinary line of steamers.

The Lord Ordinary has held that, reading the charter-party as a whole, the true construction is this—I quote from his opinion—"I have no doubt . . . . that on a sound construction of the charter-party it provides for the vessel being at Leith (which, in another part of the charter-party, is stipulated as the port of loading) at latest on the 10th of March." My Lords, I confess I have some difficulty in holding that there is an absolute obligation to provide a steamer by the 10th of March, but I agree that it was in the contemplation of parties that the steamer was to be ready on or about the 3rd, and that parties were not expected to wait after the 10th. But the matter truly depends on whether the owners have or have not fulfilled the contract by which they bound themselves to provide a ship, "expected ready to load about 3rd March," and which should, "with all convenient speed," proceed to the loading berth at Leith. There does not seem to have been any case precisely the same as the present, but there are many cases in which the words "with all convenient speed" have been construed. They mean that the vessel is to proceed as soon as it can to its destination. If it is delayed by perils of the sea, that would be a sufficient answer. If a definite date is inserted, that of course speaks for itself. But the words here are "expected

ready to load." That expression shows that the parties were well aware that the ship might not be ready on the 3rd of March, and it is for that reason that the second clause is put in, viz. that after the 10th of March the charterer might cancel the contract. The ship might not be ready through no fault of the owners; it might be delayed by accident or by stress of weather. That, however, does not alter the fundamental matter that the shipowner must do nothing on his part to prevent the ship being ready at the time mentioned.

Now in his evidence, Nicol, one of the defenders, admits frankly that he so chartered the boats in question as to make it impossible for them to be there on the 10th of March. That seems to put him out of court. We were told that this was an important case for those engaged in the coasting trade, but I cannot think that it is so, for nothing would be easier than to insert words declaring that the owners should not be liable in the event of their failure to provide a ship. I therefore think the Lord Ordinary is right, although I do not base my judgment on the same grounds. I base my judgment on this, that the shipowners, by their own act, put it out of their power to fulfil the contract. It is a case of simple breach of contract, for which the other party is entitled to sue. I am therefore for adhering to the interlocutor reclaimed against.

Lord M'Laren.—The Lord Ordinary has given very moderate damages, limited to the actual difference of freight which the Messrs Nelson had to pay for that part of the cargo which had to be sent by the regular line of steamers. No question was raised as to the amount of the damages, but it was submitted by the reclaimers that no damages were due, in respect that the insertion of the clause giving an option to cancel came in place of the common law obligation to provide a ship or pay compensation. I do not think the clause was inserted for any such purpose. Under the known case law on this subject, where there is a general obligation to send a ship with all convenient speed, and circumstances have prevented her arrival, the question is a circumstantial one whether the contract of affreightment may be rescinded. In the case of *Jackson* v. *The Union Marine Insurance Co. Ltd.*, L.R. 10, C.P. 125, which is a decision of the Exchequer Chamber and an important authority in mercantile law, it was so treated, even though in that case the ship had been a year late in arriving, the delay, however, being due to unavoidable accident. One of the five judges who heard the case gave it as his opinion that the merchant, the charterer, was bound to wait till the end of the year, but the majority thought otherwise, on the ground that the object of the contract would be defeated or frustrated by such delay, and that the charterer was entitled to treat the contract of affreightment as broken. In such a state of the law it never could be ascertained except by proceedings in Court, whether the object of the voyage had been frustrated, and whether the charterer was entitled to take another ship. That was not a very convenient rule in mercantile practice, and may have led to the insertion of clauses in charter-parties fixing the date beyond which the merchant was not bound to wait before chartering another ship.

Now I take it that this cancelling clause has fixed a time beyond which the Nelsons were not bound to wait and to risk the disappointment of those with whom they were under contract to supply the paper. That, however, leaves untouched the question whether damages are due, and I agree that the liability depends on whether the shipowner has fulfilled his primary obligation to provide a ship with all convenient speed. If it could be shown that the shipowners had used their best endeavours, and that the delay was due to unavoidable accident or perils of the sea, I should have been of opinion that no damages were due. The contract could be cancelled but damages would not be due, for each party would then be within his rights. In this case the shipowners sent each of the two named vessels on coasting voyages which could not be completed in time to admit of one of these vessels being put at the disposal of Messrs Nelson before the date prescribed when the charter might be cancelled; and when a shipowner fails, by his own wilful act, to do his best to provide a ship, I see no reason why he should not be liable in damages like any other person who is in breach of a contract.

Lord Pearson.—The charter-party which we have to construe contains a clause which is said by the defenders to have been inserted by them in order to secure a special object. They are owners of several small coasting steamships; and they say that it is necessary for their profit that the ships should be in constant employment. Their case is that they refrain from tying themselves down to any specific day for arrival at the port of loading. In order to keep their hands free, they use a form of charter-party which in their view contains no obligation at all to furnish a ship as part of the contract, but which confers on the charterers the option of cancelling the charter if no ship is tendered, or of waiting until it pleases the defenders to tender a ship. In this view, these two alternatives exhaust the charterers' remedies, so that no room is left for a claim of damages.

I do not say that it might not be possible so to frame a charter-party. I suppose it could be done by an express clause that all claims of damages for late arrival or for non-arrival at the port of loading are excluded; though whether the defenders would get merchants to hire the

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ships on such terms is another matter. Here, however, there is no such clause; and in the absence of it the Lord Ordinary has held that a claim for damages is not excluded by the clause as it stands, seeing that when read in connection with the opening words of the charter, it imports, in his view, an absolute obligation to have the ship at Leith on 10th March at latest.

I think the question so raised is one of some difficulty; and I prefer the alternative case which was made for the pursuers, and which, in my view, affords the true solution of this dispute.

The contract must be read as a whole, in order to see exactly what obligations it lays upon the shipowners according to its terms. The ship is described as "now trading"; and as the voyages were apparently confined to home-ports, there could be no difficulty in forecasting the probable day of her arrival at the port of loading, which was Leith. Accordingly, the contract declares that she is "expected ready to load about 3rd March"; and the owners undertake that she shall with all convenient speed sail and proceed to Leith, and there load as customary. The defenders dwell on the expression "expected ready to load about 3rd March," as if it left everything open, with the result that the charter is absolutely indefinite as to time, in the important matter of the commencement of loading. I do not say that the words amount to an undertaking that she will be ready to load on 3rd March, or even about 3rd March. But touching as they do a matter within the shipowners' own knowledge and control, they at least import, in my opinion, an assurance that the vessel was at the time in such a position that she might reasonably be expected to be in Leith ready to load by the day named. Now, although that assurance was well founded at the time it was made, and although the ship might with all convenient speed have proceeded to Leith in ample time, the defenders deliberately put it out of their power to fulfil the contract. If for any reason the "Alice" was not available, they had the option of substituting a sister ship. But as regards each of them it appears that the defenders interposed a new charter in such a way as to make it impossible for them to fulfil their contract with the pursuers with either ship. That of itself seems to me sufficient to infer liability in damages.—28*th May* 1907.

Counsel for Reclaimers, Morison, K.C., Jameson; Agents, Boyd, Jameson & Young, W.S.—Counsel for Respondents, The Solicitor-General (Ure, K.C.), Grainger Stewart; Agents, W. & F. Haldane, W.S. A. M.

OUTER HOUSE.

(*Lord Salvesen.*)

23. Mackay and Others *v.* Rodger and Others.

Evidence — Proof — Recompense — Claim for Expenditure on Heritable Property—Claim Provable Prout de Jure.

The following statement of the circumstances giving rise to this action is taken from the Opinion of the Lord Ordinary.

"The pursuers in this action are the brothers and sisters of a Miss Ann Mackay, who owned a piece of land on which, when she acquired it, there stood a small thatched cottage. They aver that after she had occupied the cottage a good number of years it became ruinous; and it was thought that the land could be turned to better account by taking down the cottage and erecting upon it a tenement of buildings. Miss Ann Mackay had no funds of her own; but the pursuers had a property in Paisley, which they realised and employed part of the proceeds in erecting buildings which cost £900. They say that they did this with the consent of Miss Ann Mackay, and under an arrangement with her that each of those who contributed to the cost of the erection should be entitled to a proportionate interest in the new buildings. No writing was ever executed in relation to this arrangement; and a will which Miss Ann Mackay left in favour of the pursuers having proved to be inoperative, the defenders, who are the heirs at law as heirs portioners of her younger brother, have made up a title to the land, and maintain a right of property both in the land and in the buildings upon it."

The pursuers now brought this action, the conclusions of which were: (1) To ordain the defenders to grant and execute in favour of the pursuers a disposition of eight-ninths *pro indiviso* shares, or of such other shares as the pursuers might be found entitled to, of the property referred to (eight-ninths being the pursuers' estimate of their rights in the property on the footing of the arrangement before mentioned), and also to count and reckon for their intromissions with the rents of the said subjects; (2) or otherwise, to make payment to the pursuers of the sum of £880.

It was subsequently admitted by the pursuers' counsel that he could not ask for a decree under the first conclusion. In support of the second alternative conclusion the pursuers pleaded: "The pursuers having expended upon the property the amount specified in the second alternative conclusion, in reliance upon the arrangement with the late Ann Mackay specified on record, and the said property having been

meliorated to at least that extent, the pursuers are entitled to decree in terms of the second alternative conclusion."

The defenders pleaded, *inter alia*: "(2) The averments of the pursuers being irrelevant and lacking in specification, the action should be dismissed.

"(7) The averments of the pursuers can only be proved by writ or oath in respect (*a*) that they relate to heritage; (*b*) that they relate to a trust; (*c*) that they relate to the loan or payment of money; and (*d*) that they seek to establish an innominate contract."

Held that the pursuers' averments of their claim for recompense were relevant and were provable *prout de jure*.

Lord Salvesen (after narrating the facts as quoted above).—Under the first conclusion of the Summons the pursuers demand that the defenders should convey to them eight-ninth shares *pro indiviso* of the property in question. It was admitted, however, by the pursuers' counsel that he was not in a position to insist in this demand; and accordingly the only conclusion that remains is one for payment of the sum of £880, being the value of the work and materials expended in erecting the new buildings.

Several of the defenders' pleas are directed to the first conclusion, and need not be considered. They argued, however, that such an agreement as is alleged by the pursuers cannot be proved by parole; and, as the pursuers admit that they have no writings to substantiate their averments, that the action should be dismissed. They further maintained that the averments of the pursuers are not relevant to support the conclusions, even for payment by way of recompense. In my opinion neither of these pleas can be sustained. In the case of *Bell* v. *Bell*, 1841, 3 D. 1201, where the facts were very similar, it was held that a claim for recompense, such as this, could be established *prout de jure*; and the authority of that case has not been questioned, so far as I am aware, in any subsequent decision. Indeed, in the comparatively recent case of *Allan* v. *Gilchrist*, 1875, 2 R. 592, the case of *Bell* v. *Bell* was recognised as a binding authority. No doubt, as was said in that case, the claim was one based on fraud; but the same could be said of the pursuers' claim, if it had been directed against the pursuers' author, who was maintaining her right to the sole property of the buildings, although erected with the funds of her brothers and sisters on the faith of the arrangement already referred to. In the present case there is, of course, no charge of fraud made against the defenders, who are the heirs *ab intestato* of Miss Ann Mackay; but, as such, they cannot be in a better position than their author. If the pursuers' averments are well-founded in fact, the equity of their claim is indisputable; and I know of no rule which prevents them from establishing it by parole evidence. It was said for the defenders that, a they were in entire ignorance of any such arrangement, they would be at the mercy of the pursuers at the proof. I do not think so; because the presumptions are all in their favour, and must be displaced by something more than the mere statements of interested parties. The pursuers, in order to make out their case, will require to show the source of the money which was expended in the erection of the buildings in question; and will probably, as in *Bell's* case, appeal to the real evidence afforded by the employment and payment of the tradesmen. I shall accordingly allow the pursuers a proof of their averments in common form.—24*th May* 1907.

Counsel for Pursuers, Constable; Agents, Constable & Sym, W.S.—Counsel for Defenders, Macrobert; Agents, Lister Shand & Lindsay, S.S.C. J. W. F.

FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

24. Dick's Trustees *v.* Dick and Others.

I. Succession—Trust—Charitable Trust—Uncertainty—Direction to Trustees to Pay over Residue "To or Amongst such Local or Scottish Charitable Institutions and Schemes Already Constituted, or which may Hereafter be Constituted as They May Select . . . . at Such Time . . . . as They in Their Absolute Discretion may Deem Proper"—Bequest Upheld—Hill and Others v. Burns and Others, 1826, 2 W. and S. 80, Followed.

II. Succession — Will — Revocation — Several Universal Settlements, None of which Expressly Revoked—Implied Revocation.

(*Reported ante, Vol. XIV. p.* 325.)

Reclaiming Note against an Interlocutor of Lord Dundas.

The facts of the case sufficiently appear from the previous report.

The claimants James Dick and others, next of kin and heirs *in mobilibus* to the testator, *reclaimed*, and *argued*: The bequest of residue contained in the truster's settlement of 4th March 1902 was void from uncertainty. It was true that the law showed a special favour to charitable bequests, but here there was no time specified at which it would be the duty of the trustees to apply the funds to any purpose whatever (*Hill and Others* v. *Burns and Others*, 1826, 2 W. and S. 80; *M'Caig* v. *University of Glasgow*, 1907, S.C. 231; *Shaw's Trs.* v. *Esson's Trs.*, 1905, 8 F. 53).

Argued for the Respondents, the trustees

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under the testator's settlement of 4th March 1902: It was true that the trustees here were given a very wide discretion, but that was no reason for assuming they would abuse it and refusing to give validity to the will. The case was indistinguishable from that of *Hill and Others* v. *Burns and Others*, 1826, 2 W. and S. 80 (*Dundas* v. *Dundas*, 1837, 15 S. 427; *M'Lean* v. *Henderson's Trs.*, 1880, 7 R. 601; *Robbie's Judicial Factor* v. *Macrae*, 1893, 20 R. 358; *Dick* v. *Ferguson*, 1758, M. 7446; *Blair* v. *Duncan*, 1901, 4 F. (H.L.) 1; *Cobb* v. *Cobb's Trs.*, 1894, 21 R. 638; *Crichton* v. *Grierson*, 1828, 3 W. and S. 329; *Miller*, 1837, 2 S. and M. 866).

Counsel for the trustees under the testator's prior settlements also *reclaimed*, and *argued*: The prior settlements were not revoked by the settlement of 4th March 1902 (*Kilpatrick's Trs.* v. *Kilpatrick*, 1874, 1 R. (H.L.) 37; *Richmond's Trs.* v. *Winton, etc.*, 1864, 3 M. 95).

The Court *adhered*.

The Lord President.—My Lords, the amount of money at stake here is very large; and the case would have required, I think, more ample treatment if it had not been for two circumstances. The first is the very careful Note of the Lord Ordinary, with whom I entirely agree; and secondly, that this class of question is so amply covered by decisions that I think it would be quite out of place to repeat again in less well chosen words propositions which have been established by the highest Court in the land.

My Lords, I think, in spite of the exertions of counsel for the reclaimers, it is quite impossible to distinguish this case in its essential particulars from the case of *Hill, etc.* v. *Burns*, 1826, 2 W. and S. 80, except only in one matter, and that matter has to do with the expression as to the time when the trustees are bound to carry into effect the purposes of the trust.

Now the clause which deals with that matter is this:—"I direct them at any time or times, or from time to time as and when the said residue or any part thereof becomes available, as they may deem proper, to pay over or divide the said residue or any part or parts thereof to or amongst such local or Scottish charitable institutions and schemes already constituted, or which may hereafter be constituted (and which may include these hereinbefore named) as they may select, or any one or more of such institutions and schemes, and that at such time, in such manner, or in such proportions all as they in their absolute discretion may deem proper."

My Lords, my own view of that clause is that if you read it along with the whole of the settlement, which of course one is entitled to do, it is no more, in its true construction, than giving a very ample discretion, as to time, to the trustees, but nevertheless leaving them to carry out the bequest as and when the said residue becomes available.

We cannot leave out of view that one of the arrangements of Mr Dick's settlement was one which contemplated his trustees carrying on for a more or less lengthened period his business, and necessitating the retention in the business in the meantime of a large portion of his capital. If the trustees carried on the business, not only was a certain amount of capital hung up while they carried it on, but also there was obviously a possible question of their own liability, against which they were entitled to be protected by the trust estate.

If you take these two matters together—the uncertain duration of this state of affairs, when complete realisation of Mr Dick's estate into cash was impossible, and possibly, although probably not so likely in the mind of the testator, the idea that the trustees might not wish to pay away the estate while they themselves were subject to personal and contingent liabilities in respect of that estate—I think one finds ample justification for the use of the very wide terms as to time this clause employs.

But, my Lords, I do not know that in my view that very much matters. Even if there was not that particular explanation of this clause, and if it were a mere expression of complete generality, so far as time is concerned, in the option which is given to the trustees when they are to carry out the settlement, it would not at all, in my view, derogate from the validity of the settlement.

The reasons for which wills of this sort are not given effect to may be divided into two classes. There is the case where the object which the trustees are to carry out is so imperfectly expressed that the trustees are really left with no direction, or, in other words, using the common expression, the will is void from uncertainty.

Now the decisions, of course, have long ago settled that the expression "charitable purposes" denotes a definite class of objects, and is not therefore an uncertain direction. I need not go through the cases. I have already mentioned one which is the most authoritative decision on the subject. But I would like also to refer to the summary of the whole matter in the observations made by Lord Robertson in the case of *Blair*, 1901, 4 F. (H.L.) 1, where I think his Lordship really explains the true view upon which charitable bequests have been supported, and bequests for such objects as public purposes have not been supported. The other category—I am not sure if it is another category or whether it is not really just another branch of the same subject—is where it has been held that the Court will not sustain a will which is no will at all in itself, but is simply a giving over of a man's fortune to the arbitrament of another. But beyond that it does not seem to me that the decisions have gone.

When you come to this question of time, it seems to me that the same uncertainty as to any precise period of time might be predicated of bequests which are undoubtedly good. If a man

leaves a sum of money to his trustees to be given in their discretion to a certain person—and an example of that class of bequest may be found in the well-known case of *Chambers' Trs.*, 1878, 5 R. (H.L.) 151—it is perfectly uncertain whether that bequest will be eventually made or not. It is equally true, as was stated in argument here, that at no moment of time could you ever go to the trustees and say, "Now you are bound to execute this bequest."

Now when trustees have a discretion I think—in the words of one of the learned judges in one of the cases—that although it is a discretion that will not be interfered with, yet, of course, if the trustees maladminister, and refuse to exercise the discretion at all, the Court will find a way of interfering. If you can suppose that here the trustees simply buttoned their pockets and refused to do anything, I cannot doubt that a way might be found of compelling them to act. But even apart from that, surely it would be an almost fantastic result if, where trustees profess no difficulty and are in no way behaving in a way to suggest that they are really acting *in fraudem* of their trust—it would surely be fantastic to say to them "Because conceivably you may act in such a way we will take the whole estate away from you and not allow you to deal with it at all." That is what we are asked to do here by holding that this bequest is void.

Accordingly I come to the conclusion that this clause, although it offers a distinction between the case and that of *Hill, etc.* v. *Burns*, really creates no difference, and that here the bequest is quite a good one, and the trust one such as the trustees can, consistently with the rules that I have laid down, administer.

My Lords, the second finding of the Lord Ordinary is to the effect that this will supersedes the other wills. I really cannot doubt that anyone looking at this settlement, which is absolutely a universal settlement, could come to any but one conclusion—namely, that this last will was intended to supersede the others, and I do not think we have had any argument presented to us which would shake one's belief in what I believe to be a universal rule. On the whole matter I am for adhering to the Lord Ordinary's interlocutor.

Lord M'Laren.—I have read the Lord Ordinary's note and interlocutor, and I think his Lordship's judgment contains a very well-considered and careful statement of the existing law on the subject. I am quite content to rest my opinion upon the Lord Ordinary's Note, with the further exposition of the subject which has been given by your Lordship in the chair.

I may, however, be allowed to say that I think it is a subject of regret that our law has given such a very wide extension to the doctrine of the benignant construction of charitable bequests. In the earlier cases on the subject we know that the decisions related to estates of moderate amount, and in these cases we have indications either of the parties or of the localities that were to be benefited, with directions that clearly pointed to the immediate realisation of the testator's wishes. But in the progress of the law these restrictions have been gradually and insensibly removed. Now, as I think, it results from all the authorities that the expression "charitable purposes" in a bequest of residue, coupled with the appointment of persons who are to administer that bequest, suffices to exclude the next of kin, even where the will contains no evidence that the testator had ever applied his mind to the consideration of what was to be done with his estate, or that he had any other motive than that of disappointing the expectations of his next of kin. Of course I am very far from suggesting that such was the motive in the present case. I am stating what is possible in the existing state of the law. At the same time, I think we must recognise that this is a matter of opinion. In the present state of the case law on the subject I think it must be left to the House of Lords in its judicial or legislative capacity to determine within what limits the right of charitable disposition is to be allowed.

On the second point I also agree with the Lord Ordinary and with your Lordship. The settlement under construction is a universal settlement, and I think, with the possible exception of bequests of specific articles, such a settlement is exclusive of the effect of all previous dispositions.

Therefore I agree that the reclaiming note should be refused.

Lord Kinnear.—I agree entirely with the opinion of the Lord Ordinary; and I also assent to the additional observations that have been made by your Lordship in the chair with special reference to the points which have been argued to us; and I do not need to repeat them.

Lord Pearson.—I am of the same opinion.—29*th May* 1907.

Counsel for Claimants and Reclaimers James Dick and Others, Dickson, K.C., Orr, K.C., Duncan Miller; Agents, Inglis, Orr & Bruce, W.S.—Counsel for Claimants and Respondents Dick's Trustees under 1902 *Settlement, The Solicitor-General (Ure, K.C.), Cullen, K.C., R. S. Brown; Agent, Henry Robertson, S.S.C.—Counsel for Claimants and Reclaimers Dick's Trustees under* 1891, 1899 *and* 1901 *Settlements, Lees, K.C., Ingram; Agent, Henry Robertson, S.S.C.—Counsel for Claimants and Reclaimers Mrs Hamilton and Others, Mercer; Agents, Inglis Orr & Bruce, W.S.—Counsel for Claimants and Reclaimers Peter Sinclair and Others, Hunter, K.C., Munro; Agent, W. Croft Gray, S.S.C.*

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1ST DIV.

Douglas and Others v. Marquis of Queensberry's Trustees.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

25. Douglas and Others *v.* Marquis of Queensberry's Trustees.

PROCESS — RECLAIMING NOTE — SUMMARY PETITION — DISTRIBUTION OF BUSINESS ACT 1857 (20 & 21 VICT. CAP. 56), SECT. 6—FINALITY OF INTERLOCUTOR—PETITION LODGED BY A—ANSWERS LODGED BY B—INTERLOCUTOR DISPOSING OF B'S CLAIM NOT RECLAIMED AGAINST—SUBSEQUENT INTERLOCUTOR DISPOSING OF WHOLE MERITS OF PETITION AND UPHOLDING A'S CLAIM—HELD INCOMPETENT TO REVIEW PRIOR INTERLOCUTOR UNDER RECLAIMING NOTE BY B AGAINST SECOND INTERLOCUTOR.

Reclaiming Note against an Interlocutor of Lord Mackenzie.

On 4th July 1905 Reginald Edward Walters and another, the trustees acting under a trust deed dated 10th and 14th July 1900, executed by the Marquis of Queensberry, presented a petition to the Court for authority to uplift the sum of £1026, 3s. 7d. in the hands of the Queen's and Lord Treasurer's Remembrancer. The circumstances in which the application was made were set forth in the Petition as follows:—

By private Act of Parliament, 6 Geo. IV. cap. 33, the Judges of the Court of Session in either Division were authorised and required, upon presentation of a petition by the then Charles, Marquis of Queensberry, or by the heir of entail for the time being entitled to and in the possession of the entailed estates enumerated in said Act, to take an account of the debts of the said Charles, Marquis of Queensberry, contracted by him prior to 21st May 1818, and still remaining due and unpaid, and of the burdens affecting and that might affect the entailed estates of the said Charles, Marquis of Queensberry, and to order and direct to be sold by public auction and sale such part of the said entailed estates as should be sufficient to discharge the said debts and burdens. Under and in virtue of the powers granted by said Act, certain of the said entailed lands were sold, and the purchase price applied in payment of the said debts.

By sects. 4 and 5 of the said Act it was provided as follows:—"Sect. 4. Provided always, and be it enacted by the authority aforesaid, that in case a surplus shall remain of the price of the lands so to be sold under the authority of this Act, and interest thereof, after defraying the expenses of passing this Act, and all the reasonable expenses which may be incurred in carrying the same into execution, and after payment of all the debts and obligations of the said Charles, Marquis of Queensberry, incurred and contracted prior to the said Twenty-first day of May One thousand eight hundred and eighteen, to be ascertained in manner before directed, the Judges of the said Court of Session in either Division thereof are hereby empowered and required to direct and order that the said surplus shall be laid out and employed in the purchase of other lands, which shall be limited and settled to the same uses and purposes, and under the like prohibitory, irritant, and resolutive clauses, as the said lands and estates before mentioned, by the deed of entail hereinbefore recited, now stand limited and settled; and in the meantime and until the money shall be so applied, to order and direct that the same shall remain in the Bank of Scotland, or Royal Bank of Scotland, or Bank of the British Linen Company of Scotland, subject to the direction of the Court of Session in either Division thereof, in the name of such person or persons as the Court shall appoint; and the interest arising from the money so paid in shall annually accumulate and be added to the principal sum, so that they may carry interest together until a proper purchase in lands shall be found, to be limited in the manner hereinbefore directed, and until, upon a petition to be preferred to the said Court of Session in either Division thereof in a summary way by the said Charles, Marquis of Queensberry, or any heir of entail in possession of the said estate, the money shall be ordered to be paid by the treasurer of the Bank of Scotland, or the cashier of the Royal Bank of Scotland, or the manager of the Bank of the British Linen Company of Scotland, for completing the said purchase in such manner as the said Court shall direct.

"Sect. 5. Provided always, that if the money arising by the principal and accumulated interest of such sum or sums shall exceed the amount of the purchase money, then and in that case only the surplus which shall remain, after discharging the expense of the application to the Court, shall be paid to the person or persons who for the time being would be entitled to receive the rents and profits of the lands directed to be purchased, in case the same had been purchased pursuant to this Act, or the representatives of such person or persons."

After payment of all the debts to which the purchase price of the lands sold under order of the Judges of the Court of Session was decerned to be applied, there was left over a balance of £808, 9s. 9d., which, in terms of sect. 4 of said Act, was consigned in the Bank of Scotland in name of "The Marquis of Queensberry's entailed estates," to remain subject to the orders of the Court of Session. Of the said consigned sum, £567, 10s. 4d. was, on 5th January 1837, paid to William Stewart, W.S., in terms of an Act and Warrant of the Court authorising such payment, and a new receipt was thereafter granted by the said Bank of Scotland for the balance remaining, viz., the sum of £240, 19s. 5d.

No orders were ever given with regard to the disposal of the said balance, and at 31st December 1895 it had amounted, with compound interest, to the sum of £1026, 3s. 7d. In terms of the Court of Session Consignation (Scotland) Act 1895, the said sum of £1026, 3s. 7d. was paid over as at said 31st December to the Queen's and Lord Treasurer's Remembrancer, in whose hands it has remained down to the present time.

By trust deed dated 10th and 14th days of July 1900, the Most Honourable Percy Sholto Douglas, Marquis of Queensberry, the successor and representative of the said Charles, Marquis of Queensberry, before referred to, gave, granted, assigned, and disponed to the present petitioners and Christian Chevallier Cobbold, of Fitzalan House, Arundel Street, Strand, London, who has since resigned, as trustees for the purposes mentioned in said trust deed, his estates as therein specifically mentioned,

together with "the whole other means, estate and effects, heritable and moveable, real and personal, of every kind, and wherever situate, now belonging or addebted to me, or which shall hereafter belong and be addebted to me in any manner of way."

In or about the beginning of 1901 the said Percy Sholto Douglas, Marquis of Queensberry, became bankrupt, and on 1st August 1901 a receiving order was pronounced against him, and Mr F. S. Salaman was appointed trustee upon his estates. On 12th June 1903 the said order was discharged, and it was ordered that the order of adjudication made against the bankrupt should be annulled in respect of the payment of a composition by the bankrupt. It was also further ordered that all the property of the bankrupt, except a certain cash balance in the hands of Mr Salaman, should vest in the present petitioners as trustees under the said trust deed already referred to. *Inter alia*, the property thus vested in the petitioners as such trustees included the said sum of £1026, 3s. 7d.

The petitioners prayed the Court to grant warrant to the King's and Lord Treasurer's Remembrancer to pay over to the petitioners the said sum of £1026, 3s. 7d., with the compound interest which had accrued thereon from 31st December 1895 till payment.

Answers were lodged by the Hon. Alfred Bruce and others, residuary legatees under the trust disposition and settlement of the deceased eighth Marquis of Queensberry, containing, *inter alia*, the following averments:—

Explained that the whole revenue or interest which accrued on the consigned balance of £240, 19s. 5d. from the date of the accession of John Sholto Douglas, the eighth Marquis of Queensberry, as heir of entail, on 6th August 1858 to the date of his death, which occurred on 31st January 1900, had vested in the said John Sholto Douglas by operation of law, and is now payable to the respondents as residuary beneficiaries under the trust disposition and settlement of the said John Sholto Douglas.

On 10th February 1906 the Lord Ordinary issued the following interlocutor:—

"The Lord Ordinary having considered the cause, repels the claim made by the respondents Lord Alfred Douglas and others in their answers, No. 11 of process, and continues the cause."

After certain further procedure the Lord Ordinary, on 14th July 1906, issued the following interlocutor:—

"The Lord Ordinary having resumed consideration of the Petition: Finds that the procedure has been regular and proper, and in conformity with the provisions of the statutes: Grants warrant and authority for the payment to the petitioner, The Most Honourable Percy Sholto Douglas, Marquis of Queensberry, of the sum of £1026, 3s. 7d., mentioned in the Petition, with the interest accrued thereon from 31st day of December 1895: Further, grants warrant to and authorises the King's and Lord Treasurer's Remembrancer to pay over the said sum of £1026, 3s. 7d., with interest accrued thereon as aforesaid, to the petitioners the said Percy Sholto Douglas, Marquis of Queensberry, and Reginald Edward Walters, and Henry Slane Fleming, as trustees mentioned in the Petition, and that upon the joint receipt of the said Percy Sholto Douglas, Marquis of Queensberry, and the said Reginald Edward Walters and Henry Slane Fleming as trustees foresaid; and decerns."

Sect. 6 of the Distribution of Business Act 1857 is as follows:—

"It shall not be competent to bring under review of the Court any interlocutor pronounced by the Lord Ordinary upon any such petition . . . . with a view to investigation and enquiry merely, and which does not finally dispone thereof on the merits; but any judgment pronounced by the Lord Ordinary on the merits, unless when the same shall have been pronounced in terms of instructions by the Court, on report as hereinbefore mentioned, may be reclaimed against . . . . provided that a reclaiming note shall be boxed within eight days, after which the judgment of the Lord Ordinary, if not so reclaimed against, shall be final."

The respondents the Hon. Alfred Bruce Douglas and others reclaimed against the interlocutor of 14th July 1906.

On the Reclaiming Note being put out for hearing in the Summar Roll, counsel for the petitioners and respondents objected to the competency of the reclaiming note, and *argued*: Though the reclaiming note was in form against the interlocutor of 14th July 1906, it was in reality against the interlocutor of 10th February 1906, which finally disposed of the merits of the case in so far as the reclaimers' interests were concerned. It was incompetent for the reclaimers to bring under review the interlocutor of 10th February by a reclaiming note against the interlocutor of 14th July. This being a summary petition, the procedure in it was regulated by the Distribution of Business Act 1857. Under sect. 6 of that Act the interlocutor of 10th February, though it did not dispose of the whole merits of the petition, was a judgment on the merits, and became final if not reclaimed against within eight days. Consequently the interlocutor of 10th February was not subject to review (*Macqueen* v. *Tod*, 1899, 1 F. 859; *Clark* v. *Barr's Trs.*, 1903, 5 F. 856).

Argued for the Reclaimers: (1) This being an objection to the competency of a reclaiming note, should have been stated in Single Bills, and was too late at this stage. (2) The interlocutor of 10th February was a judgment on the merits of the reclaimers' claim alone, and not a judgment on the merits of the petition, and was consequently subject to review. It was not till 14th July that the Lord Ordinary finally disposed of the merits of the petition.

The Court *refused* the reclaiming note.

The Lord President.—My Lords, the reclaimer

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began by saying that he would object to the respondents' motion that this reclaiming note be dismissed because it was an objection to the competency and, not having been taken in the Single Bills, was now too late. I express no opinion on that subject, because the respondents' objection was not really on competency at all, but raised the question whether, by reclaiming the interlocutor under review, it was competent to quarrel an interlocutor pronounced by the Lord Ordinary at a previous stage in the proceedings and not reclaimed against at the time, and which was an interlocutor on the merits though it did not dispose of the whole merits of the petition.

I am unable to distinguish this case from that of *Macqueen* v. *Tod*, 1899, 1 F. 859, followed in *Clark* v. *Barr's Trs.*, 1903, 5 F. 856, which decided that the procedure in petitions under the Distribution of Business Act 1857 is unaffected by the Court of Session Act 1868, and that the rights of reclaimers and questions as to finality are settled by the Act of 1857 and not by the Act of 1868. I am therefore of opinion that the interlocutor of 10th February 1906 was an interlocutor on the merits, and if not reclaimed against became final. No reason has been stated why the interlocutor of 14th July 1906 is wrong if the interlocutor of 10th February is to stand.

Lord M'Laren.—I am of the same opinion. I am confirmed in the view which I expressed in *Macqueen* v. *Tod*, 1 F. 859, by the further discussion of the question in the present case. It would be highly inconvenient if the rules applicable to reclaimers in ordinary actions, such as actions for the recovery of debt, were to be applied to administrative orders of the Court. Take, for instance, the case of a petition for the appointment of a factor *loco tutoris* or *curator bonis*. Interlocutors are pronounced in the course of such proceedings on points that do not admit of delay, such as the sale of the ward's estate or its investment. It would be intolerable if after the lapse of twenty years such interlocutors were to be brought under review by a reclaiming note against the curator's discharge. It cannot justly be said that on this point there is any omission in the Court of Session Act 1868, which I think designedly left the procedure in such cases to stand by itself under the code provided in the Distribution of Business Act 1857. It follows that any interlocutor which it is desired to bring under review must be reclaimed against within eight days.

Lord Kinnear.—I agree that what we are now deciding involves no decision as to whether an objection to the competency of a reclaiming note must or must not be taken at Single Bills. The objection here is not to the right to reclaim against the interlocutor of 14th July 1906. If that were the interlocutor to be brought under review, the reclaiming note would admittedly be in time. But when we go into the case it appears that the reclaimer has no interest in that interlocutor unless he can upset the interlocutor of 10th February 1906; and if that is an interlocutor on the merits, the reclaiming note is too late. But that objection does not arise upon the face of the reclaiming note, and need not be taken in the Single Bills. I agree that the question whether the interlocutor of 10th February can now be reviewed must be decided under the Distribution of Business Act 1857. It has been argued that that interlocutor was not final, because it did not dispose of the whole merits of the petition. But it disposes upon its merits of the only question in which the reclaimer is interested, and the only question which the Court is asked to consider. It is of no consequence to the reclaimers, and it is irrelevant to the question we are asked to decide, that other controversies between other persons may be raised before the petition is taken out of Court. I am of opinion that the matter we are asked to consider was finally disposed of by the interlocutor of 10th February, and it is too late to bring that interlocutor under review. There is thus no objection to the competency of the reclaiming note against the interlocutor of the 14th July. But the present reclaimer has no interest or title to complain of that interlocutor, and the reclaiming note must therefore be dismissed.

Lord Pearson concurred.—28*th May* 1907.

Counsel for Respondents and Reclaimers, Thomas Trotter; Agent, A. W. Gordon, Solicitor. —Counsel for Petitioners and Respondents, Horne; Agents, P. Gardiner Gillespie & Gillespie, S.S.C.

A. M.

OUTER HOUSE.

(*Lord Salvesen.*)

26. Cassils & Co. *v.* Absalon.

Process — Proof — Commission for Recovery of Documents — Examination of Havers—Production of Books — Regulations as to Access to Books — Duty of Commissioner—Accountant — Commissioner Has No Power to Appoint Accountant to Examine Books.

The pursuers in this action were calico printers and merchants in Glasgow, and the defender was a merchant in Belgium. In 1904 the parties had entered into an agreement in regard to the printing of handkerchiefs to be sold by the defender. In 1905 the pursuers intimated a claim for damages for breach of contract by the defender. The pursuers now raised this action,

founding on an agreement which they said was entered into for settlement of their claim. They averred that the defender agreed to pay to the pursuers a sum equivalent to the profit which the pursuers and a Mr J. W. Elliot (an agent for the sale of grey cloth supplied to the defender) had made on their transactions with the defender since January 1903. The amount thus claimed amounted to £2507, 4s. 8d. The defender resisted this claim on the grounds, *inter alia*, (1) that he was induced to believe by Mr Elliot that the profits could not exceed £250; and (2) that the sum claimed was not the true profit legitimately made by the pursuers out of the defender. The Lord Ordinary had granted the defender a commission for the recovery of documents.

At the execution of the commission the said J. W. Elliot was cited as a haver. Questions arose in regard to the production of his books, and eventually the haver insisted on locking them up, as the commissioner declined to give an undertaking that the defender would not get access to the books outwith the presence of the pursuers.

The commissioner made an interim report, and parties were heard on said report.

Argued for the Defender: In the circumstances of this case the commissioner was not bound to give the undertaking asked. The haver refused to answer questions, or to point out what entries were referable to the contract in question. The commissioner could not tell, without assistance, what entries were to be excerpted. The haver was obstructing a proper disclosure of the facts. The haver must either give the necessary information, or allow skilled assistance to trace it. The defender was therefore entitled to have an accountant appointed, and the commissioner was wrong in refusing to make such an appointment.

Argued for Pursuers: The matter was not one of obstruction, but of principle. The haver objected to the books being handed over to the inspection of a rival in trade. The commissioner was wrong in refusing to give the undertaking asked, and the haver acted within his rights.

Held (1) that the haver was justified in refusing to hand over the books; and (2) that the commissioner had no right to appoint an accountant to examine the books.

Lord Salvesen.—The first question I have to decide is the most important, whether the haver was justified in the attitude which he took up before the commissioner. He produced admittedly all the documents and books called for in the specification, and he proposed to leave them with the commissioner on the usual terms. But on the commissioner declining to give an undertaking that he would not allow the defenders access to the books outwith the presence of the pursuers, he locked up the books until that question had been determined by the Court. Now I think that the haver was quite justified in what he did. In granting these diligences one has always to consider that the powers given by the Court may be abused unless carefully safeguarded, and when one is dealing with the business books of a commercial firm it has always been customary to grant warrant for recovery of these only on the footing that they shall be lodged with a neutral person, to wit, the commissioner, and that the excerpts bearing on the question in dispute shall be taken at his sight. What the defenders in this case propose to do with the aid of the commissioner is to range through the whole of these business books in order that they may see whether they can ascertain what is the probable nature of the case which the pursuers are going to make. I do not think that is legitimate. I think if that power was given by the Court it would be liable to great abuse. I do not suggest in the present case that any improper advantage would be taken, but I have to consider that this raises a question of principle, and that my decision in the present case may be founded upon in others. The pursuers do recognise that the case is a somewhat special one, because of the number and complexity of the details involved, and accordingly they have made an offer which has very largely influenced my decision—an offer, viz., that the haver shall attend from day to day at the commissioner's office when the defenders desire it in order that the defenders may assist the commissioner in his presence in making the excerpts which they think will bear upon the averments upon record. I think that was a reasonable offer, and in view of the undertaking which has been given I shall let the commissioner know that in my opinion he ought not to allow the books to be taken out of his custody or to be examined by the defenders or their agents outwith the presence of the pursuers.

The other motion for an accountant is really not before me at present. I think, however, the commissioner was absolutely right in refusing the defenders' application for the appointment by the commissioner of an accountant to examine the books. He has no delegated powers except those given expressly by the specification.

For myself I should have considered the motion favourably, as the defender is a foreigner and not conversant with our language, but as the pursuers are willing that the defenders' commercial agent as well as his law agent should be present to assist in the examination of the books, I shall not allow anyone else.—*25th May* 1907.

Counsel for Pursuers, Macmillan; Agents, Dove, Lockhart & Smart, S.S.C.—Counsel for Defender, Horne; Agents, Morton, Smart, Macdonald & Prosser, W.S. J. W. F.

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The Mica Insulator Co. Ltd. v. Bruce Peebles & Co. Ltd.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

27. The Mica Insulator Company Limited *v.* Bruce Peebles & Company Limited.

I. Expenses — Abandonment — Full Expenses Imposed by Judicature Act, sect. 10, as Condition of Abandonment, Fall to be Taxed As Between Party and Party, But Are Not Subject to Modification.

II. Expenses—Patent Cases—Defences of Prior Use and Anticipation — Expenses of Preliminary Investigations —Sect. 29, sub-sect. 6, of Patents Act 1883 Applies to Scotland But Does Not Affect Scottish Procedure and Does Not Supersede Regulation No. 3 Appended to Act of Sederunt 15th July 1876.

III. Expenses—Regulation No. 3 Appended to Act of Sederunt 15th July 1876—Interlocutor Allowing Proof—Interlocutor Remitting to Lord Ordinary to Proceed, Where Proof Necessarily Next Step in Process, Held Equivalent to Interlocutor Allowing Proof — Observations on Nature of Charges — Precognitions — Preliminary Investigations.

(*Reported ante, Vol. XIII. p.* 281.)

Report by Lord Johnston.

This was an action for, *inter alia*, interdict and damages in respect of infringement of patents brought by the Mica Insulator Co. Ltd., London, against Messrs Bruce Peebles & Co. Ltd., Edinburgh. The defenders, in addition to other defences, pleaded that the pursuers' patents were invalid on the grounds of anticipation and prior use. On 27th March 1905 the Lord Ordinary (Stormonth-Darling) allowed a proof. The defenders reclaimed, and on 6th July 1905 the Court recalled the interlocutor of the Lord Ordinary and allowed the pursuers to lodge a Minute of Amendment of the Record. On 3rd November 1905 the Court allowed the record to be amended, of new closed the record, and remitted to the Lord Ordinary "to proceed as accords." This interlocutor did not contain a formal allowance of proof.

On 20th July 1906, before a formal order for proof had been made, the pursuers lodged a Minute of Abandonment, and the Lord Ordinary remitted the defenders' account of expenses to the Auditor to tax and report. In taxing the account the Auditor disallowed certain items charged for preliminary investigations which had been made for the purpose of setting forth on record the defences of prior use and anticipation. The question now reported arose on the defenders' objections to the Auditor's report.

The Judicature Act 1825 (6 Geo. IV. cap. 120), sect. 10, empowers a pursuer to abandon the action on payment of "full expenses."

No. 3 of the General Regulations appended to the Act of Sederunt 15th July 1876 provides:

The expenses to be charged against an opposite party shall be limited to proper "Expenses of Process" without any allowance (beyond that indicated in the table) for preliminary investigations, subject to this proviso, that precognitions (so far as relevant and necessary for proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced either approving of issues or allowing a proof.

The Patents, Designs, and Trades Marks Act 1883 (46 & 47 Vict. cap. 57), sect. 29, provides for the delivery of particulars. Sub-sect. 6 provides:

On taxation of costs, regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the Court or a judge to have been proven or to have been reasonable and proper, without regard to the general costs of the case.

Sect. 107 provides:

In any action for infringement of a patent in Scotland . . . . but otherwise nothing shall affect the jurisdiction and forms of process of the Courts in Scotland. . . .

On 22nd May 1907 the Lord Ordinary reported the cause to the Court. He added the following Note.

Lord Johnston.—This case, which was raised before Lord Stormonth-Darling in the end of 1904, and in which, after hearing parties in the Procedure Roll, his Lordship on 27th March 1905 sustained the relevancy and allowed a proof, was further discussed in the Inner House in July 1905, when (7 F. 944) your Lordships of the First Division found the pursuers' case materially wanting in specification, and consequently on 6th July 1905 recalled the Lord Ordinary's interlocutor of 27th March 1905, with a view to the pursuers considering whether they would propose to amend their record. The record was thereafter amended to the satisfaction of your Lordships, and on 3rd November 1905 it was re-closed in the Division and the case remitted to me, as in room of Lord Stormonth-Darling, to proceed as accords.

No movement was made in the case before me until July 1906, when after some fencing between the parties, the defenders moving for a diet of proof to be fixed in order to bring matters to a point—though correctly I should have had first to pronounce a renewed order for proof—and the pursuers seeking further delay, the pursuers on 20th July 1906 lodged a Minute of Abandonment in terms of the statute, in respect whereof I, on that date, in ordinary form appointed the defenders to lodge an account of the expenses incurred by them. This account, amounting to £286, 16s. 9d., has been taxed by the Auditor at £69, 3s., the sum taxed off being as much as £220, 13s. 9d. On objections for the defenders to the Auditor's report, a difficult question of process in relation to expenses arises.

Under the Judicature Act 1825 the power to abandon is given to the pursuer only subject to the condition of "paying full expenses or costs to the defender." What are "full costs" in the sense of the statute in the present case? The Auditor has taken the view that the General Regulations appended to the Act of Sederunt 15th July 1876 are peremptory and admit of no exception, and that applying them he can only allow the amount at which in an ordinary case, where no order for proof had been pronounced, the account would have been taxed, and cannot allow anything for prior investigations and precognitions. While I think from his note that the Auditor felt the hardship to the defenders of his ruling in the present case, he had, in my opinion, no alternative except to do what he did or to report the case for instructions; and he probably took the more convenient method of dealing with the case, inasmuch as the result of applying the strict rule is made more apparent from his detailed taxation.

I have given full consideration to the question and shall submit the conclusion at which I have arrived, though, for reasons to be afterwards stated, I think it proper to report the case to your Lordships.

I must refer first in greater detail to the course of procedure in the case. The action, *inter alia*, was for breach of patent, and sought interdict and damages. The patents founded on were two in number, dated in 1892 and 1895 respectively, but they had both been amended in August 1904, very shortly before the raising of the action. They were for "improvements in the manufacture of flexible sheets for electrical insulation," and the material manufactured by the pursuers under their patents they describe as "micanite" or "flexible micanite cloth." To the action the defenders pleaded (1) want of specification. But they also, besides (2) denying infringement, attacked the patent on the grounds of (3) want of patentable matter; (4) anticipation; and (5) prior use. Before lodging their defences, or at least before closing the record, the defenders took the course, first of all, of taking certain precognitions, and obtaining certain information as to the pursuers' alleged patents, and particularly as to a previous action in England at their instance, founded on one of their patents, which action they had abandoned; and secondly, of consulting two patent experts in England on the subject of their defences. The formal precognitions taken, apparently of employees in the defenders' works, were matter of little moment. The really important thing was the gathering of information in England by the defenders' agents, the consultation of patent experts, and their reports, which latter I regard both as advising as to the defence, and as the equivalent of the precognition of scientific witnesses. According to the defenders' account, No. 37 of process, all this was done prior to 27th March 1905, when Lord Stormonth-Darling allowed a proof. Had that interlocutor stood unrecalled, the Auditor would have been technically able, under the Act of Sederunt 15th July 1876, to make allowance for "precognitions" at any rate, whatever that term may cover. But that interlocutor was reclaimed against and was recalled, by reason of the original insufficiency and irrelevancy of the pursuers' statements, and therefore in the sense of the Act of Sederunt no interlocutor has been pronounced allowing a proof, which is the condition of the general regulations appended to the Act of Sederunt, precedent to the Auditor being authorised to allow for precognitions, when the case does not ultimately go to trial.

While the fact that an order for proof was pronounced by the Lord Ordinary and was recalled, and particularly was recalled by reason of the pursuers' failure to make a specific statement in support of the summons, cannot be left out of sight, I should not be inclined to found upon it either way, but to take the matter on broader grounds.

During the discussion in the Inner House the pursuers saw fit to lodge a Minute of Amendment, No. 30 of process, which was considered by your Lordships and found not to obviate the defective specification. On judgment being pronounced, the pursuers apparently craved leave to lodge a supplementary Minute, and this being granted them, there followed the withdrawal of the Minute No. 30 of process, and the lodging of a new Minute of Amendment of Record for the pursuers, No. 32 of process, which called forth a Minute of Amendment for the defenders, No. 33 of process, and thereafter a practically new record was made up on these Minutes and closed by your Lordships on 3rd November 1905, before the case was remitted to me. I have carefully examined the papers, and so far as I am in a position to judge, I am satisfied that the amended defences called for by the pursuers' amended Condescendence could not have been stated without investigations such as the defenders made between the raising of the summons and 27th March 1905. The same might possibly be said of the original defences, but it is unnecessary to consider them.

Do, then, the regulations of the Act of Sederunt of 1876 preclude the Court, in a case such as the present, from giving the defenders an allowance for the costs of such preparation for these defences, because technically there has been no interlocutor allowing proof? I think not, and I do so irrespective of the fact that the Lord Ordinary did actually allow proof, and that the recal of his interlocutor was by reason of the insufficient statements of the pursuers, who are now in the position of having to abandon their case, after having occasioned the defenders considerable trouble and expense. I should have been of the same opinion had the Lord Ordinary, as your Lordships have found he should have done, held the case irrelevant and refused a proof.

I was referred to the case of *Armitage* v. *Caird*, 1859, 21 D. 1176, also a patent case, in which absolvitor by default was pronounced before the record was finally closed. The Act of Sederunt regulating audit at that time was that of 19th December 1835, and though there were appended General Regulations, these contained nothing analogous to No. 3 of the General Regulations of 1876. The Court in that case allowed the defenders the expense of investigations prior to closing the record, and I cannot help being impressed by the views of the Lord President and Lord Deas, to the effect that a defender in such a case must put on record all his defences at the outset; he cannot make random statements; it is his duty to make only what he is prepared to support by evidence; the necessary enquiry to enable him to do so is one which the pursuer has "forced upon the defender, who was pursuing in good faith an occupation, which we have no reason for thinking he, at least, supposed to be unlawful." Where the necessary enquiry is of the highly technical kind involved in a case where the question raised is of infringement of patent, it appears to me that it would work grave injustice if the defender, by reason of a technicality, founded on the terms of a general regulation in an Act of Sederunt, were to be denied all allowance for the expense into which

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he had been forced by a pursuer, who in the end runs away from his action, admitting, as in this case, not only that it was originally in defective form, but that, amend it as he will, he cannot face a proof.

I should myself have been prepared to hold that General Regulations admitted of exception in the application, and that, without making such exception here, I should not be following the direction of the Judicature Act, which is to see that the defender gets "full" expenses. But I cannot ignore the strict view of the Act of Sederunt apparently taken by the Court in *Church*, 1883, 11 R. 398, and in *Shirar* v. *Dixon*, 1885, 12 R. 1013. In the first of these cases the circumstances did not meet the letter of the Regulations, and the letter prevailed. In the latter of these cases I think I must read the judgment as indicating that in the view of the Court the particular proceeding was one to which the Regulations did not apply, and not that in an exceptional case the Regulations might be relaxed. The Court indicated no inclination to relax the general rule. The judgment, therefore, forms no support to me in the present case.

But though I accept the view expressed by Lord Shand, that in order to prevent abuse in the conduct of process, the rule that parties should be required to make preliminary enquiries into facts, relevant though not within their own knowledge, at their own expense, unless a proof is allowed, is a salutary though a somewhat empirical one, I think that where a salutary general rule, if enforced to the letter in a particular case, does not prevent abuse, but occasions it, such general rule should admit of exception. And I am supported in this view by the declared object of the Court in Regulation 4 being to allow such expenses as are necessary to conducting litigation, and I conclude the particular litigation, in a proper manner. Expenses of the class here claimed for were, in my opinion, necessary for the proper conduct of the litigation. Were the question not one depending on the technicalities of Scottish procedure, I should consider the case of *Piggot & Co. Ltd.* v. *Corporation of Hanley*, 1906, 23 Pat. Cas. 639, as an analogous authority.

While, therefore, I should personally be prepared to direct the Auditor to allow such expenses as were properly incurred in preliminary enquiries to enable the defence to be properly stated, and for that purpose to examine and tax the items charged (for I am far from saying that the charges are to be allowed as stated), I think it proper to make avizandum with the case to your Lordships, for these reasons:—

1st. I am not the judge before whom any of the procedure in the case has been conducted. On the contrary, the materially important part of the procedure, even to the making up of the present record, has been conducted before your Lordships.

2nd. I am prepared to allow charges which may not be held strictly to come within the term "precognitions" used in the Regulations; and

3rd. The Regulations are those of the Court.

There has been no case in which, in their present aspect, these Regulations have been considered by the Court, or by either of the Divisions, and I do not think that it is within the province of a judge in the Outer House, at his own hand, and particularly in a case which only comes incidentally before him, to be the first to introduce an exception to such General Regulations.

Argued for Defenders: In patent cases the rules for making up records and taxing accounts were the same in Scotland as in England (Patents Act, sect. 29), procedure only being saved (sect. 107). In England the defenders would be entitled to recover the expenses of stating particulars if these were certified by the judge to have been reasonable and proper (Patents Act, sect. 29, sub-sect. 6). Accordingly the defenders were entitled to any expenses for which they could have got a certificate in England. In England the Court would not order a trial in order to determine whether a certificate should be granted or not (*Wilcox & Gibb* v. *Janes* [1897], 2 Ch. 71), but they would grant a certificate if they knew enough of the case to be able to certify that the particulars were reasonable and proper (*Chamberlain & Hookham Ltd.* v. *Mayor of Huddersfield*, 1901, 18 R.P.C. 454; *Ashworth* v. *Horsfall & Bickham*, 1904, 21 R.P.C. 47; *Pigott & Co. Ltd.* v. *Corporation of Hanley*, 1906, 23 R.P.C. 639). It was not necessary that the case should have gone to trial; the Court might obtain the information from interlocutory proceedings (*Kerr & Hoegger Ltd.* v. *Crompton & Horrocks*, 1901, 19 R.P.C. 9). Here the Court were in a position to say that the particulars were reasonable and the defenders were entitled to recover the expenses incurred in putting them on record. Regulation No. 3 of the Act of Sederunt 15th July 1876 did not apply to patent cases, having been superseded by sect. 29, sub-sect. 6, of the Patents Act.

The present case should be dealt with on the footing that an order for proof had been pronounced. After the record had been amended a proof was necessarily the next step of procedure, and it made no difference that the interlocutor did not formally allow a proof.

In any view Regulation No. 3, appended to the Act of Sederunt 15 July 1876, was not peremptory (*Shirer* v. *Dixon*, 1885, 12 R. 1013). The Court should exercise their discretion by seeing that the pursuers got "full expenses," which in the present case meant expenses taxed as between agent and client, or at least included the expenses of the particulars which the defenders were under a statutory duty to put on the record (Patent Act, sect. 29, sub-sect. 6; *Armitage* v. *Caird*, 1859, 21 D. 1176).

Argued for Pursuers: The defenders were not entitled to extra-judicial expenses in patent cases any more than in other cases. The pursuers were entitled to abandon on paying "full expenses" (Judicature Act, sect. 10), and "full expenses" meant expenses taxed in the usual way (*Ross* v. *Mackenzie*, 1889, 16 R. 871). *Armitage* v. *Caird* (*cit.*) was distinguishable.

Even on the analogy of the English cases the defenders were not entitled to prevail. In England they would not be entitled to the expenses of any particulars unless they had obtained a

certificate that the particulars were reasonable (Patents Act, sect. 29, sub-sect. 6), and the Court would not certify unless they had before them such evidence as would enable them to say that the particulars were reasonable (*Mandleberg* v. *Morley*, 1895, 12 R.P.C. 35; *Bethell* v. *Gage*, 1897, 14 R.P.C. 699; *Pigott & Co. Ltd.* v. *Corporation of Hanley*, *cit.*). In the present case no evidence had been led, and the Court could not certify.

No interlocutor allowing proof had been pronounced. The Lord Ordinary's interlocutor of 27th March 1905 had been recalled. It had never become final, and therefore was not an interlocutor allowing proof in the sense of Regulation No. 3 (*Clippens Oil Co. Ltd.* v. *Edinburgh Water Trustees*, 1906, 8 F. 731). The regulations were peremptory, and applied to the present case. *Shirer* v. *Dixon* (*cit.*) was special. The defenders, therefore, were not entitled even to the expense of precognitions (*Church* v. *Caledonian Railway Co.*, 1883, 11 R. 398; *Malcolm* v. *Moore*, 1901, 4 F. 369). If the case were to be dealt with on the footing that proof had been allowed, the defenders were entitled to recover only the expense of precognitions and not the expense of preliminary investigations.

The Court directed that the defenders' account of expenses should be taxed as if an order for proof had been issued at the time that the interlocutor of 3rd November 1905 was pronounced, but that beyond that no distinction could be made in respect that it is a patent case between the present cause and any other.

The Lord President.—My Lords, Lord Johnston has reported to your Lordships a question that arises upon the taxation of an account. The case is the sequel of the *Mica Insulator Co.* v. *Bruce Peebles & Co.*, which is reported in the 7th volume of Fraser, page 944. But it is as well to state, in order to make no confusion, that after the interlocutor which is appended to the report in that case the parties came back, and, on 3rd November 1905, your Lordships, having considered certain Minutes of Amendment, of new closed the record and remitted the case to the Lord Ordinary to proceed therein as accords. The parties then went back to the Outer House, and for the moment nothing was done; but, when the case was enrolled with the view of having a diet of proof fixed, a Minute of Abandonment was handed in for the pursuers, which, of course, was sustained on the ordinary terms—that is to say, on payment of full expenses, which is the condition imposed by the Judicature Act; and the question now for your Lordships, on the report of the Lord Ordinary, is upon the taxation of these expenses.

The Auditor, conceiving himself bound strictly by the terms of the third General Regulation of the Regulations appended to the Act of Sederunt of 1876, and finding that the original order for proof had been recalled by the Inner House and had not been technically replaced, considered that he was disentitled from allowing any expenses connected with anything that might be called preliminary investigation. The Auditor, in a note appended to his taxation of the account, pointed out that he considered that somewhat of a hardship in the present case; and the Lord Ordinary, who, in his written report, has gone fully into the subject, comes to this conclusion—that he should personally be prepared to direct the Auditor to allow such expenses as were properly incurred in preliminary enquiries to enable the defence to be properly stated.

Now, my Lords, on the argument we have had addressed to us, really three different questions arise. The first question was whether the expenses—"full expenses"—which are imposed statutorily by the Judicature Act as a condition of sustaining a minute of abandonment meant anything different from expenses. My Lords, in one sense I do not think they do, but in another sense the words are not *pleonastic*. I think the meaning of "full expenses," as used in the Judicature Act, is this: that it took away by statute from the judge the power which the judge would otherwise have of modifying expenses. The minute of abandonment can only be sustained if full expenses are paid, and not modified expenses. But, then, "full expenses" means, I think, expenses as between party and party, and does not admit of any other plan of taxation such as, *exempli gratia*, between agent and client. And, accordingly, for practical purposes, "full expenses" in a minute of abandonment means precisely the same thing as "with expenses" when expenses without any qualification are awarded in an ordinary action. In other words, you are remitted to the ordinary rule of taxation. Now, that was the first question.

The second question was a question which arose upon the terms of the Patent Act, upon which Mr Sandeman submitted an ingenious argument. It raised an important point which, I think, must be decided once for all. The 29th section of the Patent Act sets forth certain regulations as to what must be done in legal proceedings. In particular, it deals with the delivery of what it calls particulars, and then comes the section on which Mr Sandeman founded—sub-sect. 6, which I shall quote in a moment. Now, your Lordships have already determined, *inter alia*, in this very case, that that 29th section of the Patent Act must always be read along with the 107th section, which entirely saves Scottish procedure. Now, my Lords, I venture to say so far as the 29th section is concerned, although I quite feel that it is a direction to us which we are bound to attend to just as much as English judges are bound to attend to it, yet really the 29th section does nothing which the law of Scotland would not have done without it. First of all, take these

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branches of it which deal with the delivery of particulars and the provision that unless particulars are delivered, proof shall not be allowed upon these matters. That really is no more than an expression of what our ordinary practice rules are with regard to statements on record. We should not, quite apart from that, have ever allowed, in a patent case, a person to go in, for instance, to a proof of prior user or prior disclosure unless he had given notice of it on record. And accordingly we have held already that sect. 29 does not make it necessary in Scotland to deliver a paper headed with the name of Particulars, but that the object of it is perfectly well attained by giving notice on record in the ordinary way. Well, now, I come to the sub-section, which we have to deal particularly with here, and that says this: — [His Lordship read sub-section 6]. My Lords, I venture to think that that, again, is an expression of what our ordinary practice would have done without it. In our views of audit, we should never have allowed the costs of parts of the case that had been found to be entirely useless and did not contribute to the case at all or the eventual issue of the case at all. Of course, when you come to apply a rule of that sort to a case there are difficult questions of degree; but that is neither here nor there, the general rule is clear enough. Why that particular sub-section was put in I do not know; but I do not think it would be a difficult guess to suppose that it was put in to meet some sort of abuse which it was considered had arisen in the English practice. And, more than that, one can easily see that the phrase, as it is, had this effect in England, that it relegated the matter to the determination of the judge. Now, my Lords, although in one sense I have no right to know anything of these matters, because it is not my system of law, yet it is common knowledge, and I do know that there are in England many matters regulated by the Master which, in Scotland, are always under the determination of the judge. The effect of that section is, in England, to take these things out of the cognisance of the Master and bring them directly before the judge. And, therefore, again, if I hazard another guess, I think that that had very likely something to do with the genesis of the section. That sort of provision is, of course, of no use in Scotland, where all these matters are directly under the cognisance of the judge. And, therefore, my Lords, what it comes to is this—are your Lordships to deal with this sub-section as putting on us a statutory requirement that there should be a certificate under the hand of the judge in order to deal with what is an auditor's question? I do not think that that sub-section was meant to operate in that way at all; and I think, taken along with sect. 107, we are still entitled to go according to our own procedure in which, allowed to run in its own natural channels, we shall entirely carry out the whole spirit of the enactment that is in sub-sect. 6 of sect. 29.

Well, now, that question being put out of the way, we come to the next and only other question—whether the particular taxation here has been right. My Lords, the case in this matter is somewhat peculiar. It is not a thing that can very easily recur. The course of the case was this: The pursuers came into Court alleging an infringement by the defenders, but the infringement not of a thing but of a process. Well, they had a discussion in the Outer House, and, apparently, there was some difficulty. The Lord Ordinary allowed a proof. The defenders reclaimed, and said there was not sufficient specification in the pursuers' complaint to enable them to meet it, and, in particular, that the pursuers had not told them the way in which the defenders had infringed their process. It is evident that there is all the difference in the world between a process and a thing in this matter. If it had been that the defenders had made a certain machine or a certain thing which was like the pursuers', they would need no more specification; but if the defenders have infringed a process, the pursuers must tell in what way the particular process has been infringed. That argument prevailed in the Inner House, and the Inner House thought that, as the action stood, it really was not relevant for want of specification; but, as in all cases where the action is not relevant for want of specification, they gave the pursuers an opportunity of amending. In order to let them amend, it was necessary to get out of the way the formal order for proof standing in the interlocutor of the Lord Ordinary. Accordingly, the first step was to recal the order for proof, and give the pursuers an opportunity of amending. Parties did amend, as I pointed out, and, having amended and having made what, in the view of the Inner House, was a relevant record as being not wanting in specification, the record was of new closed and the case remitted to the Lord Ordinary. Now, of course, a formal order for proof was not renewed, but there was no other possible order which the Lord Ordinary could pronounce. Accordingly, my Lords, my view is that, when the case went back from the Inner House, it was truly in the same situation as if an order for proof had been pronounced. The General Regulations attached to the Act of Sederunt are, of course, of the highest authority, but they are only regulations. They are merely a set of rules which the Court gives out for the guidance of the Auditor. They are not rules which any one Division sitting by itself can in any way set aside, because they have the authority of the whole Court, by which one Division is bound. But, on the other hand, they are not a statute where one must necessarily stick upon the mere letter of what has been enjoined; they are merely rules for our guidance, of which we are fully entitled to interpret the spirit.

Therefore, my Lords, I am of opinion that we are entitled to say to the Auditor that, in the peculiar circumstances of the case, the spirit of the third rule is carried out by holding that here it is in the same position as if an order for proof had been pronounced. But then, my Lords, I am bound to say I do not think that leads to the result to which the Lord Ordinary seems to have come, because he says that he would allow such expenses as were properly incurred in preliminary enquiries to enable the defence to be properly stated. Now, my Lords, unless there is a distinction between patent cases and other cases—and there is no distinction raised by the terms of the Act—I see no ground for subjecting the pursuers to the expenses of the defenders in making their case. They may have, according to the General Regulations, the expense of precognition even although in the long last the proof, with a view to which those precognitions were taken, never is held, because the case has got into such a position that they were in good faith in going on and making their preparations for that proof which was necessarily the future of the case—if the case went on. It is a perfectly different thing to say that they are to have the expense of finding out what their defence is to be. It may be that there is a little hardship in it. There is always a certain amount of hardship in defending yourself against an unjust claim. But, at the same time, any opposite rule would lead to inextricable confusion. You must hold that defenders, when they are called into Court by pursuers, know their own defence. In most cases they do. Patent cases are so far peculiar that, though they may know their own defence in the infringement proper, they may not know the whole possibilities of their defence in the way of attacking the pursuer's patent, and as prudent people they may think it is a better means of defending themselves rather to direct a counter-attack against the pursuer's patent than to rely exclusively upon the fact that they had not infringed the patent.

On the whole matter, my Lords, I am, upon the Lord Ordinary's report, in favour of issuing an order to the Auditor that this account should be taxed in this case in the same way as if in this case an order for proof had been pronounced in so many words at the time the interlocutor of 3rd November was pronounced; but that beyond that no distinction can be made between this case in respect that it is a patent case and any other.

Lords M'Laren, Kinnear and *Pearson* concurred. —*30th May* 1907.

Counsel for Pursuers, Macphail, Burn Murdoch; Agents, Mackenzie & Kermack, W.S.—Counsel for Defenders, Sandeman, Christie; Agent, E. I. Findlay, S.S.C.

J. S. M., *for* A. M.

HIGH COURT OF JUSTICIARY.

(The Lord Justice-General, Lords M'Laren and Kinnear.)

28. Dickson *v.* A. B.

Justiciary Cases—Bail—Rape—Refusal of Prosecutor to Consent—Discretion of Court—Bail (Scotland) Act 1888 (51 & 52 Vict. cap. 36), sect. 2—Wilson *v.* M'Guire, 16 R. (J.C.) 89, Commented on.

Appeal.

The appellant was on 10th May arrested on a charge of having, on 17th April, committed the crime of rape. He applied on the date of arrest for liberation on finding bail; and the Sheriff-Substitute, having heard the agent of the accused and the procurator-fiscal, refused the prayer of the petition *in hoc statu*. On 20th May the accused again presented the petition for liberation on finding bail, and the Sheriff again refused the prayer of the petition, adding the following:—"Note. On the authority of *Wilson* v. *M'Guire*, 20th June 1889, 16 R. (J.C.) 89, I consider I am bound to refuse bail in cases of rape where the public prosecutor, as here, objects."

The accused appealed to the High Court of Justiciary.

The Bail (Scotland) Act 1888 provides:—

Sect. 2. The Act passed in the first Parliament of His Majesty King William the Third, intituled "An Act for preventing Wrongous Imprisonment and undue delay in Trials," so far as the same relates to bail, is hereby repealed, and from and after the passing of this Act all crimes and offences, except murder and treason, shall be bailable, and any magistrate having jurisdiction to try the offence or to commit the accused until liberated in due course of law may henceforth, at his discretion, on the application of any person who has been committed until liberation in due course of law for any crime or offence, except murder or treason, and after opportunity shall have been given to the prosecutor to be heard thereon, admit or refuse to admit such person to bail; and such application shall be disposed of within twenty-four hours after its presentation to the magistrate, failing which the accused shall be forthwith liberated.

Argued for the Appellant: There was no such rule as the Sheriff-Substitute thought had been laid down by the Lord Justice-Clerk in *Wilson* v. *M'Guire*. Such a rule would be contrary to the express provisions of the Bail Act 1888. A different view was taken by Lord Kyllachy in an unreported case of *Kay* in 1904. The Court was bound to exercise their discretion in every case. The circumstances in *Wilson's* case were exceptional; it was a very serious case. In the present case the alleged crime was committed on 17th April; the accused was a married man who was carrying on a business; he remained quietly

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at home attending to business in the ordinary way from the date of the alleged crime till he was arrested on 10th May, and there was no *prima facie* reason to suppose that, if liberated, he would disappear before the trial. The story told by the woman was very difficult to believe, and was uncorroborated by the medical evidence or any other witnesses.

The Court stopped counsel for the appellant and called upon the Solicitor-General, who stated that, having investigated the facts in the present case, he was willing that liberation on bail should be granted.

The Court *granted* liberation on the accused finding bail for £50.

The Lord Justice-General.—The Solicitor-General has consented to liberation being granted on bail, and there is therefore no further question in this case. But, as the matter of the discretion of the Court in granting liberation on bail in such cases has been mooted, it is right that I should deal with it. I cannot help thinking that a misunderstanding has arisen from the fact of the rubric in *Wilson* v. *M'Guire* going further than the Lord Justice-Clerk's judgment warrants. I do not think that his Lordship meant to say more than that, in a case in which bail is asked, if the Lord Advocate objects to it being granted, and states the grounds on which he does so, the Court will be very slow indeed to do anything contrary to his judgment. He certainly did not mean to lay down a rule that in cases of rape the Crown ought not to grant consent. That the Court has the power to grant liberation on bail I do not think can be doubted. If the Lord Advocate assures the Court that in his view the effect of that will in all likelihood be to defeat the ends of justice by the prisoner absconding, as the Lord Advocate's only object must be to secure his presence at the trial, the Court will no doubt give weight to that statement. If it is thought that is not likely to happen, there is no reason why liberation should not be granted. The relations between the Lord Advocate and the Court in this country have happily always been such as to make it unlikely that the Court would grant liberation on bail in the face of objection such as I have mentioned, but that is all that can be said. In the present case no more need be said than that the Solicitor-General has consented to liberation being granted.

Lord M'Laren.—It must be kept in view that in the earlier stages of a criminal investigation the procurator-fiscal is the person who knows most about the circumstances of the case, but the duty of deciding whether bail should be accepted or not is cast upon the magistrate to whom the application is made.

I think it is in accordance with good sense and justice that great weight should be given to the representations of the procurator-fiscal on this question, if, for example, he states that he has good reason to fear that the accused will go away and forfeit his bail. But it cannot be doubted that on a sound construction of the Bail Act of 1888 it was intended that the discretion as to granting or refusing an application for bail should lie with the magistrate.

Lord Kinnear.—I concur.—31*st May* 1907.

Counsel for Appellant, Grainger Stewart; Agents, T. & W. A. M'Laren, S.S.C.—Counsel for the Crown, Solicitor-General (Ure, K.C.), A. M. Anderson, A.-D.; Agent, W. S. Haldane, W.S., Crown Agent.

F. A. U.

OUTER HOUSE.

(*Lord Mackenzie.*)

29. **Rennie** *v.* **James.**

Process — Competent and Omitted — Decree for Expenses in Name of Agent Disburser — Suspension Incompetent on Ground that Agent in Whose Name Decree has Gone Out is Not the Agent Disburser or is Not a Duly Qualified Law Agent.

In this Note of Suspension and Interdict the facts and the contentions of parties sufficiently appear from the Lord Ordinary's Note.

The Lord Ordinary, after a proof, *repelled* the reasons for suspension.

Lord Mackenzie.—This is a suspension of a charge on an extract decree dated 19th and 21st July 1906, pronounced by the Sheriff-Substitute in the Sheriff Court of Argyllshire at Dunoon. The charge is to make payment of the expenses of an action of declarator and removing brought by the complainer, who is a writer in Glasgow, against a Mr Duncan.

The terms of the interlocutor of 19th July are as follows:—"Dunoon, 19th July 1906. Act. Rennie, Alt. James.—The Sheriff-Substitute having heard parties on the objections to the Auditor's report on the defender's account of expenses, and on the motion for the defender, to allow the decree for expenses to go out and be extracted in name of Mr William James, solicitor, Greenock, the agent disburser thereof, makes avizandum with the cause.

"Scott Moncrieff Penney."

By the interlocutor of 21st July the Sheriff-Substitute repelled the objections stated by the pursuer (the complainer in the present suspension) to the Auditor's report; approved of the report; found that the expenses due amounted to £43, 10s. 5½d., and for this sum, along with £1 of

a debate fee, he granted decree against the pursuer, and allowed "said decree to go out in name of the defender's agent (Mr James) as agent disburser." The respondent in the present suspension is Mr James.

The grounds on which suspension is sought are . . . . (fourth) that Messrs M'Ilwraith & Walker, writers, Greenock, were the agents for Mr Duncan, the defender in the action; that Mr James was merely in their employment, and was not the agent disburser. A further plea was added after the discussion in the Procedure Roll, and after proof had been allowed, that the respondent was not at the time he made the motion for expenses entitled under the Law Agents Acts 1873 and 1891 to act as agent in the cause or to recover costs therein. . . .

The procedure in the case was as follows:—An account of defender's expenses was lodged and taxed by the Auditor on 16th July 1906. On the same day the complainer lodged objections to the taxed account. A copy of these objections was sent the same day to Messrs M'Ilwraith & Walker, writers, Greenock, as agents for Mr Duncan. Mr James is a qualified law agent in the employment of Messrs M'Ilwraith & Walker. On the 16th of July, in the Sheriff-Clerk's office, the complainer tendered a caveat to secure that intimation should be given to him of any motion for decree for expenses in name of Mr James. . . .

I have left to the end two points which were strongly urged on behalf of the complainer. The *first* is that Mr James was not "the procurator who conducted the suit" within the meaning of sect. 106 of the Act of Sederunt of 1839. It was maintained that the "procurator who conducted the suit" meant the same thing as the agent disburser, and that it was Mr Walker and not Mr James who disbursed all the expenses in connection with the case. The *second* point is contained in the amendment to Statement 9, viz.—that the respondent is not, and was not at the time be obtained the decree, a certificated enrolled law agent, or at least that he had not paid the duties for the period then current entitling him to act as a law agent; and that accordingly he was not entitled under the Law Agents Act 1873 and 1891 to act as agent in the cause, or to recover costs therein. I do not consider it necessary to express an opinion upon the merits of either of these pleas. I consider that the complainer is barred by the exception of competent, and omitted from maintaining either of them as a reason for the present suspension. The decision in the case of *Ewing* v. *Wallace*, 1832, 6 W. and S. 222, seems to me a sufficient authority to cover both pleas.

I am accordingly of opinion that the reasons for suspension should be repelled.—1*st June* 1907.

Counsel for Complainer, Munro, A. M. Mackay; Agents, St Clair Swanson & Manson, W.S.—Counsel for Respondent, Craigie, K.C., A. M. Anderson; Agent, Alexander Ramsay, S.S.C.

A. M. H.

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FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

30. Boyd *v.* Hamilton and Others.

Property — Servitude — Access—Lane—Implied Grant — Grant Interpreted with Reference to Actings of Feuar Known to Superior At, and Shortly After, Date of Grant.

Reclaiming Note against an Interlocutor of Lord Low.

(*Reported ante, Vol. XIII. p.* 436.)

The pursuer *reclaimed* against an interlocutor of Lord Low assoilzieing the defenders from the conclusions of the action, these conclusions being for (1) declarator that the pursuer had a servitude right of access to a lane bounding her property, and (2) interdict against the defenders interfering with the lane in such a way as to obstruct the pursuer's right of access.

The case was heard on 12th June 1906, when the Lord Ordinary's interlocutor was recalled and a proof was allowed. Proof was led before Lord M'Laren on 25th July 1906. The case was again heard on 15th and 16th November 1906, and 29th January 1907.

By feu contract entered into between the pursuer and the defender, Henry M. M. Hamilton, that defender feued to the pursuer—

All and whole that portion of ground, part of the entailed estate of Raploch, lying in the parish of Dalserf and county of Lanark, containing Eight hundred and sixty-eight square yards and eight square feet or thereby, equal to Twenty-eight poles and seventy-two one-hundredth parts of a pole imperial measure; bounded on the north-west by west by the central line of an intended road or street to measure thirty feet in breadth, and running in a parallel direction to Raploch Street, along which it extends forty-six feet or thereby; on the north-east by north by ground about to be feued to Hugh Mackay, along which it extends One hundred and seventy feet or thereby on a line at right angles to the said road or street; on the south-east by east by an intended lane to measure Twenty feet in breadth, along which it extends Forty-six feet or thereby; on the south-west by south by ground feued to George and Thomas Thomson, along which it extends One hundred and seventy feet or thereby on a line at right angles to the said road or street, all as delineated on the feuing plan of Larkhall, prepared by Kyle, Dennison & Frew, civil engineers and land surveyors in Glasgow.

Among the conditions of the contract were the following, viz.:—

. . . . Further, the said piece of ground above disponed is so disponed always with and under the provisions, declarations, stipulations, burdens, pro-

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hibitions, restrictions, and others following, *videlicet*: —*First*. . . . *Second*. The said second party and her foresaids shall be bound and obliged forthwith to erect a dwelling-house or dwelling-houses which shall be capable of yielding a yearly rent equal to at least treble the feu-duty after mentioned, and to uphold the same so as to yield that rent in all time coming; . . . . and in the event of the said second party or her foresaids using the ground floor of said tenement as dwelling-houses, such houses shall have their respective kitchens to the back of said buildings, with access by a back door to the court or yard behind the same, through which door all water and refuse of every description shall be carried and deposited, the water in the sinks to be constructed in the back courts, and the refuse in the ashpits or dung-steads to be erected behind the said buildings as after mentioned, and no water or refuse of any description from said buildings shall be taken out of said houses by the doors fronting said intended road or street, or deposited on the said intended road or street; . . . . the second party and her foresaids shall be bound and obliged to satisfy and obtain the approval of the said first party or his foresaids as to the said dwelling-house or dwelling-houses and one-storey building so to be erected upon the said piece of ground hereby feued, and to exhibit to them and obtain the approval of all plans in connection with the same before the buildings are commenced, and which plans and erections the said first party or his foresaids shall have power to approve of or reject as they shall think proper.

This defender subsequently feued to John Hamilton, who was also called as a defender in the action, another piece of ground which included part of the *solum* of the lane which was described as the south-east by east boundary of the pursuer's feu, and over which the servitude was claimed in the present action.

Among the facts established by the proof were: That the "intended lane" had been formed before the pursuer's house was built; that a house had been built on the pursuer's feu without leaving sufficient room at the sides for carrying refuse which might be taken out at the back door round to the front entrance; that from the time the pursuer occupied her house in 1898 till 1904, when John Hamilton closed the lane, the pursuer had been in use to take in coals and manure, and to remove garden and house refuse by the lane; and that the lane had been used by neighbouring feuars in the same way.

Argued for Reclaimer: The references to the lane and the street in the feu contract were *in pari casu*. Without access to the lane the pursuer could not fulfil the conditions of her feu. That implied a right of access by the lane. The surrounding facts and circumstances must be taken into account, and the facts and circumstances proved in evidence showed that the intention of parties here was that a right of access by this lane should be given. The case was ruled by *Argyllshire Commissioners of Supply* v. *Campbell*, 1885, 12 R. 1255. Counsel also referred to *Walton Brothers* v. *Magistrates of Glasgow*, 1876, 3 R. 1130; *M'Laren* v. *City of Glasgow Union Railway Co.*, 1878, 5 R. 1042; *Louttit's Trs.* v. *Highland Railway Co.*, 1892, 19 R. 791.

Argued for Respondent: There was no actual grant of a right of access, and no such right was necessarily implied. The reference to the lane in the plan and feu contract was merely for the purposes of identifying the subjects and fixing the boundaries (*Free St Mark's Church Trs.* v. *Taylor's Trs.*, 1869, 7 M. 415; *Shearer* v. *Peddie*, 1899, 1 F. 1201).

The Court *found* that under the terms of the feu contract libelled, as explained by the subsequent actings of the parties, the pursuer had a contract right to an access to her feu from a lane there described; *found* that the lane having been formed by the superior, was appropriated to the use of the pursuer and the other feuars, to whom like rights had been granted; and *continued* the cause with a view to the disposal of the conclusions for interdict.

Lord M'Laren.—In this case the pursuer, Mrs Boyd, who is proprietor of a feu in Avon Street, Larkhall, claims to be entitled by contract with the superior to the use of a lane which runs parallel to Avon Street, and gives access to the back of the house by a door opening to the area of the feu. There is a considerable number of circumstantial cases in the reported decisions raising the same question under varying conditions, but I am not in a position to say that the law is so well defined that it is possible to extract from the decisions a definite criterion for determining whether an approach or an access referred to in the title deeds by way of description and followed by use, amounts to an obligation to warrant the right of access. On the one hand, I think it may be taken that a mere reference to a lane or other access in a bounding description does not necessarily imply a continuing right. But such a description, taken in connection with expressions in the deed which imply that the access is to be used for the purposes of the feu, may be the foundation of a claim to the use of the access in perpetuity. When this is followed by possession brought to the knowledge of the superior or his agents, and when the possession is clearly referable to the feuar's title, I think we have all elements that are necessary in a question between superior and feuar to establish a contract right.

The opinion I have formed on the merits of this case will, I think, be most easily explained if I begin by examining the import of the decisions in cognate cases, which I shall do very shortly, taking them in the order of their dates. It is not necessary to go back to the case of *Gordon* v. *The New Club*, 1818, 6 Dow 87, and cases of that class, which have settled that neither the exhibition of a feuing-plan, nor even a general reference to a feuing-plan in a feu charter or contract, will bind the superior in a question with

the feuar to what is shown on the plan. A plan, it is well understood, is only a pictorial description, and it is only incorporated with the title to the extent and for the purposes for which it is referred to in the deed of title.

To this principle we may refer the case of *Free St Mark's* v. *Taylor*, 1869, 7 M. 415, where the question was whether there was a contract between the pursuers and the original proprietor, from whom both the parties derived right, to leave space for a street between their respective properties. The property was described as bounded on the east by the central line of a proposed street, and the street was delineated on a plan referred to in the conveyance. But there was no obligation laid either on the purchaser or on the seller, who retained the property of the other half of the proposed street, not to build up to the central line. So far as I can gather from the report there was nothing either in the context of the deed, or in the possession following on it, from which a contract could be implied to make or maintain a street corresponding to the bounding description. In these circumstances the second disponee was held to be entitled to build up to the line which was the boundary of his property.

This decision may be compared with that in the previous case of *Barr* v. *Robertson*, 1854, 16 D. 1049, where damages were claimed in respect of the shutting up of a street shown on a plan which was held to be for certain purposes imported into the feu-contract. Now, while the judgment was adverse to the pursuer's claim, it is recognised in the opinions of Lord President M'Neill and Lord Rutherfurd that the descriptive boundary would give the feuar a right to have a street fronting his feu, and of the specified breadth. To that extent the right of the feuar was not disputed, that the existence of the right entered into the ground of judgment, because the question considered by the judges in their opinions was to what extent and effect were the plan and the description made part of the contract between superior and feuar.

In the next of the leading cases, *Argyllshire Commissioners of Supply* v. *Campbell*, 1885, 12 R. 1255, the principle of determining such questions by the criterion of contract right was farther developed, for in that case the Court gave weight to the actings of the feuar, not contested at the time by the superior, as evidence of the intention of the parties that a lane referred to in the bounding description of the feu right was to be available as an access. The Lord President, in particular, in his exposition of the legal question, begins by stating that if the matter had rested entirely on the terms of the title it might be questioned whether the description of the feu as bounded by a lane would imply that the feuars were to have the right of access by that lane. But then, he says, the question does not by any means arise purely in that form. Then his Lordship points out that, under the deed, buildings adapted to a particular purpose were to be erected subject to approval by the superior; and following upon that provision a building was erected with an entrance from the lane to the back part of the premises, and with a window looking out upon the lane. Now in that case the superior had by a later grant given off a feu which was held to include the *solum* of the lane; and as the result of the decision the Commissioners were held to have right to the access, and had interdict against the second feuar, restraining him from building on the lane.

It is safe to say that the case of the *Argyllshire Commissioners* is a very important decision, and has been so treated, and it is quite in accord with the principle of that decision that subsequent cases of the same character have been treated as circumstantial cases, and that the feuar has not always been successful in establishing a contract right to the access which he claimed. I merely note that in the case of *Louttit's Trs.* v. *Highland Railway Co.*, 1892, 19 R. 791, the railway company admitted their obligation to pay damages to the feuar. The Lord President's observations to the effect that the obligation to give an access is satisfied by maintaining such accesses as existed at the time, is, I think, a statement of the general rule of law, and is in no way inconsistent with the principle of the *Argyllshire* case. To the same effect Lord Low in his opinion in the case of *Cullens* v. *Cambusbarron Co-operative Society Ltd.*, 1895, 23 R. 209, reserves the question of what would be the feuar's right if a road had been in existence in the line referred to.

I must, however, refer a little more fully to the latest case in this Division of the Court, the case of *Shearer* v. *Peddie*, 1899, 1 F. 1201, because I look upon it as an illustration of the kind of case to which the principle of the *Argyllshire* case could not be applied so as to establish a right of access in favour of the feuar. The important elements in that case were, first, that according to the scheme of allotment of the eleven houses constituting Kilmailing Terrace, each feuar by his title acquired right to the property of the part of the lane situated behind his house; second, that while certain conditions were inserted in each disposition for the benefit of other feuars, the use of the lane was not one of these conditions, and the right could not be maintained on the principle of community of interest; and third, that the feuar who claimed to hold his part of the lane free from a servitude was the proprietor of the lot first given off, and his feu-right contained no reservation in favour of the superior or subsequent disponees of a right to use the portion of the feu on which it was proposed to form a lane. Under these conditions it was held that any use which had been made of the subject by other feuars depended on the tolerance of the owner of the feu, and could be recalled. In this

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case the relation of superior and feuar did not exist between the parties respectively claiming and disputing the right of access. It was really a question between two feuars, one of whom successfully maintained that his right was unrestricted.

I think it results from the decisions that in a question between a superior and a feuar who claims a right incidental to the use of his feu, the question is rather in the region of contract than of strict property law, and that evidence of acts done by the feuar in the assertion of the right is admissible to interpret the title, or at least to bar the superior from disputing the interpretation of the title which has been acted on with his knowledge, and presumably with his consent.

In the present case the first point made by the pursuer is that the feu is described as being bounded "on the south-east by east by an intended lane to measure twenty feet in breadth, along which it extends forty-six feet or thereby." This lane was formed, though it may be observed that the surface of the lane has not been put into good order, and its situation, which corresponds with the description, is nearly parallel to the street which is the principal access. In the conditions of feu which follow, the character of the house or houses to be erected is described, and it is provided that the houses shall have their respective kitchens to the back of the main buildings with access by a back door to the court or yard behind the same, "through which door all water and refuse of every description shall be carried and deposited"; and after further provisions to the like effect it is provided that no refuse of any description shall be taken out of the houses by the doors fronting said intended road or street, or deposited on said intended road or street. I ought to have noticed that the street fronting the houses is in the bounding clause described as an intended road or street to measure thirty feet in breadth. This, accordingly, is not the case of a feu abutting on a completed street, but bounded in another direction by a projected street or lane. Both lines of communication are in the region of intention, and it cannot be said that *ex facie* of the deed the implied obligation to grant ish and entry is satisfied by one access rather than the other. Passing from the point and reverting to the clause last quoted, I venture to think that there is here a strong implication that the feuar was empowered to use the lane at the rear of his building for the removal of the ashes and other refuse specified which he was prohibited from taking out of the house by the main door or depositing on the adjacent street. It is hardly conceivable that a feuar should agree to be bound by the prohibition unless it was intended that as matter of contract he was to remove the refuse by the lane described in his title, and which, when formed, would be available and suitable for this purpose.

In this question it is, of course, necessary that we should consider the whole deed; but I do not propose to read it *ad longum*, and the only other clause which I shall quote is the clause under which the feuar is taken bound to satisfy and obtain the approval of the superior as to the dwelling-house or houses to be erected, and to exhibit to him and obtain his approval of all plans in connection therewith before the buildings are commenced. I refer to this clause because the pursuer sets forth in the condescendence that the two semi-detached houses which she has erected on the feu substantially occupy the whole breadth of the feu, so that on the one side there is only a space of a few inches between the house and the boundary, and on the other side only a space of two feet clear, which, if a boundary wall was erected separating this from the adjoining feu, would be reduced to about eighteen inches. This statement is supported by the proof, and as it would not be possible to carry the refuse from the rear of the house to the front by a passage eighteen inches wide, and as the feuar is prohibited from removing it by the front door, I think it is a fair inference that the houses were so built in reliance on the implied representation in the feu-contract that a lane was to be constructed at the rear of the buildings for the accommodation of the feuars.

But, further, I think it must be taken that the plans for the pursuer's houses were exhibited to the superior or his authorised agents in conformity with the condition to that effect; and the superior must be taken to have assented to the erection of the houses on a plan which made it impossible that the refuse from the house could be removed consistently with the conditions of feu otherwise than by means of the lane.

It is proved by the evidence of the contractor that the lane was formed under the instructions of the superior's factor in 1894–95, and the pursuer's son, who was then in the service of his father, a builder to trade, says that their house was begun to be built about February 1896, and that the lane was then fully completed. The lane was regularly used by the pursuer and by the other feuars in the street until 1904, when it was closed and a fence run across it by John Hamilton, one of the defenders. The closing of the lane is defended on the ground that the superior had conveyed to John Hamilton the property of his feu in terms which included the *solum* of the lane *ex adverso* of his feu. But it is plain that if the superior had already given to Mrs Boyd and the other feuars a contract right to the use of the lane, he could only convey the *solum* of part of the lane subject to the uses already vested in the other feuars, and on that assumption neither John Hamilton nor the superior had the power of closing the lane. Now, in my opinion the pursuer had a right to the use of the lane. The clauses of the feu contract on which I have com-

mented go far to establish such a right apart from subsequent use. But assuming that they fall short of what is necessary to prove a contract, I think that taken in connection with the erection of a house with the superior's approval, to which the use of a back lane was an indispensable adjunct, and taking into account also the uninterrupted use of the lane for eight years, the superior must be taken to have made an irrevocable appropriation of the lane to the use of the feuars in fulfilment of his implied engagement to them, and that it is not in his power to withdraw the use of the lane, or to confer on any other person an unqualified right to the *solum* thereof, and thus to deprive the pursuer of her access. It follows, in my opinion, that the pursuer is entitled to decree substantially in terms of the conclusions of the action.

Lord Kinnear.—I agree, although I have found the case to be a somewhat difficult one. Not that I think there is any difficulty in the law, arising from conflict of decisions, or doubt as to the principles of the law to be applied, but I find some difficulty in reference to the inferences of fact which are to be drawn from the facts and circumstances in this case. I do not think the pursuer can maintain a right of access founded upon a grant implied from fact alone, but I think the case of the *Argyllshire Commissioners of Supply* is authority for holding that the true interpretation of a boundary description such as we have here in question is to be arrived at, not only from the terms of the description in reference to the other clauses of the grant, but also with reference to facts and circumstances at the time when the grant was made and the conduct of the parties immediately after the grant. I take it upon that decision that a grant described as bounded by a lane, or an intended lane, may mean by a way of access which the granter has made or undertakes to make, or it may be a mere description of adjoining property by which the grant is limited. But in considering which is the true meaning we must take all the facts into account. On that part of the case I have come to the conclusion at which your Lordship has arrived, and for the reasons you have given, which I consider it unnecessary to repeat. I only add that there is, to my mind, no legal difficulty created by the subsequent conveyance of part of the land to another feuar, because an effectual servitude may be created without any written constitution of the servitude, and the new feuar has the full benefit of the conveyance of the property of the land subject to a servitude right already created.

The Lord President and *Lord Pearson* concurred.—20*th March* 1907.

The Court thereafter pronounced decree of interdict in terms of an interlocutor adjusted by the parties.—25*th May* 1907.

Counsel for Pursuer, Cullen, K.C., Leadbetter; *Agents, Ronald & Ritchie, S.S.C.*—*Counsel for Respondent, M'Lennan, K.C., Wark;* *Agents, Campbell & Smith, S.S.C.* F. A. U.

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SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

31. Philp & Co. *v.* Knoblauch.

Contract—Sale—Offer and Acceptance—Terms of Correspondence Held to Constitute Contract for Sale of Linseed—Harvey *v.* Facey [1893], A.C. 552, Distinguished.

Reclaiming Note against an Interlocutor of Lord Dundas.

On 28th December 1905 Hugo Knoblauch, merchant, Leith, wrote to Messrs Philp & Co., Largo, Fife, in the following terms:—

"Dear Sirs,—I am offering to-day Plate Linseed for January/February shipment to Leith, and have pleasure in quoting you 100 tons at 41/3, usual Plate terms. I shall be glad to hear if you are buyers, and await your esteemed reply.—Yours truly, Hugo Knoblauch."

On 29th December Messrs Philp & Co. replied by telegram in the following terms:—"Accept hundred January/February Plate 41/3 Leith per steamer Leith—Philp." They also sent the following letter:—

"Largo, 30th Dec. 1905.

"Dear Sir,—Your favour of yesterday came duly to hand, and this forenoon we wired you as per enclosed copy, thus buying from you 100 tons Plate Linseed, January/February steamer shipment usual contract.—Yours truly,

Alex. Philp & Co."

Thereafter Messrs Philp & Co. having called upon Mr Knoblauch to fulfil the contract for the sale of 100 tons linseed which they alleged was constituted by the offer contained in his letter and their acceptance thereof, Mr Knoblauch denied that any such contract had been entered into. Messrs Philp & Co. thereupon bought in 100 tons linseed and raised this action against Mr Knoblauch for the damage they had suffered, being the difference between the contract price of the linseed and the market price on the day when Mr Knoblauch intimated that he declined to recognise the contract.

The Pursuers pleaded: "1. The defender being in breach of his contract with the pursuers, is liable to them in damages."

The Defender pleaded: "1. The pursuers' averments are irrelevant and insufficient to support the conclusions of the Summons.

"2. The averments of the pursuers being unfounded in fact, the defender ought to be assoilzied.

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"3. No contract having been entered into by the defender with the pursuers, he is entitled to absolvitor."

On 15th June 1906 the Lord Ordinary [Dundas] pronounced this interlocutor:—"... Sustains the first and third pleas in law for the defender: assoilzies him from the conclusions of the Summons, and decerns."

He delivered the following Opinion:—

Lord Dundas.—This case raises for decision a very short and sharp point, which is not without difficulty, and is to a considerable extent a question of impression. The matter involved is the construction of the defender's letter to the pursuers, dated 28th December 1905. The pursuers aver that by that letter "the defender offered to sell to the pursuers 100 tons Plate Linseed for January/February shipment to Leith, at the price of 41s. 3d. per quarter." This is not, in my judgment, the proper construction of the letter. If it were so, it would not, I think, be easy to affirm within what period the offer, if not recalled, might be accepted by the pursuers,—a very important matter, because, as the facts of the case indicate, the price of Plate Linseed is liable to considerable fluctuation. The defender had apparently a call upon such linseed, which he was entitled to sell. I read his letter as amounting to no more than an intimation to the pursuers of this fact; an enquiry whether they were buyers of Plate Linseed; an expression of willingness to sell to them up to 100 tons, and a quotation of the price at which it stood on the day of writing for their guidance. If this is the correct construction of the letter, it falls short, though perhaps not very far short, of a definite offer, to be closed by acceptance, to sell 100 tons at 41s. 3d. per quarter. In the dealings of the commercial world, I think the letters or telegrams which are said to import a concluded contract must be construed upon their terms, according to the fair and natural meaning of the language employed; and that it is not legitimate to infer, if it is not sufficiently expressed, an offer on the one hand or an acceptance on the other. In this connection the case of *Harvey* v. *Facey*, 1893, App. Ca. 552, is interesting and suggestive. In my opinion the defender is entitled to have his first and third pleas in law sustained, and to be assoilzied, with expenses.

The Pursuers *reclaimed*, and *argued*: The defender's letter of 28th December and the pursuers' telegram of 29th and letter of 30th December constituted a completed contract of sale.

Argued for the Defender: (1) The letter of 28th December was not an offer to sell, but merely an intimation that the defender was open to deal in linseed (*Harvey* v. *Facey*, 1893, A.C. 552). (2) If there was an offer it had not been accepted, as the pursuers did not state that they agreed that "usual Plate terms" was to be a condition of the contract.

The Court *recalled* the interlocutor reclaimed against, *repelled* the first and second pleas in law for the defender, and *remitted* the cause to the Lord Ordinary to proceed.

The Lord Justice-Clerk.—I am sorry to differ from the Lord Ordinary, who has carefully considered the case, but I am of opinion that the Lord Ordinary's interlocutor is erroneous. This first letter of 28th December 1905 is not a letter merely indicating that the defender had certain goods at his disposal and would be glad to enter into negotiations with regard to them, but stated that he had "pleasure in quoting you (the pursuers) 100 tons (of linseed) at 41/3 usual Plate terms," and that he awaited "your esteemed reply." That, I think, was clearly an offer of the 100 tons at a named price. Now, that letter was replied to by a telegram in these terms: "Accept hundred January/February Plate 41/3 Leith per steamer Leith." That was a shorthand way of stating their reply to be followed by a letter. I think the telegram was a very plain acceptance of the 100 tons which the defender had quoted. I think it must be read along with the letter which followed, in which the pursuers say: "We wired you as per enclosed copy, thus buying from you 100 tons Plate Linseed January/February steamers shipment usual contract." The pursuers' telegram, read with their letter, is a very plain acceptance of what I consider is the plain offer contained in the defender's letter of 28th December. Without going nicely into the phraseology used, I am distinctly of that opinion. The only difficulty is the question whether the words used by the pursuers involved an acceptance of the usual Plate terms as a condition of the contract. I think they did, when we read the telegram and the letter together. The telegram "accepts" without any reservation on this point, and the letter contains the words "usual contract," which plainly mean the same thing as the words usual Plate terms in the offer.

The case of *Harvey* v. *Facey*, L.R. [1893], A.C. 552, which was quoted to us, has no bearing. That was a case regarding an alleged purchase and sale of heritable property, not a transaction like this *in re mercatoria*. Further, there was never really an offer. The telegram founded on as an offer was not an offer. It was merely an opening of negotiations; it offered nothing. It was merely an intimation of the lowest price which would be considered if anyone came forward offering it. I have no doubt that decision was right, but it has no bearing here.

Lord Stormonth-Darling.—I agree. I should like in addition only to make a single reference to *Harvey* v. *Facey* [1893], A.C. 552, cited by the Lord Ordinary. In that case a telegram was sent to the owner of a certain property asking whether he was willing to sell it to the persons making the enquiry, and also asking what was the lowest price; and the telegram in reply stated the lowest price for the property but did not answer the first question. The Privy Council there held (and I do not, of course, question their judgment in the least) that there was no contract, the ground of their

judgment being that there was no answer to or agreement on the question first asked, which had to be express, and could not be implied.

But here, I am of opinion that the defender's letter to the pursuers of 28th December, and the pursuers' telegram of 29th December in answer thereto, contained all the conditions necessary to make a concluded agreement. There was no necessity or reason for the defender in that letter quoting to the pursuers a specific quantity and price unless he was prepared to make a contract with them, if buyers, as to which he awaited their reply. That reply could only be received next day, and was sent by telegram as soon as possible. I am of opinion that a contract was thereby concluded, and on usual Plate terms. It is true the telegram does not repeat "on usual Plate terms," but I think that pursuers' telegram plainly implied their consent thereto.

Lord Low.—I agree.

Lord Ardwall.—I agree. I think that the letter of 28th December 1905 contains in the first place a general statement that the defender is selling Plate linseed, and then goes on to make an absolutely definite offer of a specific quantity at a specific price. The defender says: "I shall be glad to hear if you are buyers." This does not mean buyers in general, but buyers of the quantity specified at the price quoted, otherwise there would be no meaning in the phrase which follows, "and await your esteemed reply." This offer was accepted by a telegram dated 29th December 1905, sent before the offer was recalled, and the letter and telegram constitute, in my opinion, a concluded contract for the purchase of the linseed in question.

It was maintained by the defender that there was no concluded contract, because the telegram did not fully meet the offer in respect that it did not refer to "usual Plate terms"; but with regard to a document so plainly *in re mercatoria* as a telegram, I think the acceptance therein contained, which included a specification of the subject sold, the time of delivery, the quantity and the price, was sufficient, and that it implied an acceptance of the ancillary condition "usual Plate terms." But further, the pursuers' letter of 29th December 1905 contained that condition, and moreover, these "terms" being the invariable conditions for Plate linseed, they must be held to have formed an implied condition of the acceptance unless specially excluded. For these reasons I think it is vain for the defender to plead that there was no concluded contract in respect of the absence in the telegram of a reference to "usual Plate terms."—31*st May* 1907.

Counsel for Reclaimers, Sandeman, Muir; Agent, James Ayton, S.S.C.—Counsel for Respondent, Scott Dickson, K.C., Horne; Agents, Beveridge, Sutherland & Smith, S.S.C.

J. H. H.

1st Div.

Hayman & Son v. Thomson M'Lintock and Others.

FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

32. Hayman & Son *v.* Thomson M'Lintock and Others.

I. Right in Security—Bill of Lading—Bill of Lading Given by Owner of Goods in Security for Advance Over Goods — Goods Not Delivered to Security-Holder—Rights of Holder of Bill of Lading as Against Trustee in Bankruptcy of Owner of Goods—Observed by The Lord President that the Security-Holder Cannot Lose Possession of the Goods Unless by Losing Possession of the Document of Title.

II. Sale—Sale of Unascertained Goods—Constructive Delivery — Sale of Goods Act 1893 (56 & 57 Vict. cap. 71), sect. 16.

(*Reported ante, Vol. XIII. p.* 863.)

Reclaiming Note against an Interlocutor of Lord Ardwall.

The facts of the case appear from the previous report.

The claimants M'Connell & Reid *reclaimed*. Counsel for M'Connell & Reid and for J. K. Stewart, whose claims were in the same position, *argued*: Hayman & Son were personally bound by the terms of the transfer notes delivered to the reclaimers and to Stewart to deliver the flour to them (Benjamin on Sale, 5th ed. p. 865; *Godts* v. *Rose*, 1855, 25 L.J., C.P. 61). Hayman & Son came under this obligation on the direct instructions of the sellers, *i.e.* the bankrupt, and therefore the bankrupt must leave the bags with the custodiers to allow them to implement their obligation. The trustee in bankruptcy could be in no better position than the bankrupt (*Knights* v. *Wiffen*, 1870, 5 Q.B. 660; *Henderson & Co.* v. *Williams* [1895], 1 Q.B. 521; *Macintosh* v. *Brierly*, 1846, 5 Bell's App. 1; *Whitehouse and Others* v. *Frost and Others*, 1810, 12 East 613).

Alternatively, assume the Lord Ordinary was right in holding the property in the sacks purchased had not passed. Then there was common ownership in the sacks in Hayman & Son's store (Stair's Institutions, II. 1, 37). The separation could only be done by consent of parties or by the Court. Therefore the bankrupt had a *pro indiviso* right in the sacks which he validly sold to the purchasers, who completed their right by intimating it to the common agent of the parties, the storekeeper.

Counsel for the claimant Thomson M'Lintock as against the claim of M'Connell & Reid and

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J. K. Stewart, *argued*: (1) No right of property ever passed to the purchasers, as the goods were never ascertained (Sale of Goods Act 1893, sect. 13; *Black* v. *Incorporation of Bakers, Glasgow, etc.*, 1867, 6 M. 137; *Pochin & Co.* v. *Robinows & Marjoribanks*, 1869, 7 M. 622, per the Lord President, p. 628; *Anderson & Crompton* v. *Walls & Co.*, 1870, 9 M. 122). (2) The granting of a delivery order raised no plea of bar against the seller which could be pleaded against his trustee in bankruptcy (*M'Ewan* v. *Smith*, 1849, 6 Bell's App. 340; *Distillers Co. Ltd.* v. *Russell's Tr.*, 1889, 16 R. 479). The argument for Thomson M'Lintock as against the claimants John Stevenson & Moorhead, Watson & Co., appears from the opinion of the Lord President.

Counsel referred to the following authorities: *Burdick* v. *Sewell*, 1884, 13 Q.B.D. 159, per Bowen, L.J., p. 170, 10 A.C. 74; Carver's Carriage by Sea, sect. 497; *Grange & Co.* v. *Taylor*, 1904, 9 Aspinall 559.

Counsel for the claimant John Stevenson referred to the following authorities: *Ritchie* v. *Scott*, 1899, 1 F. 728; *Hamilton* v. *Western Bank of Scotland*, 1856, 19 D. 152, per the Lord President, p. 160; Sale of Goods Act, 1893, sect. 47.

Counsel for claimants Moorhead, Watson & Co. adopted the argument for John Stevenson, and *argued* further: The bill of lading remained a good title to the goods after they were removed from the ship and stored. It was the only operative method of dealing with the goods (*Saunders Brothers* v. *Maclean & Co.*, 1883, 11 Q.B.D. 327; *Short* v. *Simpson*, 1866, 1 C.P. 248).

The Court *adhered*.

The Lord President. — This is a multiplepoinding, and the subjects *in medio* are certain bags of flour within the store of one Hayman, who is the pursuer and nominal raiser. He has no interest in the matter whatsoever, and the question arises upon a competition for these bags. Now the course of dealing out of which the question arose was this. There was a miller in America called Seymour Carter, and there was a firm of flour merchants in Glasgow of the name of John M'Nairn & Co., the sole partner of which firm was John Stevenson, and they had business relations with Seymour Carter. The course of business was this, that Carter used to ship bags of flour, and to take bills of lading in the name of himself (Carter) as consignee. He then sent over the bills of lading to his correspondents James Findlay & Co. in Glasgow, along with bills drawn upon M'Nairn & Co.; and M'Nairn & Co., on going to James Findlay & Co. and putting them in funds to retire the bills of exchange, were handed the bills of lading. Having got the bills of lading they could go to the Allan Line, by which the flour was usually sent, and from them get a delivery order to put the flour into a store, Hayman's being the store in which they generally put it. Now, as it suited the ship to get rid of the flour sometimes, if the bills of lading were not presented, the flour was stored in Hayman's store all the same. The storage order was in terms of a form, addressed to the Allan Line, Master Porter Department, which recited that the bill of lading had been presented, and that form was used even when in point of fact the bill of lading was not presented, but in that case there was a notandum added, stating that the flour was stored in the name of the ship. Then when the bill of lading was presented, a second delivery order was got from the Allan Line addressed to the store.

What happened on one occasion was this: that M'Nairn & Co. being short of money went to a Mr Stevenson, who was an uncle of the sole partner of M'Nairn & Co., and asked him if he would give him an advance; and they proposed to give him in security some of the flour which was coming. Stevenson consented to give them an advance of a certain sum, and he gave them a cheque upon his bank, the Commercial Bank, for that amount. With the proceeds of that cheque M'Nairn & Co. went to James Findlay & Co. and got the bills of lading of a certain cargo of flour; and they then handed the bills of lading blank endorsed to the Commercial Bank to hold for Stevenson. The flour was then deposited in Hayman's store in ship's name. Stevenson did nothing after that, and while the flour was still in Hayman's store M'Nairn & Co. went bankrupt. Now the state of affairs when M'Nairn & Co. went bankrupt was that Hayman had a good many bags of flour in his store—more, a good deal, than would satisfy the number of bags which were specified in the bills of lading that had been handed to Stevenson. Taking Stevenson's case, the competition arises between him as in right of these bags in virtue of the bills of lading and the delivery order which he got from the shipping company afterwards, and the trustee.

My Lords, I take Stevenson's case first, because it seems to me to come logically first. Upon this state of the facts we had an excessively ingenious argument from Mr Murray, which was really founded, I think, entirely upon the case of *Sewell* v. *Burdick*, 1884, 13 Q.B.D. 159, in the House of Lords, where a shipowner sued the holder of a bill of lading for freight. Whether he was liable as upon the contract of freight depended on the terms of the Bills of Lading Act; and the terms of the Bills of Lading Act which deal with the point are that the person is to be liable if he has the property in the goods. Now *Sewell* v. *Burdick* determined — it was an English case—that according to the law of England the question of whether the holder of a bill of lading in security was the holder of the property, or was merely a pledgee, was in each case a question of fact; but in this case

they held that he was a pledgee, and that according to the law of England a pledgee in those circumstances had not *the* property in the goods in the sense of the Bills of Lading Act, but had only a property known to the law of England as a special property. Mr Murray, commenting on that case, suddenly, so to speak, assumed that the law of Scotland was the same as the law of England, for, he said, in this case the property of the goods was not in the pledgee or holder of the security, Stevenson, but was still in the bankrupt, and that, accordingly, the property being in the bankrupt, the result obviously followed that Stevenson could only have a dividend and could not have the actual goods.

I am afraid that though that is ingenious it is too ingenious, and the fallacy rests in suddenly turning an English term to use in Scottish law, and assuming that it is the same. There is no such thing in Scots law as the term special property, and there cannot be, according to the law of Scotland, a distinction between *the* property and a special property. But the form of security effectuated by what in the law of England is called a special property is perfectly well known in the law of Scotland. There is a very well-known leading authority upon the matter—namely, the case of *Hamilton* v. *Western Bank*, 1856, 19 D. 152. I take it to be clear beyond all doubt that when a person gives a document which transfers moveable property he can make a perfectly good security, and that, whatever the law of England may be, the law of Scotland was certainly this, that the condition of affairs in which a pledgee might lose his rights by losing possession, applies only to the proper case of corporeal moveables. It is very often a confusion of ideas or quibble of words to talk of losing possession where what is given to you is not the property itself but documents which transfer the property. You cannot lose possession of the moveables unless you lose the document, and the puzzle which Mr Murray attempted to create about the loss of the possession of the bags is really no puzzle at all, because Mr Stevenson had never lost possession of the bill of lading, and therefore, upon *Hamilton* v. *Western Bank*, he holds a perfectly good security.

Mr Murray's senior, the Solicitor-General, really, remembering that this was a nautical case, jettisoned his junior's argument entirely, and he put the case upon perfectly separate grounds. He admitted that there was quite a good security in Mr Stevenson's hands; but then, he said that the security was in the circumstances of no use to him, and for this reason, that these bags of flour were in no way distinguishable: you could not tell one bag from another, and no one could say to what particular 500 bags in the store Stevenson's bills of lading applied. Therefore, said the Solicitor-General, the property is now all immixed, and being immixed it is mine. That is really a sort of new form of alluvia in the person of the trustee which I have never heard of before, and the fallacy of it, I think, can be easily tested by supposing for a moment that Stevenson, instead of being a security holder, had been merely a third party. There is the bankruptcy during which Hayman's store is filled with bags apparently belonging to the bankrupt and bags apparently belonging to this third person; and these bags are so immixed that no one can tell which bags belong to each. If the storekeeper is not in a position to fulfil his contract—that is to say, if he has not bags enough to satisfy his obligation to deliver bags to both the bankrupt and the third party—no doubt a position of some difficulty may arise. But here there is no such difficulty. It is admitted that Hayman has bags enough to satisfy both the claims of the trustee and of Stevenson, and in the circumstances I prefigured, what would have happened would be that the bags all being the same, a number corresponding to the number held by the third party would be handed to him, and the rest handed to the trustee. I do not think that anyone could suppose that there was any difficulty in that situation. If that is the situation, what difference does it make if, instead of being a third party, Stevenson is a person who holds a security over the goods, provided that security has been well constituted? Therefore I think the argument of the Solicitor-General is not so ingenious as that of his junior, and is equally unsound. Upon this matter the conclusion that the Lord Ordinary has come to is perfectly right; and that disposes of the matter so far as Mr Stevenson is concerned.

But there were other claimants, Moorhead, Watson & Company, who are for all practical purposes in precisely the same position as Stevenson, except that the bills of lading were transferred after the cargo was put in the store. In the view I have taken that distinction makes no difference, and therefore Moorhead, Watson & Co.'s case follows that of Stevenson; and that disposes of these two cases.

That leaves 424 bags in the hands of the trustee as representing the bankrupt, and upon these 424 bags arises a subsequent question with persons of the name of M'Connell & Reid and J. K. Stewart. The question arises out of this, that after the bankrupt had got the flour into the store, he entered into a contract of sale of certain of these bags in favour of these parties. There is no question as to the contract of sale of the flour lying in the store; but before anything was done in the way of separating the bags, there came the bankruptcy. The trustee in the bankruptcy appeals simply to the 16th section of the Sale of Goods Act, which specially provides that where there is a sale of unascertained goods the property shall not pass until the goods shall have been ascertained. Here nothing was done to ascertain the goods. These flour bags were not separately marked, and although doubtless if the

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buyer here had gone to the storekeeper and had got him to put aside the sacks or mark them, or put them into another room, that would have passed the property; yet as he did none of those things, the property, it seems to me, did not pass. It is not enough merely to get an acknowledgment in general terms that so many of those bags belonging to the bankrupt are held for him.

I think, therefore, that there again the Lord Ordinary has taken an entirely right view. It is a perfectly simple question arising solely on the terms of the Act. I am therefore for adhering to the judgment of the Lord Ordinary.

Lord M'Laren.—This is a somewhat involved case, and if I had had any doubt about the result I should have wished to take time to consider it and to unravel its details; but I am satisfied that the Lord Ordinary has decided the various points correctly and in accordance with settled law.

With regard to the sacks of flour which were represented by the bills of lading at the time of M'Nairn & Co.'s bankruptcy, various objections were raised to the right of Mr Stevenson as holder of these bills. In the first place, it was said that the goods were landed, and that Stevenson, the transferee of a bill of lading, was in no better position as owner of the goods than the holder of a delivery order, which would not in all circumstances suffice to pass the property. It may be that at one time the effect of the transference of bills of lading was too rigorously limited to the case of goods which were on board a ship at sea. If Mr Stevenson had advanced the money upon the security of a bill of lading while the goods were actually at sea, although he might have taken the bill in security only, I think no one who was conversant with mercantile law would dispute that Mr Stevenson had a good security upon his bill of lading to the extent of his advances. But I think the later law has settled that the question as to the effect of a bill of lading does not depend upon the arrival, or even the unloading, of the ship, and that a bill of lading must be taken to be an effective document of title representing the goods until these have been actually delivered to the person in right of the bill.

There are some advantages, and there may also be disadvantages, in the rule, as I have stated it, where the storage of the goods has extended over a considerable time; but since the case of *Barber* v. *Meyerstein*, 1870, L.R. 4 H.L. 338, I think it must be taken as settled that, although the goods are stored, the delivery of the bills of lading has effect in all respects, whether as a title of property, or whether as a security to the person to whom it has been endorsed or delivered, exactly as if the goods were on board the ship.

If that principle is once admitted, it again disposes of the next argument, which was founded upon the analogy of the delivery order. It is perfectly true that a delivery order is worthless as passing specific property until the goods have been ascertained, but that is exactly the distinction between the effect of a delivery order for goods on shore and a bill of lading. Bills of lading have been long in use, and as far back as we have any knowledge of their use, they were held to be negotiable. Such bills, expressed to be for so many bags of flour or quarters of grain on board a particular ship, would pass by blank indorsation from hand to hand while the ship was at sea. How is it possible, consistently with such a state of the law, that the goods could be specifically ascertained, or that the various persons who took such bills of lading could examine and verify the goods while the ship was in mid ocean? We know that bills of lading are granted for portions of cargo in bulk which cannot, of course, be ascertained; and when bills of lading are granted in these circumstances, they must operate as a transfer of an unascertained quantity of goods on board the ship, until delivery is made in terms of the obligation. Delivery had not been made here, and therefore Mr Stevenson's right to these undelivered goods was as effectual as if they were identified by marks and numbers. . . . I am of opinion, therefore, that on both points the Lord Ordinary's judgment should be adhered to.

Lords Kinnear and *Pearson* concurred.—28*th May* 1907.

Counsel for Claimants and Reclaimers M'Connell & Reid, Cullen, K.C., MacRobert; Agents, Cadell, Wilson & Morton, W.S.—Counsel for Claimant James K. Stewart, Cullen, K.C., MacRobert; Agents, Gardiner & Macfie, S.S.C.—Counsel for Claimant and Respondent Thomson M'Lintock, The Solicitor-General (Ure, K.C.), Murray; Agents, Cairns, M'Intosh & Morton, W.S.—Counsel for Claimant and Respondent John Stevenson, The Dean of Faculty (Campbell, K.C.), Horne; Agents, Webster, Will & Co., S.S.C.—Counsel for Claimants and Respondents Moorhead, Watson & Co., Hunter, K.C., R. S. Brown; Agents, Patrick & James, S.S.C.

A. M.

HIGH COURT OF JUSTICIARY.

(The Lord Justice-General, Lords M'Laren and Kinnear.)

33. Stott and Shaw *v.* Renton.

Justiciary Cases—Betting—Advertising by Circular and Handbill—Invitations to Bet—Betting Act 1853 (16 & 17 Vict. cap. 119), sect. 1—Betting Act 1874 (37 Vict. cap. 15), sect. 3 (3).

Stated Case.

This was an appeal against a decision of the Sheriff-Substitute of the Lothians at Edinburgh,

(Gardner Millar), convicting the appellants of contraventions of sect. 1 of the Betting Act 1853, and sect. 3, sub-sect. (3), of the Betting Act, 1874.

The facts were set forth as follows :—

This is a cause brought in this Court under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, at the instance of the respondent against the appellants, charging them—*First*, that on 15th August 1906, at some post office in Leith or Edinburgh to the respondent unknown, they did send by post to John Hepburn, wire worker, 11 Dalmeny Street, Leith (1) the circular or advertisement produced giving particulars of the terms on which they were prepared to bet with their clients, and containing, *inter alia*, the statements marked No. 1 set forth in column (I) of Schedule A annexed to the complaint ; (2) the handbill or betting card produced applicable to the making of bets with them on the Cesarewitch and Cambridge Stakes, being horse races to be run on 10th and 24th October 1906, respectively, and containing, *inter alia*, the statements marked No. 2 set forth in said column (I) of said schedule ; and (3) a betting card, also produced, containing, *inter alia*, the statements marked No. 3, set forth in column (I) of said Schedule, said card being applicable to bets to be made with them on the football matches therein mentioned and set forth in column (II) of said Schedule, and which were to be played on 18th August 1906, and that they did thus invite the said John Hepburn to make bets with them on said horse races and football matches, being such bets on such events or contingencies as are mentioned in the Betting Act 1853, sect. 1 ; and (*Second*) that on 14th September 1906, in Links Place, Leith, they did by the hands of John Ward, 77 Albert Street, Edinburgh, their messenger, send, publish, and exhibit to Thomas Donachie, 18 Couper Street, Leith, and to a number of other persons whose names were to the respondent unknown, betting cards containing, *inter alia*, the statements contained in column (I) of Schedule B annexed to said Complaint, said cards being applicable to bets to be made with them on the football matches therein mentioned and set forth in column (II) of said Schedule B, and which were to be played on 15th September 1906, and that they did thus invite the said Thomas Donachie, and other persons to the respondent unknown, who received said cards, to make bets with them on said football matches, being such bets on such events or contingencies as are mentioned in the Betting Act 1853, sect. 1, and one of said betting cards was produced, all contrary to the Betting Act 1874, sect. 3 (3), whereby the said Samuel Stott and Pearcy Shaw were each liable to the penalties provided by the 7th section of the said Betting Act 1853, with respect to offences under that section.

The complaint was called in Court before me on 9th November 1906, when, before pleading, the agent for the appellants stated the following preliminary pleas, viz. :—

That the complaint is not relevant in respect that (1) the appellants are not charged with having sent the circular, handbill, and betting cards referred to from a house, office, room, or place in terms of sect. 7 of the Betting Act 1853 ; and (2) it was not averred that the said circular, handbill, and betting cards invited the persons referred to in the complaint to resort to a particular house, office, room, or place within the meaning of said Act to make bets with the appellants.

Having heard the agent for the appellants and the respondent, I repelled all of said objections, whereupon the appellants pleaded not guilty, and the case thereafter went to trial.

The following facts were proved :

That the appellants were commission agents or bookmakers, and the only known partners of the firm of Stott & Shaw, turf and football accountants, Leith Hall, Tolbooth Wynd, Leith, at which address they carried on their said business, in the conduct of which each took an active part.

That in pursuance of their said business they were in the practice of sending out to members of the public, circulars, advertisements, handbills, and betting cards in the terms of those produced, and that these were sent, some through the post and others delivered by special messenger.

That on 15th August 1906 the said John Hepburn received through the post the three documents mentioned in the first charge, which were produced and extracts from which are given in Schedule A annexed to the complaint, and that these were sent to him by the appellants.

That on 14th September 1906, in Links Place, Leith, about 1 p.m., the said John Ward was observed handing the betting cards mentioned in the second charge, to workmen who were then passing along the street, and fifteen of said cards were given to the said Thomas Donachie. The names of the others who received said cards were unknown to the respondent. In possession of the said John Ward were found 150 of said cards, which were produced at the trial and extracts from which are given in Schedule B annexed to the complaint.

That the said John Ward was in the employment of the appellants, and that it was by their instructions he delivered said cards to the persons referred to.

That the appellants, in the documents referred to both in the first and second charges, invited the persons to whom these documents were sent, exhibited, or published, to make bets with them on the events or contingencies therein mentioned.

That any money for bets was to be sent to the appellants at their said business premises, and on the circular or advertisement mentioned in the first charge appeared the following statement :—"All business done by letters or telegrams. No callers," and on the betting cards relating to football matches there was a note in the following terms :—"All business is done by letters or telephone. No transactions are entered into by Messrs Stott & Shaw with persons resorting to their premises."

I held in law that as the documents referred to in the first and second charges of the complaint were such documents as are mentioned in sect. 3 of the Betting Act 1874, and were sent, exhibited, and published by the appellants inviting the persons in question to bet with them on the events or contingencies mentioned in said documents—being such bets on such events or contingencies as are mentioned in sect. 1 of the Betting Act 1853—the appellants were guilty of the contraventions charged, and that it was not necessary for the respondent to libel and prove that the appellants kept a betting house within the meaning of the Betting Act 1853, and that the persons to whom they sent invitations to bet were invited to resort to such premises for the purpose of betting. I therefore fined them each £20, being £10 for each offence, which fines were paid.

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Schedule A referred to was as follows :—

COLUMN I.	COLUMN II.
STATEMENTS.	FOOTBALL MATCHES.

No. 1.

"Stott & Shaw, Football and Turf Accountants. Starting Price at all Meetings. No Limit! No Limit! Send for Rules. Best Price, Double and Treble Events. Special attention given to Country Clients. Commissions received by letter attended to at once, and returned with winnings immediately after results. Leith Hall, Tolbooth Wynd, Leith.

No. 2.

Cesarewitch and Cambridge.
Double Event.
£25 to 1s.—the Sporting Double.

Cesarewitch .....
Cambridge.....

Name .....
Address .....

Stott & Shaw, Turf and Football Accountants, Leith Hall, Tolbooth Wynd, Leith, N.B. Starting Price at all Meetings. No Limit. Send for Rules.
Cesarewitch and Cambridge Stakes. Full Market Prices Laid—Horses in either Race.

No. 3.

Stott & Shaw, Turf and Football Accountants, Leith Hall, Tolbooth Wynd, Leith.
3 to 1 against naming any three winning teams.
8 to 1 against naming two winners and one draw.
10 to 1 against naming 1 home, 1 visiting, and 1 draw.
16 to 1 against naming 4 visiting winning teams.
20 to 1 against naming 1 home, 2 visiting, and 1 draw.

RULES.

1. To pay by the results in the Final Edition of the *Edinburgh Evening News*.
4. Please to write name, street, town, and amounts invested very distinctly.
All letters to Stott & Shaw, Leith Hall, Tolbooth Wynd, Leith. Starting Price at all Meetings. No Limit. Send for Rules.

In making a bet for first time	put a X in square.

Backers please place a X against your selections for drawn matches. If selecting teams to win place an O in front of the team you select. If backing correct score, please place the figures in front of selected teams—viz.,

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Please note Extended Odds.

Name .....
Address .....
Amount invested .....

Cards and Teams for next week's matches ready on Wednesdays. Post free. Send address on P.C. Send for S.P. terms and Book of Rules. This portion to be returned."

Saturday, August 18th.

HOME TEAM.	AWAY TEAM.
Aberdeen	*v.* Hibernians.
Kilmarnock	*v.* Airdrieonians.
St Mirren	*v.* Partick Thistle.
Morton	*v.* Queen's Park.
Ayr Parkhouse	*v.* Abercorn.
Cowdenbeath	*v.* Leith.
St Bernards	*v.* Dumbarton.
Vale of Leven	*v.* Raith Rovers.
Albion Rovers	*v.* Arthurlie.
Montrose	*v.* Dundee 'A.'

Schedule B contained statements and a list of football matches similar to those contained in No. 3 of Schedule A, and also rules similar to those contained in that Schedule.

The circular or advertisement referred to in the first contravention charged was as follows :—

STOTT & SHAW,

FOOTBALL & TURF ACCOUNTANTS.

Starting price at all meetings.

No Limit ! No Limit !

Send for Rules. Best Price Double and Treble Events. Special attention given to country clients.

Commissions received by letter attended to at once, and returned with winnings immediately after results.

All Business done by Letters or Telegrams.

No Callers.

LEITH HALL, TOLBOOTH WYND, LEITH.

Telephone—343 Leith. Telegrams—"Rick," Leith. Bankers—Union Bank of Scotland.

The Questions of Law for the opinion of the High Court of Justiciary were :—

1. Should the preliminary pleas hereinbefore set forth, or either of them, have been sustained ?
2. Was it necessary in order to a conviction for a contravention of sect. 3 (3) of the Betting Act 1874, that the respondent, in addition to the facts proved, should also prove that the appellants kept a betting house within the meaning of the Betting Act 1853, and invited the persons to whom they sent invitations to bet, to resort there for the purpose of betting ?

The Betting Act 1853 provides :—

Sect. 1. "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of, such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid. . . ."

The Betting Act 1874 provides :—

Sect. 3. "Where any letter, circular, telegram, placard, handbill, card or advertisement is sent, exhibited or published . . . .

"(3) inviting any person to make or take any share in or in connection with any such bet or wager ;

"every person sending, exhibiting or publishing, or causing the same to be sent, exhibited or published, shall be subject to the penalties provided in the 7th section of the principal Act with respect to offences under that section."

Argued for Appellants: The Betting Acts did not make it criminal for one person to invite others to bet. There must be an invitation to bet at a betting house in order to come within the provisions. It was not necessary, however, that there should be physical presence at the betting house, provided there was resort there. The resort might be either physically or by letter. The Act of 1853 struck at the keeping of a certain class of house. That Act was to be read along with the Act of 1874, and the provisions of the later Act were all subsidiary to the ruling provisions as to the keeping of betting houses. The invitation to bet prohibited by sect. 3, sub-sect. (3), of the 1874 Act must be an invitation to bet at a betting house. That element was wanting in the present case, because the persons who were asked to bet were specially warned against going to the address mentioned in the circulars. The bets were not to be made there. That was the interpretation of the statute laid down as correct in *Cox* v. *Andrews*, 1883, 12 Q.B.D. 126. That case was directly in point and had never been overruled, although there were *dicta* in *Hawke* v. *Mackenzie* [1902], 2 K.B. 225, which seemed difficult to reconcile with it. But in *Hawke's* case the Court found in the advertisement a place to which persons were invited to resort, and therefore the decision there was not in point.

Argued for Respondent: There was no limitation in sub-sect. (3) as regards either person or place. The Act of 1853 was referred to, not with any reference to the place where the bet might be entered into, but merely with reference to the nature of the bet to be made. It was not every bet to which the Act referred, but only what might be called sporting bets, which were enumerated in the first section of the 1853 Act. What sub-sect. (3) struck at was the mode in which the bet was entered into. It was the advertising of betting opportunities that was prohibited. The fact that the word "person" was extended by sub-sect. (1) to include persons outside the United Kingdom showed that this was what the statute meant. The distinguishing point in *Cox's* case was that there there was no actual invitation to bet at all. What the advertiser did was to offer betting information to all who might apply for it, but he did not ask them to bet with him. The present case was exactly in line with the second case in *Hawke* v. *Mackenzie*. If resorting was necessary, there was an invitation to resort here, viz., to the address given in the circular. It was well settled that resorting might be by letter (*Hart* v. *Nisbet*, 1900, 3 Adam 144; *The Queen* v. *Stoddart* [1901], 1 Q.B. 177).

The Court *answered* both questions in the negative, and *dismissed* the appeal.

High Court of Justiciary

Stott and Shaw v. Renton.

The Lord Justice-General.

The Lord Justice-General.—In this case the complaint is against two persons who call themselves football and turf accountants, who send out handbills and cards in which they invite persons to bet upon the result of races or football matches. The Sheriff-Substitute convicted them of an offence against sect. 3, sub-sect. (3), of the Betting Act 1874; and the conviction is sought to be suspended on the ground that there is not set forth in the Acts charged any true contravention of the statute, in respect those handbills and cards do not invite persons to make bets at any particular place. It is quite true that in the circulars an address is given, but the persons to whom these circulars are given or sent are told that their presence there is not desired; indeed, that they will not be admitted there. It is true they are to make their communications there, but after a communication is made there is no certioration that the bet will be accepted there; and if it is not, say the complainers, there is no bet made at a betting-house, and any betting that may take place is in the same situation as betting between private persons.

I cannot say I have any difficulty about the case, viewing it upon the complaint and the statute. The only difficulty I have arises upon some of the decisions to which we have been referred. It seems to me that the Act of 1853 started with a prohibition against keeping a house for betting. It then went on to penalise a person who advertised a betting house. That Act was felt not to be sufficient, and the Act of 1874 was passed. The third section of that act is in these terms: [His Lordship read the section]. I quite agree with what was said by Mathew, J., in *Cox* v. *Andrews*, that the two Acts are to be read together, and the decision in that case was, if I may respectfully say so, perfectly right. The advertisement there struck at was one in which the person said he would send his selections, that is to say, he would tell the names of the horses that were most likely in his opinion to win. But he did not in any way indicate that he desired to make a bet with any person who might come to him for such information. Whether they might make use of the information for betting elsewhere was a matter with which he was not concerned. If sect. 3, sub-sect. (1), was read absolutely literally, the *species facti* in that case would come within its terms. But of course it was perfectly properly held that the principal Act controls that section, and accordingly, as there was no invitation to bet, it was held that no conviction was allowed.

The other case was *Hawke* v. *Mackenzie*. The first case there I do not think causes any difficulty. It was really a repetition of *The Queen* v. *Stoddart*, and the point of that case was that a person had advertised in a newspaper that he sent out a

High Court of Justiciary

Stott and Shaw v. Renton.

The Lord Justice-General.

coupon on which people might guess the horse which would win a race, and the one who guessed correctly would get a sum of money. That is not, on the face of it, a bet, but the Lord Chief-Justice said truly that in substance it was making a bet.

The second case does cause me difficulty, and I am unable to understand it, because in the report the precise character of the advertisement is not disclosed. But, inasmuch as the Lord Chief-Justice says he approves of the decision in *Cox* v. *Andrews*, I am bound to guess that the advertisement in the second case was so related to the advertisement in the first that, although in terms it was a proposal to send what are called "tips," taken along with the other it was an invitation to bet. If it was the case of a "tip" pure and simple, it would have fallen under the decision in *Cox* v. *Andrews*.

I do not think this case causes such a difficulty, because here there was an invitation to bet. The fact that the precise place where the bet will eventually be made is not disclosed does not affect the question. Mr Craigie had really to surrender his case when he admitted, as he had of course to admit, that personal presence at the place was not necessary, but that receipt of correspondence there would be sufficient. I do not think it possible to say, after the correspondence has been received, that the bet will take place somewhere else than where it is received. For these reasons I am of opinion that the appeal should be dismissed.

Lord M'Laren.—I am of the same opinion.

Lord Kinnear.—I also agree.—31*st May* 1907.

Counsel for Appellants, Craigie, K.C., D. Anderson; Agent, Arthur C. M'Laren, Solicitor.—Counsel for Respondent, Solicitor-General (Ure, K.C.), R. L. Orr, K.C., A.-D., Adam, A.-D.; Agent, W. S. Haldane, W.S., Crown Agent.

F. A. U.

HIGH COURT OF JUSTICIARY.

(The Lord Justice-General, Lords M'Laren and Kinnear.)

34. M'Allister *v.* Abercrombie.

Justiciary Cases — Crime — Driving in Culpable and Reckless Manner — Held Not To Be a Crime at Common Law Unless it Be to the Danger of the Lieges.

Bill of Suspension.

This was a Bill of Suspension of a conviction obtained in the Justice of the Peace Court for the County of Renfrew at Paisley on a complaint which charged:—

That Patrick M'Allister, motorman, 27 New Street, Paisley, did on 7th December 1906, on the Paisley and Johnstone Road, opposite Glenview Place, Elderslie, in the Parish of Paisley and County of Renfrew, drive an electric tram car westwards, in a culpable and reckless manner, and fail to keep a proper look-out and to signal the approach of said car when approaching a horse and lorry then and there standing on the south side of said road, under the charge of Henry Muir, carter, 19 Steeple Street, Kilbarchan, whereby said car came into violent contact with said horse and lorry, overturning said lorry and damaging it, and throwing said horse violently against the iron railing in front of the house there, occupied by William Ballantyne, bricklayer, injuring said horse and knocking down and destroying or injuring about 9 feet of said railing.

The grounds of suspension and the answers thereto for the respondent were as follows:—

Stat. 2. On said complaint being called in Court on 14th December 1906, the complainer, through his agent, objected to the relevancy and competency of the complaint in respect, *inter alia* (1) That the offence charged is not a crime at common law; (2) that assuming it is, the Justices had no jurisdiction to try it; and (3) that the complaint is wanting in specification. These objections were noted and repelled by the Justices sitting on the bench, namely, David Wilson and John Armour Brown. Evidence having, on 21st December 1906, been thereafter led in support of the complaint, and in exculpation the Justices then sitting, namely, David Wilson, John Armour Brown, and Edmund Sharer, convicted the complainer of the crime charged, and fined and amerciated him in the sum of Twenty shillings sterling, and, in default of immediate payment thereof, decerned and adjudged him to be imprisoned for the space of fourteen days, unless the fine be sooner paid, and thereafter to be set at liberty, and for that purpose granted warrant to officers of Court to convey the said Patrick M'Allister to the prison of Glasgow, thereafter to be dealt with in due course of law. The complainer at once paid said fine. He maintains that said sentence of conviction is illegal, and that it ought to be set aside.

Ans. 2. Admitted that at first diet certain objections were stated. These objections are set forth in the record of proceedings, which is referred to. Said objections were noted by the Clerk of Court and read over to and approved by complainer's agent at the time. No other objections than those noted by the Clerk were taken to the complaint or to the proceedings before the Justices. Admitted that the objections taken were repelled as stated. Admitted that evidence was thereafter taken on 21st December, and that the complainer was convicted and fined, all as set forth in the conviction. Admitted that the fine was paid. *Quoad ultra*, denied.

Stat. 3. The complainer is charged with driving an electric tram car on the Paisley and Johnstone Road in a culpable and reckless manner, and failing to keep a proper look-out and to signal the approach of the car, so that a lorry was damaged and a horse injured. The complaint does not bear that his conduct was in any way to the danger of any of the lieges, and the charge made does not constitute a crime by the common law of Scotland. The Paisley District Tramways, which are laid on, *inter alia*, the Paisley and Johnstone Road, are regulated by the Tramways Act 1870, 33 & 34 Vict. c. 78, the Paisley District Tramways Order Confirmation Act

1901, 1 Edw. 7. ch. CCLXXXI., and the Regulations and Bye-Laws dated April 11, 1905, enacted by the Board of Trade with reference to the said Paisley District Tramways. By these Acts and Regulations and Bye-Laws are created obligations on the part of the servants of the Tramway Company towards the public and enforceable in the manner and subject to the penalties specified therein. These statutes, and particularly the said Bye-Laws, make provision for regulating the speed at which cars may be driven, the manner and methods of approaching, signalling, and stopping in cases of danger, and enact penalties for the breach of such regulations. They provide a code whereby the duties and responsibilities of drivers fall to be determined, and any complaint against a driver in the course of his duty for such a crime as was charged should have been brought under one or other of these statutory enactments. Further, assuming that the offence charged was a common law crime or a statutory offence, the Justices had no jurisdiction to try it.

Ans. 3. The complaint is referred to for its terms. Admitted that danger to the lieges is not libelled, and explained that this objection was not stated at either diet in the Court below, and is now taken for the first time. Explained further that no objection to the jurisdiction of the Court was taken at either of said diets. The said private Acts and the regulations and bye-laws mentioned are referred to for their terms. *Quoad ultra*, denied.

The Suspender *pleaded*:

The complainer is entitled to have the said sentence of conviction suspended in respect that (1) the Justices had no jurisdiction to try the offence charged; (2) the complaint is irrelevant; and (3) it is wanting in specification.

The Respondent *pleaded*:

The prayer of the bill ought to be refused, with expenses to the respondent, in respect—

(1) That the reasons for suspension are (*a*) irrelevant, (*b*) unfounded in fact, (*c*) unsound in law, and (*d*) were not stated in the Court below.

(2) That the complainer was rightly convicted.

Argued for Suspender: The charge of culpable and reckless driving was not a crime at common law unless it was to the danger of the lieges. That was not charged here, and there was no statement of facts contained in the complaint from which such danger was to be inferred. What was set forth was merely a ground for a civil action at the instance of the owner of the horse and cart. The authorities dealt with the subject of furious driving as a branch of the crime of culpable homicide (Hume on Crimes, Vol. I. p. 192; Bell's Notes, p. 76; Ersk., IV. 4, 5). In every case quoted by these writers there was death or injury to human beings. The lowest case at which such driving was a subject for the criminal courts was when it was only to the danger of some person. What was charged might be dealt with under different statutes. Either police or tramway Acts were available for the purpose. Counsel was stopped.

Argued for Respondent: What was done here, viz., driving culpably and recklessly to the injury of property, was laid down by Alison to be a crime. Danger to the lieges was not necessary (Alison's Criminal Law, Vol. I. pp. 120, 625). The facts set forth in the complaint showed potential danger to the lieges; because, if what was charged was proved, there must have been danger to anyone in the road. There was no reason why it should be a crime to drive in such a way as to endanger a person any more than it should be a crime to drive so recklessly as to do serious harm to property.

The Court *suspended* the conviction.

The Lord Justice-General.—This complaint is against a person called a motorman, but who may be more correctly described as an electric tramway car driver, and charges him with having driven an electric tram car in a culpable and reckless manner, and having failed to keep a proper look-out and signal the approach of the car when approaching a horse and lorry then standing on the side of the road, with the result that the car came into contact with the lorry and it was damaged, and also the horse and a garden railing. Upon that complaint the appellant was convicted, and he has appealed. I regret that we have to sustain the objection, but I do not think we have any other course. I cannot find that it is part of the law of Scotland that to drive a vehicle culpably and recklessly is a crime, unless there is danger to the lieges. If, from the statement of facts in the complaint here, we had been able to gather that there was such danger, it would have been different; but I think that what is here set forth does not constitute a crime at common law.

There are other ways in which what was charged may be attacked, such as under local police or tramway statutes. But the prosecutor has trusted himself to a statement of what was done being a common law crime, and I do not think he has set forth facts which come up to that.

Lord M'Laren.—I agree with all that has been said by your Lordship.

I shall only add that, while under the recent Criminal Procedure Act words of style, such as "feloniously," etc., may be omitted, and are taken to be implied, we must be careful not to carry that principle too far, especially where we have such words to deal with as "to the danger of the lieges," which are essential in order to make the act complained of a criminal one.

If the equivalent of these words could be found in the substance of the complaint we might hold that they were implied, but I cannot see anything here that can be read as a statement of danger to any one, and accordingly I find nothing here charged which amounts to a crime.

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M'Allister v. Abercrombie.

Lord Kinnear.

Lord Kinnear.—I agree. The only doubt which occurred to me in the course of the discussion was caused by a citation from Sir Archibald Alison. But the authority to which Sir Archibald refers is the case of *Bartholomew*, decided on 21st November 1825; and the offence thus put in the major proposition in that case was "The culpable and furious driving of carts along the king's highway, to the terror and danger of the lieges."

Now it is clear that the extent to which that case goes is to decide that it is an article of dittay that a man has, "to the danger of the lieges," driven furiously along the king's highway—and that is exactly what the prosecutor here has not said. The conduct complained of may very probably be a police offence, but it is not so charged; and no authority has been shown for saying that it is a crime at common law.—31*st May* 1907.

Counsel for Suspender, D. Anderson; Agent, A. C. D. Vert, S.S.C.—Counsel for Respondent, Macrobert; Agents, Thomson, Dickson & Shaw, W.S. F. A. U.

FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

35. Stirling & Kinniburgh *v.* Western District Committee of County Council of Haddington and Another.

Arbitration — Scope of Reference — Docqueted Account Relating to Matters Referred — Whether Exclusive of Arbiter's Jurisdiction or Subject to Construction by Him.

(*Reported ante, Vol. XIV. p.* 731.)

Reclaiming Note against an Interlocutor of Lord Mackenzie.

The facts of the case appear from the previous report.

The Court *adhered.*

The Lord President.—I agree with the result to which the Lord Ordinary has come. The arbitration clause between the parties is an arbitration clause of what may be called the most ample character. It is one of those which I think upon the cases covers all disputes, and not only disputes which may arise absolutely during the progress of the work. The argument presented to us depended upon this, that it was said by the complainers that there was really no dispute here at all, because all that they wished to do was to adhere to the measurement of the work which, under sect. 51 of the contract, fell to be made by the engineer, and which measurement was approved of by the document which we have before us, and which bears that the docquet upon it is dated 1st March 1905.

To a certain extent I was impressed with that argument, because I certainly thought that justice would not be done in a case like this, if, as a matter of fact—the engineer having truly devoted his attention to the question of measurement—it was sought afterwards to rip up everything that he had done. But, then, what prevents me from giving effect to that argument is this, that the *de quo queritur*, or one of the *de quo querituns*, is whether the engineer has truly put his mind to it in that sense. Parties are not at one as to what was truly done at the time when that account was docqueted; and, besides, the party on the other side points out with some force that that so-called measurement of the work was not only a measurement of the work, but also includes at least one sum as an allowance for claims which is not measurement at all but something of the nature of damages. Parties having gone before the arbiter on that matter, it seems to me there is a dispute pending before the arbiter, and it is impossible to take the whole matter away from the arbiter by means of an interdict. I, of course, do not prejudge the question of what the arbiter may do. It is possible that the arbiter will act *ultra vires*, but we never *ab ante* suspect the arbiter of doing that unless something is brought before us to make us think so. I think, therefore, the arbitration must go on, and I hope the arbiter will keep in view that on a just construction of the contract—as I hold—the measurement was to be done by the engineer, and anything done by the engineer ought not to be lightly interfered with.

Lord M'Laren.—I concur. I am satisfied with the judgment of the Lord Ordinary.

Lord Kinnear.—I am of the same opinion. The reclaimers' case clearly came to this, that there was no question between the parties to go before the arbiter, but it seems to me that there is quite clearly a question both as to the scope and the effect of the particular article in the specification, and as to what the engineer really did do. And since there is a dispute it must be decided by somebody, either by the Court or by the arbiter; and it is my clear opinion, with your Lordship, that it is a dispute which falls within the arbitration clause.

Lord Pearson.—I was much impressed by the argument for the reclaimers, but upon full consideration I am of the same opinion as your Lordship.—1*st June* 1907.

Counsel for Reclaimers, Clyde, K.C., Hon. W. Watson; Agents, Guild & Guild, W.S.—Counsel for Respondents, Orr, K.C., Constable; Agents, Buchan & Buchan, S.S.C. A. M.

OUTER HOUSE.

(Lord Dundas.)

36. Allan's Testamentary Trustees v. Allan's M.-C. Trustees.

I. Marriage Contract — Provisions for Children of Former Marriage—Circumstances in Which Held That Provisions to Children of Former Marriage Conferred Spes Successionis in Obligatione, and Were Irrevocable.

II. Succession—Husband and Wife—Marriage Contract—Jus Relictæ—Legitim—Conveyance by Husband of Whole Estate at Date of his Death to Marriage-Contract Trustees for Children of Former Marriage—Held That Widow and Children of Subsequent Marriage Entitled to Jus Relictæ and Legitim Respectively, Before Husband's Executors Denuded in Favour of Marriage-Contract Trustees.

This was an action of multiplepoinding in which the testamentary trustees of the late Mr James Allan were pursuers and real raisers. The late Mr Allan was three times married. Claims were lodged in the competition by the children of the first marriage, by the marriage-contract trustees of the second marriage, by the said testamentary trustees, and by the widow and children of the third marriage.

The circumstances of the case are thus narrated in the Lord Ordinary's Note.

"The fund *in medio* in this multiplepoinding is the estate which belonged to the late James Allan at the time of his death. The whole fund is claimed, on the one hand, by the trustees acting under a contract of marriage entered into by Mr Allan in 1877, in contemplation of his marriage with his second wife, and, on the other hand, by the trustees and executors acting under a testamentary settlement executed by him in the year 1905. The latter claim is supported by Mr Allan's widow, his third wife, for herself, and also as guardian of the pupil children of her marriage with Mr Allan, she and they being beneficiaries to a large extent under the settlement. Mrs Allan claims, in the alternative, that she and her children are entitled to payment of their legal rights out of Mr Allan's estate.

"Mr Allan was, as already indicated, three times married. By his first wife, with whom he had no marriage contract, he had children of whom three survive. The contract of marriage already referred to was entered into in contemplation of his second marriage with a Mrs Mackail, who had children of her own by a former marriage, who still survive. By this contract, which is dated 4th September 1877, Mr Allan, in contemplation of the said marriage, and in consideration of the conveyance by his prospective wife thereinafter written, assigned and conveyed to certain trustees the whole heritable and moveable property that might pertain and belong to him at the time of his decease. After payment of his debts, funeral charges, and expenses of the trust, the trustees were directed to pay over to his intended spouse, in case she should survive him, the whole annual produce and rents of the residue of his estate during all the days and years of her life, which provision should be held and applied as an alimentary provision for behoof of herself and the children of the said intended marriage, as well as the children of her previous marriage to Mr Mackail, and the children of the said James Allan by his previous marriage, so long as such children should be unable to provide for themselves and continued to reside in family with her. On the death of his said intended spouse, the trustees were directed to hold and apply, pay, divide, and convey the residue of the estate to and for behoof of the whole of the foresaid children as follows, *videlicet*, the children of the said James Allan by his said previous marriage, the children of Mrs Mackail by her said previous marriage, and the child or children who might be born of the then intended marriage, and the survivors and survivor of them and the lawful issue of such of them as might die leaving issue, in such proportions, at such periods, and under such restrictions and upon such terms and conditions, as the said James Allan and Mrs Mackail might jointly appoint by any writing under their hand; and failing any such writing, then to and in favour of the said children in manner thereinafter mentioned. Mrs Mackail, on her part, conveyed to the same trustees the whole property, means, and estate, heritable and moveable, real and personal, then belonging and resting owing to her, or that should pertain and become resting owing and belonging to her, during the subsistence of the said intended marriage, and Mr Allan renounced and discharged his *jus mariti* and right of administration in relation to all such property, means, estate and effects. It was declared that her said estate and effects, and the proceeds or annual produce thereof, should be held and applied by the trustees for behoof of Mr Allan and herself during the subsistence of their marriage in alimentary liferent, and for behoof of the survivor of them also in liferent, and as an alimentary provision for behoof of himself or herself and his and her respective children as aforesaid as well as the child or children that might be born of the said intended marriage; and that the fee thereof should be held and applied for behoof of the children of Mr Allan by his said previous marriage, the children of Mrs Mackail by her said previous marriage, and the child or children who might be born of the then intended marriage, and the survivors and survivor of them and the lawful issue of such of them as might die leaving issue, in such proportions, at such periods, and under such restrictions and upon such terms and conditions, as Mr Allan and Mrs Mackail might jointly appoint by any writing under their hand; and failing such writing, then to and in favour of the said children in manner thereinafter mentioned; and it was further declared that unless otherwise directed in any writing which might be jointly executed by the said spouses as aforesaid, the fee of their respective estates should fall to and be equally divided by the trustees among the children of Mr Allan by his said previous marriage, the children of Mrs Mackail by her said previous marriage, and the child or children that might be born of their said intended marriage, or the survivors of them jointly with the issue of such of them as might decease leaving issue (the division being *per stirpes*), and the

OUTER HOUSE. *Lord Dundas.*

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same should be payable to such children at the first term of Whitsunday or Martinmas occurring after the death of the longest liver of the said spouses, and after the said child or children should respectively attain majority, or be married, whichever of these two events should first happen. It was, by the said contract, further provided that, in consideration of the foregoing provisions in favour of the children of Mr Allan, and of the children of the said intended marriage, the right of the said children to *legitim* was thereby discharged.

"On 14th December 1885 Mr Allan and his said second wife executed a deed of division and apportionment, whereby, on the narrative of the said marriage contract, and that there were no children of the marriage between them, and that they had then resolved to exercise the power of division conferred upon them by said contract, they, with joint consent and assent, agreed to exercise the said power in manner set forth. With reference to Mr Allan's estate, the spouses appointed that the fee should, at the death of the survivor of them, be payable to the extent of £5 to each of the children of Mrs Allan by her former marriage or the survivor of them and the issue of such of them as might predecease the survivor of the spouses; and that the remainder and residue of Mr Allan's estate should be divided among his children by his former marriage, and the survivors and survivor of them, and the lawful issue of such of them as should predecease the survivor of the spouses, and that in such proportions, at such periods, and under such restrictions, and upon such terms and conditions, as Mr Allan might appoint by any writing under his hand; and failing such writing, then equally among his said children, and the survivors or survivor. With reference to Mrs Allan's estate, the spouses correspondingly appointed that £5 should be paid to each of Mr Allan's children by his former marriage and the survivors and issue of predeceasers, and that the residue should be divided amongst Mrs Allan's children by her former marriage in the proportions and subject to the restrictions, and upon the terms and conditions in the said deed set forth, or should be divided in such proportions and upon such conditions, etc., as she might appoint.

"No children were born of Mr Allan's second marriage. After the death of his second wife he married for the third time. He entered into no marriage contract upon this occasion; and died on 13th December 1905, survived by his widow and three children of the third marriage, all in pupillarity."

The following authorities were cited in the debate besides those referred to by the Lord Ordinary. For the widow and children: Fraser, Husband and Wife, II. 976, 994; *Fisher*, 1840, 2 D. 1121; *Grant*, 1679, M. 3596. For the M.-C. Trustees: M'Laren, Wills, I. 165 and 126; *Rait*, 1892, 19 R. 687.

The Lord Ordinary pronounced the following interlocutor:—

"Finds (1) that, upon a sound construction of the marriage contract libelled, and in the events which have happened, Mr Allan's three sons by his first marrage took a *spes in obligatione* which his trust disposition and settlement was inept to defeat; (2) that they are entitled to *legitim*, if they should elect to claim it, in preference to what they would receive under the said marriage contract, but not to both of these rights; and (3) that Mr Allan's executors, before denuding of the trust estate as at the date of his death in favour of the trustees under said marriage contract, must satisfy out of the same the claims of his widow and her children to *jus relictæ and legitim* respectively."

Lord Dundas [after stating the facts as above quoted].—The first question for consideration is as to the effect, so far as regards Mr Allan's estate, of the marriage contract entered into by him in contemplation of his second marriage. The trust thereby created was, as I have pointed out, for behoof of his then intended wife, and of his own children by his first marriage, his wife's own children by her first marriage, and the child or children to be born of the intended marriage. As that trust was not to take effect until Mr Allan's death, it seems clear that the beneficiaries had a *spes successionis* only, and nothing in the nature of a *jus crediti*. It seems also clear enough that, as regards his second wife and her own children by her first marriage, and also as regards the issue of the contemplated marriage, this *spes* was *in obligatione* and not *in destinatione* merely; and, as such, was contractual and irrevocable. But it is not clear, and must now be considered, whether, as regards the children of Mr Allan's first marriage, their *spes successionis* was, like that of the other beneficiaries, *in obligatione* and irrevocable, or *in destinatione* only, and revocable at pleasure. It is certain that these children were strangers to the marriage, so that, if the marriage contract had called them as substitutes to the children of the marriage, they would have had no more than a bare *spes*. Mr Erskine in an often quoted passage (Inst., III. viii. 39) lays it down that "the father lies under no degree of restraint in favour of the substitutes who are called by the marriage contract after the issue of the marriage, and who acquire no right by such substitution (Stewart, Ans. p. 145). For no contract can have effect beyond the interest of the parties contracting; and the wife and her relations, who are the only contractors with the husband, are not interested in the succession, except in so far as it is provided to the wife's issue. As to the remoter substitutes, if the husband contracted, it was with himself alone; and therefore the substitution must be accounted a simple destination as to them, which may be altered by him at his pleasure." But Mr Allan's children are not called as substitutes to the issue of the marriage. They are co-ordinated as institutes along with such issue, and with the existing issue of Mrs Mackail, the provision for whom was, I apprehend, part of the consideration of that lady's second marriage. If the trust created by the marriage contract had been one of divestiture, to take immediate effect as regards Mr Allan's estate, his existing children would,

I think, have been vested in a *jus crediti* along with the issue of the marriage and the Mackail children. This view seems to be in conformity with the judgment of the House of Lords, agreeing with the opinion of Lord Rutherfurd Clark, who dissented in the Court below, in the case of *Mackie*, 1883, 10 R. 746, reversed 1884, 11 R. (H.L.) 10. See also Lord Watson's observations upon that case in *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) 88, at pp. 94, 95. Here, however, there is no *jus crediti* in any of the beneficiaries, but only a *spes successionis*; and I must determine whether the right of Mr Allan's children is, equally with that of the issue of the marriage (if there had been any) and the Mackail children, a *spes in obligatione* or only a *spes in destinatione*, revocable, and (if revocable) revoked by Mr Allan's trust settlement. The point is not, I think, actually covered by any of the decisions, and is not unattended with difficulty; but my opinion is in favour of the former of the alternative views just indicated. The question comes, in my judgment, to depend upon the intention of the parties to this marriage contract, as it may be gathered from the language which they have used. I find it impossible to resist the conclusion that they intended to make of the three families of children mentioned one single class, and that the nature of the right conferred upon all of them should be the same. There is, so far as I am aware, nothing unlawful, nor is there anything unnatural or surprising, in a man making his second marriage the occasion to provide for his existing as well as for his contemplated children, and placing the two families upon an equal footing; and in a question of construction, it seems to me to be immaterial that, in point of fact, no children were born of Mr Allan's second marriage. If the issue to be born and the children of Mrs Mackail took, as I think they did take, a *spes in obligatione*, it must, in my opinion, follow that Mr Allan's first family, who are included in the same destination, took a similar right, and no less. The reasoning of the noble and learned Lords in *Mackie's* case, though I realise that the deed there under consideration was radically different from that with which I am now dealing, appears to me to afford support for the conclusion at which I have arrived. The doctrine laid down is expressed in wide and general terms, and seems to me to be applicable, by parity of reasoning, to the present case. Thus Lord Watson announces (11 R. (H.L.) at p. 16) that the authorities do not, in his opinion, give the least countenance to the proposition "that when a provision is made not only to the children of the marriage in contemplation, but also to the children of a former marriage, the provision in favour of the one must be held as onerous and irrevocable, and the provision in favour of the other as revocable and testamentary." The opinion of the Lord Chancellor (Selborne) is to the same effect; and his Lordship proceeds (at the foot of p. 13): "Is there any law which says that because it is a marriage contract, and because the previously born children are outside the matrimonial consideration as such, therefore a deed conceived in apt and proper terms and form, with a plain intention that they should take *pari passu inter se*, is not to prevail? My Lords, no principle has been stated for that, no positive rule of the law of Scotland, and no authority." I think that we have here a deed in apt and proper terms and form, with a plain intention that Mr Allan's first family should take *pari passu* along with the Mackail children and the issue of the marriage, subject to apportionment as provided. It was argued that the spouses intended the provision to be revocable by themselves jointly. But the contract itself contains no word to this effect; and further, I presume that it was delivered to the marriage trustees, and acted upon by them, as regards Mrs Mackail's fortune, and it was recorded in the Books of Council and Session. The spouses themselves do not appear to have regarded it as revocable. They did not revoke, but, on the contrary, proceeded to exercise the power of apportionment which they had reserved to themselves by the marriage contract. In my opinion, therefore, Mr Allan's trust disposition and settlement was inept to defeat the right which his first family took under the marriage contract.

If this view is correct, it remains to consider whether or not the widow and her children are entitled to receive payment of their legal rights out of the estate before the executors denude in favour of the marriage-contract trustees. I am of opinion that they are so entitled. It is well settled that a father may, notwithstanding that he has by antenuptial marriage contract settled on the children of his first marriage his whole estate as at the date of his death, in entering into a second marriage, make a reasonable provision for the children of that marriage, having regard to the amount of his estate, and to any other provisions the children of both marriages may have. On the other hand, I do not think that such provision can effectually be made by testament (*Haldane*, 1885, 13 R. 179; *Arthur & Seymour* v. *Lang*, 1870, 8 M. 928; Ersk. Inst., III. viii. 42). But Mr Allan's conveyance to the marriage-contract trustees of his whole estate at the date of his death must, in my opinion, be limited to the dead's part, and could not have the effect of defeating the right of his widow and her children to their *jus relictæ* and *legitim* respectively as creditors of the deceased. The old case of *Grant*, 1679, M. 3596, carries one some way towards this result, at all events as regards the widow. See also *Inglis*, 1869, 7 M. 435. The executors must therefore, in my opinion, before denuding of the estate of Mr Allan, satisfy the claims of the widow and her children to their legal

Outer House. *Lord Dundas.*

Allan's Testamentary Trustees v. Allan's M.-C. Trustees.

rights. If Mr Allan's first family elect to claim *legitim* in preference to what they would take under the marriage contract, they are, in my judgment, entitled to do so, but not to receive both *legitim* and the amount of the provision.

I have omitted to notice an argument which was advanced for the testamentary trustees, to the effect that, upon a sound construction of the marriage contract, the provisions contained "in the third place" thereof (as well as those "in the second place") were only intended to take effect in the event, which did not happen, of Mr Allan's second wife surviving him; and that they accordingly became inoperative and ineffectual upon her predecease. I do not think that that is an admissible construction of the contract, looking to its language as a whole. It would, in my judgment, be strange indeed that the provisions of Mr Allan for, *inter alios*, the issue of the marriage should be entirely dependent upon the contingency that he should be survived by his wife. Much reliance was placed, in support of the argument, upon the case of *Somerville's Trs.*, 1865, 3 M. 602, affd. 1867, 5 M. (H.L.) 69. But that case, though similar in some ways to the present, appears to me to be materially dissimilar in others, and throws little or no light upon the matter.—29*th May* 1907.

Counsel for Pursuers and Real Raisers, for Mr and Mrs Allan's M.-C. Trustees, and James Christie Allan and Others, Craigie, K.C., Murray; Agents, Snody & Asher, S.S.C.—Counsel for Mr Allan's Testamentary Trustees, Cullen, K.C., J. H. Henderson; Agents, Kelly, Paterson, & Co., S.S.C. —Counsel for Mrs Allan, Graham Stewart, K.C., Mercer; Agents, Ross & M'Callum, S.S.C.

W. A. R.

OUTER HOUSE.

(*Lord Dundas.*)

37. Millar & Lang *v.* Poole.

I. Diligence — Arrestment Jurisdictionis Fundandæ Causa—Subjects Arrested of No Marketable Value—Book of Samples of Gilt Designs Accompanied by Invoice for 1s. 6d. — Arrestment Insufficient to Found Jurisdiction.

II. Diligence — Arrestment Jurisdictionis Fundandæ Causa—Subject Arrested Book of Samples Obtained from Foreign Defender by an Agent of Pursuers for the Purpose of Arrestment to Found Jurisdiction—Personal Bar—Arrestment Held Invalid.

In this action Millar & Lang Ltd., art publishers in Glasgow, sued Poole, a manufacturing stationer in London, for damages in respect of the alleged infringement by the latter of the pursuers' copyright in certain designs used in connection with the manufacture of Christmas cards. The pursuers alleged that jurisdiction had been founded against the defender by certain arrestments used in the hands of a certain James Brown & Son. The defenders averred—

On 10th November 1906 the defender, in response to a letter from Messrs James Brown & Son, calling themselves nautical and engineering publishers of 52 Darnley Street, Pollokshields, Glasgow, sent them one of his pattern books of Christmas cards, containing, *inter alia*, specimens of the three mottoes complained of. Said pattern book has not been returned to the defender, nor has any order been given to or accepted by him from the said James Brown & Son for any of the cards therein contained. The defender believes and avers that said letter was written at the request and on the instructions of the pursuers, with the sole object of entrapping the defender into sending to Scotland the mottoes complained of, and of founding jurisdiction against him in Scotland thereby, and also by arrestment. The said pattern book is the only property of the defender which is in possession of the said James Brown & Son, and is the only property attached by the arrestments used by the pursuers for the purpose of founding jurisdiction in this action. Said pattern book is of no commercial value, and accordingly no jurisdiction has been founded against the defender by said arrestments.

And pleaded: "1. The defender is not subject to the jurisdiction of the Court of Session, and no jurisdiction has been founded against him."

The Lord Ordinary *allowed* a proof on the question of jurisdiction.

After hearing counsel on the evidence, his Lordship *sustained* the defender's first plea in law, and *dismissed* the action.

Lord Dundas. . . .—It appears from the evidence that the defender received a letter (No. 27 of process), dated 10th November 1906, from James Brown & Son, nautical and engineering publishers, Pollokshields, Glasgow, of whom he had no previous knowledge, stating that "as we have had your name given to us as being sellers of gold ornaments, devices and initials, we shall be glad if you will kindly forward samples along with prices." The defender was in possession of some samples of such articles, which he had received from a Yorkshire firm, without request by him or any payment, in the course of trade. On 12th November he sent Messrs Brown the samples No. 19 of process, with a letter, No. 20 of process, and an accompanying invoice, No. 26 of process. On 16th November arrestments No. 6 of process were used by the pursuers in the hands of Messrs Brown to found jurisdiction against the defender. It is, I think, plain upon the evidence that the sample cards No. 19 of process are of no mercantile value whatever. The defender pleads that upon this ground the arrestment is invalid to found jurisdiction against him. So far as I am concerned, the matter is concluded adversely to the pursuers upon this defence, by the opinion which I

expressed, and to which I adhere, in a recent action raised by the present pursuers against a different defender (*Millar & Lang Ltd.* v. *Polak*, 13th February 1907, 14 S.L.T. p. 788). I take leave to refer to my opinion in that case, and to the comments there made upon some of the decisions affecting the question. But the pursuers' counsel founded upon the invoice No. 26 of process as distinguishing *Polak's* case from the present. They argued that there is here a sale of goods, at a price fixed by the defender himself, viz. 1s. 6d., and that what was arrested was not merely the sample cards No. 19 of process, but that sum of money. In my opinion, this argument is not well founded. I wish to repeat what I said in *Polak's* case as to the determination of the Scots Courts not to extend the artificial doctrine of arrestment *jurisdictionis fundandæ causa* further in any case than is expressly warranted by authority and precedent. I do not think that the invoice No. 26 of process, coupled with the letters Nos. 27 and 20 of process, constituted a sale of goods at the price of 1s. 6d. It is clear from the evidence that the purpose and intention in the trade of sending such invoices are merely for protection against "idle curiosity"; and that traders do not, as matter of fact and custom, trouble themselves to exact payment of such trifling sums, at all events in dealing with possible customers. Putting the case at its highest from the pursuers' point of view, the matter amounts, in my judgment, to no more than a submission by the defender of samples for Messrs Brown's approval, and an indication that they should be returned, with the option, in case of *non*-return within a reasonable period—which had not, I think, expired at the date of arrestment—of paying 1s. 6d. by way of a sort of penalty. Assuming, therefore, that the arrestment of 1s. 6d. is not "illusory" in the sense of the decided cases, I am of opinion that what was here arrested was not a money debt of 1s. 6d., nor a liability to account for money, but simply the sample cards No. 19 of process, which were and are of no mercantile value, nor capable of attachment by diligence in execution, and therefore not a proper subject of arrestment *jurisdictionis fundandæ causa*.

If this view is correct, there is an end of the case. But even if it is wrong, the defender has, in my judgment, another ground upon which he is entitled to succeed. He avers (Ans. 4) that Messrs Brown's letter No. 27 of process "was written at the request and on the instructions of the pursuers, with the sole view of entrapping the defender into sending to Scotland the mottoes complained of, and of founding jurisdiction in Scotland thereby, and also by arrestment." This averment is, I think, fully established by the evidence. Mr Brown depones that he knows Mr Macaleese, who is works manager to the pursuers; that before November 1906 Mr Macaleese suggested to him to write to Polak, the defender in the other case, for designs similar to whose which form the subject of the present arrestment; that he also gave him the defender's name, and the witness proceeds thus:—"When I wrote the letter of 10th November, I was aware that an action had been raised by the pursuers against Polak, founded upon an arrestment which had been used in our hands. *Q.* To attach a similar book? *A.* They were called samples. *Q.* Is it the case that you understood perfectly well that the object of Macaleese was to get the book into your hands so that he might attach it in a similar way to the way in which it had been attached in Polak's case? *A.* He did not say as much, but I may have thought that. *By the Court.*—I did think it. *Cross-examination continued.*—Macaleese was a business friend of mine. *Q.* And you were not unwilling to help him? *A.* No; you always help a business friend if you can. . . . I did not tell Macaleese that I had written to Poole. I told him I had got the samples, and showed him the samples one day when he was in the shop two or three days after they came in. I think that must have been before the arrestments." It is thus made very clear that Brown was throughout acting in this matter as the pursuers' agent, with the object of obtaining from the defenders samples which were, upon their arrival, to be arrested in Brown's hands, in order to found jurisdiction for this action. Now it is well settled that a particular creditor may be barred from claiming the advantage of an arrestment which he has used, and which would have been valid, if it had been used by another creditor, when he has obtained it in *mala fide*, or by something in the nature of "a trick." I had occasion to consider this question, and to deal with the principal decisions bearing upon it, in the recent case of *The Old Park Forge Ltd.*, 22nd March 1907, 15 S.L.T. p. 3. For the sake of brevity, I content myself with referring to the opinion which I then delivered. The circumstances under which this defender was induced to send samples to Scotland, which were at once made (as it was intended by the pursuers that they should be made) the subject of arrestment to found jurisdiction against him, seem to me to afford a good illustration of the sort of actings on the part of an arrester or his agent which the Court will discountenance by refusing to the arrester the advantage he seeks to obtain by virtue of the arrestment which he has procured.

For the reasons which I have stated, I shall sustain the defender's first plea in law, and dismiss the action.—29*th May* 1907.

Counsel for Pursuers, Scott Dickson, K.C., Hon. W. Watson; Agents, Dove, Lockhart & Smart, S.S.C.—Counsel for Defenders, Graham Stewart, K.C., Wark; Agents, A. P. Purves & Aitken, W.S.

W. A. R.

2nd Div.

James Donaldson & Co. Ltd.

SECOND DIVISION.

(*Lords Stormonth-Darling, Low and Ardwall.*)

38. James Donaldson & Company Limited.

I. Company — Liquidator — Caution — Act of Sederunt 15th July 1904, sect. 2 (*d*)—Bond of Caution with One of "Approved Guarantee Companies" Accepted.

II. Company—Liquidator—Caution—Act of Sederunt 15th July 1904, sect. 3—Premium on Company Bond of Caution Allowed as a Charge Against Liquidation.

Note in Liquidation.

James Maxtone Graham, who was appointed by the Court liquidator of James Donaldson & Company Limited, presented this Note to the Lord Justice-Clerk, in which he stated, *inter alia*, that the assets of the said Company amounted to £9000 or thereby. The note prayed his Lordship "to move the Court to restrict the caution to be found by the liquidator, and to authorise a bond of caution by the Law Guarantee and Trust Society Limited to be accepted; and further, to authorise the premium on the said bond of caution to be paid by the liquidator out of the estate of the said James Donaldson and Company Limited; and further, to direct that the expenses of this note should be expenses in the liquidation."

The Law Guarantee and Trust Society Ltd. was one of the companies approved of for the year 1907, in terms of Act of Sederunt 15th July 1902, sect. 2 (*d*).

The case of *Alexander Forrester Ltd.*, 1907, 14 S.L.T. 789, was referred to. The Court, without delivering opinions, issued the following interlocutor:—

"Edinburgh, 11th June 1907.—The Lords having considered the Note for James Maxtone Graham, C.A., the liquidator appointed on the estate of James Donaldson & Company Limited, and having heard counsel, fix £6000 as the amount for which caution shall be found by him, and authorise the Clerk to accept a bond for that amount by the Law Guarantee and Trust Society Limited. Further, authorise the liquidator to charge the premiums payable in respect of such bond against the liquidation, but declaring that such charge shall be taken into account at the fixing of his remuneration as liquidator. Also authorise the expenses of said note to be charged against the liquidation."—11*th June* 1907.

Counsel for Liquidator, Constable; Agents, Davidson & Syme, W.S. J. H. H.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

39. O'Brien *v.* Enrico Arbib & Company.

I. Reparation—Duty of Owner of Property Towards Visitor to Premises—Liability of Owner for Injury to Visitor through Fault of Servant Acting Outwith Scope of Employment—Ship — Gangway — Visitor to Ship Injured by Breaking of Plank Used as Gangway—Circumstances in which Shipowners Held Not Liable.

II. Ship—Factory Acts — Ship in Dock — Duty to Provide Gangway—Factory and Workshop Act 1901, sect. 79—Regulations in Respect of Loading Vessels in Docks, Dated 24th October 1904, Part II., sect. 4—Held that Regulations, Part II., sect. 4, Applies only in Case of Persons Loading or Unloading or Coaling Vessel.

Appeal from the Sheriff Court at Glasgow.

This was an action raised in the Sheriff Court at Glasgow at the instance of Mrs O'Brien, wife of Michael O'Brien, master mariner, and, at the time of the accident after mentioned, chief officer on board the s.s. "Cousins Arbib," against Enrico Arbib & Co., owners of the said vessel. The action concluded for £500 damages for injuries sustained by the pursuer on 31st January 1906 while leaving the vessel, which was then lying in Prince's Dock, Glasgow, alongside the quay. The following narrative of facts is taken from the opinion of the Lord Justice-Clerk.

"The pursuer, who is the wife of the mate of a steam vessel belonging to the defenders, and which was just about to start on a voyage, came to the vessel with linen which she had been dressing for her husband. But as her husband was about to go on a voyage, she desired to see him before leaving, and to spend a little time with him, along with their child, which she had brought with her. Accordingly, she spent an hour or two in her husband's cabin. She and her husband left the cabin with a view to her going on shore. On their way to the side of the vessel the mate stopped to speak to the pilot, and the pursuer having gone forward, a rigger put a plank across to the quay, and was assisting her to cross by it, when it broke and they fell into the water, and she suffered the injuries of which she complains. The plank was rotten, and this was the cause of its giving way. It was a plank which had not been provided to be used for a gangway, but was being used at the time as a fender to prevent pieces of coal which might fall in the

work of coaling the vessel from breaking the glass of the deck skylights."

The defenders pleaded, *inter alia*—

"1. The pursuer's statements are irrelevant."

On 29th March 1906 the Sheriff-Substitute (Fyfe) sustained the first plea in law for the defenders, and dismissed the action.

The pursuer appealed to the Sheriff (Guthrie), who, on 26th May 1906, recalled the judgment of the Sheriff-Substitute and allowed a proof before answer.

The pursuer appealed to the Court of Session for trial by jury. Parties were heard on the question of relevancy, and thereafter a proof was allowed, which was led before Lord Kyllachy. Parties were subsequently heard, their contentions sufficiently appearing from the opinions of the Court.

The following authorities were cited at the hearings before and after the proof: *Nicolson*, 1888, 15 R. 854; *Campbell*, 1891, 19 R. 282; *Indermaur*, 1867, L.R. 2 C.P. 311; *Smith*, 1868, L.R. 3 C.P. 326; *Brady*, 1887, 14 R. 783; *Heaven*, 1883, 11 Q.B.D. 503; *Gordon*, 1892, 20 R. (H.L.) 23; *Messer*, 1897, 25 R. 7; *Lunnie*, 1906, 8 F. 546; *Kelly*, 1890, 27 S.L.R. 707; *Tolhauser*, 1888, 57 L.J., Q.B. 392; *Thatcher*, 1893, 10 T.L.R. 13; *Watkins*, 1877, 46 L.J. C.P. 817; *Miller* [1893], 2 Q.B. 177. Regulations in respect of loading vessels in docks, dated 24th October 1904 (made in virtue of the Factory and Workshop Act 1901, sect. 79), Part II., sect. 4.

The provisions of the Factory and Workshop Act 1901 Regulations, Part II., sect. 4, appear from the opinion of Lord Stormonth-Darling, *infra*.

The Court *sustained* the first plea in law for the defenders, and *assoilzied* them from the conclusions of the action.

The Lord Justice-Clerk [after the narrative of facts above quoted].—These being the facts, the question is whether there is any case against the defenders as having a duty towards the pursuer, as being on board in circumstances making them responsible to give safe conduct.

Now, the circumstances do not, in my opinion, disclose two important facts which are necessary to the pursuer's case. The pursuer has not made out that it was necessary for her to go on board at all. Bringing her husband's clean clothes was quite a legitimate proceeding; but they might have been delivered by hailing the deck hand on duty, and handing them to him. I cannot hold that she had any right to go on board, or any invitation to do so. This is on the assumption that she did go on board with the clothes. But in point of fact her husband got men from the vessel to go on shore and carry the clothes to his cabin. The pursuer had brought them in a cab. There was a box and a bag, and she could not have carried them on board.

Therefore the object she had in going on board was, not to bring the clothes to her husband, but to visit him as her husband, for her and his pleasure. The visit lasted for some hours, and had no connection with business or duty of any kind. She was in no different position than if she had gone to a house where her husband was staying temporarily, in order that they might enjoy one another's society. The defenders, therefore, had no duty towards the pursuer. She was not there on their invitation, any more than a visitor to a servant is invited into the servant's master's house by the master. In such a case the master would have no duty to take care of the safety of the servant's friend. That, as it appears to me, is the import of the decisions, which are numerous.

It may be said that even assuming what I have said, that it will not apply. Where a person is by permission in premises, there may be liability if some part of the premises, or appliances in premises, be in a state which constitutes a danger in use, if an invitation to any person permitted to be on the premises to use it can be inferred. However far that doctrine may have been carried, I am unable to see that it has any application here. It cannot be said that the defenders, in having this plank on board, intended it to be used, or gave any invitation to any one to use it, as a gangway. It was quite suitable for the purpose for which it was being used. The mistake made was in using it for a purpose for which it had not been intended. I think it may safely be assumed that if the pursuer's husband had not stayed behind to speak to the pilot he would not have allowed the plank to be used as it was. The placing of the plank by the riggers was a volunteered act of courtesy on their part, and not part of their duty. They had no duty, as serving the owners, to the pursuer at all. If a servant makes a mistake by which a visitor is injured it is well settled that the owner of the premises is not liable for the servant's act. Such actings are not within the scope of the servant's employment, and the master does not take any such risk. Whatever liability might have been maintained against a master if servants in using proper appliances use them in a dangerous way, this is not a case of that kind at all. Here I think the riggers went outside the scope of their employment in doing, not an act of duty, but a friendly act, for which the defenders are not responsible. What they did was not done "in the course of the service and for the master's benefit" (*Barwick* v. *English Joint-Stock Bank*, 1867, L.R. 2 Ex. 259).

I do not think it necessary to notice the contention of the pursuer that under certain public regulations those in charge of the vessel should provide a proper gangway between it and the shore. In my opinion these regulations do not apply in the circumstances of the case.

I am therefore in favour of a decree of absolvitor.

2nd Div.

O'Brien v. Enrico Arbib & Co.

Lord Stormonth-Darling.

Lord Stormonth-Darling.—I have given anxious consideration to this cause, and I own I was at one time disposed to think that the shipowners had incurred liability to pay damages to the pursuer, chiefly owing to their failure to comply with the regulations, dated 24th October 1904, made by the Secretary of State under the Factory and Workshop Act 1901, which regulations have statutory force. By Part II. sect. 4 of these regulations it was provided that, if a ship is lying at a wharf or quay for the purpose of loading or unloading or coaling, there shall be means of access for the use of persons at such times as they have to pass from the ship to the shore or from the shore to the ship, (*a*) by a gangway wherever reasonably practicable; and (*b*) in other cases by a secure ladder of adequate length, meaning, as I understand the regulation, a ladder to be used as a ladder. I further thought, and still think on the evidence, that in fact there was no such gangway on board, and that the very desire of the master and carpenter to make out, contrary to all the other evidence, that there was such a gangway (though nobody else saw it), shewed that it was "reasonably practicable" to have one.

But having read the opinion of my brother Lord Low I have come to be satisfied that this regulation was intended solely for the use of persons employed in the processes of loading or unloading and coaling, and that it cannot affect the liability of the shipowners towards persons not so employed, though otherwise in the position, as this lady was, of being lawfully there. I therefore concur with Lord Low on this point, and indeed in the whole case.

Lord Low.—I am of opinion that the defenders are not liable in damages to the pursuer in respect of the accident which occurred when she was leaving their ship.

The pursuer was lawfully on board the ship, but in my judgment she was there merely by permission and not by invitation. I do not think that she came on board ship upon any business in which the defenders had an interest. It is averred upon record that the pursuer *required* to go on board with her husband's clothes. If that had been established the pursuer might have been regarded as having been on board by invitation, and on business upon which the defenders were, although remotely, interested, in which case the latter would have been bound to use reasonable care for her safety. In the first place, however, although the pursuer did bring her husband's clothes to the ship's side, she did not require to go on board in order to deliver them; and indeed it is plain from the evidence that she did not in fact herself take them on board, or see that they were brought on board.

In the next place, her main object in going to the ship was to see as much as possible of her husband before he sailed. She accordingly took their child with her, and remained on board for several hours, and until shortly before the ship left the harbour. The pursuer, therefore, was on board ship simply in the capacity of a visitor to one of the defenders' servants, and I do not think that it makes any difference that she was the wife of that servant, and that he was an officer. A mere visitor to any member of the crew would, in my opinion, have been in the same position as the pursuer in a question with the defenders.

In such circumstances I think that the authorities shew that there was no duty on the defenders to see that the condition of the ship did not subject the pursuer to danger. I may refer to *Smith* v. *London and St Katherine Dock Co.*, 1868, L.R. 3 C.P. 326; *Indermaur* v. *Dames*, 1867, L.R. 1 C.P. 274, 2 C.P. 311; *Heaven* v. *Pender*, 1883, L.R. 11 Q.B.D. 503 (the opinion of Cotton, L.J., and Bowen, L.J.); and *Devlin* v. *Jeffray's Trs.*, 1902, 5 F. 130, and especially Lord Kinnear's opinion.

It was, however, argued that, even assuming that the pursuer was merely a volunteer or licensee, the defenders are liable because their servants used as a gangway, when the pursuer was leaving the ship, a plank which was decayed and dangerous.

Now the owner of premises may be liable to a mere licensee if the latter is injured by something which is in itself dangerous being used or left upon the premises in such a way as to be dangerous, or even if there be upon the premises a hidden danger or trap, at all events if the circumstances imply an invitation to use the trap.

The plank was certainly not a dangerous thing in itself. It was quite fit for the purpose for which it had been brought from the hold, namely, to protect a skylight when coal was being shipped, and it was dangerous only when used for an improper purpose, and one for which it was never intended. The case would have been the same if a sound plank had been used which was not strong enough to support the weight of the pursuer and of the rigger who was helping her.

In regard to the theory of invitation and trap, it may very well be that the plank, when used as a gangway, was of the nature of a trap, because I assume that to outward appearance it was sound; and admittedly the pursuer was invited to use it by one of the defenders' servants. But these facts are not in themselves sufficient to render the defenders liable. If there had been a regular gangway which the pursuer used, but which had become so decayed that it broke under her, the case would have been very different, because the very appearance of the thing would have been an invitation to use it, and a representation that it might be safely used, and it would have been part of the equipment of the ship for which the defenders were responsible. But I fail to see any sound principle

upon which the defenders can be held liable, merely because when a visitor was leaving the ship one of the ship's hands took it upon him to use a plank which was neither intended nor suited for such a purpose, as a means of communication with the quay.

It is not unimportant to remember what the actual circumstances were. The pursuer's husband intended to take her on shore, as he had brought her on board, by means of a ladder and plank, but when she was ready to leave the ship he was engaged on ship's business, and two riggers put out the plank, and one of them was leading the pursuer across it when it broke. The riggers were merely doing an act of civility to a visitor who was leaving the ship, and I do not think that the defenders are responsible for the result. It is settled that the master of a house is not liable for injuries received by a visitor through the fault or carelessness of one of his servants. That is one of the risks of the place which the visitor takes, and the fact that the visit is paid to a ship and not to a house can make no difference.

Further, I do not think that the riggers can be said to have been acting within the scope of, or in the course of, their duty. Assuming that, so far as the defenders' responsibility for their acts is concerned, the riggers were in the same position as members of the crew, it was no part of their duty to select the means by which strangers who were leaving the ship should reach the quay. If there had been a gangway which the riggers put out, and if the accident had happened because it was not placed securely, it would not have been contended that they were not acting within the scope of their duty. But they took upon themselves to select and use as a means of access to the quay a plank which was not supplied or intended for that purpose, and which, even if sound, would not have been suitable for that purpose, seeing that it was to be used by a lady. Although the riggers only intended to do what was civil and courteous, I think that they went outside of, and beyond the scope of, their duty. Willis, J., in delivering the judgment of a very strong Court in *Barwick* v. *English Joint-Stock Bank*, 1867, L.R. 2 Ex. 259, stated the law thus: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." Again, in *Storey* v. *Ashton*, 1869, L.R. 4 Q.B. 476, it was laid down that the question in such cases is, "Whether the servant was doing that which the master employed him to do?" I do not think that these statements of the principle to be applied have ever been questioned, although difficulty has been frequently found in applying them to the facts of a particular case. In the present case it seems to me to be impossible to say that the riggers were doing what the defenders employed them to do, or that they were in any reasonable sense acting for the defenders' benefit.

The pursuers, further, founded upon certain regulations in regard to gangways to be used when ships are lying at a wharf or quay. I think that it is sufficient to say that these regulations apply only in the case of persons employed in the loading, unloading, or coaling of a ship, and do not, in my judgment, affect the liability at common law of a shipowner to third parties.

I am therefore of opinion that the defenders should be assoilzied.

Lord Ardwall.—I have found this to be a case of some difficulty. The pursuer obtained access to the vessel "Cousins Arbib" on the day in question by means of a ladder laid horizontally from the quay to the ship's bridge deck and a plank laid upon the ladder, and with the assistance of her husband, who was the first officer on board the said ship. Unfortunately, when she came to leave the ship, her husband was detained for a few minutes speaking to the pilot. While he was so engaged, a person, in the employment of James Gray, a foreman rigger, and who was at the time working on the ship, instead of getting a ladder, took a plank which was lying near and laid it down between the bridge deck and the shore, and was in the act of giving the pursuer his hand to steady her when the plank broke and both of them were precipitated into the water. The proximate causes of the accident, accordingly, were, first, the unsafe condition of the plank; and second, the use of that plank without any other support to form a means of egress to the pursuer from the ship.

With regard to the first, I think it was thoughtless on the part of the defenders to have on board the ship a plank in such a rotten state as that which gave way under the weight of a woman and a man over a stretch of such a short distance as four or five feet, and I thought at the discussion that there was a good deal to be said for the view that where there is a plank of that kind on board a ship where it may be readily used for the purpose of being laid between the ship and the quay for the passage of visitors or otherwise, it was the defenders' duty to have a sound plank; but, on the other hand, there is no evidence as to the history of this plank or how it came to be on board, or even what was the cause of its breaking, the plank itself having been lost by falling into the water at the time of the accident. But there is no evidence to show that the plank was not perfectly sound when supplied by the defenders to the ship, or to show that the defenders failed to put at the disposal of the officers or others in charge of the ship, plenty of planks and other materials to supply the place of those that had suffered from long usage, so that for all that appears in the

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case it may well have been that the plank was good when originally supplied, and that the defenders throughout had put it in the power of the captain and others in charge of the ship to replace worn-out planks with new ones whenever that was necessary. But further, there is no evidence to show that this plank was intended for any other purpose than merely as a fence or fender to be hung along the port-holes and sides of the ship to prevent injury to the glass through coal falling on it in the course of loading. Indeed, as the pursuer's husband explains, that was the purpose for which that and other similar planks were got out of the vessel's hold. Now, it is impossible to say that the defenders were legally in fault in having old planks for such a purpose, provided they did not put them to other purposes for which they were not fit.

This brings me to the second point, as to whether the defenders are responsible for the rigger who was using the plank for the purpose of assisting the pursuer out of the ship. Now, undoubtedly at the time he did so, Linton was on board the ship as a rigger, and in the employment of the defenders as such for the purpose of doing a rigger's work. He was therefore their servant to that effect; but otherwise he was not in their employment but in the employment of Gray. Now, what he did in the way of putting the plank down for the pursuer to walk across was not, in my opinion, any part of his duty as a rigger in the defenders' service. He was voluntarily, and as an act of kindness, assisting the first officer's wife to leave the ship, but it was no part of his duty to determine what means should be used for that purpose; and if he had not so hastily put out this plank, which had been brought on deck for a totally different purpose, the pursuer's husband would have made the same arrangement for his wife leaving the ship as he had for her entering it, by placing the ladder between the bridge deck and the shore, and placing a plank on the top of it, which would have kept her perfectly safe. I accordingly am unable to hold that the defenders were liable for supplying the said plank as a means of egress from the ship. The fact that it was so supplied was, in my opinion, due to the unauthorised and mistaken, though well-meant, action on the part of Linton, for which, for the reasons I have above indicated, I do not think the defenders can be held legally responsible.

I have examined the cases which were quoted at the discussion as more or less resembling the present, and, in particular, the cases of *Heaven* v. *Pender*, 1883, 11 Q.B.D. 503; *Indermaur* v. *Dames*, L.R., 1867, 2 C.P. 311; *Smith* v. *The London and St Katherine Dock Co.*, 1868, L.R. 3 C.P. 326; *Miller* v. *Hancock* [1893], 2 Q.B. 177; and *Brady* v *Parker*, 1887, 14 R. 783. In all these cases it was held that liability attached to the defenders in respect of a duty towards the pursuers or plaintiffs which they had failed to perform, such duty arising from invitations, express or implied, to enter on certain premises or use certain works or ways. In my opinion the pursuer has failed to show that there was in the present case any duty upon the defenders to furnish means of access and egress to and from their ship for visitors to members of the crew, especially considering that the ship had finished loading her cargo and was ready to sail. It may be true that the pursuer was legitimately on board the ship; but, on the other hand, I am of opinion that it must be held that she was there as what has been called in England a mere "licensee," that is, voluntarily and for her own purposes, and having no business there in which the defenders were interested, or which imposed any duty upon them in relation to her. If this be so, it would appear that there are no grounds for fastening legal liability for the accident on the defenders, or for holding that the rigger, in going forward and placing an unsafe plank for the pursuer to walk upon, was engaged in the performance of an act within the scope of his employment by the defenders. It would rather seem that when the pursuer went on board in the way and at the time she did, she took all the risks of the situation, and had just to obtain by herself, or by the aid of her husband, under whose guardianship she was when she entered the ship, such means of egress as he or she herself deemed safe. Unfortunately, her husband having left her, for a minute or two, to her own guidance, she accepted the proferred services of a rigger to assist her on shore, and these, however well meant, led to the accident for which she now claims damages from the defenders. For the reasons I have stated I do not think the defenders are liable in such damages.—31*st May* 1907.

Counsel for Appellant, G. Watt, K.C., Munro; Agent, D. Maclean, Solicitor.—Counsel for Respondents, Scott Dickson, K.C., Spens; Agents, J. & J. Ross, W.S. J. H. H.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

40. Glenboig Union Fireclay Company Limited *v.* Wallace.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 1 (2) (*c*)—"Serious and Wilful Misconduct"—Death of Workman Through Explosion of Gas in Coal Mine — Breach of Rule — Accident Held Not Attributable to Serious and Wilful Misconduct.

Stated Case.

This was an appeal by way of Stated Case against a decision of the Sheriff-Substitute

(Glegg) in an arbitration under the Workmen's Compensation Act 1897 raised in the Sheriff Court at Airdrie at the instance of Mrs Wallace, widow of the deceased Joseph Wallace, against the Glenboig Union Fireclay Co. Ltd.

The case stated as follows :—

1. The *locus* of the accident is a cross-cut mine in a fireclay pit.

2. On proceeding along the mine from the pit bottom, and about 760 yards therefrom, there is met a wooden frame "A" carrying two wheels, over which the haulage rope passes ; 7 feet 6 inches farther on there is a similar frame "B" ; 11 feet 6 inches farther there is a pump, and beyond the pump the mine extends about 120 feet to the working face.

3. The mine dips to the pump at 1 in 12, and rises from the pump to the face at 1 in 4.

4. The bratticing for separating the inlet and outlet of air is continued to within a short distance of the working face.

5. On the night of 1st June 1906 some repairs to the pump had been finished, but a space of about 8 feet of the bratticing which had been removed to effect these repairs had not been replaced.

6. On the morning of 2nd June the deceased, Wallace, who was oversman in that section of the pit and in charge of the repairs, was to fill in the hole in the bratticing, and took for that purpose three men, Gilson, Paterson, and a Pole called Simon Peter.

7. Prior to the commencement of work on said morning, the fireman, John Beattie, had inspected said mine and found gas at a point about 115 feet from the pump towards the face.

8. Beattie duly marked this, and on returning towards the pit bottom marked "Gas found in mine" on the frame "A," and nailed two boards across so as to prevent passage farther into the mine.

9. He proceeded to the pit bottom on his way to enter this in the Report Book.

10. He did not stop the workmen who were then going to their work at various places on the return air course between the frame "A" and the pit bottom from proceeding to their places, but he warned Wallace, whom he met, that he had found gas in the mine, and said that no one was to go beyond the fence he had put up till his return.

11. It does not appear that Beattie led Wallace to understand that the gas was likely to reach out as far as the pump or near it while the ventilation remained as it was.

12. Beattie had no authority to prevent Wallace, who was his superior, from passing this fence, and, to perform the necessary work of repairing the bratticing, Wallace required to take down and pass the fence, and to take others with him.

13. Wallace with his three assistants proceeded, with naked lights, taking down the fence on their way to the pump, when Gilson and Paterson were sent back towards the pit bottom for tools or material, leaving Wallace and Simon Peter at the pump.

14. A few minutes thereafter, and before anything had been done to close the hole in the bratticing, an explosion occurred, by which Simon Peter was severely burned, and Wallace was killed by being dashed against the frame "A," but was not burnt.

15. Simon Peter had proceeded up the mine towards the face with his naked light till about 18 feet from the face, when his lamp ignited the gas.

16. Wallace had in the meantime gone towards the pit bottom, and was somewhere between the two frames when he was caught by the force of the explosion.

17. The pit is not a fiery one, though gas is occasionally found in it, the last occasion being 14th May 1906, and is in use to be worked with naked lights.

18. On the occasion in question Wallace had been told by the manager, as a precautionary measure, though he was not then aware that Beattie had found gas, to take safety lamps with him, and Wallace had taken two, which were found hanging at the pump, but had not been used.

19. While the bratticing remained unrepaired at the pump there was no danger of the gas actually in the mine, as shown by the *locus* of the ignition, finding its way to the pump, and the men were in no danger in using naked lights there until they began to close up the hole.

20. The gas, being lighter than air, ascended the mine, and consequently accumulated at the working face, and unless it had enormously increased in volume would not extend as far as the pump.

21. When the hole in the bratticing was closed, the air current, which had been making a short circuit through it, would be forced past the working face, and would sweep the gas along the return side of the bratticing, and thus out of the mine.

22. When the hole was so far closed as to send part of the air current past the working face it would have been dangerous to use naked lights, and it would have been obligatory to have extinguished these and to have used the safety lamps.

23. When the air current was restored all the workers on the return air course between the frame "A" and the pit bottom would also have been in danger, and it was Beattie's intention to have them removed after signing the Report Book.

24. Beattie considered that it was unnecessary to remove them at once on his finding gas, as this danger would not arise till the bratticing was repaired.

25. It was admitted that Simon Peter, who was not called, was ignorant of English, and was unable to give any explanation of his going up the mine

26. It is not proved that Wallace sent him up the mine, or that Wallace knew that he had gone there.

27. The General and Special Rules were duly posted, and Wallace was acquainted with them.

28. I also found that it would have been prudent of Wallace to have regarded General Rule VIII. of the Coal Mines Regulation Act as applying to the mine at and near the pump, and to have prevented workers taking naked lights there, but the application of the rule was a matter of opinion, and it was not proved that Wallace disregarded the rule.

29. Wallace was not in breach of any other rule.

On these facts the Sheriff-Substitute found in law that—

(1) Wallace was fatally injured by accident arising out of and in course of the employment ; (2) his injury was not attributable to his serious and wilful misconduct. He assessed the compensation payable by defenders at the agreed-on amount of £290, 10s. sterling.

The Question of Law for the opinion of the Court was :—

> Was the injury to and the death of the said Joseph Wallace attributable to his serious and wilful misconduct ?

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The following cases were referred to: *Dobson*, 1905, 8 F. 241; *Johnston* [1906], A.C. 409.

The Court *answered* the question of law in the negative.

The Lord Justice-Clerk.—I am of opinion that the respondents in the arbitration have failed to show ground for answering the question in this appeal in the affirmative. The Sheriff-Substitute has stated the facts of the case very clearly and fully. It appears that the deceased Wallace, who was oversman, and the Pole Peter were at a place where it was quite safe to carry naked lights; that the deceased was alone with Peter; that Peter moved further forward, and thus caused the explosion by his naked light firing an explosive mixture. This he did when Wallace had gone towards the pit bottom. It was not proved that Peter went forward as he did by any instruction from the deceased, nor that the deceased had any knowledge of his going forward. In these circumstances the arbitrator held in law that the deceased's injury was not caused by his serious and wilful misconduct. These are the words of the statute, and are used obviously to make sure that a workman suffering from an accident shall not lose his claim to compensation merely because his conduct may not have been absolutely prudent, or strictly in accordance with the rules imposed upon him. The act must be both a wilful act of misconduct and must be not trivial or doubtful as regards quality, but must be serious. I cannot hold that the Sheriff was wrong in law in deciding that the circumstances of this case do not disclose serious and wilful misconduct, and therefore I would move your Lordships to answer the question in the negative.

Lord Stormonth-Darling.—A fatal accident occurred on 2nd June 1906 to an oversman named Wallace in one section of a fireclay pit, and in the arbitration which followed between his dependants and the employers, the latter stated the plea that the claim should be disallowed, in respect that the injury was attributable to Wallace's serious and wilful misconduct. Sheriff Glegg, who heard the case as arbiter, found (1) that the injury arose out of and in the course of the employment; (2) that it was not attributable to Wallace's serious and wilful misconduct; and he assessed the compensation at an agreed-on amount. The question of law submitted to us is whether the second of these findings is correct.

Now, in order to justify an affirmative answer to the question it might be enough to say that the arbitrator being final on the facts, a finding by him which negatives the contention of serious and wilful misconduct ought not to be overturned, provided the arbitrator had any evidence at all to support his judgment. But as I not only think that there *was* such evidence, but also that his conclusion was the right one in the circumstances, I will shortly state my reasons for so thinking.

The defence that a workman (or his representatives) otherwise entitled to statutory compensation has lost his right to it by his own "serious and wilful misconduct" is a defence which requires proof, and the *onus* of proof undoubtedly lies upon the employer. The first thing required is that the employer must prove that the injury was "attributable" to the misconduct; the second is that he must prove it to have been "serious and wilful," in the sense of being something far beyond mere negligence, and more than bare misconduct. If there is any reasonable doubt about these two matters, the proof fails, and the rule of the statute (to which this provision forms an exception) must have its way. I think the case of *Johnson* v. *Marshall, Sons & Co. Ltd.* in the House of Lords [1906], App. Ca. 409, settles all that, and settles it in a way which is quite consistent with the previous decision of Seven Judges of this Court in *Dobson* v. *United Collieries Ltd.*, 1905, 8 F. 241. I concurred in that decision, and am very far from suggesting any doubt of its soundness, even if I were not bound by it, which I am. But the feature of that case was that it was a naked light carried by the workman himself which ignited a cartridge, and so caused the injury for which he claimed compensation; and the sole question was whether his ignorance of the duly published rule prohibiting such conduct, and his following a practice in breach of that rule, had the effect of excusing him. We held that it had not that effect, and so that his injury was attributable to his own serious and wilful misconduct. But I fail to see how that advances the argument where the question is, as here, not whether the workman was excusably or inexcusably ignorant of a rule, but whether he himself broke any rule at all to the breach of which his death was *directly* attributable. I am justified in using the adverb "directly" as qualifying the statutory adjective "attributable," because I find in a case in the First Division which has been reported since the debate in the present case—*Broxburn Oil Co.* v. *Praties*, S.L.T. (Vol. XIV. p. 866)—the Lord President, while adhering to the language which he used in *Dobson's* case, expands that language by adding the words "and the accident (which happens in consequence) is *directly* attributable to the breaking of the rules." His Lordship accordingly takes the view that the man who was killed did "do a thing which was rash, and which in a civil case would have amounted to contributory negligence, but is not wilful misconduct." Lord M'Laren in the same case adopts as the test of serious and wilful misconduct (at least in certain circumstances) whether moral blame could have been imputed to the workman, and, holding that there was no moral blame, agrees that he does not come within the scope of the statutory exception.

Now, I say the same here. I say that Wallace's

death was not directly attributable to the breaking *by him* of any rule of the pit, but to the wandering away of the Pole Simon Peter with a naked light till he got within 18 feet from the face, when his lamp ignited the gas, and so caused the explosion which killed Wallace. The Sheriff finds (Art. 28 of the case), and he is final on fact, that "it would have been prudent of Wallace to have regarded General Rule VIII. of the Coal Mines Regulation Act as applying to the mine at or near the pump, and to have prevented workers taking naked lights there, but the application of the rule was a matter of opinion, and it was not proved that Wallace disregarded the rule," and (Art. 29) that "Wallace was not in breach of any other rule." Now, what is that but to say that the worst that can be charged against Wallace is that he perhaps, to use the Lord President's words in the *Broxburn* case, "did do a thing that was rash . . . . but was not wilful misconduct"? If moral blame be sometimes the test of serious and wilful misconduct, where was the moral blame of what he did?

The wording of General Rule VIII. makes the danger of using naked lights so much a matter of opinion that I cannot doubt that the Sheriff was within his right in holding, as a matter of proof, that it was not proved that Wallace disregarded the rule. The fireman (Beattie) had no doubt found gas in the mine, and had marked a notice to that effect on the frame A, and had told Wallace, when he met him, that no one was to go beyond the two boards which he had put up there as a fence till his return. But Beattie did not think it necessary himself to stop the workmen who were then going to their work at various places on the return air course between the frame A and the pit bottom, or to prevent them from proceeding to their places (Art. 10); and he did not lead Wallace to understand that the gas was likely to reach out as far as the pump or near it while the ventilation remained as it was (Art. 11). Now, the explosion occurred from the Pole's lamp, igniting the gas before anything had been done to close the hole in the bratticing (Art. 14), and it is found as a matter of fact that the men were in no danger in using naked lights *at the pump* until they began to close up the hole (Art. 19). It must be remembered that Wallace, who was oversman in that section of the pit, was in charge of the repairs to the pump, in connection with which the hole (of about 8 feet) in the bratticing had been made, and it was to fill in this hole that he had taken three men, including Simon Peter, with him. There was, therefore, nothing wrong in his taking these men past Beattie's fence, and on to the pump. Indeed, it is found as matter of fact (Art. 12) that he required to take down and pass this fence and to take others with him, in order to perform the necessary work of repairing the bratticing. The Pole was wrong, as the event proved, in wandering up the mine to the face with a naked light. But Wallace did not send him up the mine, and did not know that he had gone there (Art. 26), and he was not of course to blame for Simon Peter being a Pole, ignorant of English, and unable to give any explanation of why he went up the mine (Art. 25). If anybody is to suffer for his ignorance of English, it must surely be those who employed him.

But then it is urged, strangely enough, by those very employers that, though it was not any act of Wallace's own which caused the explosion, though he was perfectly safe in being where he was (between the two frames) at the time of the explosion—though, in short, his injury and death were in no way attributable to his own serious and wilful misconduct—still, in some roundabout way, he was to blame for allowing Simon Peter to be where he was. I asked Mr Hunter, as counsel for the employers, on what rule he relied as fixing that duty on Wallace the oversman, and his answer was to point to Special Rules Nos. 7, 67, 71 and 100. Rule No. 7 merely requires that the oversman "shall see the General and Special Rules faithfully and vigorously enforced." But the oversman cannot be at more places than one at a time, or stand over each individual worker who has to obey the rules. Rule 67 forbids miners and other workers to proceed into travelling roads or working places until it shall have been reported to them by certain officials that such places are safe to be entered. Rule 71 (speaking generally) contains a similar prohibition against miners going into or improperly near any place throughout the whole mine where danger is known or suspected to exist. And Rule 100 is to the same effect, although it is more specific than Rules 67 and 71, in providing that workers of all descriptions are not to proceed through any fence or pass any notice erected to indicate that danger exists. But none of these rules can apply to Wallace and his three assistants in passing the fence erected by Beattie, when it is found as a fact in the case that, to perform the necessary work of repairing the bratticing, Wallace "required to take down and pass the fence, and to take others with him," and that, so long as they remained at or near the pump, they were perfectly safe in using naked lights until they began to close up the hole. The whole gravamen, therefore, of this charge against Wallace resolves itself into the Pole having been allowed—or rather not forcibly prevented—from passing up the mine towards the face with a naked light when Wallace's back was turned. A more slender or captious ground on which to base a charge of even bare misconduct against Wallace I cannot conceive, and the charge becomes, in my opinion, grossly unreasonable when it is carried so far as to be not merely misconduct, but "serious and wilful misconduct." I take leave to say that nothing at all approaching it

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has ever been sustained since the Act was passed. It is no light matter to bring a charge of that kind against a superior workman in a pit, and in my opinion it cannot be justified unless the employer can bring clear proof of a deliberate infraction by the workman so accused of some general or special rule of the pit. Without attempting any precise or exhaustive definition of what will constitute "serious and wilful misconduct," I think it is at least safe to say that it must be something positive and personal.

It was said in the course of the argument that the fireman (Beattie) was the proper person to judge of the safety of the mine as regards the presence of gas. I do not recapitulate the findings of fact which show that even Beattie did not consider it necessary to remove the men at once on his finding gas, as no danger would arise till the repair of the bratticing was begun. But on this matter I am content to rely on the Sheriff's finding in fact that Beattie had no authority, even if he had desired, to prevent Wallace, who was his superior in the mine, from passing the fence which he had erected, for the purpose of performing a necessary work. I am therefore for answering the question of law in the negative, and so for upholding the Sheriff-Substitute's decision.

Lords Low and Ardwall concurred.—31*st May* 1907.

Counsel for Appellants, Hunter, K.C., Horne; Agents, Anderson & Chisholm, Solicitors.—Counsel for Respondent, G. Watt, K.C., Munro; Agent, W. R. Tullo, S.S.C. J. H. H.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

41. Gilchrist *v.* Whyte.

I. Contract—Loan—Proof—Contract to Accept Loan on Bond and Disposition in Security Held Not Proved by Correspondence Between Parties.

II. Recompense—Heritable Loan—Refusal of Borrower to Complete Proposed Loan—Expenses Incurred by Lender in Connection with Loan—Action to Recover Expenses Dismissed.

Appeal from the Sheriff Court at Glasgow.

This was an action raised in the Sheriff Court at Glasgow at the instance of Miss Gilchrist and another, Stirling, against W. M. Whyte, architect, Glasgow, for payment of the sum of £53, 10s. 3d.

The pursuers' averments were as follows :—

Cond. 1. On or about 7th May 1904 the defender, through his agent . . . . entered into negotiations with the pursuers . . . . for a loan of £2000 over certain heritable subjects in Marlborough Crescent North, Crow Road, Partick, as the result of which the pursuers agreed to give the defender, and the defender agreed to accept from them, a loan of £1700, to be secured over the said subjects by a bond and disposition in security in the usual terms. In the course of the negotiations, which extended over several months, and for the details of which reference is made to the correspondence [*the import of which sufficiently appears from the opinion of Lord Low*, infra], the following additional conditions, *inter alia*, were agreed to, viz. :—

(1) The conditions set forth in Article 2 of the Condescendence.

(2) That a valuation of the security subjects should be procured by the pursuers at the defender's expense; and

(3) That as there had been considerable delay in settling the transaction, for which the lenders were not responsible, the interest on the sum in the bond should run as from 15th September 1904. According to the established practice in such transactions, it is incumbent on the borrower to relieve the lender of the expense incurred to the lender's law agent for professional charges and outlays. Acting on the arrangements made with the defender, and in accordance with the said practice, the pursuers, with the knowledge and consent of the defender, procured a valuation from James Barr, property valuator, Glasgow, and incurred expenses to their said law agents in carrying out the said transaction. . . .

Cond. 2. When the said loan was arranged, it was a condition of the arrangement that the defender should, prior to the settlement, procure and exhibit to them a discharge by the superior of certain real burdens on the said heritable subjects with reference to the formation of pavements and sewers. . . .

Cond. 3. The bond and disposition in security by the defender in favour of the pursuers was prepared by the latter's law agents, revised by the defender's law agent, and, afterwards, signed by the defender. When the pursuers' agents attended on the agent of the defender to settle the said loan, they were informed by the latter that the defender declined to procure and exhibit the discharge by the superior before referred to, and, as the pursuers declined to relieve him of his obligation on this point, the defender, on 2nd November 1904, finally refused to go on with the transaction.

Cond. 4. The pursuers thereupon, on 3rd November 1904, consigned the amount of the proposed loan on deposit receipt, and endeavoured to get another investment for the money, but were unable to get a suitable investment until Whitsunday 1905. Had the said bond and disposition in security been duly delivered to the pursuers, in terms of the arrangement between the parties, the earliest date at which the pursuers would have been obliged to accept repayment of the loan was Whitsunday 1905. The said bond and disposition in security and the adjusted draft thereof are in the possession of the defender or his law agents, and he is called upon to produce them. During the period from 3rd November 1904 to 15th May 1905 the said sum of £1700 was only earning interest at deposit receipt rates.

Cond. 5. In consequence of the defender's breach of contract, the pursuers have sustained loss and damage to the extent of the sum sued for, which is made up as follows :—The interest on the said sum of

£1700, at 4 per cent., from 15th September 1904 to 15th May 1905, amounts to the sum of £44, 12s. 4d., which, after deduction of £11, 18s. 5d., being the amount of deposit receipt interest on the said sum, leaves a balance of £32, 13s. 11d. of a loss of revenue to the pursuers on the said sum. The pursuers also incurred an account to their law agents, for the preparation of the said bond, amounting to £20, 16s. 4d. The said two sums of £32, 13s. 11d. and £20, 16s. 4d. make up the sum sued for. *Or otherwise the pursuers, in reliance on the defender's representations that the said bond would be granted and the said conditions specified in Articles 1 and 2 of the Condescendence implemented, incurred the said account to their law agents, and also lost the said sum of interest in consequence of their being unable to obtain another investment as condescended upon.*

The Pursuers *pleaded*:

"1. The pursuers having suffered loss and damage to the extent of the sum sued for, through the defender's breach of contract, decree should be granted as craved.

"2. *The pursuers having incurred expense and sustained loss in consequence of their reliance on the defender's representations as condescended on, are entitled to decree as concluded for.*"

The passage in italics in Cond. 5 and the second plea in law were added by way of amendment at the close of the debate in the Court of Session.

The Defender *pleaded*, *inter alia*:—

"1. The action is irrelevant."

On 9th December 1905 the Sheriff-Substitute (Fyfe) sustained the first plea in law for the defender and dismissed the action.

The pursuers appealed to the Sheriff (Guthrie), who, on 13th June 1906, recalled the interlocutor of the Sheriff-Substitute, found that the pursuers, in reliance on representations made by the defender, incurred certain expenses in connection with the proposed loan for which the defender was liable, and allowed a proof of the damages claimed.

The Defender *appealed* to the Court of Session, and *argued*: (1) Any contract relating to sale of, or loan on, heritage must be holograph or tested (*Goldston*, 1868, 7 M. 188; *Scottish Lands Co.*, 1880, 7 R. 756; *Woddrop*, 1906, 14 S.L.T. 319; *Mowat*, 1895, 33 S.L.R. 203; *Bryan*, 1892, 19 R. 490; Dickson on Evidence, sects. 549, 550). Further, it must be stamped. The writings relied on as constituting the contract in the present case satisfied none of these conditions. (2) The pursuers had stated no relevant claim for recompense, and the cases cited by them in this connection did not apply.

Argued for the Pursuers: (1) The correspondence between parties' agents instructed a completed contract to borrow on the conditions therein specified (*Westren*, 1879, 7 R. 173; *Anderson*, 1901, 4 F. 68; *South African Territories Ltd.*, [1898], A.C. 309). (2) In any case the defender was bound to recoup the pursuers for the loss suffered by them in consequence of the representations made by him: (*Walker*, 1823, 2 S. 379; *Heddle*, 1846, 8 D. 376; *Dobie*, 1873, 11 M. 749; *Allan*, 1875, 2 R. 587; *Hamilton*, 1899, 1 F. 478).

The Court *sustained* the appeal, *recalled* the judgment appealed against, *affirmed* the interlocutor of the Sheriff-Substitute of 9th December 1905, and *dismissed* the action.

Lord Stormonth-Darling.—This is an action of damages by two ladies who had money to lend on heritable security, and who say that all the essential terms of an agreement to lend £1700 over certain heritable subjects in Partick belonging to the defender had been arranged with him between May and November 1904, when he suddenly drew back and refused to go on with the transaction. The consequence is, according to the pursuers, that they have lost the sum of £53, 10s. 3d., made up (1) of £32, 13s. 11d., being the difference between deposit receipt interest and interest at 4 per cent., which the loan was to have borne if the transaction had gone on; and (2) £20, 16s. 4d., being the account which they have incurred to their law agents for the preparation of the bond. The action was originally laid on breach of contract alone (though specific implement was never demanded), but since the appeal was brought the pursuers have amended their condescendence and pleas by founding alternatively on their having incurred expense and sustained loss by their reliance on the representations of the defenders. In other words, they rely alternatively on the class of cases of which *Walker* v. *Milne* (the Melville Monument case), 2 S. 379, is the best-known example.

The Sheriff-Substitute (Fyfe), dealing with the case as it then stood, sustained the plea of irrelevancy and dismissed the action. The Sheriff recalled this interlocutor, pronounced certain findings as to the effect of the admitted correspondence between the agents of the parties, including a finding that the pursuers had relied on the representation made by the defender, and that the defender was liable to pay the expenses, if any, which the pursuers had incurred in consequence of their so relying, and the learned Sheriff concluded with allowing a proof of the specific damages alleged, which proof, by a subsequent interlocutor, he remitted to the Sheriff-Substitute to take. It is obvious, both from the Sheriff's findings, and still more plainly from his note, that in his view the real case for the pursuer is founded on the Melville Monument case—that view is, by the amendment which we have allowed, now formulated by the pursuers themselves.

It still has to be considered, however, whether the pursuers have succeeded in making a relevant case even on this ground. Now, the whole point of a claim of this kind is that the pursuer,

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despairing of making out a contract of which he can demand implement, falls back on a claim of indemnification for any actual loss or damage which he may have sustained "through the representations and inducements recklessly and unwarrantably held out to him by the other party." I take these words from the opinion of Lord Deas in *Allan* v. *Gilchrist*, 2 R. at p. 590, where he analyses all the cases on this exceptional branch of the law from *Wallace* v. *Milne* downwards.

Where, I ask, is the averment of any such representations and inducements? Not certainly by merely saying that "according to the established practice in such transactions, it is incumbent on the borrower to relieve the lender of the expense incurred to the lender's law agent for professional charges and outlays"—which is one head of the claim in this case—or by merely saying that on a particular date "the pursuers consigned the amount of the proposed loan on deposit receipt, and endeavoured to get another investment for the money, but were unable to get a suitable investment until Whitsunday 1905"—which is the other head of the claim. Neither of these averments is an averment of representations and inducements held out by the defender to the effect that, whether the proposed transactions went on or not, the defender would reimburse the pursuers. The first of these averments is simply an averment of the pursuers' understanding of the alleged practice, not an averment of any representation made by the defender; and unless it can be maintained that in every negotiation for a loan on heritable security the proposed lender is entitled to run up an account with his own law agent at the expense of the borrower, I fail to apprehend the relevancy of the averment. Similarly, with regard to the second averment, can it be said that the moment the lender thinks proper to consign the money, he is entitled to charge against the proposed borrower the difference between deposit receipt rate and the rate of interest on the loan, without any special stipulation to that effect? I agree with the Sheriff Substitute that possible borrowers would be rather startled by the suggestion.

On the whole matter I have come to the conclusion that, waiving all questions as to the mode of proof in a case raising purely the question whether there had been an agreement to make a loan on certain conditions, there is here no relevant averment either of breach of contract, or of right to reimbursement of actual outlay incurred on the faith of representations made by the defender. I am therefore of opinion, with all respect to the Sheriff, that we should find that the pursuers have not stated a relevant case in support of either of their pleas in law, and dismiss the action.

Lord Low.—The defender was proprietor of two tenements at Broomhill, near Partick, over each of which he was desirous of borrowing. The pursuers were willing to lend a sum not exceeding £1800 upon the security of one of the tenements, and the defender was willing to accept a loan of that amount. Ultimately the precise amount of the proposed loan was fixed at £1700.

It appears that the tenements were not quite completed when the negotiations commenced, and further, the ground on which they were built appears to have been part of a larger area, the whole of which was subject to certain conditions and obligations in regard to the erection of building, the formation of pavements, and the repayment to the superior of the cost of making certain roads and sewers. These conditions and obligations had only been partially fulfilled, and accordingly the pursuers' agents very properly insisted that arrangements should be made which would free their clients from the risk of the security subjects being liable to claims at the instance of the superior of an unascertained amount. In such circumstances it is not surprising that the negotiations should have been both complicated and prolonged.

Shortly after the commencement of the negotiations, namely, on 18th May 1904, the pursuers' agents wrote to the defender's agent specifying a number of points which a perusal of the titles had suggested. One of these had regard to the conditions and obligations to which I have already referred. In reference to these the pursuers' agents wrote: "The feuar is bound to form Marlborough Avenue, to form a pavement along Crow Road, to pay interest at five per cent. on £421, 8s. 8d., being half cost of formation of Broomhill Drive and sewer, and on completion of each tenement in Broomhill Drive to repay the capital sum applicable thereto. As these conditions are real burdens on the whole ground, non-fulfilment of which may result in forfeiture of the whole ground, it is necessary that the superior should free the two tenements of these obligations."

In reply, the defender's agent simply stated the position in which matters stood, which amounted to this, that the conditions referred to were, in so far as not already implemented, in course of being implemented.

After some further correspondence, to which it is unnecessary to refer, the pursuers' agents again wrote to the defender's agent on 1st July 1904, saying, *inter alia*, "The obligations to the superior regarding the formation of streets, the formation of foot pavements, etc., should be implemented before settlement of the bond, so that the security subjects may be cleared of any claim by the superior for these matters or for interest relating thereto."

In answer to that part of the letter, the defender's agent wrote: "Under this head I anticipate no difficulty whatever."

The pursuers' agents evidently regarded that answer as satisfactory, because they proceeded with the negotiations, and a bond and disposition in security was prepared, and apparently was actually executed by the defender. When, however, the time for settlement arrived, the conditions in regard to the formation of streets, etc., had not been completely implemented, and the pursuers' agents were not satisfied that the security subjects were free from the possibility of claims on the part of the superior. In these circumstances various proposals were made upon the one side and the other with the view of getting over the difficulty, but no agreement was come to—the pursuers' agents regarding the proposals of the defender's agent as inadequate, and the latter regarding the demands of the former as excessive. Negotiations were accordingly broken off, and thereafter the pursuers brought the present action, in which they demand payment from the defender of the sum of £53, 10s. 3d. being the amount (£20, 16s. 4d.) of the account which they have incurred to their law agents, and £32, 13s. 11d., being the difference between the amount of interest which they would have received if the transaction had been completed and deposit receipt interest, which was all that they actually received, until another investment for the capital sum was obtained.

As the action was originally laid, the pursuers' claim was based entirely upon alleged breach of contract: that is to say, upon breach of a contract for the loan of money by the pursuers to the defender upon the security of heritable property belonging to the latter. It is plain that no such contract was ever completed, negotiations being broken off because the pursuers' law agents were not satisfied with the state of the title. Accordingly the original ground of action fails. The pursuers have, however, amended the record to the effect of adding another ground of claim which they state thus:—"The pursuers, in reliance on the defender's representations that the said bond would be granted and the said conditions specified in Articles 1 and 2 of the Condescendence implemented, incurred the said account to their law agents and also lost the said sum of interest."

Now, I do not know what is meant by the statement that the defender represented that the bond would be granted; but the fact was that the defender was all along willing to grant the bond, and would have granted it, if the pursuers would have accepted it in exchange for the money.

In regard to the conditions which it is averred that the defender represented should be implemented, those which are specified in Articles 1 and 2 of the Condescendence, and to which it is averred that the defender agreed, are three in number. There is first the condition made by the pursuers' agents in their letter of 18th May 1904, that it was "necessary that the superior should free the tenements" of the obligations in regard to the formation of streets, sewers, and so forth, or, as they put it in their letter of 1st July, that the obligations should be "implemented before settlement of the bond, so that the security subjects may be cleared of any claim by the superior for these matters, or for interest relating thereto."

I have already pointed out that in answer to the first of these letters the defender's agent merely stated how matters stood, and that in answer to the second letter he wrote—"Under this head I anticipate no difficulty whatever."

I do not doubt that the latter influenced the pursuers' agents in continuing the negotiations, because if the defender's agent had said that there was no chance of the conditions being implemented or of the security subjects being otherwise freed of possible claims on the part of the superior when settlement of the loan came to be made, I think that very probably the pursuers' agents would have declined to go on. I am of opinion, however, that the statement of the defender's agent did not amount to a representation upon the faith of which the subsequent expense of the negotiations must be held to have been incurred. Indeed, the statement was not a representation at all, but an expression of opinion (and I do not doubt of a perfectly honest opinion), and the pursuers' agents took the risk of that opinion not being confirmed by the event. I am therefore of opinion that, so far as the condition with which I have been dealing is concerned, this is not one of those cases in which a party who has incurred expense or performed operations in reliance upon representations made by another is entitled to be indemnified by that other, although there has been no actual contract between them.

The next condition founded on in the condescendence is "that a valuation of the security subjects should be procured by the pursuers at the defender's expense." Now the defender did agree that a valuation of the subjects should be "instructed by the pursuers in the usual way." My impression is that it is a matter of common occurrence for an agreement to be made that the proposed lender shall obtain a valuation of the security subjects at the expense of the proposed borrower, whether the loan is ultimately given or not. I think, therefore, that there would have been a great deal to be said for the view that the words "in the usual way" meant that the defender should in any event bear the cost of the valuation. No such argument, however, was stated for the pursuers, and it cannot be assumed that, if it had been stated, the defender would not have had a good answer. At all events, he was entitled to be heard.

The third condition founded upon is that interest should run from 15th September 1904. It is true that the defender agreed to pay

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interest from that date, but that was only in the event of the transaction being completed. He never agreed to pay, or represented that he would pay, interest if the money was not in fact lent to him.

I am therefore of opinion that the defender is entitled to absolvitor. I am not surprised that the pursuers should feel aggrieved that they should have sustained so considerable a loss without any corresponding benefit; but, with the exception perhaps of the cost of the valuation, the pursuers' losses are of a kind which a person negotiating a loan of money upon heritable security has always, in a greater or less degree, to face, and the fact that the loss has been perhaps unusually heavy in this case is simply due to the peculiar circumstances to which I have alluded.

Lord Ardwall.—I agree with what has been said by Lord Stormonth-Darling and Lord Low as to the history and facts of this case, and it is unnecessary for me to go over them in detail.

The ground on which the action proceeded as first brought into Court was breach of contract, but it is clear that as concerns that ground the action is irrelevant, and that there was no completed contract of loan over heritage between the parties. But a plea was subsequently added to the effect that the pursuers, having incurred expense and sustained loss in consequence of their reliance on the defender's representations as condescended on with regard to a proposed loan, are entitled to decree as concluded for; in other words, damages are sought for expenses incurred in connection with an inchoate contract which has never been completed. I think that as such an action does not proceed on contract, it must proceed on one of two grounds, either on wrongdoing more or less flagrant, or on the ground which is expressed in the brocard *nemo debet ex alieno damno lucrari.*

The decided cases in which an action has been sustained in respect of damage caused by one of the parties to an inchoate contract not carrying it out are few in number and peculiar in their circumstances. All the cases up to March 1875 are ably analysed and reviewed by Lord Deas in the case of *Allan* v. *Gilchrist*, 2 R. 587. He points out that in the case of *Walker* v. *Milne*, 2 Shaw 338, the relevancy of the items of the alleged loss did not appear to have been settled or the case brought to any judicial conclusion. In the case of *Heddle* v. *Baikie*, 8 D. 376, the circumstances were very special, and the damage to which the pursuer was found entitled was, not for breach of contract, but for loss sustained after possession of a farm had been ceded to him, and while certain grossly illegal and oppressive proceedings had been going on; or, in other words, it was for actual loss sustained in consequence of the unjustifiable representations and inducements made and held out by the one party to the other, contrary to all good faith, and his unjustifiable conduct throughout the whole transaction. The case of *Bell* v. *Bell*, 3 D. 1201, rested on the second ground I have above alluded to, the damage claimed being for the loss caused by building a house on a piece of ground on the faith of a promise that it would be conveyed to the pursuer, and in respect that the defender had *mala fide* or fraudulently induced the pursuer to build, but the damages were limited to the specific amount expended on the house. Subsequent to the case of *Allan* v. *Gilchrist*, the case of *Dobie* v. *Lauder's Trs.*, 11 M. 749 occurred, in which the pursuer averred that the defenders arranged to board certain children with her, and that both parties having contemplated that the arrangement should endure for a term of years, she had incurred certain expenditure, which she lost by the guardians suddenly and without any reasonable excuse bringing the arrangement to a close. There it was held that the pursuer was entitled to be reimbursed for actual loss, Lord Neaves putting the liability on the ground that when parties are engaged mutually in promoting an object of common interest, and the expenses of furthering that object are thrown on one of the parties, that when the expenditure fails in the end aimed at, the party-disburser must be reimbursed as being the disburser for a common object. But it may, I think with equal truth, be said that this was an action founded upon a wrong which consisted in the defenders leading the pursuer, by certain representations, to incur serious outlay, and then disappointing these expectations without any reason.

Again, in the case of *Hamilton* v. *Lochrane*, 1 F. 478, a proof was allowed of the pursuer's averments where a sum of £150 was claimed as the cost of certain alterations made by the pursuer on a villa that he was in course of erecting, on the request of the defender, who had an option of purchasing the house down to a certain date. This was, in my opinion, a very narrow case, and all that was decided was to allow a proof before answer; and the decision, such as it was, was a reversal of the decisions of a Sheriff and a Sheriff-Substitute, and the soundness of that reversal was strongly doubted by Lord Moncreiff.

From these authorities I think it may be inferred that an action of damages founded on the ground of recompense for loss caused through failure to complete or carry out a contract, but where there has been no breach of contract, will only be entertained by the Court in very special circumstances indeed, and for the most part only in cases where (1) loss has been wrongfully caused by one of the parties to the other, including, however, loss or expense incurred as part of the abortive negotiations between the parties; (2) where the wrong has been done without any excuse; and (3) where the losing party is in no way to blame for the loss.

But it need hardly be pointed out how inconvenient and ridiculous it would be if in any case where a person has been put to expense and trouble in the hope or expectation or anticipation of a contract being concluded and after all no contract is concluded, he should be entitled to ask a court of law to entertain and investigate a claim of damages against the party who withdrew from the negotiations, it being in law the right of every one to resile from a contract before final consents have been exchanged, or, in the case of heritage, before it has been concluded *habili modo* by writing or otherwise. If such actions were to be allowed it would necessitate an enquiry in every case of the kind into nice and difficult questions as to which of the parties had behaved reasonably or unreasonably in order to determine the question of who was to blame for the contract not being proceeded with. Such actions, accordingly, will not as a rule be entertained by a court of law.

Applying these remarks to the present case, I am of opinion that the pursuers have presented no relevant case, for I entirely agree with what has been said by your Lordships as to there being no blame on the part of the defender leading to loss of such description as the Court will take cognisance of. My impression is that the pursuers were unnecessarily anxious and troublesome regarding the settlement of a transaction in which it was the defender's interest as well as their own that there should be no forfeiture of the feu, and where, as far as I can see, there were no important practical difficulties in the way of the loan being concluded, except those raised by the pursuers themselves.

The Lord Justice-Clerk concurred.—31*st May* 1907.

Counsel for Appellant, W. Thomson, Morton; Agent, Norman M. Macpherson, S.S.C.—Counsel for Respondents, Macmillan, Maitland; Agent, J. Gordon Mason, S.S.C. J. H. H.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

42. Grieve's Trustees *v.* Grieve and Others.

EXPENSES—DECREE IN NAME OF AGENT DISBURSER—EXPENSES AWARDED IN THE HOUSE OF LORDS OUT OF FUND IN MEDIO TO CLAIMANT IN MULTIPLEPOINDING—MOTION FOR DECREE FOR EXPENSES IN NAME OF AGENT DISBURSER REFUSED WHERE CLAIMANT HAD RECEIVED PAYMENT OUT OF FUND IN MEDIO OF SUM OF MONEY IN ACCORDANCE WITH THE JUDGMENT OF THE COURT OF SESSION, WHICH JUDGMENT HAD BEEN REVERSED IN HOUSE OF LORDS—MUNRO v. BOTHWELL, 1846, ARKLEY'S JUST. REPORTS 118, DISAPPROVED.

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Grieve's Trustees v. Grieve and Others.

Petition to Apply Judgment of the House of Lords.

This was a motion in the Single Bills in a petition to apply the judgment of the House of Lords in an action of multiplepoinding raised by the trustees of the late John Grieve, hotelkeeper, Edinburgh, who died in 1903, for the distribution of his estate.

The question raised in the case, which turned on the interpretation of an agreement between the testator and his son James Grieve (and is not reported), was whether by said agreement the prior testamentary writings of the testator were impliedly revoked. These writings included a codicil under which Mrs Grieve, the testator's widow, claimed the liferent of a sum of £10,000. In the Outer House Lord Kyllachy held, by interlocutor dated 22nd June 1904, that the agreement between the testator and his son operated as a revocation of his prior testamentary writings, including the said codicil. On 16th November 1904 the First Division (The Lord President (Lord Kinross) and Lords Adam and Moncrieff) recalled that interlocutor, and found, *inter alia*, that Mrs Grieve was entitled to the liferent of the sum of £10,000. On 30th December 1904, Mrs Grieve having made application to the trustees, received from them the sum of £500 to account of her liferent of the sum of £10,000, and granted a simple receipt in those terms. In May 1905 James Grieve, the testator's son, appealed to the House of Lords, and in July 1906 the House sustained the appeal and restored the interlocutor of Lord Kyllachy. Mrs Grieve and the other claimants asked for their expenses out of the fund *in medio*, in view of the fact that the litigation was caused by the way in which the testator had left his testamentary writings. The House allowed all parties their expenses out of the fund.

On the petition by the trustees of James Grieve (who had died since the appeal) to apply the judgment of the House of Lords, Mrs Grieve moved that the decree in her favour for expenses (as taxed at £421) should go out in name of her agents as disbursers of the expenses.

The trustees of James Grieve opposed the motion, and *argued* that as Mrs Grieve had received £500 out of the fund *in medio* which, under the judgment of the House of Lords, she was not entitled to, and had not repaid that money, decree should go out in her own name. [The Lord President referred to the case of *Lochgelly Iron and Coal Co. Ltd.* v. *Sinclair*, 1907, 14 S.L.T. 783.]

Argued for Mrs Grieve: The purpose of a decree in name of agent disburser was to protect the agent against compensation between the expenses for which decree was given, and any other debt due by the party in whose favour expenses had been awarded. The doctrine was

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well established, and the only exception allowed to it was where there were two awards of expenses in favour of different parties, in which case the one might be set off against the other, and decree in the agent's name would not be allowed. Here the £500 had been paid direct to Mrs Grieve and spent by her, and the agents had themselves disbursed the expenses of the House of Lords appeal. The *Lochgelly Iron Co.* case and all the cases cited in it were cases of two sets of expenses, and the judgment there had no bearing on the present question. Mrs Grieve might or might not ultimately be liable to pay the £500, but even assuming that decree had gone out against her to repay that money in the same interlocutor that awarded her expenses, compensation would not be allowed between the principal sum and the expenses (*Munro* v. *Bothwell*, 1846, Arkley's Just. Rep. 118; Bell's Com., II. 36; Bell's Prin., sect. 1389; *Russell* v. *Greig & Peddie*, 1826, 4 S. 403; *Miller* v. *Geils*, 1848, 10 D. 1384; *Gordon* v. *Davidson*, 1868, 3 M. 938, Begg on Law Agents, 193).

The Court *refused* the motion.

The Lord President.—The facts on which this controversy arises are these:—A certain lady, Mrs Grieve, was a claimant in a multiplepoinding which had to do with the estate of her deceased husband John Grieve. In the Court of Session there was a finding pronounced which affirmed her right to the interest on a sum of £10,000. After that finding was pronounced, Mrs Grieve made application to the trustees, and the trustees made a payment to her of £500. Another claimant thereafter took an appeal to the House of Lords, which reversed the finding of the Court of Session to which I have referred, and determined that Mrs Grieve had no right to any interest on the sum of £10,000. At the same time the House of Lords awarded expenses to all the claimants out of the fund *in medio*.

On a motion to apply the judgment the agent for Mrs Grieve asks that decree for expenses be pronounced in name of the agent disburser. This motion is resisted by the trustees, who point out that if decree is granted as craved they will lose their right to retain the sum found due as expenses against the £500 paid by them to Mrs Grieve out of the estate.

The point is really settled by the judgment in *Lochgelly Iron and Coal Co. Ltd.* v. *Sinclair*, 14 S.L.T. 783. I had occasion in that case to go into the general principles determining the right of an agent to get a decree in his name, and the judgment in that case was based on the judgment of Lord Justice-Clerk Inglis in *Gordon* v. *Davidson*, 13th June 1865, 3 M. 938. The point is found shortly stated in a sentence quoted in the opinion of Lord Justice-Clerk Inglis in that case from Lord Glenlee: "I have no idea that the agent in a cause is in any better situation than the principal party, barring extrinsic claims of compensation." Applying that, I have no doubt that this is not an extrinsic claim. Part of the fund *in medio* has been paid to this lady, and it is difficult to see why the trustees should be deprived of their right to claim retention or compensation. We are not deciding as to whether the lady herself may not have a good defence against this claim.

I may add that the case of *Munro* v. *Bothwell*, 16th September 1846, Arkley's Justiciary Reports 118, is in conflict with the other decisions, and cannot be looked on as an authority. That judgment, though by a judge of great eminence, was given on circuit, where there is naturally less time for deliberation than in cases determined by a Division of the Court. In view of other decisions, I think that that case is not law.

Lords M'Laren, Kinnear and *Pearson* concurred.—30*th May* 1907.

Counsel for John Grieve's Trustees, Chree; Agents, E. A. & F. Hunter, W.S.—Counsel for James Grieve's Trustees, Macmillan; Agents, Menzies, Bruce-Low & Thomson, W.S.—Counsel for Mrs Grieve, Grainger Stewart; Agents, Morton, Smart, Macdonald & Prosser, W.S. A. M.

HOUSE OF LORDS.

(*The Lord Chancellor* (*Lord Loreburn*), *Lords Macnaghten, Ashbourne, James, Robertson, Atkinson and Collins.*)

43. Clippens Oil Company Limited *v.* Edinburgh and District Water Trustees.

I. Reparation — Wrongous Interdict — Interim Interdict — Assessment of Damages for Loss Incurred Owing to Wrongous Interdict.

II. Process — Appeal — House of Lords—Amount of Damages—Observed by The Lord Chancellor "This is Like the Common Case where a Jury are Asked to Assess Damages with No Fixed Rule and Few Ascertained Facts to Guide Them. In Such Cases Very Strong Ground must be Laid for Disturbing the Verdict. I Think Your Lordships Can Only Apply the Same Principle Here. I Have Not Been Satisfied that the Sum of £27,000 Does Not Fairly Represent the Damages."

(*Reported ante, Vol. XIII. pp.* 6 *and* 957; *and on other points pp.* 220 *and* 985.)

Appeal against a Decision of the First Division (*The Lord President* (*Lord Dunedin*), *Lords M'Laren and Kinnear*).

The Clippens Oil Co. Ltd. appealed against the interlocutor of the First Division awarding

£27,000 damages, and the Edinburgh and District Water Trustees lodged a cross appeal.

The argument turned on the question of liability and the amount of damages due. No argument was presented against the judgment of the Court of Seven Judges as to the date till which the interim interdict subsisted.

The House *dismissed* both appeals, with costs.

HOUSE OF LORDS.

Clippens Oil Co. Ltd. v. Edinburgh and District Water Trustees.

The Lord Chancellor.

The Lord Chancellor.—This case comes before your Lordships under conditions of exceptional difficulty. Both the Lord Ordinary and the First Division have found in favour of the pursuers. Nor is there any dispute in regard to liability. It is merely a question of damages. But the amount of damages, so far from admitting of precise calculation, depends upon a series of conjectures as to what would or might have happened in the way of working a shale mine if the defenders had not obtained a wrongous interdict to prevent or hinder its being worked. And the learned judges who heard this case in the Outer and the Inner House have not specifically found one way or another upon a variety of issues of fact, in regard to which a Court ought to be satisfied before it can assess damages with accuracy. No doubt these matters were duly weighed in the Courts below, but we have not their conclusions upon all of them, and this House can hardly review with any sense of confidence the great mass of detailed evidence without seeing and hearing the witnesses, and judging for itself of their trustworthiness.

In substance the story of the dispute is as follows. Defenders, as the water authority for the city of Edinburgh, own two water pipes which run over the surface of land beneath which are the pursuers' mines. If any subsidence should occur, these pipes would be injured, and the mines themselves might be flooded. Accordingly the pursuers wished the defenders to purchase under the Waterworks Clauses Acts a strip of the mines of forty yards in width on either side of the track upon which the water pipes ran. Defenders refused to purchase. Upon this the pursuers, thinking that this refusal entitled them, under the Waterworks Act, to work out their mines beneath the pipes, and remove the pillars which had been left from previous workings, notified their intention of so doing. This was in the year 1897.

Now it so happened that both parties were at that time under a misapprehension of their legal rights. In law (though the point was not finally determined until it came before this House in 1903) the defenders were entitled to common law support for one of their two pipes. Therefore the pursuers had no right to work their mines so as to let down the surface, and their view that they had such a right was wholly erroneous. On the other hand, the defenders, though ignorant of their true title to support, erroneously thought that the pursuers were precluded from working within a space of forty yards on either side of a line vertically beneath the track of their water pipes, because of their having already worked within that space before giving notices under the Waterworks Clauses Act. In this mistaken belief the defenders applied for and obtained, in March 1897, an interdict prohibiting pursuers from working their mines or removing shale within the said space of eighty yards. Now, if the interdict had merely prohibited working so as to let down the surface, it would have been quite proper, for one of the pipes was in fact entitled to support. But instead of doing that, the interdict went further, and forbade all removal of shale within the forbidden area. The reason of this blunder was that defenders misconceived their legal position; but the result of it is that they are liable in damages for whatever loss was sustained by pursuers in consequence of the interdict being in excess of what it ought to have been.

This interdict was granted in March 1897. In September 1897 the Lord Ordinary recalled it so far as the points now in issue were concerned. But the defenders appealed against this recal; and here, unfortunately, another error arose. It was held by the Lord Ordinary, erroneously, as is now admitted, that the interdict did not continue operative until the appeal was heard in the Inner House. In Scottish law this interdict did in fact check the pursuers' mining operations from March 1897 till February 1898, when it was finally recalled by the Inner House.

When pursuers first brought their action they thought that the interdict was wrong from beginning to end, and claimed that they had suffered damages to the extent of £137,000 by reason of being prevented from working the mines under the track of the pipes for a space of eighty yards in width. When they learned from the decision of this House in 1903 that the interdict was only in part wrong, they adapted their claim to the altered legal conditions and said that the interdict wrongously prohibited them from driving levels through the eighty yards strip so as to get at and work shale lying outside of that strip. The claim for damages remained, as before, £137,000. It is not disputed that the interdict did prohibit driving such levels, and was to that extent wrongous, for such levels might have been driven without letting down the surface. And the real controversy in this case is narrowed down to the question, What damages have pursuers suffered by reason of the interdict stopping them from driving such levels and getting at the shale beyond during the eleven months from March 1897 to February 1898?

I do not think any useful purpose would be served by a minute examination of the claim. It is based upon the theory that the pursuers had a prosperous future before them, and that they incurred ruin because of this interdict. I must say that the particulars of the claim seem

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The Lord Chancellor.

to me most unsatisfactory. And the foundation on which it rests is highly speculative. I find it very difficult to believe that this Company had any but the most remote prospects of success, and it seems at least doubtful whether it was to any considerable extent affected by so much of the interdict of March 1897 as was wrongous. There is a great deal to be said for the view that the Company would in no case have succeeded, and that the grievance of not being able to drive levels is a mere afterthought, conjured up to sustain a claim of damages when the original claim had broken down. But I do not feel myself at liberty to depart on such points from the opinion of the learned judge who saw and heard the witnesses. And though he does not in detail deal with the evidence which has awakened my misgivings, he does find that a wrong was done, and that substantial damage has ensued. Your Lordships, as it seems to me, are in this case practically bound to accept that conclusion.

In assessing the damages, Lord Pearson arrived at the figure £15,000, upon the footing, which is not now sustained, that the interdict was operative only till September of 1897. No materials are given that enable me to discover how this figure was arrived at. The First Division found that the interdict was operative till February 1898, and fixed the damages at £27,000. So far as can be surmised, for here again materials are wanting for a definite opinion, the First Division adopted Lord Pearson's basis, and merely gave an additional sum for the additional months during which the interdict continued in force. Where everything, or nearly everything, rests in conjecture, there is room for infinite diversity of view.

This is like the common case where a jury are asked to assess damages with no fixed rule and few ascertained facts to guide them. In such cases very strong ground must be laid for disturbing the verdict. I think your Lordships can only apply the same principle here. I have not been satisfied that the sum of £27,000 does not fairly represent the damages.

For these reasons I am of opinion that both the appeal and the cross appeal should be dismissed with costs.

I am requested by Lord Macnaghten, who is unable to be present, to say that he concurs.

Lord Ashbourne.—I agree with the Lord Chancellor. Yet, although the liability of the defendants is clear, the question, in my opinion, resolves itself into consideration of the amount of the damages to be awarded. The case is one of much difficulty, and it is far from easy to make anything like a precise calculation of the sum to be assessed as damages. The amount asked for by pursuers is the large sum of £137,000, and Lord Pearson has awarded the substantial sum of £15,000, which the First Division has increased to £27,000. We have no means of knowing how these figures were worked out, but once the First Division decided that the interdict continued until the final disposal of the case in February 1898, instead of terminating, as the Lord Ordinary thought, in September 1897, it was obvious that the damages must be largely increased. It is not easy to see why the Lord Ordinary fixed the sum of £15,000 as being the appropriate figure, or why the First Division considered £12,000 as being the proper increase. Possibly accepting the £15,000 fixed by Lord Pearson after seeing the witnesses, as being reasonably sufficient to satisfy the damage sustained during the period in which he considered the injunction was in operation, the First Division thought £12,000 would about represent the addition which should be made for the period between September 1897 and February 1898. There is great scope for speculation and uncertainty as to the figures, but I see no reason why the decision of the First Division should be dissented from. In my opinion the judgment of the Lord Chancellor is correct.

Lord James.—My Lords, I concur in the judgment of the Lord Chancellor.

Lord Robertson.—My Lords, I agree that the appeal should be dismissed.

Lord Collins.—It seems to me that the question on this appeal resolves itself into one of fact upon which we are invited to differ, not only with the judge of first instance, who heard and saw the witnesses, but also with the Lord President and the First Division judges, who elaborately reviewed his decision. It would be very difficult for this House, upon an examination of the materials before them, to differ upon a question of fact unless it were made to appear that some wrong principle of law had been brought to bear on the facts. And the appellants have accordingly sought to point out one or more misconceptions on the part of their Lordships in dealing with the facts.

Now, it seems to me impossible to contend that the interdict of the 16th March 1897 was not wrongous, in that it put too rigorous a restraint upon the working of their mine by the appellants. In fact, the defenders hardly contended the contrary before us, in view of the consensus of opinion below upon this point. But they urged one main contention with respect to it, viz., that by reason of the independent obligation on the Company to safeguard the Crawley pipe, the interdict placed no larger limitation upon their working than that which already bound them in respect of the Crawley pipe. This is a question of fact, and lies at the bottom of the appeal, since there could be no claim for damages in respect of interdiction from doing that which they were not free to do if there had been no interdict. I am of opinion that this

point has been completely and satisfactorily disposed of in the judgments of the Lord Ordinary and the Lord President, and that accordingly the pursuers sustained not merely nominal but substantial damages by reason of the interdict.

The next point urged by the respondents in their case was that the interdict must be taken to have ceased to be effective after the 18th September 1899, when the Lord Ordinary repelled the interdict as to the shale, leaving that as to the limestone perpetual; and this was the view taken by the Lord Ordinary himself. The point turns upon a nice question of Scottish practice, on which the opinion of the Seven Judges was taken, and is elaborately dealt with by the Lord President in the First Division, holding that the interdict continued effective until the final disposal of the case in February 1898. The respondents abandoned this point at the hearing.

The appellants, therefore, it seems to me, have established their right to claim substantial damages, treating the interdict as continuing in operation down to the latter date. But have they succeeded in showing that, having so far made good the position accorded them by the Court below, they are entitled to still further damages? They have not, as it seems to me, succeeded in pointing out any reasons which would justify us in interfering with the conclusions of fact arrived at below on questions of mining practice and business management, nor, indeed, have we the materials before us which would enable us to review these findings were we otherwise competent to do so. But they do take one point which they contend shows that a wrong measure of damages was applied, and that in consequence the amount awarded was improperly reduced. For this point they found mainly on a passage in Lord Dunedin's judgment: "The defenders are not to be prejudiced by the fact that the times were bad and that the Company was not rich. Accordingly a claim upon total loss is, I think, inadmissible." It was contended that this implied that the defenders were entitled to measure the damages on the footing that it was the duty of the Company to do all that was reasonably possible to mitigate the loss, and that if, through lack of funds, they were unable to incur the necessary expense of such remedial measures, the defenders ought not to suffer for it. If this were the true construction to put upon the passage cited, I think there would be force in the observation, for, in my opinion, the wrongdoer must take his victim *talem qualem*, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act. On the other hand, the victim being in fact a poor man is not entitled to claim damages in respect of lost opportunities which he could not have utilised unless he had been rich. A company whose financial position was such that it could not have availed itself of the opportunity of placing its goods in substantial quantities on a rising market cannot claim damages on the footing that it might have done so. If the pecuniary disability were traceable to the wrongdoer the case would, of course, be different. But I think the words in their context do not imply more than I have stated, and I think this is made clearer by comparing a passage in the judgment of the Lord Ordinary which was probably in Lord Dunedin's mind in the passage referred to. The passage in Lord Pearson's judgment is on page 885 of the record, where he says: "The evidence leaves in considerable doubt whether they would have been able, if all had gone on uninterruptedly, to take advantage of the rise in prices and to hold their own with other companies." This seems to me a perfectly legitimate consideration. They cannot claim to be placed in a better position by reason of the wrong than they would have been in had it never been committed.

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Lord Collins.

Another point in the judgment of Lord Dunedin is, I think, open to criticism, viz., that the pursuers might have reverted to the Broxburn seam, and cannot rely upon the contention that they were advised by their expert not to do so. I think the wrongdoer is not entitled to criticise the course honestly taken by the injured person on the advice of his experts, even though it should appear by the light of after events that another course might have saved loss. The loss he has to pay for is that which has actually followed under such circumstances upon his wrong. However, I feel that it is impossible, on the materials before us, to measure approximately what sum has been deducted in the calculation on this point from what otherwise might have been allowed, and I am not prepared to say that the sum awarded to the Company is not, on the whole, enough.

One other point ought to be noticed. The appellants pressed upon us the view that the Trustees had acted maliciously in procuring the interdict; that is to say, that their object had been, not so much to protect their pipes, as to force the appellants into bankruptcy. I agree with Lord Dunedin that there is evidence in support of this view, but I am at a loss to see what bearing it has on the actual facts of this case. It is not essential to the cause of action, which rests on the grant of the interdict on caution, and therefore I think it is not a case for exemplary or punitive, as distinguished from compensatory damages. Nor, as it seems to me, can it have any effect upon the measure of damages in the events that have happened. The defenders do not, as I understand them, dispute that if what Lord Dunedin described as "total loss," or what Mr Clyde called "bleeding to death," were legally traceable to the wrong done by the defenders, they would be

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liable to pay damages measured by that standard, and the introduction of malice could not possibly entitle them to more. In the result I agree with the conclusions of the First Division, and am of opinion that the appeal and the cross appeal must be dismissed.

Lord Collins.

The Lord Chancellor.—My noble and learned friend Lord Atkinson also desires me to say that he concurs in the opinion I have expressed. —11*th June* 1907.

Counsel for Appellants, Rufus Isaacs, K.C., Clyde, K.C., T. B. Morison, K.C.; Agents, Drummond & Reid, W.S., and John Kennedy, W.S., London.—Counsel for Respondents, Cripps, K.C., F. T. Cooper, K.C., J. R. N. Macphail; Agents, Millar, Robson & M'Lean, W.S., and A. & W. Beveridge, London.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Low.*)

44. Burgh-Smeaton *v.* Whitson and Others.

Marriage Contract—Antenuptial—Wife Infeft in Heritable Subjects, Conveyed same to M.-C. Trustees—No Express Destination of Fee—Wife Divorced for Adultery—Held Implied Destination of Fee to Issue in Certain Events, and Wife Not Entitled to Immediate Reconveyance of Subjects.

(*Reported ante, Vol. XIV. p.* 839.)

Reclaiming Note against an Interlocutor of Lord Johnston.

The facts of the case appear from the previous report. The pursuer (Mrs Burgh-Smeaton) *reclaimed*, and *argued*: In the marriage contract there was no express destination of the fee to the children, and no words from which a grant of fee could be inferred by implication. Accordingly, the radical right of fee remained in the truster, Mrs Burgh-Smeaton, and she was entitled to declarator to that effect and to reconveyance of the subjects (*Higginbotham's Trs.*, 1886, 13 R. 1016; *Scott's Trs.*, 1902, 10 S.L.T. 122; *Ralph*, 1879, 11 Ch. D. 873).

Argued for the Respondents: There was an implied grant of fee in the marriage contract in favour of the issue of the marriage in the event of their surviving their parents. Accordingly Mrs Burgh-Smeaton had not an unqualified right in the fee of the subjects, and was not entitled to have them reconveyed to her (*Douglas*, 1843, 6 D. 318; *Campbell*, 1852, 15 D. 173; *Dolphin's Trs.*, 1888, 15 R. 733; *Bate's Trs.*, 1906, 8 F. 861).

The Court *recalled* the interlocutor reclaimed against in so far as it assoilzied the defenders from the first conclusion of the action, and in lieu thereof *dismissed* the action in so far as the said first conclusion was concerned; and with this variation, *adhered* to the interlocutor reclaimed against.

Lord Low.—I agree substantially with the conclusion at which the Lord Ordinary has arrived, and the reasons upon which he proceeds.

It is not unimportant to remember that the instrument under construction is an antenuptial marriage contract which purports not only to regulate the rights of the parties in regard to their respective estates, but to make provision for the children of the marriage should there any be; and I do not think that anyone could read the contract without coming to the conclusion that the intention of the parties—that to which they had agreed—was that the children of the marriage should have a right to the estate, heritable and moveable, of the wife, at all events if they survived both their parents, or if they survived their mother and the second marriage of their father, which, so far as the right of the children was concerned, was made equivalent to his death. Unfortunately, however, the conveyancer who prepared the contract omitted to insert any express gift of the wife's estate to the children, and the question is whether the implication from the language actually used is sufficiently plain to supply the place of, and be equivalent to, an express gift, to the extent, at least, of disentitling the pursuer to have it declared now that she has the sole right and beneficial interest in the fee of the estate of Coul, and is entitled to dispose thereof?

I am of opinion that that question falls to be answered in the affirmative, and I shall shortly state the reasons which have led me to that conclusion.

The third and fourth purposes of the trusts upon which the wife conveyed her estate to trustees provided for the case of the dissolution of the marriage by the death of the husband. The third purpose provided that upon that event, "if there be issue of the marriage or children of predeceasing issue alive," the trustees should continue to hold the estate and pay the income to the wife during her lifetime, "or until the failure of the issue of the marriage, should they all predecease her"; and by the fourth purpose it was provided that in the same event (the predecease of the husband) the trustees should, "if there be no issue of the marriage, or on the failure of such issue by predeceasing the wife, re-convey the whole heritable estate" to the wife and a certain series of heirs, and hand over to her the moveable estate.

Now the contracting parties must have had some purpose in view in agreeing that the extent and character of the right of the wife to her own

estate after the death of her husband should depend on whether there were or were not surviving children of the marriage. They agreed that if and so long as such children existed the wife should have only a liferent of her estate; and they agreed that in the event, and only in the event, of there being no issue, or of the issue failing during the wife's lifetime, the trustees should be directed to re-convey the estate to the wife. It seems to me that the Lord Ordinary is right in saying that there was no conceivable object in so limiting the rights of the wife unless the parties intended and had agreed that if the wife was survived by issue her estate should pass to them at her death.

These are the trust purposes in the event of the predecease of the husband, and those applicable to the event of the predecease of the wife are to the following effect:—If issue of the marriage survives the wife, the husband is to have a liferent of the whole estate, under burden of the maintenance and education of such issue, until such issue shall fail or until he marries again; if there is no issue, or if the issue fails during the husband's life, his right is restricted to an annuity of £200, and the trustees are directed to hand over the moveable estate to the wife's heirs *in mobilibus*, exclusive of any right on the husband's part, and to convey the heritable estate, under burden of the husband's annuity, to such persons as the wife may direct by settlement or other writing; and failing such direction, to the person entitled to succeed under the destination in a certain disposition; finally, in the event of the husband marrying again his right to the annuity is to cease, and in that event, or in the event of his death, the trustees are directed to hand over the moveable estate to the wife's heirs *in mobilibus*, exclusive of the husband's rights, and "failing issue of the marriage or children of predeceasing issue," to convey the heritable estate as directed in the event of failure of issue.

The most important of these purposes is the last, which provides for the disposal of the wife's estate upon the second marriage or death of the husband survived by children. In either of these events the moveable estate is to be handed over to the wife's heirs *in mobilibus*; and, of course, children who had survived her, and who also survived the husband, would be among the heirs *in mobilibus* of the former. Whether, however, they would be entitled to the whole moveable estate might depend upon whether other children had predeceased leaving issue, and upon the question whether the expression "heirs *in mobilibus*," as used in the contract, means the persons answering to that description at the wife's death or at the husband's death or second marriage.

In regard to the heritable estate the nominee of the wife, or the heir under the destination referred to, is only given right "failing issue of the marriage, or children of predeceasing issue," and would therefore not be entitled to a conveyance of the estate if issue existed at the death or second marriage of the husband. Here, again, I can imagine no reason for making the right of the wife's nominee, or of the heir under the old destination, depend upon whether or not there were surviving children of the marriage, unless it was that the parties intended, and had agreed, that if there were surviving children they should have right to the estate. What precisely are the nature of the rights may be a question; but the implication from the whole trust purposes read together, that surviving children should have a right to the heritable estate which would be preferable to that of the wife's nominee or the heir under the destination, seems to me to be sufficiently plain to make it impossible to give the pursuer the declarator which she seeks. I am inclined to think, however, that it would be premature to do more than to hold that in existing circumstances the pursuer is not entitled to decree, because a change of circumstances—as, for example, the predecease of all the children without issue—might entirely alter her position and rights. It therefore seems to me that instead of assoilzieing from the first conclusion of the summons, it would be safer simply to dismiss it. I think, however, that the Lord Ordinary was right to assoilzie from the first alternative of the second conclusion and from the third conclusion, because under them it is sought to have the judicial factor ordained "forthwith" to denude of the estate in the pursuer's favour.

Lord Stormonth-Darling.—I entirely agree with Lord Low and in substance with the Lord Ordinary. I only desire to add two things. First, it is a peculiarity of this case that the pursuer, Mrs Burgh-Smeaton, seeks, by her first conclusion, to have it declared that she has the sole right of fee in the estate of Coul (which she conveyed to her marriage-contract trustees for the purposes therein set forth) at a time when not only her husband survives and has not married again, but her three children survive, and when the only thing that has occurred to dissolve the marriage has been her divorce for adultery. I agree with the Lord Ordinary that this kind of dissolution of the marriage is not equivalent to its dissolution by the death of the offending spouse, and, in particular, that the rights of third parties and, *inter alios*, of the issue of the marriage, are not affected thereby. It is true that the pursuer does not now ask for declarator of her right to sell and dispose of her beneficial interest in the fee. But the whole conception of the first conclusion being, at all events, premature, I agree that the best way to deal with it is to dismiss it, and to assoilzie from the first alternative of the second conclusion and from the third conclusion, both of which ask that the judicial factor should "forthwith"

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denude of the heritage. The second thing which I would add is that in my view the cases cited are all too special to have any application.

The Lord Justice-Clerk.

The Lord Justice-Clerk.—I concur with your Lordships. I am satisfied that the conveyance by the wife tied up the estate while issue should be alive, and that, given children alive, she could only enjoy a liferent, and I agree with the Lord Ordinary that the purpose evidently was to secure the fee to the children, should they or any of them survive the spouses, or should predeceasing children leave descendants. This, I agree with Lord Low, applied to both classes of estate.

I also agree that the judgment should not go beyond what has been proposed by Lord Low at this stage in the history of this trust.

The result will be to recal the Lord Ordinary's interlocutor, and to substitute dismissal for absolvitor, and, *quoad ultra*, to adhere.—*6th June* 1907.

Counsel for the Reclaimer, Cooper, K.C., A. A. Fraser; Agents, Cockburn & Meikle, W.S.—Counsel for the Respondents Whitson and Others, Clyde, K.C., W. Thomson; Agents, Drummond & Reid, W.S.—Counsel for the Respondents T. W. Burgh-Smeaton and Others, Clyde, K.C., Hon. W. Watson; Agents, Hope, Todd & Kirk, W.S.

J. H. H.

OUTER HOUSE.

(*Lord Johnston.*)

45. Buckle and Another *v.* Kirk (Buckle's Curator) and Others.

I. Succession—Destination—Stock Bought with Mother's Money Registered in Joint Names of Mother and Son—Inscribed Stock of British Colony—No Evidence that Intended as Testamentary Destination — Intention — Universal Settlement by Mother Overruling any Special Destination which Might Exist — Connell's Trustees, 1886, 13 R. 1175, Commented On.

II. Evidence — Witness — Admissibility — Lunatic—Capacity to Give Evidence—Circumstances in which Held that Lunatic who Suffered, not Merely from Specific Delusion, but Whose Intellect was Also Impaired, Could Not be Examined as Witness when Questions not on Simple Matters of Fact but on Communications Involving Resulting Legal Deductions.

III. Parent and Child—Legitim—Legitim Out of Mother's Estate—Father Died 1863—Clause in Father's Settlement Discharging Right to Legitim upon Death of Father or Mother—Mother Died 1905—Circumstances in which Held that this Did Not Discharge Son's Right to Legitim Out of Mother's Estate — Supervening Legislation—Married Women's Property Act 1881 (44 & 45 Vict. cap. 21), sect. 7.

IV. Expenses — Expenses Occasioned by Mental Incapacity of Party to be Borne by His Estate.

The facts of this case and the contentions of parties sufficiently appear from the Lord Ordinary's Note.

The Lord Ordinary *held* (1) that the inscribed stock registered in joint names of Mrs Buckle and her son truly belonged to the former, and was carried by her universal settlement; (2) that Cuthbert Buckle, the son, was entitled to *legitim* out of his mother's estate. He further *held*, upon a motion to adjourn the proof to take the evidence of Cuthbert Buckle, who had been for eleven years in an asylum, that upon medical evidence as to his state of mind, which showed that in addition to specific delusion he suffered also from impaired intellect, he was unsuitable as a witness upon questions involving legal deductions. In the whole circumstances he *held* that Cuthbert Buckle's estate must bear the whole expenses occasioned by his mental incapacity, and that Mrs Buckle's trustees having acted unreasonably as regards the giving of information to the pursuers, should bear the expense occasioned by their appearance as defenders.

Lord Johnstone.—The late John Buckle and Mrs Dorothea Blackwell or Buckle were married in 1834. They entered into an antenuptial marriage contract, whereby Mr Buckle made certain provisions for his wife and children, and which contained a clause declaring the provisions for Miss Blackwell to be in full of all claims competent to her or her next of kin according as she survived or predeceased Mr Buckle; and the provisions in favour of children "to be in full satisfaction to him, her, or them, of all bairns' part of gear, legitim, portion natural, executry, and everything else they can claim through the decease of the said John Buckle their father, leaving any further provision to his good will alone."

The settlement was silent as regards any estate of Miss Blackwell.

In 1844 Mr Buckle executed his trust disposition and settlement. As Mr Buckle was twice married, Miss Blackwell being his second wife, and had families by both marriages, his settlement was somewhat complicated. But shortly put, it provided for the children of the first marriage, by apportioning among them a certain settled fund, and for his second wife and family, by conveying his general estate, so far as it did not fall under that settlement, to trustees for his second wife Mrs Dorothea Blackwell or

Buckle in liferent, and his children by his marriage with her in fee. And there followed this clause: "Which provisions in favour of my said spouse I hereby declare to be in full satisfaction to her of all terce of lands half or third of moveables and every other claim which she has *jure relictæ* or otherwise could have in consequence of my predeceasing her, or which her nearest in kin might have against me if I should happen to survive her: And which provisions in favour of my said children shall be in full satisfaction to them of all legitim, executry and every other thing which they might claim in consequence of the decease either of me or my said spouse."

I quote this clause in full, because one of the main questions in the case depends upon its effect.

Mr Buckle died in 1863, leaving Mrs Dorothea Blackwell or Buckle and several children surviving him. Mrs Buckle survived till 25th October 1905. She was predeceased by all her children except one, Cuthbert Buckle, who at the time of her death was an inmate of Mavisbank Lunatic Asylum. Mr Cuthbert Buckle's history was this: Delicate in youth, he had gone to Australia in early life, had made some little money there in sheep-farming, and had returned to this country about twenty years before his mother's death. Having a reasonable competency, he took up his abode with his mother at 12 Duncan Street, Edinburgh, where he lived without further occupation till 1895. He then manifested symptoms of mental aberration, which required that he should be confined to an asylum, towards the end of that year, and he has continued an inmate of Mavisbank accordingly. He is now over seventy years of age. At the time of his confinement Mr Cuthbert Buckle had estate of his own amounting to about £9000, which had increased to about £10,000 before his mother's death. By her death he came in for about £7000 more, which had been held in settlement, under his father and his mother's marriage contract and his father's will, during her life. He was maintained in the asylum from the income of his own funds, Mr William John Kirk, W.S., having been since 1901 his *curator bonis*.

Mrs Buckle, who as above mentioned survived till 1905, executed a trust disposition and settlement on 4th September 1902, by which she conveyed to trustees "my whole estate both heritable and moveable, real and personal, of whatever description and wherever situated, belonging to me or which shall belong to me at the time of my death, or over which I have now or may at the time of my death have the power of disposal."

The trust purposes were payment of a number of small legacies, personal and charitable, and division of the residue equally between Miss Bella Buckle, Wimbledon, and Evelyn Buckle or Greenfield, London, described as "grandnieces of my late husband"; but really I believe granddaughters by his first marriage, and therefore step-grandchildren of Mrs Buckle. No mention was made of her son Cuthbert Buckle.

The pursuers of the action are the residuary legatees Miss Buckle and Mrs Greenfield, and the defenders are Mr Cuthbert Buckle's *curator bonis* and the testamentary trustees of Mrs Buckle.

The first question which arises has reference to an item of £900 Cape of Good Hope 4 per cent. Consolidated Inscribed Stock, which stood at Mrs Buckle's death registered in the joint names of Mrs Buckle and her son Mr Cuthbert Buckle in the books of the London and Westminster Bank, Ltd., Lothbury, London, as agents for the Colony. It is claimed by the pursuers as being truly part of Mrs Buckle's estate, notwithstanding the terms of the registration, and it is claimed by the defender Mr Kirk, as Mr Cuthbert Buckle's *curator*, as belonging to Mr Cuthbert Buckle on his survivance of his mother by virtue of the destination involved or implied in the registration, to the extent of one-half, if the terms of the registered title are to be interpreted by Scots law, and of the whole, if by English law.

The circumstances of the investment, so far as they can now be ascertained, are these. Mrs Buckle had in 1894 a sum of rather over £1000, the produce, it is believed, of her savings, to invest. Her son Mr Cuthbert Buckle was in London in June 1894, on a visit to Mr Greenfield and his wife, who is one of the residuary legatees and pursuers. Mr Greenfield is a stockbroker in London. One evening after dinner Mr Buckle mentioned that his mother had this money to invest, and some conversation ensued regarding the class of investment to be selected, in course of which Mr Greenfield suggested the registration of the stock to be purchased in the joint names of Mrs Buckle and her son. Mr Greenfield says that he naturally concluded that Mr Cuthbert Buckle, as his mother's only surviving child, would succeed to her means, and that he made this suggestion with a view to saving trouble and expense at her death, which he assumed in all human probability would occur before that of her son. Mr Buckle undertook to write him when he got home. This he did on 26th June 1894, and a short correspondence passed, ending on 7th July. Mr Buckle's letters are extant, those of Mr Greenfield or his firm are not, and their letter books have been destroyed. The result of this correspondence was the purchase of £900 of the Cape of Good Hope Inscribed Stock for £1020, its payment entirely out of Mrs Buckle's monies, and its registration in the books of the London and Westminster Bank as agents for the Colony, in the joint names of Mrs Buckle and her son Mr Cuthbert Buckle. Mr Greenfield had no communication with Mrs Buckle. She wrote nothing with reference

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to the matter. The only thing under her hand is the signature, along with her son, of a mandate to the London and Westminster Bank to pay the dividends on the stock to the Bank of Scotland, to whom instructions to credit them to Mrs Buckle's account must have been given, as they were so credited from the date of the investment onwards. From this mandate it must be taken that Mrs Buckle knew that the investment stood in the joint names of herself and her son. But of what explanations were given to her by her son there is no proof whatever. At the close of the rest of the evidence for the *curator bonis*, I was asked to adjourn the proof that Mr Cuthbert Buckle might be examined. I heard Dr Joseph Bell, who had known him throughout the whole period of his malady and longer, Dr Batty Tuke, who had had him under his charge for about a year, and Dr Clouston, who had seen him recently, and the conclusion that I came to was that Mr Cuthbert Buckle was not in a condition to justify his being examined as a witness in the cause, in respect that it appears that he now suffers not merely from a specific delusion, but from general impairment of intellect, and because it now very clearly appears that Mr Buckle's evidence is wanted, not on simple matters of fact, but on communications involving resulting legal deductions, and could not be taken without a close cross-examination. Accordingly I refused the motion to examine Mr Buckle, and the case must be decided on such information as it has been possible to adduce without him.

All that is clearly known is that the investment in question was made with Mrs Buckle's money, that it was in her knowledge made in the joint names of herself and her son, and that she drew the income of it during her life.

It is also known that the suggestion to put the investment in joint names did not emanate from Mrs Buckle herself. But emanating as it did from Mr Greenfield, and having been made on a definite hypothesis that Mr Cuthbert Buckle would in natural course be his mother's heir, and with the definite object of saving, as was thought, trouble and expense at his mother's death, it is not known how far Mr Cuthbert Buckle, or even Mr Greenfield, knew the legal result of such registration in joint names, and still less how far this was explained to Mrs Buckle.

The only other surrounding circumstances which it is necessary to note are that Mr Buckle was, compared with his mother, comfortably off at the date when the investment was made, and would, independently of her, receive at her death a considerable accession to his fortune, and that within a year of the transaction he had become an inmate of Mavisbank Lunatic Asylum, where he continued till his mother's death ten years after.

It was maintained by the *curator* that the case was concluded by the authority of *Connell's Trs.*, 1886, 13 R. 1175. But while I must consider that authority, its application is not so easy or simple as may at first sight appear. There is no doubt that what I may call a destination has, on the analogy of feudal conveyancing, received effect in the case of a proper personal bond, as, for instance, a bond of the Dundee Harbour Trust, *Walker's Trs.*, 1878, 5 R. 965, and that the same principle was extended to the indefinite sort of obligation undertaken in connection with, for instance, the Greenock Harbour Funded Debt, and also to shares in railway companies and in registered joint stock companies in the case of *Connell's Trs.*, *supra*. But it would be a still further step to extend the principle to stock the sole title to which is the registration in the books of the agents of a Colonial Government. For in cases of these inscribed stocks no certificate is issued, at any rate by the London and Westminster Bank. As, however, the true title in the case of stocks of a company is not the stock certificate, but the company's register, I think that it would be difficult on this score alone to draw a distinction between *Connell's Trs.* case and the present. There is, however, another, and a serious, difficulty experienced in applying the authorities to the case in question, viz., that in the case of an inscribed stock it is impossible to conceive of any equivalent for delivery to the destinee of the writ of title as his own proper writ.

As I understand the decision in *Connell's Trs.* case, a personal bond, registration of shares and the accompanying certificate, and *a fortiori* inscription of stock without a certificate, cannot be regarded as documents of a testamentary nature, for one reason, at least conclusive, that a testament must bear the signature of the testator. Yet judge after judge in the various decisions on the subject speaks of them as having "testamentary" effect. In truth I think that they must be regarded as capable of being one of two things, as regards the person in the destination from whom the fund is not derived, viz., either first a mandate or trust for the purpose of convenient administration; or, second, a title capable from its nature of giving an ultimate beneficial right, but requiring something of the nature of delivery to give it that effect, remaining therefore under the control of the person who takes the title by way of such destination, until the delivery or equivalent of delivery is complete. It is clear, therefore, that the terms of the destination or title are not in themselves conclusive—that the rights therefrom arising are a question of circumstances varying in each case, and that there may be cases in which the mere death of the person who has taken the destination and retained the control, leaving the destination standing, is a sufficient equivalent of delivery to raise the inchoate right of the destinee into an absolute right. I accept what is said by Lord M'Laren,

with the concurrence of Lord Kinnear, in the case of *Paterson's Factor*, 1899, 24 R. 499, both as to whether such destinations ought to have received this effect, and as to the question being foreclosed to me.

But if I have read the decision in *Connell's Trs.* aright, the first question is, *quo animo* the destination was taken, and indeed the question of intention is the first thing to which Lord Adam applies himself in the leading opinion in that case. Now here the only evidence available leads to the conclusion that the destination was taken for the purpose of convenient administration, in the event of the natural supposition that Mr Cuthbert Buckle would be his mother's heir should be fulfilled. It may be that more was intended, but this is not known, and I do not think that there is enough from which safely to infer it. The nature of the investment differs from that of the deposit of money in a bank in joint names, and yet the circumstances of the investment really bring it into the category which is *prima facie* implied in such deposit.

At the same time the nature of the investment and title made it possible that what began as a mandate or trust might be developed into a beneficial destination. But be it so, the circumstances of the present case make it exceptionally necessary to find satisfactory evidence of the equivalent of delivery as the destinee's proper deed, and the abandonment of control by the party taking the destination in joint names. Every circumstance in addition to the peculiar form of the title is against this. From the day the mandate to pay interest was executed Mr Cuthbert Buckle had nothing to do with the stock. Within a year he was confined as a lunatic, and continued so during the eleven years that his mother survived the investment. Moreover, there was no call on his mother to do anything for his support, as he had ample means in possession and more in prospect.

Hence, apart from the consideration of her will, I should have concluded that there was nothing in this case to justify my giving to the inscription in joint names of this stock the effect of a *mortis causa* disposition, either in whole or in part, to the surviving son unrevoked at the mother's death.

But when I come to regard the settlement of Mrs Buckle, the circumstances in which it was made, and its universality, covering as it does everything over which she had power of disposal, I am satisfied that any apparent right which Mr Cuthbert Buckle might have had, had his mother died intestate, was abrogated. I am therefore relieved of the question whether the alleged destination is to be construed by Scottish or English law. But it is one of two considerations creating extreme difficulty in sustaining the curator's contention that the result of the alleged destination might depend upon whether it is to be construed by Scots or English law.

There remains the question whether Mr Cuthbert Buckle is entitled to *legitim* out of his mother's estate. It is admitted that this would now be so under the Act of 1881 but for the clause above quoted in the settlement of his father. I do not, however, think that this clause deprives him of his right. The case bears to be distinguished from that of *Dunbar Dunbar*, 1905, 7 F. (H.L.) 92. There the clause of satisfaction occurred in a marriage contract. The mother being possessed of means made provision for children, which she declared to be in full satisfaction of all bairns' part of gear, executry, and everything else to which they could succeed by or through her decease on any ground whatever. The marriage was in 1848, when children had no rights of *legitim* in their mother's estate, though they had a right to a share of the goods in communion on her predeceasing their father. The Court, however, held the clause wide enough to cover rights in their mother's estate emerging through legislation supervening before the dissolution of the marriage and Mrs Dunbar's death. But the present clause occurs, not in a contract, not in the mother's settlement, but in the father's settlement, who wrote in 1844 and died in 1863, eighteen years before the passing of the 1881 Act.

I think, first, that Mr Buckle's clause, when read in connection with its context, is intended to apply to any claims against him and his estate which should arise at or prior to his own death.

Second, that even if it could be extended further it must be read as applying to things as they stood fixed at the date of his death, and cannot be read to cover claims which could not have had any existence at the date of his death, and only emerged forty-two years after his death, owing to legislation supervening eighteen years after his death. But

Third, that no *jus quæsitum* is conferred on Mrs Buckle's representatives by the clause. If it had the intention, it has not the effect, of putting Mr Cuthbert Buckle to his election between provisions under his father's settlement and *legitim* out of his mother's estate. The case is the obverse of *Kerr* v. *Thomson's Trs.*, 1865, 4 Macph. 179.

I shall therefore grant decree in terms of the first alternative of the first conclusion of the Summons, and assoilzie the defenders from the second declaratory conclusion of the Summons.

I have considered the contentions of the parties on the subject of expenses. I think that Mr Cuthbert Buckle's estate must bear the expenses occasioned by the misfortune of his mental condition, and in these I include not merely the costs incurred in determining whether he was in a fit state to be examined as a witness, but the costs of the proof generally. *Quoad ultra*, as in a case of divided success, I think that the *curator* and the residuary legatees of Mrs Buckle should each bear their own expenses.

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There is a separate question as to the costs of Mrs Buckle's trustees. I have read a considerable portion of the correspondence which preceded the action, and I think that the attitude of the trustees throughout has not been reasonable, and has compelled the residuary legatees to take the action which they ultimately did. It was, I think, most unfortunate that the trustees were in this matter advised and represented by a firm of which Mr Buckle's *curator* was a partner, though he appears in these judicial proceedings by a separate agent. I think, therefore, that these trustees should be made liable to the pursuers in any expenses incurred by their appearance, and should not be allowed to charge their own expenses against the estate, in the residue of which the pursuers are alone interested.—5*th June* 1907.

Counsel for Pursuers, M'Lennan, K.C., Lippe; Agents, J. Millar Thomson & Co., W.S.—Counsel for W. J. Kirk (Cuthbert Buckle's Curator Bonis), *C. S. Dickson, K.C., Hon. William Watson; Agents, Purves & Simpson, W.S.—Counsel for Mrs Buckle's Trustees, Spens; Agents, Hope, Todd & Kirk, W.S.* R. S. B.

FIRST DIVISION.

(*Lords M'Laren, Kinnear and Pearson.*)

46. Goldberg *v.* Glasgow and South-Western Railway Company.

Reparation — Negligence — Railway—Invitation to Alight—Train Stopping at Station and Moving On Again—Injury to Passenger Preparing to Leave the Train.

Reclaiming Note against an Interlocutor of Lord Dundas.

In this action, the pursuer, Hyman Goldberg, sued the Glasgow and South-Western Railway Company for damages for personal injuries which he alleged he had sustained while a passenger in one of their trains. The averments on which the claim was based were as follows:—

Cond. 2. . . . . The pursuer . . . . went from Yarmouth to London and travelled from there to Glasgow by the express from St Prancas, due to arrive in Glasgow on the morning of 7th of November 1906.

Cond. 3. The pursuer travelled in a third-class compartment, with his back to the engine, and he had a travelling bag in the rack overhead. When the said train came into St Enoch Station at the arrival platform, it stopped, and the pursuer and another traveller, who was in the same compartment, rose from their seats to leave the train. While the pursuer was in the act of taking down his said travelling bag from the rack, the train, without any warning having been given, gave a sudden and violent jerk. In consequence of this unexpected and violent movement of the train, the said travelling bag fell from pursuer's hand on the seat, and the pursuer was thrown down on the floor of the compartment, sustaining the injuries after mentioned.

Cond. 4. The pursuer was rendered unconscious by said fall, and was taken home. A doctor was called in, and on his advice the pursuer was removed to the Royal Infirmary, Glasgow, when it was found that his right leg was broken at the thigh. . . . He is still unable to attend to business, and in consequence of this inability, which is owing to said accident, he has sustained serious business losses. . . .

Cond. 5. The pursuer's said injuries were caused by the fault of the defenders, or of their servants in charge of said train, for whom defenders are responsible. The driver of the engine attached to said train was in fault in starting it or otherwise causing it to move suddenly and unexpectedly, and without any warning having been given, after the train had come to a stop at the arrival platform, and thereby causing the carriages to jerk violently at the moment when the passengers were in the act of leaving or were preparing to leave the said carriages. In consequence of this culpable and negligent act the pursuer was injured as before mentioned.

The Pursuer pleaded—

"The pursuer having been injured through the fault of the defenders, or of those for whom they are responsible, is entitled to reparation."

The Defenders pleaded—

"The pursuer's averments being irrelevant and insufficient to support the conclusion of the Summons, the action should be dismissed."

The Lord Ordinary *approved* an issue for the trial of the cause.

The defenders *reclaimed.*

The Court *recalled* the Lord Ordinary's interlocutor, and *dismissed* the action, with expenses.

Lord M'Laren.—This is a claim by a passenger in a train of the defendant Company for injuries said to be sustained while he was travelling in one of the Company's carriages. The circumstances under which the injury was sustained are thus set forth. [His lordship read Cond. 3 as quoted above.] It is then stated that the pursuer was rendered unconscious by his fall, and that on being removed to the Glasgow Royal Infirmary it was found that the pursuer's leg was broken. The averment of fault is thus stated. [His lordship read Cond. 5 as quoted above.]

Now it is matter of common and familiar experience that if a railway traveller rises from his seat when the train stops at a station, whether for the purpose of changing his seat or for getting hold of any of the small articles which he is allowed to take into the carriage with him, he is liable to be incommoded by the unexpected starting of the train, or it may be by a movement of the train for some other purpose, such as the shifting of the place of the train in the station, the detachment of a carriage, or the putting on of additional carriages. Fortunately for the travelling public, these unexpected movements do not in general result in injury to any

one. They may be said to be ordinary incidents of railway travelling, and I suppose that people who rise from their seats are to some extent on their guard against a sudden starting of the train by which the passenger might be thrown off his balance.

I have not been able to find anything in the pursuer's narrative which distinguishes the occurrence he describes from the ordinary case of a traveller who is jostled or shaken by the starting of the train, except the serious nature of the consequent injury which he sets forth. It is not said that there was an invitation to alight, and on the pursuer's statement he was not in the act of alighting; he had only risen from his seat in order to take his travelling-bag from the rack, as he might have done at any other place in the course of the journey.

In the ordinary case of an accident resulting from a supposed invitation to alight, the passenger is led to believe that the train has come to rest; and if it is started when he is in the act of alighting, he is liable to be thrown down and injured by the relative movement of train and platform for which he is not prepared. But a prudent passenger is supposed to be able to take care of himself when within the carriage in which he is travelling, and if he is unable to do so, I can see no other solution of the difficulty except that he may stay at home, because if a train is stopped whether in transit or at the arrival terminus it must sometimes be necessary that it should be started again, and then all the passengers are more or less exposed to be jostled or shaken by the start and the reaction of the carriages against the springs by which they are coupled together.

In these circumstances I have looked carefully into the pursuer's averment of fault to discover, if possible, what is the wrong of which he complains. But the only fault alleged is that the engine-driver was in fault in starting the train without any warning having been given after the train had come to a stop at the arrival platform. I do not think that the action of the engine-driver thus described was necessarily, or even probably, faulty. It is quite consistent with the pursuer's statement that the train had stopped short of the place where it was intended that passengers should alight, and that a further movement of the train was necessary to bring it to its proper position alongside of the platform. The pursuer's statement does not negative that supposition, and therefore it is quite consistent with the case as stated, that the engine-driver in starting the train was only performing his accustomed duty of bringing the train up to its place of discharge.

It is, no doubt, a very great misfortune to the pursuer that he should sustain this serious injury, but I cannot find in the record any averments of fact leading to the conclusion that the railway company had failed in its obligation to use reasonable care and skill in carrying the pursuer to his destination.

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Lord Kinnear.—I am of the same opinion. I am reluctant to criticise a record which has been made up in the Sheriff Court, or even in this Court, in actions of this kind too rigorously, if the averments disclose a substantial ground of action although the averments may not be very skilfully framed. But there is nothing to suggest that the deficiencies of the present record are due to any want of skill on the part of the framer, or to anything but the unsubstantial character of the case itself. The averment of what actually happened seems to me to come to nothing more than this—that the train stopped and went on again. There is no averment that anything was said or done by officers of the Company to induce the pursuer to believe that he was in safety to alight, or that he did, in fact, believe it. All that is said is that when the train stopped the pursuer stood up to take his bag off the rack. There is nothing in that to shew that he had any reason to suppose that the train had come to a final stoppage, or that he had even adverted to the contingency of its being set in motion. He may, or may not, have been prudent in this action, but for all that appears from his statement the moving of the train may have been perfectly right, and may also have been just such an event as a prudent passenger taking care for his own safety would have anticipated. I therefore agree that there is no issuable matter in this record.

Lord Pearson.—I think it important to keep in view that there is no question here as to the stoppage of a train at a platform, regarded as an invitation to alight. The case has to do with a passenger still within his compartment, and engaged in taking down his hand-luggage from the rack. It is said that he was justified in assuming without anything more, that when the train stopped it had stopped finally. I observe that there is no specific averment as to duty on the part of the driver; but the averment of fault on the part of the defenders is that the driver was culpably negligent in starting the train suddenly and unexpectedly after it had stopped at the terminal platform. I cannot hold that in the circumstances averred that is a sufficient averment of fault to infer liability against the defenders.—13*th June* 1907.

Counsel for Pursuer, Orr, K.C., A. M. Anderson; Agent, C. Strang Watson, Solicitor.—Counsel for Defenders, Dean of Faculty (Campbell, K.C.), Macmillan; Agents, John C. Brodie & Sons, W.S. F. A. U.

1ST DIV.

Thompson v. Western Steamship Co. Ltd.

FIRST DIVISION.

(Exchequer Cause.)

(*Lords M'Laren, Kinnear and Pearson.*)

47. Thompson *v.* Western Steamship Company Limited.

REVENUE — INCOME TAX — DEDUCTIONS—STEAMSHIP COMPANY — LOSS OF SHIP— SHIP PARTLY INSURED—BALANCE OF LOSS RECOUPED FROM COMPANY'S INSURANCE FUND—PAYMENTS TO INSURANCE FUND NOT DEDUCTIBLE—LOSS OF CAPITAL—BALANCE OF LOSS HELD NOT DEDUCTIBLE IN MAKING RETURN—INCOME TAX ACT 1842 (5 & 6 VICT. CAP. 35), SECT. 100, SCHEDULE D, FIRST CASE, RULES 1, 3, SECT. 159.

Case.

This was a case under the Taxes Management Act 1880, between the Surveyor of Taxes, Glasgow, and the Western Steamship Co. Ltd., on appeal from the Commissioners, who had allowed a deduction of £2465, 4s. 1d. claimed by the Company.

The case stated :—

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts, and for executing the Acts relating to the Inhabited House Duties for the City of Glasgow, held at Glasgow on the 30th day of October 1905 :

The Western Steamship Company, Limited (hereinafter referred to as "the Company"), appealed, under the 133rd section of the Act 5 and 6 Vict. c. 35, as amended by the 6th section of the Act 28 and 29 Vict. c. 30, against an assessment for the year ended 5th April 1905 on the sum of £13,637 (duty £681, 17s.), made upon it under Schedule D of the Income Tax Acts, in respect of the profits of the business carried on by it, after allowing a deduction of £1860 for the wear and tear of machinery and plant, and craved to have it restricted to £8400, and having paid a sum of £461, 2s. to account of the duty, claimed repayment of £41, 2s.

The assessment was made under the Acts 5 and 6 Vict. c. 35, s. 100, Schedule D, First Case ; 16 and 17 Vict. c. 34, s. 2, Schedule D ; 28 and 29 Vict. c. 30, s. 6 ; and 4 Edw. 7, c. 7, s. 7.

The following facts were admitted or proved :—

1. The Company was incorporated on 28th January 1898 under the Companies Acts, as a company limited by shares, and its registered office is situated at No. 24 Saint Vincent Place, Glasgow. The capital of the Company is £100,000, divided into 20,000 shares of £5 each.

2. The objects of the Company, as set forth in the third article of its memorandum of association, are, *inter alia*, as follows :—

"(*a*) To carry on the business of shipowners in all its branches."

. . . . . .

"(*c*) To purchase, charter, hire, or otherwise acquire, build, equip, and maintain steam or other ships, and other vessels of every description, or shares in the same ; and to work, let out to hire, or otherwise employ, sell, exchange, dispose of, or deal with the same."

. . . . . .

"(*f*) To insure, if the Company see fit, and for such sums as it deems proper, the ships, vessels, freights, goods, and property of the Company, or in which the Company is interested with other companies or persons, or by joining any association for mutual insurance, or otherwise."

3. The Company's articles of association provide, *inter alia*,—

"54. The managers shall carry on the business of the Company, and shall have and may exercise all such powers, and do all such acts and things as are not hereby, or by statute, expressly directed or required to be exercised or done by the Company in general meeting."

. . . . . .

"56. The Company shall, at the first statutory meeting, and at every annual meeting thereafter, appoint a committee of three members of the Company with whom the managers shall consult regarding the purchase and sale of steamers, the financing of the Company, the stating of accounts for general meeting after same have been examined by auditors, and any other matters the managers may see fit. The managers shall not conclude a sale or purchase of a steamer or steamers without the consent of the committee, or of a meeting convened for the purpose."

. . . . . .

"62. The managers shall resolve, after consultation with the committee, what portion of the profits, after payment of interest and transfer to the insurance and reserve or other funds of such sums as they consider expedient in respect of depreciation or otherwise, is available for division as dividend, and shall declare the same."

. . . . . .

"65. The amount from time to time at the credit of any insurance and reserve fund may be applied by the managers as they may think expedient for the purposes of the Company, including, among other purposes, to pay any claims or losses arising on risks undertaken by the Company ; to improve, alter, repair, or renew the ships or property of the Company ; to meet contingencies, redeem debentures, or equalise dividends ; or they may pay for new steamers or old ones wholly or partially, from the said fund."

4. The Company makes up its accounts annually on 31st December.

5. The profits of the Company for the year of assessment, estimated in accordance with the provisions of the 133rd section of 5 and 6 Vict. c. 35, as amended by the 6th section of 28 and 29 Vict. c. 30, on the average of the three years ending the 31st December 1904, after allowing a deduction of £1860 for wear and tear as aforesaid, but disallowing the deduction of £2465, 4s. 1d. (referred to under article 14 hereof) claimed by the Company, were £9222.

6. The Company owned two steamships, the prime cost of which was £84,919. The prime cost of one was £46,510, and the prime cost of the other, named "Kenmore," was £38,409. The written-down value of both steamships on 31st December 1903, as entered in the balance sheet of the Company, was £45,400. The proportion of the said written-down value effeiring to the "Kenmore" was £21,000.

7. The "Kenmore" was bought by the Company in the year 1898. It was wrecked on 11th January 1904, and became a total loss. Its market value immediately before being wrecked was £37,000.

8. The company claimed and was allowed for the purposes of the Income Tax Acts, by way of deduction from the profits of each year, a sum for the diminished value of the "Kenmore" by reason of wear and tear. The total sum so allowed from 1898 to 11th January 1904 was £9229.

9. The value at which the "Kenmore" stood in the Income Tax books on 11th January 1904 was £29,180, being the difference between the prime cost (£38,409) and the total amount (£9229) of the sums allowed for wear and tear.

10. The "Kenmore" was insured with underwriters to the amount of £34,500 on a valuation in the policies of £37,000. The Company, in accordance with a common practice of shipowners, took upon itself a risk of loss to the amount of £2500, and claims that to that extent it insured itself and ran a risk of loss on trading account.

11. The amount actually paid by the Company to underwriters for insurance premiums was allowed as a deduction from the profits of each year in arriving at the amount of the assessable profits of the year.

12. The Company, in accordance with its practice, transferred from its revenue account to its insurance fund a sum equivalent to the amount of premium that would have been payable to an underwriter on a risk of £2500, the amount of the risk undertaken by the Company itself. No deduction from profits in calculating income tax was allowed for the sum so transferred. The sums so transferred, and on which the Company paid income tax, amounted in all to £1557, 5s. 2d.

The proportion of said sum of £1557, 5s. 2d. effeiring to the "Kenmore" was £252, 17s. 8d.

13. The Company recovered from the outside underwriters the full amount of £34,500. The commission paid by it on that amount to the insurance broker was £305.

14. In arriving at the amount of the assessable profits for the year ending 31st December 1904, the Company claimed to deduct from its revenue for that year the sum of £2465, 4s. 1d., being the amount of the risk of £2500 undertaken by itself, less £34, 15s. 11d. received from the Salvage Association as the proportion of the proceeds of the sale of the wrecked "Kenmore" effeiring to the risk of £2500. The Company transferred the said sum of £2465, 4s. 1d. from its insurance fund to its capital account.

Argued for Appellant: There was no authority in the Income Tax Acts for allowing the deduction claimed. It was a loss of capital, and that could not be deducted (Income Tax Act 1842; *Smith* v. *Westinghouse Brake Co.*, 1888, 2 Tax Cas. 357; *Granite Supply Association Ltd.* v. *Kitton*, 1905, 8 F. 55, 5 Tax Cas. 168; *Alianza Co. Ltd.* v. *Bell* [1906], A.C. 18. The amount was not a disbursement by the Company in earning its profits, but was transferred from revenue account and really capital. It was not connected with a contract of insurance, and, if it was, it was not lost and therefore not deductible. The Act did not say what deductions were allowable, but prohibited certain deductions. As to the meaning of "loss not connected with or arising out of" in Rule 3 of First Case, Schedule D, counsel referred to *Brown* v. *Watt*, 1886, 23 S.L.R. 403, 2 Tax Cas. 143.

Argued for Respondents: The deduction claimed should be allowed, as it was necessary to earn freight (*Moore* v. *Stewarts & Lloyds Ltd.*, 1906, 8 F. 1129). It was not capital but accumulated revenue. The respondents were not allowed to deduct the yearly sums put aside in this way as insurance money, and they ought not to be penalised, as they would be if this deduction was not allowed now. If this money had been paid to an outside underwriter they would have been allowed to deduct it.

The Court *reversed* the determination of the Commissioners, and *remitted* to them to disallow the deduction of £2465, 4s. 1d. claimed by the Company, and to refuse a certificate of overpayment of duty.

Lord M'Laren.—The ship "Kenmore," whereof the respondents are owners, was wrecked, as we are informed, on 11th January 1904, and became a total loss. It was insured with underwriters to the amount of £34,500, on a valuation in the policy of £37,000.

It is stated in the case that the market-value of the "Kenmore" immediately before being wrecked was £37,000, and it must be taken for the purposes of this appeal that the valuation in the policies of insurance represents the true value of the ship. Accordingly the sum of £37,000 is the "measure of indemnity," and to the extent of £2500 it must be taken that the "Kenmore" was uninsured.

It is true that the owners for their own protection against losses had established what is called an "insurance fund," into which they were in the practice of paying every year sums equal to the premiums of insurance which would have been payable to an underwriter in respect of the uninsured fraction of the value of each ship. The fund thus provided was then liable to be drawn upon for losses, and the respondents say that by payments into this fund in respect of the "Kenmore" they insured themselves to the extent of the sum of £2500, which was not covered by underwriters' insurances.

I do not doubt that it is a common practice, and I may say a very laudable practice, of shipowners to take upon themselves a certain proportion of the risk of losses, and to provide for the distribution of such losses over a term of years by means of a so-called insurance fund. But I must point out that this is not marine insurance in the legal sense of the term; because there is no contract of insurance, but only a reservation of a sum out of the profits of the business to provide for future losses.

In this state of the facts the respondent company claim, in a question with the Inland Revenue Department, to be entitled to a deduction from the profits of the year of the sum of £2500, less a small sum recovered as salvage, on the ground that they have lost this sum in the course of their trade during the year. This contention, as I think, is not consistent with the

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view which they put forward, that they have insured themselves to that extent, because if they are insured, then they have sustained no loss, and at most they could only claim deduction of the amount which they had paid as the equivalent of a premium into their own insurance fund. It is not a satisfactory answer to say that they have not been allowed to deduct these *quasi*-premiums in the income tax accounts. I do not, as at present advised, see how they could maintain a claim for such deduction, because under the Income Tax Acts, sums which are set apart out of gross profits to meet future contingencies are not allowed as deductions from assessable profits. In any case we must assume that the sums set apart as the equivalent of premiums were rightly treated as subject to income tax, because the company has paid the tax and has not appealed under this head.

But now, if we reject the theory that the Company has insured itself to the extent of £2500, it follows (on the assumption that the ship was not overvalued) that a loss has been sustained to the extent of £2500. But then I am afraid that in this view the Company is in no better position to maintain its claim, because this is a loss affecting its capital account; and if anything is clear in the income tax rules for assessment, it is that losses affecting capital are not allowed as a deduction from the profits of the year.

The most favourable view of the case for the respondents' argument is, that a sum of £2500 had to be provided by way of reinstatement in order that the Company should be enabled to complete the purchase of a new ship. But I think the conclusive answer is, that this is just a replacement of a capital sum which has been lost. If it can be replaced out of the Company's insurance fund the Company's capital account does not suffer diminution. If it cannot be replaced in this way, the capital of the Company is less by £2500 than it was before the ship was wrecked; but that is a loss of capital, and is a loss which does not enter into the trading account on which income tax has to be assessed. I am accordingly of opinion that the appeal of the Surveyor of Taxes should be allowed.

Lord Kinnear.—I am of the same opinion.

Lord Pearson.—The sum of £2465, 4s. 1d., which is sought to be deducted from profits before calculating the income tax, represents the uninsured part of the loss incurred by the Western Steamship Company on their ship "Kenmore." When the loss occurred, the Company transferred that sum from its insurance fund to its capital account, so replacing the loss to capital. In my opinion that is not a case for deducting the sum from income in calculating income tax. The loss is really a loss of capital; and I think the fallacy of the view submitted by the Company results from a failure to distinguish between the Company's business and the Company's practice in carrying on their business. It is said that to the extent of the sum claimed they are their own insurers; that their insurance fund is the product of monies which had previously paid income tax; and that they should not be put in a worse position than an outside underwriter, who would have been allowed the loss, when it occurred, as a deduction from profits. It is a convenient expression to describe a shipowner in these circumstances as his own insurer; but that is a figurative expression, and there is no real analogy between his position and that of a person carrying on the business of underwriter.—*5th June* 1907.

Counsel for Appellant, Cullen, K.C., A. J. Young; Agent, Philip J. Hamilton Grierson, Solicitor of Inland Revenue.—Counsel for Respondents, Hunter, K.C., Macmillan; Agents, J. & J. Ross, W.S. *f.* A. U.

OUTER HOUSE.

(*Lord Mackenzie.*)

48. Bremner *v.* M'Alpine.

REPARATION — MASTER AND SERVANT — LIABILITY AT COMMON LAW — RELEVANCY — DANGEROUS SYSTEM — FAILURE TO PROVIDE "REDCAP" DURING SHUNTING OPERATIONS.

The circumstances of this case and the contentions of parties sufficiently appear from the Lord Ordinary's Note.

The Lord Ordinary *allowed* an issue at common law.

Lord Mackenzie.—In this case it is admitted that the pursuer cannot insist in his claim against the defenders under the Employers' Liability Act, because there was no timeous notice. The question, therefore, is whether he is entitled to an issue on the ground of liability at common law.

The pursuer's father was killed whilst in the employment of the defenders. He was a carpenter employed at their contract for the construction of a new railway. It is averred that the deceased was engaged, under the supervision of a foreman, in repairing a waggon which was standing on a line of rails at said railway works, and that, while he was engaged below the waggon, an engine belonging to the defenders and in charge of one of their servants shunted a number of waggons along the line of rails on which the waggon being repaired by the deceased was standing, and ran over him. The fault charged against the defenders is that their system of work was defective. The first particular in respect of which the system is said to have been defective is that the waggon which was undergoing repair should have been removed clear of the line of

rails before the work of repairing was undertaken. This, in my opinion, plainly does not disclose a good ground of liability at common law, but concerns what was a matter of detail and cannot be described as a fault in the system.

The proper construction to be placed on the averments which immediately follow was matter of controversy. I have come to the conclusion that they are capable of being read in the manner contended for by the pursuer. In this view they contain two separate points. The first is set out as follows:—"It was the duty of the defenders, while said repairs were being carried out, to have had a signalman stationed to warn the pursuer and the other workmen engaged in executing said repairs of the approach of moving waggons upon said line; but their system of working was defective and dangerous in that they failed to provide any such signalman; they failed to take these precautions, and thus caused the accident to the pursuer." The second point is contained in the next two sentences, which aver "In the performance of such contracts as that at which defenders employed deceased, it is usual for the contractors to provide a signalman to precede an engine when shunting is taking place at lyes and sidings upon which workmen are engaged. This is a reasonable and necessary precaution, and if it had been adopted by defenders said accident to deceased would not have happened." The averment in the first sentence quoted above contains an allegation of fault on the part of the defenders, in that they failed to have a signalman stationed to warn the pursuer while the repairs were being carried out. The averment in the next two sentences is that it is a reasonable and necessary precaution in carrying out the ordinary operation of shunting at lyes and sidings upon which workmen are engaged in the construction of a new railway, to provide a signalman to precede the engine. This is irrespective of whether any repairs are being executed on a waggon. By such a signalman I understand is meant what is popularly known as a "redcap." The defenders maintain that the whole of these three sentences must be read as limited to the averment of a duty to provide what one may call an emergency signalman on the occasion when repairs are being carried out. If this were the true reading of the record I should agree with the defenders that this was not properly a defect in what could be called a part of their system. I consider, however, that the latter averment quoted above does properly aver a defect in the system, and does aver a failure to provide a servant necessary to carry out with safety the ordinary and everyday operation of shunting.

The defenders maintained that in any view the averment was irrelevant on the authority of the cases of *Harper* v. *Dunlop & Co.* (1902, 5 F. 208) and *Thomson* v. *Baird & Co.* (1903, 6 F. 142). It is therefore necessary to see what exactly was decided in these two cases. In *Harper's* case it is clearly pointed out in Lord Adam's opinion that there would be liability at common law if the defenders had failed to supply a sufficient number of men to carry out their work, but that in that case the pursuer's averments disclosed that there was a sufficient number of men supplied, though three of them had been sent elsewhere. That was not the fault of the defenders as distinguished from fault of persons in their employment. The defenders could not be expected to know that three men had been temporarily sent away to another job. The fault, if any, was that of the foreman. The case of *Harper*, therefore, appears to me to be different from the present. In that case there was no averment that a sufficient number of workmen had not been supplied. Here there is an averment of failure to supply a signalman who was necessary for the ordinary operation of shunting. I may also point out that the view taken in *Harper* of the nature of the operation which caused the accident (the unloading of a bogey) was that it was of the nature of a particular job carried out in a particular way, and was not a usual operation in the ordinary course of the defenders' work. This remark is not applicable to the operation of shunting in the present case, and it was the shunting, not the repairing of the waggon, that caused the accident.

The case of *Thomson*, though at first sight it bears some analogy to the present, is, in my opinion, when examined, really different. The pursuer there was engaged along with two other men in repairing a railway adjoining the defenders' works. Now that was not the case of a new railway under construction. There was no averment that any such person as a "redcap" was required to precede the engine. There is nothing to indicate that it was any more necessary to have a signalman to precede the engines on that line than it would be to have a signalman to precede any North British or Caledonian train. It was a case in which a gang of platelayers had to provide their own lookout man. In such a case, as Lord M'Laren pointed out, it would be preposterous to say that the directors of a company were bound personally to see that one of the gang was deputed to keep a lookout. The fault in that case was on the part of one whose business it was to superintend, in not having directed one of the men to keep a lookout. That is a question, not of administration, but of distribution, and therefore not relevant to raise a case of liability at common law. In the present case I am unable to see, taking the case solely on the averments of the pursuer, how it can be represented that there was a duty on the part of the defenders' foreman to detail one of the carpenters' squad to precede a shunting engine as signalman. That was a matter within the province of those who organised the arrangements

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for shunting. However sufficient the supply of workmen for the carpentering job, this would still, under the case made by the pursuer, leave the defenders *minus* a "redcap" for their shunting engine.

Of course it may turn out at the trial that there was no duty on the defenders to provide a "redcap," and that there was a duty on the foreman to provide a lookout man from his carpenters' squad. If the jury took that view, they would not be entitled to return a verdict for the pursuer under the only issue proposed, which is one at common law. The fault would then be, not one of administration, but of distribution, and the case would fall within the principle of that of *Thomson*. For the reasons stated above, I am of opinion that the pursuer has averred sufficient to distinguish his case from that of *Thomson*.

I should advert to another point which was made for the defenders, viz., that the record discloses in the later portions of Cond. 4 that the accident happened because the defenders' foreman ordered the deceased to do the work, when he knew, or ought to have known, that waggons were about to be shunted. If, however, the defenders had provided the "redcap" said to be necessary the pursuer would not have been injured. I am accordingly of opinion that the issue proposed should be approved.—*4th June* 1907.

Counsel for Pursuer, J. A. Christie; Agents, St Clair Swanson & Manson, W.S.—Counsel for Defenders, Munro, Mair; Agents, Macpherson & Mackay, S.S.C. A. M. H.

OUTER HOUSE.

(*Lord Guthrie.*)

49. A. B. *v.* C. B.'s Trustees.

I. Succession—Provisions for Widow—Restriction of Widow's Rights under Settlement on "Entering into a Second Marriage"—Ceremony of Marriage Solemnised—Subsequent Decree of Nullity of Marriage Pronounced by High Court in England—Held that Widow's Provisions Were Not Subject to Restriction.

II. Husband and Wife—Marriage—Impotency—Decree of Nullity—Marriage Held Null at its Date.

The question decided in this case was whether a widow, who had gone through a ceremony of marriage which was subsequently held to be null and void by a competent Court, had or had not "entered into a second marriage" in the sense of a provision in her first husband's trust disposition and settlement restricting her rights under the settlement in that event.

The following authorities were cited in the Procedure Roll in addition to those quoted in the Lord Ordinary's opinion:—Hume on Crimes, I. 456; Stair, I. 4, 6; *Cavell* v. *Prince*, 1866, L.R. 1 Ex. 246; *A.* v. *B.*, 1868, L.R. 1 P. and M., 559; Eversley's Law of the Domestic Relations, pp. 59, 60; *Wilson* v. *Wilson*, 1846, 1 H.L. Ca. 538; *Turner* v. *Thompson*, 1888, 13 P.D. 37; *Aldridge* v. *Aldridge*, 1888, 13 P.D. 210; *Dormer* v. *Ward*, L.R. (1901), Prob. 20; *Attwood* v. *Attwood*, L.R. (1903), Prob. 7.

The Lord Ordinary *held* that on a sound construction of the words in the settlement the pursuer was entitled to declarator that she had not entered into a second marriage.

Lord Guthrie.—The only question I have to decide is raised by the proposed declarator "that the pursuer has not entered into a second marriage within the meaning of the said trust disposition and settlement." If I affirm that proposition, there must be an accounting under the alternative conclusion at the end of the Summons.

No marriage contract was entered into between the late Captain C. B. and the pursuer. There is one child of the marriage, a pupil, posthumous. Captain C. B. died on 8th April 1898. A ceremony of marriage was solemnised in the parish church of . . . . London, on 2nd October 1901, between the pursuer and Captain D. By final decree of the High Court of Justice in England, Probate, Divorce and Admiralty Division, dated 30th April 1906, this marriage was declared to be, and to have been, absolutely null and void. Down to 2nd October 1901, from the death of Captain C. B., three years before, the pursuer enjoyed the liferent of Captain C. B.'s estate under the provisions of his trust disposition and settlement. Since that date, the defenders have paid the pursuer for the past six years the restricted annuity of £300 a year (increased by certain payments for the child), provided to her by Captain C. B. in the event of her "entering into a second marriage and there being children or their issue then alive."

The pursuer maintains on a sound construction of Captain C. B.'s will that she did not *enter into a second marriage* on 2nd October 1901, and that she is now entitled to the difference between the sum she has received and the liferent of Captain C. B.'s estate.

I think the pursuer's contention is sound, whether the words of the will be construed popularly, or according to their strict legal signification. I do not consider how the testator himself would have construed them, for that might have depended on idiosyncrasies, of which I know nothing. Yet it is right to point out that there is nothing in the will to suggest that he would have given them any abnormally narrow or ungenerous construction. There is no appearance of a morbid wish to perpetuate his

widow's retention of his name to the prejudice of her own desires or interests. There is no restriction if, ceasing her apparent allegiance to his memory, she becomes engaged to be married. Nor is a ceremony of marriage enough; she must "enter into a second marriage." From the trust deed I see no reason to think that Captain C. B., any more than other ordinary men, would have intended to cut down his wife's rights if she was ignorantly the unhappy victim of a ceremony of marriage with a eunuch. I say ignorantly, because, had she gone through the ceremony in knowledge of Captain D.'s condition, she would not have been entitled to the decree of nullity which she has obtained from the English Court.

But it was argued that the true question was, not what might be thought by the man in the street, but did not the pursuer, in the eyes of the law, enter into a second marriage on 2nd October 1901? I answer that question also in the negative. The decree of the English Court, referring to the "marriage in fact had and solemnized on 2nd October 1901," has pronounced and declared "the said marriage to be, and to have been, absolutely null and void, and that the said petitioner was and is free from all bond of marriage" with Captain D.

It was not disputed that the effect of this decree is the same in law as the corresponding Scotch decree. The result is that it has been declared by a final judgment of a competent Court that, as I read it, the marriage not merely is, but was at its date, null and void. If so, I cannot declare that on 2nd October 1901 the pursuer entered into what the law considers a second marriage. I do not find it necessary to embark on an examination of the numerous cases and authorities which were cited. There are two distinctions between nullity suits on the ground of impotency and nullity suits on the grounds of (*a*) incapacity from nonage, insanity, imbecility, or intoxication; (*b*) forbidden degrees; and (*c*) prior marriage. These are, *first*, restriction of the instance to the injured contracting party; and, *second*, the operation of personal exception to bar the remedy sharply distinguishing a case of personal incapacity from cases of legal or mental incapacity. There are institutional and judicial *dicta* so emphasising these distinctions as to take an impotency suit out of the region of nullity into that of divorce. But these views do not find expression in the decrees which are pronounced in nullity actions. I may add that none of the cases overthrow the authority of Erskine's statement, if there be substituted in the first sentence, copulation for procreation. I. 6, 7: "Marriage is in itself null when either of the parties is at the time of contracting it naturally incapable of procreation." I. 6, 43: "A marriage which is null from the beginning, and may be declared so by a sentence of a proper Court (instances of which have been mentioned ss. 2, 7), cannot be said to be dissolved, because it was never truly contracted: and as marriages in themselves void can have no legal effects, everything must, in a declaration of their nullity, return *hinc inde* to its former condition."—15*th June* 1907.

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Counsel for Pursuer, Dean of Faculty (Campbell, K.C.), Moncrieff; Agents, Fraser, Stodart & Ballingall, W.S.—Counsel for Defenders, Hunter, K.C., Black; Agents, Forrester & Davidson, W.S. C. H. B.

OUTER HOUSE.

(*Lord Guthrie.*)

50. Lawrie *v.* James Brown & Company Limited.

I. WORKMEN'S COMPENSATION ACT 1897 (60 & 61 VICT. CAP. 37)—AGREEMENT TO PAY COMPENSATION — AGREEMENT TO GIVE INJURED WORKMAN REGULAR EMPLOYMENT AT A FIXED WAGE—ACTION OF DAMAGES AT COMMON LAW AFTER RECORDING OF MEMORANDUM FOR ALLEGED BREACH OF OBLIGATION TO GIVE REGULAR EMPLOYMENT—ACTION HELD INCOMPETENT.

II. CONTRACT — DISCHARGE — BREACH — CONTRACT TO GIVE WORKMAN REGULAR EMPLOYMENT—DISMISSAL OF WORKMAN AFTER THREE YEARS — RELEVANCY OF ACTION FOR BREACH.

In this action Thomas Lawrie, head fireman, formerly in the employment of James Brown & Co. Ltd., Esk Mills, Penicuik, who had been injured while in their employment, sued the said James Brown & Co. Ltd. for damages for breach of an agreement by them to give him regular employment. After narrating his injury, which involved the loss of his right eye, the pursuer made the following averments as to the agreement and what had followed upon it:—

COND. 3. The defenders, recognising that the pursuer had a serious claim both at common law and under the Workmen's Compensation Act 1897, at once began to negotiate a settlement with him. They were well aware that he had a wife and family dependent upon him, and that he was seriously handicapped by the accident from being able to support them. Accordingly they proposed that the pursuer should make an agreement with them under the Workmen's Compensation Act, in order that the pursuer might be enabled to earn substantial wages, and promised that they would receive into their employment one of the pursuer's children who was then of an age ready for work, and the younger ones as they came to be of an age for working. The defenders, further recognising that their general work involved considerable risk to the pursuer's remaining eye, agreed to give the pursuer regular employment as a foreman over their workers at the settling ponds in connection with their works at Esk Mills, paying him a fixed wage of twenty-three shillings per week, with

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the usual additional pay for extra work, which they promised would be equal to one day per week or three shillings and tenpence of additional wages. The pursuer's wages previous to the accident averaged from thirty-five shillings to thirty-seven shillings per week. In respect of the outlay, loss, etc., consequent on the injury to the pursuer's eye, the defenders further agreed to pay the pursuer £90 sterling. In so far as the said agreement related to the matters contemplated by the Workmen's Compensation Act, a memorandum of agreement was entered into between the pursuer and defenders (a copy of which is herewith produced), and was duly recorded in the Sheriff-Court Books at Edinburgh on 3rd December 1903.

Cond. 4. Acting under the said arrangement the defenders paid the said £90 and took the pursuer back temporarily into their service, but in all other respects they have grossly failed to fulfil their said agreement, and have acted in direct violation of its terms, being enabled to do so by taking advantage of the necessitous circumstances of the pursuer, and with the object of affording them some pretext to dispense with the services of the pursuer. In particular, the pursuer requested that two of his younger children should be given work as promised, but this the defenders refused. The defenders, in place of giving the pursuer the position of foreman of the settling ponds, compelled him to work as a general labourer, his duties mainly being the filling of carts and barrows with materials containing caustic soda and other dust which created a grave risk of accident to the pursuer's remaining eye. The defenders also refused to give the pursuer any opportunity of earning wages for overtime. The pursuer at first suggested to the defenders that they were not fulfilling their agreement with him, but they intimated they were having the agreement fully in view, and the pursuer, partly on this account and partly on account of said necessitous condition, performed the duties allotted to him by the defenders. The pursuer, however, frequently protested against the defenders' breach of agreement, and ultimately insisted (1) that his work should be the work of superintendence at the settling ponds, and (2) that he should be given ordinary facilities for working overtime. In consequence of the pursuer's attempting to hold the defenders to the said agreement, he was dismissed by them, without notice or reason assigned, on 3rd July 1906. During the whole period of the defenders' employment of the pursuer as foreman, they acted in gross violation of the said agreement in the hope that the pursuer might leave their service, but finding that he did not do so, they also, in gross breach of their obligations and the duty which they owed to the pursuer, turned him out of their employment, and now refuse both to implement their engagement to give him employment and to recognise his just claim for compensation arising in consequence of their violation of it.

In the Procedure Roll the defenders *argued, inter alia*—(1) That the action was incompetent, in respect that although the claim arose out of an agreement under the Workmen's Compensation Act 1897, it sought to add a remedy not given by the Act; and (2) that it was irrelevant, in respect that their actings as averred by the pursuer did not constitute a breach of the agreement to give regular employment.

The Lord Ordinary *held* the action to be both incompetent and irrelevant.

Lord Guthrie.—The defenders plead incompetency and irrelevancy.

They say that the action is incompetent because the only claim stated by the pursuer against them arises out of an agreement under the Workmen's Compensation Act 1897. That agreement, they admit, can be enforced in all its terms under the Act, but, according to them, no part of it can be made the ground for a claim for damages at common law, such as is made in this action. The pursuer has foreseen the difficulty and endeavoured in Cond. 3. to evade it by representing the statutory agreement as one contract and the agreement for regular employment, which is the basis of his present claim, as another and distinct contract. But this is not so, either in fact or in law. The whole stipulations are contained in one agreement. It is headed in the usual form, "In the matter of an agreement under the Workmen's Compensation Act 1897," etc., and, after detailing the terms of the agreement, including the undertaking by the defenders to give the pursuer "regular employment as foreman over the workers at the settling ponds," ends with these words: "and these in full of his claims for compensation under the said Act in respect of the said injury." In these circumstances it is unsound to maintain, as the pursuer does, that the case is the same as if the stipulation as to regular employment was in a separate document containing no reference to the Act. If the contract founded on by the pursuer is part of an agreement under the Act, as I hold it is, it is not disputed that it cannot be enforced in this action.

I also sustain the plea to the relevancy. It is not necessary to consider the pursuer's averments as to the defenders' breach of a verbal contract to employ his children, and to afford him extra work, because it was explained that those are not matter of substantive claim. Nor is any case made of want of reasonable notice, if the pursuer was truly employed by the defenders, as alleged by them, at will. The pursuer's complaint is that while the defenders undertook to give him regular employment, they only did so for nearly three years and then dismissed him. I see no breach of contract by the defenders in thus acting, unless there be read into the agreement an obligation on the defenders to give the pursuer regular employment for life, or at least, as the pursuer contended, so long as he is able and willing to serve them and does his work properly. I see no warrant for reading any such terms into the agreement, and I therefore hold the pursuer's averments of breach of contract irrelevant.—15*th June* 1907.

Counsel for Pursuer, Morison, K.C., Gillon; Agents, Kirk Mackie & Elliot, S.S.C.—Counsel for Defenders, Lees, K.C., Burn-Murdoch; Agents, Hagart & Burn Murdoch, W.S. C. H. B.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

51. Dick's Trustees *v.* Cameron and Others.

Succession — Power of Appointment — Exercise of Power—Alternatives Offered —First Alternative Illusory and Intended to Force Acceptance of Second Alternative —Second Alternative Invalid—Held Power Not Exercised Bona Fide, and Appointment Wholly Invalid.

Special Case.

By their marriage contract, dated 23rd September 1873, Mr and Mrs Dick directed the marriage-contract funds to be divided among the children of the marriage in such proportions and under such conditions as the spouses or either of them should direct.

Mrs Dick died in 1902, survived by her husband and four children, viz., Mrs Cameron, Mrs Higinbotham, Henry and Alice.

Mrs Dick left a holograph settlement, by which she bequeathed £7000 in liferent to her daughter Mrs Cameron, and in fee to her children; £20,000 in liferent to her daughter Alice, and in fee to her children; an annuity of £50 to her daughter Mrs Higinbotham, and the residue of her estate to her son Henry, one-half in fee and one-half in liferent, with fee to his children.

Mr Dick died in 1905, survived by the said four children, leaving a trust disposition and settlement and codicils, by which he bequeathed legacies of £5000 each to his daughters Mrs Cameron and Mrs Higinbotham in liferent, and their children in fee; a legacy of £250 to his daughter Alice, and the residue of his estate to his son Henry in liferent with a power of disposal.

Mr Dick also left a deed of apportionment dated 20th July 1904, in the following terms:—

I, Henry Knox Dick of Torbrex, 61 Grange Loan, Edinburgh, considering that by my marriage contract with my late wife I have power to apportion the funds thereunder among my family and in terms of such power I hereby direct the trustees under the said contract to pay to each of my daughters the sum of £500, and to my only son Henry the whole residue of the estate. It being my desire, however, so far as consistent with my own private estate that my said daughters should benefit as far as possible and to such an extent as their mother under her holograph deed of settlement, dated 24th February 1901, desired they should, I hereby declare that my said daughters shall have the option of either accepting the foresaid £500 each or they shall have the right to claim the following increased amounts but that only on the conditions stipulated for in the said holograph deed of settlement of my said wife,—That is to say in the case of my daughter Mrs Cecilia Isabel Dick or Cameron the liferent of £7000, and in the case of my daughter Mrs Agnes MacKenzie Dick or Higinbotham the liferent of £3500 and in the case of my daughter Alice Helen the liferent of £20,000 which sums to meet said liferents shall be deducted from the residue of the said estate and they or each of them shall grant such deed or deeds necessary in favour of the trustees under the marriage contract to carry out the purposes contained in the said holograph deed of settlement which shall form the basis upon which the liferent and disposal of the fee are to be settled. In regard however to my daughter Agnes who under the will was only entitled to a half-yearly payment of £50 in the event of her electing to take the £3500 it shall be on the same conditions as are specially provided for in the said holograph deed as regards her sister Isabel. . . .

The amount of estate left by Mr Dick was upwards of £54,000, and the amount of the marriage-contract funds was about £60,000, of which £2500 was contributed by Mr Dick, and the remainder by his wife.

Questions having arisen regarding the disposal of the marriage-contract funds, this special case was presented, to which, *inter alios*, the parties were (1) the Marriage-Contract Trustees, (2) Mrs Cameron and Mrs Higinbotham, (3) Henry Dick, and (4) Alice Dick.

The first question which was raised was whether Mrs Dick's holograph settlement was a valid exercise of her power of appointment over the share contributed by her to the marriage-contract funds. It is unnecessary to refer further to this question, beyond stating that the decision of the Court was to the effect that her holograph settlement was not a valid exercise of her power of appointment, in respect that it limited the right of her daughter Alice — who was an object of the power—to a liferent, and gave a fee to persons who were not objects of the power.

The second question related to the validity of the deed of appointment executed by Mr Dick.

The second parties *maintained* and *argued* that it was wholly bad. The first alternative offered to the children was merely intended to coerce them into accepting the second alternative, and was not a *bona fide* exercise of the power. The second alternative was invalid; cf. *Baikie's Trs.*, 1862, 24 D. 589.

The third party *maintained* and *argued*: The deed was valid in so far as it appointed £500 to each of the daughters and the residue to the son. The remainder was invalid, and fell to be regarded "*pro non scripto*" (*M'Donald*, 1875, 2 R. (H.L.) 125; *Middleton's Trs.*, 1906, 8 F. 1037.

The fourth party *maintained* and *argued*: The deed was a valid exercise of the power of appointment, and under the option granted her, she was entitled to £20,000 free of all conditions (*Matthews Duncan's Trs.*, 1901, 3 F. 533). Alternatively she maintained that the deed was wholly invalid.

The following question was, *inter alia*, submitted to the Court:—

2ND DIV.
Dick's Trs. v. Cameron and Others.

"As regards the marriage-contract funds . . . . (*d*) Is the deed of appointment by Mr Knox Dick, dated 20th July 1904, entirely ineffectual?"

The Court *answered* this question in the affirmative.

The opinion of the Court was delivered by Lord Low.

Lord Low. . . .—The next question is whether the deed of apportionment executed by Mr Dick was a valid exercise of the power? That deed is in a very peculiar form, because it gives the daughters the option of taking very small sums absolutely, or large sums in liferent only, with fee to their children if they have any, and failing children, to fall into residue which is destined to the only son of the marriage.

The deed commences with a narrative of the power conferred by the marriage contract, and proceeds: "In terms of such power I hereby direct the trustees under the said contract to pay to each of my daughters the sum of £500, and to my only son Henry the whole residue of the estate."

If the deed had stopped there I take it that the appointment could not have been challenged, although it would, considering the large amount at Mr Dick's disposal, have left the daughters (of whom there were three) very slenderly provided for. The trust funds amounted to some £60,000, and Mr Dick's means, which did not fall under the marriage contract, to over £54,000, and by his testamentary settlement he had left to each of two of his daughters—Mrs Cameron and Mrs Higinbotham—the liferent only of £5000, and to his daughter Alice only a legacy of £250.

Mr Dick recognised that to appoint to each of his daughters so small a share of the marriage-contract funds as £500 would leave them inadequately provided for, and accordingly he proceeds to give them the option to which I have referred, and he explains his reasons for adopting that course in the following words: "It being my desire, however, so far as consistent with my own private estate, that my daughters should benefit as far as possible, and to such an extent as their mother under her holograph deed of settlement desired they should."

Evidently some words have been omitted from that sentence, but I think that it is plain enough that what Mr Dick meant by the words "so far as consistent with my own private estate" was so far as consistent with *the testamentary settlement which he had made of his own private estate.* If that be a sound construction of the language used, then Mr Dick's reasons for giving his daughters an option were (1) that he did not wish to give them anything more from his own estate than what he had provided to them in the settlement which he had executed; and (2) that he desired that the wishes of his wife as expressed in her holograph settlement should be given effect to in the division of the marriage-contract funds.

The deed accordingly proceeds: "I hereby declare that my said daughters shall have the option of either accepting the foresaid £500 each, or they shall have right to claim the following increased amounts, but that only on the conditions stipulated for in the said holograph settlement of my said wife." He then gave to his daughters Mrs Cameron and Miss Alice Dick liferents of the same sums as those provided for them in Mrs Dick's settlement—namely, £7000 in the former case and £20,000 in the latter. To the third daughter, Mrs Higinbotham, he gave a liferent of £3500, whereas in Mrs Dick's settlement she was restricted to an annuity of £50. All these gifts were declared to be subject to the conditions specified in Mrs Dick's settlement, to which effect was directed to be given. The result was that the daughters were restricted to a liferent, that the capital sums were given to their children if they had any, and failing children were to fall into residue which by Mrs Dick's settlement was destined under certain limitations to the only son of the marriage.

Now it is plain that if Mrs Dick's settlement was invalid as an exercise of the power of appointment, the alternative which Mr Dick offered to his daughters was equally so; but it was argued that if they did not accept the alternative, they must content themselves with £500 each, because Mr Dick had undoubtedly power to restrict them to that amount.

I think that the best answer to that argument is that Mr Dick's deed of apportionment was not a *bona fide* exercise of the power. I take it that the power was conferred because circumstances might arise which would render it expedient and just that there should not be an equal division of the marriage-contract funds among the children, and that some of them should get more and others less. Mr Dick, however, was not actuated by consideration of that kind in appointing £500 to each of his daughters, because it seems to me to be plain that he never intended that his daughters' interest in the marriage-contract funds should in fact be restricted to that sum. In particular, it is absurd to suggest that he ever contemplated that the sole provision for his daughter Alice out of parental estates amounting to nearly £120,000, should be a capital sum of £750—that is, a legacy of £250 under Mr Dick's settlement and £500 under his deed of apportionment. The appointment of £500 to each of the daughters was therefore merely a threat, a weapon which he used for the purpose of concussing the daughters to agree to a disposition of the marriage-contract funds, which was contrary to the provisions of the contract, and which he had no power to make. I think that that was an illegitimate use—indeed, an abuse—of the power

which the Court cannot sanction. Accordingly, Mr Dick's deed of apportionment was, in my judgment, altogether bad, and cannot receive effect. . . .—6*th June* 1907.

Counsel for First Parties, Grainger Stewart; Agents, Carmichael & Miller, W.S.—Counsel for Second Parties, Clyde, K.C., Graham Stewart, K.C., Chree; Agents, Knox Crawford & Son, S.S.C.—Counsel for Third Party, Cullen, K.C., Hon. W. Watson; Agents, J. & A. Peddie & Ivory, W.S.—Counsel for Fourth Party, Hunter, K.C., Horne; Agents, Carmichael & Miller, W.S.

J. H. H.

SECOND DIVISION.

(*Lords Stormonth-Darling, Low and Ardwall.*)

52. Sinclair *v.* Tod.

Landlord and Tenant—Removing—Ejection—Title to Possess—Relevancy—Action of Damages for Ejection Without Warrant — Pursuer Possessing Without Title — Action Held Irrelevant — Macdonald, 1860, 22 D. 1075, and Macdonald, 1883, 10 R. 1079, Followed.

Appeal from the Sheriff Court at Stirling.

This was an action of damages raised in the Sheriff Court at Stirling at the instance of Peter Sinclair, shepherd, against John Tod, farmer. The following narrative of the pursuer's averments is taken from the Opinion of Lord Ardwall.

"The pursuer and his wife were in the service of the defender, and as part of the remuneration for their services they were entitled to the occupation of a house free of rent. On account of a dispute between the pursuer's wife and the defender's wife on 30th July 1905, the defender dismissed the pursuer's wife from his employment. It seems to be uncertain at what point of time the pursuer was dismissed, but there is no doubt that the pursuer's contract of service came to an end on or before the 2nd August 1905. On 2nd August 1905 the pursuer raised an action in the Small Debt Court at Stirling for £53, 11s., restricted to £12, one of the items claimed being the rent of the said house till Whitsunday 1906. The pursuer's wife also raised an action against the defender for £11, 6s. 6d. on the same date. The pursuer and his wife attended the calling of these Small Debt actions in the Sheriff Court at Stirling on 11th August 1905, and, taking the opportunity of their being absent from home, the defender removed the pursuer's whole furniture and effects out of the said house, and placed them on the ground outside.

"The pursuer alleges that he and his wife and family have suffered in their feelings and reputation, and have been put to considerable loss and trouble, and that their furniture has been damaged, and the present action is brought to recover that damage.

"It may be mentioned that the Small Debt actions were compromised by a payment of £6 paid before decree."

The defender pleaded, *inter alia*, that the action was irrelevant.

On 15th May 1906 the Sheriff-Substitute (Buntine) sustained this plea and dismissed the action.

The pursuer appealed to the Sheriff (Lees), who on 11th June 1906 adhered to the interlocutor of the Sheriff-Substitute. He delivered the following note:—

On a careful consideration of the pursuer's averments and of the authorities, I am afraid the pursuer has no valid claim against the defender for the injuries to his repute and to his furniture that the somewhat unusual course taken by the defender is said to have caused.

It is plain that if a servant's period of service has come to an end he has no claim to receive remuneration thereafter. Now, the right to occupy the house was part of the remuneration given to the pursuer; and after his dismissal he had no more claim to the house than he had to further wages. No doubt, if the defender had taken the usual course of applying to the Court for reinstatement in his rights, the Court would have given the pursuer a reasonable interval to find a house and remove his family and his furniture; and an employer cannot by taking the law into his own hands deprive his servant of this necessary time. But here the defender left the pursuer in possession for about twelve days; and the pursuer does not say that the defender agreed to allow him to continue to occupy the house, or that he was unable to get a house, or that there was any illness or other cause that prevented him from removing. Then, as regards the furniture, he does not aver that it was roughly used, or that he was unable to take it away, or that the defender could have put it in any outhouse to save it from the weather. His sole ground of claim, as far as I can find from his condescendence, is that the defender took the unusual course of ejecting the pursuer at his own hands and without any warrant.

But then the Supreme Court has, on several occasions, held or observed that where a servant's right of occupation has ceased, and he refuses to remove, his employer may put him out of the premises; and if he brings an action for this ejectment, he is excluded from any claim, as he had no title to possess. The authorities are all collected and commented on by Mr Sheriff Begg in his admirable judgment in the case of *Wallace* v. *Hamiltons*, 9 Sheriff Court Reports 130, to which I may for brevity refer.

There are thus no special grounds presented by the pursuer in this action which would justify me in giving him a redress which the Supreme Court has held in other actions must be refused. In deference, therefore, to these authorities, I think I am bound to affirm the judgment of the Sheriff-Substitute.

The Pursuer *appealed* to the Court of Session, and *argued:* The defender was wrong in evicting the pursuer without a warrant from the Sheriff, which was necessary even when the possession

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was precarious (*Scougal*, 1819, 2 Mur. 110; *Hally*, 1867, 5 M. 951; *Scottish Property Investment Co.*, 1881, 8 R. 737; Stair, IV. 28, 12; Ersk. Inst., III. 7, 16, and IV. 1, 15).

Argued for the Defender: Reasonable time was given to the pursuer after he received notice to leave, before he was turned out. A person who is in possession without a title may be evicted without a warrant (*Macdonald*, 1860, 22 D. 1075; *Macdonald*, 1883, 10 R. 1079; *Scott*, 1869, 6 S.L.R. 301; Fraser on Master and Servant, p. 332).

The Court *affirmed* the judgment appealed against.

Lord Stormonth-Darling.—The pursuer here, who was a shepherd on a farm near Denny in Stirlingshire, with a free house on the farm as part of his remuneration, complains of a rather high-handed proceeding on the part of his master the defender, by which the defender, on 11th August 1905, without any legal form of process, entered the pursuer's house and turned his whole furniture and effects into the road outside the house. For this he claims damages, which he estimates at £32, 1s. 6d.

The defender admits the removal of the furniture, and justifies it on the ground that the pursuer had been dismissed from the defender's service on 29th July, and that the pursuer had no right to occupy the house after that date.

This action was called on 20th March 1906, and the Sheriff-Substitute, on 15th May, sustained a plea of irrelevancy stated for the defender, on the ground that the pursuer had no title to occupy the house at the time in question, and dismissed the action. The Sheriff, on appeal, as I gather from his note, rather reluctantly adhered, for he called the course taken by the defender, in not first applying for a legal warrant of ejection, a "somewhat unusual" course.

Now, I agree with the Sheriff there, for such a warrant would undoubtedly have been granted, but only according to the practice of the Sheriff Court on some short but reasonable notice, which would probably have enabled the pursuer to remove the furniture himself, and could at least have given him time to make arrangements for its disposal. I cannot, therefore, commend the action of the defender in proceeding to remove the furniture at his own hand, though he may have had considerable provocation from the pursuer.

But it is one thing to express disapproval of the defender's action, and it is another thing to say that the pursuer has a right to claim damages for the removal of the furniture. That can only arise if the defender's conduct was illegal, or, in other words, if the defender on his part had no right to do what he did.

Now, looking to the cases (which are not many, but fairly recent, on this branch of the law), I cannot say that the defender was not entitled to act as he did. After dismissal the pursuer's title of possession had come to an end; and although I do not think that the defender would have been justified in turning him out the very next day, I cannot say that he had no right to turn him out in twelve days, which was what he actually did. The case of *Macdonald* v. *Duchess of Leeds* in 1860, 22 D. 1075, and *Macdonald* v. *Watson* in 1883, 10 R. 1079, are both to the effect that a pursuer who complains of ejection without a warrant must set forth a title to possess, and that, in the absence of such a title, ejection without a warrant is, in the words of Lord President Inglis, "a perfectly legal proceeding." To the same effect is a passage in Lord Fraser's book on Master and Servant, p. 332.

I therefore think that we must affirm the judgments of the Sheriffs.

Lord Low.—I have carefully considered the argument in this case, because where a party has taken the law into his own hands it is incumbent upon the Court to scrutinise the circumstances closely. The conclusion at which I have arrived is that the learned Sheriffs have rightly decided this case, and upon the proper ground.

The question seems to me to be whether the pursuer has averred any legal title to possess the house at the time when the defender removed the furniture from it. In the third article of the Condescendence the pursuer makes a somewhat curious averment. He says that his wife, who was also in the defender's employment, had a dispute on 30th July 1905 with the defender's wife, and that on account of that dispute "the defender dismissed her" (the pursuer's wife) "from his employment, but expressed his willingness at the time to retain the pursuer in his employment." The pursuer does not say what answer he gave to that proposal, but immediately proceeds to refer to an action which he brought against the defender on 2nd August in the Small Debt Court.

I suppose that the averment in regard to the alleged offer of the defender to retain the pursuer in his employment was intended to suggest, at all events, that the pursuer had not been ordered to leave the house. The action in the Small Debt Court, however, to which the pursuer refers, at once disposes of any such suggestion, because in the claim annexed to the Summons the pursuer averred that the defender on 30th July, without previous notice, and without cause, dismissed him from his service, and also insisted upon his leaving the dwelling-house, and the pursuer, *inter alia*, claimed £6 as rent of dwelling-house up to the following term of Whitsunday.

Therefore the facts must be taken to be (as indeed was not disputed) that the defender dismissed the pursuer from his service on the 30th July, and ordered him to leave the house, the

right to occupy which was part of his wages, and that it was not until the 11th of August that the defender put the pursuer's furniture out of the house.

Now it was conceded that the pursuer was entitled to a reasonable time after his dismissal to make arrangements for living elsewhere. What is a reasonable time is a matter of circumstances, but *prima facie*, from the 30th of July to the 11th of August should have been ample. If the pursuer had averred that he had done his best to get another dwelling-place, but had been unable to do so, and that the defender knew that that was the case, a different question might have arisen. But the pursuer makes no averment of that sort, and for anything which he says to the contrary, he may have done nothing at all in the way of looking out for another residence.

These being the circumstances, it is plain that the pursuer had on 11th August no title whatever to possess the house; and that being so, it is settled that he cannot claim damages from the defender because the latter removed his furniture from the house. The cases of *Macdonald* v. *Duchess of Leeds*, 1860, 22 D. 1075, and *Macdonald* v. *Watson*, 1883, 10 R. 1079, are directly in point; indeed, the circumstances in these cases appear to me to have been more favourable to the party claiming damages than in this case. These were both considered decisions of the First Division, and, so far as I know, their soundness has never been impugned.

I am therefore of opinion that the interlocutor of the Sheriffs should be affirmed.

Lord Ardwall.—This is an action for damages for wrongous ejection. The Sheriff-Substitute dismissed the case as irrelevant, and that judgment was, on appeal, adhered to by the Sheriff. I am of opinion that the judgments of the Sheriff and Sheriff-Substitute are well founded, and ought to be affirmed.

[*After the narrative of facts above quoted.*] The defender pleads, *inter alia*, that the action is irrelevant, and this plea the Sheriffs have sustained.

The plea against the relevancy is founded on the fact that at the time the ejection complained of took place the pursuer had no title to possess the house in question or to keep his furniture there. I am of opinion that the plea is well founded in fact and law. I am of opinion that in an action of damages for alleged wrongous ejection the tenant must set forth his title to possess the premises from which he complains he has been ejected; and further, that a landlord does not require a warrant to remove a person who has no title to possess. This, I think, is settled by the judgments in the case of *Macdonald* v. *Watson*, 1883, 10 R. 1079, following on the case of *Macdonald* v. *Duchess of Leeds*, 1860, 22 D. 1075.

In the present case there can be no doubt that the pursuer on the 11th of August 1905 had no title to possess the house in question. He and his wife had been dismissed, and he had raised an action of damages in the Small Debt Court on 2nd August, in which he claimed, *inter alia*, the rent of the house from that date till Whitsunday 1906. It is therefore vain to say that he had any title, either as a servant or otherwise, to possess the house on the 11th of August. His contract of service had come to a termination, and he accepted that situation. Lord Fraser, in his work on Master and Servant, page 332, writes thus: "If a servant refuse to depart of his own accord, the master is even entitled to turn him out and remove his effects from the premises without process of law." He points out that the contrary was laid down in the case of *Scougal* v. *Crawford*, 2 Mur. 110 (1819), but that that is inconsistent with the later case of *Scott* v. *M'Murdo*, 1869, 6 S.L.R. 301. I prefer, however, to rest my judgment in this case upon the two cases first cited.

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While, therefore, I have no doubt upon the law applicable to the present case, I must not be taken as approving in the usual case of an ejection being carried out without process of law. With regard to a dismissed servant a summary application for removing would be competent, and I think that this is the course that it is prudent and right to follow where there are no exceptional circumstances. It is certainly the safer course for the master, and fairer to the servant.

I cannot, however, say that, looking at the averments of both parties in the present case, it appears that the pursuer was very harshly treated. The defender says that the pursuer agreed with him to leave the house on the Thursday following the 31st of July, the defender representing that he required the house for a new servant. The defender further avers that he agreed to pay the expense of the pursuer's removal. Of course, there has been no proof on these matters, and I merely allude to them for the purpose of saying that without a proof it is not fair to hold that the defender behaved harshly or without warning of any kind in what he did. This, however, does not enter into my decision of the case, which proceeds entirely upon the ground that the pursuer, not having set forth any title to occupy the house, has stated no relevant case entitling him to damages, and it seems to me that it would be a startling proposition to affirm that a person is liable in damages for removing from a house belonging to him, furniture belonging to another person who had no right to be there.—13*th June* 1907.

Counsel for Appellants, M'Lennan, K.C., A. A. Fraser; Agent, R. F. Calder.—Counsel for Respondent, Wark; Agents, Macpherson & Mackay, S.S.C.

J. H. H.

2nd Div.

Bell v. Adam & Co.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

53. Bell *v.* Adam & Company.

Process—Proof or Jury Trial—Discretion of Lord Ordinary—Action of Damages for Personal Injury—Proof Allowed by Lord Ordinary on Account of Partial Irrelevancy of Averments — On Appeal Action Held Wholly Relevant and Issue Allowed.

Reclaiming Note against an Interlocutor of Lord Johnston.

This was an action at the instance of Mrs Bell against Adam & Co. to recover damages for the death of her husband, who was killed by an accident while in the employment of the defenders.

On 20th March 1907 the Lord Ordinary (Johnston) allowed a proof before answer. He delivered the following opinion:—

Lord Johnston.—I think that the Condescendence is partly relevant and partly irrelevant. The pursuer's position on record is that the deceased Robert Galbraith Bell was employed as a coppersmith, and that he had no experience of the work he was ordered to undertake, which was the dismantling and removing of heavy utensils from a disused sugar refinery in Greenock.

Now, his widow says that the deceased and those who were working with him went to the defenders' works to obtain tackle; that there was no tackle suitable for lowering the utensils to the ground; that according to the practice in the defenders' works, all tackle required by their employees hung up in the brass shop, and from this tackle they were in use to make selection of what they required. Then she says deceased did the best he could by taking certain slings and removing them to the sugar refinery; that he and his mates broke up the utensils and lowered parts to the ground. When they came to the heavy portion they failed to get it down owing to something jamming, and in course of their efforts the pulley gave way, and the deceased was precipitated to the ground and killed. And then the pursuer goes on to aver fault on the part of the defenders.

But she sets forth no relevant averment of defective construction.

It is not said that the rope was frayed or insufficient for the weight, but for aught that is said it was a perfectly efficient piece of plant if properly used, but was, on the statement, improperly used by the rope being rove through the wrong place, it having been passed through the thimble instead of round the thimble of the tackle. The thimble not being intended to stand a strain in this way, gave way, and the accident happened.

This is not a relevant statement of defective construction or of defective condition, or of an accident happening through defective condition or construction of plant. But then it is also alleged that it was "gross negligence on the defenders' part to entrust to the deceased and his fellow-workmen the duty of executing, unaided, work which required the direction and assistance of skilled riggers in order to allow of its being safely performed."

I cannot say at this stage that this is irrelevant. I think that if it turned out that these coppersmiths are artificers, whose experience is confined to the workshop, that it was not proper to have sent them out to perform this operation of breaking up and lowering from a fourth storey utensils of such considerable weight.

I cannot say how the matter will turn out on proof, but I can say that I think there is enough relevantly stated to justify enquiry. But I do not think that the case ought to go to a jury. The case is, at least, only partly relevant, and it is difficult, before a jury, to confine the evidence to that which bears on the relevant part of the case, and whatever care the presiding judge may take in charging them, to induce the jury to restrict their consideration to that part of the evidence.

I shall therefore allow a proof before answer.

The Pursuer *reclaimed*, and *argued*: The whole of the averments were relevant for enquiry. The Lord Ordinary had allowed a proof because he considered the case only partly relevant. If he were wrong on this point, then the mode of proof should be altered to trial by jury.

Argued for the Defenders: There were no grounds for disturbing the exercise of the Lord Ordinary's discretion in determing the mode of trial (*Vallery*, 1905, 7 F. 640; *Jack*, 1904, 6 F. 572; *Edinburgh Railway Access Co.*, 1903, 5 F. 299; *Fern*, 1 F. 701; *Cooke*, 1905, 13 S.L.T. 536; *Barclay*, 1904, 12 S.L.T. 45).

The Court *recalled* the interlocutor reclaimed against, and *allowed* an issue.

The Lord Justice-Clerk.—I should be sorry to interfere with the general rule that the Court will not interfere with the discretion of the Lord Ordinary as to whether a proof or a jury trial should be allowed. But although that is the general rule, this is not a case in which the rule is applicable. Apparently the Lord Ordinary's reason for allowing a proof was because he was of opinion that while part of the pursuer's averments were relevant, the other part was not. Now, I am not satisfied that the whole case for the pursuer is not a relevant case. Presumably, although he does not say so, if the Lord Ordinary had been of this opinion, he would have allowed the case, which does not appear on the facts to be a complicated one, to go to a jury. Accordingly, I am in favour of recalling the Lord Ordinary's interlocutor, and allowing the issue proposed, as to the form of which no objection was taken.

Lords Stormonth-Darling, Low and *Ardwall* concurred.—15*th June* 1907.

Counsel for Reclaimers, Morison, K.C., A. Moncrieff; Agents, Laing & Motherwell, W.S.—Counsel for Respondents, Constable; Agents, Bonar, Hunter & Johnstone, W.S. J. H. H.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

54. Goodwins, Jardine & Company Limited *v.* Brand & Company.

Expenses — Taxation — Counsels' Fees — Fees of Twenty-five and Eighteen Guineas Allowed for Senior and Junior Counsel Respectively for First Day of Proof, and Twenty and Fifteen Guineas for Remaining Days of Proof—Fees of Fifteen and Twelve Guineas Allowed to Senior and Junior Counsel Respectively for First Day of Hearing in Inner House, and Twelve and Ten Guineas for Subsequent Days.

(Reported ante, Vol. XI. p. 482; Vol. XIII. p. 329; Vol. XIV. p. 949.)

Note of Objections to Auditor's Report.

In this case Goodwins, Jardine & Co. Ltd., in liquidation, and James Watson Stewart, C.A., Glasgow, the liquidator thereof, sued Charles Brand & Son, contractors, Glasgow, for £10,917, being the balance alleged to be due under a contract for the supply of girder work for the formation of portions of Glasgow Central Railway.

Proof lasting four days was led before Lord Dundas, and the hearing on the proof lasted two days. Lord Dundas issued findings leaving it to the parties to work out the amount due by the defenders to the pursuers.

The defenders *reclaimed*, and the Court, after a three days' hearing, decerned against the defenders for payment to the pursuers of the sum of £7210, 8s. 10d., with expenses both in the Inner and Outer House, subject to deduction of one-fourth of the taxed amount thereof, as modification, and remitted to the Auditor to tax and to report.

The pursuers lodged a note of objections to the Auditor's report of their account of expenses. The objections were (1) to a reduction of the fees of thirty guineas sent to senior counsel for each day of the proof to twenty guineas for the first day and fifteen guineas for each subsequent day; and to a reduction of the fees of twenty guineas sent to junior counsel for each day of the proof to fifteen guineas for the first day and twelve guineas for each subsequent. (2) To a reduction of the fees of fifteen and ten guineas sent to the senior and junior counsel respectively for each day of the hearing in the Outer House to twelve guineas and four guineas respectively for each day. (3) To a reduction of the fees of twenty guineas sent to senior counsel for each day of the hearing in the Inner House, to fees of fifteen guineas for the first day and twelve guineas for each subsequent day; and to a reduction of the fees of fifteen guineas sent to junior counsel for each day of the hearing in the Inner House to twelve guineas for the first day and ten guineas for each subsequent day.

On the Note of Objections appearing in the Single Bills the pursuers *maintained* that the fees as taxed by the Auditor were too small in view of the complexity of the case and the large amount at stake. In the case of *Rees* v. *Henderson*, 1902, 4 F. 813, a fee of twenty-five guineas was allowed for senior counsel. This was a jury trial, but there was no reason for drawing a distinction between fees in jury trials and in proofs (*Shaw & Shaw and Others* v. *J. T. Boyd Ltd.*, 1907, 14 S.L.T. 880).

Argued for Defenders: The maximum fees allowed for proofs were twenty and fifteen guineas for senior counsel, and fifteen and twelve guineas for junior counsel, for the first and subsequent days of a proof respectively. No reason had been shewn why these fees should be exceeded in this case (*Wilson* v. *North British Railway Co.*, 1873, 1 R. 304; *Burrell and Son* v. *Russell and Co.*, 1900, 3 F. 12).

The Court *sustained* the pursuers' note of objections to the Auditor's report to the extent of allowing fees for senior counsel of twenty-five and twenty guineas for the first and subsequent days of the proof respectively, and of eighteen and fifteen guineas for junior counsel for the first and subsequent days of the proof respectively; and of allowing the fees paid of fifteen and ten guineas for each day of the hearing in the Outer House for senior and junior counsel respectively. The Court upheld the decision of the Auditor as to the fees in the Inner House.

The Lord President.—My Lords, the question raised in this note of objection, is as to fees to counsel. Taking the fees of senior counsel in the case I find that thirty guineas and twenty guineas were paid, and that twenty guineas and fifteen guineas have been allowed by the Auditor. Now, my Lords, I have nothing more to say than what I said in the case of *Shaw* v. *Boyd*, which was quoted to us. My observations in that case were concurred in by your Lordships. In the case of *Shaw* v. *Boyd* I indicated quite clearly that there were cases where what may be looked upon as a normal fee might fairly be exceeded. I said that I did so as a guidance for the Auditor in future. My Lords, I have no doubt this case which we have before us is *a fortiori* of *Shaw* v. *Boyd*. In this case your Lordships have the advantage of having heard the whole argument and read the proof, so that you are quite familiar with the circumstances of the case. The two considerations which I put before your lordships in *Shaw* v. *Boyd* for fixing what is a proper fee were first, the trouble involved in the preparation of the case, and, second, the amount at stake. The amount at stake here is very large, very much larger than in the case of

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Goodwins, Jardine & Co. Ltd. v. Brand & Co.

The Lord President.

Shaw v. *Boyd*. Then as regards trouble in preparation, the trouble in preparation in this case must have been very considerable, because the case was complicated, and there was the necessity for anterior preparation in connection with a great many technical drawings. That being so, I think that the fee here ought to have been allowed on a larger scale than the ordinary one. Therefore I propose that the fees of the senior counsel should be twenty-five guineas for the first day and twenty guineas for the other days, and that the fees for junior counsel should be altered in the same proportion.

Lords M'Laren, Kinnear and *Pearson* concurred. —30*th May* 1907.

Counsel for Pursuers, Morison, K.C., Black; Agents, Webster, Will & Co., W.S.—Counsel for Defenders, Murray; Agents, Alexander Morison & Co., W.S. A. M.

OUTER HOUSE.

(*Lord Salvesen.*)

55. Russell & Company *v.* The United Society of Boilermakers and Iron and Steel Shipbuilders and Another.

I. Trade Union—Trade Disputes Act 1906 (6 Edw. VII. cap. 47) sect. 4 (1)—Action Raised Prior to Act Held Not to Be Excluded.

II. Statute—Trade Disputes Act 1906 (6 Edw. VII. cap. 47)—Construction—Whether Retrospective.

The pursuers were shipbuilders in Port-Glasgow, and they raised this action for £300 damages against (1) The United Society of Boilermakers and Iron and Steel Shipbuilders, registered as a Trade Union in terms of the Trades Union Acts 1871 and 1876, and (2) John Sanderson, district delegate for Port-Glasgow, one of the districts into which under its constitution and rules the Society was divided.

On 2nd December 1905 all the fitters and platers in the employment of the pursuers left their work between the hours of 9.45 a.m. and 12.45 p.m. They were all members of the above Society. The ground of action was that the men committed a breach of their contract of employment, and that that breach was induced or procured by the defender Sanderson acting on behalf of the Society.

The defenders lodged separate defences, but both pleaded, *inter alia*:—

"1. The action is excluded by the Trade Disputes Act 1906.

"2. The averments of the pursuers are irrelevant, and insufficient in law to sustain the conclusions of the action."

The question of relevancy does not call for any report.

The following authorities were referred to on the question raised by the first plea in law:—

For Defenders: *Reid and Others, Petitioners*, 1863, 1 M. 774; *Towler* v. *Chatterton*, 1829, 6 Bingham 258; *Hilliard* v. *Linard*, 1829, 1 M. and M. 297; *Ballinten* v. *Connor*, 1852, 14 D. 927.

For Pursuers: Maxwell on Statutes, p. 321; *Gardner* v. *Lucas*, 1878, 3 App. Cas. 582; *Knight* v. *Lees* [1893], 1 Q.B. 41.

The Lord Ordinary *repelled* the first two pleas in law for each of the defenders, and allowed a proof.

Lord Salvesen [after dealing with the question of relevancy]. — The defenders further argued that, under sect. 4 (1) of the Trade Disputes Act 1906, 6 Edw. VII. cap. 47, the action is excluded. The section is in these terms: "An action against a trade union, whether of workmen or masters, or against any members or officials thereof, on behalf of themselves and all other members of the trade union, in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court." In this case both the cause of action and the action itself occurred prior to the Act coming into operation, and the argument, therefore, involves that the Act is retrospective. I was referred to various cases, of which the case of *Ballinten*, 14 D. 927, is an example, in support of this proposition. That decision, however, related to a statute regulating procedure which was held to be applicable to existing suits in the absence of express reservation, and does not, in my opinion, apply where the effect of the statute if retrospective would be to take away a previously existing right of action. The rule in this matter was stated by Lord Blackburn in *Gardner* v. *Lucas*, 5 R. (H.L.) 117, where he pointed out that the presumption is that statutes are not retrospective unless this is expressed, or clearly implied, from the language used by the Legislature. The words founded on here, "An action shall not be entertained by any Court," do not, I think, imply that an action already competently in Court shall not be allowed to proceed to trial. A very similar question arose in the case of *Knight* v. *Lee*, L.R. 1 Q.B.D. 41, where Mr Justice Bruce said: "Here the plaintiff had a vested right of action required before the statute came into force; and it cannot be supposed that the statute was intended to take such a right away." The words in the statute then under construction which compare with the words I have to consider were these, "No action shall be brought or maintained," and appear to be rather more favourable to the contention that the Act operated retrospectively than those in the present case. I shall accordingly repel the first two pleas in

law for each defender, and allow the parties a proof of their averments.—*25th May* 1907.

Counsel for Pursuers, Dean of Faculty (Campbell, K.C.), C. D. Murray; Agents, Morton, Smart, Macdonald & Prosser, W.S.—Counsel for the Society, Hunter, K.C., Wark.—Counsel for Sanderson, T. G. Robertson; Agents, J. & J. Galletly, S.S.C.

J. W. F.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

56. Owners of s.s. "Olga" *v.* Owners of s.s. "Anglia" and Others.

Ship—Collision—Mutual Fault—Limitation of Liability—Expenses—Claim By One Vessel in Petition By Second Vessel for Limitation of Liability — Both Ships to Blame—Petitioners Found Liable in Expenses of Claim.

Motion.

(*Reported ante, Vol. XII. p.* 812; *and Vol. XIV. p.* 316.)

In February 1903 a collision occurred between the "Olga" and the "Anglia." Cross-actions of damages were brought, and it was ultimately decided that both vessels were to blame. Thereafter a petition in the usual terms was presented by the owners of the "Olga" under sects. 503 and 504 of the Merchant Shipping Act 1894 for limitation of liability, in which claims were lodged by the owners of the "Anglia" and by the owners of cargo on board the "Anglia."

A question arose between the claimants, which was tried and decided in the limitation proceedings. Decree was pronounced in terms of the prayer of the petition. The proceedings down to this stage are reported in 7 F. 739 and 8 F. (H.L.) 22, and in 12 S.L.T. 812 and 14 S.L.T. 316. Thereafter the claimants moved for the expenses of lodging their claims and relative procedure, and referred to these authorities: *Burrell*, 1877, 4 R. 1133; *Carron Co.*, 1885, 13 R. 114; Marsden on Collisions, p. 161. The petitioners opposed the motion, and argued that the rule laid down in the cases cited did not apply to the case where both ships were to blame. Reference was made to *Miller*, 1875, 2 R. 976 at p. 979.

The Court *pronounced* the following interlocutor: "Find the claimants [the owners of the "Anglia" and the cargo owners] entitled to the expenses of their respective claims and relative procedure in the limitation proceedings against the petitioners, the owners of the s.s. 'Olga.'"

The Lord Justice-Clerk.—Whatever might have been our opinion if this question were now before us for the first time, I think the matter is practically settled by authority. In the case of the *Carron Co.*, 1885, 13 R. 114, the Lord President observes that a party who has presented a petition for limitation of liability is bound to pay the expenses of the procedure, for the reason that the procedure is rendered necessary by the fact of the collision occasioned through his fault. In the present instance the collision was occasioned by the fault of the petitioner's vessel, and the fact that the "Anglia" was also to blame does not seem to me to matter at all in the question before us. The owners of the "Olga" appeal by petition under Act of Parliament in order to limit their liability, and to save themselves from actions which would be raised against them, and to which they would otherwise have had no defence. In such circumstances I think it is perfectly right that they should pay the expense of claims lodged in the petition.

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The Lord Justice-Clerk.

Lord Ardwall.—I concur. I think this matter is settled by invariable practice, not only in Scotland, but also in England, where there are many more cases of this nature than in our Courts. Further, I think that the rule as laid down in these cases is founded on good sense and equity. The petition is presented by the ship, or one of the ships, which is to blame for a collision in order to get rid of full liability for damage. It is presented purely in the interest of the shipowner, who thereby escapes paying full damages and the expenses of many actions which might have been brought against him. I think that the fund to which liability has been limited should not be encroached upon by the expenses of the limitation petition, and that the petitioner should pay the expenses of the claimants in these proceedings, excluding, of course, all expenses caused by the competition between the various claimants, in which he has no interest and for which he has no responsibility.

Lords Stormonth-Darling and *Low* concurred. —*15th June* 1907.

Counsel for Petitioners, Hon. W. Watson; Agents, Alex. Morison & Co., W.S.—Counsel for Claimants (owners of s.s. "Anglia"), W. T. Watson; Agents, Beveridge, Sutherland & Smith, S.S.C.—Counsel for Claimants (owners of cargo), Spens; Agents, Boyd, Jameson & Young, W.S.

J. H. H.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

57. Caledonian Railway Company *v.* Walmsley.

Railway—Trespass—Question of Civil Right—Prosecution for Crossing Railway Otherwise than by Authorised Crossing—

2ND DIV. Caledonian Railway Co. v. Walmsley.

ALLEGATION OF RIGHT OF WAY—HELD NO QUESTION OF HERITABLE RIGHT INVOLVED—CALEDONIAN RAILWAY ACT 1898 (61 & 62 VICT. CAP. 188), SECT. 36.

Stated Case.

This was an appeal by way of Stated Case against a decision of the Sheriff-Substitute (Moffatt), in the Sheriff Court at Falkirk. The case was stated as follows:—

This is a case brought under the Summary Jurisdiction (Scotland) Acts 1864 and 1881 at the instance of the appellants against the respondent and John Gillespie, labourer, residing with James Gillespie at 68 Forth Street, Grangemouth, charging that on the 23rd March 1906 they did trespass upon the railway belonging to the appellants, in the parish of Grangemouth and county of Stirling, at a point about 396 yards or thereby to the south-west of Grangemouth Station, by being or passing upon the said railway, and not for the purpose of crossing the same at a level-crossing thereof, contrary to the 36th section of the Caledonian Railway Act 1898 (61 & 62 Vict. cap. 188).

The case was tried before me of this date (1st May 1906). It was stated *in limine* for the respondent that he, as one of the public, claimed a right to cross the railway at the place in question by virtue of the existence of a public right of way for foot-passengers. The appellants denied that there was any public right of way, and stated further that they were prepared to prove that the respondent and Gillespie did not follow the line of the right of way claimed.

The respondents claimed that the complaint should be dismissed, in respect that a substantial question of civil right was involved. I intimated that I could not at that stage determine whether there was a substantial question of civil right, and that the case must go to trial. Evidence was accordingly adduced in support of the complaint, and also for the respondents.

The facts proved in evidence were as follows:—

The respondent is employed in Messrs Brownlee's saw mills, which adjoin the railway on the west, and were opened about a year ago. There is another saw mill on the west of the railway belonging to Messrs Muirhead, opened three or four years ago. On the date libelled the respondent the said John Gillespie, and twenty or thirty other workmen from these mills, left the mills at 9 a.m. to go home for breakfast. They live in the new town of Grangemouth, on the east side of the railway, and to cross the railway was a much shorter way home than round by the public road. On leaving the mills the men got on to the bank of a timber pond on which there is a foot-path which the appellants allege is their private property, but which the respondents allege is part of a public right of way used by the public from time immemorial and before the railway entered Grangemouth. The men then got on to a piece of waste ground by the side of the railway without crossing any fence, passing through a space about five feet wide between Messrs Brownlee's fence and the corner of a garden belonging to the appellants. The railway at this point now consists of the Grangemouth branch line and eight railways sidings in all. The railway was begun in 1858, and at first consisted of a single line only.

When the men were in the act of crossing the railway they were challenged by two railway servants who had been stationed there for the purpose. The respondent and Gillespie were stopped by the two railway servants and asked their names and addresses, which were given. The rest of the twenty or thirty men turned back, but the respondent and Gillespie proceeded and crossed the railway. To get off the railway ground they had to climb over a close sleeper fence fully six feet high, in which iron spikes had been driven in to assist persons climbing over said fence at the part where it is alleged the said right of way exists. By whom the spikes had been driven in did not appear.

The respondent adhered substantially, though not quite exactly, to the line of the alleged right of way.

Gillespie kept further north, and deviated substantially from the alleged right of way.

There is no level-crossing at or near the place in question, and there has been none since 1882. The notices warning against trespassing were duly exhibited at the nearest station and the nearest level-crossing, in terms of said 36th section of the Caledonian Railway Act 1898. A similar notice was also exhibited at the place the respondent crossed. Prior to the year 1882 there was a level-crossing at the place in question, with gates for the roadway and wicket gates at the side for foot passengers. The appellants alleged that this was a private level-crossing for the use of the farm tenant who at that time had ground on both sides of the railway. The respondent admitted that as regards the roadway for carts, etc., the crossing was private, but alleged that a public right of way for foot passengers coincided with the tenant's crossing, and that the wicket gates were for the public as well as for the tenant.

From 1882 onwards members of the public occasionally crossed the railway at the point in question, in the belief that there existed an ancient public right of way dating from a time anterior to the formation of the railway, and leading from the old town of Grangemouth to Polmont Church.

The question whether there really exists a right of way was not fully gone into, but I am satisfied that the contention was put forward *in bona fide* and was not frivolous or without some probable grounds.

As the respondent had adhered substantially to the line of the alleged right of way, and as the question whether there was a right of way or not could not be tried under the present proceedings, I dismissed the case against the respondent. As Gillespie had deviated from the alleged right of way, I convicted him and dismissed him with an admonition.

The Question of Law for the opinion of the Court was:—

> In the circumstances, ought the respondent to have been convicted of the contravention charged, notwithstanding his allegation of a right of way?

Argued for the Appellants (Caledonian Railway Co.): No question of heritable right was involved in the case, and the respondent should have been convicted. "Trespassing on a railway" was a statutory offence, and was defined in the Regulation of Railways Act 1868, sect. 23, as "being or passing upon any railway except for the purpose of crossing the same at any authorised

crossing": cf. Regulation of Railways Act 1840, sect. 16; Caledonian Railway Act 1898, sect. 36. The only question which the Sheriff had to consider was whether or not there was a level-crossing at the point in question, and if there were not, a conviction should have followed (*Scott*, 1887, 14 R.J. 45; *Dalrymple*, 1886, 13 R.J. 34). If the respondent desired to raise the question of right of way, he should have proceeded by an application to the Sheriff under sect. 54 of the Railways Clauses Act 1845.

Argued for the Respondent: Where a civil right is maintained by the respondent to a criminal complaint, the case should be dismissed and the parties left to determine the question in a competent process (*Barlas*, 1876, 3 R.J. 26; *Cole*, 1888, 57 L.J. (Mag. Cas.) 132. Until the question of right of way was determined, it was impossible to say whether or not the respondent was guilty of trespassing (*Hay's Trs.*, 1877, 4 R. 398; *Dalrymple, cit supra*). It was the duty of the railway company to provide proper crossings where a right of way crossed the railway (Railways Clauses Act, 1845, sects. 39 to 54; *Dartmouth Railway* [1896], 2 Q.B. 74).

The Court *answered* the question of law in the affirmative.

The Lord Justice-Clerk.—In my opinion, the question put in this stated case should be answered in the affirmative. It is undoubtedly a well-established doctrine that where a criminal proceeding involves the decision of a question of civil right, a Court ought not to determine the former till the latter has been answered by a competent Court. But in this case it does not appear to me that that doctrine has any application. A railway company, when it is empowered to make a line for traffic, must at all places where roads cross the line provide bridges or level-crossings, according to its undertaking under its application to Parliament. On the other hand, it is vested with a power to have trespassers on its line dealt with penally by fine, in a way not open to the ordinary owner of property. This power is given in view of the public safety, there being necessarily public danger, if persons go on to the line at places other than those where provision is made for crossing. If persons claim a right to cross at places where such provision is not made, they must take civil steps to have a crossing provided, which they can only do by proving their right. If they trespass on the line by climbing over fences, they cannot claim immunity from the statutory penalties, if they thus take the law into their own hands. They are trespassing if they are not crossing at a place provided for that purpose.

In this case there had been no crossing place since the year 1882. The railway company had possessed their line without a crossing during all that time. Recently persons have been crossing, and climbing over the fence, which is what the clause of the statute was intended to prevent. The magistrate had one question, and one question only, before him, "Did the accused cross the line at a place where in fact there was no crossing?" In my opinion he should, on the facts stated, have answered that question in the affirmative, and pronounced a conviction. Whether by proper legal proceedings anyone can prove that the Company are bound to provide a safe crossing, is a totally different question. The case before him did not, in my opinion, involve the decision of any question of civil right. No such matter could be raised in the proceedings on the complaint before him.

Lord Low.—If in order to decide whether the respondent Walmsley had or had not been guilty of trespassing upon the appellants' railway within the meaning of the 36th section of the Caledonian Railway Act 1898, it had been necessary to determine a question of heritable right, I have no doubt that the Sheriff-Substitute would have been justified in dismissing the complaint.

In my opinion, however, no such question required to be determined, because although the respondent maintained, upon what the Sheriff-Substitute has found to be "some probable grounds," that there is a public right of way across the line at the place where he crossed it, I think that the respondent was nevertheless trespassing upon the line within the meaning of the section.

By the Railway Acts a railway company is bound, when it constructs its line, to make provision, by means of bridges or level crossings, for carrying all public roads of every description across the line, so that they may be available for the public use as freely and fully as before the construction of the railway. If, therefore, a railway company fulfils its obligations no one has a right to cross the line except at one of the crossing places provided by the Company. That, of course, is the consequence at common law of the fulfilment by the Company of its statutory obligations; but from considerations of public safety the Legislature has, in addition to the rights of the railway company at common law, made trespassing upon a railway, in spite of warning, an offence punishable by fine. In the public statutes enactments to that effect will be found in the Regulation of Railways Act 1840, sect. 16, and in the Regulation of Railways Act 1868, sect. 23. Similar provisions are commonly inserted in the private Acts of railway companies, and the enactment upon which the complaint in the present case proceeds, is, as I have indicated, the 36th section of the Private Act of the Caledonian Railway Company of 1898.

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Lord Low.

By that section it is provided that "any person who shall trespass upon any of the railways, stations, works, lands and property belonging to or worked by the Company, shall, without having received any personal or other warning than as hereinafter mentioned, forfeit and pay by way of penalty any sum not exceeding forty shillings." It is then provided that notices affixed to notice boards shall be sufficient warning, and "that no person lawfully crossing the railway at any level-crossing thereof shall be liable to any such penalty as aforesaid."

The argument for the respondent was that if, as he alleged upon probable grounds, there existed a public right of way across the line which he, as a member of the public, was using, he could not be said to be trespassing upon the line, because he was there in the exercise of a right. Therefore, as the question whether the respondent had or had not committed an offence within the meaning of the section depended upon whether or not the alleged right of way existed, the Sheriff-Substitute was right in dismissing the complaint.

There is, no doubt, considerable force in that argument, but I am satisfied that it is not well founded. In construing the word "trespass" in the section, it seems to me that regard must be had to the subject-matter and purpose of the enactment. It is founded upon considerations of public safety; it recognises that a railway is a dangerous place; and that for persons to cross or stray upon a railway, except in the proper use of a level-crossing, is dangerous, not only to themselves, but to the travelling public. Accordingly the Legislature has enacted, in the public interest, that a person trespassing upon a railway shall, in addition to any civil remedy which may be put in force against him, be liable in a penalty if the trespass takes place after warning has been given. It is plain that the object of the enactment would to some extent be defeated if it were a good answer to a complaint that the person who had crossed the railway in spite of warning, was able to maintain upon "some probable grounds" that he was following the line of an old right of way. It seems to me that the remedy which such a person has is to take the necessary steps to have the right of way which he alleges declared, and the railway company compelled to make a crossing. He is not entitled to take the law into his own hands and force his way across the line. If he does so he is, in my judgment, guilty of a trespass within the meaning of the Act.

I have already pointed out that it is the statutory duty of a railway company to carry any public road, including rights of way, across their line, and therefore it seems to me that where there is no crossing provided there is a presumption that there is no right of way—a presumption strong enough at all events to lay the *onus* of establishing that there is a right of way upon the party alleging it. I do not think that that proposition could be seriously disputed, but it might be said that although the railway company might be entitled to have the *status quo* maintained by interdicting the party claiming a right of way from crossing the line until the existence of the right had been established in an appropriate process, they would not be entitled to attain that end by *quasi*-criminal proceedings under which a person who in fact had a right to cross the railway might be subjected to a penalty as a trespasser. That is a consideration which might have considerable weight if it were not that the matter is one concerning the public safety. For the safety of the public the Legislature considered it necessary to enact that anyone crossing a railway should be liable to a fine, provided (1) that he had been duly warned; and (2) that he had crossed the railway otherwise than by a level-crossing. It seems to me that unless a person against whom a complaint is brought can bring himself within one or other of these exceptions, he must be held to have committed the statutory offence. If that view be sound, it follows that the respondent ought to have been convicted.

I have only to add that there seems to me to be nothing in the special circumstances of this case which would justify the Court in treating it as exceptional. The railway was constructed in 1858, and then a level-crossing, for carriage traffic as well as foot-passengers, was made at the place in question. That level-crossing was, however, discontinued and shut up in 1882. The fact that there was once a level-crossing may perhaps lend some probability to the respondent's contention that there was a right of way at the place in question, but I do not think that it affects the present case. There has been no level-crossing for more than five and twenty years, and accordingly it seems to me that the *onus* of proving that there is a right of way and that there ought to be a level-crossing is just as much upon the person maintaining that view as if there had never been a crossing at all. In saying that, however, I do not mean to indicate an opinion that it would have made any difference if the level-crossing had been shut up *de recenti*.

Further, I may observe, although perhaps it has no direct bearing upon the present question, that by the Local Government Act 1894, the duty of protecting and keeping open rights of way is laid upon the District Committee, or, where there is no District Committee, upon the County Council; and if a Parish Council or six parish electors represent to the District Committee or the County Council, as the case may be, that a right of way has been shut up or obstructed, the Committee or the Council are bound, if they are satisfied that the representation is well founded, to take such proceedings as may be required with the right of way. I mention that circumstance, because it shows that the view which I take of the case does not involve what

might be regarded as a hardship. The respondent and other workmen in a like position are not placed in the dilemma of having either to lose the use of a right of way which would be a great convenience to them, or to embark upon an expensive litigation to vindicate the right.

I am therefore of opinion that the question submitted to the Court should be answered in the affirmative.

Lords Stormonth-Darling and *Ardwall* concurred.—18*th June* 1907.

Counsel for Appellants, Blackburn, K.C., W. J. King; Agents, Hope, Todd & Kirk, W.S.—Counsel for Respondent, M'Lennan, K.C., Findlay; Agents, Dalgleish & Dobbie, W.S. J. H. H.

HIGH COURT OF JUSTICIARY.

(*Lords M'Laren, Kinnear and Pearson.*)

58. M'Lean *v.* Skinner.

Justiciary Cases—Evidence—Evidence of Previous Conviction—Charge of Contravention of Poor Law (Scotland) Act 1845 (8 & 9 Vict. cap. 83), sect. 80—No Charge of Previous Conviction—Evidence Allowed of Previous Conviction of Contravention of Prevention of Cruelty to Children Act 1904 (4 Edw. VII. cap. 15), sect. 1—Criminal Procedure (Scotland) Act 1887 (50 & 51 Vict. cap. 35), sects. 67, 71—Conviction Suspended.

Bill of Suspension.

This was a bill of suspension of a conviction obtained against the suspender in the Sheriff Court at Oban, on a complaint charging—

That Hector M'Lean, fisherman, Oban, has, at his dwelling-house in Oban, in the parish of Kilmore and Kilbride, and from or about, and since, the Thirteenth day of November Nineteen hundred and six years, deserted, neglected, or failed to maintain Annie M'Lean, aged thirteen years, and Katie M'Lean, aged eleven years, and Hector M'Lean, aged ten years, and Arthur M'Lean, aged five years, and Alexander M'Lean, aged three years, and John M'Lean, aged seven years, his children, he being able so to do, whereby his said children have become chargeable to the said parish of Kilmore and Kilbride, contrary to sect. 80 of the Poor Law (Scotland) Act 1845 (8 & 9 Vict. cap. 83).

The grounds of suspension were set forth, *inter alia*, as follows:—

Stat. 1. The complainer is a fisherman or sailor. His wife died about two years ago, leaving him with six young children, who since March 1906 have been in the charge of the local authorities. He was, on or about 20th February 1907, charged before the Sheriff of the County of Argyll, at the instance of the respondent, with a contravention of sect. 80 of the Poor Law (Scotland) Act 1845 (8 & 9 Vict. cap. 83), in respect that he had, at his dwelling-house in Oban, in the parish of Kilmore and Kilbride, and from or about and since the 13th day of November 1906, deserted, neglected, or failed to maintain his children therein named, he being able so to do, whereby they had become chargeable to said parish, and on 22nd February 1907 he pleaded not guilty.

Ans. 1. Admitted. Explained that the complainer failed to maintain his said children on and after 13th November 1906, and that said desertion and failure was continuous. . . .

Stat. 2. The complainer was, on 23rd February 1907, tried by the Sheriff-Substitute of Argyll at Oban on said complaint. . . .

Ans. 2. . . . .

Stat. 4. As part of the proof for the prosecution, and before the evidence in defence was taken, the respondent tendered Malcolm MacArthur, sergeant of police, Oban, as a witness to prove a conviction, of date 6th March 1906, under the Prevention of Cruelty to Children Act 1904, sect. 1. Said conviction was not, and could not, have been libelled in the complaint, either substantively or as an aggravation. The complainer's agent objected to the evidence tendered. In face of the objection the Sheriff-Substitute allowed the evidence, which the witness then gave by reading an entry from a police register. No extract of said conviction was produced, nor was the register lodged and noted as a production. After the close of the proof, and in his address to the Court prior to conviction, the respondent's agent emphasised the previous conviction as a presumption of guilt. Such evidence and comment were irregular and illegal, and contrary to the provisions of the Criminal Procedure (Scotland) Act 1887, sects. 63 to 67 inclusive, and sect. 71 thereof, and sect. 24 of the Summary Procedure (Scotland) Act 1864.

Ans. 4. Denied that the respondent's said agent emphasised the previous conviction as a presumption of guilt. The admissibility of the said evidence was duly considered by the Sheriff-Substitute, who was the judge when the complainer was convicted on 6th March 1906, and who allowed the said evidence to be led *quantum valeat*. The said Acts are referred to for their terms, beyond which no admission is made. *Quoad ultra*, admitted.

Stat. 6. After hearing evidence and argument for both parties, the Sheriff-Substitute found the complainer guilty of the offence libelled, on the ground that he was able-bodied, though it was proved that he was unable to obtain employment and was earning nothing, and sentenced him to pay a fine of £3 or to suffer thirty days' imprisonment.

Ans. 6. Denied that it was proved that the complainer was unable to obtain employment and was earning nothing. *Quoad ultra*, admitted. . . .

The Suspender pleaded, *inter alia*—

"The conviction is null and void in respect: (1) that incompetent and illegal evidence of an alleged previous conviction was admitted and used against accused, and (2) that the police register was not lodged and noted on record as a production."

Argued for Suspender: It was incompetent to prove a conviction for a different offence under

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a different statute as an aggravation of what was charged. The Court must presume that such evidence influenced the mind of the Sheriff-Substitute, and the extent to which it influenced him could not be determined. In any event, evidence of previous conviction cannot be given unless the previous conviction is libelled, and it was not libelled here (Dickson on Evidence, sect. 15; *Burns* v. *Hart*, 1856, 2 Irv. 571).

Argued for Respondent: The evidence was competent, as the offence to which the previous conviction related was of a similar character to that charged in the present case. In any case the Sheriff-Substitute was not misled, because the previous conviction was also obtained before him, and he must have been aware of it.

The Court *suspended* the conviction and sentence.

Lord M'Laren.—This is a process of suspension of a conviction obtained before the Sheriff-Substitute of Argyllshire at Oban under the 80th section of the Poor Law Amendment Act 1845. The complaint sets forth that from and since the 13th day of November 1906, Hector M'Lean, fisherman, Oban, had deserted his three children therein named, whereby his children had become chargeable to the parish of Kilmore and Kilbride, contrary to the statute.

Various objections to the conviction were argued, but in the view which your Lordships have taken of the case, it is only necessary that I should deal with one of the grounds of suspension, viz., that which is the subject of the second plea in law.

The plea sets forth (1) that incompetent and illegal evidence of an alleged previous conviction was admitted and used against the accused, and (2) that the police register was not lodged and noted on record as a production. These, I think, are to be considered rather as alternative ways of stating the objection to the evidence. The thing complained of in the Bill is that the Sheriff-Substitute improperly admitted evidence to prove a previous conviction of the accused for contravention of the 1st section of the Cruelty to Children Act 1904. The record of the conviction names and designs the witnesses who were examined in support of the complaint; and to the entry, Malcolm MacArthur, sergeant of police, Oban, is appended this note: "Objection by Mr Stewart that no previous conviction libelled; objection repelled." I read the plea as meaning, either that evidence of a previous conviction of the accused was inadmissible, or that if it was admissible then it was improperly admitted because the police register, which touches the conviction, ought to have been noted. Now it is perfectly clear that the Sheriff-Substitute admitted the evidence of Sergeant MacArthur, because he notes that the objection to this evidence was repelled, and it is of no consequence whether we are to treat the police register as having been admitted or not, because it is not disputed that Sergeant MacArthur was called to prove a conviction under the Cruelty to Children Act 1904, and the only question is whether evidence of such a conviction was admissible.

It was not a conviction of the same offence for which M'Lean was on his trial, because a man may be liable to conviction under the 80th section of the Poor Law Act without being guilty of cruelty or of any act tending to endanger life. It follows that the conviction under the Cruelty to Children Act was not an aggravation (in the legal sense) of the offence of desertion of children. Neither was the conviction competent evidence for proving guilty intention. I do not say that evidence of the fact of cruel conduct to the children would not be relevant to prove that the case was one of wilful desertion. But the cruelty in the case supposed must be proved by the evidence of eyewitnesses, and not by the production of a conviction in a previous process.

In this, as in almost all cases on admission or rejection of evidence, the question arises, What is the bearing of the erroneous ruling on the conviction?

I can imagine a case where a question was improperly allowed, or a document received in evidence, neither of which could have had any prejudicial effect on the case of the accused person. When evidence has been admitted we can always (if the parties are not agreed) find out what it was in substance and effect, and if the evidence turns out to be quite innocuous, the conviction may be allowed to stand. But in the present case the evidence, although inadmissible in the form in which it was offered, was not irrelevant to the subject-matter of the complaint; because if the Sheriff held it proved that the accused had been cruel to his children, he might the more readily infer that the subsequent desertion of these children was not due to poverty, but was the result of wilful neglect. We do not know what weight the Sheriff-Substitute gave to the previous conviction, but in my opinion there was such a connection between the two things that the admission of the conviction, or of evidence of the conviction, was calculated to affect the decision of the case, and I accordingly move your Lordships that the conviction be suspended on this ground.

I shall say nothing regarding the other grounds of suspension, except that I think there is more ingenuity than substance in them.

Lord Kinnear.—I agree. We heard a great many objections to this conviction, most of which were very unsubstantial, while others might require some consideration, were it not that the ground on which your Lordship proposes to proceed is sufficient for the decision of the case.

The Sheriff-Substitute has undoubtedly admitted incompetent evidence, and therefore the

only question is whether or not that improper evidence may have had any effect in determining the judgment. Now it appears to me a conclusive answer to that question that the admission of the evidence was objected to, and the objection was repelled by the Sheriff-Substitute. It follows that in his judgment it was both competent and relevant, and therefore he was bound to take it into account in coming to a decision. But since it was wrong to give it any weight whatever, and we cannot know the effect which it had on his mind, the conviction ought to be quashed.

Lord Pearson.—I am of the same opinion. Whatever may be said as to the other matters argued, the objection dealt with by your Lordship stands out clearly as raising a question of vital importance. This was a prosecution under sect. 80 of the Poor Law Act. A witness was tendered to prove, and I assume did prove, a prior conviction of an offence under the Prevention of Cruelty to Children Act 1904, notwithstanding an objection on the part of the complainer. That seems to me to have been entirely incompetent. The only explanation given by the respondent is that the admission of this evidence was duly considered by the Sheriff-Substitute, who "allowed the said evidence to be led *quantum valeat*," but, for anything we know, it may have led directly to the conviction. I therefore think the case falls within the rule as to the admission of incompetent evidence.—13*th June* 1907.

Counsel for Suspender, Paton; Agents, Gill & Pringle, W.S.—Counsel for Respondent, A. A. Fraser; Agents, M'Nab & MacHardy, S.S.C.

F. A. U.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

59. Dryden and Others v. M'Gibbon. M'Gibbon v. Dryden.

I. Husband and Wife — Earnings of Married Woman—Circumstances in which Held that Profits of Hotel Business Carried on by Spouses Jointly Were Not in Part Property of Wife—Married Women's Property (Scotland) Act 1877 (40 & 41 Vict. cap. 29), sect. 3—M'Ginty, 1892, 19 R. 935, Followed—Morrison, 1888, 16 R. 247, Distinguished.

II. Husband and Wife — Donation — Remuneratory Donation—Circumstances in which Held that Donation was Revocable and not Remuneratory.

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The first of these two actions was raised at the instance of the heirs *in mobilibus* of the deceased Mrs M'Gibbon against her husband, to vindicate their right to certain property which they alleged to belong to Mrs M'Gibbon's estate, as earnings of a business carried on by her from which her husband's *jus mariti* and right of administration were excluded. The second action was raised at the instance of Mr M'Gibbon against his wife's heir at law to recover a house on the ground that it was a *donatio inter virum et uxorem* which had been revoked by him.

The facts of the case sufficiently appear from the opinions of the Lord Ordinary (Dundas) and Lord Ardwall *infra.*

On 27th June 1906 the Lord Ordinary assoilzied the defender in the first action, and pronounced decree in favour of the pursuer in the second action.

He delivered the following Opinion:—

Lord Dundas.—This action was raised on 14th November 1905 by the next of kin of the deceased Mrs Mary Jane Dryden or M'Gibbon, and the compearing defender was her husband, the now deceased John M'Gibbon. The conclusions are for reduction of a discharge and renunciation by the pursuers in favour of the defender, which has been reduced, of consent, by my interlocutor of 30th January 1906; and also for count, reckoning and payment in respect of the defender's intromissions, as his wife's executor, with her moveable estate.

I have also to dispose now of an action which was raised on 15th December 1905 by the said John M'Gibbon, and which is insisted in by his brother and heir at law, against Peter Dryden, the heir at law of his sister the said Mrs M'Gibbon. The history of the two cases arises out of the same facts, and the proof which has been led is applicable to both actions. The difficulty, as regards the matter of evidence, is greatly increased by the fact that both Mr and Mrs M'Gibbon are now dead. The story is a somewhat tangled one, but I shall endeavour to recapitulate succinctly the material facts to which it is necessary to advert.

John M'Gibbon and his wife were married on 28th November 1890. Prior to the marriage, Mrs M'Gibbon had earned about ten or twelve shillings a week, but at its date she had no saved earnings. She had, however, some furniture in a small house in Drummond Street where she had resided, and where the spouses lived together after the marriage till Whitsunday 1891. The husband was a compositor, earning wages of not less than £2 per week. At Whitsunday 1891 the M'Gibbons removed to a house of three rooms and a kitchen in St Mary Street, where they took in lodgers. There is some evidence to show that Mrs M'Gibbon there acquired a certain amount of additional furniture from one of her lodgers. In November 1894 the couple became tenants at 142 High Street of two rooms and a kitchen; there was no written lease or missives of lease; the let was arranged by Mrs M'Gibbon with the factor, Mr Clephane, who says that he looked to her for the rent; but the husband's name was put in the Valuation Roll—upon the wife's instruction,

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as Mr Clephane depones—in order that the vote in respect of the premises should not be lost. At Whitsunday 1895 the tenancy became extended to the whole of the flat, at a rent of £26 per annum. This flat had formerly been used as a temperance hotel, and the business was revived at and from Whitsunday 1895. It is clear upon the evidence that Mrs M'Gibbon did in fact manage this business throughout, with slight (if any) practical assistance by her husband, he being engaged in his business upon the night shift, and not available for work during the day. The business was from the first successful, upon a modest scale, and continued to be so, at all events until the end of 1903. It appears that Mrs M'Gibbon, who died on 24th December 1904, had fallen into a habit of excessive drinking for some time prior to her death. The receipts for rent were granted in name of the husband. Such accounts as are produced, rendered by tradesmen and others, are in his name. His name also appeared upon a brass plate on the door of the premises; the plate had been brought from the house in St Mary Street. Upon the street side of the building the words "M'Gibbon's Temperance Hotel," or "Temperance Hotel," were painted. The pursuers produce, and found upon, a business card, No. 38 of process, on which the words "proprietrix, Mrs M'Gibbon," occur, and about which some of the witnesses give evidence more or less vague. It appears that there was also a card, of which No. 73 of process is a type, upon which these words do not occur, but only "M'Gibbon's (late Fuller's) Commercial and Temperance Hotel." It is not, I think, clear whether or not cards such as No. 73 were in existence or use contemporaneously with those of which No. 38 is an example. In the Edinburgh Directories from 1896–97 onwards Mr M'Gibbon's name is in the list of hotelkeepers. A fire policy of insurance over the flat (No. 26 of process), dated 21st January 1897, is in the wife's name. A fire policy of insurance over furniture (No. 54 of process), originally taken out in Mr M'Gibbon's name, was in June 1900 transferred to that of his wife.

In January 1897 an important event occurred, viz., the purchase of the flat at 142 High Street. It seems clear that this transaction was wholly carried out by Mrs M'Gibbon—both with the factor of the proprietor, Mr Clephane, and with the lawyer, Mr Wakelin. The destination in the disposition (No. 6 of process) gives in effect a liferent to Mr M'Gibbon on his wife's death, and the fee to his wife. I think that it is unfortunate that Mr M'Gibbon's own views were not ascertained at the time. But it seems that he signed the deed without demur, a fact strongly founded upon by the pursuers, and also by the defender in the second action, to which I have made reference. At the time of the purchase, additional furniture appears to have been bought, which must, I think, have been paid for out of the profits of the hotel business. The price of the premises was £475. A bond for £200 over them was obtained, which was signed by both Mr and Mrs M'Gibbon. It appears that at this time there were two bank accounts, and two only, in the name of the spouses, or either of them. Copies of these are Nos. 28 and 29 of process respectively. Both were with the Savings Bank. No. 28 was in name of the wife, and was headed "Own earnings." No. 29 was in the joint names of the husband and wife. I should say here that it is, in my opinion, clearly proved, by witnesses upon both sides of the case, that Mr M'Gibbon was in the habit, during the entire period of the spouses' residence in High Street, of handing over to his wife substantially the whole of his wages weekly. These she kept, along with the profits of the business, so far as not banked, in a locked box in a locked room in the house. As one of the witnesses tersely phrases it, "She was the bank." One must now see how the balance of the purchase price, £275, was paid, and how the sum in the bond, £200, was paid off. As regards the first of these, it is pretty clear that the money was paid by Mrs M'Gibbon, to the extent of £80 from the account No. 28 of process, and to the extent of £57, 10s. 1d. from the account No. 29 of process, making together the sum of £137, 10s. 1d.; and that the balance, viz., £137, 9s. 11d., was paid by her in cash. This cash must, in my opinion, be held to have come from the cash-box above-mentioned, in which it is proved that Mrs M'Gibbon was in the habit of keeping very considerable sums of money. There is no other feasible suggestion of a source from which the sum can have been raised. If this is the correct view, then I take it that this cash balance was paid out of the profits of the hotel business and the wages of the husband. The £200 due under the bond appears to have been paid by three instalments, viz.—(1) On 10th May 1899, a payment of £50. This, to the extent of £25, came apparently from account No. 29 of process. The balance was paid in cash, presumably from the cash-box. (2) On 14th May 1900, a payment of £50. The source from which this money came is not, I think, clearly proved. (3) On 1st July 1902, a payment of £100. This sum apparently came, to the extent of £93, 5s. 2d., from account No. 29 of process, and the small balance was paid in cash. In June 1900 the account No. 28 of process was exhausted and ended, by the withdrawal of its then existing balance of £192, 15s. 7d. At the same time there began a series of deposit receipts with the Royal Bank of Scotland (Hunter Square Branch), which (as shewn in No. 30 of process) rose steadily from £350 as at 22nd June 1900 up to £750 as at 29th December 1903. These deposit receipts stood in name of Mrs M'Gibbon, and at her death on 24th December 1904 the amount at credit was £744, 17s. 6d.

In these circumstances the pursuers aver "that the said flat was purchased, and the said bond paid, by the deceased Mrs Mary Jane Dryden or M'Gibbon with her own money, and that the sums placed on deposit receipt with the Royal Bank of Scotland were also her own money. Said money was earned by her before marriage, or in the said hotel business." In my opinion, the pursuers' case fails entirely. It is, I think, established by the evidence that Mrs M'Gibbon had, at the date of her marriage, no saved earnings. As regards the hotel business, the case seems to me equally to fail. After Mrs M'Gibbon's death an inventory (No. 7 of process) of her estate was prepared in Mr Wakelin's office, and given in for the husband's confirmation as her executor. That inventory contained the sum in deposit receipt, but appended was a "*Note.*—This money is claimed by the husband of the deceased as forming the joint savings of himself and his wife, or otherwise as money belonging to himself." It appears that Mr M'Gibbon had made statements to Mr Wakelin, and to those in his office, that he considered the money to be his own, as coming from the hotel business, which was in fact largely contributed to by his own earnings. The note was worded in cautious terms. But later on—after a more definite investigation into the facts—a corrective inventory (No. 9 of process) was lodged, omitting the money upon deposit receipt; and the duty which had been paid in respect thereof was recovered by Mr Wakelin from the Inland

Revenue authorities. Mr M'Gibbon appears to me to have been singularly careless about his money matters, whether from exuberant trust and confidence in his wife as their manager, or from some other cause or causes. It seems that he was aware that there was at her death money on deposit receipt, but that he was quite ignorant as to its amount. The pursuers' argument was, briefly stated, to the following effect. The deposited money, they said, belonged wholly to the wife, because it was made by her out of the profits of the hotel business; and that business was a separate business belonging to her. This last fact, it was urged, was evidenced by her sole management of the hotel, coupled with the terms of the disposition (No. 6 of process) and of the bond (No. 24 of process). The pursuers relied also upon certain very vague statements said to have been made by Mrs M'Gibbon to some of the witnesses; upon the card No. 38 of process; and some other small items of evidence. Now, I think that the pursuers have entirely failed to prove the crucial fact upon which their argument depends, viz., that the business belonged to Mrs M'Gibbon. The presumption, in my opinion, where a wife lives in a house with her husband, and is the active manager of a business carried on there, is that she is managing it as the agent of her husband. The Married Women's Property (Scotland) Act 1877, sect. 3, protects, as against her husband, the wages or earnings of a married woman gained by her "in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name." It has been decided, to quote the words of Lord President Robertson in *M'Ginty* v. *M'Alpine*, 1892, 19 R. 935, 939, that, in order to come under that section, "the wife must have some other 'employer' than the husband, or the 'occupation or trade' must not be simply the occupation or trade of her husband, if it is to yield 'earnings' in the sense of the section." It seems clear that Mrs M'Gibbon had no employer other than her husband; nor do I think that it can be successfully maintained that she carried on the hotel business under her own name within the meaning of the Act. I have referred to the evidence upon this matter; and I again emphasise the fact that the husband's wages were substantially contributed to the business of the hotel. The pursuers' case, then, as regards the money upon deposit receipt, appears to me to fail. Their strongest point lies in the fact that, under the title, the wife was fiar of the house. But that fact is not conclusive, and is not *per se* sufficient to outweigh the presumption of her agency in the conduct of the business. This topic, which is important in the first action, enters vitally into the subject-matter of the second case, and may appropriately be here exhausted. There is no evidence to shew with what idea, or with what knowledge, Mr M'Gibbon signed the disposition. It appears that he was much surprised when he was informed by the lawyers, after his wife's death, that he was not in a position to sell the house. When they so informed him, he was already in Court as defender in the first action. As pursuer in the second action, he took up the position that the premises were purchased with his money, and that the destination in the title was of the nature of a gift by him to his wife, which he was entitled to revoke, and which he bore to revoke by deed of revocation dated 5th December 1905. I am satisfied, for the reasons above expressed, that the premises were purchased and the bond paid off with the husband's money; and I can see nothing which should prevent him, if the facts of the matter are as I have related them, from validly revoking the gift—unless indeed it was *donatio remuneratoria*, a view with which I shall deal immediately. The pursuer's counsel insisted that Mr M'Gibbon's word is unreliable. It seems to be the case that he wrote and spoke falsely and deceitfully in connection with the discharge which he obtained from the pursuers, and which has since been reduced of consent. But that does not seem to me to alter or affect the fact that he did revoke the gift. Nor do I think that the facts bring this case within the region of a remuneratory, and therefore irrevocable, donation. There is no evidence at all that he intended it to be so. The presumption, and such evidence as there is, lie in the opposite direction.

The result of the whole matter is, in my opinion, that in the first action the defender is entitled to absolvitor; and that in the second action I ought to find, declare, and decern in terms of the conclusions of the Summons

Mr Dryden (pursuer in the first action, and defender in the second) *reclaimed.*

The contentions of parties sufficiently appear from the opinion of Lord Ardwall *infra.* In addition to the authorities commented on by him, the following were referred to: *Ferguson's Trs.*, 1883, 11 R. 261 at p. 266; *Galloway*, 1861, 4 Macq. 267; *Loudoun*, 1856, 19 D. 140; Married Women's Property Act 1881, sect. 1 (*b*). Sect. 3 of the Married Women's Property Act 1877 is cited in Lord Ardwall's opinion.

The Court *adhered* to the interlocutor reclaimed against in both actions.

The Lord Justice-Clerk.—If the purpose of the Married Women's Property Act was, as I am satisfied it was, to protect to the wife the proceeds of business conducted by herself, and on her own credit, unassociated with her husband, then in this case I have no hesitation in holding that the decision of the Lord Ordinary in regard to the business of keeping lodgers, followed by temperance hotel keeping carried on by the late Mrs M'Gibbon, is right. When that business was begun, there were no funds by which the outlays required for it could be met, except the £2 or £2 5s. a week which were the earnings of the husband by his own labour. These, his wages, with the exception of trifling sums in the character of pocket money, passed into the wife's hands, and were in no way kept distinct, but went into the hotel business, without any distinction being made between them or funds, if any, provided by the wife. For proof that she did provide any I look in vain in these proceedings. The circumstances founded on in support of this contention certainly do not bear it out, and the other circumstances pointed out by the Lord Ordinary substantially negative it. That Mrs M'Gibbon managed the business does not appear at all to affect the question. A woman living with her husband and managing a business into which only his money is put, is presumably his manager, and is not in right of the business she is

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managing. The Act excludes the case of a woman employed by her husband, and not carrying on a business under her own name. In this case I hold that Mrs M'Gibbon was in that category.

The Lord Justice-Clerk.

The fact that the title to the house was taken in Mrs M'Gibbon's name is not conclusive, and I see no ground for holding that the gift was a *donatio remuneratoria*, and hold that it was revocable.

I do not enter into detail, being satisfied with the grounds for the opinion I have expressed, as they are given in the opinion of Lord Ardwall, which I have had an opportunity of perusing.

Lord Ardwall.—The two actions which have been brought under review of the Court on reclaiming notes against the interlocutors of Lord Dundas (Ordinary), arise out of disputes between the representatives of the deceased Mrs. Mary Jane Dryden or M'Gibbon on the one hand and the representatives of her husband, the now deceased John M'Gibbon, on the other.

The first action, which is at the instance of the heirs *in mobilibus* of Mrs M'Gibbon, who died intestate without issue on 24th December 1904, concludes, in the first place, for reduction of a pretended discharge and renunciation granted by them in favour of the said John M'Gibbon. Decree was pronounced in terms of that conclusion by the Lord Ordinary on 30th January 1906, in terms of a Minute for the defender. The remaining conclusions of the Summons are for count, reckoning and payment against the said John M'Gibbon as executor of his wife, in order that the balance due by him to the pursuers as her heirs *in mobilibus* may appear and be ascertained, and payment thereof made to them.

John M'Gibbon having died on 30th January 1906, his executor, George M'Gibbon, was sisted in his place. The other action was originally brought by the deceased John M'Gibbon against Peter Dryden, the heir in heritage of Mrs M'Gibbon, for declarator that the dwelling-house, being the third storey of 142 High Street, Edinburgh, was purchased with funds belonging to Mr M'Gibbon; that his taking the disposition in name of his wife constituted a donation *inter virum et uxorem* which had been revoked by him, and thereafter the Summons concludes as usual for a conveyance or adjudication of the said subjects in favour of Mr M'Gibbon.

A proof was taken before the Lord Ordinary, which has been held applicable, of consent of parties, to both actions.

The question to be decided in the first action, and which partly entered into the case made for the defenders in the second action, is whether the savings of the spouses, which were represented at the death of Mrs M'Gibbon by a deposit receipt for £744 17s. 6d. in her name by the Royal Bank of Scotland, and were also represented to a greater or less degree by the house No. 142 High Street, which was purchased out of such savings, are to be held to be, to the extent of one-half thereof, the property of Mrs M'Gibbon?

The Lord Ordinary has gone with great care into the details and history of the case, and I need not recapitulate what he has already so well said; but, taking the result of the evidence as stated by him, and which, in my opinion, is correctly stated, I shall proceed to consider the question whether these savings are to be regarded as having to any extent belonged to Mrs M'Gibbon at the time of her death in respect of the provisions of sect. 3 of 40 & 41 Vict. cap. 29 (The Married Women's Property (Scotland) Act 1877). That section provides that "the *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman acquired or gained by her after the commencement of this Act in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name." I am of opinion that these savings are not the property of Mrs M'Gibbon in respect of the provisions of this section.

Mrs M'Gibbon had at the date of the marriage no saved earnings. Mr M'Gibbon was at that time a compositor, receiving about two pounds a week in wages, which were afterwards raised to £2 5s., and he was earning these wages up to the time of Mrs M'Gibbon's death. It is therefore certain that at and after its initiation the business of the small temperance hotel which was carried on in the house No. 142 High Street depended almost entirely in its early stages on the wages of Mr M'Gibbon. As was pointed out by the Lord Ordinary, the spouses went to live at 142 High Street, in a house of two rooms and a kitchen, but at Whitsunday 1895 the tenancy became extended to the whole of the flat which had formerly been used as a temperance hotel, and that business was revived there from and after Whitsunday 1895.

Dealing with the first question raised under the Act, namely, whether the business was carried on under Mrs M'Gibbon's own name, I agree with the Lord Ordinary that it was not so carried on. Receipts for the rent were granted in name of Mr M'Gibbon, the accounts produced which were rendered by tradesmen and others who did work in the house are in his name; his name also appeared on a brass plate on the door of the premises, and that plate had been brought from a house where they had formerly lived in St Mary Street; and upon the street side of the building the words "M'Gibbon's Temperance Hotel" were painted. In the Edinburgh directories for the year 1896–97 and onwards Mr M'Gibbon's name is in the list of hotelkeepers. The only evidence on the other side is a business card, No. 38 of process, in which the words

"Proprietrix, Mrs M'Gibbon," appear. The evidence about this card is vague, and in no view can I regard it as amounting to very much, as the word "proprietor" or "proprietrix" in connection with a hotel are frequently used as equivalent to nothing more than "manager" or "manageress." It is further to be noticed that on another card, of which No. 73 of process is a sample, these words do not occur, but only "M'Gibbon's (late Fuller's) Commercial and Temperance Hotel." Further, a fire policy of insurance over the flat was in Mrs M'Gibbon's name, but this is quite accounted for by the fact that at that date a disposition had been taken in her name under circumstances to which I shall presently allude. A fire policy of insurance over furniture was originally taken out in Mr M'Gibbon's name, but in June 1900 was transferred to that of his wife.

In these circumstances I do not think it can be held to be proved that the business was a business carried on by the wife under her own name.

Apart from the absence of evidence, I think that the statute, when it speaks of a business carried on under a wife's own name, must be held to imply that the business was carried on by the wife entirely separate from her husband. Now that is not the case here. The house in which the temperance hotel was carried on was the matrimonial home of Mr and Mrs M'Gibbon, and they both constantly resided there together; and I agree with the Lord Ordinary's opinion that where a wife lives in a house with her husband and is the active manager of a business carried on there, the presumption is that she is managing it as the agent of her husband.

But it was further argued that whether the earnings of the hotel were to be held to be earnings of a business carried on under Mrs M'Gibbon's own name or not, they were in any view her earnings acquired "in an employment, occupation, or trade in which she was engaged." On this matter, along with the Lord Ordinary, I follow the opinion of Lord President Robertson in *M'Ginty* v. *M'Alpine*, 1892, 19 R. 935–939; he there lays down that in order to come under the 3rd section of the Act of 1877 "the wife must have some other 'employer' than the husband, or the 'occupation or trade' must not be simply the occupation or trade of her husband if it is to yield earnings in the sense of the section." In other words, I hold that not only must the employment be under some other person than her husband, but that the trade or occupation must not be one which is carried on jointly or along with her husband, but must be entirely removed from his participation and control. Now, in the present case I think it is proved that the hotel business was started and, all along, more or less carried on by means of the husband's wages, which were contributed to the common purse which was kept by Mrs M'Gibbon, and into which her husband's wages and the proceeds of the hotel business were regularly put, subject to deductions for personal and current expenses. As it turned out, the sums thus saved were dealt with by Mrs M'Gibbon just as she pleased, one of her objects apparently being to secure a substantial sum for her own future benefit. I need hardly say that her treating practically the whole profits of the hotel as "her own earnings" in a savings bank book, and putting the general savings into a deposit receipt in her own name, does not affect the real ownership of the money thus dealt with. The case of *Morrison* v. *Tawse's Executors*, 16 R. 247, was strongly relied on by the pursuers in the first action, but I am of opinion that that case differed from the present in several particulars. There the wife had brought her husband a little money, and a part of it was spent in building a washing-house which was attached to the house in which they lived, and the evidence showed that her husband allowed her to follow her occupation in that place and thereby to gain earnings which were proved to amount to 24s. a week, and sometimes to as much as 28s.; it was possible, accordingly, to hold that the wife's business was carried on in separate premises from these occupied by her husband. This money was deposited along with the balance of her husband's earnings, in a bank in the joint names of the spouses, payable to either and the survivor. I am bound to say I consider that the judgment in that case, which was strongly dissented from by Lord Young, is a somewhat narrow one; and I prefer the opinions expressed in *M'Ginty's* case as setting forth with greater accuracy the application of the Act to cases of this sort than the opinion of Lord Lee in *Morrison's* case.

As to the general policy of the Act in its application to cases of this sort, I think it would be very mischievous were claims such as are made here to be open to the heirs of a wife on her decease in all cases where, with her husband's permission and consent, she kept a shop in the house in which they lived; or in the case of a small farm took entire charge of the poultry yard and its proceeds; or in the case of an inn, took the whole charge and management of the visitors' department, leaving the husband to attend to the stabling and possibly the bar business of the same establishment; and it would be still more inconvenient if in every case where a wife took in sewing or washing to the house occupied by herself and her husband, that was to found a claim on the part of her relatives on her decease for a share of the common savings of the spouses. I do not think that the Married Women's Property Act was intended to give rise to such claims at all, but was intended to protect, from the interference of her spouse, the wages or earnings of any industrious woman who might be forced into supporting herself by an idle

2nd Div.

Dryden & Others v. M'Gibbon. M'Gibbon v. Dryden.

Lord Ardwall.

or improvident husband. Were the Married Women's Property Acts held to be capable of giving rise to actions of the nature above indicated, such as I consider the present to be, it would have very much the effect of leading to a revival of the inconvenient and vexatious class of actions which arose out of the doctrine of *communio bonorum* and were put an end to by the sixth section of the Intestate Moveable Succession Act 1855, which provided that in the case of a wife's predecease her next of kin, executors, or other representatives, should have no right to any share of the goods in communion.

On these grounds, along with those stated by the Lord Ordinary, I propose that his decision in the first action should be affirmed.

With regard to the second action for declarator and adjudication as regards the house No. 142 High Street, I need not deal with the defender's claim so far as founded on the price of the house being provided to a greater or less extent from funds belonging to the wife, for although it is proved that the price was paid *pro tanto* out of the profits drawn from the hotel business, for the reasons I have already stated that founds no claim on the part of Mrs M'Gibbon's heir in heritage or other representatives.

But it was maintained, separately altogether from that ground of defence, that assuming the house to have been bought with Mr M'Gibbon's money, the donation made by him in taking the title in his wife's name, or allowing it to be so taken, was not revocable in respect that it was a remuneratory donation, being granted in respect of the services rendered by Mrs M'Gibbon to her husband in the initiation and carrying on of the hotel business. Lord Fraser in his work on Husband and Wife, Vol. II. p. 926, thus defines a donation *inter virum et uxorem*: "A donation is something valuable given by one spouse to the other without receiving anything in return for it, and without being under any natural or civil obligation to grant it"; and it was maintained, in the first place for the defender, that the donation of the house does not strictly fall under this definition at all, and therefore not being a donation is not revocable. I cannot assent to this argument. I think that the true question is whether this donation of the house does or does not fall to be held to be a remuneratory donation. The general rule applicable to such donations is thus stated in the case of *Brownlie* v. *Stevenson*; Elch. *v.* "Presumption," No. 5 (1735): "Remuneratory donations betwixt husband and wife are not revocable by the donor nor quarrellable by his creditors as *in fraudem creditorum*"; and Lord Fraser states the rule thus: "Where an equivalent has been given there is no revocation." This doctrine is supported by references to Bankton and Erskine, and to the digest and several old cases. The doctrine was recently given effect to in the Outer House by Lord Low in the case of *Stewart*, 11 S.L.T. 721 (1904), where it was held that the gift of a large sum paid over by a husband to his wife on the sale of a restaurant business, and which was stated at the time to be in respect of her services in building up and carrying on the business, was not revocable; and it was also given effect to in a recent judgment pronounced by myself as Lord Ordinary in the case of *Steven* v. *Steven* (not reported), where it was proved that a wife had advanced several sums acquired from her own father and other relatives to her husband for use in his business; and although no documents of debt passed between them relative to such sums, I held that the taking of the title to a cottage and ground at Duddingston in the wife's name, the price being paid by the husband, was a remuneratory donation, he having stated to several members of the family that it was intended as an equivalent for the sums which she had advanced to him.

It was argued for the defender in the declarator and adjudication that in these two last cited cases, as well as in all others where a donation had been held to be remuneratory, there were expressions used either verbally or in writing by the husband to the effect that the donation was made in respect of an equivalent then and there mentioned, but counsel for the pursuer quoted two cases, namely, *Countess of Oxenford* v. *The Viscount*, M. 6136 (1664), and *Chisholm* v. *Brae*, M. 6137 (1669), in both of which the Court inferred from the circumstances that the donation was a remuneratory donation, and was intended to be so, notwithstanding that in the latter case the deed expressly bore, in the narrative, to be granted for "love and favour."

I am of opinion, following these two last cited cases, that the law applicable to cases of alleged remuneratory donation is that the remuneratory character of a donation may be inferred from the circumstances in which it is made or given without there being any express indication, verbal or written, that it was intended to be remuneratory. But in such cases the circumstances require to be distinctly proved, and to be such as to lead directly to the inference that the donation was intended as an equivalent for something proved to have been done or given by the donee to the donor.

In the present case there is no evidence of anything said or written by the donor to the effect that the donation of the house was intended to be remuneratory, and I do not think that the circumstances are such as to entitle the Court to infer that it was *de facto* remuneratory. At the time the disposition of the house was granted in January 1897, the hotel business which was carried on there had only existed for about nineteen months, namely from Whitsunday 1895, and, as already pointed out, during that period it must have been started and kept going principally by the earnings of the husband himself. It is quite true that Mrs M'Gibbon practically

managed the hotel business and spent a good deal of time and trouble upon it, but the fact of her having done so for nineteen months can hardly be regarded as a circumstance leading directly to the inference that the taking of the disposition of the house in her name was intended to be an equivalent to her for her services. It falls, moreover, to be noticed that the price of the house much exceeded the profits of the hotel up to the date of the alleged donation, and that the said price was paid out of a fund produced by the husband's wages and the earnings of the hotel put together, along with money raised by a bond for £200, in which Mr M'Gibbon was the principal obligant. I think it is the reasonable inference from these facts that Mr M'Gibbon intended what he did to be a *mortis causa* provision in his wife's favour, and although the terms of the disposition militate somewhat against that view, I do not think it can be held that Mr M'Gibbon fully knew or understood the effect of these, which, I may add, were inserted entirely on the instructions of Mrs M'Gibbon. A very different case might have been raised if the donation of the house had been carried out after many years' hard work in connection with the hotel on Mrs M'Gibbon's part, and after a large sum had been saved out of the earnings from the hotel business, but I think that the circumstances as they existed at the date of the disposition itself practically exclude the idea of its being of the character of a remuneratory donation.

I therefore am of opinion that the Lord Ordinary's interlocutor in the second action should also be adhered to.

Lords Stormonth-Darling and *Low* concurred.—18*th June* 1907.

Counsel for Reclaimers, M'Lennan, K.C., Hamilton; Agent, Andrew H. Hogg, S.S.C.—Counsel for Respondent, Wilson, K.C., Constable, R. S. Brown; Agent, Henry Wakelin, Solicitor.

J. H. H.

OUTER HOUSE.

(*Lord Salvesen.*)

60. Robertson Durham (Liquidator of Muirhead's Trawlers Limited) *v.* Constant.

RIGHT IN SECURITY — MOVEABLE — SHIP—MORTGAGE—SALE OF SHIP BY MORTGAGEE—COMMISSION—RIGHT OF MORTGAGEE TO COMMISSION ON SALE AND OUTLAYS.

Muirhead's Trawlers Ltd. had gone into liquidation, and the question in this case was whether a mortgagee, who had taken possession of certain of the trawlers under power contained in a deed of covenant between him and the Company, was entitled to charge the liquidator of the Company with commission on sales of the trawlers effected by him.

The Lord Ordinary *found* that such sale commissions did not form good items of charge as against the liquidator. His opinion sufficiently reports the case.

OUTER HOUSE. *Lord Salvesen.*

Robertson Durham (Liquidator of Muirhead's Trawlers Ltd.) v. Constant.

Lord Salvesen.—The question to be decided in this case arises on a note presented by the liquidator of Muirhead's Trawlers Ltd., *inter alia*, for authority to divide the assets and discharge the liquidator. In the note the liquidator stated that the assets of the Company consisted principally of nine steam trawlers, with their gear, five of which were mortgaged to Joseph Constant, shipbroker in London; that Mr Constant had taken summary possession of these boats under power contained in a deed of covenant between him and the Company; that he had sold the boats; but, although repeatedly called on to do so, had failed to exhibit an account of his intromissions with the prices of the boats. Having these averments before me when the liquidator moved in terms of the prayer of the note, I declined to grant the motion until he had satisfied himself as to Mr Constant's intromissions; and, on 20th February, I pronounced an order on Constant to produce accounts. After some delay the statement No. 196 of process was ultimately produced; and after the liquidator had lodged objections, an alternative statement, No. 213 of process, giving effect to some of them was lodged by Mr Constant. From this it appears that Mr Constant claims to be a creditor of the Company, as at 4th April 1907, to the amount of £1207, 3s. 11d.; but as he has still a considerable sum — apparently £1312, 10s.—to receive as unpaid instalments of the purchase price of three of the trawlers, it would appear that—even on his own showing—there may ultimately be a small sum due to the liquidator. This sum will fall to be increased if, and to the extent that, the objections still insisted in by the liquidator are given effect to.

The only one of the objections which I am in a position to dispose of without enquiry relates to two sums of commission charged by Mr Constant. It appears that on 23rd December 1904 he received for the sale of two trawlers, the "Mont Cenis" and the "Mont Blanc," a sum of £5500; and he charges £275, being a commission of five per cent. for carrying through the sale. Similarly, in October 1905, he arranged a sale of the three remaining vessels at the price of £6070, payable to the extent of £4320 in cash and the remainder in instalments; and he credits himself with £303, 10s., as at 11th October 1905, as a commission at five per cent. on the full sum of £6070, on the same footing as if he had then received it. This claim for commission is, in the first instance, based on the deed of covenant between him and Muirhead's Trawlers Ltd., No. 11 of process.

The deed narrates that the Company are the owners of five several steam trawlers, and

OUTER HOUSE. *Lord Salvesen.*

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had by five several deeds of even date mortgaged the said steamships to secure the payment of a sum of £10,000. The Company then assign to the mortgagee their interest in charter-parties, bills of lading, policies of insurance, etc., in trust and for the purposes thereinafter declared. By the third article provision is made for repayment of the sum of £10,000 in instalments, with eight per cent. interest. There follow some further provisions with regard to the security of the mortgagee which it is unnecessary to particularise, with the exception of the articles relating to a sale. By Article 7 it is provided "that in case default shall be made in payment of the principal or interest, the mortgagee shall be entitled, at any time after such default, to take possession of the steamships and to sell them as he thinks fit"; and by Article 9, it is declared that the mortgagee shall stand possessed of the monies arising from the sale of the said steamships "upon trust, in the first place, to pay and satisfy himself the costs, charges and expenses which he himself shall or may be put unto in obtaining possession of the said steam ships . . . . or in the sale of the said steam ships, or any part thereof, or in attempting to effect a sale thereof, or otherwise to be incurred in the execution or exercise of any of the powers herein contained . . . . and in the next place, in trust to pay and satisfy himself all and every debts and debt, sum or sums of money, and charges which shall or may be then due or owing on the security of these presents, and of the foresaid statutory mortgages . . . . and in the next place, in trust to pay the surplus of said monies, if any, unto the Company."

The liquidator admits that, under these provisions, the expenses incurred by Mr Constant, in connection with the sale or sales of the trawlers, are properly chargeable against the proceeds realised; but he argues—and I think rightly—that there is no express provision made for payment of a commission to Mr Constant for effecting the sales; and he maintains that as by the deed Mr Constant was constituted a trustee for the Company, he is not entitled to charge any commission. On the other hand, Mr Constant contends that the liquidator is not entitled to take the benefit of his exertions in selling the property of the Company without remunerating him therefor, and that he is entitled to charge the ordinary commission which would have been payable if he had employed another broker to sell the ships.

Neither party referred me to any authority on the subject; and I must therefore decide the case upon principle. Now it has frequently been decided that a trustee, in the absence of express authority from the truster, is not entitled to remuneration for the services which he renders in the administration of the trust. This is best illustrated by the cases which have occurred of a solicitor, who, being himself a trustee, employed his firm to do the law business required by the trust. In such a case, however unexceptionable the charges may be, the Court has uniformly refused to allow any sums by way of remuneration to the solicitor, or the firm of which he was a partner; and it has not been moved by considerations similar to those urged here that exactly the same charges would have been incurred if an independent solicitor had been employed. The reason of the rule, of which this is only an illustration, is "that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty," and the rule itself was declared by Lord Cranworth, in *Broughton* v. *Broughton*, 1855, 5 De G. M. and G. 164, in language which has been often quoted, to be of general application. He says: "The result, therefore, is that no person, in whom fiduciary duties are vested, shall make a profit of them by employing himself, because in doing this, he cannot perform one part of his trust, namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee." In the present case it may be assumed that, as there seems to have been only a small margin of security, Mr Constant did his best to realise a full price; but the rule—which is a salutary one—is not affected by such specialties. If the margin had been ample, it is conceivable that the trustee would have been more concerned to earn commission for himself than to protect the interests of the truster; and it is eminently desirable that a trustee should not be exposed to any such temptation as he would be if the Court sanctioned such charges.

Such cases as the present of a mortgagee selling under his mortgage must constantly have occurred; and yet there is no recorded instance of the mortgagee being remunerated for his trouble in realising the mortgaged property. So far as I am concerned, I decline to introduce any relaxation of what I consider to be a most salutary rule, although it may operate hardly in individual cases. I may add that, even if I had thought the claim for commission admissible, I would not have allowed commission on the sale in October 1905, except upon the instalments as and when they became payable.

In his answers Mr Constant states that he incurred charges for brokerage and advertising in connection with the sales, which he has not debited, on the ground that these are usually held covered by the commission. Of course, in disallowing the commission I do not preclude Mr Constant from charging any out-of-pocket expenses which he is able to vouch. Possibly he may even have a claim for a clerk's salary, if he can show that he incurred any additional liability to his clerks in connection with the transaction.—30*th May* 1907.

Counsel for Liquidator, Sandeman; Agent, A. P. Nimmo, W.S.—Counsel for Constant, D. Anderson; Agents, Alex. Campbell & Son, S.S.C.

J. W. F.

FIRST DIVISION.

(Lords M'Laren, Kinnear and Pearson.)

61. Jardine *v.* Burgh of Moffat.

Process — Reclaiming Note — Court of Session Act 1868 (31 and 32 Vict. cap. 100), sects. 53 and 54—Action Concluding for Declarator and Interdict—Interlocutor of Lord Ordinary Finding in Terms of Declaratory Conclusion, Superseding Meanwhile Further Consideration of Conclusion for Interdict — Reclaiming Note Lodged Twenty Days After Date of Interlocutor — Interlocutor Held Not to Dispose of Whole Subject-matter of Cause—Reclaiming Note Dismissed.

Reclaiming Note against an Interlocutor of Lord Mackenzie.

In this action the pursuer sought to have it declared that the Magistrates of the Burgh of Moffat were not entitled to supply water taken from the estate of Granton except to houses, tenements, or premises within the boundaries of the burgh. There was a corresponding conclusion for interdict.

The Lord Ordinary, after hearing parties in the Procedure Roll, pronounced the following interlocutor on 28th May 1907:—

"The Lord Ordinary having considered the cause, Finds and declares in terms of the declaratory conclusions of the Summons, and decerns; supersedes in the meantime further consideration of the conclusion for interdict; finds the pursuers entitled to expenses; allows an account to be lodged, and remits the same to the Auditor to tax and report; grants leave to reclaim."

On 17th June 1907 the defenders lodged a reclaiming note to the First Division against the above interlocutor.

On 20th June 1907, in Single Bills, the respondent moved the Court to dismiss the reclaiming note.

Argued for the Respondent: The interlocutor reclaimed against was not a final judgment of the Outer House in terms of sect. 53 of the Court of Session Act, and should have been reclaimed against within ten days of its date, in terms of sect. 54 of the said Act.

Argued for the Reclaimers: The interlocutor of the Lord Ordinary had in substance disposed of the whole subject-matter of the cause in terms of sect. 54 of the Act (*Kirkwood*, 1874, 1 R. 1190). The sustention of the declaratory conclusion made it impossible for the reclaimers to resist the conclusion for interdict which, had declarator been refused, the respondents would have been unable to pursue. All that remained to be done in the cause was merely executorial (*Caledonian Railway* v. *City of Glasgow*, 1900, 2 F. 871, per Lord Adam at pp. 872–3).

Sect. 53 of the Court of Session Act 1868 provides as follows:—

"It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary, which, either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole merits of the cause or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause. . . ."

The Court *dismissed* the reclaiming note.

Lord M'Laren.—It is perfectly clear that this reclaiming note has not been presented within the statutory time. It was maintained that the whole subject-matter of the cause had been disposed of by the Lord Ordinary. Now there are conclusions for declarator and also for interdict. The conclusions for interdict have not been disposed of in any definite way. The Lord Ordinary, after granting the declarator asked for, superseded consideration of the conclusions for interdict, either that the parties might have a chance of coming to an arrangement, or because he thought it might be unfair to grant interdict without allowing time for making new arrangements consequential on his decision. In either case the conclusions for interdict are undisposed of, and in these circumstances it is vain to contend that this is a final interlocutor.

Lord Kinnear.—I am of the same opinion. I think the case of *Kirkwood* is altogether inapplicable, and for the reasons given in the opinion of the Lord President and of Lord Deas in that case. The interlocutor there reclaimed against ordained the defender to erect certain buildings within a certain time, and found the defender liable in the expenses of the action. The question was whether that interlocutor did or did not dispose of the whole merits of the action, because, as the Lord President pointed out, "If this decree is implemented there is an end of the case, and nothing remains but to take the action formally out of Court"; and as Lord Deas added, "If these buildings are erected the operation cannot be undone, so the subject-matter is clearly exhausted by this judgment." The question arose in that case from the fact that there was in the summons an alternative conclusion for payment of a sum of £1500 in the event of the defender failing to complete the buildings in question within a certain time. The Lord Ordinary did not dispose of that alternative conclusion in terms, but he gave decree in terms of the first alternative, and therefore by his interlocutor the whole merits of the case were disposed of.

1ST DIV.
Jardine v. Burgh of Moffat.
Lord Pearson.

Lord Pearson.—I am of the same opinion. I think that this is clearly a ten days' interlocutor. —*20th June* 1907.

Counsel for Reclaimers, W. J. Robertson; Agents, Cuthbert & Marchbank, S.S.C.—Counsel for Respondents, Strain; Agents, Pairman, Easson, & Miller, S.S.C. W. A. R.

OUTER HOUSE.

(*Lord Mackenzie.*)

62. Wilkie *v.* Wilkie.

HUSBAND AND WIFE — DONATION INTER VIRUM ET UXOREM—NULLITY OF MARRIAGE —SUMS BELONGING TO WIFE APPLIED FOR COMMON PURPOSES WHILE PARTIES LIVING TOGETHER — HELD THAT WIFE COULD NOT RECOVER.

This was an action at the instance of Mrs Elizabeth Henderson or Wilkie against William Wilkie. The parties had been married to each other, but the marriage had been declared null in an action at the instance of the defender. The sum in dispute was one which had been given to Mrs Wilkie during the subsistence of the marriage, and, as she maintained, had been appropriated by the defender. The facts of the case and the contentions of parties sufficiently appear from the Lord Ordinary's Note.

The Lord Ordinary *granted* decree of absolvitor.

Lord Mackenzie.—The first conclusion of this action (the only one about which there is dispute) is for payment of £100. The pursuer was married to the defender on 16th September 1902. They parted company on 6th March 1906, and decree of nullity of marriage was pronounced on 19th January 1907, in an action at the husband's instance.

The £100 sued for represents the proceeds of a cheque which the wife handed her husband on 25th September 1902, £80 of which he paid in to his bank account, the remaining £20 being handed to his wife, and applied, as she depones, in payment of bills in connection with her husband's business of hotelkeeper.

The facts in connection with this cheque are, in my opinion, proved to have been as follows:—The money was a present from the pursuer's father to her. She had assisted him in his business before her marriage without wages, and he had promised her the present. On 24th September he took the cheque produced, drawn payable to himself and endorsed, and gave it to her in her husband's hotel. He gave it to her to keep for herself, and to bank in her own name. It appears that previously he had been asked to become cautioner for an overdraft to the defender, but had declined. He had not a good opinion of the defender's financial position, and says he gave his daughter the money to make sure she should have something, in case anything happened to her husband's affairs. The defender says the pursuer's father told him that day he had handed the cheque to his daughter to give him to help in his business. This is denied by the father, who says he never told the defender he had given his daughter the cheque. I believe the evidence of the pursuer's father. The pursuer told her husband of the cheque that evening. On the following day the defender got the cheque from his wife, as she says, to lodge in bank in her name. She was unable to say whether this was to be on deposit or not. Of the £100 the pursuer received £20, which she states was applied in paying accounts in connection with the hotel business. It is not very clearly proved what was done with the money, but in the view I take it may be assumed it was so applied. Shortly afterwards, when she looked at the defender's bank-book, she saw that the remaining £80 had been placed to his credit. Her evidence is that she complained of this to the defender, and continued to do so, and that she asked for a receipt. She spoke to her father about it a fortnight later and on other occasions, but he seems not to have said anything to the defender about it. I think that the pursuer must very soon have come to know that the £80 had been drawn out of the bank by the defender and spent, either on his business or in paying household accounts.

The question is whether the pursuer, who during the time in question occupied the position of the defender's wife, can now recover from him monies which she must be held to have known were being applied for mutual purposes. If this were the case of a marriage dissolved by decree of divorce it would, I think, be plain from the decision in *Fenton Livingstone* (1907, 14 S.L.T. 892) and the cases there referred to, that she could not.

It has been maintained, however, that the case here, being one of nullity, is different; that it must be held there never was a marriage —*Nec vir, nec uxor, nec nuptiæ, nec matrimonium, nec dos intelligitur* (Fraser, Husband and Wife, I. 149; Ersk. Inst., I. vi. 43)—and accordingly that there must be mutual restitution of property. I am of opinion that the principle of the case above referred to applies to monies spent on mutual purposes during the period the pursuer and defender believed they were married persons. I am accordingly of opinion that the defender is entitled to be assoilzied from the petitory conclusion.

It was suggested that, as the decree in the nullity case only ordained the wife to make restitution to the husband, the former could not insist in her present demand. That, however, appears to me not tenable. There is nothing in the decree to prevent her claiming restitution if otherwise entitled to it.—*7th June* 1907.

Counsel for Pursuer, Orr, K.C., A. M. Anderson; Agents, Clark & Macdonald, S.S.C.—Counsel for Defender, Spens; Agents, Cunningham & Lawson, Solicitors. A. M. H.

OUTER HOUSE.

(*Lord Johnston.*)

63. Tait (Liquidator of the Scottish Motor Engineering Company Limited).

Company — Liquidation — Liquidator — Powers—Power to Sell—Terms of Prayer Refused as Being Too General.

Note in Liquidation.

John Scott Tait, C.A., liquidator of the Scottish Motor Engineering Co. Ltd., in liquidation under supervision of the Court, presented a note craving the Court, *inter alia*, (1) to authorise the liquidator to make such arrangements as might be necessary with the trustees for the debenture-holders for the sale of the Company's heritable property and machinery, and thereafter "to advertise the Company's buildings, machinery, plant, etc., for sale by public roup or private bargain at such price or prices . . . . and otherwise on such terms and conditions as in his discretion the liquidator shall deem fit, and to grant all necessary conveyances and dispositions in favour of purchasers."

The Lord Ordinary *refused* to grant the prayer in the terms asked; but allowed petitioner to amend in the following terms:—"To advertise the said security subjects, comprising the buildings and fixed machinery, for sale by public roup at the upset price of £12,500, and to grant all necessary conveyances and dispositions in favour of purchasers, said purchasers being bound under the articles and conditions of roup to acquire and take over the whole moveable machinery and stock in the Company's works at a mutual valuation," and granted the prayer as amended.—18*th June* 1907.

Counsel for Liquidator, Mackay; Agents, Morton, Smart, Macdonald & Prosser, W.S.

For R. S. B., G. H.

SECOND DIVISION.

(*Lords Stormonth-Darling, Low and Ardwall.*)

64. Rutherglen Parish Council *v.* New Monkland Parish Council.

Poor Law — Residential Settlement—Pupil Child — Industrial Settlement Acquired by Widow After Death of Husband — Held that Derivative Settlement which Child Had From Father Revived on Death of Mother.

Appeal from the Sheriff Court at Airdrie.

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The following narrative of the circumstances out of which this action arose is taken from the opinion of Lord Stormonth-Darling.

"Samuel Brown, while still a pupil, became chargeable to the parish of Rutherglen as a pauper on 30th November 1905, and he continues to be so chargeable. He was born in the parish of New Monkland on 26th January 1894. His father died on 18th June 1899, having a residential settlement in that parish. Two years before his death the father had removed, with his wife and family, to the parish of Rutherglen. The mother of the pauper continued to reside there after her husband's death till her own death on 30th or 31st July 1904, when she died without having re-married. At the date of her death she had acquired a residential settlement in the parish of Rutherglen. First the father and then the mother continued to support the boy in family while they lived, for he only became chargeable a few months after his surviving parent's death."

In these circumstances this action was raised in the Sheriff Court at Airdrie at the instance of the Parish Council of Rutherglen against the Parish Council of New Monkland, for recovery of advances made by them on behalf of Samuel Brown so long as he remained chargeable on the parish.

On 7th June 1906 the Sheriff-Substitute (Glegg) pronounced the following interlocutor:—

"The Sheriff-Substitute finds in fact that (1) the pauper was born on 26th January 1894 in the parish of New Monkland, and his father died in 1899, having a residential settlement in that parish; (2) in 1897 the pauper's father removed to the parish of Rutherglen with his wife and family, and after his death there, his widow continued to reside and maintain the pauper in that parish, and at her death there in 1904 she had acquired a residential settlement in that parish; (3) on 3rd November 1905 the pauper, being still in pupillarity, became chargeable to the parish of Rutherglen: Finds in law that (1) the derivative settlement which the pauper had from his father in New Monkland was lost by the acquisition of a settlement in the parish of Rutherglen, derived from his mother through her residence there; (2) on his mother's death the derivative settlement in the parish of Rutherglen subsisted, and the derivative settlement in the parish of New Monkland did not revive: therefore assoilzies the defenders from the conclusions of the action."

He delivered the following Note:—

Note.—The question in this case is whether a pupil, whose widowed mother had at the time of her death a residential settlement different from that of her predeceasing husband, takes at her death the settlement of his mother, or the prior settlement of his father. There is no doubt on the authorities that a

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widow can acquire a settlement which becomes, during her life, the settlement of her pupil children. It is not so clear on the authorities that this settlement attaches to her children at her death, to the exclusion of the father's residential settlement, but I think that this result must be ascribed to them. In *Crieff* v. *Fowlis-Wester*, 1842, 4 D. 1538, it was held that a posthumous child took the residential settlement of its mother and not the birth settlement of its father. The opinions of the judges in that case regard the settlement acquired by the mother after the father's death as of the same order as a settlement acquired by the father. In *Gibson* v. *Murray*, 1854, 16 D. 926, the Court preferred the birth settlement of their living mother to the birth settlement of the children. The Lord President said, at p. 929, that children have the benefit of a mother's residential settlement, and the Lord Justice-Clerk, on p. 935, that children take the mother's residential settlement after the father's death, just as they previously took the father's. The expressions used do not suggest that the mother's settlement was to rule only during her life, but apparently treat it as equally permanent with that of the father. In *Grant* v. *Reid*, 1860, 22 D. 1110, an imbecile became chargeable after the death of his widowed mother, and it was not disputed that the residential settlement of the mother settled the question of which parish was chargeable, and accordingly, residence being established, that parish was found liable, and not the parish of the pauper's birth nor that of his father's birth. In *Carmichael* v. *Adamson*, 1863, 1 M. 452, the birth settlement of a deceased widowed mother was preferred to the parish of the pupil's birth. The opinions in this case, however, except that they recognise the existence of a derivative settlement after the mother's death, do not much help the present question, as they proceed on ground that there was no father's settlement to fall back on. In *M'Lennan* v. *Waite*, 1872, 10 M. 908, a minor, after the death of her widowed mother, became a pauper, and it was found that being emancipated and past pupillarity, and having lost the derivative settlement she enjoyed through her mother's residential settlement, she was chargeable to the parish of her birth. It was argued that she was chargeable to her father's residential settlement, but that argument was not entertained, and the question was whether she had lost the derivative settlement acquired through her mother. It is clear from the language of the Lord President, that if the claim for relief had been made while the pauper was in pupillarity, and after her mother's death, that the mother's residential settlement would have been taken. In *Shotts* v. *Bothwell*, 1896, 24 R. 169, the pauper's mother, after the death of his father, re-married without having acquired a residential settlement, and the pauper became chargeable after his mother's death. It was held that the new settlement acquired by the mother through her re-marriage had no effect on the settlement of the pauper. It was clearly pointed out, however, that the mother took the settlement of the second husband solely for purposes of practical convenience, and that it was entirely different from a settlement acquired by residence. It simply, as regarded the children, temporarily suspended or superseded their own proper settlement, and being in their case merely the derivative of a derivative, was ended at once by the dissolution of the marriage. It is obvious that this decision does not conflict in the least with the present judgment, nor, I think, do the *dicta* of the judges do so. Lord Adam, on p. 171, speaks of the settlement of the father remaining that of the children, but he does so, it seems to me, in view of the argument that the mother's re-marriage affected this settlement. His Lordship seems to be re-stating the effect of *Beattie* v. *Mackenna*, 1878, 5 R. 737, which decided that a second marriage, though it gave the children a temporary claim on their stepfather's parish, did not finally sever their connection with their own father's settlement. That case decided nothing more, for it appears that the interval between the death of the first husband and the marrying of his successor was too brief to allow of the widow acquiring a settlement for herself and her children. Indeed, it appears from the opinion of Lord Shand, that if the mother had acquired a residential settlement, the claim there made, being that of a pupil after the mother's death, would have lain against the settlement of that parish. For his Lordship says: "If the pauper had acquired her mother's settlement, and had lost that settlement," a certain question would have arisen, and he goes on to say that the fact of a second marriage does not create a settlement for the children. Lord Mure speaks of the father's settlement as pertaining to the children, but he does that because, in the case under discussion, there was no settlement acquired by residence of the mother, and the question was between the father's and the stepfather's. To return to the *Shotts* case, it is to be pointed out that Lord Kinnear reaches the liability of the parish of the pauper's birth in a way that implies that a residential settlement on the part of the mother would have prevented that result being arrived at. For, after dealing with two prior contingencies, he dismisses the third, the liability of the stepfather's parish, because, p. 173, "The settlement which the widow acquired by residence after her first husband's death, and during her second marriage, was not an independent industrial settlement acquired by herself, but through her second husband's settlement, from which I am unable to see that the children of her first marriage could acquire any right. Therefore we must fall back on the parish of the pauper's own birth."

Now, the conclusion I draw from these authorities is that a widow can acquire a residential settlement for herself and her pupil children, which comes in place of that derived from her deceased husband, and consequently that on her death it is the settlement so acquired that rules, and not the settlement of her deceased husband.

I was referred to an arbitration by the Local Government Board in Graham on Poor Law, p. 36, viz., *Glasgow* v. *Paisley*, 1903, where exactly the contrary view was held, but I must respectfully differ from it.

The pursuers *appealed* to the Court of Session.

The following authorities were referred to: *Barbour*, 1853, 1 Macq. 376; *Coldinghame*, 1779, M. 10582; *Craig*, 1863, 1 M. 1172; *Greig*, 1865, 3 M. 575; *Crieff*, 1842, 4 D. 1538; *Gibson*, 1854, 16 D. 926; *Grant*, 1860, 22 D. 1110; *Carmichael*, 1863, 1 M. 452; *M'Lennan*, 1872, 10 M. 908; *St Cuthbert's*, 1873, 1 R. 174; *Beattie*, 1878, 5 R. 737; *Hendry*, 1880, 7 R. 458; *Shotts*, 1896, 24 R. 169; *Rutherglen*, 1902, 4 F. (H.L.) 19; Graham's Poor Law, p. 186.

The Court pronounced the following Interlocutor: — "Recal the interlocutor appealed against; find in fact in terms of the findings in fact in the said interlocutor; find in law that

the derivative settlement which the pauper had from his father in New Monkland was not lost at the date of the pauper becoming chargeable, but revived on his mother's death in 1904; therefore find in favour of the pursuer in terms of the prayer of the petition, and decern."

Lord Stormonth-Darling. — This case raises what may fairly be called a new point in the poor law, for it is not decided in terms by any previous judgment.

[*After the narrative of facts above quoted.*] In these circumstances, which are all admitted, a contest has arisen between the two parishes, Rutherglen maintaining that the pauper took at his father's death and retained during pupillarity the residential settlement in New Monkland which he derived from his father, though this may have been temporarily suspended from the time when his mother acquired a residential settlement in Rutherglen down to her own death; and New Monkland, on the other hand, maintaining that the pauper derived from his mother the residential settlement which she had acquired as a widow in the parish of Rutherglen, and that this settlement subsisted during his pupillarity to the exclusion of the prior settlement derived from his father. There is no doubt on the authorities, as the Sheriff-Substitute observes, that a widow can acquire a settlement by residence which becomes during her life the settlement of her pupil children; but it is not so clear, he adds, that this settlement attaches to her children *at her death* to the exclusion of the father's settlement, whether by birth or residence. It is on this point that the parties are sharply at issue: they are at one in maintaining that the settlement of a pupil child is always derivative where a derivative settlement can be found. This has been the law of Scotland ever since the reversal by the House of Lords in 1853 of the case of *Barbour* v. *Adamson*, 1 Macq. 376.

The Sheriff-Substitute decided in favour of New Monkland, the Council of which parish he assoilzied; and the novelty of the point consists in his finding in law (1) that the derivative settlement which the pauper had from his father in New Monkland was lost by the acquisition of a settlement in the parish of Rutherglen derived from his mother, through her residence there; and (2) that on his mother's death the derivative settlement in the parish of Rutherglen subsisted, and the derivative settlement in the parish of New Monkland did not revive. The point is perhaps difficult as well as new, and it has been treated by the Sheriff-Substitute with his usual care and ability. But I have come to hold, on a consideration of all the cases, that the weight of judicial opinion is in favour of holding that a derivative settlement acquired by a pupil from his mother by virtue of her residence as a widow for the requisite period does not subsist after her death, at all events where there is a settlement derived from the father to fall back upon. I shall go over the cases cited by the Sheriff-Substitute in their order.

The strongest case in support of his judgment is the case of *Crieff* v. *Fowlis-Wester* (in 1842), 4 D. 1538. That was treated entirely as a question of which of three settlements was to be held liable—the parish of the female pauper's own birth settlement, viz., Little Dunkeld, where she was born in 1804; the parish of her residential settlement, if of sufficient duration, after she attained puberty, viz., Crieff; and the parish where her mother had acquired a settlement by residence as a widow for eighteen years, viz., Fowlis-Wester. These were all the parishes that were parties to the process. The pauper's own residence in Crieff was held of insufficient duration, and the decision was that Fowlis-Wester was liable. This undoubtedly implied that a pauper could derive a settlement from a widowed mother after the mother's death. But the case was taken on the footing that the father did not appear to have acquired any settlement by residence, and no claim was made upon the parish of his birth, if indeed it was in Scotland and was known. It is noticeable that the case arose three years before new conditions had been imposed upon the acquisition of a residential settlement by sect. 76 of the Act of 1845, and eleven years before a father's birth settlement was assimilated to his residential settlement (if he had acquired such), as creating a derivative liability for his pupil children by the case of *Barbour* v. *Adamson* (*supra cit.*). But in any case the *Crieff* case cannot be regarded as deciding anything more than that a derivative settlement through the mother *may* subsist after her own death. In particular, it does not decide that it shall prevail over a father's settlement when that is known.

The case of *Gibson* v. *Murray* in 1854 (16 D. 926) was the case of pupil children whose English father had not acquired any settlement in Scotland and whose mother was alive, so the question which we have here to deal with did not arise.

The case of *Grant* v. *Reid* in 1860 (22 D. 1110) established that an imbecile, who, as such, was incapable of acquiring a settlement for himself, had acquired a derivative settlement in the parish of his widowed mother which remained available to him after her death in preference to the birth parish of the pauper himself and also the birth parish of his deceased father. The question was treated as a narrow one, but what was chiefly discussed in the opinion of the judges was the continuity of the mother's residence in Kilmallie, and not the question of the liability of the father's birth parish. The report is unsatisfactory, for the arguments of counsel are not given, and there is no general doctrine in the opinions either of the Lord Ordinary or Lord President Macneill. In these

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circumstances I cannot hold that the judgment has any bearing on a point which it practically ignores. If it has, I think it is inconsistent with subsequent cases to which I shall presently refer; and on the same assumption I must respectfully express my inability to agree with it.

The important whole Court case of *Carmichael* v. *Adamson* in 1863 (1 M. 452) has little bearing on the real question here except that, as the Sheriff-Substitute says, it recognises the existence of a derivative settlement from the mother after the mother's death. But if that general proposition is qualified, as it must be, by the addition that in *Carmichael's* case there was no father's settlement, either by birth or residence, to fall back upon, it does not go far to support the Sheriff in holding that on the mother's death the settlement derived from the father did *not* revive. The case is chiefly remarkable for a vigorous dissent by Lord-President Inglis, who not only asserted the principle, which has subsequently been adopted by the House of Lords, that a husband's desertion of his wife does not confer upon her the capacity to acquire an industrial settlement for herself, but also insisted that, as a general rule, pupil children are so identified with their father that they can neither have status, rights, nor liabilities except through him. Lords Neaves and Mackenzie, who were in the majority, while agreeing with their brethren as to the effect of desertion, laid it down with equal clearness (1) that pupil children, being legitimate, follow the settlement of their father if he has one; and (2) that after the father's death they follow his settlement in the first instance, but that, failing the father's settlement, the mother, *as now the head of the family*, may acquire an independent settlement for herself and them.

M'Lennan v. *Waite* (1872), 10 M. 908, was a special case, the parties to which were the parish at once of the female pauper's own birth and of her deceased father's residential settlement and the parish where her mother had lived long enough to acquire a residential settlement. The point of the case was that the pauper was *minor pubes* when she became chargeable, and the decision was that, in accordance with the whole Court case of *Craig* v. *Greig and M'Donald*, 1863, 1 M. 1172, the pauper being above the age of puberty and not having acquired any residential settlement in her own right, was chargeable to the parish of her own birth. It was implied in the decision that the pauper had lost the derivative settlement which, before emancipation, she had acquired through her mother. But I demur to the inference of the Sheriff-Substitute that "if the claim for relief had been made while the pauper was in pupillarity and after the mother's death, the mother's residential settlement would have been taken." If this means that the decision would have been laid on different grounds, I agree, because the essential facts would have been different, but if it means that the parish of the mother's residential settlement would have been taken rather than the parish of the father's residential settlement, I do not agree, and I see nothing in the Lord President's very guarded opinion to justify that inference. His Lordship's reference to the pauper's settlement being in her birth parish "in preference to any derivative settlement which she formerly had" is all qualified by the postulate that she had attained the age of puberty.

The other two cases quoted by the Sheriff-Substitute—*Beattie* v. *M'Kenna* in 1878 (5 R. 737), and *Shotts* v. *Bothwell* in 1896 (24 R. 169)—are both cases presenting the peculiarity that the mother of the paupers had married again. In *Beattie's* case the pauper, when he became chargeable, was still a pupil. In *Shotts* the pauper, when he became chargeable, had reached puberty. In *Beattie's* case Lord Mure, who delivered the leading judgment, laid down the general rule of law as clear that "pupil children, being legitimate, follow the settlement of their father if he has one in Scotland, whether that settlement be one of residence or of birth, and that they continue in the ordinary case to hold that settlement after the father's death." The decision was that the parish of the father's birth settlement continued to be liable during the pauper's pupillarity notwithstanding the second marriage of the pauper's mother. Lord Shand, in concurring, said that "the previous cases seem to come to this, that when the mother has survived the father, the pupil children must, *during her lifetime*, be charged on her parish, because she is truly the pauper. The pauper still, however, has a settlement derived from his 'father.' Though there may be a temporary suspension of that settlement in following that of the mother if she became a pauper, on the mother's death the child's settlement is that derived from his father." If that is a correct statement of the law, it directly contradicts the Sheriff-Substitute's finding to the effect that on the mother's death the derivative settlement in the parish of New Monkland did not revive. For I do not follow the learned Sheriff's criticism on Lord Shand's opinion that "if the mother had acquired a residential settlement the claim there made, being that of a pupil after the mother's death, would have lain against the settlement of that parish." That is plainly inconsistent with Lord Shand's phrase about there being only a "temporary suspension" of the settlement derived from the father—a suspension, that is to say, ending with the mother's life and her position as the temporary "head of the family."

Shotts v. *Bothwell*, besides reaffirming the principle that the parish of settlement of a second husband could not be made liable for the first family, between whom and the second husband there existed no legal relation, had only a bearing on the question here in so far as it

contained a restatement by Lord Adam (who had been Lord Ordinary in *Beattie's* case) of the "temporary suspension" view of the settlement derived from the first husband. The real point of the case was that a child who had ceased to be a pupil, could have no right as a rule to any derivative settlement, and must therefore become chargeable to his own birth settlement. I am at a loss to see how that warrants any inference that a residential settlement acquired by a widow for herself and her pupil children comes in place, after her death, of a settlement derived from the children's own father.

I quite agree that in poor law questions, wherever anything has been expressly decided, it is more important to preserve uniformity of decision than to insist on strict adherence to principle. But it is not contended that there is any prior decision that precisely rules this case. And I think, not only that there are weighty opinions to the effect that, in the case of pupils, the settlement of their father is the primary ground of liability, just as he himself is primarily liable for their support if he has the means, and that the emergence of any other ground of liability is limited and temporary; but I think also that principle is all in favour of that conclusion. There is nothing new or startling in the idea of a settlement reviving, for a birth settlement is always capable of being revived on a residential settlement being lost, and the principle which lies at the foundation of a derivative settlement through a parent, viz., the expediency of not separating a mother from her children, or the children from each other, does not apply after the mother's death, when she has ceased to be, in point of fact, the "head of the family." Moreover, it is plain that the capacity of a mother to attract the children's settlement to her own is very different and much slighter than the capacity of a father to do the same, if only in respect of her liability to have her settlement changed by marrying again.

I therefore propose that we should recal the Sheriff-Substitute's interlocutor of 7th June 1906, and, while repeating his findings in fact, find in law that the derivative settlement which the pauper had from his father in New Monkland was not lost at the date of the pauper becoming chargeable, but revived on his mother's death in 1904.

Lord Low.—I concur in the conclusion at which your Lordship has arrived. The judgment proposed appears to me to be rested upon sound principle, and to be entirely consistent with the view of the law which was very clearly stated in *Beattie* v. *M'Kenna*, 1878, 5 R. 737, and *Shotts* v. *Bothwell*, 1896, 24 R. 169.

The only difficulty which I have felt has been caused by the cases of *Crieff* v. *Fowlis-Wester*, 1842, 4 D. 1538, and *Grant* v. *Reid*, 1860, 22 D. 1110.

In the former case it was admitted that the deceased father of the pauper had never acquired a residential settlement, but nothing is said in the report as to whether or not he had a birth settlement in Scotland. I have also looked at the Session papers in the case, but they throw no light upon that matter. No proof was led in regard to the father's settlement, and no parish said to be the parish of his birth was a party to the case. I think, therefore, that it may be assumed that, as stated by Lord Anderson in *Gibson* v. *Murray*, 1854, 16 D. 926, the father's settlement could not be ascertained. If so, then the judgment in *Crieff* v. *Fowlis-Wester* is no authority in the present case, and is in no respect inconsistent with the views expressed by your Lordship.

In *Grant* v. *Reid* the pauper's father had a birth settlement in Scotland, and the question arose between the parish of that settlement and the parish in which, after the father's death, the mother had acquired a residential settlement. It was held that the latter parish was liable, and therefore, *prima facie*, the judgment is directly in favour of the view taken by the learned Sheriff-Substitute. It is plain, however, that the question, and the only question, which was argued and decided was whether the mother had not lost the residential settlement which she had admittedly acquired after her husband's death? Thus the Lord President, in giving the judgment of the Court, said: "It is not disputed that if the widow retained the settlement she had acquired in Kilmallie, the liability attaches to that parish."

The judgment, therefore, proceeded upon a concession, but it is not without significance that the learned counsel who represented the parish of the father's birth made the concession, and that it was referred to by the Lord President in terms which suggest to my mind that in his opinion it was properly made. Of course, if the question whether, assuming that the mother had a residential settlement at her death, the parish of the father's birth was nevertheless liable, had been argued, the result might have been different; but I cannot help thinking that the judgment is an example of a view which is indicated in several of the earlier cases, namely, that a residential, or, as it was often termed, an industrial settlement, having presumably benefited the parish in which the residence took place, founded a claim against that parish (which could not be urged against the parish of birth) for the support of pupil children of the parent by whose residence the settlement has been acquired. That view, however, had never been given effect to by an actual decision, and I do not think that it has received much countenance in more recent times.

I therefore think that to hold in this case that the pauper took the residential settlement of his father is not, on the one hand, contrary

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Lord Ardwall.

to any of the decisions, while, on the other hand, it is consistent with principle, and with the more recent authorities. I therefore concur.

Lord Ardwall.—In this action the parish of Rutherglen claims relief from the parish of New Monkland for the aliment of a pauper named Samuel Brown, who became chargeable on 30th November 1905, and was relieved by Rutherglen.

The pauper was born in the parish of New Monkland on the 26th of January 1894; he is therefore still in pupillarity.

The father of the pauper died on the 18th of June 1899, having at the time of his death a residential settlement in New Monkland. The pauper's father had, however, two years before his death, removed to Rutherglen, where he died. After his death the pauper's mother and the pauper resided in family in Rutherglen till the 30th of July 1904, when she died, without having re-married. Neither parent of the said pauper ever applied for or received relief from the parish of Rutherglen.

The question now is whether, on his mother's death, the pauper's derivative settlement acquired from his mother's residential settlement in the parish of Rutherglen came to an end, and the derivative settlement acquired from his father in New Monkland revived.

The Sheriff-Substitute has held that the pauper's settlement in the parish of Rutherglen subsisted at the time of his mother's death and still subsists, and that the pauper's derivative settlement in the parish of New Monkland did not revive. I am of the contrary opinion.

It is well settled that where, after the death of a father, the mother acquires a new settlement for herself, either by residence or in respect of a second marriage, the pupil children of her first marriage take the derivative settlement of their mother, and are entitled to be supported, in the case of becoming paupers, by the parish of such settlement so long as the mother is alive.

The general question raised in this case is whether, on the death of a widowed mother after having acquired a residential settlement for herself, and a deceased father having also had at the time of his death a known residential settlement, a pupil child takes the derivative residential settlement of his mother or of his father? I am of opinion that he takes that of his father. The policy of the law is to prevent the dispersion of the family, as was said in the case of *Adamson* v. *Barbour*, 1858, 1 Macq. 376. This has been repeated in many other cases, and it is this policy that is the ground of the rule which is very well established, to the effect that pupil children, after the death of their father, take a derivative settlement from their mother during her lifetime (see *Gibson* v. *Murray*, 1854, 16 D. 926; *Greig* v. *Adamson and Craig*, 1865, 3 M. 575).

It has been held in two cases—*Beattie* v. *M'Kenna*, 1878, 5 R. 737, and *Shotts* v. *Bothwell and Rutherglen*, 1896, 24 R. 169—that where a widow having pupil children marries again, and thereby acquires the settlement of her second husband, the pupil children are liable to be relieved should they become chargeable as paupers by the parish in which their mother has a settlement through her second husband, but on the death of the mother the derivative settlement acquired by the children in the parish of her settlement ceases to subsist, and the children, if still pupils, take a derivative settlement from their deceased father, either in his birth parish or in his parish of settlement. Lord Muir says in *Beattie's* case: "I can see nothing in the circumstances of the present case to take it out of the broad general rule that a legitimate child being a pupil, follows the settlement of his father, whether the father is dead or is alive." Lord Deas says: "I hold it to be quite fixed that where the mother after the father's death maintains the family, her settlement, of whatever kind or however acquired, is their settlement. She is the pauper." And Lord Shand says that the previous cases seemed to come to this, that when the mother has survived the father the pupil children must during her lifetime be charged on her parish, because she is truly the pauper. He goes on to say: "The pupil has still, however, the settlement derived from his father. Though there may be a temporary suspension of his settlement in following that of the mother if she become a pauper, yet on the mother's death the child's settlement is that derived from his father"; and his Lordship then points out that the mother being dead, the principle of *Barbour's* case, that there should be no dispersion of the family, is not interfered with.

In my opinion there seems no good reason why the rule thus applied to the case of a mother who has married a second time should not apply to the case of a mother dying leaving pupil children where she has not married a second time. In short, I think that one and the same rule must be applied to the mother's settlement however acquired, that rule being that on her death the suspended derivative settlement of her pupil children in their father's parish revives.

As already pointed out, the reason for pupil children taking (as far as parochial relief is concerned) the mother's settlement on the death of their father in preference to the father's, is to avoid dispersion of the family, and when that reason ceases by the mother's death, there seems no good reason why the parish of the father's settlement should not be that of his children; or, in the words of Lord Mure, why the broad general rule should not apply that a legitimate child, being a pupil, follows the settlement of its father whether that father is dead or alive.

But it is said against this view that in the cases of *Crieff* v. *Fowlis-Wester*, 1842, 4 D.

1538, and *Carmichael* v. *Adamson*, 1863, 1 M. 452, the derivative settlement acquired through a mother was preferred to the settlement of the father, and the case of *Gibson* v. *Murray*, 1854, 16 D. 927, was also cited as supporting this view. Now it appears, as stated by the Lord Ordinary in the case of *Gibson* v. *Murray*, that in the case of *Crieff* v. *Fowlis-Wester* the parish of the father's settlement could not be ascertained, and the mother had an industrial settlement acquired by thirteen years' residence. It appears from the report that the father had no residential settlement, and nothing is said about his birth settlement. I think, therefore, that it must be assumed that in the *Crieff* case the father's settlement could not be ascertained. Accordingly that case does not militate against the views expressed in the later decisions above cited.

Taking next the cases of *Carmichael* and *Gibson* it is perfectly clear that in these cases the father had no settlement in Scotland, and accordingly all that was decided was that in these circumstances the children who were in pupillarity fell to be supported by the mother's parish of settlement, and not by their own birth parishes, as that would have led to the dispersion of the family. These decisions accordingly do not encroach upon the broad general rule above referred to, and which I think must govern the present case.

The law applicable to this case may be shortly summed up as follows:—

1. A legitimate pupil child on the death of his father takes a derivative settlement in the parish in which his father had a settlement at the date of his death.

2. But in the case where the mother of the pupil child survives his father, and acquires a settlement in a parish other than the parish of the father's settlement, the pupil, in the case of his becoming a pauper, is entitled to be relieved by the parish of his mother's settlement. The liability of the mother's parish rests on two grounds: (*a*) that it is the policy of the poor law to avoid the dispersion of a family; and (*b*) that in such a case it is the mother who is truly the pauper, the children being viewed as her dependants.

3. In the event, however, of the mother's death after acquiring a settlement in a particular parish, the liability of that parish for the support of her pupil child ceases to exist, and the suspended liability of the deceased father's parish to support the pupil child revives.

4. The said liability of the mother's parish ceases at her death in whatever way her settlement in such parish may have been acquired, whether by industrial residence, or re-marriage, or otherwise, the reason for such cessation being that the grounds on which the mother's parish is made liable in preference to the father's necessarily cease to exist on the occurrence of her death.

I cannot reconcile the decision in *Grant* v. *Reid*, 1860, 22 D. 1110, with the decisions above referred to, and I accordingly must hold that it falls to be disregarded as not authoritative. I concur in holding that the interlocutor of the Sheriff-Substitute ought to be recalled and decree pronounced in favour of the pursuers as concluded for, with expenses in both Courts.—18*th June* 1907.

2nd Div.

Rutherglen Parish Council v. New Monkland Parish Council.

Lord Ardwall.

Counsel for Appellants, Orr Deas, D. P. Fleming; Agents, H. B. & F. J. Dewar, W.S.—Counsel for Respondents, Hunter, K.C., Grainger Stewart; Agent, A. P. Nimmo, W.S.

J. H. H.

HIGH COURT OF JUSTICIARY.

(Circuit Court at Glasgow.)

(*Lord Mackenzie.*)

65. Rollands *v.* Rolland.

Justiciary Cases—Small Debt—Appeal—Deviation in Point of Form—Substantial Injustice—Proof of Counter-claim Allowed Without Notice Thereof Being Given—Lien—Small Debt (Scotland) Act 1837 (7 Will. IV. and 1 Vict. cap. 41), sects. 11, 31—Small Debt Amendment (Scotland) Act 1889 (52 & 53 Vict. cap. 26), sect. 2.

Appeal.

This was an appeal against a decision of the Sheriff-Substitute of Lanarkshire at Glasgow (Boyd), assoilzieing the defender in an action at the instance of the appellants.

The note of appeal set forth the facts and the grounds of appeal as follows, viz.:—

On 18th March 1907 the appellants took out a summons against the respondent to appear in the Sheriff Small Debt Court at Glasgow on 25th March 1907, to answer to a claim for delivery of (1) two portraits of pursuers, and (2) four policies of the Prudential Assurance Co. Ltd., in the name of pursuers or either of them, the premiums on which, up till January 1907, were paid by or on behalf of the female pursuer.

On the case being called in Court before Mr Sheriff Boyd on 25th March 1907, defender admitted that the portraits and policies were the property of the pursuers, and stated that he was willing to deliver the portraits now, but he would not deliver the policies except on payment of two and a half years' premiums thereon, amounting to £7, 0s. 10d., which he alleged he had paid in respect thereof. The pursuers denied that the defender had so paid. The pursuers' agent, however, took the following exceptions to the defence and to the procedure thereanent: (1) that the defender had served no counter-claim on the pursuers, or given notice in any way of his defence; and (2) that the defence by way of counter-claim was incompetent in itself.

The Sheriff-Substitute repelled the objection, admitted evidence in support of the defence stated, and thereafter having again heard parties' agents, made avizandum.

High Court of Justiciary

Rollands v. Rolland.

On 28th March 1907 the Sheriff-Substitute, without further hearing or attendance of parties, issued the following interlocutor, viz. :—"Continues till 15th April next in Court for delivery as craved on payment of £7, 0s. 10d. to the defender," the summons being marked by him on the back thus :—"Sustains the defence; pursuers to have delivery on payment of £7, 0s. 10d. to the defender. J. B."

On 15th April 1907, when the case was again called in Court, pursuers' agent renewed his objections, stated at the first calling, to the competency of the counter-claim for £7, 0s. 10d., and also objected to the competency of the interlocutor superseding decree for delivery till payment of the counter-claim, and craved decree of delivery *de plano*, with expenses. He also tendered a formal Minute covering said objections. The Sheriff-Substitute declined to receive same, and, as moved by the respondent's agent, granted the defender absolvitor with expenses, for which he decerned against the pursuers.

The appellants consider themselves aggrieved by the said interlocutor and decree, and complain thereof, and seek relief against the same for the following reasons, and for others to be stated at the hearing hereof :—*First*, Because the said defence was absolutely incompetent, being an attempt to counter-claim money against delivery of moveables; *Second*, because the Sheriff-Substitute (apart from the incompetency of the defence) acted contrary to the express terms of sect. 11 of the Small Debt (Scotland) Act 1837, in admitting the counter-claim for £7, 0s. 10d., no counter-claim having been served on pursuers in terms thereof; *Third*, because the Sheriff-Substitute, in so admitting evidence for and entertaining said defence, acted with malice and oppression in the sense of sect. 31 of the said Small Debt (Scotland) Act 1837, and he also wilfully deviated in point of form from the statutory enactments, causing substantial injustice to the pursuers.

The Small Debt (Scotland) Act 1837 provides :—

"Sect. 11. Where any defender intends to plead any counter account or claim against the debt, demand, or penalty pursued for, the defender shall serve a copy of such counter account or claim by an officer on the pursuer . . . . at least one free day before the day of appearance, otherwise the same shall not be heard or allowed to be pleaded, except with the pursuer's consent, but action shall be reserved for the same."

Sect. 31 provides for appeal to the Court of Justiciary "only when founded on the ground of corruption or malice, and oppression on the part of the Sheriff, or on such deviation in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff."

The Small Debt Amendment (Scotland) Act 1889 provides :—

"Sect. 2. Where a party claims to be owner, or to be entitled to the possession of any corporeal moveables, the value of which shall be proved to the satisfaction of the Sheriff not to exceed £12, and which are wrongfully withheld from him, he may apply in the Small Debt Court for an order for delivery thereof, and the Sheriff may grant such order accordingly. . . ."

The following cases were cited at the discussion :—*Taylor* v. *Ormond & Co.*, 1906, 8 F. (J.) 76; *Buchanan* v. *Glasgow Corporation Water works Commissioners*, 1862, 4 Irv. 225.

The Court *sustained* the appeal; *found* that in attaching as a condition of implement of the claim for delivery the payment of £7, 0s. 10d. without service of a counter-claim there was on the part of the Sheriff-Substitute such deviation in point of form from the statutory enactments as had prevented substantial justice from being done; *recalled* the interlocutors appealed against; and *remitted* to the Sheriff-Substitute to grant decree of delivery in terms of the Summons.

Lord Mackenzie.—I have come to be of opinion that this is a case where a counter-claim should have been served. It is no doubt true that when sect. 11 of the Small Debt Act was drafted there was no provision for action for delivery of corporeal moveables. Such provision, however, was made by sect. 2 of the Small Debt Amendment Act 1889. But it appears to me that when an action for delivery is brought and the defence stated is, "You are not entitled to delivery, because I have a claim against you for a certain pecuniary amount," that in effect is just a demand under sect. 11 of the Small Debt Act 1837, and that was just the position taken up by the pursuers' agent. He objected to there not having been a counter-claim served upon him under sect. 11. He appears to have taken part in the proof, but I do not think he was thereby prejudiced. He repeated his objection after the proof, and again at the continued diet on 15th April, when he lodged the formal Minute. Therefore I think there was a deviation in point of form on the part of the Sheriff-Substitute, and I think that in result the deviation has prevented substantial justice being done, because, as matters stand, the defender has been assoilzied from the demand for delivery of the policies, although they were apparently the property of the pursuers, while the defender's claim is unaffected. The right to demand payment is entirely reserved by sect. 11. Therefore, anything I do will not prejudice or prejudge the defender's right to get payment of any monies he may have expended on the policies. But I think there was deviation resulting in such substantial injustice as to bring the case within the principle in *Taylor* v. *Ormond*, although no doubt the circumstances there were somewhat different.—*9th May* 1907.

Counsel for Appellants, Munro; Agent, Archibald Hamilton, Solicitor, Glasgow.—Counsel for Respondent, Trotter; Agent, David Cook, Writer, Glasgow.

F. A. U.

OUTER HOUSE.

(*Lord Salvesen.*)

66. Peden *v.* Graham.

Fraud—Agent and Client—Part Repayment of Principal Sum in a Bond to Solicitor of Bondholder—Misappropriation by Solicitor — Solicitor Not Authorised to Receive Payment of Principal—Held that Debtor, Who Had Paid to Agent of Creditor Sums the Agent Was Not Authorised by his Principal to Receive, Must Suffer for Fraud of Agent.

The following statement of the circumstances giving rise to this Note of Suspension is taken from the Opinion of the Lord Ordinary.

"The material facts in this case are quite simple. The complainer, John Peden, who is a miner, in the early summer of 1903 wished a loan of £100 on the security of property in Armadale. He applied to Mr James Aitken, then of the firm of Aitken & Gibb, writers, Glasgow, for the loan, and was told by him that a client of his (the respondent) was willing to grant it. The respondent, John Graham, farmer, North Rigg, Shotts, remitted £100 to Mr Aitken on 9th June, and on 24th June the complainer called and signed a bond in favour of the respondent for that amount. At this interview the complainer and his wife both say that he asked Mr Aitken whether he would be willing to accept repayment of the loan by instalments, and was assured that he would. The bond was then signed by the complainer; but instead of receiving £100 from Mr Aitken he only received about £79. The difference between these two sums is satisfactorily accounted for only to the extent of about £5, being the business account payable by the borrower in respect of the loan. The balance, I am afraid, there is no doubt was appropriated by Mr Aitken, who took advantage of the complainer's ignorance of business to defraud him. This sum, however, is not in question.

"After the transaction was complete the complainer received, prior to each half-yearly term, a notice from Mr Aitken on behalf of the respondent, asking payment of the interest that was shortly to become payable, and at each term he paid Mr Aitken the amount due. At Martinmas 1904, when paying the half-year's interest, he also paid £20 to account of the principal sum and received the receipt No. 7 of process, which bears to be given on behalf of John Graham, Esq. A payment of equal amount was made on 9th November 1905, and a receipt in similar terms, No. 9 of process, granted by Mr Aitken. These two sums of £20 each were duly entered to the credit of the respondent in the books of Aitken & Gibb, ' it instead of remitting the money to the respondent as he received it, Mr Aitken embezzled it. He continued to account to the respondent for interest on the full sum contained in the bond, but only claimed and received from the complainer interest on the reduced amount. He became bankrupt in 1906, and it was then discovered that he had defrauded the respondent of other sums. The question in this case is on which of the two innocent parties the loss of the £40 must fall."

At Martinmas 1906 the respondent himself requested the complainer to pay the half-year's interest due at that term direct to himself, and the complainer sent the respondent a remittance of £1, 4s., being the interest on the balance of £60 then due, and being the same amount as the complainer had paid to the said James Aitken for the half-year to Whitsunday 1906. The respondent, however, returned the same, and refused to accept interest on the said balance of £60, and demanded payment of interest on the whole sum of £100 contained in the said bond. The respondent further caused a charge to be given to the complainer upon 22nd December 1906 for payment of the said principal sum of £100, with interest thereon at 5 per cent. from Whitsunday 1906, and liquidate penalties.

The complainer now brought this note to suspend the said charge and whole grounds and warrants thereof. The complainer in the note offered to pay to the respondent the principal sum of £60 with interest thereon. The contentions of the parties sufficiently appear from the opinion of the Lord Ordinary.

The following authorities were referred to in the course of the debate:—*Mackintosh* v. *Pitcairn*, 1851, 24 Sc. Jur. 81; *Rose* v. *Spavens*, 1880, 7 R. 925; *Richardson* v. *M'Geoch's Trs.*, 1898, 1 F. 145; *Withington* v. *Tate*, 1869, L.R. 4 Ch. App. 288; *Duncan* v. *Clyde Trs.*, 13 D. 518; *Macdonald* v. *Warren*, 1889, 27 S.L.R. 46.

The Lord Ordinary *refused* the note, with expenses.

Lord Salvesen [after narrating the facts as quoted above].—It is not surprising that the complainer acted as he did. He had received the money originally from the hands of Aitken on the express footing that he was to be at liberty to repay the loan by instalments. Every term he received notice from Aitken to pay the interest, and he paid it on his receipt without question. He might therefore well infer that Aitken was authorised by his client to receive payment of the instalments; and even a man better versed in business matters than the complainer would scarcely have insisted on the agent producing his authority, or handing him partial discharges as a condition of making the payments. On the other hand, he knew that the money had been borrowed from the respondent, and that he was

OUTER HOUSE. *Lord Salvesen.* — Peden v. Graham.

his creditor in the bond. In these circumstances, unless Aitken is proved to have had authority to receive the payments on behalf of his principal, the loss must fall upon the complainer, for it was he who enabled the law agent to commit the fraud by placing the money in his hands, without ascertaining whether it ever reached his creditor. The case of *Withington* v. *Tate*, L.R. 4 Ch. 288, is a distinct authority to this effect; and although it is an English decision, I apprehend that there is no distinction between the law of England and Scotland in this matter.

The complainer, apparently anticipating this view of the law, has averred in Stat. 5 that Aitken was authorised by the respondent to receive payments on his behalf in connection with the loan in question; and the complainer's counsel contended that he had proved authority. Unfortunately, Aitken was not available as a witness; as it appears that subsequent to his sequestration he has become mentally deranged, and is now in an asylum. The authority averred must therefore be proved out of the mouth of the respondent himself, and I have come to be of opinion that his evidence does not establish it. Although Aitken acted as his ordinary law agent and had authority to collect interest on bonds on his behalf, the respondent denies that he ever authorised him to receive payment of the principal. An attempt to show that on a previous occasion Aitken had received repayment of money on his behalf completely failed. It is true that the respondent admitted that he would have been quite willing to receive payment by instalments from the complainer through Aitken if Aitken had handed him the money. But it is perfectly plain that the respondent not merely did not know that the payments to account had been made, but was entitled to believe from the statements rendered to him by Aitken that the whole sum in the bond remained due. I cannot therefore hold that he authorised Aitken to receive the two payments in question on his behalf. In law I hold that the complainer made Mr Aitken in this matter his agent to pay the money to his creditor; and that he must therefore bear the consequences of the agent's fraud. I regret that I have to reach this decision, as I think the case is one of very great hardship to the complainer.—*7th June* 1907.

Counsel for Complainer, Sandeman, J. B. Young; Agents, Purves & Simpson, W.S.—Counsel for Respondent, Mitchell; Agents, Hugh Martin & Wright, S.S.C. J. W. F.

OUTER HOUSE.

(*Lord Guthrie.*)

67. Erskine v. Erskine.

HUSBAND AND WIFE—DIVORCE—ADULTERY—LENOCINIUM—KNOWLEDGE BY HUSBAND THAT WIFE LIVED AN IMMORAL LIFE BEFORE MARRIAGE—WIFE LEFT WITH MOTHER-IN-LAW IN SCOTLAND WHILE HUSBAND ABSENT ABROAD—NO REMITTANCES BY HUSBAND—DECREE OF DIVORCE GRANTED.

This was an action of divorce raised by a husband against his wife on the ground of adultery. No defences were lodged, but appearance was made for the defender at the proof, when *lenocinium* was attempted to be established, the acts of adultery being admitted. The facts upon which the defender relied fully appear in the Lord Ordinary's judgment.

The Lord Ordinary *granted* decree as craved.

Lord Guthrie.—No defences were lodged in this case. But the defender Mrs Erskine, accompanied by an attendant from Girgenti Inebriate Reformatory, where she has been in confinement since January, appeared at the proof by counsel and agents, and was examined on her own behalf.

The cross-examination of the pursuer's witnesses and the examination of the defender were directed to establish condonation and *lenocinium*. In view of the defender's admissions as to her life on the streets after the last possible act of connection with her husband, the plea of condonation was not pressed. But Mr Spens submitted an ingenuous argument in support of the plea of *lenocinium*. He maintained that, when the pursuer married the defender in 1902, he must have known that she had been living, not only a drunken but also an immoral life. This was denied by the pursuer, but I think it inevitably follows from the proved facts. He next founded on the admitted fact that in January 1903 the pursuer went to America, leaving the defender in Glasgow, where she had been living as a prostitute before the marriage, and that until his return to Glasgow in 1906 he sent her no money. From these facts Mr Spens deduced such connivance on the part of the pursuer as barred him from founding on the defender's immoral conduct.

Even if these facts stood alone, I do not think they would imply that willing consent to the wife's guilty conduct which has been held sufficient to bar a husband from the remedy of divorce (*Walker*, 1796, cited in *Rogers*, 1830, 3 Haggard's Ecclesiastical Reports, p. 59, per Lord Stowell; *Stone*, 1844, 1 Rob. 101, per Dr Lushington; *Marris*, 1862, 31 L.J. P. and M. 69, per Mr Justice Cresswell; *Wemyss*, 1866, 4 M. 662, per Lord Justice-Clerk Inglis).

But they do not stand alone. Before the husband left for America he made arrangements for the defender going into a Home with the view of curing her of her drunken habits, and ultimately of her joining him in America. When he left, his wife was residing safely with his mother. That the arrangement failed, and that the defender returned to her old life notwithstanding all the persevering efforts for her reform by that good Samaritan Mrs Adair, was not the pursuer's fault. He wrote to her from America, but got no answer. He heard the worst reports of her conduct, and in these circumstances it was not wonderful that he did not make her remittances.

I accordingly grant decree of divorce.—21*st June* 1907.

Counsel for Pursuer, Candlish Henderson; Agent, R. S. Carmichael, S.S.C.—Counsel for Defender, Spens; Agents, Bryson & Grant, S.S.C.

C. H. B.

FIRST DIVISION.

(*Lords Adam, M'Laren and Kincairney,*

and afterwards

Lords M'Laren, Kinnear and Pearson.)

68. Brown's Trustees *v.* Horne.

I. Right in Security—Heritable Security — Trust — Trustees Creditors in Heritable Security—Trustees Enter into Possession—Expenses of Managing Property—Law Agent's Account—Trustees Empowered to Employ and Pay One of Their Number as Agent—Trustee Partner in Firm to which Account Incurred—Law Agent's Account Held Chargeable Against Owner of Security Subjects.

II. Process — Amendment of Record — Judicial Reference — Refusal of Referee to Allow Amendment—Circumstances in Which the Court Refused to Allow the Record to Be Amended After the Whole Cause Had Been Referred to a Judicial Referee—Observations on Powers of Judicial Referee of Allowing Amendment of Record.

(*Reported ante, Vol. XII.* p. 614.)

Reclaiming Notes against Interlocutors of Lord Stormonth-Darling and Lord Mackenzie.

This was an action for payment of a sum of £411, 7s. 11d., brought by the trustees of the late John Brown against David Horne, builder, Glasgow.

The said John Brown, and after his death the pursuers, had made advances to the defender or his nominee on the security of subjects in Belmont Street, Glasgow. On 4th November 1884 the pursuers entered into possession of the security subjects. They remained in possession until 29th September 1903. The pursuers produced an account which brought out the sum due by the defender to them at £1947, 14s. 11d.

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On said date of 29th September 1903 an arrangement was come to between the parties in pursuance whereof the pursuers disburdened the security subjects, and the defender paid the sum of £1536, 7s. to the pursuers. The pursuers reserved their right to recover the balance of £411, 7s. 11d. (the sum sued for). The defender reserved his defences against the claim for £411, 7s. 11d., and he also reserved the right to claim repayment of the sum of £67, 10s. included in the sum of £1536, 7s. paid by him to the pursuers.

The defender averred that the sum of £67, 10s. consisted of advance fees with which he had been debited but which had not been paid to him. The sum of £411, 7s. 11d. consisted of law agents' charges in connection with managing the property and interest thereon. The defender objected to this item on, *inter alia*, the ground, stated in his fifth plea in law, that one of the trustees was himself a partner in the firm of law agents to whom the account was incurred.

On 13th December 1904 the Lord Ordinary (Stormonth-Darling) repelled the fifth plea in law for the defender. His opinion is reported *ut supra.*

The defender reclaimed.

On 15th March 1905 the Court adhered.

Lord Adam.—The only question argued to us under this reclaiming note was whether the Lord Ordinary was right in repelling the fifth plea in law stated for the defender.

The question arises in these circumstances:—The pursuers are the trustees of the late Mr Brown. Mr David Craig, of the firm of Messrs Craig & Risk, writers in Glasgow, was, and is, one of the trustees appointed by Mr Brown.

Mr Brown was the proprietor of certain building ground situated at Hillhead, Glasgow. By minute of agreement and sale dated in March and July 1882, he sold part of this ground to a Miss Horne, who was the nominee of the defender, and whose actings through the transactions in question he adopts. By minute of agreement and sale dated in February 1883 Mr Brown's trustees sold certain other parts of the ground to the defender.

In order to enable the defender to erect the buildings which he was bound to erect on the ground, Mr Brown and his trustees agreed to make, and made, advances of money from time to time to him.

In security of these advances the defender granted to the pursuers a bond and disposition in security over the subjects in question dated 11th November 1882, and also two *ex facie absolute* dispositions dated respectively 9th June and 6th July 1883.

It further appears that the pursuers in November 1884 entered into possession of the subjects under the bond and disposition in security and the *ex facie absolute* dispositions and relative letter of date 4th November of that year.

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Brown's Trustees v. Horne.

Lord Adam.

The pursuers continued in the possession and management of the subjects until 26th September 1903, and of course had to account to the defenders for their intromissions during that time.

They claimed that a sum of £1947, 14s. 11d. still remained due to them. The defender admitted that a sum of £1536, 7s. still remained due by him, leaving a balance of £411, 7s. 11d. in dispute between the parties. Thereupon the parties came to an agreement, which will be found in a back letter dated 29th September 1903, addressed by the defender to the pursuers and accepted by them, under which the defender was retrocessed in the subjects, under reservation on his part of his right to claim repetition of a sum of £67, 10s. included in the payment made by him, and on the pursuers' part, of their right to sue for and recover the balance of £411, 7s. 11d. claimed by them.

The present action is brought to recover payment of that sum.

As I have previously stated, Mr David Craig is one of Mr Brown's trustees, and it appears that the trustees employed his firm of Messrs Craig & Risk to act as their agents and factors in the management of the security subjects of which they were in possession.

It is stated that the sum sued for consists almost entirely of professional charges and commission debited to the trustees by Messrs Craig & Risk in connection with their management and disposal of the properties.

In these circumstances the Lord Ordinary says that both parties concurred in asking him to dispose of the defender's fifth plea in law, which is in these terms:—"The legal charges sued for having been incurred by the trustees of John Brown to a firm of which one of them is a partner, are illegal, and the defender is not liable therefor." The Lord Ordinary has disposed of the plea by repelling it, and I think he is right.

As I understand the law there is nothing illegal in a body of trustees employing one of their number as agent or factor. It is true that in a question with the beneficiaries under the trust, if the trust deed is silent on the subject, such agent or factor can only recover his outlay on the ground that he is not entitled to make a profit out of the trust. But if the beneficiaries do not object, I do not know that it is in the mouth of any third party to do so. But it is unnecessary to consider that question in this case, because the trust deed contains a clause empowering the trustees to appoint any one or more of their own number, or any other person, to be law agent or factor for the trust, and to allow the usual remuneration for services rendered, any rule of law or equity to the contrary notwithstanding.

It is said that the trustees have not yet paid Messrs Craig & Risk's account, but that is immaterial, because beyond all question they are liable for and bound to pay it.

I think, accordingly, that it is the duty of the Auditor to tax the account as if it had been incurred to an entirely independent agent or factor, and to allow the "usual remuneration" in such cases—for which the defender will be liable.

I think this is so entirely a matter of Scots law and practice that it is unnecessary to consider the law of England as regards a mortgagor and mortgagee, but I may say that I concur with the Lord Ordinary's observations on that matter.

I think the reclaiming note should be refused, and on the same grounds the reclaiming note in the other case (*i.e.* that regarding the Simpson Street subjects).

Lord M'Laren concurred.

Lord Kincairney.—This action by Brown's trustees against David Horne, builder, Glasgow, has arisen out of transactions between them relating to certain building ground in Glasgow which belonged to Brown's trustees and was purchased from them by Horne, with the view of erecting buildings on it. It may be premised that David Horne is the only defender—Elizabeth Horne, whose name is used in some of the deeds, having no interest, and being merely the nominee of the defender David Horne. The reason why her name was used has not been explained, and is, I suppose, of no consequence. The record appears to me to be complicated and rather obscure, but the main facts seem to be these:—By minute of agreement between Brown's trustees and Elizabeth Horne (nominally) dated 14th March and 28th July 1882, Brown's trustees agreed to sell and she (for David Horne) to purchase portions of the building ground which belonged to Brown's trustees, the price agreed on being a ground annual of £70.

Horne had not sufficient funds for building the houses which he contemplated, and he borrowed £2200 from Brown's trustees to enable him to do so; and it was agreed by back letter dated 28th July 1882 that until that advance was repaid Brown's trustees should not be obliged to grant a title. Notwithstanding this agreement, I understand that from time to time dispositions of various portions of the building ground were granted by Brown's trustees to Horne; and Horne, on the other hand, executed a bond and disposition in security for £2300, dated 11th November and recorded 19th December 1882, over the subjects which Brown's trustees had disponed to him.

In Condescendence 5 Brown's trustees aver that as the advances by them had not been repaid, they entered into possession of the subjects in virtue of the bond and disposition in security, and also in virtue of a letter, dated 4th November 1884, addressed to Brown's trustees by Elizabeth Horne, and granted apparently merely to save the expense of an action of maills and duties, which letter bore to authorise Craig & Risk, writers, Glasgow, "your agents and factors" (*i.e.* agents and factors of Brown's trustees), to uplift and apply the rents. For this letter David Horne accepts responsibility. In his answer to this condescendence Horne admits that the pursuers "entered into possession of the security subjects," but states that they had not accounted for the rents collected. It thus appears that the parties were agreed that the position was this, that Horne was proprietor of the subjects in question, and that Brown's trustees were in possession as creditors under the disposition in security granted by him, and were uplifting the rents as creditors under that deed. Horne, on the other hand, was the owner, and was indebted to Brown's trustees in the sums which they had advanced, and Brown's trustees were in the course of recouping themselves of their advances by uplifting and applying the rents. I think the record is framed on that view, which appears to me to be correct. In this action, arising out of that condition of affairs, Brown's trustees conclude for payment of £411, 7s. 11d., which is the difference between £1947, 14s. 11d., which they regard as the true balance to which they are entitled in accounting with Horne, and the sum of £1536, 7s. which Horne

admits to be due and has paid. But he disputes his liability for the balance of £411, 7s. 11d. And the question in this case is whether Brown's trustees are entitled to receive, and Horne is bound to pay, that sum. It consists mainly of professional charges debited against Brown's trustees by their agents, Craig & Risk, in connection with the properties of which Brown's trustees had entered into possession, and of commission on the rents collected by Craig & Risk.

The pursuers, Brown's trustees, maintain that, in accounting for the rents collected by them, they are entitled to take credit for this sum as being part of the expense of collecting the rents and managing the subjects into possession of which they had entered.

The defender Horne, while not disputing the claim of Brown's trustees to their expenses generally, disputes their right to take credit for this particular sum, and he has expressed the ground of his objection in his fifth plea, which is thus expressed: "The legal charges sued for having been incurred by the trustees of John Brown to a firm of which one of them is a partner, are illegal, and the defender is not liable therefor." This plea the Lord Ordinary has repelled, and the question which has been discussed is that which is expressed in that plea. The other subordinate findings have not been debated.

The fact on which the plea is based is this, that Mr Craig, who is a partner of the firm of Craig & Risk, law agents for Brown's trustees, is also one of these trustees, and, as such, a pursuer of this action.

The question appears to be simply this, whether creditors in possession under a bond and disposition in security are entitled in the circumstances to credit for the professional charges incurred to the law agent whom they employ in collecting the rents and managing the property. Now that is a question with which the courts of Scotland are quite familiar, and for the solution of which it seems hardly to be necessary to resort to the law of England.

The first contention of the defender is that, even if they were entitled to take credit for the expense incurred to a law agent in the general case, they are not entitled in this case, because the law agent whom they employed, or one of the firm of such agents, is himself a trustee. As a general principle that plea might be good, if the truster had not specially authorised the employment of one of the trustees as agent, on the principle that a trustee cannot profit by his office. But in this case the trust deed confers that power in perfectly general terms. The clause has not itself been printed. But it is averred by the pursuers "that in Mr Brown's trust disposition and settlement his trustees were empowered to appoint any one or more of their own number, or any other person, to be law agent or factor for the trust, and to allow the usual remuneration for services rendered, any rule of law or equity to the contrary notwithstanding"; and that averment is not denied on record, and was not disputed at the debate; and it is well settled that in such a case an agent who is a trustee may be employed to do professional work for the trust, and may charge the usual accounts against the trust estate. In this case Craig & Risk would be entitled to recover the usual professional remuneration from Brown's trustees which any other law agent not a trustee would, if employed by the trustees, have been entitled to charge against the trust: See *Goodsir* v. *Carruther*, 1858, 20 D. 1141; *Ommaney* v. *Smith*, 1854, 16 D. 721. Such charges, therefore, become a part of the legitimate expenses of the trust. But then the defender, Horne, maintains that although Craig & Risk's account might be legitimately charged against the trust, it did not follow that it was chargeable against him; and it seems to be maintained as a general rule that a creditor in possession employing a law agent or factor to manage the property and collect the rents could not in any case take credit for the law agent's account incurred in collecting the rents, and that a factor's fee was not an item of expense which could be allowed to the creditor. For that proposition he cited the case of *Kildonan* v. *Douglas Heron & Co.*, 16th June 1785, M. 14135, a case which certainly appears to support the defender's contention.

But Mr Johnston for Brown's trustees maintained that the report of this case was erroneous, and was not justified by the session papers, and that the judgment, as reported, went beyond the prayer of the petition. I think both the report and also the record as appearing from the session papers are obscure and unsatisfactory. But besides, it does not appear that the judgment, as reported, has been followed in practice. It is cited in a note in Bell's Com., I. 701. But it is strongly questioned by Professor More in his Notes on Stair, Vol. I. cclxi, and also by Professor Bell, Lectures, II. 1076; and it appears to be contrary to general practice.

I think these considerations sufficient for judgment, and that it is unnecessary to consider the law as to the trust said to be implied in a bond and disposition in security when the creditor enters into possession.

On the whole, I am of opinion that the judgment of the Lord Ordinary ought to be affirmed, and that the case should be remitted to his Lordship for further procedure.—*15th March* 1905.

On 15th November 1906 the Lord Ordinary (Mackenzie) interponed authority to a joint minute whereby the parties agreed "to refer the whole cause and the question of expenses therein to Mr A. J. F. Wedderburn, S.S.C., Edinburgh, as judicial referee."

On 9th January 1907 the defender submitted to the referee the following Minute of Proposed Amendment of Record:—

The defender moved the judicial referee to allow him to amend the Record in the action by adding to Answer 7 the following:—"In any event, the defender is entitled to credit for the income tax on interest to the amount of £2217, 17s. 10d. debited by the pursuers to him in the account, bringing out a balance of £1947, 14s. 11d. specified by the pursuers in Condescendence 6."

A statement showing how the said sum of £2217, 17s. 10d. is arrived at is herewith produced and referred to, and to add the following plea in law:—"In any event, the defender is entitled to credit for the income tax specified in his answer to Condescendence 7."

On 8th May 1907 the referee refused to allow the proposed amendment. In a note of Proposed Findings the referee said:—

If the referee were of opinion that he could competently open up and amend the Record, he would be disposed to give the defender an opportunity of withdrawing the objection in question from the Simpson Street case; but he has arrived at the conclusion that he can only dispose of the case as it

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stands on the Record remitted to him. The process, notwithstanding the remit, continues to depend before the Court, and it appears to the referee that if he were to authorise amendments of the Record, he would be usurping the functions of the Court, and in the end might be reporting on a totally different case from that which had been remitted. Reference is made to Mackay's Manual, p. 279, par 1. The referee is all the more constrained to this view for the reason that involved in the question of the defender's right to make the amendment, there appears to be the question whether the defender, by the terms of the back letter of 29th September 1903 (Appendix A), is barred from raising any objections to the account sued on, other than the objection to the advance fees and the objections to the items making up the difference between the totals of Statements A and B. It seems clear to the referee that he would be acting *ultra vires* in disposing of any such question.

If the defender wishes to bring the amendment before the Court, the referee will delay issuing his final report to give him an opportunity of doing so.

On 25th May the defender craved the Lord Ordinary for leave to amend the Record in the terms proposed before the referee.

The Lord Ordinary *refused* the defender's motion. His Lordship issued no opinion with his interlocutor.

The Defender *reclaimed*, and *argued*: What was referred was "the whole cause," and that included the cause with all its potentialities by way of amendment (*Hope* v. *Derwent Rolling Mills Co. Ltd.*, 1905, 7 F. 837, per the Lord President at p. 845). The question at issue between the parties was whether the defender was due the sum of £411, 7s. 11d. to the pursuers. The claim for repayment of income tax was a good defence to the pursuers' claim. It was therefore within the *fines compromissi*, and the referee, in refusing to allow the amendment, was refusing to exercise his jurisdiction. In point of fact, the referee was willing to allow the amendment, but thought that to do so would be to usurp the functions of the Court. The judicial reference did not take the case out of Court. The Court still had jurisdiction to see that the referee had fully exercised his powers (*Shiels* v. *Shiels' Trs.*, 1874, 1 R. 502 at p. 506, per L.P. Inglis). The case being still in Court, the Court could exercise all the powers of amendment conferred by the Court of Session Act 1868 (31 & 32 Vict. cap. 100), sect. 29. The statement in Mackay's Manual, p. 279, was misleading. The cases cited (*Roberts* v. *Roberts*, 1833, 12 S. 210, and *Clyne's Trs.* v. *Edinburgh Oil Gas Light Co.*, 1835, 2 Sh. and M'L. 243) were distinguishable. In these cases the referee had given his decision, whereas in the present case the questions were still pending before the referee. Even if the reference were in the same position as an ordinary arbitration the amendment was competent and should have been allowed (*Moore* v. *M'Cosh*, 1903, 5 F. 946; *Christison's Trs.* v. *Callender Brodie*, 1906, 8 F. 928, at p. 931).

Argued for the Respondents: The only questions left open by the agreement of 29th September 1903 were (1) whether the defender was liable for the sum of £411, 7s. 11d., and (2) whether the defender was entitled to repayment of the sum of £67, 10s. The present claim related to income tax on sums of interest included in the sum of £1536, 7s. paid by defender to pursuers, and was thus an attempt to rip up the transaction of 29th September 1903. A reference of the whole cause was a reference of the cause as it stood at the date of the reference (*Roberts* v. *Roberts*, *cit.*). Any other view would make the referee the judge of questions which the parties never intended to refer. The argument that the Court retained all the powers of amendment conferred by the Court of Session Act (sect. 29) was fallacious. It involved the consequence that the Court might introduce a new defender. The proposed amendment was therefore incompetent. In any event the question whether the amendment should be allowed was for the referee. He had decided that question adversely to the defender, and his decision could not be reversed by the Court (*Mackenzie* v. *Girvan*, 1840, 3 D 318; *Walker* v. *Stewart*, 1855, 2 Macq. 424 at p. 428).

The Court *adhered* to the interlocutor of the Lord Ordinary.

Lord M'Laren.—This reclaiming note arises out of an attempt, in a case which has been made the subject of a judicial reference, to have the record amended. Two questions have to be considered: first, whether this is a case in which a party has any right to make an amendment; and secondly, if so, how is it to be made, whether by the arbiter or by the Lord Ordinary, who still has the control of the process, at least for the purpose of making the arbiter's award effectual.

We must keep in view that this is not an action of accounting between the parties in which everything was open. The parties had come to an arrangement under which, out of a sum of over £1900 which was claimed by the party making the advances, more than £1500 had been paid, and the balance of £411, 17s. 11d. was alone the subject of dispute between the parties. Further, it had been agreed that by repaying the £1500 the builder (to whom the advances had been made) was not to be prejudiced in his objections to the outstanding claim of £411. Accordingly the pursuers, who made the advances, brought this action for the purpose of enforcing their claim to the £411, and, in consequence of the reservation that had been made at the time of payment of the £1500, it was still open to the defender to dispute such items as he might select out of the unpaid balance of £411. Then after accounts had been given in and some progress made with the case, the parties referred

the whole cause to the decision of Mr Wedderburn in a judicial reference.

Now it has been made perfectly clear to me that the claim which it is now proposed to introduce by way of amendment—a claim for deduction of income tax upon interest—is one which, if it were to be made at all, should have been made at the time that the interim payment was arranged, because that interim payment consisted to a large extent of interest on advances. That was the time to claim abatement, in the usual way, of the amount of the creditor's income tax upon his interest. But that was not done; and it is quite clear that the point that is raised now is not with regard to a sum that enters into the constitution of the £411 that was reserved for the decision of the arbiter, but is an entirely separable and separate claim, and is, moreover, a claim for repayment of what had already been settled by the parties in the accounting.

I am not surprised in these circumstances that the arbitrator refused to allow the amendment proposed. He could not deal with the subject except on an amendment of the pleadings, and it is a condition of the case that these items of income tax are no part of the £411 that was reserved for the consideration of the arbiter. The arbiter, without giving an opinion, was willing that the parties should have an opportunity of going to the Lord Ordinary, who, he thought, might possibly have larger powers in the direction of introducing new matter into the action; but the Lord Ordinary has not taken a different view from the arbiter, and has refused the application for an amendment of the record.

These are all the considerations that enter into the question except this, that I observe it is not stated by the party who makes this claim—the debtor in the building advance account—it is not stated by him that he had in fact paid his creditor's income tax to the Inland Revenue Department; and of course the condition under which a debtor is allowed to deduct income tax in settling with his creditor is that he has either paid, or admits his liability to pay, that sum to the Inland Revenue, on the principle of the tax being collected at its source. I do not think, however, that this circumstance affects our decision, although it may possibly account for the claim not having been made at an earlier stage.

I think that the Lord Ordinary, and also the arbiter—though with his judgment we are not at present concerned—has rightly dealt with this application, in holding that he had no power to give effect to it. The question referred to arbitration was the whole cause, which must be taken to mean the cause as it existed when the minute of judicial reference was signed. I cannot conceive that in referring the whole cause, the parties intended to reserve a right to litigate upon any new matter between them which might transpire, and which one of them might think could be introduced into the cause. On the contrary, I think their object was to put an end to litigation as quickly as possible, and to substitute a summary method of procedure before the arbiter for the procedure of an ordinary action.

The power of amendment is a very important incident of procedure in our Courts, and I should be sorry to see it in any way abridged; but it appears to me to be essentially one of those things that belong to the region of the *lex fori*, and it exists only so long as the action continues to be, not merely a depending action for the purpose of decree, but a going action for the purpose of adjudicating upon the points in dispute. It does not follow that similar powers of amendment exist in arbitration cases, because the powers of courts of law to introduce new matter into actions have been not only different at different times, but have been different in regard to different Courts; and it cannot be said that the powers that belong to the Court of Session are any part of the powers of an arbiter, any more than those that belong more especially to the Sheriff Court.

In this case if the claim which is now made had, in the judgment of the arbiter, fallen within the conclusion of the Summons—if it had been a claim that could in any way have been held to form part of the £411 sued for—then I do not doubt that the arbitrator could have allowed a supplementary claim to the effect of raising the point; but as it was a claim independent of that sum I think it is equally clear that he was right in refusing to deal with it, because it was not a part of the case that was remitted to him. I am therefore of opinion that we should adhere to the Lord Ordinary's interlocutor.

Lord Kinnear.—I also think we must adhere to the Lord Ordinary's interlocutor. The purpose of the reclaiming note is to obtain a judgment which will have the effect of reversing the decision of the judicial referee; and that creates a formidable difficulty in the reclaimer's way at the outset, because the award of a judicial referee is just as final as the award of any other arbitrator. But then the reclaimer says, and says correctly, that an arbiter is never the final and exclusive judge of his own jurisdiction, and that if he exceeds his jurisdiction, or falls short of it, he may be corrected by the Court; and his case is, as I understand it, that, in refusing to allow the amendment of the record which had been brought before him, he refused to exercise the jurisdiction committed to him by the contract of submission.

I should be very sorry to say that a judicial referee or any other arbiter can have no power to amend a record. It seems to me to be clear enough that he has quite sufficient control of the procedure before him to allow any amendment which he thinks reasonable and proper, provided it does not go beyond the scope of the questions submitted to him. He may alter if he thinks

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fit, or allow the party to alter, the pleadings before him, but he cannot alter the contract of reference. And therefore the question which arises in this case is necessarily whether he was asked to do something which was within the contract, or whether he was right in thinking that he was asked to do what was incompetent because it was subjecting to his decision a question that was not within the contract.

Now the reclaimer argued that the question which he wished to raise was necessarily within the contract of reference, because the subject referred to the judicial referee was the whole cause, and then the learned counsel said, "Look at the summons and you will see it is a summons concluding for payment of £411, 17s. 11d.; and in referring the whole case involved in that conclusion to the judicial referee, the parties necessarily referred to him to consider whether that sum of £411, 17s. 11d. is really due or not; and therefore referred to him every claim that could possibly be made by the defender."

It may very well be that if the whole case had been referred upon the Summons alone there would have been a great deal of force in an argument of that kind; but that is not the reference that was made. A record was made up and the action proceeded so far that a judgment was pronounced by the Lord Ordinary upon the merits of one part of the case, and the Lord Ordinary's judgment was adhered to by this Court; and it was only after that, and after some subsequent procedure, that the parties agreed to refer what was still in dispute to the judicial referee. I say "what was still in dispute," because I take it to be perfectly clear that no one could obtain a judicial reference to enable the referee to reconsider what had been already decided by the Court. That was not the purpose of the reference at all; the sole purpose of the reference was to obtain his award on questions that still remained in dispute. What was referred to him was not the case that was originally instituted, but all that was left of it; and therefore the question really comes to be what was it that was left in the case at that stage.

Now I do not repeat your Lordship's examination of the details of the record. I think it enough to say that it seems to me that the purpose of this amendment is to submit to the adjudication of the referee a question that was not raised at the time that the parties agreed to refer; which is not within the record as it stood at that stage; and which is therefore not within the reference. I am therefore of opinion with your Lordship that we cannot hold that, in refusing to allow this amendment, the arbiter was refusing to exercise any discretion which was committed to him. Even if he had a discretion I see no reason to suppose that he exercised it wrongly. The material point is that what he was asked to do was to allow a question to be raised which had not been raised in the case originally when the reference was made, and which had therefore not been referred to him. I agree that we should adhere to the Lord Ordinary's interlocutor.

Lord Pearson.—I am entirely of the same opinion. I think it necessary to attend precisely to the nature of the claim made in the Summons, and more especially to the claim as it is set forth in the closed record; because I find that although the record was closed in 1904 the parties did not agree to refer "the whole cause" to Mr Wedderburn until the action had been more than two years in Court. The parties therefore had ample time to come to some kind of understanding as to the exact questions they intended to raise in the litigation. Now although in form the pursuers' claim is for payment of a sum of money, £411, 17s. 11d., that was really only the disputed balance of a much larger amount which was originally in dispute between the parties; and it is, I think, essential in disposing of this question to keep that in view.

Before the action was raised the parties met, very sensibly, in order to narrow the area of dispute; and it appears that on that occasion the pursuers claimed £1947, while the defender was only willing to pay £1536; and that meeting ended in the defender paying £1536 to the pursuers—subject only to a reservation as to a matter of £67, 10s. which has nothing to do with any of the questions raised in the present dispute. The result was that the pursuer sued the defender for the disputed sum of £411, 17s. 11d. which remained over after payment of the £1536; and the defender pleaded, first, that no part of the £411, 17s. 11d. was due; and second, that if anything was due he was entitled to a rebate of £67, 10s.

When the judicial referee took up the case the defender moved for leave to amend the record. He did so in order to add a claim for a further deduction in name of income tax, which he says ought to have been deducted from the sums of interest charged in the original account. Now, all the charges of interest from which this income tax was to be deducted were contained in that part of the original account which was settled and paid, and not in that part of the original account which was objected to, or which was within the reserved area of the dispute. Therefore the question belongs really to the settled part of the claim; and the defender's proposal amounts really to this, a claim for repayment of part of the £1536 which he has already paid.

I think the peculiarity of this case is that the area of dispute was already limited by agreement of parties before the action came into Court at all; and I cannot find that the pursuers have, by the judicial reference, agreed to any enlargement so as to include matters which I think were disposed of finally before the action ever came into Court.—12*th June* 1907.

Counsel for Reclaimer, Murray, Irvine; Agents, Dove, Lockhart & Smart, S.S.C.—Counsel for Respondents, Fleming, K.C., Chree; Agents, Morton, Smart, Macdonald & Prosser, W.S.

J. S. M.,
for F. A. U.

SECOND DIVISION.

(*Lords Stormonth-Darling, Low and Ardwall.*)

69. Lochgelly Iron and Coal Company Limited *v.* Sinclair.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 1 (3), Schedule II. (8)—Process—Competency—Application for Arbitration to Fix Compensation Presented During Dependence of Proceedings to Have Memorandum of Agreement Recorded—Warrant to Record Memorandum Granted—Application Dismissed as Incompetent.

Stated Case.

(Cf. *Lochgelly Iron and Coal Co. Ltd.* v. *Sinclair*, 1907, S.C. 3; 14 S.L.T. 341.)

This was an appeal by way of stated case against a decision of the Sheriff-Substitute (Shennan) in an application for arbitration raised in the Sheriff Court at Dunfermline at the instance of the Lochgelly Iron and Coal Co. Ltd. against Daniel Sinclair.

The case stated as follows:—

This is an application for arbitration in which the appellants requested the Sheriff, as arbiter, to find that the appellants' liability to compensate the respondent in respect of an injury sustained by him on or about 12th October 1904, while employed as a miner in the appellants' Lochhead Pit, Raith Colliery, near Lochgelly, came to an end on 25th January 1905, and to grant an order declaring the respondent's right to compensation to have ended as from and after said last-mentioned date; or alternatively, to ascertain and fix such weekly payments as might be due to the respondent under the Workmen's Compensation Act 1897 in respect of such injury, and to grant an award against the appellants finding the respondent entitled to such weekly payments, beginning the first payment on 1st February 1905 for the week preceding that date, and so on weekly thereafter until such weekly payments are varied or ended by the Court.

It was admitted that on or about 12th October 1904, and for some time prior thereto, the respondent was in the employment of the appellants as a miner in their said Lochhead Pit, and that while in the course of his said employment on said date he sustained injuries which incapacitated him from work. It was also admitted that respondent had been paid compensation at the rate of 16s. 9d. per week from a fortnight after the date of said accident down to said 25th January, since which date payments had been discontinued.

The said application for arbitration was lodged on 3rd April 1906. At that time there was depending before me a petition by the respondent, Daniel Sinclair, for a special warrant to record a memorandum of agreement between himself and the appellants, which last-mentioned petition had been presented on 27th March 1906. Accordingly, on 21st April 1906, after hearing parties, I sisted procedure in the application for arbitration to await the issue of the application previously lodged by the respondent Sinclair for warrant to record the memorandum of agreement.

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After sundry procedure I granted the special warrant. On 8th January 1907 the application for arbitration was enrolled, and it was reported to me that the special warrant to record the memorandum had been brought under review of the Court of Session upon a note for an order upon the Sheriff to state a case, and had been confirmed by that Court, and that the memorandum had since been recorded. I accordingly dismissed the application for arbitration on the grounds that as an original application for arbitration it was excluded by the agreement of which a memorandum had been recorded, and that the application was not so framed that it could be treated as a petition for review of the compensation fixed by the agreement.

The Questions of Law for the opinion of the Court were:—

1. When an application for arbitration to fix compensation is presented during the dependence of proceedings to have a memorandum of agreement relating to the same compensation recorded and warrant to record said memorandum of agreement is granted in these proceedings, is it competent to proceed with the said application for arbitration?
2. In the circumstances narrated was the application for compensation rightly dismissed?

Argued for the Appellants: The application for arbitration was competent. The workman's incapacity had admittedly ceased in April 1905 (cf. *Lochgelly Coal and Iron Co.*, 1907, S.C. 3), and accordingly the agreement founded on as in bar of the present proceedings had terminated before they began. In any event there was still a question as to the duration of the compensation under the agreement which could competently be determined in an arbitration. Alternatively the present proceedings were competent as an application for review of the compensation under the agreement.

Argued for the Respondent: The present proceedings were excluded by the existence of the agreement (*Dunlop*, 1901, 4 F. 203; Workmen's Compensation Act 1897, sect. 1 (3), Sched. I. 12; Act of Sederunt, 3rd June 1898, sect. 5. Nor could they be treated as an application for review under Sched. I. 12.

The Court *answered* the first question of law in the negative, and the second in the affirmative.

Lord Stormonth-Darling.—I think this case may be briefly and colloquially summed up by saying that the employers here have tried to sit upon two stools, and in the opinion of the Sheriff-Substitute have fallen between them. That means that I think the Sheriff-Substitute's

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judgment is perfectly right on both alternative grounds. He says that he "dismissed the application for arbitration on the grounds that as an original application for arbitration it was excluded by the agreement of which a memorandum had been recorded, and that the application was not so framed that it could be treated as a petition for review of the compensation fixed by the agreement." He puts two questions of law which state these two grounds, and I think we must answer these questions, the first in the negative and the second in the affirmative.

There was an agreement here undoubtedly, and there came to be a real question between the parties as to the duration of agreement. The accident happened on 12th October 1904, and payment was actually made down to 25th January 1905 at the full rate agreed on. Then in the opinion of the employers the total incapacity had ceased, and accordingly they discontinued that payment. The next thing was that the workman presented an application to have the agreement recorded, and the result of that was that it was recorded after considerable procedure. During the course of that procedure the employers apparently woke up and presented a curious kind of application for arbitration of a rather hybrid character. They did that upon 3rd April 1906; and that application for arbitration contained two alternative prayers. One was that, admitting the accident, they asked the Sheriff to find that the agreement, or rather the liability to compensate the respondent, had come to an end from and after 25th January 1905, which was the date when payment under the agreement had actually ceased; and then alternatively they asked the Sheriff "to ascertain and fix such weekly payments as might be due to the respondent under the Workmen's Compensation Act 1897 in respect of such injury, and to grant an award against the appellants finding the respondent entitled to such weekly payments, beginning the first payment on 1st February 1905 for the week preceding that date," which, be it observed, was just a week after the actual payment had ceased. That was not in accordance with the workman's view of the agreement, and certainly there is no view upon which it can be said that the agreement warranted the employers in discontinuing payment on 25th January 1905.

Accordingly, what the Sheriff has done in this hybrid application is to find that while the application for recording the memorandum at the instance of the workman was in dependence he could not deal with the application for arbitration first, because, if it were to be regarded as an application for arbitration *de novo*, it was excluded by the decision of this Court in *Dunlop* v. *Rankine & Blackmore*, 4 Fraser 203, where Lord Moncreiff laid it down (explaining the whole decision) that—"Under the Act, sect. 1 (3) where a question as to the amount or duration of compensation has been settled by agreement there is no room for arbitration; it is excluded." Now, plainly, Lord Moncreiff meant, and the Court meant, that the question as to the amount or duration of the compensation included the very question Mr Strain has argued the employers wished to raise, namely, whether they were entitled to bring it to an end at their own hand when they found the incapacity had ceased. They did not take any of the proceedings which the Act prescribes for bringing the weekly payment to an end. Therefore I think the Sheriff was undoubtedly right in holding that, viewed as an application for an original arbitration *de novo*, he could not deal with it while the application for recording the memorandum of the agreement was pending before him. In the same way I think that he was perfectly right in saying that, once that was before him and settled in favour of the agreement, it was impossible to hold that the application for arbitration could be otherwise than dismissed. Therefore I think the Sheriff was right on both grounds, and that we must answer the stated case accordingly.

Lord Low.—I concur. I should be very slow to throw out an application made to the Sheriff as an arbiter under the Act merely on account of a defect in the form of the application, and accordingly, if the application which was presented to him upon 3rd April 1906 had been in substance an application to review the weekly payment under the 12th section of the first schedule, I should not approve of its being thrown out merely in respect of the form in which it was framed. But I think there is a question here of substance and not of form at all. I think that in substance this application was not, and was plainly not intended to be, an application for review of the weekly payment under the 12th section; and accordingly I am of opinion that the Sheriff-Substitute was right in coming to the conclusion that it was so framed that it could not be treated as a petition for review, and therefore that he was right in dismissing it.

Lord Ardwall.—I agree. I think it is quite plain that this application as presented proceeds upon the footing that there had been no antecedent agreement between the parties. That there was an antecedent agreement is certain. I agree with the Sheriff-Substitute that once an agreement has been entered into, arbitration proceedings—original arbitration proceedings—under this Act are out of place. There is no suggestion from beginning to end of this application as recited in the stated case, that it was brought for the purpose of putting an end to the payment under a subsisting agreement, or of diminishing that payment as from and after 25th January 1905. On the contrary, both in substance and in form it appears to be simply an

application for an original arbitration under this Act. Now, that being so, I consider it entirely out of place, standing the agreement between the parties. I therefore consider that the Sheriff-Substitute treated the matter entirely rightly in holding that it was an original application for arbitration, both in substance and in form, and that as such it is excluded by the agreement of which a memorandum has been recorded. With regard to this being considered to be a petition for review, it is not, either in substance or in form, an application for review under the 12th section of the first schedule appended to the Act of 1897, which is the only method prescribed by the statute for having such payment ended or continued on a diminished scale. On these grounds I am in favour of affirming the judgment of the Sheriff-Substitute. —21*st June* 1907.

Counsel for Appellants, Horne, Strain; Agents, W. & J. Burness, W.S.—Counsel for Respondent, Crabb Watt, K.C., A. M. Anderson; Agent, C. Strang Watson, Solicitor. J. H. H.

FIRST DIVISION.

(*Lords M'Laren, Kinnear and Pearson.*)

70. Macpherson's Trustees *v.* Macpherson.

Apportionment — Will — Construction— Direction to Trustees that Dividends Accruing from Certain Shares Shall, as Received, be Paid Over to Beneficiary— Direction Held to be Stipulation That No Apportionment Shall Take Place—Apportionment Act 1870 (33 & 34 Vict. cap. 35), sect. 7.

Special Case.

This was a Special Case to which the two parties were the testamentary trustees and the widow of the late William Macpherson respectively.

The case set forth as follows :—

William Macpherson, managing director of The Globe Express Ltd., died on 7th July 1905, leaving a trust disposition and settlement dated 24th December 1900, with relative codicil dated 19th March 1904, which were registered in the Books of Council and Session on 14th July 1905. . . . Mr Macpherson was survived by his widow, but no children. The trustees acting under the said trust disposition and settlement and relative codicil are the first parties hereto, and Mr Macpherson's widow is the second party. At the time of his death Mr Macpherson held 197 shares of £100 each (fully paid) in The Globe Express Ltd., of which company he was the principal shareholder.

By his said trust disposition and settlement the said William Macpherson assigned and disponed to the first parties his whole means and estate . . . . in trust for the ends, uses, and purposes therein mentioned.

. . . . . .

By the sixth purpose of the said trust disposition and settlement the truster directed his trustees to make over, upon his death, certain lots of shares (70 in all) in The Globe Express Ltd., to the legatees therein mentioned, who were all directors or branch managers of the said Company, "each share carrying with it the current year's dividend corresponding thereto." These legatees all survived the testator, with the exception of Mr Alfred Fowler, and, by the second purpose of the codicil, the truster directed that the 20 shares in The Globe Express Ltd., bequeathed to Mr Alfred Fowler, should fall under and be disposed of in accordance with the seventh purpose of the said trust disposition and settlement.

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The seventh purpose of the said trust disposition and settlement is as follows :—"The remainder of my shares in the Company shall be retained by my trustees during the survivance of my wife, and the dividends accruing from said shares shall, as received, be paid over to her." The truster thereafter directed that, on the death of his wife, the said shares should pass to certain other beneficiaries; . . . and by the eighth purpose of the said trust disposition and settlement the truster directed that his trustees should allow his wife the free liferent of the whole residue and remainder of his means and estate during her survivance. . . .

By the last purpose of the said trust disposition and settlement, the truster directed that the whole residue and remainder of his estate, after payment of all duties and expenses, should be divided into twenty equal parts, which should be distributed as therein mentioned. . . .

The Globe Express Ltd. is a Company registered in Scotland in 1896, with a capital of £35,000, divided into 350 shares of £100 each. In accordance with No. 92 of the Articles of Association of that Company, the accounts of the Company are made up to 30th April in each year, and a statement of profit is prepared for the purpose of declaring a dividend for the financial year ending on that date. No provision is made in the said Articles of Association with regard to the date of the annual meeting at which the dividend for the year ending 30th April is declared; but in order to allow time for the audit of the accounts it has been the invariable practice of the Directors of the Company to hold that meeting in the month of October annually.

At the annual meeting of the Company held on 10th October 1905 a dividend of 7 per cent. was declared for the year ending 30th April 1905. The first parties were thereafter paid a sum of £1379, being dividend at the said rate on the 197 shares of the Company held by them at the date of the truster's death. The surviving legatees, named in the sixth purpose of the said trust disposition and settlement, at first claimed the whole of the dividend for the year ending 30th April 1905, on the 50 shares bequeathed to them, but that claim has been departed from.

The second party now maintains that the whole of the said dividend on the remaining 147 shares, amounting to the sum of £1029, should, in terms of the seventh purpose and other provisions of the said trust disposition and settlement, have been paid to her by the first parties when received by them, or at all events that she is entitled to the whole of the dividend which may be paid by the Company for the year ending 30th April 1906, when received by the first parties. The first parties, on the other hand, maintain that the dividends payable in respect of the year ending 30th April 1905, and for the period from 30th April to 7th July 1905, form part of the capital

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of the trust estate, and that the second party is only entitled, in terms of the eighth purpose of the said trust disposition and settlement, and in accordance with the Apportionment Act 1870, to the free liferent of the sums representing the said dividend for the year ending 30th April 1905, and the portion of any dividend which may be declared for the succeeding year, applicable to the period from 1st May 1905 to 7th July 1905, the date of the truster's death.

The parties craved the opinion and judgment of the Court upon the following

QUESTIONS OF LAW.

1. Does the whole of the dividend for the year ending 30th April 1905 on the said 147 shares of The Globe Express Ltd., held by the first parties, fall to be paid to the second party under the provisions of the said trust disposition and settlement?

2. In the event of the first question being answered in the negative, does the portion of the dividend for the year ending 30th April 1906, for the period from 1st May 1905 to 7th July 1905, fall to be paid to the second party under the provisions of the said trust disposition and settlement?

Argued for the First Parties:

The Apportionment Act must be held to apply. There was in the deed under construction no express stipulation that apportionment *was excluded* as required by sect. 7 of the Act (*in re Oppenheimer*, L.R. [1907], 1 Ch. 399; *Pollock*, 1874, 18 Eq. 329). Nor was the language so expressed that apportionment was impossible consistently with it (*Tyrrell* v. *Clark*, 1854, 2 Drewry's Rep. 86).

Argued for the Second Party:

The Apportionment Act did not apply. The seventh purpose of the settlement contained what was in effect a stipulation excluding the operation of the Act (*Lysaght* v. *Lysaght* [1898], 1 Ch. 115). *Tyrrell* did not apply. It was decided on the Apportionment Act of 1834 in 1854.

The Court *answered* the first question in the affirmative. The second question was not answered.

Lord M'Laren.—I think the trustees of Mr Macpherson could hardly be expected, without the authority of the Court, to decide this question for themselves. The Apportionment Act was, I think, primarily intended to regulate the division of termly payments in cases where the division of such payments was not arranged by the parties interested. In such cases the Act of Parliament provides that, where parties have not arranged how these payments are to be allocated, a proportional part shall vest *de die in diem* in the parties interested. That principle is applicable alike to contracts and to wills or rights in succession. But then I see no evidence in the Act that it was intended to interfere with, or to have any overruling influence upon, contracts or voluntary provisions, which were expressed in clear language appropriate to the division of the termly payments in question. On the contrary, the concluding clause of the statute providing for the exclusion of the Act where it is expressly stipulated that no apportionments shall take place, makes it evident that it was really intended to supply what the parties had omitted, and was not intended in any way to run counter to the intention of parties where that intention was clearly expressed.

Now in this case we have to consider a will dealing with a substantial amount of personal property, and dealing with it in reasonably clear terms. Among other things, Mr Macpherson, after disposing of seventy shares in The Globe Express Ltd., valued at £7000, directs with respect to the remainder of his shares in that Company that they "shall be retained by my trustees during the survivance of my wife, and the dividends accruing from said shares shall, as received, be paid over to her." Now there is here a trust to hold for the benefit of Mrs Macpherson, the testator's widow. He then goes on to say what is to be done with the capital; but that does not enter into the present question, and therefore I do not pursue the subject further. The shares are to be held by the trustees during Mrs Macpherson's life, and the trustees are charged with the duty of paying over to her the annual produce or income of these shares. If the direction had been given in these general terms, that the lady was to receive payment of the income of the shares, I do not doubt that the Apportionment Act would have taken effect upon the provision and would have made it necessary to apportion the termly payment accruing in the year of the testator's death, because in the case supposed there would have been an omission on the testator's part to provide how that particular year's income should be dealt with. But then I do not think there has been any omission in this case, because the direction is given that the dividends accruing from the shares shall, "as received," be paid over to his wife. I think that under that provision the first of the dividends received after the testator's death falls to be dealt with exactly as all the others accruing in the course of her life would be treated. If the trustees, following out the direction literally, had in the month of October, when a dividend was declared, paid it over to Mrs Macpherson, and if the next of kin or any one having an adverse interest were to challenge the payment, I have difficulty in seeing on what argument such a challenge could be rested. I think the answer would be that the trustees had followed the truster's direction by paying the dividend as it accrued, and that the lady, in accordance with that direction, was entitled to apply the income, as received, for her own benefit.

This seems to me to be the preferable view, because in the absence of any direction as to

apportioning the year's income, I think it may be inferred that the testator did not contemplate any apportionment, and did not think it necessary to give any direction on the subject. I think his meaning was that the income should be treated as accruing to his wife as and when it was received by the trustees, and that it should be, without delay, paid over to her for her own benefit. I am therefore of opinion that the first question should be answered in favour of the second party.

Lord Kinnear.—I agree. The statute prescribes the manner in which termly payments such as the dividends in question are to be apportioned between parties in the relative positions of the widow and the trustees. But it does not prevent the testator disposing of the income of his estate in any manner he thinks fit, provided only that he does so in sufficiently clear and express language; and if he directs in express terms that dividends shall go wholly to a legatee, and that no part of them shall be apportioned to the general estate, that is a perfectly effectual testamentary direction which will receive effect. In the case of *Tyrrell*, which was cited to us, it was held that the Apportionment Act was not to be excluded by any inference which might be drawn from the general terms of a will. But on the other hand, in the case of *Lysaght*, and apparently from the report of a case (*in re Meredith*, 1898, 67 L.J. (Ch.) 409) which was not cited, but which is referred to in the case of *Oppenheimer* quoted to us, it was decided with equal clearness that when a testator expressly directs that income which would be otherwise apportionable shall be given to a particular legatee, the Act will not apply. I think the present case falls under the latter rule. The truster says that the dividends accruing from the said shares "shall, as received, be paid over" to his wife. In saying so he gives his trustees a clear and express direction which they are bound to follow.

I entirely agree, however, with the observation which fell from your Lordship in the chair, that although we think the direction clear enough, it was nevertheless perfectly natural and proper on the part of the trustees to bring this question before the Court in order that they might have judicial authority for the course they might agree to follow.

Lord Pearson.—I am of the same opinion.—21*st June* 1907.

Counsel for First Parties, D. P. Fleming; Agents, Webster, Will & Co., S.S.C.—Counsel for Second Party, Horne; Agents, P. Gardiner Gillespie & Gillespie, S.S.C. W. A. R.

2nd Div.

O'Neill v. Motherwell.

SECOND DIVISION.

(*Lords Stormonth-Darling, Low and Ardwall.*)

71. O'Neill *v.* Motherwell.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 2—Time for Taking Proceedings — Claim — Circumstances in which Application Held Incompetent in Respect Claim for Compensation Not Made Within Six Months of Accident.

Stated Case.

This was an appeal by way of Stated Case against a decision of the Sheriff-Substitute (Fyfe) in an arbitration under the Workmen's Compensation Act 1897, raised in the Sheriff Court at Glasgow at the instance of Mrs O'Neill against Andrew Motherwell.

The facts of the case were stated as follows:—

1. That respondent is a grain-merchant, carrying on business in Glasgow.

2. That his business premises, fronting Surrey Street, Cumberland Street, and Main Street, Glasgow, consist of (*a*) grain mill and other buildings, entering from Surrey Street; and (*b*) office quarters, entering from Cumberland Street.

3. That these two parts of the premises are not under one roof, but are separate buildings situated at some distance apart.

4. That an overhead railway runs between these two sections of the premises, but access is possible from the one to the other by means of a pend which enters from Cumberland Street, passes under the office buildings, through an arch beneath the railway, and into a lane upon which the mills portion of the property abuts.

5. That, as the buildings were constructed at 11th April 1904, the only access to the office where appellant was employed as an office-cleaner was by a stair leading direct from Cumberland Street up to the office, and the only egress was by this same stair into Cumberland Street.

6. That machinery was employed in the mills fronting Surrey Street.

7. That the only mechanical appliance which was in the portion of the buildings where the office was situated was an electric motor, situated in the same part of the Cumberland Street building as the office, and behind the portion used as an office.

8. That this mechanical power was primarily provided and used for working a hoist, but it was also connected to a mixer, used for the purpose of mixing flour to make it self-rising, and so preparing it for the market for sale.

9. That in a portion of the Surrey Street building adjoining the grain-mill (and entering from it) there is a bag-room where women are employed, on piecework, to make and mend bags.

10. That for some time prior to April 1904 appellant had been in the employment of the respondent under two distinct engagements.

11. That one was, that in the mornings from 6 till 9 she was engaged as an office-cleaner, to keep in order the said office, entering from Cumberland Street as described.

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12. That for this daily duty she received a fixed wage of 9s. per week.

13. That the other was that from 10 a.m. till 5 p.m. the appellant was at liberty to work, and was accustomed to work, in the bag-room of the mill entering from Surrey Street.

14. That for this work she was paid by piece-work, and her average weekly earnings amounted to 9s. 6d. per week.

15. That on the morning of 11th April 1904, whilst appellant was engaged in her office-cleaning duty within the said office entering from Cumberland Street, she fell off two chairs upon which she was standing to reach and dust some pictures.

16. That she broke her left arm.

17. That she was thereby incapacitated from following the occupation either of an office-cleaner or a bag-mender.

18. That she is now sufficiently recovered to be able to undertake the work of bag-mending, but that she is not yet able to undertake the duty of an office-cleaner.

19. That formal notice was not given to respondent of the accident, but he was at the time aware of it, and has not been prejudiced by the want of formal notice.

20. That appellant did not, within six months of the occurrence of the accident, make a claim for compensation.

21. That the respondent, from the date of the accident until the end of September 1904, voluntarily made to the appellant an allowance of 10s. per week.

22. That appellant's daughter Catherine, aged 17, then and still residing in family with her mother, had been accustomed to assist her mother in her office-cleaning work.

23. That she was capable of undertaking this work alone, and upon her mother becoming incapacitated respondent continued this daughter as the office-cleaner, at the same wage of 9s. per week, and she still continues to do this work.

24. That early in October 1904 respondent proposed to reduce the cash allowance to 5s. per week, whereupon appellant declined to accept anything less than 10s.

25. That the allowance was therefore altogether discontinued.

26. That the respondent's said premises constitute a factory within the meaning of the Workmen's Compensation Act 1897.

27. That respondent is the undertaker.

On these facts the Sheriff found in law that in respect the making of a claim within six months was under the statute a condition precedent to proceedings for recovery of compensation, and that appellant had failed to comply with this statutory requisite, her application for compensation was incompetent. He therefore dismissed the application, and assoilzied the respondent.

The question of law for the opinion of the Court was: Is the application competent?

Argued for the Appellant: (1) In the circumstances of this case the respondent was barred from founding on the absence of a claim within the statutory period (*Freeman*, 1848, 2 W. H. and G. 654; *M'Kenzie*, 1881, 8 R. (H.L.) 8). (2) In point of fact the appellant made a "claim" within the meaning of the Act when she said she would not take less than 10s. per week (*Wright* [1900], 2 Q.B. 240; *Powell* [1900], A.C. 366).

Argued for the Respondent: (1) There was no question of bar, because there never was any agreement to pay compensation (*Kilpatrick*, 1907, S.C. 320). (2) The Sheriff had found as a fact that no claim was made, and that was conclusive.

The Court *answered* the question of law in the negative.

Lord Low.—The question in this case relates to the competency of a workman instituting arbitration proceedings under the Workmen's Compensation Act, after the elapse of more than six months from the date of the accident, no claim having been made within the six months.

The material facts are these. The appellant, who was employed to clean the office of the respondent, and who also worked at piece-work in the bag-room of his mill, broke her arm upon the 11th of April 1904. For cleaning the office she received 9s., and in the mill she earned 9s. 6d. weekly, so that the most she could have claimed under the Act would have been 9s. 3d. weekly during total incapacity, and that, too, only from a period of two weeks after the accident. Now, without anything being said about the Act, the employer paid her 10s. a week from the date of the accident, and employed her daughter, who was seventeen years of age, and lived with the appellant, to clean the office, at the same wage—9s. a week—which the appellant had received, the result being that more money was coming into the appellant's house after than before the accident. These payments were continued for about six months, and then the employer proposed to reduce the allowance of 10s. to the appellant to 5s. The appellant objected, and made an attempt to have a memorandum of agreement formally registered. She was unsuccessful, and her next step was to bring these arbitration proceedings. The Sheriff-Substitute has found as a fact that the appellant did not within six months of the accident make a claim for compensation, and he has accordingly held that the application for arbitration is incompetent.

It was argued for the appellant that the present application is not barred by the fact that she did not make a claim within the six months, because she was led by the respondent to believe that he admitted her right to compensation, and that there was no necessity for her to make a claim.

Now if the case should arise of an employer deliberately misleading an injured workman, and inducing him to refrain from making a claim within six months, I have no doubt that the Court would find a remedy, but no such case is disclosed by the facts as stated by the Sheriff-Substitute in this case. I think that the inference from the facts is that the respondent acted

in perfect good faith, and did what he considered to be fair to the appellant irrespective of his obligation under the Act, and the appellant was quite willing (which is not surprising) to accept what the respondent offered. In these circumstances I see no reason why the strict rule that a claim must be made within six months should not be enforced. I accordingly think that the Sheriff-Substitute was right, and that the question stated should be answered in the negative.

Lord Ardwall.—I agree with your Lordship. There is nothing stated in the case which is sufficient to raise a bar against the employer, or entitle the Court to diverge from the rule laid down in the Act.

Lord Stormonth-Darling concurred. — 22*nd June* 1907.

Counsel for Appellant, Hunter, K.C., J. A. T. Robertson; Agent, Alex. Wylie, S.S.C.—Counsel for Respondent, J. R. Christie; Agents, Simpson & Marwick, W.S. J. H. H.

OUTER HOUSE.

(*Lord Dundas.*)

72. Boucher's Trustees *v.* Boucher's Trustees and Others.

Outer House. *Lord Dundas.*

Boucher's Trustees v. Boucher's Trustees and Others.

I. Marriage Contract—Post-nuptial Contract of Marriage — Disposition by Husband of Whole Means and Estate in Trust for Behoof of his Widow and Children—Disposition by Wife of Whole Means and Estate to her Husband and the Heirs of the Marriage—Power Reserved to Spouses to Alter or Revoke "At Any Time During Their Joint Lives"—Delivery Dispensed With—Subsequent Testamentary Writings by Husband Disposing of his Estate—Docquet, Holograph of Husband and Signed by Wife, Appended to a Holograph Testamentary Writing of Husband in Following Terms, "Seen and Approved Of by My Wife"—Held that Post-nuptial Contract of Marriage Not Revoked.

II. Donation—Donation Inter Vivos—Deposit Receipt Found in Father's Repositories After his Death in Name of Three Trustees "In Trust For" his Two Daughters, "Repayable to Any Two of Them or the Survivor"—Proof on Which Held that Donation was Proved.

III. Donation—Donation Inter Vivos—Sum of Money Placed by Father at his Daughter's Credit with Bank—Bank Pass-book Found in Father's Repositories After his Death in Name of his Daughter—Proof on Which Held that Donation Proved.

This was an action raised at the instance of the trustees acting under the post-nuptial contract of marriage of Mr and Mrs James Boucher, dated 28th May 1861, and relative deed of alteration dated 1865, against (1) the testamentary trustees of the said James Boucher; (2) James Boucher's widow and two daughters, Miss Ella Boucher and Mrs Janey Laurie Boucher or Colvil; and (3) the trustees nominated in a deposit receipt, dated 12th October 1905, by the Commercial Bank of Scotland Ltd. in favour of them in trust for James Boucher's said daughters, and others.

The Summons concluded for declarator (first) that the said post-nuptial contract of marriage, dated 28th May 1861, entered into between Mr and Mrs Boucher, and relative deed of alteration by them thereon, dated 31st July 1865, had not been revoked by subsequent testamentary writings of Mr Boucher, and that the whole estate, heritable and moveable, belonging to Mr Boucher at his death fell to be administered by the pursuers as trustees under the said post-nuptial contract of marriage; and (second) that the estate left by Mr Boucher falling to be administered as aforesaid, included, *inter alia*, (1) the sum of £5500 with interest, contained in the said deposit receipt by the Commercial Bank of Scotland, dated 12th October 1905; and (5) the sum of £299, 19s. contained in an account current with the Commercial Bank of Scotland in name of the said Ella Boucher.

The defenders, Mr Boucher's testamentary trustees, Mr Boucher's widow and daughters, and the trustees nominated in the said deposit receipt dated 12th October 1905, compeared and defended the action for their respective interests.

The Pursuers pleaded:

1. The post-nuptial contract of marriage being onerous and contractual as regards the widow and descendants of the marriage, and the provisions therein contained in favour of said widow and descendants being reasonable provisions, could not be revoked or altered by James Boucher without his wife's consent.

2. The testamentary writings of the said James Boucher having been executed without his wife's consent, are ineffectual to alter the provisions of the post-nuptial contract of marriage.

3. The sums contained in said deposit receipts and in said account current having belonged to the said James Boucher and not having been effectually donated by him, formed part of his estate at his death, and fall to be administered by the pursuers as trustees under the post-nuptial contract of marriage.

4. The sums contained in said deposit receipts and in said account current having belonged to the said James Boucher, and he having no power without his wife's consent to make gifts or donations to take effect after his death, formed at the time of his death

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part of his estate, and fall to be administered by the pursuers as trustees under the post-nuptial contract of marriage.

The Defenders pleaded:

1. The alleged post-nuptial contract of marriage being testamentary and revocable by the said James Boucher, and having been revoked by his said testamentary writings, the defenders should be assoilzied from the first conclusion of the summons.

2. The said James Boucher being entitled to deal with and dispose of his estate during his lifetime as he pleased, and having effectually donated the said sums of £5500 and £299, 19s. during his lifetime, and divested himself thereof, as condescended on, the defenders should be assoilzied from the second conclusion of the summons.

Proof was led before the Lord Ordinary, the purport of which and the facts of the case sufficiently appear from the Lord Ordinary's opinion.

The following authorities were quoted in addition to those referred to by the Lord Ordinary:—*Hill* v. *Hill*, 1755, M. 11580; *Balvaird* v. *Latimer*, 5th December 1816, F.C.; *Cameron's Trs.* v. *Cameron*, 1907, S.C. 407; *Wright's Trs. &c.*, 1870, 8 M. 708; *Kennedy* v. *Rose*, 1863, 1 M. 1042; *Miller* v. *Miller*, 1874, 1 R. 1107; *Mackellars* v. *Hunter*, 1858, 20 D. 761.

The Lord Ordinary issued the following interlocutor:—"Finds, declares and decerns in terms of the first conclusion of the Summons as concluded for; . . . . (3) Finds, as regards the sums (1) and (5) respectively described in said second conclusion, that they are not included in the estate left by the deceased James Boucher at his death, in respect that he effectually donated the same *inter vivos*, and divested himself thereof: Sustains the first and second pleas for the pursuers and the second plea for the compearing defenders, and repels the whole other pleas of the parties respectively, and decerns."

Lord Dundas.—The late James Boucher was married on 7th October 1858. He died on 7th September 1906, survived by his wife and by the two children of their marriage—Miss Ella Boucher and Mrs Janey Laurie Boucher or Colvil—all of whom are still alive. The daughters are respectively 39 and 37 years of age or thereby. Mr and Mrs Boucher had no ante-nuptial marriage contract. But on 28th May 1861 they entered into a post-nuptial contract of marriage (No. 33 of process). By that contract, which proceeded on the narrative that the parties thereto, taking into consideration that there was no contract entered into between them at the time of their marriage, had, in order to supply that defect, resolved and agreed to execute it, Mr Boucher, "for the love and affection he bears to his said spouse, and in consideration of the provision in his favour hereinafter written, and for other considerations," disponed and assigned to his wife, while she remained a widow, and to other persons named, as trustees, "all and sundry lands and heritable estate of the said James Boucher, as also his whole moveable and personal means and estate of whatever kind, which shall belong to him at the time of his death." It was provided by the (*third*) purpose that, in the event of there being a child or children of the marriage surviving Mr Boucher—which event occurred—the trustees should invest the whole residue of his moveable estate in good securities, and pay over the proceeds or annual revenue thereof, as well as the free yearly proceeds of any heritable property of which he might die possessed, to his said wife, to be applied for the support and maintenance of herself and the said child or children; and it was further provided that, on the death of his said wife, should she survive him—as she did—the trustees should lay out the proceeds of his said estate in the support and education of the said child or children of the marriage; and on the youngest of them attaining the age of twenty-one years complete the trustees should realise and convert the whole estate into cash, and divide the same amongst the said children in equal proportions. By the said contract it was further declared that the provisions thereby conceived in favour of Mrs Boucher and the children of the marriage should be in full satisfaction to them of their respective legal rights. Mrs Boucher, on her part, disponed and made over to Mr Boucher and the heirs of the marriage, whom failing, her own heirs, all and sundry goods, gear, debts, and sums of money, as well heritable as moveable, that were then belonging or resting owing to her, or that should pertain and be owing to her during the subsistence of the marriage, other than the provisions thereinbefore conceived in her favour. The said post-nuptial contract further contained a clause in the following terms: "And the parties hereto, and each of them, reserve their respective liferents of the estates and effects above conveyed, with full power to them at any time during their joint lives to alter and revoke these presents in whole or in part as they may see proper; but declaring always that the same, in so far as it shall not be altered or revoked as aforesaid, shall be effectual, though found lying by either of the parties at the time of his or her predecease, or in the custody of any other person for their behoof, with the delivery whereof they hereby dispense for ever." On 31st July 1865 Mr and Mrs Boucher executed a deed of alteration of the said post-nuptial contract of marriage, but the terms of that deed do not in any way concern the present case. Mr Boucher commenced business as an architect in Glasgow about the year 1855. At the time of his marriage, and also at the date of the post-nuptial contract, though his business was promising well, he had but small savings. At his death, however, he left heritable estate of the value of £22,500 or thereby, and considerable moveable

estate as well. Mrs Boucher, when she married, and also when the post-nuptial contract was executed, was possessed of no estate; but she had considerable expectations from relatives, which, however, from various causes, did not in fact bring very much to her in the end. Mr Boucher left at his death sundry testamentary writings bearing to dispose of his estate, both heritable and moveable, the most important of which appears to be dated 14th January 1895.

The present action is brought by the pursuers, original and assumed, acting under the said post-nuptial contract. The first conclusion of the summons is for declarator that the post-nuptial contract and relative deed of alteration have not been revoked by any of the testamentary writings of Mr Boucher, and that the whole estate, heritable and moveable, belonging to him at the time of his death falls to be held and administered by the pursuers and their successors as trustees under the said contract and deed of alteration, for the purposes therein contained; and that the testamentary writings of Mr Boucher are ineffectual to alter or impair the provisions in the said contract and deed of alteration. The negative of these propositions was somewhat faintly maintained by counsel for the testamentary trustees, and also, but only as an alternative to their principal argument, for the daughters of the marriage. I see no reason at all to doubt that this conclusion of the summons is well founded, and must be given effect to. The provisions made by the post-nuptial contract appear to me to be clearly "remuneratory," and therefore contractual. The parties to that contract expressly dispensed with delivery and declared that it should be effectual except in so far as it was revoked by them during their joint lives. It appears that at the end of Mr Boucher's holograph trust disposition and settlement, dated 14th January 1895, there is a docquet, holograph of him, in these terms, "Seen and approved of by my wife, Mrs Rebecca Laurie or Boucher, on the 28th January 1895," which is signed "Rebecca Boucher." I gravely doubt whether this docquet, even if duly witnessed, could be held, in conjunction with the settlement to which it is appended, to amount to a revocation of the post-nuptial contract by the parties thereto "during their joint lives." But it is sufficient to observe that the docquet, as it stands, is not probative. It seems to me, therefore, that the first conclusion of the summons must be given effect to.

By the second conclusion the pursuers ask declarator that the estate left by Mr Boucher, falling to be held and administered by them and their successors in trust, includes, *inter alia*, five specified sums of money. There is no dispute, and there could not be any, that as regards the 2nd, 3rd and 4th of these sums the conclusion is well founded. These are sums of money contained in deposit receipts in name of Mr and Mrs Boucher, payable to either or survivor. But the sums 1st and 5th specified stand in a different position.

The first sum of money is contained in a deposit receipt by the Commercial Bank of Scotland (St Vincent Street branch, Glasgow), dated 12th October 1905, in names of three gentlemen, "Trustees of James Boucher Esq. of Coulport, in trust for Miss Ella Boucher and Miss Janey Laurie Boucher, repayable to any two of them or the survivor, the sum of £5500 sterling, which is placed to their credit on deposit receipt with the Commercial Bank of Scotland Limited." It is maintained on behalf of the three trustees, and of Mrs Boucher's daughters, that this sum of £5500 was validly gifted by Mr Boucher *inter vivos*, and that the gift was not, and could not be, recalled or affected by his testamentary settlements. In my opinion this contention is right, and is entitled to prevail. The history of the matter is as follows. In July 1904 Mr Boucher deposited two sums of £4000 and £1000 respectively on receipts in name of his daughters, both then unmarried, jointly, or the survivor (Nos. 74 and 75 of process). As to these, Mr Waddell, the bank agent, says that Mr Boucher "had always talked about making some provision for his daughters—that he wanted to put some money aside for the girls, and I think he was going for a holiday. He mentioned it several times." But in October 1905 Mr Boucher approached Mr Waddell with a view to having the terms of these deposit receipts changed. Mr Waddell pointed out that this could only be done by the endorsation of the receipts by the daughters; the endorsation was procured by Mr Boucher, as appears from his letter to Mr Waddell, No. 14 of process, dated 8th October 1905; the accrued interest was apparently placed to the credit of Mr Boucher's account and a fresh deposit receipt for £5500 was taken out on 12th October, in the terms which I have already quoted. Mr Waddell explains the reasons which led up to the change. He says Mr Boucher "did not want the money back to himself, because he could have taken a deposit receipt in his own name, but he put it in the names of his trustees for his daughters. . . . *Q.* Before this date, had he said anything to you about putting the money in the names of trustees, and if so, what? *A.* Yes, he did. His reason for doing it was that Miss Janey Boucher had got engaged to be married, and he wanted to create a separate trust. He wanted to put that beyond the rights of the husband, and that was the reason for him putting it in the trustees' names. I told him that if he did not want them to have the money, he could take it back, and that it could be put in his own name in a new deposit receipt, but he did not want that. It was put in the names of the trustees, and he was to leave instructions with the trustees as to the disposal of that money. I explained to him that in putting it

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in the names of the trustees it was beyond his control, and that he could not touch the money. He fully understood that the money was beyond his control. He did not know very well how to do it, and he did not want that money to go into his own estate. I suggested that it should be put in the name of his trustees, or some other person." Mr Waddell's account of the matter is to some extent confirmed. It appears that on 11th October 1905, Mr Boucher wrote a letter to each of the three trustees named in the deposit receipt asking them to accept the trust. These letters, naturally enough, are not now forthcoming. But the three letters written in reply are produced (Nos. 17, 18, and 19 of process). No. 18 is the reply of Mr A. S. Cousland, dated 16th October, in which, after referring to Mr Boucher's letter to him of 11th inst., he says: "I note that one of your daughters is to be married, and that they possess money in a bank receipt"; and he adds some sensible remarks as to the propriety of giving explicit instructions to trustees in such a matter, as to the truster's wishes and intentions. The evidence of the daughters does not add much to the case in one direction or the other. Mrs Colvil says that she did not know about the deposit receipt for the £5500 till after her father's death; and her impression was that the provision for her and her sister, of which he sometimes spoke to her, was to be "through his will." Miss Boucher's evidence (taken on commission) is also vague. She says her father had told her the names of the three trustees. "He said something to the effect that there was money set apart for me and Janey. That was a good long time before his death. I think it was before Janey's marriage. I remember him being at Harrogate about 1905. It was shortly after his return that he said something to the effect I have just indicated." This passage is distinct enough, if taken alone, and the time is correctly fixed by reference to Mr Boucher's visit to Harrogate; but its effect is considerably weakened by other portions of this witness's evidence. Still, in my opinion the terms of the deposit receipt No. 21 of process, coupled with the distinct evidence of Mr Waddell, an independent witness entirely above suspicion, are sufficient to establish the daughters' case upon this matter. All that is necessary to their success is, I apprehend, sufficient proof of a completed intention of immediate gift on the part of their father. In my opinion there is here such proof. I was referred by counsel to a very large number of decided cases, many of which relate to *mortis causa* donations. It is, I think, unnecessary to deal with these in detail, or to discuss certain vexed questions which are involved in some of them. One need not, for example, decide whether delivery is or is not requisite to constitute donation *mortis causa*. That question may perhaps be regarded as still open (*Rose*, 1901, 3 F. 337); though in *Macfarlane's Trs.* (1898, 25 R. 1201) Lord President Robertson said "that delivery is not in law necessary to complete the donation *mortis causa* of deposit receipts has been three times deliberately laid down in the cases of *Gibson* v. *Hutchison*, 10 M. 923; *Crosbie's Trs.* v. *Wright*, 7 R. 823; and *Blyth* v. *Curles*, 12 R. 674, and I cannot go against this series of decisions. Delivery can only now be regarded as a piece of evidence, more or less strong but not indispensable, and in the present case I think there is enough without it." Perhaps the two cases which throw most light upon the present are these of *British Linen Co.* v. *Martin*, 1849, 11 D. 1004; and *Thomson's Exrs.*, 1882, 9 R. 911. In the former case, Mr Burns, on the day before his death, directed his clerk to draw £800 (more than half his Scotch estate) from his bank account, and deposit it again in bank, on a receipt in name of his housekeeper. The receipt remained in the clerk's hands at Mr Burns's death. The donation of £800 to the housekeeper was held valid. Lord Fullerton observed: "When we say that donation is not to be presumed, the only practical result is that it must be sufficiently proved; that there must be such a preponderance of evidence in favour of it, as to render any other supposition inadmissible according to the ordinary probabilities of dealing between the parties"; and his Lordship proceeded to point out that Mr Burns "of his own accord placed in the hands of the bank, as a general recipient of sums to be accounted for, a sum which by his dictation was to be accounted for, not to himself, but to her" (the housekeeper). "In short, he did not shift, as in the case of *Henderson*, the debt from the bank to the party drawing the money, but he parted entirely with his right of credit." The later case, *Thomson's Exrs.*, was one, as this is, of *inter vivos* donation, and the opinions of the judges are instructive. Every case must, of course, be decided upon its own facts. I am satisfied in this case, upon a careful study of the evidence, oral and real, that donation is sufficiently proved. It was argued that the trust constituted by the deposit receipt was inept and ineffectual as between the trustees and the beneficiaries; but assuming that to be so, it would not, in my judgment, affect the question whether the donor did not, in a question with the trustees and also with his daughters, "part entirely with his right of credit." I am of opinion that he did so, notwithstanding that the deposit receipt—the mere voucher of the gift—continued in his own possession.

The only remaining question has to do with the fifth of the sums with reference to which declarator is asked in the summons, being a sum of £299, 19s., contained in an account current with the Commercial Bank in name of Miss Ella Boucher. It appears that by letter No. 15 of

process, dated 5th February 1906, Mr Boucher instructed Mr Waddell, *inter alia*, to place £300 to the credit of his daughter Ella in a new account, and to send him the pass-book with a shilling cheque-book "for her use (to order)." Mr Waddell obeyed these instructions, and debited the account with one shilling, the price of the cheque-book. The pass-book (No. 38 of process) in name of Miss Ella Boucher was found in her father's repositories after his death in an envelope addressed to her. She never, in fact, operated upon the account. But I think that this sum of £299, 19s. must be held to have been validly gifted by Mr Boucher to his daughter *inter vivos*. The evidence is even more distinct than that with regard to the deposit receipt for £5500. Miss Boucher herself depones: "My father about that time, some months before my sister's marriage, showed me a bank-book in my name. That now shown me is the book. *Q.* Did he tell you what it was? *A.* Yes; he said it was a bank-book for money which he had put in the bank for me. This was at Coulport he showed me this. He put the book into his safe. . . . *Q.* When your father shewed you this bank-book which you have spoken to, did he say anything about putting you on an equal footing with Janey, who had been getting a good deal of money in connection with her wedding? *A.* Yes; he said he wanted me to have the same as she had." Upon this latter point Miss Boucher is distinctly corroborated, both by her sister Mrs Colvil and her mother.

Upon the whole matter, therefore, I shall pronounce decree of declarator in terms of the first conclusion of the Summons; and also in terms of the second conclusion, so far as regards the sums (2), (3) and (4) respectively therein set forth; but with regard to the sums (1) and (5) respectively described in the said conclusion, I shall find that they are not included in the estate left by Mr Boucher at his death, in respect that he effectually donated the same *inter vivos* and divested himself thereof.—21*st June* 1907.

Counsel for Pursuers, Craigie, K.C., Chree; Agents, Gill & Pringle, W.S.—Counsel for Compearing Defenders, Wilson, K.C., A. M. Anderson; Agents, Balfour & Manson, S.S.C.

A. M.

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(*Lord Dundas.*)

73. Frederick Braby & Company Limited *v.* Edwin Danks & Company (Oldbury) Limited.

Diligence — Arrestment Jurisdictionis Fundandæ Causa—Goods Rejected as Disconform to Contract Dispatched by Arrangement to Sellers — Goods Arrested while in Hands of Railway Company to Found Jurisdiction Against Sellers—Personal Bar — Held that Arrestment was Valid.

Outer House. *Lord Dundas.*

Frederick Braby & Co. Ltd. v. Edwin Danks & Co. (Oldbury) Ltd.

In this action Frederick Braby & Co. Ltd. sued Edwin Danks & Co. (Oldbury), Ltd., for damages sustained by them owing to the defenders' breach of contract.

Arrestments were used to found jurisdiction, and the defenders pleaded, *inter alia*, "no jurisdiction."

The facts of the case and the circumstances in which the arrestments were used sufficiently appear from the Lord Ordinary's Opinion.

The Lord Ordinary repelled the defenders' plea of "no jurisdiction," and allowed a proof.

Lord Dundas.—The pursuers are a limited company carrying on business in Glasgow and elsewhere as constructional engineers, roofing contractors, and galvanisers. The defenders carry on business as boiler and tank makers and manufacturers of galvanising baths at Oldbury, near Birmingham. The pursuers in the course of their business use what are called galvanising baths. The defenders from time to time supplied such baths to the pursuers, under contracts which are set forth on record. The pursuers now sue the defenders for damages, and allege that they have founded jurisdiction against them in this Court by arrestments laid on for that purpose. The defenders plead—"1. No jurisdiction." The case was sent, upon their motion, to the Procedure Roll, to discuss the preliminary question thus raised. Counsel for the parties agreed that the discussion should proceed upon the footing that the correspondence (No. 13 of process) was admitted to be genuine, and that further probation upon this question was renounced. It appears that in October 1906 the pursuers claimed right to reject some of the galvanising baths supplied to them by the defenders, as being disconform to contract. On 17th October the defenders' agents wrote that their clients were "so disgusted with the matter that probably they would be willing to take back the baths, subject to your paying for those you have accepted and used." On 22nd October the pursuers' agents replied that "the rejected baths are six in number. . . . None have been accepted. The baths are at your clients' order and risk, and our clients decline to make any payment in respect of them." On 7th November the pursuers' agents further wrote that "unless we hear from you with your clients' directions as to the removal of the baths, our clients will be under the necessity of having them removed and stored at your clients' risk and expense." In reply to these letters, the defenders' agents on 9th November wrote: "Will you please ask your clients to consign the baths referred to, to Edwin Danks & Co. (Oldbury) Ltd., Oldbury, near

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Birmingham (carriage forward). . . . Please advise us that the baths have been sent, and oblige." On 12th November the pursuers' agents asked the defenders' agents to say by which railway their clients desired the baths to be returned. The defenders' agents, on 13th November, requested the pursuers' agents to ask their clients to consign the baths by Caledonian and L. and N.-W. Railway; and this request was, as appears by letter from the pursuers' agents of 14th November, duly communicated to their clients. While the baths were in the hands of the Caledonian Railway Company they were arrested by the pursuers, in order to found jurisdiction against the defenders for the purpose of this action.

It is not disputed by the defenders (at least for the purposes of the present argument) that the baths so arrested are their property; nor that they are proper and suitable subjects of arrestment, nor that the letters of arrestment are *ex facie* valid and regular. Their plea, though baldly stated in the two words "no jurisdiction," is really one of personal bar. They aver in Answer 10 that an "arrangement" was come to between the parties for the return to the defenders of the baths in question, and that the pursuers, "in breach of the arrangement," arrested the baths in the hands of the railway company. The defenders' counsel argued that, in the circumstances disclosed by the correspondence—to the material portions of which I have referred—the pursuers put themselves in the position of agents, or *quasi*-agents, of the defenders, and that their action in arresting the baths brought them within the well-established doctrine that a creditor may, in special circumstances, by his own actings, be barred from taking advantage of an arrestment which if laid on by another creditor would have been valid and effectual. My opinion is adverse to the defenders' contention. I find no trace in the correspondence of any such "arrangement," or of any such agency or *quasi*-agency as is suggested. In sending off the baths the pursuers did not act without the defenders' authority, but, upon the contrary, in accordance with their express desire and instructions. The pursuers did not, so far as I see, manufacture or create the situation; but merely took advantage, as they were legally entitled to do, of the circumstances which had occurred. I do not think it necessary to discuss in detail the cases bearing upon the point, among which may be noted *Campbell*, 1858, 21 D. 63; *Rintoul*, 1862, 1 M. 137; *Carlberg*, 1877, 5 R. 390, affid. 1878, *ib.* (H.L.) 217 and 3 A.C. 1322; *Græme's Trs.*, 1888, 15 R. 691; and *Trowsdale's Trs.*, 1870, 9 M. 88. I had occasion to consider these cases, and express my views upon them, in the recent case of *The Old Park Forge Ltd.*, 21st March 1907, 15 S.L.T. 3, when I sustained the jurisdiction. I refer to my opinion in that case, and also in a still more recent decision—*Millar & Lang Ltd.* v. *Poole*, 29th May 1907, 15 S.L.T. 76—in which the plea of "no jurisdiction" was sustained.

For these reasons I shall repel the first plea in law stated for the defenders, and allow the parties a proof upon the merits of the case.—18*th June* 1907.

Counsel for Pursuers, The Dean of Faculty (Campbell, K.C.), D. Anderson; Agents, J. W. & J. Mackenzie, W.S.—Counsel for Defenders, Dickson, K.C., Murray; Agents, Murray Lawson & Darling, S.S.C. A. M.

OUTER HOUSE.

(*Lord Dundas.*)

74. Wilson's Trustees *v.* Wilson and Others.

I. Succession — Marriage Contract — Construction — Obligation in Ante-nuptial Marriage Contract to Dispone Whole Estate, Heritable and Moveable, to Trustees — Held to Mean Whole Estate at Date of Death.

II. Succession—Power of Appointment—Ante-nuptial Contract of Marriage Providing for Payment of Residue to Children of Marriage — Power of Appointment Reserved to Father—Provision for Issue of Child Predeceasing Term of Payment Taking Parent's Share—Trust Settlement by Father Apportioning Residue Among Children—Codicil Limiting Interest of One Child in his Share to Liferent with Fee to Child's Issue — Grandchildren Not Objects of Power of Appointment—Held that Codicil not a Valid Exercise of Power of Appointment.

This was an action of multiplepoinding in which the fund *in medio* was the whole means and estate belonging to John Wilson, merchant, Glasgow, at the date of his death, subject to certain deductions which had no bearing on the case. The fund was in the hands of the trustees appointed by decree of the Court dated 14th December 1906 to act under the ante-nuptial contract of marriage entered into between John Wilson and his second wife Mrs Mary Gemmill or Wilson, dated 11th May 1861. The said trustees, who were the same persons as were appointed trustees under John Wilson's trust disposition and settlement and relative codicils, were the pursuers and real raisers, and also claimants.

The facts of the case and the contentions of the parties appear from the Lord Ordinary's Opinion.

The Lord Ordinary issued the following inter-

locutor:—"Finds that the provisions of the codicil dated 11th September 1905 libelled are invalid as an exercise by the testator of his power of appointment in regard to the share of his residue effeiring to his son the claimant Matthew Gemmill Wilson, and that in terms of the marriage and of the trust disposition and settlement libelled, the said claimant is entitled to be ranked and preferred to the extent of one-fifth share of the fund *in medio*, subject to all proper deductions therefrom; repels the claim and relative pleas in law for the tutors and curators of the children of the said Matthew Gemmill Wilson; *quoad ultra*, appoints the cause to be enrolled for further procedure."

Lord Dundas.—The late John Wilson, merchant in Glasgow, died on 29th December 1905. He was survived by his widow, by three children of his marriage with her, and by two children of a former marriage. The fund *in medio* in this action is the whole estate, heritable and moveable, left by Mr Wilson, so far as remaining in the hands of his trustees. By ante-nuptial marriage contract dated 11th May 1861, Mr Wilson, in contemplation of his second marriage, after making sundry provisions for his intended spouse, bound and obliged himself and his heirs, executors, successors, and representatives whomsoever, "to settle his whole estate, heritable and moveable" (subject to the burden of certain payments) "upon the children of said intended marriage and the said James Wilson and Jane Wilson" (the children of his first marriage); "and that by disponing the same to" three gentlemen named, and the survivors and survivor of them, or such other persons as he might appoint, to be held by them in trust for the purposes in said contract after-mentioned. It was mooted, rather than argued, at the debate in the Procedure Roll that this obligation to "settle" covered only the "whole estate" belonging to Mr Wilson at the date of the marriage contract—which was very much smaller than that of which he ultimately died possessed. Upon a careful study of the contract as a whole I am of opinion that this is not a correct view, and that Mr Wilson intended the obligation to cover and include his whole estate at the time of his death. The *third* purpose of the said trust was "for the payment and division of the residue among the children of said intended marriage and the said James Wilson and Jane Wilson in such shares and at such times as the said John Wilson shall fix and appoint by any writing under his hand; and, failing his exercising such power of apportionment, equally share and share alike upon their severally attaining the age of majority; and in case any of said children shall die before receiving his or her share, leaving lawful issue, such issue shall be entitled to the share of their parent equally among them. But it is hereby declared that such conveyance" (*i.e.* the disposition to the trustees) "shall be made subject to such provisions, conditions, and declarations as the said John Wilson may think proper to be inserted in the trust deed to be granted by him in implement of the present obligation." If the opinion which I have expressed is correct, I think there can be no doubt that, under the clauses which I have quoted, Mr Wilson's children took a protected right of succession, which their father could not defeat by any merely gratuitous alienation, testamentary or otherwise.

Mr Wilson left a trust disposition and settlement, dated 10th November 1900, bearing to dispose of the whole estate, heritable and moveable, presently belonging, or that might belong, to him at his decease, or as to which he might have a power of disposal. The settlement makes no express reference to the marriage contract into which Mr Wilson had entered nearly thirty years before. By the *fifth* purpose of the settlement the trustees were directed (after having set aside sufficient of the estate to meet certain provisions made for the testator's wife) to divide the whole remainder of his estate into as many shares as he might have children surviving him, along with the issue of any child who might predecease him, such issue being reckoned *per stirpes*, and to pay over to such children or issue of such children, provided they had attained the age of twenty-one years, the amount of his or their share, at the first term occurring six months after his death; and in *the last place* Mr Wilson directed that, on the death of his wife, the whole residue of his estate set free by that event should be divided and paid, all in the same way and to the same effect as was provided for in the *fifth* place as above recited. It was by said settlement declared that the whole provisions in favour of the testator's children or the issue of any predeceasing child or children should vest in them as at the date of his death. I do not understand it to be disputed that the combined effect of the power of appointment reserved by the marriage contract, and of the provisions in the trust settlement which I have narrated, would, if the matter stood upon them alone, be to vest each of the truster's five children in one-fifth share of the residue of his estate.

The only question which was argued at the debate related to the manner in which Mr Wilson proceeded to deal with the share of residue effeiring to his son Matthew Gemmill Wilson. By codicil, dated 11th January 1904, the testator provided that there should be deducted by his trustees from the share payable to this son the sum of £23,000. By a later codicil, dated 11th September 1905, the truster provided that in the execution of his said trust disposition and settlement his trustees should set aside the share and interest in his estate effeiring to his said son Matthew (after giving effect to the said deduction) and should hold the same in trust for the purposes following, *videlicet*, for payment of

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the free annual income thereof to Matthew for his liferent alimentary use allenarly during the whole days and years of his life at two terms in the year, Whitsunday and Martinmas; and on the death of Matthew, the said share and interest should be paid to and among the children of Matthew, in such manner and in such proportions as he might direct by any writing under his hand, with power to him to restrict the interest of any child to a bare liferent; and failing such directions, then the said share and interest should be divided into as many shares as Matthew might have children surviving his decease, along with the issue of any child who might have predeceased him, such issue taking *per stirpes*, and one of the said shares, should be paid over to each child so surviving, and one of said shares to the issue of each child who might have predeceased leaving lawful issue; declaring that in the event of the death of Matthew without leaving any child surviving, or the issue of any predeceasing child, then the said share and interest should be paid over and conveyed in such manner as Matthew might by any writing under his hand direct, and failing such direction, then to his heirs *in mobilibus*.

Counsel for Mr Matthew Gemmill Wilson argued that the codicil of 11th September 1905 was inept and ineffectual to defeat his right to a full one-fifth share of his fathers' residue, subject to the said deduction. On the other hand, an argument was submitted on behalf of the tutors and curators of Mr Matthew Gemmill Wilson's two children, to the effect that the said codicil was valid and effectual. I have come, without much difficulty, to the conclusion that the first of these arguments is right, and that the second is wrong. The contention on behalf of Matthew Wilson's children was presented in a very ingenious but, to my mind, wholly unconvincing fashion. It was, as I understood it, to the effect *first*, that the codicil, so far as it restricted Matthew's interest to a bare liferent, was a valid exercise of the reserved power, inasmuch as it gave him a "share" of the residue; and *second*, that, even if the appointment to his children was invalid, owing to their being strangers to the reserved power, the result was merely to bring one back to the terms of the marriage contract, under which, it was argued, Matthew's children would take the unappointed fee of his share, by virtue of the destination therein contained. I shall deal with the two branches of this argument separately. As regards the first branch, I think that the decided cases indicate that, under certain circumstances, it may be within the right of one exercising a power of apportionment to restrict the share of one of the objects of the power to a mere liferent, but only if the fee of that share is appointed to some one or more of the objects of the power. I think that there is no doubt that the children of Mr Matthew Wilson must be regarded in this matter as strangers to the power. An argument to the contrary was suggested, upon the view that the marriage contract makes, in a certain event, which has not happened, a provision for grandchildren of the testator. But this argument is, in my judgment, wholly untenable. *Gillon's Trs.*, 1890, 17 R. 435, is a direct authority to the effect that, if a share of the fund is apportioned to an object of the power in liferent, and to strangers to the power—viz. his children—in fee, the appointment is wholly bad. The point now under consideration appears to me to have been accurately figured and dealt with by Lord M'Laren in the case of *Neill's Trs.*, 1902, 4 F. 636. His Lordship said (at p. 640): "I only wish to add one general observation as to the question whether under a power of appointment it is lawful to the appointer to sever out a liferent for one person. That would entirely depend on how the fee is disposed of. If it is lawful to give £5 to one of the appointees and the balance to the others, it could hardly be held to be objectionable to give so much a year to one party, if the capital is divided among the objects of power." Lord M'Laren's opinion was referred to by the learned judges in the later cases of *Dalziel's Trs.*, 1905, 7 F. 545, per Lord President Dunedin at p. 553, and *Middleton's Trs.*, 1906, 8 F. 1037, per Lord Kyllachy at p. 1042 and Lord Stormonth Darling at p. 1044. I may also note the case of *Warrand's Trs.*, 1901, 3 F. 369. It seems to me, therefore, that the first branch of the argument presented for the children of Matthew Wilson can hardly be supported, because the appointment made by the codicil—to himself in liferent allenarly, and to his children (being strangers to the power) in fee—is wholly invalid. But if one turns to the second branch of the argument, it is, in my judgment, entitled to no better measure of success. A sufficient and, in my opinion, conclusive answer to it can be briefly stated. Even upon the assumption that the appointment of a liferent allenarly to Matthew Wilson was a valid exercise of the power, and that accordingly we must revert to the terms of the marriage contract to discover the right, by its destination, to the fee of the share of residue in question, the argument for the children of Matthew is, in my judgment, in no way bettered. It is, to my mind, obvious that no case has here arisen of a child of the testator having died, before receiving his share leaving lawful issue, so as to let Matthew's children in, under the destination. In the first place, Matthew, who is alive, would *ex hypothesi* be entitled to receive his "share," viz. his liferent allenarly of the share of residue effeiring to him; and in the second place, his children could not, in that view, be entitled to claim the "share of their parent equally among them." This seems to me a sufficient answer to the claim on behalf of these grandchildren of the testator. It is not, therefore, necessary to decide as to the soundness, or the reverse, of a further argument

which was plausibly stated to the effect that, upon the assumption postulated by the grandchildren's claim, one would not be called upon to revert to the destination contained in the marriage contract at all, because, if the introduction of the grandchildren, strangers to the power, by the codicil, was *ultra vires* of the appointer, the apportionment of the fee contained in the trust settlement would stand good, not having been revoked by the codicil of 11th September 1905.

For these reasons I am of opinion that the claim for the tutors and curators of Matthew Gemmill Wilson's children is ill founded, and must be repelled, and that the claim for Matthew Gemmill Wilson must be sustained, subject to some adjustment as to deductions.

I understood, at the debate, that the question which I have now decided was the only point of real controversy in the case; and that, this being determined, the parties would have no difficulty in adjusting the terms of an interlocutor which should give effect to the claims of all the parties.—26*th June* 1907.

Counsel for Pursuers and Real Raisers and for Claimants the Trustees under John Wilson's Settlement and Ante-nuptial Contract of Marriage, and for Claimants the Tutors and Curators of Matthew Gemmill Wilson, The Dean of Faculty (Campbell, K.C.), Macmillan; Agents, Erskine Dods & Rhind, S.S.C.—Counsel for Claimant Matthew Gemmill Wilson, The Solicitor-General (Ure, K.C.), Murray; Agents, J. W. & J. Mackenzie, W.S. A. M.

SECOND DIVISION.

(*Lords Stormonth-Darling, Low and Ardwall.*)

75. Campbell *v.* John Ritchie & Co. Hay *v.* John Ritchie & Co.

Slander — Newspaper — Innuendo — "Thief" — Terms of Newspaper Article Held Not to Support Innuendo of Charge of Theft.

Reclaiming Notes against Interlocutors of Lord Mackenzie.

These actions were raised at the instance of George Campbell and Robert Hay respectively against John Ritchie & Co., and concluded for damages in respect of a slander said to be contained in the issue of the "Edinburgh Evening Dispatch" of 26th December 1906. The averments for the pursuer Campbell were as follows:—

Cond. 1. On 26th December 1906 the pursuer was convicted in the Sheriff Court of the Sheriffdom of the Lothians and Peebles at Edinburgh, and fined 4s. sterling following on a complaint of the Procurator-Fiscal of Court of Midlothian for the public interest, of having, along with another on 2nd December 1906, being a date within the period specified in the Order aftermentioned, on Sea Road, near Lauriston Farm in the parish of Cramond and county of Edinburgh, taken three green linnets and a grey linnet, both species of wild birds named in said Order, contrary to the Wild Birds Protection (County of Midlothian) Order 1905, made by the Secretary for Scotland in pursuance of the powers conferred upon him by the Wild Birds Protection Acts 1880 and 1896.

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Cond. 2. On 26th December 1906 the defenders, who are the printers, proprietors, and publishers of "The Edinburgh Evening Dispatch" newspaper, published in their issue of said newspaper the following report upon the conviction:—"Bird-liming in Midlothian. Effect of an important new Order. Protection for linnets. As the result of a new Order to apply to Midlothian under the Wild Birds Protection Regulations it is hoped that the prevalent practice of bird-liming for linnets, siskins, wrens, etc., will be stamped out. In the past the Midlothian police have been able to deal with thieves who captured in this way owls and the larger birds, and now the smaller birds will have an equal measure of protection. One of the first cases under the new Order was dealt with at Edinburgh Sheriff Court to-day, when George Campbell, coal porter, Church Place, Edinburgh, and Robert Hay, coal porter, St Stephen's Place, were fined 4s. each or three days for having on 2nd December in Sea Road, near Lauriston Farm, Cramond, taken three green linnets and one grey linnet.

"The mode of operations of the bird-limers is as follows:—The thieves set up decoy birds in cages in a hedge in the vicinity of a house where the birds on which they have an eye are. The hedge itself is strewn with twigs coated with lime, and the thieves have merely to wait till the birds, attracted by the presence of the occupants of the decoy cages, flutter on to the hedge and are caught by the lime."

Cond. 3. The foresaid statements are of and concerning the pursuer. They are false and calumnious, and were made maliciously and without probable or any cause. They charge the pursuer with being a thief and with having stolen said birds, whereas the conviction against him was merely of having contravened the terms of the said Wild Birds Protection Order. Such a contravention does not infer that the contravener has been guilty of the crime of theft or is in any way dishonest, yet the defenders in their said paragraph, in reporting the conviction of the pursuer and commenting thereon and on the methods of bird-limers by which method the pursuer took or aided in taking the birds in question, made use of the word "thieves" on three separate occasions, and thereby led the general public to believe that the pursuer was guilty of the crime of theft and had been convicted of that crime.

The averments for the pursuer Hay were in the same terms.

Each of the pursuers proposed an issue in the following terms:—

It being admitted that the defenders are the printers, proprietors, and publishers of "The Edinburgh Evening Dispatch" newspaper published in Edinburgh; it being also admitted that in the number of the said newspaper which bears date and was printed and published in Edinburgh upon the 26th day of December 1906, there was printed the report set forth in the Schedule annexed hereto,—

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Whether the said report is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had been guilty of theft, to his loss, injury, and damage?

Damages laid at £100.

Schedule.

[*The Schedule contained the article quoted* supra *in Cond.* 2.]

On 22nd May 1907 the Lord Ordinary (Mackenzie) approved of the issues.

The Defenders *reclaimed*, and *argued*: An issue should be refused where, as here, a jury could not reasonably give a verdict for the pursuers. The article in question could not support the meaning that the pursuers had been guilty of theft in a criminal sense. The word "thief" was applied to bird-limers as a class and not to the pursuers as individuals, and was used merely as a term of reproach (*Bruce*, 1901, 4 F. 171; *Watson*, 1890, 17 R. 404; *Agnew*, 1906, 8 F. 422; *Archer*, 18 R. 719; *Meikle*, 1893, 20 R. 928; *Wardlaw*, 1898, 25 R. 879; *M'Neill*, 1883, 10 R. 867).

Argued for the Respondents: To call a person a thief is plainly actionable, and that is what the defenders called the pursuers in the article in question. Whether the defenders' language was slanderous or not, was a question for a jury, and an issue should be allowed.

The Court *disallowed* the issues and *dismissed* the actions.

Lord Stormonth-Darling.—This is a reclaiming note against an interlocutor pronounced by Lord Mackenzie on 22nd May last, by which his Lordship approved of an issue for the trial of an action of damages for libel brought by George Campbell, a coal porter in Edinburgh, against the proprietors of the "Evening Dispatch" newspaper. The issue thus approved of by the Lord Ordinary sets out in a schedule the whole of the paragraph of which the pursuer complains as defamatory, and it asks the question whether the said "report" is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had been guilty of theft, to his loss, injury and damage.

Now, the paragraph which the pursuer calls a report is partly report and partly comment. In so far as it is a report the pursuer finds no fault with it. He admits that on 26th December last he was convicted in the Sheriff Court of Edinburgh of having committed a contravention of the Wild Birds Protection Order of 1905 by having taken four linnets, a species of small birds named in the Order, within the prohibited time, for which contravention he was fined 4s. So far there is nothing to complain of. But the writer of the paragraph, not content with a mere report, goes on to comment upon the incident, and in describing (correctly enough) the methods of what he calls the "bird-limers," he uses three times the word "thieves," and expresses the hope that the prevalent practice of bird-liming will be stamped out. In the use of the word "thieves"—a rather foolish, because inappropriate, word—the pursuer sees his opportunity. Accordingly he proposes as the question for the jury whether the paragraph represents that the pursuer had been guilty of theft. I do not think that the pursuer could have avoided an innuendo of this kind, because if the paragraph did not come up to that, it would not have been libellous at all.

The question, therefore, which we have to decide is whether the words used will bear the innuendo—in other words, whether a jury, having the whole paragraph before them, could reasonably say that it meant to charge the pursuer with theft. Now, I quite concede that, where such a question is doubtful, the proper tribunal to decide it is a jury. Evidence is led before them of persons who have read the words complained of, and can say what impression was made upon their minds. That is the ordinary and proper way, according to our practice, of arriving at a just conclusion as to what the words were really calculated to convey. But that is all qualified by this, that the matter must be in itself doubtful, and that evidence is really required as to the effect produced upon the minds of ordinary readers. I suppose the Lord Ordinary was of opinion, although we do not know precisely what his reasons were, that there was sufficient doubt about the paragraph to require that the case should be laid before a jury.

In that I am sorry that I cannot agree with him. Reading the paragraph as a whole—and that is what we are bound to do—I do not think that any reader of the newspaper could, on reasonable grounds, reach the conclusion that it charged the pursuer with having been guilty of theft. Consequently, I do not think that any jury could, on reasonable grounds, return a verdict for the pursuer. The actual offence with which the pursuer was charged, the plea which he tendered, the penalty which was inflicted upon him, are all correctly set forth. Even the *modus operandi* of the class of bird-limers is not said to be misrepresented. The only thing complained of is that a word was used in connection with the class of bird-limers which was manifestly exaggerated and inappropriate. How that could reasonably imply that the pursuer had been guilty of theft I am altogether at a loss to see; and therefore I propose that we shall recal the Lord Ordinary's interlocutor, and find that there is no issuable matter on record.

Lord Low.—It is rather unfortunate that the Lord Ordinary has given no note of the reasons which induced him in this case to allow an issue. We have, however, had the advantage of a very

good argument, and I have, and I confess without much difficulty, come to a conclusion different from that at which the Lord Ordinary arrived. The issue proposed is to the effect that the report in the defenders' newspaper represents that "the pursuer had been guilty of theft." The question, accordingly, is whether the article, when fairly read, can be regarded as being capable of bearing that meaning. I think that it cannot. It is quite plain that it does not directly charge the pursuers with theft. The report is headed: "Bird-liming in Midlothian. Effect of an important new Order. Protection for linnets." It then commences by saying that, "as the result of a new Order, to apply to Midlothian, under the Wild Birds Protection Regulations, it is hoped that the prevalent practice of bird-liming for linnets, siskins, wrens, etc., will be stamped out." Omitting in the meantime a sentence to which I shall refer presently, the report proceeds to say: "One of the first cases under the new Order was dealt with at Edinburgh Sheriff Court to-day, when George Campbell and another were fined 4s. each, for having taken three green linnets and one grey linnet." That is the only part of the report which in any way refers directly to the pursuer, and it is not complained of. It is, in fact, admittedly correct. But then the writer of the article, who is evidently a gentleman with strong humanitarian views upon the subject of bird-catching, proceeds to discourse (in the sentence which I omitted, and in the concluding sentences of the article) upon the methods of those who practise the capture of birds by means of bird-lime, and whom he describes as "thieves." Now the pursuer's argument is that seeing that the writer of the article asserts that all bird-limers are thieves, and states (quite truly) that the pursuer was convicted of capturing birds by means of bird-lime, the plain inference is that he represents that the pursuer is a thief, and has been guilty of theft. The logic of the argument is sound enough, but there still remains the question, What did the writer of the article mean by "thief"? I think it is perfectly plain that he did not use the word in the sense contended for by the pursuer, but in another sense, in which it is sometimes (probably incorrectly) used, viz. as designating a person who contrives to get some advantage to which he is not morally entitled although he keeps within his strict legal rights. The pursuer's innuendo accordingly, in my opinion, fails, and he is not entitled to the issue which he asks.

Lord Ardwall.—I am of opinion that in these two actions the first plea in law for the defenders ought to be sustained, and the actions dismissed.

The actions conclude for damages for an alleged slander said to be contained in what the pursuers term a "report upon the conviction" of the pursuers on 26th December 1906, in the Sheriff Court at Edinburgh, and the question is whether the said report can reasonably be held to contain or to import a charge of the crime of theft against the pursuers, or can be reasonably supposed to "lead the general public to believe that the pursuers were guilty of the crime of theft, and had been convicted of that crime." I am of opinion that it would be impossible for any reasonable person to read the report as importing a charge of theft.

The report must be read as a whole; and so reading it, I think it is made plain beyond all possibility of mistake that what the pursuers did was, not to commit the crime of theft, but, in the words of the report, to "take three green linnets and one grey linnet," and that what they were convicted of was not stealing, but catching small birds by means of bird-lime. In my view it would be impossible for any reasonable person to take any other meaning out of the report complained of. The headlines are—

"BIRD-LIMING IN MIDLOTHIAN.

"EFFECT OF AN IMPORTANT NEW ORDER.

"PROTECTION FOR LINNETS."

And then the report goes on to say that one of the first cases under the new Order was dealt with at the Edinburgh Sheriff Court that day, and then proceeds to name the defenders and state the sentence pronounced on them and the offence for which they were convicted. All these statements are absolutely correct, and are not called in question. But it is said that in three places in the report the word "thieves" is used as designating bird-limers, and that the use of this word imports a charge of the crime of theft, and would lead members of the public to believe that the pursuers had been convicted of that crime. I think this is an untenable position. The word "thief" of itself no doubt primarily means a person who steals the property of others, but it also is used as an abusive epithet; and in the said report where it first occurs it refers to persons who capture owls and the larger birds, but it is not averred for the pursuers that they ever captured such birds. Coming next to the passage which is particularly complained of as referring to the pursuers, it is found that instead of being directed against them individually, the passage opens thus:—"The mode of operations of the bird-limers is as follows:—The thieves set up decoy birds in cages in a hedge in the vicinity of a house where the birds on which they have an eye are. The hedge itself is strewn with twigs coated with lime, and the thieves have merely to wait till the birds, attracted by the presence of the occupants of the decoy cages, flutter on to the hedge and are caught by the lime."

Now it needs hardly to be pointed out that what the bird-limers are here described as doing is not stealing but catching birds, although the author of the report, foolishly as I think, uses a rather

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extravagant term of abuse towards those who practise bird-liming. It is plain, however, that it does not accuse bird-limers as a class of the crime of theft, but merely of performing the operations described. It is of importance to notice also that it is in connection with a class, and not with individuals, that the word "thieves" is here used, and this would bring the case within the principle laid down in the case of *Wardlaw*, 1898, 25 R. 879, to the effect that intemperate and foolish language directed against a class will not entitle an individual belonging to that class to sue for slander in respect of such language. While I agree with this, I must say I have some difficulty in holding that the words in *Wardlaw's* case did not sufficiently identify individuals so as to take that particular case out of the category to which the above doctrine applies. I therefore think that the passage of the report which deals with the facts attending the conviction is perfectly inconsistent with a charge of theft, and the information supplied to the public as to the operations of bird-limers in general, is also couched in such language as conclusively to show that the word "thieves" was used as an abusive term and not as intending to mean that the bird-limers were guilty of the crime of theft. Every one knows that the capturing of wild birds is not theft, although it might, as regards game birds, come under another category, which the least educated of the populace understand—viz. that of poaching. On these grounds I hold that the report complained of is not slanderous, because, although the word "thieves" is used, it was impossible, reading the report as a whole, for a person, even of the humblest intelligence, to be misled into the belief that the pursuers had been guilty of the crime of theft, and plainly no reasonable person would ever suppose such a thing.

Thereafter the defenders moved for expenses. The Court *refused* the motion.

Lord Stormonth-Darling.—The Court is of opinion that there should be no award of expenses, as the action was to some extent provoked by the exaggerated language used in the article.—22*nd June* 1907.

Counsel for Reclaimers, Cooper, K.C., Jameson; Agents, Drummond & Reid, W.S.—Counsel for Respondents, G. Watt, K.C., Morton; Agents, Davidson & Macnaughton, S.S.C. J. H. H.

FIRST DIVISION.

(*Lords M'Laren, Kinnear and Pearson.*)

76. M. Langlands & Son *v.* D. M'Master & Company.

Ship—Cargo—Quantity Shipped—No Bill of Lading—Delivery—Goods Put Out of Ship and Placed on Quay—Goods Subsequently Transferred to Consignees' Carts — Ship's Responsibility Ceasing When Goods Landed on Quay—Ship Held to Have Delivered Whole Quantity Shipped Although No Receipts Produced and No Tally Taken at Ship's Side.

(*Appeal from Sheriff Court of Forfarshire at Dundee.*)

This was an action brought by Messrs M. Langlands & Son, shipowners, Dundee, against Messrs D. M'Master & Co., manufacturers, Dundee, to recover a sum of £53, 0s. 3d., being the balance of freight in respect of goods which the pursuers had carried from Liverpool to Dundee on behalf of the defenders. The defenders claimed right to retain the sum of £39 in respect of short delivery, and they tendered £21, 10s. in full of the sum sued for.

In January 1904 the defenders bought a quantity of damaged jute cloth called Hessians at an auction sale at Liverpool. On 20th January 1904 Mr M'Master, the sole partner of defenders' firm, entered into a verbal contract with the pursuers' representatives at Liverpool for the conveyance of the goods from Liverpool to Dundee. He handed to the pursuers a delivery order which he had obtained from the auctioneers. The goods were uplifted from the auctioneers by carters employed by the pursuers, and were shipped on three different vessels belonging to the pursuers, the "Princess Victoria," the "Princess Olga," and the "Princess Maud." No bill of lading was granted.

On the arrival of the ships at Dundee the pursuers gave notice of arrival to the defenders' agents, the East Port Calendering Company, to whom the pursuers had been instructed to deliver the goods. It appeared that the goods were put out of the ship and placed on the quay, or in a shed on the quay, by a squad of stevedores called the Dundee Stevedoring Company, who were employed and paid by the shipowners. The goods were then transferred to carts belonging to the East Port Calendering Company by a squad of porters called the Liverpool and Hamburg porters, who were employed and paid by the consignees. The Dundee Stevedoring Company and the Liverpool and Hamburg porters were the same persons under different names. No tally was taken at the ship's side, but the pursuers' clerks generally took receipts from the carters

employed by the consignees. It appeared from the receipts that the quantity of Hessians received by the carters was 37 bales and 2171 loose pieces.

The defenders maintained that the quantity of Hessians delivered to the pursuers at Liverpool was 44 bales and 2095 loose pieces. As the quantity received by the defenders at Dundee was 37 bales and 2171 loose pieces, it followed that the pursuers had delivered at Dundee 7 bales less and 76 pieces more than, in the view of the defenders, they ought to have delivered. The defenders maintained that the seven missing bales contained 134 pieces, and that there was thus a shortage of 58 pieces.

The pursuers maintained that they had delivered at Dundee the whole Hessians which they had received at Liverpool. They denied having received 44 bales and 2095 pieces at Liverpool. Alternatively, on the assumption that they had received that quantity, they maintained that the seven missing bales were represented by the 76 extra pieces which they delivered at Dundee. On the assumption that any goods received by the pursuers at Liverpool had not been received by the defenders at Dundee, the pursuers maintained that the missing goods had been lost after delivery, at a time when they were no longer responsible for the goods.

The pursuers also maintained that they were not liable for the loss of the defenders' goods in respect (1) that they were not common carriers, and (2) that their sailing conditions formed part of the contract between the pursuers and the defenders. The Court found it unnecessary to decide the questions raised by these contentions.

On 28th February 1906 the Sheriff-Substitute (Campbell Smith) decerned against the defenders in terms of their tender.

The pursuers appealed to the Sheriff, who, on 4th April 1906, recalled the Sheriff-Substitute's interlocutor and decerned against the defenders in terms of the prayer of the petition.

The Defenders *appealed*, and *argued*: The contract between the parties was a contract for the conveyance of the defenders' goods from the auctioneers' premises at Liverpool to Dundee, and it was proved that the pursuers had uplifted the whole goods sold to the defenders (*i.e.* 44 bales and 2095 loose pieces). The pursuers were therefore bound to account for that quantity. It was further proved that the whole quantity had been put on board ship. Now only 37 bales and 2171 loose pieces were delivered at Dundee. There was a shortage of 58 pieces, and the defenders were entitled to deduct their value. The pursuers were responsible for the goods until the goods reached the consignees' carts. Even if the goods were held to be delivered when they reached the quay, it was for the ship to shew that this had been done (*Henry Smith & Co.* v. *Bedwin Steam Navigation Co.*, 1895, 23 R. (H.L.) 1). The ship might easily have put this beyond question by tallying the goods at the ship's side. But there was no tally until the goods arrived at the consignees' carts, and the carters' receipts showed that there was a shortage. It was not proved that the goods ever came over the ship's side. The pursuers were therefore liable.

Argued for the Respondents: The pursuers were liable as insurers only for goods which were actually put on board ship. The conveyance of the goods from the auctioneers' premises to the ship at Liverpool depended on a separate contract. If any goods were lost during the transit from the auctioneers' premises to the ship the pursuers were liable only if the loss were due to their negligence, and there was no attempt to prove negligence. There was no bill of lading, and the quantity put on board had not been proved. The pursuers had proved affirmatively that the whole goods put on board at Liverpool had been put out of the ship at Dundee. Even if it were held that 44 bales and 2095 pieces had been shipped there was no shortage. The defenders maintained that pursuers had delivered 7 bales too few and 76 pieces too many. The 76 pieces were the missing seven bales broken up. The goods were delivered as soon as they reached the quay (*British Shipowners Co. Ltd.* v. *Grimond*, 1876, 3 R. 968; *Knight Steamship Co.* v. *Fleming, Douglas & Co.*, 1898, 25 R. 1070). If any goods had been lost subsequent to their being landed on the quay the pursuers were not responsible. It was immaterial that the goods had not arrived at the carts. The defenders, if they were to succeed, must exclude this possibility, and they had not done so.

The Court *affirmed* the interlocutor of the Sheriff.

Lord M'Laren.—I agree with the Sheriff in his conclusions, and in the main in his analysis of the evidence, and I do not propose in the observations which I offer to enter minutely into questions of detail. The question is, whether the respondents Langlands & Son, a firm of Liverpool shipowners, are liable to the appellants for an apparent deficiency in the quantity of jute goods, called Hessians, received by the appellants at Dundee, when compared with the quantity shipped or supposed to be shipped at Liverpool. The goods in question were part of the salvage of two wrecks. They were damaged by seawater, and were purchased by the appellants at a low price at an auction sale at Liverpool. The deficiency only applied to the goods got from the wreck of the "Highland Scot," with which alone we are concerned. By the contract of carriage, as proved, the respondents undertook to carry a quantity of jute, estimated at from 100 to 150 tons in weight, from Liverpool to Dundee at the rate of ten shillings per ton, which included the cost of lifting the goods and loading at Liverpool. The respondents received from

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the appellants the auctioneers' delivery orders entitling them to uplift the jute from the dock where it was stored.

They employed carters to bring the jute goods to another dock where they were to be shipped, and the jute was sent in portions in three of the respondents' ships which sailed at different times, all, I think, within ten days of the receipt of the goods at Liverpool. No bills of lading were issued, and apparently the respondents were not even asked for receipts for specific quantities. This is not very surprising when it is considered that the goods were damaged goods purchased at a low price, and that in the contract of carriage the goods were treated like goods in bulk, and charged by weight.

The absence of specific receipts is, however, in my opinion, not material to the question of liability, because I am satisfied on the evidence that all the jute sold to the appellants *ex* "Highland Scot" was collected by the respondents, and put on board their ships, and was carried safely to Dundee. In particular, the auctioneers' foreman, Boultbee, gives his assurance that all the goods sold to Mr M'Master were delivered to Messrs Langlands or the persons employed by them. Equally clear and unshaken is the statement of the respondents' wharfinger, that all the jute brought by the carters was put on board their ships under his personal supervision. It is admitted that at the Liverpool docks the theft of bulky goods is practically impossible. The next step in tracing the goods is the custody and care of the goods on the respective voyages. The master and the chief mate of each of the ships were examined, and their evidence is to the effect that all the jute put on board at Liverpool was carried to Dundee, and that no mistakes were made. From their evidence I think that it is also reasonably certain that all the jute carried to Dundee for the appellants was put over the ship's side in each case, and either delivered straight into the appellants' carts, which were waiting to receive it, or, when the carts were not there, placed under a shed on the quay which was appropriated to the reception of goods in course of loading or unloading.

Now the jute as salved consisted in part of bales containing an uncertain number of pieces in each, and in part of loose pieces. When the jute was delivered at Liverpool, there were, I think, seven broken bales containing 134 pieces which became loose pieces in the course of the voyage, and at least two other bales are said to have gone to pieces in handling, thus increasing the number of loose pieces. After allowing for these changes, and treating all the bales as delivered, there was a deficiency on arrival at the calendering establishment at Dundee of a number of loose pieces, estimated at fifty-eight.

I understood that counsel on both sides were satisfied that the deficiency was in the cargo carried by the "Princess Olga," one of the respondents' steamers. I think it is also common ground, at all events it is clear on the evidence, that all the bales are accounted for, and that the deficiency arose on the tally of the loose pieces. The missing pieces seem to have disappeared after they were landed at Dundee, because I think the respondents have satisfactorily discharged themselves of the obligation to prove that all the goods entrusted to their care were brought safely to Dundee.

Now the appellants' case was put in two ways. First, they say the ship can only be legally discharged of its obligation by producing receipts from the consignees, or the carters employed by them, for the entire quantity of goods which were put on board. Alternatively they say there must at least be taken what they call a tally of the goods put over the ship's side, corresponding with the quantity put on board.

I think the first proposition is not maintainable, because it supposes a state of facts which is impossible in practice—that at every moment of time when the ship is unloading there should always be a cart on the spot ready to receive the goods and a carter to give a receipt. But even if a sufficient number of carts are sent to receive the cargo, it will unavoidably happen that from time to time the unloading goes on somewhat faster than the carting; and it is out of the question to say that the ship is to suspend the business of unloading until carts arrive. In this case the ship followed the usual practice of unloading into the shed provided for the reception of the goods, from which the goods were taken by the carts as they arrived. If any of the goods disappeared from the quay (which is a not improbable explanation of the deficiency) I do not think that the ship can be made responsible, because the contract of carriage is at an end as soon as the goods are put on shore. There may be exceptions, as in the case where the indorsee of a bill of lading does not come forward on the ship's arrival and the goods have to be stored. But here the consignee received notice and sent carts for the goods against the ship's arrival. If, then, there was any possibility of pilfering, it was the business of the consignee, and not of the shipowner, to have a person stationed at the landing shed to look after the goods until they were carted away.

The objection that no tally was taken of the goods as landed raises a different question. It is evident that if a tally is to be of any use in fixing responsibility, it must be taken by two persons representing the two parties respectively. Now, if the case of the appellant were that he had sent a representative to check the quantities landed, and that the ship's officers had refused to co-operate in taking a tally, or had professed that there was not time for effective checking, I should have thought there

was force in the argument. But it is not said that the respondents were asked to take a tally of the goods, and if they did not think it necessary to do so for their own protection, the only effect of the omission, if it be such, is that the respondents must prove that they landed all the goods which they received at Liverpool. I think they have proved their case on this point, and I will only add that a tally, while it might have saved the cost of this litigation, would have been of no avail for tracing the missing pieces, because there were no marks of identification of any kind on the loose pieces.

In the view I take of the case it is unnecessary to consider the respondents' points: (1) that they do not hold themselves out as common carriers; and (2) that they have disaffirmed liability for loss of goods, by notices sent to all their customers. I think, however, it is safe to affirm that if a shipowner runs his ships as general ships, and takes goods from every one who offers to send them, he is in fact a common carrier, and his saying that he is not a common carrier will not alter the fact. We should then have to consider the effect of the notice disaffirming all responsibility for the safe delivery of goods which the shipowner had contracted to carry, including the two questions which have been so often considered, whether the other party may be taken to have accepted the condition, and whether it is a reasonable condition. There is perhaps a third question, Whether there can be a contract in which the one party is liable to pay freight and the other party is under no obligation to deliver the goods? But as I am of opinion that the respondents have performed their obligation (which would attach to them as common carriers) by restoring the goods on the completion of the voyage, I do not propose to answer any of these questions.

It follows that the respondents are entitled to our decree for the unpaid part of the freight of the goods from Liverpool to Dundee, and that the appellants' counter-claim should be disallowed.

Lords Kinnear and *Pearson* concurred.—27*th June* 1907.

Counsel for Appellants, Scott Dickson, K.C., Lippe; Agents, Boyd, Jameson & Young, W.S.—Counsel for Respondents, Hunter, K.C., Murray; Agents, Elder & Aikman, W.S.

J. S. M.,
for F. A. U.

FIRST DIVISION.

(Exchequer Cause.)

(*Lords M'Laren, Kinnear and Pearson.*)

1st Div.

The General Accident Assurance Corporation Ltd. v. M'Gowan.

77. The General Accident Assurance Corporation Limited *v.* M'Gowan.

Revenue—Income Tax—Insurance Company — Fire, Accident and Guarantee — Method of Calculating Profits — Allowance for Unexpired Risks—Company with Fluctuating Premium Income — Property and Income Tax Act 1842 (5 and 6 Vict. cap. 35), sect. 100, Sched. D, First Case—Scottish Union and National Insurance Company v. Inland Revenue, 1889, 16 R. 461, 474, Followed.

Case.

This was a case under the Taxes Management Act 1880, between the General Accident Assurance Corporation Ltd. and the Surveyor of Taxes, Perth, on appeal from the Commissioners, who had refused to allow the appellants, in calculating profits for the purposes of income tax, to make a deduction in respect of unexpired risks amounting to one-third of their annual premium income.

The case stated:—

At a meeting of the Commissioners for the general purposes of the Income Tax Acts and for executing the Acts relating to Inhabited House Duties for the District of the City of Perth, held at Perth on the 15th day of December 1905—

The General Accident Assurance Corporation, Limited, General Buildings, Perth (hereinafter referred to as "The Company"), appealed against an assessment for the year ending 5th April 1906, on the sum of £20,950 (duty, £1047, 10s.) made upon it under Schedule D of the Income Tax Acts in respect of the profits of the business carried on by it, on the ground that in arriving at the assessable profits no deduction had been allowed to meet losses on unexpired risks.

The assessment was made under 5 & 6 Vict. cap. 35, sect. 100, first case; 16 & 17 Vict. cap. 34, sect. 2; and 5 Edw. VII. cap. 4, sect. 6; and the sum assessed is the amount, on an average of three years ending 31st December 1904, arrived at by reference to the Company's revenue accounts as follows:—

Year ending 31st December 1902.

Balance of Revenue Account .	£25,659	10	7
Less balance brought forward from previous year's account .	3,694	7	5
	£21,965	3	2
Add sums debited in Revenue Account and not allowable as deductions	1,071	19	4
	£23,037	2	6
Deduct interest and rents of properties already taxed, and the annual value of the Company's offices	6,199	14	2
Amount of profit .	£16,837	8	4

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Year ending 31st December 1903.

Amount of profit (after making similar addition and deductions as above)	£22,503	6	8
Year ending 31st December 1904.			
Amount of profit (after making similar addition and deductions as above)	23,509	18	2
Total profits for three years .	£62,850	13	2
One-third whereof is . . .	£20,950	0	0

The Company claimed a deduction from the total premium income of each year to meet the estimated losses on risks unexpired at the end of each year, as shewn by the following statement:—

Surplus income:—Year to 31st December 1902	£16,837	8	4
Add for unexpired risks at 31st December 1901, 33⅓ per cent. of total premiums (£170,338, 8s. 2d.) . .	56,779	9	4
	£73,616	17	8
Deduct for unexpired risks at 31st December 1902, 33⅓ per cent. of total premiums (£231,354, 14s. 10d.) . .	77,118	4	11
Loss .	£3,501	7	3
Surplus income:—Year to 31st December 1903	£22,503	6	8
Add for unexpired risks at 31st December 1902 . . .	77,118	4	11
	£99,621	11	7
Deduct for unexpired risks at 31st December 1903, 33⅓ per cent. of total premiums (£262,479, 8s. 3d.) . .	87,493	2	9
Profit .	£12,128	8	10
Surplus Income:—Year to 31st December 1904	£23,509	18	2
Add—For unexpired risks at 31st December 1903 . . .	87,493	2	9
	£111,003	0	11
Deduct—For unexpired risks at 31st December 1904— 33⅓ per cent. of total premiums (£306,258, 2s. 6d.) £102,086 0 10 And 50 per cent. of one month's monthly payment premiums (the total amount of which for this year is £52,940, 12s. 3d.) 2,205 17 2	104,291	18	0
Profit .	£6,711	2	11

Summary:—Year 1903—*Profit* .	£12,128	8	10
„ 1904—*Profit* .	6,711	2	11
	£18,839	11	9
„ 1902—*Loss* .	3,501	7	3
	£15,338	4	6
One-third whereof is .	£5,112	14	10

The amount on which the Company claims to be assessed.

I. The following facts were admitted or proved:—

1. The Company was incorporated on 23rd February 1891, under the Companies Acts, as a Company limited by shares. The subscribed capital of the Company as on 31st December 1904 was £400,000, divided into 400,000 shares of £1 each. The paid-up capital then amounted to £99,997.
2. The objects of the Company as set forth in the third Article of its Memorandum of Association then in force were, *inter alia*:—"(*a*) To undertake and carry on the business of Accident, Employers' Liability, Fidelity, Guarantee, Third Party, Burglary or Theft, Fire, Marine, Vehicle, Plate Glass, and Mortgage, or other investment insurances, or any of them, and all or any other kinds of Insurances of the like or a similar nature . . . . excepting Life Insurance."
3. The Company's Articles of Association provide, *inter alia*:—
   "87. The Directors may, with the sanction of the Company in general meeting, declare a dividend to be paid to the members in proportion to the amount paid up in pursuance of calls upon the shares held by them, having regard to any preference or priority attaching to such shares respectively."
   "89. No dividend shall be payable except out of the income and profits arising from the investments and business of the Company."
   "90. The Directors may, before paying or recommending any dividend, set aside out of the profits of the Company such sums as they think proper as a Reserve Fund, to meet contingencies or for equalising dividends, bonuses, or for other matters required by or connected with the business of the Company, or any part thereof; and the Directors shall invest separately from other funds the sums so set apart as a Reserve Fund."
   "96. Once at least in every year the Directors shall lay before the Company in general meeting a Balance Sheet and Statement of the Income and Expenditure made up to a date not more than four months before such meeting, and shall send to each shareholder, at least seven days prior to such meeting, a printed copy of such Balance Sheet and Statement. . . ."
4. The Company makes up its accounts to the 31st December in each year. For each of the years ending 31st December 1902, 31st December 1903, and 31st December 1904,

the Company paid the dividends shewn in its Reports and Accounts.

5. The business carried on by the Company up to 31st December 1904 consisted of Fire, Sickness, Accident, and Guarantee Insurances. The net premium income for the year 1902 was £231,354, 14s. 10d.; for the year 1903, £262,479, 8s. 3d.; and for the year 1904 (exclusive of £52,940 for monthly payment premiums), £306,258, 2s. 6d.

6. Insurances are effected with the Company at all periods of the year. All its Fire Policies, and much the larger proportion of all its other Policies, are granted for one year. Some of the Policies endure for one month only.

7. It is the practice of Insurance Companies to estimate the unexpired risk at any given date on yearly policies of insurance, whether against Fire, Sickness, or Accident, at 33⅓ per cent. of the total premium income of the year. In the case of policies granted by this Company for one month, it estimates the unexpired risk at any given date at 50 per cent. of one month's premium income.

8. The annual accounts made up by the Company, in terms of the Companies Acts, shew the results of the Company's business in all its branches in one Revenue Account. Each year's Revenue Account credits premiums, interest, and other income received, and debits losses, expenses of management, and other disbursements made during the year, and brings out a balance which, for each of the years 1902, 1903, and 1904, was a credit balance or surplus.

9. This surplus is described in the Reports by the Directors of the Company as "the balance at credit of Revenue Account after providing for estimated claims" (*i.e.* claims made but not settled) "and outstanding accounts." In their Reports the Directors recommend that a certain proportion of this surplus shall be appropriated to the payment of dividend, interim (previously declared) and final; that a certain proportion shall be placed to reserve; and that the balance shall be carried forward to next year's account, and these recommendations are considered at the annual meetings of the Company held in March or April each year and adopted, a fixed amount of the balance of the Revenue Account being thus appropriated to interim dividend, final dividend, and reserve.

10. The amount paid in dividends for *each* of the years 1902, 1903, and 1904, was £9999. The amount placed to reserve for the year 1902 was £14,000, and for *each* of the years 1903 and 1904, £20,000.

11. The amount of the reserve as at 31st December 1904 was £150,000, made up of £85,500 set aside from Revenue Account and of £64,500 derived from premiums on the issue, during the period from the year 1896 to the year 1902, of new shares in the Company, which latter sum was carried direct to reserve, and was not credited in the Revenue Accounts, and on which no income tax has been paid. The amount of the deduction claimed by the Company for unexpired risks at 31st December 1904 is £104,291, 18s. The Reserve is described in the Annual Balance Sheets as "Reserve Fund, including reserve for unexpired risks." In the opinion of the Commissioners, no part of the Company's Revenue is specifically appropriated to a Reserve for unexpired risks, and no losses arising during the period of unexpired risks are charged to Reserve Fund. The income of each year has hitherto been sufficient to meet the losses on the unexpired risks of the previous year as well as its own losses, and to allow of an addition being made to the reserve. The losses on the unexpired risks of any year are paid out of the income of the following year, and in arriving at the amount of the profits for such following year for the purposes of the Income Tax Acts, a deduction is allowed in respect of such payments.

12. In arriving at the assessable profits of the Company for the purposes of the Income Tax Acts in any year a deduction for the unexpired risks of that year has never been allowed.

II. The Company contended that, before arriving at the profits for the year for income tax purposes, the deductions for unexpired risks made in the foregoing particulars of income should be allowed; that, in the case of any insurance company with yearly policies, and in particular, in the case of a company whose premium income was rapidly increasing, it was clearly necessary to provide for unexpired risks before the true profit could be ascertained; and that, if this were so, the appellants were entitled to the deductions claimed, whether they had made provision for unexpired risks in their annual accounts or not. It was further contended that, in point of fact, such provision had been made in the annual accounts, because the Balance Sheet contained an account entered as "Reserve Fund, including amount reserved for unexpired risks," and to that account the Company had each year carried a large proportion of the balance of revenue. It was further contended that the case differed entirely from that of the *Scottish Union and National Insurance Company* v. *Inland Revenue*, 1889, 16 R., pp. 461 and 474, relied on by the Surveyor of Taxes, in respect (1) that in that case the premium income was practically stationary, and (2) that no provision whatever had been made in the accounts for unexpired risk.

III. The Surveyor of Taxes (Mr James M'Gowan) maintained (1) that in arriving at the amount of the assessable profits of the Company the whole of the premiums received by the Company in any year ought to be taken into account as profits of that year, notwithstanding that the risks covered by a portion of such premiums may extend into the subsequent year (*Imperial Fire Insurance Company* v. *Wilson*, 1876, 35 L.T.R. 271; 1 Tax Cases 71); (2) that the Company is not entitled to make yearly the deduction claimed for unexpired risks in respect that the deduction is not one of the expressly enumerated deductions authorised by the provisions of the Income Tax Act to be made in estimating its annual profits (5 and 6 Vict. c. 35, ss. 100 and 159); (3) that the unexpired risks ought not to be taken into account in ascertaining the amount of income tax payable by the Company, in respect that the accounts of the Company, on which the assessment made is based, show that such risks are not taken into account for the purpose of ascertaining the amount of profits divisible among the shareholders of the Company, and

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that it is only after declaring the dividend out of the profits that any sum is placed to General Reserve; and (4) that the present case is governed by the opinion of the Court in the cases of the *Scottish Union and National Insurance Company*, and the *North British and Mercantile Insurance Company* v. *Inland Revenue*, 1889, 16 R. 461 and 474. In the latter case it was stated that "in the Fire Department of the business it has for many years been the custom of the Company, on 31st December, when the books are closed for the year, to set aside one third of the net premiums received during the past year to provide for liabilities on current policies" (Stated Case, p. 6).

IV. The Commissioners, on consideration of the facts and arguments submitted to them, being of opinion that the assessment on the Company was made in accordance with the instructions given by the Court in the cases of the *Scottish Union and National Insurance Company and Others* v. *Inland Revenue*, dismissed the appeal and confirmed the assessment.

Counsel for the appellants cited, in addition to the decisions mentioned in the case, *Rance's* case, 1870, 6 Ch. App. 104.

Counsel for the respondent was not called on.

The Court *dismissed* the appeal.

Lord M'Laren. — There is no doubt that the question which has been argued before us is a question of great importance to insurance companies, whose business in the aggregate is very large, and if it had come up for the first time, we should have desired to hear a full argument upon it. But the point is not new, because it was first considered nearly thirty years ago by the Court of Exchequer in England in *The Imperial Fire Insurance Co.* v. *Wilson*, and eighteen years ago it was considered by this Division of the Court in the case of the *Scottish Union and National Insurance Co.* In the collective opinion of the Court, which was delivered by Lord President Inglis, the distinction (which had long before been recognised) is clearly drawn between the character of the business done by fire insurance offices and the character of the business done by life insurance offices, the one being an annual contract of indemnity and the other being a prospective contract which may endure for the whole course of the life of the person making the contract, provided he continues to pay his premiums. Obviously these two classes of insurance business have to be treated on different principles. Now, with regard to fire insurance, their Lordships, who had the English case before them, were satisfied with the rules there laid down, and they were content in a single sentence to express the ratio of that judgment—that the contract was an annual contract, and that while a complete deduction could not be made in the year in which the premiums were paid, yet what was not made in that year was allowed in the following year, and thus approximate justice was done between the Crown and the subject. That, according to the opinion of the Court of Exchequer in England and the Court of Exchequer in Scotland, is the best approximation we can make to profits under the somewhat stringent conditions of the Income Tax Acts. Now we are asked to reconsider the question. I do not think that any of your Lordships would hold that this Division of the Court would take it upon itself to consider the question as if it had not been already decided by our own Division, and I do not see anything in the circumstances of the case which ought to lead us to refer it to a larger Court. I think, on the contrary, the acquiescence for eighteen years in the principle of that decision shews that the insurance companies have not felt aggrieved by the rule there laid down. But, sitting as one Division of the Court, I think it is enough to say that we confirm the decision of the Commissioners.

Lord Kinnear.—Mr Constable conceded that he could not prevail in this case unless we are to overrule the judgment in the case of the *Scottish Union and National Insurance Co.*, and the other case which was considered at the same time. I cannot doubt that that decision is binding upon this Court, and I think we are not entitled to disregard it. If it is to be challenged, it must be challenged elsewhere. So far as we are concerned, we are bound to follow it.

Lord Pearson.—I take the same view.—*4th June* 1907.

Counsel for Appellants, Dean of Faculty (Campbell, K.C.), Constable; Agents, Bonar, Hunter & Johnstone, W.S.—Counsel for Respondent, Cullen, K.C., A. J. Young; Agent, Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

F. A. U.

FIRST DIVISION.

(*Lords M'Laren, Kinnear and Pearson.*)

78. Parish Council of Edinburgh *v.* Magistrates of Edinburgh.

I. ASSESSMENT—POOR RATES—EXEMPTION—EDINBURGH MUNICIPAL AND POLICE ACT 1879 (42 AND 43 VICT. CAP. 132), SECT. 70 — POLICE OFFICES — STATION HOUSES, HOUSES AND OTHER BUILDINGS OR GROUNDS CONNECTED WITH THE POLICE ESTABLISHMENT EXEMPTED FROM POOR RATES—HELD EXEMPTION LIMITED TO PREMISES CONNECTED WITH SUPPRESSION OF CRIME, AND DOES NOT INCLUDE PREMISES CONNECTED WITH OTHER DEPARTMENTS OF CITY ADMINISTRATION.

II. ASSESSMENT—POOR RATE—EXEMPTION—EDINBURGH MUNICIPAL AND POLICE ACT

1879, sects. 5 and 70—Held Houses Occupied Rent Free by Members of Police Force Fall Within Exemption in sect. 70.

III. Assessment—Poor Rate — Exemption—Edinburgh Municipal and Police Act 1879, sect. 70 — Separate Parts of Premises Used for Police Purposes—Held Parts Used Solely for Police Purposes May be Separately Valued.

IV. Assessment—Poor Rate—Exemptions—Edinburgh Municipal and Police Act 1879, sect. 70—Premises Used at Times for Police Purposes and at Times for Municipal Purposes Do Not Fall Under Exemption in sect. 70.

V. Assessment—School Rate—Exemption—Edinburgh Municipal and Police Act 1879, sect. 70—Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), sect. 44—Premises Exempt from Poor Rate Not Exempt from School Rate Except in Case of Premises Appropriated to Service of Crown—Hogg v. Parochial Board of Auchtermuchty, 1880, 7 R. 986, and Gillanders v. Campbell, 1884, 12 R. 309, Followed.

Special Case.

The parties to this Special Case were the Parish Council of the City Parish of Edinburgh, First Parties, and the Lord Provost, Magistrates, and Town Councillors of the City of Edinburgh, Second Parties.

The questions submitted to the Court raised a number of points as to assessments imposed by the First Parties.

The following were the statutory enactments referred to as set forth in the case.

Sect. 22 of the Act of 1832 (2 Will. IV. cap. 87) provides: "The police offices, watch-houses, and other buildings or grounds within the said bounds connected with the establishment of the said police shall be exempted from the payment of all cess, minister's stipend, road money, poor's-rates, and police duties, imposed or to be imposed."

The Edinburgh Police Act 1848 (11 and 12 Vict. cap. 113), sect. 58, provides: "The police offices, station houses, dwelling-houses, and other buildings or grounds within the limits of this Act connected with the police establishment shall be exempted from the payment of all cess, minister's stipend, road money, poor's-rates, and police assessments, imposed or to be imposed."

By the Edinburgh Municipality Extension Act 1856, the municipal boundaries of the city were made co-extensive with the police bounndaries, and the powers and duties of the Commissioners of Police under the previous Police Acts were transferred to and vested in the second parties, who thenceforward were the administrators of both the municipal or common good properties and duties, and the various properties and duties, which had previously been under the Commissioners of Police.

By the Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. 132), the Acts of 1848 and 1856 were repealed. Sect. 70 provided: "The burgh assessments shall not be imposed in respect of the Royal Palace of Holyrood, Queen's Park, Arthur's Seat, Duddingston Loch, nor houses or buildings in the Castle of Edinburgh, nor the Courts of Justice, General Register House, City Chambers, County Buildings, Prison of Edinburgh, nor the University of Edinburgh and the buildings connected therewith, except those parts which are used as houses, nor the Royal Infirmary, the Royal Edinburgh Hospital for Sick Children, nor the Assembly Hall of the Church of Scotland, the Free Church College, the Free Church Assembly Hall, the Synod Hall of the United Presbyterian Church, and the buildings connected therewith, so long as these shall continue to be solely used for ecclesiastical purposes or shall not be let for hire for other purposes, except those parts which are used as houses; or in respect of any house or building which is solely occupied for purposes of public charity, or any premises exempted from taxation by public law: and the public parks, gardens, and bleaching greens, drying greens and grounds, public buildings, public wash-houses, baths, gymnasiums, open spaces, the police offices, station houses, and other buildings or grounds connected with the police establishment, or provided or upheld out of the burgh assessments, shall be exempted from the payment of such assessments, and the said police offices, station houses, houses, and other buildings or grounds connected with the police establishment shall also continue to be exempted from the payment of all cess or poor-rates imposed or to be imposed." By sect. 5 the word "house" is interpreted to mean "dwelling-house."

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Parish Council of Edinburgh v. Magistrates of Edinburgh.

The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), sect. 44, provides: "Any sum required to meet a deficiency in the school fund, whether for satisfying present or future liabilities, shall be provided by means of a local rate within the parish or burgh in the school fund of which the deficiency exists. The School Board of each parish and burgh shall annually, and not later than the 12th day of June in each year, certify to the Parochial Board or other authority charged with the duty of levying the assessment for relief of the poor in such parish or burgh the amount of the deficiency in the school fund required to be provided by means of a local rate, and the said Parochial Board or other authority is hereby authorised and required to add the same under the name of 'School Rate' to the next assessment for relief of the poor, and to lay on and assess the same, one-half upon the owners and the other half on the occupiers of all lands and heritages, and to levy and collect the same along with the assessment for relief of the poor when that assessment is so imposed and levied, and to pay over the amount to the School Board . . . . and should there be no assessment for the poor, or should that assessment not be laid, one-half on the owners and the other half on the occupiers of all lands and heritages within such parish or burgh, the School Board shall be entitled and bound directly to assess for and levy the school rate in the same manner as if it were poor's assessment duly authorised to be assessed and levied in the same manner, and for that purpose shall have all the powers and authorities of any Parochial Board or other authority with respect to assessing, levying, and collecting poor's assessment, and the school rate shall in all cases be levied and collected in the same manner as poor's assessment, and the laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the school rate."

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The following statement of facts is taken from Articles 8 and 10 of the Special Case (certain passages as to the former practice in regard to the payment of rates being omitted).

"8. Under the provisions of the 1879 Act, the second parties were required to appoint, *inter alia*, the following officials for carrying on the government of the city placed by the statutes upon them, viz. a "collector" (defined by sect. 5 of the said Act to mean "the collector of police and other local rates leviable under this or any general or local Act of Parliament"), an inspector of lighting and cleansing, a burgh engineer, a medical officer of health and surgeon of police, a chief constable, a prosecutor in the Police Court, a clerk of the Police Court, and a firemaster. The second parties also appoint (1) a town clerk, who, in addition to his ordinary duties as town clerk, performs the duties formerly discharged by the clerk appointed by the Police Commissioners under the Act of 1848, and (2) an official who, in addition to being city chamberlain, performs the duties of the police treasurer.

"10. The properties in respect of which the first parties have imposed poor and school rates upon the second parties (which rates the second parties decline to pay) are properties owned, occupied, and used by the second parties, or occupied and used by the second parties for carrying on the duties of administration placed by the statutes upon them. These properties embrace the following:—

"(1) The Police Chambers, No. 1 Parliament Square. At present the Police Chambers, in addition to being the headquarters of the police or watching force, also contain the following—the Police Court-room and relative offices for the Clerk of Court and Public Prosecutor, a room for the Judge of Police, a room for the Medical Officer of Health and Surgeon of Police, and the office of the Burgh Engineer and Master of Works. There are also two houses on the top flat occupied rent-free by the Deputy Chief Constable and the caretaker of the chambers, who are required to live in them in connection with their services. In addition to the above, the Police Chambers until a few years ago contained the following:—The headquarters of the fire brigade (now removed to the new chief fire station at Lauriston Place), the offices of the Collector of Police and other local rates, and the Inspector of Lighting and Cleansing (now removed to more commodious premises in the High Street adjoining the City Chambers), and the offices of the Medical Officer of Health and Surgeon of Police and Sanitary Inspector (now also removed to more commodious premises in the High Street, except that the Medical Officer of Health and Surgeon of Police still retains one room in the Police Chambers). The Collector of Police Rates, in addition to collecting the burgh assessments, also collects the charges for electric current, his office and staff being used for both these purposes. . . . The various premises included in the Police Chambers are not entered separately in the Valuation Roll, a *cumulo* rent being entered for the whole building.

"(2) The City Chambers, Royal Exchange. These premises are used partly for police, partly for municipal, and partly for judicial purposes, and comprise the following:—Council and committee rooms and relative premises; Burgh Court-room (used also as Dean of Guild Court-room) and relative offices for the Clerk of Court and Procurator-Fiscal; offices of the Town Clerk, the City Chamberlain and Treasurer of Police, the City Superintendent of Works, the City Road Surveyor, the City Gardener, the Inspector of Hackney Carriages, and Council Officers; and houses occupied rent-free by the housekeeper and two other officers who are required to live in them in connection with their services. . . . Since 1873 the City Chambers have been greatly extended. For the purposes of the city accounts one-fourth of their upkeep is now charged against the municipal funds, and three-fourths against the burgh assessments. The work of the police department, in proportion to the municipal department, has greatly increased in recent years. The various premises included in the City Chambers are not entered separately in the Valuation Roll, a *cumulo* rent being entered for the whole building.

"(3) Houses not contiguous to branch police stations occupied rent-free by officers of the police or watching force, who are required to live in them in connection with their services. . . .

"(4) Properties connected with the fire-engines department, comprising the chief fire station, branch fire stations, houses in chief and branch fire station buildings, or contiguous thereto, occupied rent-free by the firemaster and members of the fire brigade, who are required to live in them in connection with their services, and houses similarly occupied by members of the fire brigade, but which are not contiguous to branch fire stations. . . .

"(5) Properties connected with the lighting and cleansing department, comprising the offices of the Inspector of Lighting and Cleansing, workshops, stables, yards and stores for the department, muster rooms, mud tooms, refuse destructor, and refuse loading banks. . . .

"(6) The offices of the Medical Officer of Health and Surgeon of Police, the Sanitary Inspector, and the Collector of Police. Until a few years ago these offices were situated in the Police Chambers. . . .

"(7) Workshops, stores, yards, etc., in connection with the Burgh Engineer's department. . . .

"(8) Offices, yards, and stone depôts of the Roads Department. . . ."

The contentions of parties were set forth in the case as follows:—

12. In these circumstances, the first parties maintain that they are entitled to assess properties falling under the heads enumerated in Article 10 hereof for both poor and school rates. They maintain that any exemption in a local Act from burdens imposed by a public general statute must be strictly interpreted, and that the exemption in question is limited to premises connected with the police establishment—that is, the ordinary organised civil police of the city, maintained for the preservation of order and prevention of crime. In particular, with reference to free houses occupied by members of the police force, the first parties maintain that these represent wages or salary, and that unless they actually form part of the police offices, stations, and other premises specially exempted by said clause, they are rateable. Further, with particular reference to the Police Chambers, No. 1 Parliament Square, and the City Chambers, the first parties maintain that as these are not used exclusively in connection with the police establishment, the said subjects are not entitled to exemption, at least until the rental has been allocated. The first parties further maintain that all these contentions apply equally to school rate as to poor rate in respect of the provisions of sect. 44 of the Education (Scot-

land) Act 1872. Alternatively, the first parties maintain that all the said subjects are and were assessable in so far as used for purposes not connected with the police establishment, strictly so called.

13. The second parties maintain (1) That the phrase "police establishment" used in sect. 58 of the Act of 1848 means the whole organisation which the Commissioners of Police appointed under that Act were required to set up for the purpose of carrying out its provisions, and does not mean merely the watching force; (2) that the phrase "police establishment" in sect. 70 of the Act of 1879 means similarly the whole organisation which the second parties are required by statute to set up, and for which they are entitled to levy rates, and does not mean merely the watching force; or, in any event, it means such part of the organisation which the second parties were required to set up under the 1879 Act as they were authorised to maintain under the 1848 Act; (3) that the second parties are entitled to exemption from poor rates on all the properties occupied and used by them in carrying out the provisions of the statutes providing for the administration of the city, or, in any event, on all properties occupied and used by them for purposes for which they required properties under the 1848 Act; and (4) that they are entitled to exemption from poor rates in respect of the subjects specified in Article 10 hereof. The second parties do not claim exemption from poor rates in respect of properties which, although maintained out of the burgh assessments, are not occupied or used in connection with the administration of the city,—as, for example, properties dedicated to the use or recreation of members of the public, such as public parks, public baths, public wash-houses, free libraries, etc. The second parties maintain in any event that they are entitled to exemption from poor rates in respect of the portions of the Police Chambers occupied by the Watching Department and as a Court-room and as accommodation for the Clerk of Court and Public Prosecutor and their staffs, to an extent proportionate to the ratio borne by these portions to the whole building. The second parties further maintain that they are entitled to exemption from poor rates in respect of the portions of the City Chambers occupied by the Burgh Court-room, and the offices of the Clerk of Court and Procurator-Fiscal, and the portion of the Police Chambers occupied by the Police Court-room, the Clerk of the Police Court, and the Public Prosecutor, on the ground that they are premises dedicated to the administration of justice, and that such premises are exempt from taxation. The second parties also maintain that, in view of the terms of sect. 44 of the Education (Scotland) Act 1872, the first parties are not entitled to levy school rates on any properties which are exempt from poor rates.

The Questions of Law were as follows:—

1. Does the exemption from liability to poor rates contained in the 70th section of the Edinburgh Municipal and Police Act 1879 apply only to the offices, stations, and other premises connected with the police establishment in the sense contended for by the first parties in Article 12 hereof?

   Or, alternatively,

   Does it apply to subjects or premises belonging to or leased by the second parties and occupied in the conduct of the following departments, or any of them, viz.:—
   (1) The Burgh Engineer's Department.
   (2) The Department of the Medical Officer of Health and Surgeon of Police.
   (3) The Town Clerk's Department, with the exception of the proportion effeiring to the Common Good or proper municipal business.
   (4) The Treasurer of Police Department.
   (5) The City Superintendent of Works Department, with the exception of the proportion effeiring to the Common Good properties.
   (6) The City Roads Department.
   (7) The Fire Department.
   (8) The Lighting Department.
   (9) The Cleansing Department.
   (10) The Sanitary Inspector's Department.
   (11) The Collector of Police Department.
2. Are the first parties entitled to assess for poor rates houses belonging to or leased by the second parties, not contiguous to police stations, and occupied rent free by members of the police force?
3. Where a building belonging to or leased by the second parties is entered at a *cumulo* rent in the Valuation Roll, and parts of such building are occupied by departments whose premises are exempt from poor rates and parts by departments whose premises are not so exempt, are the first parties entitled to recover poor rates from the second parties on the *cumulo* rent of the building?

   Or, alternatively,

   Should the said rent be rateably apportioned as between the parts of the premises which are exempt and the parts of the premises which are not exempt, and the poor rate levied accordingly?
4. Should a rateable apportionment be made in the case of premises occupied partly in connection with departments to which the exemption from poor rates applies and partly in connection with departments to which said exemption does not apply, and the poor rate levied accordingly?
5. Are the second parties entitled to exemption from poor rates in respect of (*a*) the portion of the City Chambers occupied by the Burgh Court-room, and the offices of the Clerk of the Burgh Court and Procurator-Fiscal; and (*b*) the portion of the Police Chambers occupied by the Police Court-room and the offices of the Clerk of Court and Public Prosecutor?
6. Are the first parties entitled to levy school rates on properties which are exempt from poor rates?

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Argued for the First Parties: Query 1. Apart from the case of Crown property, the presumption was against exemption, and it was for the second parties to shew that they were exempt (*Mersey Docks and Harbour Board Trs.* v. *Cameron*, 1865, 11 Clark (H.L.) 443; *Magistrates of Edinburgh* v. *Surveyor of Taxes*, 1889, 17 R. 73). The words "police establishment" might be read as including the whole city administration apart from the common good. But in their primary meaning the words included only those

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functions of preserving order and suppressing crime which were functions of the imperial government (*Coomber* v. *Justices of Berkshire*, 1883, L.R. 9 A.C. 61; *Surveyor of Taxes* v. *Smith*, 1901, 4 F. 31). It was no answer to say that in this view the exemption did no more than exempt only premises which were exempt at common law. The framer of the section had seen fit to exempt from burgh assessments the palace of Holyrood and other Crown property, which were unquestionably exempt at common law. No doubt the word "continue" referred back to the old statutes of 1832 and 1848. But the practice under these statutes (the details of which were set forth in the special case but are not material for the purposes of this report) was irrelevant. The doctrine of *contemporanea expositio* did not apply to modern statutes (*Clyde Navigation Trs.* v. *Laird*, 1883, 10 R. (H.L.) 77, per Lord Watson at p. 83). The first alternative of question 1 should be answered in the affirmative, and the second alternative in the negative. Query 2. The houses occupied by members of the police force were merely rented houses, and were truly a portion of the men's wages. Therefore they were not exempt (*Advocate-General* v. *Beattie*, 1856, 18 D. 378; *Rex* v. *Matthews*, 1777, Caldecott 1; *Showers* v. *Chelmsford Union*, 1890, 60 L J. Mags. Cases, 1 and 55). They might have been exempt if they had formed part of police station premises (*Cross* v. *West Derby Union*, 1899, 16 T.L.R. 120), but this was not the case. Query 3. Where separate parts of premises were used for police purposes, and separate parts for municipal purposes, the second parties were not entitled to exemption until they allocated the rent so as to show the value of the premises which still remained assessable. It was for the second parties to make out their exemption. Further, the second parties were and the first parties were not in a position to ascertain the true value of the separate parts of the premises (*Cowan & Strachan* v. *Inland Revenue*, 1880, 7 R. 491). Query 4. Where the same premises were used partly for police and partly for municipal purposes, and local separation was impossible, the premises were not exempt. The premises were either connected with the police establishment or they were not. It was necessary to ascertain their true character, and a money allocation was incompetent. The second parties were not entitled to exemption except in the case of premises which were used wholly for police purposes (*College Street U.F. Church Trs.* v. *Parish Council of Edinburgh*, 1901, 3 F. 414). Query 5. This query should be answered in the negative. The second parties were not entitled to exemption until they had allocated the rent. Query 6. Exemption from poor rates did not infer exemption from school rates. Sect. 44 of the Education Act imported the law relating to the imposition of poor rate, but not the exemptions therefrom (*Hogg* v. *Parochial Board of Auchtermuchty*, 1880, 7 R. 986; *Gillanders* v. *Campbell*, 1884, 12 R. 309).

Argued for the Second Parties: The words "police establishment" included all departments of city government which the second parties were bound by their statutes to set up as distinguished from such subjects as parks and bowling greens, which the second parties were entitled, but were not under statutory obligation, to acquire. If the first parties' construction were sound, it must be applied to the exemption from burgh assessments, and would lead to the anomalous result that the second parties would have to pay rates to themselves in respect of the subjects in question. The word "continue" in sect. 70 referred back to the previous Acts of 1832 and 1848, and the practice under these Acts was important, as showing that the subjects in question were exempt (Maxwell on the Interpretation of Statutes, p. 459). Query 2. Sect. 70 exempted houses connected with the police establishment. By sect. 5 the word "house" was interpreted to mean "dwelling-house." It followed that houses occupied by members of the police force were exempt. Query 3. The first alternative should be answered in the negative, and the second in the affirmative (*Magistrates of Edinburgh* v. *Surveyor of Taxes, cit.*). There was no practical difficulty in allocating the rent. The first parties were bound to make deductions for repairs from the rent appearing in the Valuation Roll (*Aberdeen Parish Council* v. *Caledonian Railway Co.*, 1906, 8 F. 1072), and it was just as easy to make a deduction in respect of parts of the premises which were not assessable. Query 4. Where the same premises were used at one time for police purposes, and at another for municipal purposes, a money allocation should be made (*Magistrates of Edinburgh* v. *The Surveyor of Taxes, cit.*). Query 5. This query should be answered in the affirmative. It raised only the question of allocation. Query 6. Wherever the second parties were entitled to exemption from poor rates they were also exempt from school rates. Sect. 44 of the Education Act imported the whole law relating to the collection of the poor rate, including exemptions. The ministers' cases (*Hogg, cit.*, and *Gillanders, cit.*) were distinguishable. There the exemption was personal to the parish minister. Here the exemption was claimed in respect of subjects.

The Court *answered* the first alternative of the first question in the affirmative and the second alternative in the negative; the second question in the negative; the second alternative of the third question in the affirmative; the fourth question in the negative; the fifth question in the affirmative; and the sixth question in the affirmative except as to the subjects described in question five, which at common law are exempt from taxation.

The opinion of the Court was delivered by Lord M'Laren.

Lord M'Laren.—By a series of local statutes, the last of which is entitled The Edinburgh Police Act 1848, the control of certain departments of local administration was vested in a representative body called the Police Commission. By the 58th section of this Act certain buildings were exempted from the payment of local rates, poor rate being expressly mentioned. In the description of the buildings exempted the words used are "police offices, station houses, dwelling-houses, and other buildings or grounds within the limits of this Act connected with the police establishment." The first question for consideration is, whether the expressions "police" and "police establishment" are to be construed according to the ordinary and more restricted meaning of an organisation for the prevention of crime and the maintenance of public order, or are to be taken in a wider sense as including other departments of municipal administration constituted by statute. As a guide to the true meaning of the words in question, it may be useful to consider what is the extent of the exemption from taxation which may be claimed by public authorities independently of special statutory exemption. The most authoritative statement of the law on this subject is the judgment of the House of Lords in the case of *Coomber* v. *The Justices of Berkshire.* The question was as to the liability to taxation of a county assize court with its offices. Lord Blackburn delivered the leading opinion, but perhaps the clearest statement of the principle is a passage quoted by Lord Watson from Lord Blackburn's opinion in a previous case: "Long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police and the administration of justice, no one is rateable in respect of such occupation" (9 App. Ca. 72).

In 1848, when the Edinburgh Police Act was passed, it cannot be said that the application of this principle or its extent were fully understood; indeed I am not sure that the limits of the principle are even yet thoroughly settled. It was therefore very natural that the Police Commissioners, in the Act which they obtained from Parliament, should seek to have a settlement of this question for themselves. On the other hand, I think it is unlikely that they should have sought, or that Parliament should have granted, exemptions from taxation that were independent of the general law as to the incidence of taxation on public property. If, then, there is any ambiguity in the words "police" and "police establishment," as used in the Police Act of 1848, sound construction requires that we should give to these words a meaning which is consistent with the general law, rather than to interpret them in the wider sense, which would include buildings appropriated to purely municipal purposes for the exemption of which no good reason can be assigned.

I ought to state that there is a later Act than that of 1848, viz. the Act of 1879, passed after the Police Board had been merged in the Town Council. But the exemption (which is contained in sect. 70) is only a repetition of the exemption in the 1848 Act in identical terms.

The first question in the case includes a large number of alternatives; but as the answers to these all depend on the application of the principle of construction which I have announced, it will be sufficient to state the decision of the Court under each head.

(1) and (2). Departments of burgh engineer and medical officer of health. These are departments of municipal administration, and do not fall within the exemption.

(3) and (4). The business of the town clerk's department and of the treasurer of police are said to include the administration of funds which are raised for proper police purposes. But the greater part of the work done in these departments is municipal business, and as it is impossible to make a local separation, exemption cannot be claimed under these heads. It would be contrary to the spirit of all the authorities to make a money allocation of the premises used for such purposes; because the principle is, that unless the building is used *exclusively* for purposes connected with the service of the Crown, the exemption will not hold.

These observations apply also to heads (10) and (11).

(5) and (6). The works and roads here referred to were not under the care of the Police Commission during the time when there was a Police Commission distinct from the Town Council, and the exemption cannot be maintained.

(7), (8), and (9). Fire prevention and lighting and cleansing were within the functions of the Police Commission as defined by the recited statutes, but it is not therefore to be assumed that the buildings used for these purposes are exempt from total taxation. If it had been intended that no building used for any of the public purposes which were controlled by the Police Commission should be assessed for poor rates, this might easily have been expressed as a general exemption of all the property of the Commission. But the exemption is not of this general character. Sect. 58 of the Police Act of 1848 (p. 5 of the Case) enumerates the classes of buildings which are to be exempted from local taxation. These are, briefly, police offices and buildings on grounds connected with the police establishment; and it could not be intended under this description to include buildings appropriated to lighting and cleansing or the prevention of fire.

The result is that the exemption does not apply to any of the buildings enumerated under the second alternative of the first question. The first alternative of the first question will therefore fall to be answered in the affirmative and the second alternative in the negative.

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2. We consider that the houses here described are covered by the expression, "police offices, station-houses and dwelling-houses" used in the 58th section of the Act of 1848, and substantially re-enacted by the Act of 1879. The question will accordingly be answered in the negative.

3. Where a local separation of the subjects entered in *cumulo* can be made, as in the case of the burgh court room and the police court room and their precincts, the second parties will be entitled to have these subjects separately valued. As regards the current year we cannot give any useful decision, as the parties have not put a value upon the subjects for which exemption is claimed.

4. We answer this question in the negative.

5. We answer this question in the affirmative.

6. It is settled by concurring decisions of the two Divisions of this Court, that what are termed class-exemptions from assessment for poor rate are not extended to school rate (*Hogg*, 7 R. 986, and *Gillanders*, 12 R. 309). The Education Act does not authorise such exemptions, and the provision that the school rate is to be collected along with the poor rate is held to be a merely administrative provision with a view to economical collection of the rates, and not as intended to identify the rates.

In the case of *Gillanders*, the Lord President, after stating the principle that no person can claim exemption from a tax or rate imposed by statute unless the statute gives him the exemption, goes on to say that there is one exception to this rule, the case of Crown property, an exception depending on the constitutional principle that the Crown cannot be taxed without its consent. Under this exception it is clear that the second parties are entitled to exemption from school rates as well as poor rates in respect of the buildings described in question 5, viz. the court rooms and their adjuncts, as being property appropriated to the service of the Crown, although heritably vested in the magistrates and council of Edinburgh.

But with respect to the other police buildings which are exempted from poor rates by these local statutes, the exemption would not apply to school rates. The claim of the second parties to exemption from school rates in respect of police offices, barracks, and police officers' houses, is based on the theory that these buildings are appropriated to the service of the Crown. Now it is true that in the case of *Coomber* the county building which was held by the House of Lords to be exempted from income tax included a police station which was a part of the block of buildings erected for the purposes of an assize court. But in that case the police station was really an adjunct of the assize court, and it would be carrying the principle too far to treat the central police office of Edinburgh and the police stations and barracks throughout the city as adjuncts or pertinents of the police court, which is a court of very limited jurisdiction. Unless they can be so treated, so as to fall within the general exemption of Crown property from imperial and local taxation, these buildings must be considered as subject to payment of school rates. This question, accordingly, must be answered in the affirmative, except as to the subjects described in the fifth question, which at common law are exempt from taxation.—*27th June* 1907.

Counsel for the First Parties, Dean of Faculty (Campbell, K.C.), W. J. Robertson; Agents, R. Addison Smith & Co., W.S.—Counsel for the Second Parties, Cooper, K.C., Spens; Agent, Thomas Hunter, W.S.

J. S. M.,
for F. A. U.

OUTER HOUSE.

(*Lord Salvesen.*)

79. Handasyde *v.* J. Hepworth & Son Limited.

I. SLANDER — LETTER—ISSUE — CHARGE OF THEFT—RELEVANCY.

II. SLANDER — PRIVILEGE — CLAIM FOR PAYMENT OF COAT PURCHASED AND DELIVERED — IMPUTATION OF DISHONESTY AND THREAT OF CRIMINAL PROCEEDINGS —HELD NOT TO BE PRIVILEGED OCCASION.

III. SLANDER—MASTER AND SERVANT—SCOPE OF EMPLOYMENT—DENIAL OF AUTHORITY OF SERVANT TO WRITE LETTER—FORM OF ISSUE.

The pursuer, who was a clerk and journalist in Edinburgh, raised this action of damages for slander against the defenders, who carried on a clothier's business in Edinburgh and elsewhere. The following statement of the circumstances giving rise to the action is taken from the Opinion of the Lord Ordinary.

"The slander complained of in this action is contained in a letter written by the defenders' manager, W. O. Hall, to the pursuer. The circumstances in which the letter was written, according to the pursuer's averments, are these. On or prior to 2nd February 1907 the pursuer purchased an overcoat at the defender's Edinburgh shop. The coat was delivered on 2nd February; and I think I may assume the price was payable on delivery. The pursuer found that it did not fit, and as he had occasion to use it he asked the porter to leave it, which he did, on the pursuer's promise to call and settle with the defenders. He did not do so at once, and on 11th February the letter founded on was written. On the following day the pursuer paid the price of the overcoat."

The letter, which was in the schedule appended to the proposed issue, was in the following terms:—

27 North Bridge,
Edinburgh, Feby. 11/07.

Mr Handasyde,
41 Bruntsfield Gdns.

Dear Sir,

We beg to call your attention to our memo of the 7th inst., the terms of which you have failed to comply. You also promised our assistant on the 8th inst. that you would call and see our manager on the 9th inst. in respect to the payment of the Overcoat, this also you have failed to do.

We have consulted our agent on the matter, who points out that you having insisted on keeping the Overcoat and refusing to pay for it in the face of our protest makes the case one of theft and for the police authorities to take up.

We therefore herewith give you notice that unless the Overcoat is settled here by 12 oc. noon Tuesday, 12th inst., we shall at once instruct our agent to proceed with the case.—Yours faithfully,

For J. Hepworth & Son, Limited,
W. O. H.

The pursuer averred that the letter was written by Hall as manager of the business, and within the scope of his authority, and for his masters' benefit.

The defenders pleaded (1) that the averments of the pursuer were irrelevant; (2) that the statements in the letter were not slanderous; (3) that the occasion being privileged, malice must go into the issue, and that no facts and circumstances inferring malice were averred; (4) that Mr Hall in writing said letter acted outwith the scope of his employment.

The Lord Ordinary *repelled* the first plea in law for the defenders, and *approved* of the following issue as amended for the trial of the cause:—

Whether, on or about the eleventh day of February nineteen hundred and seven, the defenders, by their manager, W. O. Hall, wrote and dispatched to the pursuer a letter in the terms contained in the Schedule hereto annexed; and whether the statements in said letter are of and concerning the pursuer, and falsely and calumniously represent that the pursuer had been guilty of theft, to the pursuer's loss, injury, and damage?

Lord Salvesen [after stating the facts as above].—I cannot doubt that on the face of it the letter is slanderous, as imputing dishonesty to the pursuer. It distinctly asserts that his conduct amounted to theft, and was one for the police authorities to take up; and I think the last sentence is capable of meaning that unless payment were made, instructions would be given for criminal proceedings against the pursuer. The defenders, however, plead that the letter was privileged, and that therefore malice must go into the issue. I think the question is one of difficulty, but I have come to be of opinion that the slanderous statement was not *prima facie* privileged. There is no plea of *veritas*, and accordingly the imputation on the pursuer's character must be held to have been false. The defenders had, of course, a perfect right to communicate with the pursuer on the subject of the overcoat, and to urge him, under the threat of civil proceedings, to make payment; but the pursuer's averments do not disclose that the defenders had anything but a civil claim against him. If goods are sold on the footing that payment is to be made on delivery, and payment is not so made, the creditor is entitled, in his option, either to have the goods restored or to payment of the price; but the failure to pay on delivery in terms of the contract does not justify the creditor in imputing dishonesty to his customer or threatening him with criminal proceedings. *Robertson*, 1828, 4 Bing., p. 670; *Rae* v. *M'Lay*, 1852, 14 D. 988; *Mackay* v. *M'Cankie*, 1883, 10 R. 537; and *Ramsay* v. *M'Lay & Co.*, 1890, 18 R. 130, are authorities more or less in point. Should a case of privilege be disclosed at the trial, the defenders will be sufficiently protected by the judge's direction to the jury. I may add that if, contrary to my opinion, malice must go into the issue, this is not a case where special facts and circumstances inferring malice require to be averred. In *Brown* v. *Fraser*, 1906, 8 F. 1000, the Lord Justice-Clerk said: "When the case arises out of the pursuer having been accused or handed over to the police on a criminal charge, I cannot understand how it can be laid down as a general rule that it is necessary in every case that facts independent of the case complained of and its surrounding circumstances should be averred, showing antecedent malice on the part of the defender. It would be very undesirable if that were so, as in cases of handing over to the police the whole matter may arise in a moment, without any previous questions between the parties, and the malice alleged may arise only at the time of the pursuer being accused." I think these observations are equally applicable to a case where a person is threatened with criminal proceedings for which the defender admits there was no warrant, and where the proof of malice depends, not on any private grudge, but on the recklessness of the conduct displayed.

The defenders further urged that as the letter in question was written, not by a director of the limited company who are sued, but only by the manager of their Edinburgh shop, the Company could not be held responsible. That of course depends upon whether the writer acted within the scope of his authority; but here there is a distinct averment that he did so act, and also that he acted for his master's benefit. The case of *Ellis*, 1905, 7 F. 629, settles that in such circumstances the master will be responsible for his servant's slander, just as he is for any other wrong committed by the servant in the course of his service and for his master's benefit. If it be true, however, as the defenders aver, that Hall, the writer of the letter, was personally respon-

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sible to them for the price of goods sold in the shop of which he had charge, the pursuer may have difficulty in proving his case, but that is not a matter of relevancy. I shall therefore repel the first plea in law for the defenders, and approve of the issue as amended.—13*th June* 1907.

Counsel for Pursuer, W. Thomson; Agents, Connell & Campbell, S.S.C.—Counsel for Defenders, Morton; Agent, P. Maclagan Morrison, Solicitor. J. W. F.

OUTER HOUSE.

(*Lord Guthrie.*)

80. Wilson *v.* Junor.

Process — Contingency — Motion for Transmission of Sheriff Court Process—Action by Law Agent in Court of Session for Sum Due on Accounting—Action of Accounting in Sheriff Court by Client Against Agent for Larger Sum—Lis Alibi Pendens—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sect. 74.

This was an action in the Court of Session by a solicitor against a client for a sum of £394 odds alleged to be due by the client to the agent on a just accounting. An action had previously been raised in the Sheriff Court of Aberdeen by the client against the agent, concluding for an accounting, or, failing an accounting, for £1000 as the balance due him.

In the Court of Session action the pursuer moved for transmission of the Sheriff Court process *ob contingentiam* in terms of sect. 74 of the Court of Session Act 1868, which is in the following terms:—

> In place of advocations of actions and proceedings in inferior Courts *ob contingentiam* of a process in the Court of Session, it shall be lawful for the party desiring to remove any such action or proceeding to the Court of Session to lay before the Lord Ordinary, or the Division of the Court before which such Court of Session process shall actually be at the time, a copy of the inferior court record, or of such pleadings as may have been lodged, and of the interlocutors in the cause, certified by the clerk of the said inferior court, and to move for the transmission of the inferior court process to the Court of Session, and if, upon consideration thereof, the said Lord Ordinary or Division of the Court shall be of opinion that there is contingency between the two processes, he or they shall grant warrant to the clerk of the inferior court process for the transmission thereof; and upon such transmission being made, the said process shall thenceforth be proceeded with in all respects as if it had been advocated *ob contingentiam* to the Court of Session according to the present law and practice.

In support of his motion the pursuer *argued* (*first*) that transmission should be granted, as the result of the one case would decide in whole or in part the other (*Robertson* v. *Duke of Athole*, *infra*; and (*secondly*) that the test was whether the two actions would be conjoined or not, if both raised in the Sheriff Court, and clearly these two actions would be. By sect. 74 of the Court of Session Act 1868, transmission was substituted for advocation, and where contingency exists the Court has no choice but to grant warrant for transmission.

The defender opposed the pursuer's motion, and *argued* (*first*), assuming contingency to exist, the authorities shew that the Court will not transmit a Sheriff Court process to the Court of Session if the effect of transmission will be to deprive defenders in the Court of Session of the opportunity of stating preliminary pleas in the Court of Session process. Here the action should either be dismissed as incompetent on the plea of *lis alibi pendens*, or sisted until the determination of the Sheriff Court action (*Greig* v. *Johnston*, 1835, 13 S. 635; *Lowe's Trs.* v. *Lowe*, 1893, 1 S.L.T. 29; 50 Geo. III. cap. 112, sect. 86; Mackay's Practice, p. 271; *Fleming* v. *Morrison*, 1835, 13 S. 859); (*secondly*), there was no contingency here in the sense of sect. 74. The statute clearly brought out the contrast between a transmission from the Sheriff Court to the Court of Session and a transmission from one Lord Ordinary to another (Mackay, p. 268; 48 Geo. III. cap. 151, sect. 9).

The Lord Ordinary *granted* the pursuer's motion for transmission of the process.

Lord Guthrie.—The summons in this action is dated 4th February 1907. The pursuer asks at this stage of the case for transmission on the ground of contingency of a process in an action raised against him by the defender in the Sheriff Court of Aberdeenshire on 7th August 1906, six months before the raising of the present action. Both actions are between the same parties and they are concerned with the same subject-matter, namely, the state of accounts between the parties. The conclusions are different. In the Aberdeen action the present defender Junor sues the present pursuer Wilson for an account, or for £1000. In this action Wilson sues Junor for £394, 7s. 6d. as the balance due to him on a just accounting.

Junor opposes transmission, and pleads *lis alibi pendens*. I think his plea is bad, and that transmission must be granted. Wilson alleges in the Sheriff Court action at Junor's instance that, instead of being Junor's debtor, Junor is due him £394. Wilson may shew in the Sheriff Court action that he is not Junor's debtor, but he cannot get decree for any sum due to him. He is, therefore, clearly entitled to have his claim constituted, and to raise his action for that purpose now, either in the Sheriff Court or in the Court of Session. He has chosen to do so in the Court of Session, and this action is no

more open to the plea of *lis alibi* than a Sheriff Court action with the same conclusions would be.

I think I am bound, under the 74th section of the Court of Session Act of 1868, to grant the pursuer's motion for transmission of the Sheriff Court process. The contingency is clear, and the section is imperative. The parties are the same; the subject-matter is the same, and decision in the one case would or might settle part of the dispute in the other case (*Duke of Athole* v. *Robertson*, 1869, 8 M. 304, per Moncreiff, L.J.C.; *Reid's Trs.* v. *Reid*, 1873, 45 Scot Jurist 191, per Inglis, L.P. In his Lordship's opinion the sentence "connection means no more than contingency" is apparently a misreport for "contingency means more than connection."

Even if I had a discretion, I would not refuse the motion. Accounts have been ordered and lodged in the Sheriff Court action, but the Sheriff-Substitute has not yet applied his mind to the merits of the dispute between the parties. The Sheriff Court action might be decided in favour of Wilson without any such complete investigation into the whole accounts as is necessary to do justice between the parties. For instance, once the Sheriff reached the conclusion that nothing was due to Junor, he would not proceed further in the accounting. If the Sheriff Court process is transmitted probably the actions will be conjoined, and the Aberdeen procedure, with the documents lodged there, will be available in the conjoined actions.—*27th June* 1907.

Counsel for Pursuer, Munro; Agents, Galbraith, Stewart & Reid, S.S.C.—Counsel for Defender, A. R. Brown; Agents, Macpherson & Mackay, S.S.C. C. H. B.

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(*Lord Dundas.*)

81. Somerville and Others *v.* Commissioners for the Harbour and Docks of Leith.

HARBOUR—DOCK—CHARGES — LEITH HARBOUR AND DOCKS ACT 1892 (55 AND 56 VICT. CAP. clxxvii), SECT. 58, SCHEDULE (B)—SPECIAL CHARGE IMPOSED BY HARBOUR COMMISSIONERS FOR LOCKING VESSELS IN OR OUT OF DOCKS—HELD THAT VESSELS ENTITLED TO ACCESS TO AND EGRESS FROM DOCKS FREE OF ANY RATE OTHER THAN RATE PAYABLE UNDER SECT. 58 AND SCHEDULE (B) OF ACT OF 1892, AT ALL TIMES WHEN ACCESS AND EGRESS COULD BE GIVEN WITH SAFETY BY MEANS OF LOCKS OR OTHERWISE.

This was an action at the instance of Robert Somerville, shipowner, Dalkeith, and certain other shipowners, against the Commissioners for the Harbour and Docks of Leith, incorporated by The Leith Harbour and Docks Act 1875, concluding for, *inter alia*, declarator that the pursuers, upon payment of the rates made payable by sect. 58 of an Act of Parliament entitled The Leith Harbour and Docks Act 1892 (55 and 56 Vict. cap. 177), and by Schedule (B) to the said Act, were entitled to have access to and egress from the harbour and docks of Leith given to all ships, vessels, barks, boats, or lighters belonging to them or any of them, free of any rate or charge other than the rates made payable by sect. 58 and Schedule (B) of the said Act, and that at all times when access to and egress from the said harbour and docks can be given with safety, either by means of the locks in the said harbour or otherwise, and for declarator that the defenders had no right to levy from the pursuers any dues or charges other than the rates made payable as aforesaid for any ships belonging to the pursuers obtaining access to or egress from the said harbour and docks by means of the locks through which the said docks were approached; and for reduction of two Minutes of the defenders, dated 8th September 1905 and 13th July 1906; and for repetition of sums charged illegally against the pursuers over and above the rates specified in the said Act and Schedule (B) thereof.

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By sect. 33 of The Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. cap. 27), which is incorporated with The Leith Harbour and Docks Acts of 1875 and 1892, it is provided that

"Upon payment of the rates made payable by this and the Special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers."

By sect. 2 of the said Act of 1847, which is also incorporated with The Leith Harbour and Docks Acts of 1875 and 1892,

"The expression 'the Special Act' shall be construed to mean any Act which shall be hereafter passed authorising the construction or improving of a harbour, dock, or pier, and with which this Act shall be incorporated,"

and

"The expression 'the harbour, dock, or pier' shall mean the harbour, dock, or pier and the works connected therewith by the Special Act authorised to be constructed;"

By sect. 58 of The Leith Harbour and Docks Act 1892 (55 and 56 Vict. cap. 177), it is, *inter alia*, provided that:

"From and after the commencement of this Act, section 74 of the Act of 1875 is hereby repealed, and it shall be lawful for the Commissioners, and they are hereby authorised from and after that date to demand, levy, collect, and receive . . . . from the owners of

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every ship, vessel, bark, boat, or lighter coming into and going out of the harbour and docks or precincts of the port aforesaid, or the agents or managers of such owners, the rates on vessels specified in Schedule (B) to this Act—both subject to and in conformity with the regulations applicable to such Schedules (A) and (B) contained in Schedule (C) to this Act."

Schedule (B), which contains a table of the rates payable on vessels, provides that the rates are to be payable

"per register ton per inward voyage in each year between Whitsunday and Whitsunday."

By sect. 59 of the said Act of 1892 it is provided:

"The Commissioners may from time to time vary the rates by this Act authorised to be levied, or any of them, by reducing or raising the same in such way and manner and to such extent as they deem expedient or necessary, and may reduce or increase the rates on vessels from any place or places specified in Branch I. of Schedule (B) to this Act, without altering the rates on vessels from any other place or places specified in the same group therewith in the said branch of such schedule: Provided always, that no rates shall be increased to more than one-fourth above the amount which would have been leviable in conformity with the schedules of rates annexed to the Act of 1875, and that such rates shall at all times be charged equally to all persons in respect of vessels of the same class or description, arriving from or sailing for the same port or ports, and in respect of the same class or description of goods, and for and in respect of anything whatsoever for which such rates are exigible, and that, before any increase on the rates shall take effect, at least twenty-one days' previous notice thereof shall be given in at least one newspaper published in Edinburgh or Leith."

On or about 8th September 1905 the defenders, by Minute, passed a resolution in the following terms:—

"(1) Locking in and out of vessels should be allowed in the Albert and Imperial Docks; (2) Locking should be limited to two hours after high water; (3) No locking should be allowed when the water on the Imperial Dock sill is less than 21 ft. 6 in.; (4) No vessel should be locked unless arrangements have been timeously made with the dockmaster, according to regulations to be issued by the superintendent; (5) The dock master should have power to decline to lock in or out any vessel without giving reasons; (6) A charge of £2 for each locking should be made against each vessel arranging to be locked in or out; £1 to be returned in the event of a ship arranging to be locked in or out and not taking advantage of the arrangement."

This resolution was subsequently modified by Minute of the defenders dated 13th July 1906, by which the charge for locking vessels in and out of the Imperial and Albert Docks was reduced to £1 per vessel. The defenders did not publish any notice of the imposition of this charge for locking in any newspaper, in terms of sect. 59 of the Act of 1892.

Sect. 76 of The Leith Harbour and Docks Act 1875 (38 and 39 Vict. cap. 160) enacts that the Commissioners

"shall be entitled to make all reasonable charges for work done, services rendered, facilities afforded, and plant, machinery, or appliances provided by them for the despatch of business at the harbour and docks, or the convenience of shipmasters, merchants, and others concerned with the traffic thereat, in so far as such charges are not expressly provided for by this Act."

Sect. 60 of The Leith Harbour and Docks Act 1892 (55 and 56 Vict. cap. 177) enacts that the Commissioners

"shall be entitled to make all reasonable charges for work done, services rendered, facilities afforded, and use of plant, machinery, and appliances provided by them for the despatch of business at the harbour and docks, or the convenience of shipmasters, merchants, and others concerned with the traffic thereat, in so far as such charges are not expressly provided for by this Act."

The Lord Ordinary *issued* the following interlocutor: "Finds and declares in terms of the first declaratory conclusion of the summons, viz. that the pursuers, upon payment of the rates made payable by sect. 58 of an Act of Parliament entitled The Leith Harbour and Docks Act 1892, and by Schedule (B) to the said Act, are entitled to have access to and egress from the harbour and docks of Leith given to all ships, vessels, barks, boats, or lighters belonging to them or any of them, free of any rate or charge other than the rates made payable by sect. 58 and Schedule (B) of the said Act, and that at all times when access to and egress from the said harbour and docks can be given with safety either by means of the locks in the said harbour or otherwise, and when accommodation is available; further, decerns and ordains the defenders to make payment to the pursuers of the various sums set forth in the petitory conclusion of the summons; finds it unnecessary to dispose of the remaining conclusions of the summons."

Lord Dundas.—The pursuers are owners of a fleet of steamships trading regularly between Leith and ports in England and on the Continent. The defenders are the Commissioners for the Harbour and Docks of Leith, incorporated by the Leith Harbour and Docks Act 1875 (38 and 39 Vict. cap. 160). The main (if not the only) question is whether or not the pursuers, upon payment of the rates made payable by sect. 58 of the Leith Harbour and Docks Act 1892 (55 and 56 Vict. cap. 177) and Schedule (B) to said Act, are entitled to have access to and egress from the harbour and docks of Leith given to their ships and other craft, free of any other rate or charge, "and that at all times when access to and egress from the said harbour and docks can be given with safety, either by means of the locks in the said harbour or otherwise, and when accommoda-

tion is available." This question is one of importance to the parties, but I have not found it to be attended with serious doubt or difficulty. It relates, as explained in the condescendence, really to the three docks known as the Albert, the Edinburgh, and the Imperial respectively, which are, like most modern docks, approached through locks. These three docks are the largest in Leith harbour, and are suitable for, and used by, the pursuers' vessels. It may be convenient at the outset to explain the general nature and character of the various docks at Leith, all of which are shown on the small hand-map with which I was furnished at the discussion. The old docks (East and West) were opened about 1806. They were constructed under the authority of an old Act, and were, as the map indicates, approached by a lock; but I am informed that as matter of fact this lock has not been used for a long period—more than forty years. The Victoria Dock was constructed about 1852, without the authority of any special Act of Parliament. It has a gate, but no lock. The Albert Dock was opened in 1869, without the authority of any special Act. It is approached by a lock, and is now connected by waterway with the Imperial and also with the Edinburgh Docks. The Edinburgh Dock was opened in 1881, and was among the works authorised by the said Act of 1875. It lies to the east of, and is approached from, the Albert Dock, through an open passage opened by a swing bridge. The Imperial Dock was authorised by the said Act of 1892, and was opened in 1902. Its entrance lock is mentioned in sect. 22 (2) and (3) of the Act.

The question now in dispute was sharply raised when the defenders passed, on 8th September 1905, a resolution, varied later by a resolution dated 13th July 1906, both of which are quoted in Art. 5 of the Condescendence, by which the defenders, for the first time, imposed a pecuniary charge for the locking in or out of vessels going to or from the three docks with which this case is concerned.

The substantive case stated for the pursuers is based upon the following statutory enactments. By sect. 33 of "The Harbour, Docks and Piers Clauses Act 1847" (10 Vict. cap. 27), it is provided that "upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers." By sect. 2 of the same Act, "the expression the harbour, dock or pier shall mean the harbour, dock or pier and the works connected therewith by the Special Act authorised to be constructed"; and sect. 4 provides that "the word 'rate' shall mean any rate or duty or other payment in the nature thereof payable under the special Act." Sect. 4 of the Special Act of 1875 (repeated by sect. 4 of the Special Act of 1892) enacts that "the expression 'harbour and docks' means and includes the port and harbour of Leith, and the harbours, docks, quays, piers, and whole other works and property included in the undertaking defined and vested in the Commissioners by this Act, and all future additions thereto and extensions thereof." Sect. 58 of the said Act of 1892 authorises the Commissioners to levy and collect, *inter alia*, "from the owners of every ship, vessel, bark, boat, or lighter, coming into or going out of the harbour and docks or precincts of the port aforesaid, or the agents or managers of such owners, the rates on vessels specified in Schedule (B) to this Act. . . ."

Upon a construction of these sections, the pursuers argue that their vessels are entitled, upon payment of the rates prescribed by sect. 58 and Schedule (B) of the special Act of 1892, to free access to or egress from the whole harbour, docks, and piers of Leith, including those parts of the same which are accessible only by locks, at all times when such access or egress can be accomplished with safety, and when accommodation is available. As to these last conditions, they concede that the discretion must lie with the defenders' harbourmaster, so long as he exercises it fairly and in *bona fide*. I should here explain that the parties agreed in stating that for two or three hours before high water at each tide the gates of the locks lie open, and that for some hours thereafter (as to the number of these the parties were not in agreement) the operation of locking a vessel in or out can be carried on with perfect safety; but the defenders say that if the pursuers' contention is given effect to they "will be obliged to keep a large staff of experienced men on duty day and night for the purpose of working the lock gates, and will thus be involved in heavy additional expense." The matter is thus one of expenditure pure and simple. I am of opinion that the pursuers' argument is well founded. I think that the statutory provisions to which I have referred give shipowners and others an absolute right, upon payment of the rates prescribed, to demand access to or egress from all parts of the harbour or docks to or from which such access or egress can be afforded with safety and due regard to accommodation. A contrary hypothesis might, I think, result in anomalies. In the case, for example, of a harbour to which access can only be obtained by the opening of gates, it would seem that vessels could not demand right to enter the harbour at all, except upon payment of some extra charge over and above the rate. But the defenders argued, in the first place, that the pursuers' construction of the Acts would violate the obligation which is admittedly incumbent upon harbour commissioners to treat all classes of shipping upon equal terms. They explained (and it was not disputed) that many vessels—even of the larger classes—coming

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to Leith do not, in fact, go into docks at all, but take up their berths in the areas coloured brown on the hand-map; that others are in use to resort to the Victoria Dock, or to the old docks; that others, again, are content to obtain entrance to or exit from the three docks in question at the times, above referred to, when the lock gates are lying open; and that some of the vessels which frequent the port of Leith are, owing to their great length, unable to enter these docks at all.

The defenders put their case so high as to say that they would not be legally entitled, looking to their duty of equal treatment, to afford to the pursuers' ships the privilege of entry to and exit from the docks in question, at times when it was necessary for that purpose to work the lock-gates, without some special charge being made over and above the prescribed "rates." In my judgment, this argument is fallacious. It is, no doubt, true that at all ports there are different classes of shipping, with different habits, capacities, and requirements. But if the pursuers' view of this matter is right, as I think it is, all vessels (including those belonging to them) which desired, and were physically able, to enter these docks would require to be equally dealt with; and it is, I think, nothing to the purpose to say that there are other ships at Leith which either can not, or do not, desire to enter the docks at all times when it would be possible to do so with safety, and having regard to accommodation. Then the defenders relied strongly upon sect. 76 of the Act of 1875, which is practically repeated by sect. 60 of the Act of 1892. Those sections authorise the defenders to "make all reasonable charges for work done, services rendered, facilities afforded, and use of plant, machinery, or appliances provided by them . . . . in so far as such charges are not expressly provided for by this Act." But if the pursuers' view as to the policy of the Acts and the construction of the sections previously dealt with is correct, as I think it is, getting in or out of these docks at all times when the gates can with safety and propriety be opened does not appear to me to be a matter of "work done," or "services rendered," or "facilities afforded," or "use of plant, machinery, or appliances provided." It is matter of right, upon payment of the "rates." These sections seem to me to have reference, not to anything done in the exercise of that right, but to special facilities which may be asked and received after the vessel has obtained due access to the harbour and docks. This view is, in my judgment, confirmed by the total absence in the Acts (with the exception of sect. 22 (2) and (3) of the Act of 1892) of any reference to locks and of any express right on the Commissioners' part to charge for locking vessels in or out. Such operations must, I think, be regarded as mere incidents in that free access to the harbour and docks which is to be had by vessels upon payment of the rates. The defenders also referred to sects. 51 and 52 of the General Act of 1847. But I can find nothing there to authorise the Commissioners or their harbourmaster to impose an extra charge for locking operations, as they bear to do by their "resolutions," quoted upon the record. The defenders have power to pass bye-laws for various purposes, and under certain conditions—sect. 83 of the General Act of 1847, and sect. 71 of the Special Act of 1875—but, for obvious reasons, they shrank from saying that the desired result could be achieved in that manner; and I do not think that it could.

Upon the whole matter, therefore, I am of opinion that the pursuers' argument is substantially right, and that they are entitled to decree of declarator in terms of their first crave of the summons. Their counsel stated that if I should be of that view they would not press for the further declarator sought, nor for the conclusions for interdict and for reduction. The defenders' counsel, on the other hand, conceded that, if the first declaratory conclusion were to be granted, they did not oppose decree going forth in terms of the petitory conclusion.—21*st June* 1907.

Counsel for Pursuers, Clyde, K.C., Macmillan; Agents, Beveridge, Sutherland & Smith, S.S.C.—Counsel for Defenders, Dickson, K.C., J. H. Millar; Agent, Victor A. Noël Paton, W.S.

A. M.

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(*Lord Mackenzie.*)

82. Plotzker and Others *v.* Lucas.

I. Partnership—Proof—Circumstances in which Held that Partnership was Proved.

II. Trade Name — Name Descriptive of Article Sold — Right to Exclusive Use of Name.

III. Trade Names—Name Indicating Goods Dealt In by Retail Dealer — Name Descriptive of Article Sold—"Passing Off"—Imitation — Tendency to Deceive.

IV. Trade Name — Ex Turpi Causa Non Oritur Actio — Statements made in Advertising Held Not to Amount to Misrepresentation.

(*Reported ante, Vol. XIV. p.* 678.)

The circumstances of this case and the contentions of parties sufficiently appear from the Lord Ordinary's Note and the prior report.

After a proof had been taken the Lord Ordinary *dismissed* the note, *holding* (1) that the pursuers were partners, and were entitled to sue; (2) that they had not established an exclusive right to the name "Irish Linen Company"; (3) that they

had not proved that the respondent had passed off, or attempted to pass off, his goods as theirs; and (4) that a representation by the complainers that they were manufacturers of the goods sold by them, whereas they were only retailers thereof, would not have barred them from obtaining the remedy sought, if they could have established any right to it.

Lord Mackenzie.—This is an application for interdict at the instance of five brothers of the name of Plotzker, who are described as carrying on business under the style of Irish Linen Company, against Hessel Lucas, who is described as carrying on business at 23 Nicolson Street, Edinburgh, under the name Irish Linen Company. The prayer is to prohibit the respondent (1) from carrying on business under the style or title of "Irish Linen Company"; and (2) from passing off or attempting to pass off his goods as and for the goods of the complainers.

The first plea for the respondent is that the instance in the note is defective. This plea was repelled as reported in *Plotzker* v. *Lucas* (S.C. 1907, 315; 14 S.L.T. 678). The judgment then pronounced was to the effect that what the complainers require to prove first of all is that the persons designated in the instance are carrying on business in common with a view to profit, and that that business is carried on under the style and title of Irish Linen Company; that is to say the complainers must prove that they are suing in respect of a partnership right.

The complainers are Marcus Plotzker, living in London, William Plotzker, living in Manchester; Herman Plotzker, living in Southport, David Plotzker, living in Sheffield, and Bernard Plotzker, living in Glasgow.

The first time when the style Irish Linen Company appears to have been used by the complainers was in March 1902, when a shop was opened in Birmingham by Marcus, his partner in this venture being his brother William. Previous to that, William had been carrying on a drapery business at 10 Acomb Street, Manchester, under the name of W. Williams & Co. The name Irish Linen Company did not appear upon these premises, although, after the business of the Irish Linen Company was developed, Acomb Street was treated as the head office down to November 1906, when the head office was removed to Fleet Street, London. The business increased rapidly. William Plotzker was undoubtedly the master mind in the undertaking, and I have no doubt that it was mainly to his energy and ability that the growth of the business was due. He gives in his evidence a list of eighteen shops which have been opened since 1902. Seven of these are in London. There are also shops at Birmingham, Bradford, Manchester, Leeds, Leicester, Sheffield, Nottingham, Cardiff, Southport, and two in Glasgow. The rents paid range from £150 to £1079 per annum.

The case for the complainers is that William and Marcus assumed as partners the other brothers, as and when the shops were opened, and that since the action was commenced a sixth brother (Lessor) has also been made a partner. There is no written contract of co-partnery. William Plotzker states, and his evidence is corroborated by Marcus, Herman, and Bernard, who were examined as witnesses, that the brothers are in partnership, that the management of the shops is distributed among the brothers, and that they are all entitled to share in the profits according to the turnover in the respective shops for which they are responsible. The goods which they sell are mainly shirts and collars which come from Ireland and are sent direct to the branches. In the case of large orders to premises newly opened it is usual for the Irish manufacturer to write to the head office for confirmation before forwarding the goods. A certain stock of goods was kept at Acomb Street, and is kept at Fleet Street, from which a branch may be supplied if necessary. The appearance of the shops is more or less uniform, green being the prevailing colour of the sign-boards, except in the case of Union Street, Glasgow, which, on account of a restriction by the landlords, is brown. Each shop has a sign-board which bears "Irish Linen Company." In some cases there is added "Factories, Belfast and Londonderry," and this is the case with regard to the shop in Sauchiehall Street, Glasgow. The windows are dressed to a uniform pattern, and the goods exhibited have attached to them tickets with a green edge and white centre. Stationery of a uniform pattern with green heading and "Irish Linen Company" is issued from the head office to the branches. A small book is circulated which bears on the front page the name "Irish Linen Company," a statement that they are manufacturers of shirts, collars, etc., the name of the branch, and the statement that they have factories at Belfast and Londonderry. Advertisements containing these particulars are inserted in newspapers, apparently not in daily papers (at least none such have been produced), but in magazines such as "The Strand" and weekly papers such as "Country Life." The cost of advertising is borne by the branches proportionately. The complainers have a registered trade mark which bears "Irish Linen Company, Manufacturers. Trade mark. None genuine without this trade mark," and it is in evidence that the goods which they sell are stamped with this trade mark. It does not appear when this trade mark was registered. A system of exchange prevails among the branches, by which a customer who has bought goods at one of the shops may get them exchanged at another. The business appears to have been very successful. It is said the company have an annual turnover of £140,000. Mr Leinster, the Londonderry manufacturer, states that their payments to him come

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to about £15,000 a year. Mr Sheills, another Londonderry manufacturer, states that they pay him about £16,000 or £17,000 a year. There have apparently been as yet no losses on any of the branches. The profits upon the branches were remitted first to the head office at Acomb Street, Manchester, and latterly to the head office in Fleet Street, London, and have been applied in opening new branches and extending the business. A book is kept for each branch in the branch itself, which shows the business done there, and a duplicate is kept in the head office. Stationery and circulars are issued from the head office to the branches.

The respondent says that these facts are insufficient to instruct partnership. The criticism that he makes is that no balance sheet has been produced, and that none has ever been prepared; that there is no statement of the amount of capital contributed by each partner; that none of the books kept at the head office have been produced, and that the state of the bank account there has not been disclosed; that the shop at 10 Acomb Street, Manchester, bears the name of W. Williams & Co., not "Irish Linen Company"; that at the various branches the leases have been granted to the respective brothers as individuals; and that the branch bank accounts are also kept in their names and not in the name of the firm. The complainers explain that the pressure of work in extending their business has been such that it is only now that accountants have been set to work to make up a balance sheet. There is no doubt that the complainers were regarded by such persons as Leinster and Shiells, as well as by Griffiths, their salesman, as carrying on business in partnership. The alternatives would be that William was the sole owner, the other brothers working as his servants; or that each brother had his own shop or shops; or that there was a combination to use the name "Irish Linen Company," each brother being solely liable for the debts of the branch for which he was responsible. I see no reason to doubt the evidence given by the Plotzkers. I think the probable inference from the facts proved is that they were in partnership, and I think sufficient facts have been proved to warrant this inference. I am accordingly of opinion that they have proved sufficient to entitle them to insist in the present application for interdict.

The next question is whether they were entitled to prevent the respondent from carrying on business under the style or title of "Irish Linen Company." This means that they have the sole and exclusive right to use this trade name. No question of trade mark has been raised in the case. Now the name "Irish Linen Company" is one which primarily is just descriptive of a company which sells Irish linen. Accordingly the complainers must establish that their name has acquired in the market a secondary sense; that is to say, that goods sold under that name no longer mean simply goods sold by a company dealing in Irish linen, but mean and are understood to mean goods sold solely by the complainers; and that the mere use by the respondent of that name is *per se* deceptive. The first difficulty in the way of the complainers is that they do not appear to have been the first inventors of the name. The evidence is, I think, clear that the name was in use at Hove, the Isle of Man, and Belfast, before the complainers adopted it. The evidence is not so clear in regard to its use at Torquay, but it seems to have been used at Harrogate. It also appears to have been used at Scarborough so far back as the year 1892. In the Isle of Man it was first used in 1894. It was suggested on behalf of the complainers that the Mohuns' business was household linen and not shirts and collars. I do not think this is of much importance when the question is one of exclusive right to the name. On this branch of the case the complainers carried their argument so far as to say that they would be entitled to stop the use of the name Irish Linen Company, not only in every town in England, but also every town in Scotland and, crossing to Ireland, to prohibit it even in Dublin. Taking the case of Scotland, which is what we are immediately concerned with, the evidence shews that down to June 1905 the complainers had no shop in Scotland at all. They then opened the Sauchiehall Street shop in Glasgow. The respondent opened his shop in Nicolson Street, Edinburgh, on 31st August 1906. I think it is impossible, on the evidence, to hold that the complainers have captured the Scotch market so as to entitle them to a monopoly of the name Irish Linen Company, and I am accordingly of opinion that they are not entitled to interdict in terms of the first branch of the prayer of the note.

The question then arises whether the complainers have succeeded in proving that the respondent has passed off or attempted to pass off his goods as theirs. The principle to be applied to this part of the case is laid down in *Reddaway* v. *Banham* (1896, A.C. 199), by Lord Herschell at p. 209 thus:—"The principle which is applicable to this class of cases was, in my judgment, well laid down by Lord Kingsdown in *Leather Cloth Co.* v. *American Leather Cloth Co.* (1865, 11 Clark H.L. 523 at p. 538). It had been previously enunciated in much the same way by Lord Langdale in the case of *Croft* v. *Day* (1845, 7 Beav. 84). Lord Kingsdown's words were as follows:—'The fundamental rule is, that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore (in the language of Lord Langdale, in the case of *Perry* v. *Truefit*, 1842, 6 Beav. 66), be allowed to use names, marks, letters, or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are the

manufacture of another person.'" It is not necessary in order to get interdict to prove a fraudulent intention on the part of the respondent (*Cellular Clothing Co.* v. *Maxton & Murray*, 1899, 1 F. (H.L.) 29, per L.C. Halsbury at p. 31).

In the present case what the complainers allege is that not only does the respondent use the same name as they do, but that his window dressing and window tickets so resemble theirs that they are calculated to mislead, and have misled, customers into thinking that the shop at Nicolson Street is a branch of their business. The peculiarity of the present case which makes it unlike any of those cited at the hearing is that we are here dealing with retailers, not manufacturers. What the complainers are trying to do is to prevent the respondent retailing goods irrespective of any question as to their manufacture. No doubt the complainers do represent in their advertisements and circulars that they are manufacturers, but the case made for them was not that the respondent was passing off goods as manufactured by the complainers which were in truth manufactured by some one else. Their case is that the respondent, as a retailer, was adopting means which would have the effect of diverting their customers. As regards the complainers' claim to be manufacturers, it appears that William Plotzker had in the year 1902 a factory at Londonderry, the rent of which was £1, 17s. 6d. He admits that he could not give it personal supervision, and had to give it up. It is maintained, however, that although the goods they sell are made by such manufacturers as Leinster and Sheills, there is on the part of William Plotzker a certain selection of raw material and designing of shapes. It is in evidence that certain machinery at Leinster's manufactory is set apart for complainers' business, and that they have a special stock room there. Special plant is also reserved for them in James Sheills' manufactory in Londonderry. In reality, however, both the complainers and the respondent are selling goods which are made by third parties. The respondent gets goods which he sells from John A. Sheills in Belfast. The complainers get goods which they sell from James Sheills in Londonderry. The case is, therefore, not one in which any representation is made in regard to a manufactured article. The complainers' case is that the respondent has used means in exposing his goods for sale which induce customers to believe his shop is a branch of theirs.

It is not clear what prompted the respondent to go into the shirt and collar trade. He seems to have been a commercial traveller in furniture, jewellery, etc., before 1902, when he went to South Africa for about three years. His brother, Harris Lucas, who is a horse-dealer, seems to have been acting along with him in the establishment of the Nicolson Street shop, although he says he had no general authority to act for him. The shop was taken in the month of May 1906. The first thing that was done was to employ the witness Grant, who is a shopfitter in Edinburgh. According to his evidence—and he seemed a reliable witness—it was he who suggested that the signboard should bear the name "Irish Linen Company." The evidence of the respondent is that at this time he had never heard of the Plotzkers in connection with this or any other business. A suggestion was made by some of the complainers' witnesses that the respondent knew of the Irish Linen Company, because the Plotzkers and the Lucases were connected by marriage. The respondent, on the other hand, says that it was on the occasion of a visit to the Isle of Man that he got the idea of the name Irish Linen Company. Against this is the fact that there is no mention of Isle of Man on record, although there is mention of an Irish Linen Company at Harrogate. The evidence of Leinster rather confirms the idea that Harris Lucas at least knew something of the complainers' business. The next step was that Harris Lucas went to Ireland early in July 1906 to interview Leinster. He says that he got his name out of a directory. Nothing passed between them on the occasion of this meeting in regard to the Plotzkers. It was on the occasion of a second visit that Harris Lucas paid to Ireland, about the 23rd of July, that Leinster says Harris Lucas mentioned that he was thinking of trading as the Irish Linen Company, when he (Leinster) warned him against doing so, on account of the complainers' business with that name. By this time the signboard had been put on the respondent's shop. The respondent was told by Harris of his conversation with Leinster, but considered that he was within his rights in using the name Irish Linen Company. The respondent then gave an order to the witness Wood, a ticket writer in Edinburgh, to prepare tickets for his shop. The designs of the tickets were left to Wood, who used for them dies which he had had for more than twenty years. They are lighter in colour than the complainers', and I do not think can be said to be an imitation. The window dressing was left to Chamberlain, who carried it out according to his own ideas without any suggestion from Harris or Hessel Lucas. The shop was opened on 31st August.

One difficulty about this part of the case is in connection with Harris Lucas, whom I did not consider a satisfactory witness. I think it is proved by the evidence of Griffiths and M'Call that he visited the complainers' shop in Sauchiehall Street—they say about the month of August—and took stock of its contents. I also think it proved by the evidence of Peters, a ticket writer in Glasgow, that Harris Lucas instructed him to copy the tickets in the Sauchiehall Street shop. Whether this visit to Peters was before or after the visit to the

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Sauchiehall Street shop spoken to by Griffiths and M'Call is not clear. The commission given by Harris Lucas to Peters came to nothing, and the tickets were in point of fact supplied by Wood. Whatever the motive was that induced Harris Lucas to act as he did in Glasgow, I do not think the respondent is necessarily affected by what he did, and I think it is proved that Grant, Wood, and Chamberlain did their work on Hessel's instructions, without any intentions of copying the complainers' Sauchiehall Street shop. I think that the result of the evidence is to show that, from whatever cause, the respondent came to believe that there would be a demand for Irish linen shirts and collars in Edinburgh. Even if he believed that custom could be attracted by a shop of the particular design which had attracted custom in Glasgow, I do not think he would be doing anything illegitimate in employing the same means, provided it was only to attract custom and not to divert customers from the complainers. I think the evidence as to the existence of customers of the complainers in Edinburgh is inconclusive. In the first place, Bernard Plotzker, who is in charge of the Sauchiehall Street shop and the shop in Union Street, Glasgow, subsequently opened, cannot name a single Edinburgh customer. The complainers' agent who examined the list of customers in the Fleet Street books states that he made up a list which contained thirty Edinburgh customers. This list was, however, not produced, and there has been no opportunity of finding out who these customers are. Griffiths, the salesman in Sauchiehall Street, says there are a number of customers in Edinburgh. Here, again, there is a total absence of names, and no information is given as to the dates on which they were supplied. Two witnesses were adduced who were said to have been actually misled, the first an Indian of the name of Khory. He, however, only came to know of the Irish Linen Company in Sauchiehall Street in September 1906. This was after the respondent's shop was opened, and he only saw No. 75 of process, which is the respondent's advertisement, in a theatre programme, on which the complainers founded a strong argument, in October 1906. The other witness, Greenhorn, states that he has got goods from the complainers for two years. This was from Acomb Street, Manchester, a shop which, according to the evidence, never had "Irish Linen Company" on it, but only bore the name William Williams & Company. It does not appear that the complainers advertised in any distinctively Edinburgh or indeed in any distinctively Scotch newspaper. I am inclined to take the view of the respondent's business which is put by his shopman. He says that it is a retail business which depends on customers passing the shop and being attracted by the goods, and going in and buying, and that the business stands on its own legs and depends on its own attractions. As Lord Macnaghten puts it in the case of *Montgomery* v. *Thomson* (1891, A.C. 217 at p. 223), the question is whether the respondent went to Nicolson Street simply with the object of stealing the complainers' trade, and in the hope of reaping where he had not sown. I am unable to take this view of the respondent's conduct, and therefore think the complainers have failed to make out a case of passing off.

There only remains the point which is stated in the 13th plea in law for the respondent. [Plea 13:—"In respect that the complainers have made false statements to the public to induce trade, as condescended on, they are barred from insisting in the present proceedings."] The argument in support of it is founded on such cases as *Newman* v. *Pinto* (1887, 4 R. P.C. 508), and *Bile Beans Manufacturing Co.* v. *Davidson* (1906, 8 F. 1181). I do not think these cases have any bearing on the present. There is no suggestion that the shirts and collars supplied by the complainers did not come from Ireland; and whatever view may be taken of the accuracy of their representation that they are manufacturers, there is nothing to bring the case nearly up to what is required in the authorities referred to. If the complainers had been able to make out a case for interdict I should not have held that they were barred from getting it by any representations they made.

For the reasons above mentioned I am of opinion that they have failed to make out their case, and that accordingly the note should be refused, with expenses.—22*nd June* 1907.

Counsel for the Complainers, Crabb Watt, K.C., Orr Deas; Agent, Robert M. Scott, Solicitor.—Counsel for Respondent, A. M. Anderson, A. A. Fraser; Agents, Robertson & Wallace, S.S.C.

A. M. H.

BILL CHAMBER.

(*Lord Guthrie.*)

83. Elliott *v.* Charles W. Cassils & Company and Others.

Partnership — Dissolved Partnership—Differences Between Partners—Accounting — Action of Accounting Pending in Sheriff Court — Petition for Judicial Factor—Appointment Refused — Partnership Act 1890 (53 and 54 Vict. cap. 39), sect. 39.

This was a petition by John Wilson Elliott, merchant, Glasgow, presented under sect. 39 of the Partnership Act 1890, and also at common law, for sequestration of the partnership or joint adventure between him and Charles W. Cassils & Co., calico printers, Glasgow, and Charles Cassils and Charles William Cassils, the in-

dividual partners of said firm, with a view to profit in soft goods and general merchandise, and the appointment of a judicial factor to wind up the co-partnery.

Sect. 39 of the Partnership Act 1890 is in these terms:—

On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm.

The petitioner made, *inter alia*, the following averments:—

The terms of the co-partnery were arranged between the petitioner and the said Charles Cassils. It was agreed that the co-partnery should be terminable at will, that each of the partners should be interested in the profits and losses to the extent of one-half, and that the profits should be divided between the partners as and when available. No capital was contributed by either party, and none was required for the purpose of the business.

The business of the co-partnery, which was successful, was by mutual arrangement transacted in the name of the said Charles W. Cassils & Co., who had control of the financial arrangements, and acted as cashiers for the concern. They from time to time received the sums due to, and made payment of the sums due by, the co-partnery.

The parties carried on the co-partnery under the arrangement mentioned until 20th February 1907, when the same was terminated by notice given by the petitioner to the said Charles W. Cassils & Co., which was thereafter duly confirmed and accepted by them. The petitioner from time to time received sums against his share of profits, but throughout the currency of the co-partnery a large sum stood and presently stands at his credit. On the co-partnery being terminated as aforesaid, the said Charles W. Cassils & Co. prepared a trial balance-sheet as at 20th February 1907, and submitted same to the petitioner. The said balance-sheet shews that at that date the said Charles W. Cassils & Co. held a sum of cash amounting to over £2500 belonging to the co-partnery, against which there were certain liabilities outstanding, but the same are small in number and amount, and are more than met by outstanding book-debts and other claims due to the concern.

During the currency of the co-partnery the said Charles W. Cassils & Co. and the said individual partners thereof, wrongfully and in breach of their duty, failed to keep the cash balances arising on the co-partnery trading separate from their own monies, but immixed the same with and used and applied them for their own purposes, and in particular in furthering their own separate business of calico printers. In particular, on or about 19th July 1905, part of the co-partnery funds, amounting to £1200 or thereby, was, without the authority and consent of the petitioner, applied by them in the purchase, or in part payment of the purchase price, of certain copper rollers. Said rollers are presently being used by them for their own behoof in their calico printing business, and are alleged by them to be their exclusive property. From the use thereof large profits have accrued to them, but they decline to recognise their liability to account therefor to the petitioner. It is believed and averred that at or about the time in question practically the whole balance at the credit of the co-partnery had been applied by the said Charles W. Cassils & Co. and the said individual partners thereof to their own uses, and were at risk in their separate business. The business of the said Charles W. Cassils & Co. has latterly been in an unsatisfactory state, owing to losses sustained and to excessive drawings on the part of the said Charles Cassils.

The trial balance-sheet, dated 1st April 1907, before mentioned, purports to bring out a sum of £478, 1s. 6d. as the divisible assets of the concern. Said balance-sheet is in many respects inaccurate; the liabilities therein stated, amounting to over £400, are either not due by the co-partnery, or in whole or in part cancelled by admitted credit entries. Further, the said Charles W. Cassils & Co. and the individual partners thereof wrongfully claim to retain a sum of £150 per annum during the last two years of the co-partnery in respect of alleged services rendered. In said balance-sheet no stock has been taken into account, and no provision made for interest on cash balances or for outstanding debts, some of which, it is believed and averred, have been collected by the said Charles W. Cassils & Co. without advising the petitioner or crediting him therewith.

The petitioner has invited the said Charles W. Cassils & Co. and the said individual partners thereof to concur with him in appointing a neutral person to wind up the affairs of the co-partnery, but they decline to do so. The petitioner has also demanded access to the bank pass-books in order to investigate the application by them of the co-partnery funds. This also has been refused. The cash balance at credit of the co-partnery, amounting to over £2000, and the whole stock-in-trade, are presently in the hands or under the control of the said Charles W. Cassils & Co. and the said individual partners thereof. Looking to the questions which have arisen between the parties, and more particularly the questions as to the liability of the said Charles W. Cassils & Co. and the said individual partners thereof to the co-partnery in respect of their unauthorised user of the co-partnery funds, their purchase of the said rollers, and their liability to deliver the same and to account for the profits accruing from their use of said rollers, it is expedient and necessary, in order to secure the petitioner's interest, that the affairs of the co-partnery should be sequestrated and a judicial factor appointed to wind up the co-partnery.

Answers were lodged for Charles W. Cassils & Co. and the said Charles Cassils and Charles William Cassils, in which, *inter alia*, the following averments were made:—

The respondents were approached by the petitioner in May 1902, in consequence of the failure of a business in Belfast, with which he had been connected, and with a view to assisting him they entered into the joint-adventure referred to. The respondents have an office and staff, and conduct a large business in Glasgow as calico printers and merchants. The petitioner has no business premises, and resides in lodgings in Glasgow. It was arranged between the

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parties that a sum of £150 should be charged annually against the joint-adventure in respect of the use of the respondents' name, business premises, and staff, and this sum was duly debited against the joint-adventure from time to time. A special set of books was kept by the respondents for the joint-adventure, and all funds were passed through their general bank account with the petitioner's full knowledge and consent and in accordance with the arrangement between the parties. The petitioner had daily access to the cash book, and was fully conversant with all the cash transactions of the joint-adventure, and he never on any occasion took objection to the manner in which the accounts and cash were dealt with. During the subsistence of the joint-adventure the petitioner was by arrangement allowed to draw £20 per month in anticipation of profits, but in point of fact he drew sums considerably in excess of this amount, which were duly debited against him. There was no fixed period for the division of profits, and although trial balances were made out from time to time, no concluded balance-sheet was ever adjusted nor any final settlement of accounts demanded by the petitioner until his withdrawal from the joint-adventure. The petitioner in May 1906 was requested by the respondents to furnish a statement of the stock which he had in hand belonging to the joint-adventure, but declined to do so, and on the respondents investigating matters for themselves, they found that the petitioner had in his previous statements misrepresented to them the stocks held by him on which the trial balances had been framed, and that greatly exaggerated profits had in consequence been shown. The petitioner, in consequence of these discoveries by the respondents, intimated his withdrawal from the joint-adventure.

On receiving the petitioner's said letter of withdrawal, the respondents informed him that they would proceed to realise the remaining assets of the joint-adventure, and bring the same to a close with all possible speed in accordance with the subsisting arrangements between the parties. The petitioner, however, brought an action against the respondents in the Sheriff Court of Lanarkshire, concluding for payment of £826, 8s. 11d., and for warrant to sell various goods which he alleged to form part of the stock in trade of the joint-adventure. The petitioner's claims in the said action are greatly exaggerated and in large part unfounded, and the result of the proceedings thus taken by him has been to prevent the respondents winding up the affairs of the joint-adventure, and duly accounting to the petitioner for his share therein.

The respondents, on receiving the petitioner's notice of withdrawal, proceeded to frame a trial balance-sheet in order to ascertain approximately how the affairs of the joint-adventure stood. A copy of the said trial balance-sheet is produced herewith, bringing out a sum of £478, 1s. 6d. at the credit of the same. As against this balance there will be required a sum of £430 in order to pay for work done in connection with pending contracts, and what remains is liable to be absorbed in paying claims in respect of goods sold by the joint-adventure. There is, further, an unascertained liability against the joint-adventure in respect of the expenses of an action presently depending in the Court of Session, nominally at the instance of the respondents' firm, but in reality for behoof of the joint-adventure, against Ernest Absalon, merchant, Brussels. An order for proof has been pronounced in this action, and until the final determination of the case there is in this connection a large contingent liability for expenses, of which the petitioner is liable in his proportion. The petitioner has, moreover, collected certain sums and holds certain accounts in his own name which belong to the joint-adventure, but, although called upon to do so, he declines to furnish an account thereof.

The Petitioner *argued* that he had made out a case for the appointment of a factor in respect (*first*), that the respondents, in whom he had lost confidence, admittedly had monies of his in their hands; and (*secondly*), that his want of confidence was justified by his demand to see the books being refused and the respondents' declinature to appoint a neutral person to wind up the concern. No reasonable offer had been made by the respondents as in the case of *Gow*, *infra*, and an action in which the petitioner's and respondents' interests were divergent was pending in the Sheriff Court (Lindley on Partnership, 5th edition, p. 547; II. Bell's Comm. p. 524; *Pirie*, 1892, L.R. 1 Ch. 633).

The Respondents *argued* that the petition should be refused, as the questions between the parties were merely questions of accounting, and these questions could all be fought out in the Sheriff Court action (*Gow* v. *Schulze*, *infra*; *Collins*, 1852, 14 D. 540, and 1853, 1 Macq. 385).

The Lord Ordinary *refused* the prayer of the petition.

Lord Guthrie.—The partnership or joint-adventure in soft goods, in which the petitioner and the respondents were equally interested, was entered into on 17th May 1902. It was terminable at will, and the petitioner dissolved it by notice given on 20th February 1907. It is now being wound up by the petitioner and the respondents, and, on account of differences which have arisen between the parties in winding up the concern, the petitioner asks the appointment of a judicial factor to take over and complete the winding up.

The case of *Gow* v. *Schulze*, 1877, 4 R. 928, shows on the one hand that if, from disputes between the partners of a dissolved firm, the assets of the firm cannot be realised to advantage and the debts duly paid, a judicial factor will be appointed. In this case there are disputes between the partners of a dissolved firm, but not in regard to collecting debts or paying creditors. In the Sheriff Court action referred to in the Answers, the petitioner states: "The outstanding liabilities of the said partnership or joint-adventure are small in number and amount, and are more than balanced by outstanding book debts and claims due to the concern."

But *Gow* v. *Schulze* also shews that the existence of questions of accounting between the partners of a dissolved firm forms no sufficient ground for the appointment of a judicial factor, because such questions cannot be dealt with by a judicial factor, but must form the subject of an action or actions between the parties. In this case the questions between the petitioner and the re-

spondents resolve themselves into questions of accounting, including (*a*) a question as to the use of partnership funds in connection with the respondents' separate business as calico printers; (*b*) the respondents' right to credit themselves with £150 a year during the last two years of the partnership in respect of alleged services rendered; (*c*) a question whether the petitioner did not draw more than he was entitled to draw; and (*d*) whether the respondents have credited the partnership with all the sums collected by them from the firm's debtors. These questions and others are all involved in an action at present pending in the Sheriff Court at Glasgow, raised by the petitioner against the respondents.

I may add that the petitioner's averments as to the financial position of the respondents are too vague to be considered.

I therefore refuse the petition, with expenses.—*27th June* 1907.

Counsel for Petitioner, C. D. Murray; Agents, Cumming & Duff, S.S.C. — Counsel for Respondents, Spens; Agents, Auld & Macdonald, W.S.

C. H. B.

FIRST DIVISION.

(*Lords M'Laren, Kinnear and Pearson.*)

84. Macdougall *v.* Bremner.

Contract—Validity—Pactum Illicitum—Agreement Between A, a Building Superintendent, and B, a Measurer Employed by A to Measure Certain Buildings for A's Principal, That B Should Pay Commission to A on Measuring Job—Circumstances in Which Court Refused to Enforce Contract Although No Plea Against Its Validity Was Stated on Record.

Appeal from the Sheriff Court of Lanarkshire at Glasgow.

In this action William Brown Macdougall, the son and assignee of Robert Macdougall, sought to recover from John Bremner, a measurer, the sum of £68, 4s. 3d. alleged to be due as commission on a measuring job stipulated for in a verbal agreement entered into between the defender and the said Robert Macdougall, the pursuer's author.

The pursuer's averments were to the following effect:—

Cond. 1. During the years 1902 to 1906 Mr John Cyril Macdougall, 44 Granby Terrace, Hillhead, Glasgow, was in course of erecting four tenements of dwelling-houses at the corner of Albany Street and Kelburn Street North, Kelvinside, Glasgow. Robert Macdougall, residing at 44 Granby Terrace aforesaid, the father of the said John Cyril Macdougall, had full charge and control of the building operations on behalf of his said son.

Cond. 2. During or about the month of May 1902 the said Robert Macdougall, in pursuit of his conduct of the said building operations, agreed to employ and did employ the defender, John Bremner, as measurer for the said job. It was a condition of the employment of the said John Bremner by the said Robert Macdougall, expressly agreed to by the former when the latter agreed to employ him as aforesaid (the bargain both as to the employment and as to the after-mentioned commission being made verbally between the defender and the said Robert Macdougall), that the former should pay to the latter in respect of such employment a commission of three-quarters per cent. upon the total amount of the contracts of the various tradesmen as the same should be ascertained by the measurement of the said John Bremner. The said total amount of these contracts is £9095, and the amount of said commission payable to the said Robert Macdougall in terms of said arrangement is £68, 4s. 3d.

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Cond. 3. By assignation dated 21st June 1906, the said Robert Macdougall assigned to the pursuer William Brown Macdougall (his son), his whole right, title, and interest in and to his claim against the defender John Bremner for the said sum of £68, 4s. 3d. sterling, being the amount of his said commission.

The defender denied the contract and pleaded, *inter alia*: "(1) The action is irrelevant."

On 25th July 1906 the Sheriff Substitute (Fyfe) pronounced the following interlocutor:—

"Having heard parties' procurators and considered the closed record, Sustains defender's first plea; dismisses the action."

"*Note.*—I think that it is accepted law that innominate contracts of an anomalous and unusual character cannot be constituted by parole testimony alone. The pursuer's case is laid solely upon a verbal arrangement, under which his author was to receive the sum now sued for. The only question, therefore, is whether that arrangement founded on falls within the description of contracts which cannot be proved parole. I think it very obviously does.

"The case laid is—(1) that Robert Macdougall, being the building superintendent for John Cyril Macdougall, and acting as such superintendent, engaged defender as the measurer for the building [that is to say, that Robert Macdougall as superintendent, and defender as measurer, were alike the employees of John Cyril Macdougall]; (2) that Robert Macdougall, on his employer's behalf, undertook to pay defender certain fees, but that on his own behalf Robert Macdougall arranged verbally with defender that of such fees—which were represented to the employer as going into defender's pocket—a proportion was really to find its way into the private pocket of Robert Macdougall.

"This secret commission arrangement is what pursuer wants to prove parole. I don't think the action as laid is relevant.

"I think, also, that the case is irrelevant in respect the sum sued for is claimed by Robert Macdougall personally. Upon pursuer's own statement of his case, Robert Macdougall could not take this sum personally, for he says he was

11*a* and 12*a*

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John Cyril Macdougall's agent, and if an agent gets a rebate upon an account payable by his principal, that rebate belongs, not to the agent, but to the principal.

"I think, further, that the case as stated is not relevant, because a rebate upon fees cannot be claimed until the fees themselves have been paid, and it is not here averred that John Cyril Macdougall has paid the measurer's fees to defender. I accordingly sustain defender's first plea in law, and I do not therefore require to express any opinion upon the second plea, which possibly would have necessitated at least a limited proof."

The pursuer *appealed* to the First Division of the Court of Session.

Argued for the Appellants: The contract was not of so unusual or anomalous character that it could not be constituted by parole evidence alone (*Forbes* v. *Caird*, 1877, 4 R. 1141; *Henderson* v. *United Collieries*, 1904, 11 S.L.T. 653).

Argued for the Respondents: The alleged contract was a *pactum illicitum* and contrary to public policy, and could not be enforced by the Court (*Laughland* v. *Millar, Laughland & Co.*, 1904, 6 F. 413; *Harrington* v. *Victoria Graving Dock*, 1878, 3 Q.B. Div. 549). It was a bargain of the kind which was now an offence under the Prevention of Corruption Act, 6 Edw. VII. cap. 34.

The Court *assoilzied* the defender.

Lord M'Laren.—This action is brought by the assignee of a person who, as clerk of works, had charge of the erection of certain buildings in Glasgow. This clerk of works, Mr Robert Macdougall, employed John Bremner, the defender, as measurer to make the measurements on which the tradesmen were to be paid, and as a condition of giving him the employment he avers that he stipulated for payment of a commission of ¾ per cent. upon the total amount of the contracts of the tradesmen as ascertained by the measurement. That was a substantial proportion of what Mr Bremner was to get for doing the measuring. The action is brought to enforce payment of this secret commission. The Sheriff-Substitute has dismissed the action on the ground that the contract was an innominate contract of an anomalous and unusual character, which could not be proved by parole testimony alone.

I do not think that it is necessary to consider whether the case does fall within the rule on which the Sheriff founds. I am not at all disposed to say that the Sheriff-Substitute's finding is wrong. But it seems to me that there is a clearer and more direct ground of decision, and that is that the stipulation is illegal. It is true that this defence is not specially pleaded. But where the nature of the transaction is disclosed on the face of the proceedings, it is consistent with the known law on this subject that the Court will refuse to give decree in an action to enforce a *pactum illicitum*. There is no doubt that the stipulation which it is here sought to enforce was within the class of obligations contrary to public policy. This is assumed in the Act of Parliament recently passed, because it is impossible otherwise to suppose that the Legislature would have made it punishable to bargain for a secret commission. I am confirmed in proposing to decide the case on the ground I have stated by the case of *Harrington*, to which we were referred; and apart from authority, I am sure your Lordships would not give the aid of the process of the Court to enforce a bargain which the Legislature has declared to be a crime.

Lord Kinnear and *Lord Pearson* concurred.—*26th June* 1907.

Counsel for Appellant, A. M. Anderson; Agents, Clark & Macdonald, S.S.C.—Counsel for Respondent, Macaulay Smith, Morton; Agent, Norman N. Macpherson, S.S.C. W. A. R.

FIRST DIVISION.

(The Lord President, Lords Kinnear and Pearson.)

85. Hastie *v.* Magistrates of Edinburgh.

REPARATION — RELEVANCY — NEGLIGENCE—PROPERTY—DUTY OF PUBLIC AUTHORITY WITH REGARD TO UNFENCED ARTIFICIAL POND IN PUBLIC PARK — SAFETY OF CHILDREN UNATTENDED—CONTRIBUTORY NEGLIGENCE.

(*Reported ante, Vol. XIV. p.* 208.)

Reclaiming Note against an Interlocutor of Lord Salvesen.

The facts of the case appear from the previous report.

The Pursuer *reclaimed* and *argued*: This was an artificial pond constructed by the defenders in a place to which children had access and were known to resort. It was the duty of the defenders to construct such a pond so as not to be a danger to children; in any case their duty to fence it for their protection was clear (*Greer* v. *Stirlingshire Road Trs.*, 1882, 9 R. 1069; *Gibson* v. *Glasgow Police Commissioners*, 1893, 20 R. 466). The Lord Ordinary in his judgment founded to some extent upon the fact that the child had been allowed to be unattended. That did not amount to contributory negligence on the part of the parents (*Martin* v. *Wards*, 1887, 14 R. 814; *Forbes* v. *Aberdeen Commissioners*, 1888, 15 R. 323).

The Court, without calling upon counsel for the respondents, *refused* the reclaiming note.

The Lord President.—My Lords, I think the judgment of the Lord Ordinary is right. I do not think it expedient, in such a case as this, to lay down in general terms what are the precise duties which lie on persons who, like the magistrates here, have the care of public places; but the existence of the so-called negligence which is averred here would, in my humble judgment, prevent the existence of artificial water at all.

I think the learned counsel commented too much on the topic of contributory negligence, and neglected to consider what was the proximate cause of the accident. The proximate cause was not the existence of the pond, but the fact of the child being unattended. He says the child had a right to be there; of course it had, just as a child has a right to be on the public street. But if the parents of children of such tender years cannot provide nurses to look after them, those children run risks which other children who are more carefully looked after do not. That cannot be altered by law; it is just one of the results of the world as we find it; and to say that if a child unattended falls into a pond and is drowned that imposes liability on the magistrates, seems to me to be against all common sense. It may be quite true, as the reclaimer's counsel stated, that the pieces of water in the other parks of Edinburgh are natural and not artificial, but I see no distinction in this matter between pieces of water which are natural and those which are artificial. I never heard that if a child who was left to run about unattended fell into the Serpentine the owners of Hyde Park would be liable. I am of opinion that the Lord Ordinary is right.

Lord Kinnear.—I quite agree with the Lord Ordinary and with your Lordship. There is here no question of contributory negligence. What we are asked to consider is whether there is here a relevant averment of fault on the part of the magistrates, and until that question is decided no question of contributory negligence can arise.

Children cannot be left by their parents to play in public places except subject to the risks which must necessarily be attendant on such places.

Lord Pearson.—I also agree.—*2nd July* 1907.

Counsel for Reclaimer, M'Lennan, K.C., Ingram; Agent, R. Arthur Maitland, S.S.C.—Counsel for Respondents, Cooper, K.C., Spens; Agent, Thomas Hunter, W.S. W. A. R.

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Cassidy v. Connochie.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling and Low.)

86. Cassidy *v.* Connochie.

I. Slander — Relevancy — No Damage—Charge against Police Constable of Taking Bribes — Investigation with Result of Clearing the Constable in the Eyes of Superior Officers—Proof Allowed.

II. Slander — Privilege — Information by Member of Public to Chief Constable that Sergeant of Police Took Bribes from Publicans—Communication Held Privileged.

III. Mora—Action of Damages — Verbal Slander—Action Raised Three and a Half Years after Slander Uttered —Slander of Police Constable—Constable Unable to Raise Action while Member of Police Force — Action Raised after Retiral on Pension—Plea of Mora Repelled.

Appeal against Interlocutor of the Sheriff-Substitute of Lanarkshire at Glasgow.

This was an action of damages for verbal slander alleged to have been uttered in November 1902, the present action having been raised in June 1906. The material averments for the pursuer were as follows, the words printed in italics having been added by amendment at the hearing on 4th July 1907:—

Cond. 1. The pursuer Patrick Cassidy was for over thirty years in the Dumbartonshire Constabulary, from which he retired on pension on 2nd December 1905. At his retiral he held the rank of sergeant, and in November 1902 he was sergeant in charge at Duntocher Police Station. The defender Daniel Connochie is a spirit dealer in Glasgow, and at the date mentioned he resided in Helensburgh.

Cond. 2. On or about 14th November 1902 the pursuer met Mr T. Y. Paterson, brewer, 284–288 Castle Street, Glasgow, in Hardgate, Duntocher, when the latter invited him for some refreshment into the public-house there kept by John Black. The pursuer refused the invitation, which was urgently pressed upon him by Paterson. Later in the day the pursuer again met Paterson, who repeated his invitation and invited him into the public-house of Robert Horne, Hardgate, Duntocher, and the pursuer then accompanied Paterson into Mr Horne's house, where he was served with a refreshment. Immediately thereafter Paterson rose and went out hurriedly, and on his way out he threw some money upon the table in the room, saying to Horne "Give the sergeant a bottle of whisky," or words to that effect. The pursuer, who was very much annoyed at what had taken place, indignantly refused to accept either the whisky or the money, and at once left the house.

Cond. 3. On or about 28th November 1902 the pursuer again met Paterson in Hardgate, Duntocher,

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when he urgently pressed him to accompany him to John Black's public-house for a refreshment, but the pursuer peremptorily declined the invitation. Defender was with Paterson when the invitation was given and refused.

Cond. 4. The pursuer believes and avers that on or about said date Paterson and the defender called at the said public-house kept by Robert Horne, where they falsely represented to James M'Kenna (the person then in charge) that the defender was one of Paterson's English travellers, and the defender or Paterson then and there handed to M'Kenna a small sum of money with the remark that it was "for a dram for the sergeant," meaning the pursuer. When the pursuer was informed of this he indignantly and peremptorily repudiated the suggestion that he should take either the drink or the money, and it is believed and averred that the said Robert Horne returned both sums of money to Paterson in a registered letter.

Cond. 5. On or about Sunday 30th November 1902, and in or near the Roman Catholic Church in Helensburgh, the defender falsely and calumniously stated to Chief Constable M'Hardy of the Dumbartonshire Constabulary that the pursuer was guilty of irregularities of a serious nature in the performance of his duties as sergeant of police which rendered him unworthy of occupying the position he held; and in particular he then and there falsely and calumniously stated to the said Chief Constable that the pursuer had accepted bribes from the said T. Y. Paterson, and that Paterson had on two occasions, condescended on in Articles 2 and 4, left money with the said Robert Horne for the pursuer, who applied for and received spirits from the latter. The defender further, at the same time and place, falsely and calumniously stated to the same Chief-Constable that the pursuer had been heavily indebted to his grocer and had received money by way of bribe from Horne or Paterson to pay off the debt. *The said statements were also made maliciously and without probable cause.*

Cond. 6. The said statements were made by the defender of and concerning the pursuer, and falsely and calumniously represented, and were meant by the defender to represent, that the pursuer was guilty of misconduct and corruption in the exercise of his duties, and had accepted bribes from publicans and others not to report offences against the licensing laws, and that pursuer was thereby unfit to act as sergeant of police.

Cond. 7. The pursuer had repeatedly reported John Black, publican, Hardgate, Duntocher, for breach of his certificate, and he believes and avers that the defender and the said T. Y. Paterson, or one or other of them, were interested in the business carried on by Black, and had formed a scheme to bribe the pursuer not to report further breaches of certificates, and if he had accepted the bribes offered to him to deter him from reporting such breaches by threatening to report him to the Chief Constable if he did so, or otherwise to represent that the pursuer had accepted bribes and thereby to have him dismissed from the constabulary, or at all events removed from that district, so that he might not have an opportunity of reporting further breaches of certificate by Black. The pursuer further believes and avers that in pursuance of this scheme the defender and Paterson attempted to bribe the pursuer, as condescended on in Articles 2 and 4, and having failed to induce the pursuer to accept any bribe the defender falsely and calumniously made the statements complained of, with the intention and for the purpose of having the pursuer dismissed from his employment.

Cond. 8. As a result of the said false and calumnious statements Chief Constable M'Hardy, on or about 1st December 1902, summoned the pursuer to headquarters in Dumbarton and charged him with accepting bribes of drink and money from Paterson and Horne, and, although the pursuer denied the charges, the Chief Constable instructed Depute-Chief Constable Cameron to proceed to Duntocher and inquire into the charges and to report. The Depute-Chief Constable instituted inquiries at Duntocher accordingly, and reported in writing that the charges against the pursuer were unfounded. Thereafter the Chief Constable instituted other inquiries, and in particular he summoned the said Robert Horne to Dumbarton and examined him with reference to the said charges, with the same result.

Cond. 9. The pursuer, under conditions of his service in the Dumbartonshire constabulary, was debarred from instituting any action for damages for the slanders complained of while he remained in the service without the consent of the Chief Constable, for which he applied verbally and in writing, but the Chief Constable refused to give his permission, and undertook to get a withdrawal of and an apology from the defender for the slanders, but it is believed and averred that the defender refused to make any apology.

The pursuer pleaded, *inter alia*:

"2. The defender having maliciously and without probable cause slandered the pursuer as condescended on, the pursuer is entitled to reparation as prayed for."

The Defender pleaded, *inter alia*:

"1. *Mora.*

"1*a*. Privilege.

"2. The action is irrelevant."

The Sheriff-Substitute (Fyfe) sustained the first and second pleas in law for the defender, and dismissed the action.

The pursuer appealed.

Argued for the Pursuer: 1. Relevancy. It was no answer to say that, the slanderous statement being on investigation found to be false, the pursuer was retained in his situation as police sergeant, and that therefore he suffered no damage. There was damage to feelings and reputation, and the pursuer was entitled to something in name of *solatium*, or at least to an apology. 2. Privilege. There was here no privilege. It was not enough that the person to whom the communication was made had an interest to know, if the person making it had no duty, legal or moral, to make it (*M'Callum* v. *M'Diarmid & Co.*, 1900, 2 F. 357, per Lord Kincairney at 359). Facts and circumstances shewing malice were averred, and it was not necessary to use the word "maliciously" in the condescendence. The averment of malice and want of probable cause was there in substance, and it was pleaded in the pleas in law. *Ob majorum cautelam* the pursuer was willing to amend by averring it. 3. *Mora.* *Mora* was not a plea in law. It was a circumstance bearing on the evidence (*Bain* v. *Assets Co. Ltd.*, 1905, 7 F.

(H.L.) 105, per Lord Davey at 109; *Moncrieff* v. *Waugh*, 1859, 21 D. 216). The delay in bringing this action was explained in a satisfactory manner. The pursuer was really *non valens agere*, so far as this case was concerned, while he was in the police force (*Cunningham* v. *Skinner*, 1902, 4 F. 1124; *Winn* v. *Quillan*, 1899, 2 F. 322).

Argued for Defender: [Counsel was asked to speak only to the questions of relevancy and *mora*, the Court being satisfied that the occasion was a privileged one]. 1. Relevancy. The privilege here was of a very high order. Facts and circumstances shewing malice must be averred, and these must be independent of the facts averred as ground of action in this case (*Campbell* v. *Cochrane*, 1905, 8 F. 205, per Lord President at 212, and Lord M'Laren at 214). There was no proper averment that a scheme had been concocted by the defender. In any event, the pursuer must amend by averring malice and want of probable cause. 2. *Mora.* Cases of verbal slander were the very cases above all others in which action must be taken at once if the pursuer was not to be held to have given up any claim he had. In *Winn's* case the slanders were continuous, down to the time of raising action. In *Cunningham's* case there had been an action prior to that in question, which had been dismissed because the pursuer was unable to find caution. There was a pecuniary disability which had prevented the pursuer suing earlier. He had, in effect, given notice to the defender that he had not departed from his claim. The position of the defender must be considered as well as that of the pursuer (*Young* v. *Young*, 1903, 5 F. 330; *Assets Co. Ltd.* v. *Bain*, 1904, 6 F. 676, per Lord Kyllachy at 685; 1905, 7 F. (H.L.) 105, per Lord Chancellor at 106; *Colvin* v. *Johnstone*, 1890, 18 R. 115). There were the two elements of (*a*) hardship on the defender, and (*b*) presumed abandonment of claim. In such a case as this the latter was probably the more important. 3. If the pursuer amended and the case was sent back to the Sheriff as relevant, the defender should get full expenses (*Thornton* v. *Boyd & Forrest*, 1907, S.C. 390).

Counsel for the pursuer craved leave to amend by adding the words printed in italics at the end of Cond. 5. Leave was granted.

The Court *sustained* the appeal, *recalled* the interlocutor appealed against, *remitted* the cause to the Sheriff to proceed as accords, and *found* no expenses due to or by either party since the date of the interlocutor appealed against.

Lord Stormonth-Darling.—In this case a retired police sergeant sues a publican in Glasgow for alleged slander. The slander is said to have been uttered on 30th November 1902. It is practically admitted that something of the nature alleged was said by the defender, although there is some dispute as to the exact terms of his communication to the chief constable. The pursuer retired from the police force on 2nd December 1905. This action was brought in June 1906. The Sheriff-Substitute has disposed of the case in this way: he has sustained the "defender's first and second pleas." By that I think it clear he means the defender's pleas 1, 1A and 2, because he refers to these pleas in a way which shews that he intended to sustain them all. I do not think that is the right way of disposing of the action.

1. As to the defender's first plea, viz. *mora*, I agree that in the ordinary case there is no justification for bottling up—if I may so express it—an action of damages for slander, particularly when it is for verbal slander uttered *in rixa*, or when it is merely a case of loss of temper or good manners. No Court will encourage a stale action of slander, and I would say that an action of slander might generally be described as stale where the slander has been uttered four years before the bringing of the action. But with regard to *mora*, in this case it is to my mind a decisive consideration that during most of the time which elapsed between the utterance of the slander and the bringing of the action the pursuer was under inhibition from his superior officer. Under the rules of the police force he required the consent of the chief constable before he could bring an action. It is not disputed that such consent was asked and was refused, but the refusal was coupled with something like a promise by the chief constable that he would ask the defender for a retraction. The retraction was refused. Looking to this fact, and considering that the pursuer only left the police force on 2nd December 1905, it is, I think, impossible to say that there was any undue delay in raising the action.

2. With regard to the plea of privilege I think the Sheriff-Substitute was undoubtedly right in saying that this was a privileged occasion, and that an averment of malice and want of probable cause was necessary. But this defect has been cured by amendment. I do not know why the words now inserted were not there from the first, because the pursuer is not under the necessity of adding any averment of facts and circumstances inferring malice. Such facts and circumstances were already distinctly alleged on record, because the pursuer avers that the defender and another person being interested in the business carried on by a publican whom the pursuer had repeatedly reported for breach of certificate, had formed a scheme either to induce the pursuer to accept bribes and so to obtain a hold over him by threatening to report him; or otherwise, to represent that the pursuer had accepted bribes, and so to get him dismissed. Anything more serious, or more calculated to found a charge of malice, if proved, I cannot imagine. But it is not necessary to dilate on

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that part of the case, because the pursuer does not ask for an issue, but is willing that the case should go back to the Sheriff Court to be tried before the Sheriff himself.

3. The remaining plea sustained by the Sheriff-Substitute is that the action is irrelevant. All that he says about that is that this "is a claim for injury to reputation, and pursuer's own statement is that he suffered no such injury, because after official enquiry, his reputation was cleared to the satisfaction of the only parties to whom the slander is alleged to have been uttered." I cannot agree with this. No doubt the pursuer was cleared in the eyes of his superior officer, and therefore did not suffer any injury of that particular kind. But if a slander has been uttered, the pursuer is *prima facie* entitled to some damages, or at all events to an apology. Therefore I think this is not a good reason for dismissing the action on the ground of irrelevancy. On the whole matter, I think, now that the necessary words have been added to the record, we should recal the Sheriff-Substitute's interlocutor and remit to him to proceed as accords.

Lord Low.—I am of the same opinion. I should only like to say this—I think that when an action is raised on the ground of slander, and particularly verbal slander, it ought to be brought within a reasonable time after the slander has been uttered; and the Court will view with disfavour any considerable delay. In this case a long period elapsed between the uttering of the slander and the raising of the action; but that delay has been explained in a way which is entirely satisfactory. Further, the defender has not, so far as I can judge, been prejudiced by the delay, and therefore the plea of *mora* is not, in my opinion, well founded. In other respects I agree with what has been said by my brother Lord Stormonth-Darling.

The Lord Justice-Clerk.—I agree. The plea of *mora* should not be sustained as a ground for preventing enquiry into the facts, except in very special circumstances. Here the delay is explained. As to the relevancy of the action the Sheriff-Substitute says that the pursuer has sustained no damage. I think that is an assumption which cannot be made. When there is a relevant averment of slander, the question whether there has or has not been damage to the pursuer cannot be decided until there has been enquiry into the facts.—*4th July* 1907.

Counsel for Pursuer, T. B. Morison, K.C., J. M. Irvine; Agents, Dove, Lockhart & Smart, S.S.C.—Counsel for Defender, Morton; Agent, Charles George, S.S.C. F. A. U.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

87. Brims & Mackay and Others *v.* M'Neill & Sime, S.S.C., and Others.

Process — Summons — Competency — Several Pursuers—Community of Interest —Several Claims—Action to Recover Debts Due to Existing Firm and to Dissolved Firm of Same Name to Whose Business It Succeeded — Action Raised in Name of Both Firms—Conclusion for Payment of Single Sum—Action Held Incompetent.

Reclaiming Note against an Interlocutor of Lord Guthrie.

This was an action of count, reckoning and payment, raised at the instance of "Brims & Mackay, Solicitors, Thurso," the partners thereof, the trustees of the deceased James Brims, and "the now dissolved firm of Brims & Mackay, Solicitors, Thurso," against "M'Neill & Sime, S.S.C., Edinburgh, and James Adam Pattullo, S.S.C., and Henry Vetch, S.S.C., the individual partners of said firm, as such partners, and also against the said James Adam Pattullo, as an individual." The summons concluded against the defenders "conjunctly and severally, or otherwise severally," for payment of the sum of £200 sterling.

The action was raised to recover money alleged to be due under an agreement entered into in 1893 between Brims & Mackay and Pattullo, by which the former sent business to the latter on condition of receiving a certain share of the fees earned.

The firm of Brims & Mackay as it existed in 1893 was dissolved in 1901 by the death of one of the partners, James Brims, but the business was carried on under the same name by another firm, and it was averred that "by arrangement between the parties, it is provided that all accounts due to the late firm of Brims & Mackay are to be collected by and paid to the present firm of Brims & Mackay." In 1893 Pattullo was in business on his own account, but in 1898 he entered into partnership with Vetch, and thereafter the two carried on business under the firm name of M'Neill & Sime. The sum sued for was in respect of business sent to Pattullo both before and after 1901, and both before and after he became a member of the firm of M'Neill & Sime.

The defenders, M'Neill & Sime, pleaded, *inter alia*: "2. The action as laid is incompetent. 3. The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

The defender Pattullo pleaded, *inter alia*:

"1. No title to sue.

"2. The action as laid is incompetent.

"3. The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed.

"4. The arrangement or agreement condescended on with reference to the matter of agency fees is only provable by this defender's writ or oath."

On 26th March 1907 the Lord Ordinary (Guthrie) pronounced the following interlocutor:

Sustains the second and third pleas in law for the defenders M'Neill & Sime; dismisses the action so far as directed against them, and decerns; . . . . further, repels the first, third and fourth pleas in law for the defender James Adam Pattullo, and *quoad* the said defender and the pursuers, allows them a proof *habili modo* of their respective averments.

He delivered the following opinion:—

Lord Guthrie.—The defenders M'Neill & Sime maintained their first, second, third and seventh pleas, namely, no title to sue, incompetency, irrelevancy and prescription. The defender Mr Pattullo maintained similar pleas.

So far as the defenders M'Neill & Sime are concerned, I sustain their pleas to competency and relevancy, and dismiss the action against them.

The objection of these defenders to relevancy was founded on the absence of any relevant averment of an agreement between them and the pursuers to allow the pursuers a share of agency fees. The agreement founded on by the pursuers is alleged to have been made in 1893, when Mr Pattullo began business on his own account, and, as in a question with him, it is said to have continued after he became a partner of the firm of M'Neill & Sime in 1898. But I find no averment of any agreement between the pursuers and M'Neill & Sime, nor any sufficient averment of actings on the part of that firm which necessarily implied such an agreement, apart from Mr Pattullo's alleged obligation.

On the question of competency, both sets of defenders object to the proposal of the pursuers to recover one sum of £200 from them "conjunctly and severally, or otherwise severally." They point out that, while Mr Pattullo's alleged obligation applies to the whole period covered by the condescendence, namely, from 1894 to 1906, M'Neill & Sime had admittedly no relations with the pursuers till 1898, when Mr Pattullo joined the firm. The result is, they say, that the summons contains a conclusion under which it would be possible to find M'Neill & Sime liable for the proportion of the £200 concluded for effeiring to the period between 1894 and 1898, for which, according to the pursuers' averments, Mr Pattullo is alone responsible. I think this objection is well founded, and that the case is indistinguishable from that of *Sinclair* v. *Caithness Flagstone Co.*, 1898, 25 R. 703, per Lord Kinnear, p. 707.

Turning now to the case against Mr Pattullo, I take first his seventh plea, relating to prescription. That plea cannot be disposed of at this stage. The pursuers aver that the accounts in question were incurred on written instructions, and further, that they formed one continuous series. These questions of fact must first be determined before the plea of prescription can be dealt with.

Mr Pattullo's plea on title to sue does not cover the whole accounts sued for. It relates to the period from 1894 to 1st August 1901, during which the firm of Brims & Mackay consisted of the late Mr James Brims and the pursuer Mr Alexander Mackay. Mr James Brims died on 1st August 1901, and thereafter the firm of Brims & Mackay, of which he had been a partner, subsisted only for the purpose of winding up by the surviving partner, Mr Alexander Mackay. For the accounts alleged to be due in connection with work done during that period, the only pursuers are the late Mr James Brims' trustees and "the now dissolved firm of Brims & Mackay." Mr Alexander Mackay is also a partner, but only as a partner of the existing firm of Brims & Mackay. It is said that in order to constitute a good instance for recovery of the accounts during the existence of the dissolved firm, Mr Alexander Mackay ought to have been a pursuer as the surviving partner of that firm.

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This objection is technical, and in the absence of express authority in its support, I repel it. It is admitted that in the case of an existing firm like Brims & Mackay, with a personal firm name, it is not necessary to conjoin the names of any of the partners in order to make a good instance. If this be so, I do not see sufficient reason for holding that a debt due to a firm, which, although dissolved so as to be incapable of carrying on business, still subsists for the purpose of winding up, cannot be recovered without conjoining in the instance the surviving partner or partners, or, at least, the surviving partner who is in charge of winding up (II. Bell's Comm. 527, 533). The cases quoted by the defenders in support of their view were cases where the firm name was descriptive and not personal, and where, therefore, whether dissolved or not, the names of the partners were necessary.

I shall therefore repel Mr Pattullo's first plea of no title to sue, and also his third plea to relevancy. I think the pursuers have sufficiently averred a case of express contract between him and them of the nature alleged by them, and have also made a sufficient case, so far as averment goes, as a foundation for their third plea.

The defender Pattullo *reclaimed* and *argued*: The action was incompetent, in respect that the two sets of pursuers—the existing firm of Brims & Mackay and the dissolved firm of Brims & Mackay—had no community of interest, and were suing for independent debts (*Killin*, 1905, 7 F. 526; *Gibson*, 1866, 5 M. 113). It was further incompetent in respect that it concluded for payment of a single sum of money, and that there was no specification of the amounts claimed by the pursuers respectively.

Argued for the Respondents: A dissolved firm could sue in its own name—if it were a personal one—without conjoining the name of a surviving partner (*Nicoll*, 1877, 5 R. 137; Lindley on Partnership, p. 837). Even though the case were dismissed as against one defender, it did not necessarily fail as against the other (*Robinson*, 1900, 2 F. 928). There was no absolute rule against different pursuers conjoining in one action; it was a matter of convenience, depending upon the circumstances of each case (*Cowan*, 1876, 4 R. (H.L.) 14, at p. 17). In the present case the form of action chosen was the most suitable, as it convened all the parties having an interest in the matter. The two firms of Brims & Mackay were intimately connected, as predecessor and successor in the same business.

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Brims & Mackay and Others v. M'Neill & Sime, S.S.C. and Others.

Counsel for the respondents intimated that they acquiesced in the decision of the Lord Ordinary dismissing the action as against M'Neill & Sime.

The Court *sustained* the second plea in law for the defender Pattullo, and *dismissed* the action.

The Lord Justice-Clerk.—In this case a firm of Brims & Mackay are said to have sent business to Mr Pattullo, the defender, on special terms, and it is for fulfilment of these terms that the action is brought.

In 1898 Pattullo joined partnership with one Vetch, and they carried on business under the firm of M'Neill & Sime. The pursuers now ask an accounting for all business sent by them to Pattullo, both before and after the institution of the co-partnery.

They lay their action (1) against Pattullo, (2) against M'Neill & Sime, and (3) against Pattullo and Vetch as the partners of that firm. They ask decree conjunctly and severally, or otherwise severally.

The question now is whether the Lord Ordinary was wrong in holding the pursuers to have a title to sue Pattullo. I agree with him in thinking that they have such a title. That he was employed by them is distinctly averred, and the terms of the employment are distinctly specified.

But that is not the only question with which the Lord Ordinary deals. Another important question is whether the action is competent, seeing that the firm of Brims & Mackay, which now exists, and which sues the action, was not the firm with which the bargain with Pattullo took place. The original firm was broken up by the death of Mr Brims in 1901, and although there is now a firm of Brims & Mackay, it is not the same firm as that which existed prior to 1901. The debts of Pattullo were due to the firm which came to an end in that year, and there is no connection of title or of right to the second firm for debts due to the first. It cannot be successfully maintained that the new firm has any joint interest to entitle them to sue for the debts incurred before they came into existence.

Moreover, there is no distinction drawn in the summons between debts said to have been incurred by Pattullo while the old firm subsisted, and debts which may have been incurred after it had ceased to exist. The pursuers have failed by any specification, by separate conclusions, to distinguish between what is alleged to be due to the old firm and what to the new.

It appears to me in these circumstances that Mr Pattullo's plea must be sustained, with the result that the Lord Ordinary's interlocutor should be recalled and the action dismissed.

Lord Low.—The circumstances in which this action has been brought may be stated very shortly.

It appears that in 1893 the defender Pattullo commenced business on his own account as a law agent in Edinburgh, and the pursuers aver that the then firm of Brims & Mackay, law agents in Thurso, from time to time sent business to him upon the condition, to which he agreed, that they should receive one-third of the fees which he earned. In 1898 Pattullo went into partnership with the defender Henry Vetch, and the two of them carried on business as law agents under the name of M'Neill & Sime. The pursuers aver that thereafter they continued to send business to Pattullo on the same footing as before. In these circumstances they call for an account of the fees recovered upon all the business sent by them to Pattullo, both before and after he became a member of the firm of M'Neill & Sime.

The action is brought not only against Pattullo as an individual, but against the firm of M'Neill & Sime, and Pattullo and Vetch as the partners thereof, and decree for the full sum of £200 claimed by the pursuers is asked against the defenders "conjunctly and severally, or otherwise severally."

The Lord Ordinary has dismissed the action in so far as it is directed against M'Neill & Sime, on the grounds (1) that the pursuers have no title to sue, because they have made no relevant averment of an agreement to share fees with M'Neill & Sime; and (2) that the action as laid is incompetent, in respect that it is sought to make M'Neill & Sime liable for that part of the £200 which represents the alleged debt due by Pattullo alone before he joined that firm. So far, the interlocutor has not been challenged. The Lord Ordinary has, however, further held that the pursuers have a title to sue Pattullo, and the first question is whether he was right in doing so?

That is a question which is not free from difficulty, but I agree with the views expressed by the Lord Ordinary; and if it had been the only question which we had to determine I should have been prepared to adhere.

There is, however, another question which was very fully argued before us, but with which the Lord Ordinary has not dealt. That question is, whether the action as laid against Pattullo is competent? Pattullo's second plea in law is that the action as laid is incompetent. The Lord Ordinary, however, has not dealt in any way with that plea, although he has repelled the first plea (of no title to sue), the third plea (that the pursuers' averments are irrelevant), and the fourth plea (that the agreement averred can only be proved by writ or oath). Probably the question was not argued to the Lord Ordinary, at all events as fully as it was in this Court, and his Lordship may have thought that he would be better able to deal with the competency of the action after the facts had been ascertained.

The conclusion to which I have come, after careful consideration, is that the second plea for Pattullo should be sustained.

It is well settled that two or more unconnected persons cannot sue in one joint action, unless they have been aggrieved by the same act of the defender, or have a joint interest in the matter libelled (*Killin* v. *Weir*, 7 F. 526).

Now it was argued that the two firms of Brims & Mackay—that is to say, the firm which was dissolved in 1901, and the existing firm—cannot be regarded as unconnected persons, because the same business has been carried on by them in succession without any break in its continuity. That is quite true; but as regards debts due to the old firm and the new firm respectively there is no connection between them. It is not said that the new firm acquired, by assignation or otherwise, debts due to the old firm. All that is said is that an arrangement has been made for the new firm to collect accounts due to the old firm, but that only means that for the purpose of collecting accounts the new firm is authorised to act as the agents of the old firm. The fact remains that so far as the right and title to debts due to them respectively are concerned, there is no connection between the two firms.

Again, I do not think that even if the two firms could be regarded as being only technically and not in any practical sense unconnected persons, they have a joint interest in the matter libelled. No doubt they both claim debts incurred in respect that both firms in succession employed Pattullo to do business for them, and in some cases employment which was commenced by the old firm was continued by the new firm. But in whatever amount Pattullo may be indebted to the two firms, it must be divisible into two portions, the one due to the old firm alone and the other due to the new firm alone.

Again, even if it could be said that both firms founded on the same act of the defender, namely, his refusal to carry out the agreement alleged to have been made with the old firm and continued with the new firm when it came into existence, the action as laid would still be incompetent, because it would have been necessary to have separate conclusions, the one specifying the sum alleged to be due to the old firm, and the other the sum alleged to be due to the new firm (*Harkes* v. *Mowat*, 24 D. 701).

There are other grave objections to the form of the action, which, however, it is unnecessary to consider, because if the view which I take be sound it is sufficient for the disposal of the case.

I am therefore of opinion that the second plea in law for Pattullo should be sustained, and the action dismissed.

Lord Ardwall.—I agree with the opinion just delivered by my brother Lord Low, but I would like to say in regard to what his Lordship seems to have had in view in the last sentence or two of his opinion, that I desire to reserve my judgment on the question of title to sue as viewed from the standpoint of form. I am of opinion that if the pursuers Brims & Mackay sue as agents for, or in any other capacity representing, the old firm of the same name, and they do apparently sue as such agents, that capacity or character should have been set forth in the instance of the summons.

It may be quite true, as stated in the record, that an arrangement was made with the old firm that "all accounts due to the late firm of Brims & Mackay are to be collected by and paid to the present firm of Brims & Mackay." And we all know that it is a very common arrangement that all assets of a firm should be handed over to and collected by a succeeding firm; but if that is so in this case it should have appeared in some way in the instance of the summons, and the mandate, assignation, agreement, or other document conferring on them a title to sue for sums due to the old firm and to recover payment thereof ought also to have been mentioned in the instance of the summons. With this reservation I agree entirely with what has been said by Lord Low, and think that the action should be dismissed.—*2nd July* 1907.

Counsel for Reclaimer, Morison, K.C., W. L. Mackenzie; Agents, M'Neill & Sime, S.S.C.—Counsel for Respondents, Hunter, K.C., D. Anderson; Agents, Purves & Simpson, W.S.

J. H. H.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

88. Trainer *v.* Upper District Committee of County Council of Renfrew.

Process—Interdict—Appeal from Sheriff Court—Interlocutor of Sheriff-Substitute Granting Interdict Appealed to Inner House—Application by Appellant to Court of Session for Recal of Interdict Pending Decision of Appeal—Application Refused—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sects. 69 and 79.

Note in Appeal from an Interlocutor of the Sheriff-Substitute of Renfrew.

This was an application by way of note craving the Court to recal an interdict obtained in the Sheriff Court pending the decision of an appeal against the interlocutor of the Sheriff-Substitute granting the said interdict.

In this action the pursuer, a farmer in the Upper District of the County of Renfrew, *inter*

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Trainer v. Upper District Committee of County Council of Renfrew.

alia, craved interdict against the defenders discharging sewage from the village of Mearns and from certain irrigation works into a certain burn in such a manner as to pollute the water thereof and render it unfit for the primary purposes. On 11th June 1907 the Sheriff-Substitute granted interdict as craved. The defenders appealed against this interlocutor, and on 5th July presented this note to the First Division. They pointed out therein the serious consequences which would follow the enforcement of the interdict. It would be necessary to abandon the present purification works, constructed at great expense, and to erect new works. Further, until the completion of the new works the disposal of the sewage of Newton Mearns could not be conducted in a manner consistent with public safety. They accordingly, in Single Bills, craved the Court, pending the decision of the present appeal, to recal the interdict granted by the Sheriff-Substitute as aforesaid.

Sects. 69 and 79 of the Court of Session Act 1868 were referred to in argument. They enact respectively as follows:—

"Sect. 69. *Effect of Appeals under this Act.*—Such appeal shall be effectual to submit to the review of the Court of Session the whole interlocutors and judgments pronounced in the cause, not only at the instance of the appellant, but also at the instance of every other party appearing in the appeal, to the effect of enabling the Court to do complete justice without hindrance from the terms of any interlocutor in the cause, and without the necessity of any counter appeal; and an appellant shall not be at liberty to withdraw or abandon an appeal without leave of the Court; and an appeal may be insisted in by any party in the cause other than the appellant, in the same manner and to the like effect as if it had been taken by himself."

"Sect. 79. *Regulation of Interim Possession, pending Appeal to the Court of Session.*—In all cases where the judgment of any inferior court shall be brought under the review of the Court of Session by appeal it shall be competent for the inferior court to regulate in the meantime, on the application of either party, all matters relating to interim possession, having due regard to the manner in which the interests of the parties may be affected by the final decision of the cause; and such interim order shall not be subject to review, except by the Court at the hearing of such appeal, when the Court shall have full power to give such orders and direction in respect to interim possession as justice may require."

The Court *refused* the note.

The Lord President.—This application raises a point which, it is surprising to find, is novel. One would have supposed that the point would have arisen before, but counsel have not been able to produce any authority. The matter arises in this way. The Upper District Committee of the County Council of Renfrew have had an action raised against them in the Sheriff Court at Renfrew seeking to interdict them from discharging sewage into a certain burn from their irrigation works. Now these sewage works are part of a sewage scheme of the defenders, and it is clear that to prevent the operation of these sewage works is a very serious thing. The pursuer asserts that the defenders are doing an illegal act, and the Sheriff-Substitute has so found, and has, *causa cognita*, granted interdict.

I assume, of course, at present, that that interlocutor is right, but at the same time it is a judgment against which the defenders are entitled to appeal, and they have appealed. They have also lodged this note to the Lord President, pointing out the serious consequences which the enforcement of the interdict would involve, and craving that, pending the decision of the appeal, the interdict granted by the Sheriff-Substitute should be recalled.

I have come to be of opinion that the course asked by the defenders is incompetent, but that the defenders are not without remedy. The matter is regulated by two sections of the Court of Session Act 1868, viz. sects. 69 and 79. Sect. 69 is the section which determines the effect of appeals from the Sheriff Court to this Court, and it provides [his Lordship quoted the section]. The matter is more particularly dealt with in sect. 79. It provides [his Lordship quoted the section]. It seems to me that sect. 79 covers the case, and that it is perfectly possible for the defenders to make a motion before the Sheriff-Substitute asking him to suspend the operation of the interdict until the appeal shall have been decided in this case. It will not affect the decree, and in truth will not be an ordinary interlocutor in the cause. I say this, that the Sheriff-Substitute may not be hampered by the fact that the process is here. It will not, as I have said, be, strictly speaking, an interlocutor in the cause, but will be an independent interlocutor written on a separate interlocutor sheet, though, of course, the interlocutor will be subject to review in terms of the 79th section.

I have no doubt that what I have said will be before the Sheriff-Substitute when he comes to consider the suggested application, and that he will have it in mind that it is a very serious thing to stop the operation of a drainage scheme when perhaps—I don't say probably, but perhaps—the judgment may be reversed.

Lord Kinnear and *Lord Dundas* concurred.—*5th July* 1907.

Counsel for the Appellants, M'Clure, K.C., Macmillan; Agent, F. J. Martin, W.S.—Counsel for Respondent, MacRobert; Agent, J. A. Kessen, S.S.C. W. A. R.

OUTER HOUSE.

(*Lord Johnston.*)

89. More (Morton's Trustee) *v.* Kirkhope & Gilmour.

Right in Security — Law Agent—Absolute Disposition to Law Agents — Back Letter—Trust Disposition and Settlement —Sequestration of Trust Estate—Trustee in Bankruptcy—Accounting—Law Agents' Account for Professional Charges Held Chargeable Against Security Subjects Quoad Management and Realisation.

This was an action of accounting at the instance of David More, trustee on the sequestrated estate of James Morton, for the balance of the price of certain heritable properties sold by the defenders as *ex facie* absolute disponees. The defenders maintained that on a just accounting there remained a balance due to them.

The following statement of facts is taken from the opinion of the Lord Ordinary :—

"James Morton, station master, South Beach, Ardrossan, died on 3rd September 1905, leaving a trust disposition and settlement in favour of Robert Gardiner and others, who accepted and acted. But as Morton's estate turned out to be insolvent they were superseded by the appointment, on 7th February 1906, of the pursuer David More, solicitor, Kilmarnock, as trustee on the estate which it was found necessary to sequestrate. Owing to the embarrassed condition of Mr Morton's affairs, a committee of creditors, of which the pursuer More was a member, had been appointed in October 1905 (said on record to be 1906, but the true date must be 1905), which had co-operated with the testamentary trustees until the estate was sequestrated.

"Mr Morton's financial embarrassment was occasioned by speculations in house property. At his death he had on hand a semi-detached villa and a self-contained cottage in Sorbie Road, Ardrossan, and two tenements of dwelling-houses at Catrine. The half villa in Sorbie Road was bonded for £400; the cottage in Sorbie Road was bonded for £450; and the tenements were bonded for £700 and £725 respectively. The total of these securities amounted to £2275. When the properties were realised at the Whitsunday after Mr Morton's death they brought £2735, which left a balance of £460, after deduction of the bonds. This £460 is the subject of dispute in the present action.

"Messrs Thomas Kirkhope & Gilmour, solicitors, Ardrossan, were the agents of Mr Morton, and had assisted him in his financial difficulties. After bonding the Sorbie Road villa and cottage as above mentioned, Mr Morton, on 9th June 1905, executed an *ex facie* absolute disposition of these subjects in favour of Messrs Thomas Kirkhope & Gilmour, and of even date a minute of agreement qualifying the terms of the disposition was entered into between the disponees and Mr Morton.

"The transaction with regard to the Catrine tenements is a little more complicated. The facts do not very clearly appear at present, but I gather that the *ex facie* absolute disposition of these tenements which Mr Morton executed in favour of Messrs Thomas Kirkhope & Gilmour, preceded the bonding of these tenements which was carried out at and shortly after Whitsunday 1905. I understand that the sums advanced on the faith of the *ex facie* absolute disposition were repaid out of the proceeds of the bonds, but that notwithstanding, the *ex facie* absolute disposition was allowed to stand, with what effect is one of the questions between the parties. But this disposition was also qualified by an agreement between the disponees and Mr Morton of even date with itself, viz. 1st March 1905."

The Pursuer pleaded: "3. In any event the defenders, so far as acting as their own factors and law agents in administering and realising the security subjects, are entitled only to their outlays."

The following cases were cited in argument. For the Pursuer: *Robertson* v. *Duff*, 1840, 2 D. 279; *Callum* v. *Goldie*, 1885, 12 R. 1137; *National Bank of Scotland* v. *Union Bank*, 1885, 13 R. 380, 1886, 14 R. (H.L.) 1; *Anderson's Trs.* v. *John Somerville & Co. Ltd.*, 1899, 36 S.L.R. 833.

For the Defenders: *Borthwick* v. *Scottish Widows' Fund*, 1864, 2 M. 595; *Mitchell* v. *Mackersy*, 1905, 8 F. 198.

The Lord Ordinary *found* (1) that on the death of Mr Morton the defenders were not entitled to make further advances or to do further work to be charged against the security subjects except in the management and realisation of said subjects, unless by agreement; and (2) that the defenders were not precluded from making professional charges in connection with the management and realisation of the security subjects.

Lord Johnston [after narrating the facts above quoted].—The present action is in the form of an accounting raised by Mr More as trustee on Morton's sequestrated estate against Messrs Thomas Kirkhope & Gilmour for the balance of their intromissions with the heritable properties in question, which they have now sold under their *ex facie* absolute dispositions. Accounts have been lodged under my order, and objections and answers tabled of a voluminous and somewhat argumentative nature, the questions raised in

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which have been very keenly argued before me in the Procedure Roll. I am clear that I cannot dispose of the whole matters raised without proof or admissions, but I think it is proper, after the discussion which has been had, to consider the questions of law involved with a view of defining what remains for proof.

Messrs Thomas Kirkhope & Gilmour credit themselves with three items—£207, 16s. 4d., being cash advanced to Mr Morton, £200; and interest to 16th July 1906, £7, 16s. 4d., as per state No. 9 of process; further, with six business accounts against Mr Morton personally, amounting to £38, 2s. 2d.; and lastly, with a general account for business and outlays incurred to them by Mr Morton's trustees, the committee of his creditors and the pursuer as trustee on his sequestrated estate, from the date of Mr Morton's death down to Martinmas 1906, when the business connected with the transfer on sale of the security subjects was completed. This account amounts to £255, 11s. 6d. On the other hand, they debit themselves with a sum of £361, 17s. 10½d. as the balance of their intromissions on cash account from Mr Morton's death down to the sales of the security properties and settlement of the price. Accordingly, they bring out on their account, subject to the taxation of their accounts, which they have all along offered, a balance of £139, 12s. 1½d. due to them instead of anything due by them. The pursuer Mr More challenges not so much at present the accuracy of their accounts, as the defenders' right to charge the various items against the proceeds of the properties which they held under their *ex facie* absolute dispositions. His objections raise the questions of law which I have now to consider. These, I think, so far as they are general questions, may be summarised as follows:

First, Did the death of Mr Morton *ipso facto* close the accounts for which the subjects were held in security so that the defenders are not entitled to charge anything against their proceeds except the sums actually due by Mr Morton at the date of his death, together with the legitimate costs of realisation?

Second, Can the defenders legitimately charge more than their outlays in connection with the realisation of the subjects, they being themselves law agents, in respect that in doing so they would be *auctores in rem suam*?

Third, What was the effect of the pursuer's appointment? Can the defenders charge against the proceeds of the subjects any item of date subsequent to 7th February 1905? In this respect I do not think that the pursuer even admits the defenders' right to the legitimate costs of realisation, but maintains that he was wrongously prevented from realising under his statutory title. . . .

Taking, then, these general objections in the above order.

First, If the pursuer is right, the defenders are precluded from paying themselves out of the proceeds of the properties any more than their cash advances to Mr Morton . £200 0 0
Interest 7 16 4
The six business accounts, as these may be taxed 38 2 2

£245 18 6

There can be little doubt that under the agreements embodied in the back letters were covered only transactions between Mr Morton himself and the defenders. But I do not think that that ends the matter. It must be remembered that the back letters, though granted, never entered the record. On Mr Morton's death his trustees came into his rights and under his obligations. His right was to redeem the properties if he chose, and to the reversion of their price if he did not choose or was not able to redeem them. There has been much difference of opinion as to the character of this right, but I think it must now be accepted that though it was not a radical right in the strict sense, it was so in a popular sense. Morton was feudally divested, and his radical right depended not on his feudal title, but on the obligation his disponees lay under to him. His right of reversion was a *jus actionis* merely, and was therefore assignable (*Union Bank of Scotland* v. *National Bank of Scotland*, 14 R. (H.L.) 1). That right passed to his trustees. Now, notwithstanding the terms of the back letters, the defenders would have been entitled to retain against Mr Morton the reversion of his property if he had incurred debt to them not contemplated by the terms of the agreement or back letters, and I think that his trustees if they did not redeem the subjects, but left them in the defenders' hands, and thereafter incurred further debt to the defenders in the matter of Mr Morton's estate, though these were not contemplated by the terms of the agreement or back letters, were open to the same plea of retention that Mr Morton was himself.

While, therefore, there may be questions of fact arising on the accounts, I think, on the principle of retention, that the defenders have an effectual security in these *ex facie* absolute titles for advances made or debts incurred after Mr Morton's death and before the sequestration of the estate.

Further, there can be no question that they are entitled to the legitimate costs of realising their security. In fact, I have failed to understand the pursuer's contention to the contrary.

Second, It is maintained that these accounts must be restricted to outlays merely, and that the defenders cannot make business charges as solicitors in respect that they are acting as agents for themselves as creditors. I am not aware of this subject having been touched upon in the Scottish Courts except in the case of *Brown's Trs.* v. *Horne* in the Outer House (21st January 1905, 12 S.L.T. 614), and I cannot find that Lord Stormonth-Darling's judgment in that case was

brought under review.* But the case does not directly dispose of the present question, as the circumstances did not directly raise it. The pursuer, therefore, has to rest his case on the English decisions which were canvassed in *Brown's Trs.* v. *Horne*, viz.: *in re Wallis*, L.R. 25 Q.B.D. 176, and in *re Doody*, L.R. 1893, 1 Ch. 129, in which the law of England prior to the Mortgagees Legal Costs Act 1895, was held to be that a solicitor-mortgagee acting as solicitor for himself cannot charge profit-costs against the mortgagor but only out-of-pocket costs. Though in the latter case Mr Justice Stirling refers to the rules as to the solicitor-trustee, I think that the Court in these cases, and in those on which they are based, do not regard the mortgagee as in any true sense a trustee for the mortgagor's interest, but treat the matter as one of contract purely. Taking the terms of the mortgage as obliging the mortgagors to pay principal, interest, costs, charges and expenses, the English Courts held that it was not part of the contract that the mortgagee should recover anything for personal trouble undertaken, even if he might have employed another to perform the work and have recovered his charges. Notwithstanding the great authority of the judges who decided these English cases, I am not persuaded of the soundness of their judgment if attempted to be applied to the case of a Scottish bond and disposition in security, and still less if attempted to be applied to a security by way of *ex facie* absolute disposition as here. If the circumstances and terms of the back letters here are considered, it is seen that the defenders might have had to enter into possession, and let the subjects, attend to their upkeep, pay taxes, and collect rents. Had they been acting for the mortgagor they would have been entitled to professional remuneration. They would have accounted for net returns only. They were working for him though they were themselves mortgagees, and I cannot understand why that circumstance should entitle him to their services gratis. The same applies when they come, not to let and administer, but to sell the properties. They would naturally have done the business for him as client; why should they not do it for him as client and debtor? If the principle underlying the disallowance of such charges in the case of the solicitor-trustee applied, viz. that in such relation the risk of interest conflicting with duty must at all hazards be avoided, it would be different. But it is admitted that that question does not arise, and that the question is simply, What was the contract? I cannot help suspecting that it must generally have been felt that the ground of judgment in these cases was not sound, or else the last of them would not immediately have been followed by the passing of an Act which, if on the contrary the ground of judgment was sound, looks, particularly as sect. 3 of the Mortgagees Legal Costs Act 1895 is retrospective, very much like a statutory breach of contract which the Legislature has not been in use to countenance.

Third, The effect of the pursuer's appointment as trustee on the deceased Mr Morton's sequestrated estate is a different matter. The right of Mr Morton and his trustees being what I have already indicated, that right was by the 102nd section of the Bankruptcy Act 1856 vested in the pursuer *ipso facto* by his act and warrant, and as regards the defenders' security, the defenders were from that point onward *in pari casu* with the National Bank and the pursuer in *pari casu* with the Union Bank in the case of *The Union Bank of Scotland* v. *The National Bank of Scotland*, *supra cit.* But the actings of parties after the pursuer's appointment may affect the position created by the pursuer's appointment, and give the defenders rights to retain, which they would not otherwise have had, for advances made or accounts incurred after that date. As to these actings, there must be enquiry or admissions. In any view the defenders were, even after the pursuer's confirmation, entitled to realise and charge against the proceeds of the subjects their legitimate expenses, if the pursuer did not offer to redeem.

. . . .—18*th June* 1907.

Counsel for Pursuer, Craigie, K.C., A. M. Stuart; Agent, Alexander Ramsay, S.S.C.—Counsel for Defenders, Anderson; Agents, Laing & Motherwell, W.S.

G. H.,
for R. S. B.

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* [The First Division adhered to Lord Stormonth-Darling's interlocutor. The case was again in the Inner House this session, on another point, and both judgments are reported *supra*, p. 145.—Ed. S.L.T.]

OUTER HOUSE.

(*Lord Salvesen.*)

90. Millar *v.* Millar.

Arrestment—Future Debt—Arrestments on Dependence of Action of Adherence and Aliment at Instance of Wife—Recal of Arrestment—Circumstances Where Arrestments Recalled on Caution Being Found—Amount of Caution.

This was a petition for recal of arrestments used by a wife in an action of adherence and aliment against her husband. The petitioner expressed his willingness to find caution for expenses. For the respondent it was contended that the arrestments should not be recalled unless caution was found for £20,000.

The opinion of the Lord Ordinary further sufficiently reports this case.

Lord Salvesen.—On 13th May 1907 Mrs Millar raised an action of adherence and aliment against her husband, the amount of aliment

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concluded for being £3000 yearly. She avers that her husband declined to live with her, and that he had an income of at least £10,000 a year. On the dependence of this action she used arrestments to the extent of £30,000.

The record was closed on 5th June, and thereafter, on the motion of the pursuer, I pronounced an interim decree in her favour for £600 to account of aliment and £150 to account of expenses. I intimated at the time that, as the proof was fixed for a date early in the winter session, I should not entertain any further applications either for interim aliment or interim expenses, unless some unforeseen circumstances emerged. Both these sums have been paid; and the defender has now presented a petition for recal of the arrestments. Answers to this petition have been lodged, in which the respondent maintains that, if the arrestments are recalled, that should only be done on very substantial caution.

The law as to this matter was finally settled by the decision of the First Division in the case of *Symington*, 1875, 3 R. 205. In that case the Lord President (Inglis) said: "I think that a lady who is separated from her husband, as she does not thereby cease to be his wife, must still follow his fortunes. I should be very slow to hold that because a wife is separated from her husband she is entitled to have her aliment secured so as to give her a preference for life over all her husband's creditors." And further on he says: "For all that is due and bygone the diligence is competent; but, for future debts, I think we cannot lay it down too distinctly that the diligence is incompetent unless the debtor is *vergens ad inopiam*, or there be other circumstances of a parallel kind."

In the later case of *Burns*, 1879, 7 R. 355, where the husband had expressed an intention of realising his means and of leaving the country, a petition presented by him for recal of arrestments used against him by his wife, on the dependence of an action of separation and aliment, was granted only on substantial caution. The respondent founded on this case, and endeavoured to assimilate its circumstances to those which are said to be present here. She avers that Mr Millar has sold off his house in Claremont Terrace and the furniture therein; and this is admitted, so far as the house and the bulk of the furniture are concerned. She says, further, that, although her husband has taken on lease a small bachelor's flat in Glasgow, she believes that he intends to remove to London, and transfer his business and his whole property there. The last averment is not admitted; but, even if it were true, it appears to me not to bring the case within the rule established by the decision in *Burns* v. *Burns*. Even if the defender removed to London, any decree against him pronounced in Scotland could be enforced under the Judgments Extension Act just as effectually as if he remained in Scotland. The other averment which follows, that the pursuer has reason to believe that the defender, with the object of defeating her claims, has placed portions of his property on investments in the names of third parties, is, I think, equally irrelevant. A husband may, if he please, divest himself of his estate if he does so completely; even although the effect may be to reduce his own income and the amount of aliment payable therefrom to his wife. If, on the other hand, he does not divest himself, his property will be liable to be attached by his creditors—including his wife, even if it be in the names of third parties. Apart from all this, I do not think I am entitled to proceed on a vague general averment unsupported by *prima facie* evidence, and I cannot believe it to be likely that a man who is said to be worth £100,000 should strip himself of the most of the bulk of his property in order to defeat his wife's claim for aliment.

On the other hand, in a case of this nature, which may be keenly contested and not finally decided for possibly a year, I am disposed to give the wife the benefit of the arrestment which she has used for the purpose of securing the expenses to which she will be put in constituting her claim, and also of securing aliment during the dependence of the action. For these two purposes a sum of £2500 will, I think, be ample; and, on caution being found for this sum, I shall recal the arrestments.

The following interlocutor was pronounced:—"The Lord Ordinary having considered the petition and answers, on caution for £2500 being found by the petitioner, recals the arrestments used at the instance of the respondent; finds the respondent entitled to expenses as between party and party; modifies the same to ten guineas."—*5th July* 1907.

Counsel for Petitioner, Dickson, K.C., Hon. W. Watson; Agents, Dove, Lockhart & Smart, S.S.C.—Counsel for Respondent, Clyde, K.C., M. P. Fraser; Agents, Campbell & Smith, S.S.C.

J. W. F.

FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

91. Morrison *v.* Vallance's Executors.

I. Process — Citation — Citation by Registered Letter—Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 77), sect. 3—Defender's Last Known Residence in Scotland Pursuer's House — Summons Served by Pursuer on Defender by Registered Letter Addressed to Defender at Pursuer's House After Defender had

Left Scotland — Registered Letter Taken In by Pursuer—Personal Bar —Held that Pursuer Barred from Pleading that Citation was Good.

II. Process — Citation — Usual Place of Residence — Act of Sederunt 14th December 1805, sect. 1—Opinion Reserved Whether Citation on a Person Who Is Known by the Pursuer to be Furth of Scotland Should be Edictal or at his Last Known Residence in Scotland Within Forty Days of his Leaving That Residence.

III. Process — Citation — Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. cap. 70), sect. 12 (2)—Executors of a Deceased Defender Against Whom Decree in Absence Had Been Got, Held Entitled, After Being Sisted as Defenders, to Object to the Regularity of the Citation.

Appeal from Sheriff Court of Lanarkshire.

This was an action raised in 1893 in the Sheriff Court of Lanarkshire at Glasgow, at the instance of Mrs Vallance or Morrison, residing at 33 Cumberland Street, Glasgow, against her brother Dr Vallance, designed in the petition as also residing there. The action concluded for payment to the pursuer of the sum of £472, 5s. 3d., made up of £239, 7s. for board and lodging for the period from July 1888 to 10th March 1893, during which Dr Vallance resided with the pursuer; £160 for clothes, pocket money and education provided for him by the pursuer; £42, 18s. 3d. for class fees paid for him by the pursuer; and £30 lent to him by the pursuer.

On the 10th March 1893 Dr Vallance left his sister's house to take up a position as ship surgeon on board an Allan liner, and never thereafter returned to reside with his sister. The summons was served on 31st March 1893 in a registered letter addressed to the defender at his sister's house. The registered letter was taken in by the pursuer, who averred that she forwarded it to Dr Vallance at the office of the Allan Line. Decree in absence was granted against Dr Vallance on 20th April 1893, but the decree was not extracted till 24th January 1906, after Dr Vallance's death on 1st January 1906.

On 1st March 1906 Dr Vallance's executors were sisted as defenders to the action, and the decree in absence was recalled. Dr Vallance's executors lodged defences, and pleaded, *inter alia*: "There having been no valid service of the petition on the original defender, the proceedings are null and void."

Sect. 12 (2) of the Sheriff Courts (Scotland) Act 1876 is as follows:—"A party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened."

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After a proof had been taken as to the circumstances of the service of the action, the Sheriff-Substitute (Fyfe), on 10th July 1906, issued an interlocutor finding that the action not having been competently served, the proceedings thereupon were null and void, and dismissing the action. He added the following note:—

I think it is quite beyond argument that the petition in this case was never served. It was posted to the defender, addressed to the pursuer's residence, and the letter was taken delivery of by the pursuer herself. It never reached the late Dr Vallance, who had ceased to reside in the pursuer's house. All that has followed is void, and this action must be dismissed.

The Pursuer appealed, and *argued*: (1) Dr Vallance's executors having been sisted as defenders and lodged defences, were barred from stating any objection to the service of the action in terms of sect. 12 (2) of the Sheriff Courts (Scotland) Act 1876. Sect. 12 (2) of this Act was in practically the same terms as sect. 21 of the Court of Session Act 1868, and applied equally to the original defender and his executors. (2) Apart from the specialties of the case the citation was good, as it complied with the provisions of sect. 3 of the Citation Amendment (Scotland) Act 1882. Dr Vallance had not left his sister's house for forty days before the service of the summons, and consequently her house was his "legal domicile or proper place of citation." The meaning of sect. 1 of the Act of Sederunt 14th December 1805 was that until a person had been absent from his last known address in Scotland for forty days it remained his "proper place of citation," and edictal citation was incompetent (*Corstorphine* v. *Kasten*, 1898, 1 F. 287, per Lord President Robertson at p. 293; Mackay's Manual of Practice, p. 197; Dove Wilson's Sheriff Court Practice, p. 67; Judicature Act 1825 (6 Geo. IV. cap. 120), sect. 53). (3) The specialties of the case did not affect the result; there was nothing irregular in the appellant's taking in Dr Vallance's letters and forwarding them to him. Had she refused to take in the letter the only result would have been that it would have been left by a sheriff messenger.

Argued for the Respondents: (1) The citation should have been edictal, as the pursuer knew for a fact that Dr Vallance had left Scotland. Citation at the last known place of residence was only competent within the forty days when the pursuer was uncertain whether the defender was furth of Scotland or not (*Brown* v. *Blaikie*, 1849, 11 D. 474, per Lord Jeffrey at p. 482; *Cribbes* v. *Ross*, 1851, 13 D. 1369). (2) The appellant was barred from pleading the citation was good by her own acts. She had no right to use the Citation Amendment Act in such a way as really to serve the action on herself. She ought to have refused to take in the registered letter and let it take its course.

Counsel for the respondents were not called

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upon to reply to the first point argued for the appellant.

The Court *affirmed* the interlocutor *appealed* against.

The Lord President.—My Lords, the circumstances in this case are peculiar. The pursuer, Mrs Vallance or Morrison, on 20th April 1893 got decree in absence against her brother Dr Vallance for certain sums alleged to be due her for board and lodging, and advances to enable the defender to pursue his studies. After getting that decree the pursuer did nothing till 1906, when the defender died, and she put forward a claim against his executors for the amount found due in the decree in absence. Dr Vallance's executors appeared in the process and were sisted as defenders and reponed against the decree in absence.

The defenders pleaded that the decree in absence against Dr Vallance was bad, because of the circumstances of his citation. These circumstances were that prior to 10th March 1893 Dr Vallance lived with his sister, the pursuer, but at that date left to take up a situation as ship's surgeon on board an Allan liner and never returned to live with his sister. After his departure the pursuer instructed her agents to serve a summons against him concluding for payment to her of £472, 5s. 3d., made up of payment for board and lodging and for clothes and education during the time the defender resided with her. The pursuer's agents, on 31st March 1893, posted the summons in registered letter addressed to Dr Vallance at the pursuer's house, in terms of the Citation Amendment Act. Sect. 3 of that Act provides that citation by registered letter shall be "a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address, if it continues to be his legal domicile or proper place of citation."

The registered letter was taken in by the pursuer herself, and though she says that it was forwarded to her brother, Dr Vallance, there is no proof that he ever got it.

The question raised is a double one: (1) Whether the citation was good under the circumstances, apart from the specialties arising out of the position of the pursuer. The answer to that question depends on sect. 3 of the Citation Amendment Act, which provides for citation by registered letter on the person to be cited at "his last known address, if it continues to be his legal domicile or proper place of citation."

There is no question that the pursuer's house was Dr Vallance's "last known address"; the question is whether it continued to be "his legal domicile or proper place of citation." That depends on sect. 1 of the Act of Sederunt of 14th December 1805, which provides "That where any person against whom legal diligence is meant to be executed, or who is to be cited as a party in any judicial proceeding, has left the ordinary place of his residence, which may render it doubtful whether he is within the kingdom of Scotland or not, and consequently whether the charge or citation against him ought to be executed at his dwelling-house, or at the market cross of Edinburgh and pier and shore of Leith, when he is not personally found, it shall in time coming be held and presumed that the said person, after forty days' absence from his usual place of residence, but not sooner, is furth of the kingdom of Scotland; and therefore, that within the said forty days the citation or charge may be at his late dwelling-house; but, after that period, must be at the market cross of Edinburgh and pier and shore of Leith."

It was argued for the pursuer that the effect of that section is that after a person goes from his last known place of residence in Scotland, his domicile of citation remains for forty days at that residence. On the other hand, it is argued for the defenders that this is so only if there is a doubt in the mind of the pursuer whether the person to be cited has gone from Scotland or not, but that if the pursuer knows for a fact that he has gone from Scotland, then the citation must be edictal even within the forty days.

The point does not seem ever to have been decided, and there are conflicting *dicta*. On the one side there is the *dictum* of Lord Jeffrey in *Brown* v. *Blaikie*, 11 D. at p. 482; on the other, that of Lord President Robertson in *Corstorphine* v. *Kasten*, 1 F. at p. 293. I do not think it is necessary to decide this point, though, as far as my own view is concerned, it coincides with the *dictum* of Lord President Robertson and not with that of Lord Jeffrey.

(2) Assuming the citation is good apart from the specialties of this case, the question arises whether it is good in view of those specialties. I am of opinion that it is not, and that the pursuer is barred by her own acts from pleading that the citation is good under the Citation Amendment Act. If she had refused to take in the registered letter, it would, in terms of the Act, have been returned to the Sheriff-Clerk, and decree in absence could not have been got without certain further procedure. The pursuer, by taking in the letter, constituted herself an agent for the defender without any right to do so. She had no right to take in the summons, but having done so, was bound to see that the defender got it. She cannot be heard to say that the defender did get it, so on the specialties of the case I am of opinion that the citation was invalid.

The argument of the pursuer, based on sect. 12 (2) of the Sheriff Courts Act 1876, is obviously unsound, because the parties here appearing, *i.e.* the executors, are not stating an objection to the regularity of the service as against themselves, but as against another person, *i.e.* the

deceased; and in this sense an executor is not *eadem persona cum defuncto.*

Lord Kinnear.—I agree on the special ground on which your Lordship proposes to decide this case.

On the question as to which of the conflicting *dicta* by Lord Jeffrey and Lord President Robertson is sound, I reserve my opinion until the question is raised in a case in which it is necessary to decide it.

Lords M'Laren and *Pearson* concurred.—1*st June* 1907.

Counsel for Appellant, Orr, K.C., D. P. Fleming; Agents, Clark & Macdonald, S.S.C.—Counsel for Respondents, The Dean of Faculty (Campbell, K.C.), Grainger Stewart; Agents, W. & J. L. Officer, W.S. A. M.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

92. Arthur and Others *v.* Aird and Others.

I. Process — Interdict — Competency — Several Pursuers—Community of Interest—Action by Two Proprietors for Interdict Against Trespassing on Lands of Both—Interdict Refused.

II. Process — Interdict — Competency — Several Pursuers—Community of Interest—Action by Two Proprietors for Interdict Against Fishing in River Flowing Past Lands of Each—Terms of Interdict Granted.

III. Fishing—Trout Fishing—Observations per Lords Low and Ardwall on Rights of Trout Fishing in Small Rivers.

Appeal from the Sheriff Court at Ayr.

This was an action raised in the Sheriff Court at Ayr at the instance of (1) James Arthur, tenant of the estate of Montgomerie, with consent and concurrence of W. R. Paterson, heir of entail of the said estate, and of Mrs Paterson, his curator, and (2) John Meikle, proprietor of the estate of Barskimming. The defenders were Thomas Aird, John Jones, and Robert Wallace, miners, Hurlford.

The prayer of the petition was:—

To interdict the defenders from unlawfully entering and trespassing upon the lands and estate of Montgomerie, situated in the parish of Tarbolton and county of Ayr, or upon any part thereof, or from unlawfully entering and trespassing upon the lands and estate of Barskimming, situated in the parish of Stair and county of Ayr, and in particular from fishing for or trying to catch or kill in any way yellow trout or grayling in the portion of the River Ayr, so far as it flows *ex adverso* of the said estates of Montgomerie and Barskimming.

A plan (No. 19 of process) was lodged, shewing the relative positions of the river Ayr and of the estates of Montgomerie and Barskimming. The following description of the plan is taken from the opinion of Lord Low.

"The river Ayr forms the boundary between Montgomerie and Barskimming for that part of its course which lies between the letters A B and C D on the plan No. 19 of process. There is there a stretch of the river (lying between the letters A B and H G on the plan) which forms the boundary between Barskimming and another estate, the proprietor of which is not a party to this action, and finally there is a stretch of the river (G H to E F on the plan) which lies wholly within the estate of Barskimming."

The pursuers averred that the defenders had trespassed on their estates and had fished in the river at various points on the portions of the river marked on the plan, but there was no averment of trespass or fishing at the part between the lines E F and G H.

The defenders pleaded, *inter alia*:

2. The action is incompetent and irrelevant.
3. No title to sue.
4. The River Ayr, at the points referred to in the pursuers' condescendence, being a public river, the right to fish for trout therein is common property.
5. That the public have from time immemorial, or at least for the prescriptive period, with the knowledge of the pursuers or of their authors, exercised the right to fish for trout and salmon in said river at the points specified in the pursuers' condescendence. This defender, as a member of the public, is entitled to fish therein.

The pursuers pleaded, *inter alia*:

4. The defences stated are irrelevant.

On 19th December 1905 the Sheriff-Substitute (Shairp) granted interdict, in terms of the prayer of the petition, against entering and trespassing on the estates of Montgomerie and Barskimming, and against fishing for trout or grayling in the river Ayr between the lines (1) E F and G H, and (2) A B and C D on the plain.

He delivered the following note:—

The defenders' substantial defence in the present action is that, as members of the public, they are entitled to fish in the River Ayr at the places mentioned, in respect that the public have acquired by prescription a right to fish for yellow trout or grayling in these waters. It is admitted by the defenders' agent that, at these portions of its course, the River Ayr is neither tidal nor navigable. This point is not in dispute between the parties. In the case of *Grant* v. *Henry*, 12th January 1894, 21 Rettie, p. 358, the law laid down by previous decisions is expressly reaffirmed, that a right of trout fishing cannot be acquired by prescriptive use in a question between the public and a riparian proprietor. The present is not a case where the defenders allege any title competing with that of the pursuers, and, if it were held

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that, on their present record, the defenders are entitled to go into a close investigation of the pursuers' titles, then such a course would be open to every poacher who is challenged for fishing in waters that do not belong to him. In these circumstances, I have no choice but to grant the interdict which pursuers crave.

The above interlocutor has been expressed in the foregoing terms because I am of opinion that the pursuers are entitled to interdict against the defenders fishing for yellow trout or grayling where, either together or singly, the pursuers hold riparian rights on both sides of the River Ayr. Matters are in a somewhat different position wherever their riparian rights are limited to one bank. In the latter case the pursuers are, in my opinion, only entitled to interdict the defenders from trespassing upon their lands, and this, of course, would cover the case of the defenders walking on the bed of the river belonging to the pursuers up to the *medium filum*. It is, of course, conceivable that, where the pursuers do not hold both banks of the river, the riparian proprietor of the opposite bank, not represented in the present action, might allow the defenders to fish from his side, and in that case they might be able legally to fish over the whole breadth of the river at that part without walking beyond the *medium filum*, and so trespassing on the pursuers' lands. It is because I have had these considerations in view that the foregoing interlocutor has been expressed in the terms in which it is couched.

The defenders appealed to the Sheriff (Brand), who adhered.

The defenders *appealed* to the Court of Session, and *argued*: The action was wholly incompetent. The pursuers had no community of interest, and could not conjoin in an action in which each asked for interdict against trespassing on the lands of the other (*Gray*, 1741, M. 11986; *Gibson*, 1866, 5 M. 113; *Smyth*, 1891, 19 R. 81). Further, there was no averment of fishing in the river between the lines G H and E F on the plan, and *quoad* that portion, interdict should in any event be refused.

Argued for the Respondents: The form of the action was the most convenient for all parties, and was competent. There was sufficient community of interest between the pursuers (*Killin*, 1905, 7 F. 526 at p. 528). No right of fishing could be prescribed (*Montgomery*, 1861, 23 D. 635; *Somerville*, 1859, 22 D. 279).

The following case was referred to by Lord Low: *Cowan & Sons*, 1876, 4 R. (H.L.) 14.

The Court *recalled* the interlocutor appealed against, *interdicted* the defenders from fishing in the river Ayr in the portion between the lines A B and C D on the plan, and *quoad ultra dismissed* the action.

The Lord Justice-Clerk.—Judging from what is to be found in the proceedings in the Sheriff Court in this case, I think it right, before dealing with the case as presented to this Court, to state the following propositions in law, which are beyond doubt:—

1. No one has any right to trespass on the lands of another for the purpose of fishing.
2. No one, even if he is lawfully on the bank of a river, has, merely because he is lawfully there, a right to fish in the stream.
3. It is not possible for members of the community having no title to establish a right to fish by any usage of fishing for however long a period as against a proprietor having a title to the land over which a stream flows.

As regards the case as now presented to us I have to point out that the action is somewhat strange in its conclusions, for it is raised by two proprietors of separate estates for interdict against trespass on both estates.

The view I have formed of the case can be stated in a few sentences. I have no doubt in holding that no such interdict upon joint application can be granted as is prayed for by the pursuers, as it would be to give a right to sue for breach of interdict to persons having no right as regards the lands respectively of which they were neither proprietors nor tenants.

But in so far as the prayer of the interdict is directed against fishing for trout in the Ayr so far as it flows altogether *ex adverso* of the estates of Montgomerie and Barskimming—that is to say, where the two estates face one another on the river—the case is somewhat different. For the river being there the division between the two proprietors, I hold it to be settled that the proprietors have a common interest in the stream, their rights in the *solum* of which extend to the *medium filum* respectively, which is the boundary between them. I therefore am of opinion that the pursuers are entitled to interdict as regards that part of the river which lies between the letters A B and C D on the plan No. 19 of process.

On the other hand, for the reason already stated, I hold that the pursuers are not entitled, suing jointly as they do, to any interdict as regards those parts of the river to which either of them has the right of property or tenancy on one bank only.

I would propose that your Lordships should adhere to the interlocutor of the Sheriff in so far as it grants interdict as between A B and C D, and *quoad ultra*, recal the interlocutor and dismiss the action.

Lord Low.—The pursuers in this action are (1) the tenant of the mansion-house, shootings and fishings of the estate of Montgomerie, with the consent and concurrence of the heir of entail in possession, and (2) the proprietor of the estate of Barskimming. These are entirely separate estates, but the leading crave in the prayer is that the defenders—of whom there are three—should be interdicted from unlawfully entering and trespassing upon the estate of Montgomerie or upon the estate of Barskimming.

It appears to me that that is an incompetent application. The proprietor of Montgomerie has no right or title whatever to interdict trespassers upon Barskimming, and the proprietor of Barskimming has no right or title to interdict trespassers upon Montgomerie. It follows that the two of them cannot obtain a joint interdict against trespassing upon either estate.

The prayer, however, proceeds to ask that the defenders should be interdicted "in particular, etc." [*His Lordship quoted the prayer of the petition and described the plan No.* 19 *of process as cited* supra.]

The Sheriff-Substitute, in an interlocutor to which the Sheriff adhered, interdicted the defenders from "trespassing upon the lands and estate of Montgomerie, or upon any part thereof, or from trespassing upon the lands and estate of Barskimming, or upon any part thereof; and in particular from fishing for or trying to catch or kill in any way yellow trout or grayling in the river Ayr between the lines (1st) E F and G H; and (2nd) between the lines A B and C D on the plan."

Now, for the reasons which I have already given, I am of opinion that that interlocutor, in so far as it is directed against trespassing in general terms, was incompetent. I think that it was also incompetent to grant interdict at the joint instance of the proprietors of the two estates against fishing in the Ayr between the lines E F and G H, because that part of the river is wholly within the estate of Barskimming. I do not think that a riparian proprietor has any right or title to interfere with fishing in a part of the river which is wholly beyond the limits of his estate. Plainly, the proprietor of Montgomerie, if he had sued alone, and with no other title than that of proprietor of Montgomerie, would not have been entitled to interdict anyone from fishing between E F and G H. He would have had no more right to do so than an outsider who had no property upon the river at all. Therefore I think that an interdict at the joint instance of the proprietor of Barskimming and the proprietor of Montgomerie is just as incompetent as if it had been at the joint instance of the former and of a member of the public who had no connection with the river.

I would further observe that there is no foundation for an interdict even at the instance of the proprietor of Barskimming in regard to the part of the river with which I am now dealing, because it is not averred that any of the defenders ever fished that part of the river.

A different question, however, arises in regard to the part of the river between A B and C D; there the river flows between the two properties, and although each property only extends *ad medium filum*, it may very well be that the proprietors have a common interest in the whole of that part of the river sufficient to make it competent for them to sue together in one action a person by whose act both of them have been aggrieved. It has never been expressly decided whether the proprietor of the lands upon one side of a river only is entitled to cast his line across the *medium filum* and to take trout out of water flowing over the half of the *alveus* belonging to his neighbour. In regard to that question I would only say that it seems to me to be plain that in small rivers, which, with or without wading, can be commanded from bank to bank (a category which includes the great majority of trout streams, and among them the Ayr at the point in question), a rule limiting the angler on either bank to his own side of the *medium filum* would be unworkable, and could not possibly be enforced; and, unless the river were of considerable size, such a rule would hamper the angler upon either side to an extent which would greatly detract from the value and amenity of the right of fishing. Accordingly, so far as I know, such a rule is, in practice, unknown in Scotland so far as trout fishing is concerned. I therefore think that riparian proprietors upon opposite sides of a trout river have a common interest in that part of the river which flows between their estates which entitles them to take joint action against anyone fishing the water from either side.

Now, all the defenders admit that they fished in the Ayr between the points marked A B and C D on the plan, and that they refused to stop fishing when requested to do so. I infer from the pursuers' averments that all the defenders were fishing from the Montgomerie side of the water, but none of them found upon that fact as a reason why interdict should not be granted against them. Their defence is that as members of the public they were entitled to fish in the river, which, of course, is an entirely untenable proposition.

I am therefore of opinion that the Sheriff-Substitute's interlocutor should be affirmed in so far as it interdicts the defenders from fishing in the river between the points A B and C D, and that, *quoad ultra*, the interlocutor should be recalled and the action dismissed.

Lord Ardwall.—A number of questions are raised by the pleadings in the present actions, but the discussion in this Court was limited by the counsel for the defenders to the second and third pleas stated for them, which are directed respectively against the competency and the relevancy and the pursuers' title to sue.

The pursuers are, first, James Arthur, the tenant of Montgomerie, and William Robert Paterson, the proprietor of that estate, with his curator; and, second, John Meikle, proprietor of the estate of Barskimming. At the instance of these pursuers the Court is asked, first, to interdict the defenders from trespassing on the estate of Montgomerie, and next from trespassing on the estate of Barskimming.

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Lord Ardwall.

I am of opinion that up to this point the pleas of incompetency and no title to sue must be sustained. The proprietor and tenant of Montgomerie have no title to sue for interdict against trespassing on the estate of Barskimming, nor has the proprietor of the estate of Barskimming any title to sue for interdict against the defenders trespassing on the estate of Montgomerie, and accordingly the two sets of proprietors are not entitled to obtain jointly an interdict against trespassing on either estate; and it was incompetent to make them joint pursuers in the action for interdict against trespass on lands in which it could not be said that both of them had an interest.

In the next place, interdict is asked against the defenders from fishing for yellow trout or grayling in the portion of the river Ayr so far as it flows *ex adverso* of the said estates of Montgomerie and Barskimming. This portion of the prayer requires to be considered with reference to the different parts of the river to which the interdict is to apply. With regard to the portion of the river between the letters E F and G H, it flows through the estate of Barskimming, and both banks of the river are in that estate. For the reasons above adverted to with reference to the estate generally, it is evident that the proprietor of Montgomerie has no title to ask for interdict as regards this part of the river; and the interdict being asked at the joint instance of all the pursuers, it is, so far as this portion of the river is concerned, incompetent.

With regard to the part of the river between the points marked A B and C D on the plan, the question stands in a different position. During that portion of its course the river flows between the estates of Barskimming on the one side and Montgomerie on the other; and as the river Ayr is a water of such a size as that it can be practically fished across its whole breadth from either side of the *medium filum* thereof, it seems to follow that no interdict against fishing in that portion of the river would be effectual unless obtained at the instance of the proprietors on both sides. Further, both proprietors have a common interest in the fishing over this portion of the river, and therefore a right to obtain a joint interdict against fishing there. I may refer to the case of *Lord Forbes and Others* v. *Leys, Mason & Co.* (1824, 2 Shaw (N.E.) 515), where a number of upper heritors were held entitled to sue jointly for the removal of a dam which injured their salmon fishings; and in the case of the *Duke of Buccleuch* v. *Cowan & Sons*, 2 M. 653, it was held that a number of riparian owners were entitled to sue jointly an action of declarator and interdict for putting a stop to the pollution of the river Esk which flowed past their respective properties; while with regard to the conjunction of Mr Arthur, the tenant of Montgomerie in the action, I may refer to the case of *Jolly* v. *Brown* (28th May 1826, 6 Shaw 872), where two persons jointly raised an interdict against trespassing on the estate of which they were respectively proprietor and tenant.

I agree with what Lord Low has said with regard to the law of angling in a burn or river of such small size as that the angler can cast his line across the *medium filum* and practically command the whole stream from either side of it, and I have nothing further to say except that I agree *in omnibus* with his remarks on this subject, on which, however, I am unaware there is any direct authority to be found in the legal text-books or reports.

Assuming the law to be as stated by Lord Low, it follows, I think, with regard to the remaining portion of the river between A B and G H, that it would be incompetent to grant an interdict at the instance of the proprietor of Barskimming against fishing in that part of the river, seeing that the proprietor of Failford is not a party to these proceedings. From what has been above said with regard to the rights of angling in a water such as the Ayr, it would seem to follow that interdict as regards this part of the river would not be competent or effectual except at the instance of the proprietors on both sides, though of course the proprietor of Barskimming alone could, if he so desired it, in another action obtain an interdict against trespassing on his own estate which would prevent fishermen from using the Barskimming banks of the water of Ayr at that place or the *alveus* of the stream up to the *medium filum* for the purpose of fishing therefrom.

I am accordingly of opinion that the interlocutors of the Sheriff and the Sheriff-Substitute should be recalled, and interdict granted against the defenders fishing for yellow trout or grayling in the river Ayr between the lines A B and C D on the plan No. 19 of process.—*2nd July* 1907.

Counsel for Appellants, Lippe; Agent, W. Croft Gray, S.S.C.—Counsel for Respondents, Morison, K.C., Smith Clark; Agent, James Ayton, S.S.C. J. H. H.

OUTER HOUSE.

(*Lord Johnston.*)

93. Temperance Halls Co-operative Building Society Limited *v.* Glasgow Pavilion Company Limited.

Contract—Sale—Sale of Building—Condition — Condition that Theatre Licence will be Granted—Theatre Licence Granted on Condition that Liquor Licence will not be Applied For—Building Erected Prior to Licensing Act 1903—Licensing Acts 1835 and 1903 (5 and 6 Will. IV. cap. 39, sect. 7; 3 Edw. VII. cap. 28, sect. 47)—Theatres Regulation Act 1845 (6 and 7 Vict. cap. 68),

sects. 2, 5, 7, and 11—Condition of Contract Held to Have Failed — Licensing Authority May Competently Impose Condition in Granting Licence—The Queen v. County Council of West Riding of Yorkshire [1896], 2 Q.B. 386, Followed.

The facts of this case and the contentions of parties sufficiently appear from the Lord Ordinary's Note.

The Lord Ordinary *assoilzied* the defenders from the conclusions of the action.

Lord Johnston.—In this action the Temperance Halls Co-operative Building Society Ltd., of Hamilton, owners of the Victoria Hall there, sue the Glasgow Pavilion Company for implement of certain missives of sale dated 3rd and 5th May 1906, under which, as alleged, the pursuers sold to the defenders the Victoria Halls, Hamilton, at a price of £4750. These missives were subject, *inter alia*, to this condition:

"5. The sale to be conditional on the granting of a theatrical licence to my clients (*i.e.* The Pavilion Company) at an early meeting by the competent licensing authorities of Hamilton."

The pursuers maintain, and the defenders dispute, that this condition has been purified.

After discussion in the Procedure Roll, it became apparent that a knowledge of the circumstances surrounding the bargain would, or at least might, aid in the disposal of the question at issue, and accordingly I allowed a proof in words I now see unfortunately chosen, though I cannot explain how this came about. It was intended to limit the proof to such evidence as would place the Court in the same position as to information as the parties occupied at the time when these negotiations culminated, and in no sense to limit the mode of proof. And this, I think, was understood by the parties. But my careless use of language opened the door to a general proof of negotiations *ante* and transactions *post* the date of the agreement, which I found it impossible judiciously to check during the proof, and therefore contented myself with warning the parties that though they might be allowed to prove what facts they thought relevant, it must be understood that the relevancy and competency of the various points in their proof remained to be sifted—in fact, that the proof must be accepted as one "before answer." On the whole, I do not think that the case will suffer from the more general proof which has been led.

The facts which I select as material and relevant and competent to be proved are these.

The Victoria Hall has been in existence for more than twenty years. For a long time past it has been used, not continuously as a theatre, but for the occasional visits of operatic and theatrical companies such as take places like Hamilton on their tours. By a misconception on the part of the Temperance Halls Society of their obligation, and on the part of the local licensing authority of their duty, or through mere negligence on the part of both, it appears that until a year before the agreement of May 1906 in question, the hall had never been licensed. This, however, was not known generally, and in dealing with the pursuers, the defenders did, in my opinion, proceed, and I think were entitled to proceed, on the assumption that as the hall had been for years back used for theatrical performances, it had, throughout and down to the time of these negotiations, possessed the statutory licence.

The Victoria Hall has on the ground floor its entrance flanked by shops on each side, and has two or three rooms at the back, disconnected with the shops, and used for nondescript purposes connected with the hall. The hall itself is on the first floor, and it has the usual adjuncts of a very minor local theatre or music hall—a stage, a dress-circle, stalls, a pit, and a gallery—suitable for theatrical and other public entertainments, but also for public meetings. I do not rest anything on the fact that the pursuers' company is styled the *Temperance* Halls, etc., Society, because this name is for practical purposes sunk in the name by which the hall is known, viz. the Victoria Hall. But the fact remains that it has throughout been conducted without any liquor licence, and that there is, in fact, no bar within the premises, and, I think I may add, no suitable place in which to establish one, and that the fact that it had neither liquor licence nor bar was apparent on the surface, and was known to the defenders, though they maintain that the premises admitted of a bar being established, and that they had in view to establish one.

I may here refer to two points. (1.) Ground had been acquired by excambion at the back, for extension and improvement, I presume, of the stage and its accessories. But this was not a term of the agreement, and indeed had no relation to it. The excambion had been arranged by the Temperance Hall Society before the negotiations between them and the defenders were entered on.

(2.) It may be said that the hall was more properly styled a music hall than a theatre. That may be so, but as a theatre it had been used. And I am unable to follow some of the witnesses, and even counsel, who spoke as if there was something of the nature of a music hall licence, differing from and inferior to a theatre licence. I cannot claim to be familiar with the statutes on this point; but I am not aware of, and cannot find, any ground for the distinction, and none such was supplied to me in the course of the discussion. I therefore proceed upon the footing that I am concerned with but one form of licence, and that a theatrical licence, under the Act 6 and 7 Vict. cap. 68.

The conditional agreement having been entered

Outer House. *Lord Johnston.*

Temperance Halls Co-operative Building Society Ltd. v. Glasgow Pavilion Co. Ltd.

into, application was at once made, under the statutory rules, to the licensing authority by the defenders for a theatrical licence, and on 12th July 1906 the Justices determined that a licence should be granted, but subject to an undertaking secured by a bond of caution that the grantees would not apply for an Excise licence, without the consent of the Justices being first asked and obtained. A licence on these terms was refused by the defenders, who now maintain that on these terms the condition No. 5 of the agreement of sale and purchase has not been, and cannot be, purified.

These are, I think, all the facts that I can competently entertain in considering the question raised. I do not think that I am concerned with the episode of the employment of Mr Paterson, architect, to prepare and pass plans for the improvement of the hall and its better adaptation to the defenders' purposes, or with the somewhat inconsistent action of the defenders after the determination of the Justices was announced to them—an action which seems to imply that the defenders' managers were acting without fully consulting their board.

The statutory regulations for the control of theatres and theatrical performances, so far as bearing on the present case, are, first, the Act of 1843 (6 and 7 Vict. cap. 68), which repeated existing enactments on the subject, and provided (sect. 2) that it shall not be lawful for any person to have or keep any house or other place of public resort in Great Britain for the performance of stage plays, without the authority of letters patent, the licence of the Lord Chamberlain in the metropolitan district, or of the Justices of the Peace elsewhere; (sect. 5) that on application to the Justices for a theatrical licence a special session shall be held, certain procedure be followed, and the licence, if granted, bear the signature of four Justices; (sect. 7) that the licence shall be granted to the responsible manager of the theatre for the time being; and (sect. 11) that certain penalties shall be incurred by persons acting or presenting stage plays in places not duly licensed. This Act, it will be observed on a further examination of its detailed enactments, deals solely with the control of theatrical performances, and has no bearing on the sale of liquor in theatres.

That matter was, at the passing of the Act of 1843, and, until recently, continued to be regulated by the Act of 1835 (5 and 6 Will. IV. cap. 39), which provided (sect. 7) that it should be lawful for the Excise, and they were strictly authorised and empowered to grant a retail licence for the sale of liquor in any theatre established by royal patent or licensed by the Lord Chamberlain or Justices, without requiring the production of the statutory certificate precedent to the granting of a licence to keep a common inn, alehouse, or victualling house. That is to say, the obtaining a theatrical licence *ipso facto* entitled the licensee to take out an Excise licence.

This system lasted (notwithstanding the passing of the Public-House (Scotland) Acts 1853 and 1862; see *Arthur* v. *Lord Advocate*, 1895, 22 R. 382) until 1903, when it was enacted (3 Edw. VII. cap. 25, sect. 47): "Notwithstanding anything contained in the Excise Act 1835 (5 and 6 Will. IV. cap. 39), no licence to sell excisable liquors in any theatre or other place of public entertainment erected after the commencement of this Act, shall be granted by the Commissioners of Inland Revenue to any person who shall not produce a certificate granted in terms of this Act."

It is, therefore, the present law that when a theatre or other place of public entertainment was "erected" before the commencement of the Act of 1903, it being licensed as a theatre, *ipso facto* entitles its proprietors to an Excise licence, but that where the theatre or other place of public entertainment has been "erected" since that date, its licensing does not carry that consequence; but if a liquor licence is wanted, application to the licensing (liquor) authority for a certificate must be made as in the case of any other premises for which a licence is desired. The first question therefore is, Was the Victoria Hall "erected" prior to the passing of the Act of 1903 in the terms of that statute? I think that it was.

I do not think that it is incumbent on me to consider exhaustively the meaning of the phrase "erected." It is enough for this case that *de facto* the building had been erected, and the proposed alterations cannot be construed as an erection of new, and that *de facto* it had been used as a theatre, and had even latterly, I think, been licensed. On this latter question there is some discrepancy between Mr Bell and Mr Hiddleston. But even if no licence had actually been granted prior to the defenders' application, I think there was, for the purpose of this case, the equivalent in respect of its having been used as if licensed, by the mistake or neglect of those concerned, including the licensing authority. If I am right, then on obtaining a theatrical licence, or the removal of a theatrical licence, the proprietor of the Victoria Hall would by statute have been entitled to go direct to the Excise, who must (*Arthur* v. *Lord Advocate*, *supra*) have granted a liquor licence.

In the next place, were the magistrates legally entitled to impose the condition which they did on granting the licence? This has been decided in the affirmative in England (*The Queen* v. *County Council of West Riding of Yorkshire* [1896], 2 Q.B. 386), and I adopt the judgment and the reasoning of the Court without comment.

But though the parties were acting within their powers, that does not solve the question which I have to decide.

The defenders purchased conditionally a theatre or place of public entertainment erected and *de facto* or *de jure* licensed—this, at any rate, they are entitled to assume. In the circumstances they were also entitled to assume, and I think did assume, that its then proprietor could at any moment have obtained, without further intervention of the Justices, an Excise licence; and what I think they bargained for was that before the provisional or conditional contract became absolute, they should get a licence, or rather transfer of licence, which would put them in the same position as that in which the pursuers actually were, or in which the defenders were entitled to believe that the pursuers were. The granting of a licence under conditions fenced by caution did not place them in that position, and did not, in my opinion, purify the condition of the contract. In fact, until caution was found and the licence accepted on these terms, though the licence was signed, it was not granted. And in a question with the pursuers they were not, I think, bound to accept the terms and find the caution.

I cannot approve the defenders' evasive and underhand mode of proceeding, in suppressing the fact that they contemplated the use of the theatre licence in course of time, or rather after biding their time, to obtain, behind the back of the parties, an Excise licence, and to provide bars, without such structural alteration as would have required them to go back to the Dean of Guild Court. Nor can I approve their employment of Mr Paterson with a view to his exercising influence on the Justices' Bench. But I should be sorry to think that Mr Paterson, had he known their object, would have accepted their employment, though the bare suggestion shows how improper it is to place professional men on the roll of Justices.

But notwithstanding the defenders' conduct, I am obliged to conclude without hesitation, though with reluctance, that they are entitled to be free of their bargain.

I shall therefore assoilzie the defenders from the conclusion of the action, with expenses.—*3rd July* 1907.

Counsel for Pursuers, Hunter, K.C., Macmillan; Agents, Ross Smith & Dykes, S.S.C.—Counsel for Defenders, Blackburn, K.C., D. Anderson; Agents, M'Nab & MacHardy, S.S.C.

R. S. B.

OUTER HOUSE.

(*Lord Johnston.*)

94. Dick *v.* Dick's Trustees.

Succession—Liferent and Fee—Liferent With Power of Disposal "By Will or Other Deed"—Intention of Testator—Intention to Restrict to Liferent, and to Give Power of Testamentary Disposal Only.

Outer House. *Lord Johnston.* Dick v. Dick's Trustees.

This was an action at the instance of Henry Cecil Knox Dick against his late father's trustees, to have it found and declared that he was presently vested and entitled to the fee of the residue of his father's estate.

The late Mr Henry Knox Dick, by the last purpose of his trust disposition and settlement, dated 17th March 1904, appointed the pursuer sole residuary legatee, and directed his trustees to "pay" to him the one-half of the free residue of his estate at the age of twenty-five and the other half when he attained the age of thirty, and the half of the whole revenue of said residue till he attained the age of thirty, and he declared that the whole provisions above conceived in favour of his children should be purely alimentary and not assignable or attachable by creditors. Mr Dick executed three codicils to his will. By the third and last of these, dated 20th July 1904, he provided as follows:—

"I, Henry Knox Dick, maker of the foregoing settlement and codicils, do hereby revoke the provisions therein made in favour of my son Henry in regard to the residue of my estate, and in place thereof I hereby bequeath to him a liferent of the whole of the residue of my estate, and instruct my trustees to pay over to him the one-half of the revenue of the said residue when he attains the age of twenty-five and the whole revenue when he attains the age of thirty, and that half-yearly; but he shall have power, however, to dispose of the capital by will or other deed in such way as he thinks proper, and, failing such disposal, then to his lawful heirs."

The Lord Ordinary *held* that upon a sound construction of the testator's testamentary writings the pursuer was given a liferent only, with a power to dispose of the fee testamentarily.

Lord Johnston.—The question is raised in this case whether a liferent with a power of disposal amounts to a fee. On a sound construction of the testamentary writings in question I think the question falls to be answered in the negative.

The whole testamentary writings must be read together. Now by the original settlement of 17th March 1904 the testator gave his whole residue to his son Henry (the pursuer) without effectual qualification, except as regards the time of payment, for the clause excluding his creditors was of no avail. By his third codicil of 20th July 1904, however, the testator revoked this provision in favour of his son Henry, and in place thereof bequeathed him a liferent of the residue of the estate, and directed his trustees to pay over to him the revenue of this residue, one-half at twenty-five and the whole at thirty years of age, and then added: "But he shall have power, however, to dispose of the capital by will or other deed, in such way as he thinks proper;

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and failing such disposal, then to his lawful heirs." There is a failure in the grammar of this clause, but I think that there is little doubt as to what the testator intended.

If the result of the clause is to give the pursuer a fee of the residue, then the codicil may be taken as *pro non scripto*. Matters would be left where they were under the main settlement. But it is clear that that is not what the testator intended. He revoked the fee already given, and substituted a liferent, with a power of disposal in the terms quoted. And the inference certainly is that he intended to reduce his son's interest from a fee to something more restricted. Nevertheless, he may have failed to effect his purpose. But before I could come to that conclusion the failure must be plain and unmistakable. I do not think that it is so. I think very apt words are used to shew that the testator only intended to give his son a power of testamentary disposal, failing his exercising which, "his lawful heirs" are conditionally instituted. "By will or other deed" plainly means by will or other deed *ejusdem generis*, or of a testamentary nature. I can hardly imagine a more appropriate case for the application of this well-known principle of construction.

I shall therefore assoilzie the defenders from the conclusion of the summons, with expenses.—2*nd July* 1907.

Counsel for Pursuer, Hon. W. Watson; Agents, J. and A. Peddie & Ivory, W.S.—Counsel for Defenders, Hunter, K.C., C. H. Brown; Agents, Ronald & Ritchie, S.S.C. R. S. B.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

95. M'Creadie *v.* Thomson.

Reparation — Relevancy — Administration of Justice—Magistrate—Privilege—Ultra Vires Act—Sentence of Imprisonment Without Option of Fine upon Complaint Where Fine Alone Competent—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sects. 380 (10), 487, 501 (*b*)—Issue Allowed.

(*Reported ante, Vol. XIV. p.* 968.)

Reclaiming Note against an Interlocutor of Lord Johnston.

The facts of the case and the contentions of parties appear from the previous report.

The defender *reclaimed*, and referred to the following authorities:—*Haggart's Trs.*, 1824, 2 Sh. App. 125; *Harvey*, 1876, 4 R. 265; *Primrose*, 1902, 4 F. 783; *Pollock*, 1829, 8 S. 1; *Houlden*, 1850, 19 L.J. Q.B. 170; *Haggard* [1892], A.C. 61; Stair, IV. 1, 5; Ersk. Inst., I. 2, 32.

The following authorities were referred to for the respondent:—*Taaffe*, 1839, 3 Moore P.C. 36; *Barton*, 1850, 13 A. and E. 393; *Strachan*, 1828, 7 S. 4; *Groome*, 1816, 5 M. and G. 313; *Orr*, 1839, 1 D. 551; *Arbuckle*, 1815, 3 Dow's App. 160; *Laing*, 1791, 3 Pat. App. 219; *Carne*, 1851, 13 D. 1253; *Corkery*, 1876, L.R. (Irish) 10 C.L. 174; Justices Protection Act, 1848, sects. 1, 2; Justices Protection Act, 1803; Bell's Prin., sects. 2034, 2036, 2038; Bevan on Negligence, p. 278; Clark and Lindsell on Torts, p. 737; Addison on Torts, p. 742.

The Court *adhered*.

The opinion of the Court was delivered by the Lord Justice-Clerk.

The Lord Justice-Clerk.—This case raises a question of much importance. The pursuer asks for damages from a magistrate sitting in a summary court, on the ground that he sentenced her to imprisonment without the option of a fine, under a complaint based upon a clause of a statute which did not empower him to pronounce a sentence of imprisonment, except as an alternative to the non-payment of a pecuniary penalty, the prayer of the complaint being in terms of the statute. She alleges that although it was pointed out by the Clerk as the Court's Assessor that such a sentence could not be pronounced, he insisted on inflicting it, on the view that he could deal with the matter, not as it was charged in the complaint, but as constituting an offence at common law—viz. a breach of the peace, for which he had by law the power to pronounce a sentence of imprisonment as a direct punishment. That he erred in this cannot be doubted, and that consequently he acted outwith, and in excess of, his jurisdiction, is equally plain. The question now before the Court is whether an action of damages can be competently and relevantly raised against him in these circumstances.

We had the advantage of a very able and full argument from the bar, the one party alleging that a judge sitting as the defender did, is immune from all actions at law for damages for anything done by him when sitting in his judicial capacity; the other party maintaining that while such immunity from attack in a court of law applies to judges of superior jurisdiction, there is no law to the effect that inferior magistrates may not be called upon to make reparation, where they have gone outside their powers, and inflicted a wrong.

Upon the question of immunity of the judges of the Supreme Court there can be no doubt. The principle is clear, and the decisions are emphatic. The principle is that such judges are the king's judges directly, bound to administer the law between his subjects, and even between

his subjects and himself. To make them amenable to actions of damages for things done in their judicial capacity, to be dealt with by judges only their equals in authority and by juries, would be to make them not responsible to the king, but subject to other considerations than their duty to him in giving their decisions, and to expose them to be dealt with as servants, not of him, but of the public. Accordingly, the remedy in this case, if they flagrantly offend against duty, is not by proceedings in any court, but only by addresses to the Crown from the Houses of Parliament. Between their position and that of judges appointed, not by the king, but by the community, or some authority in the community not having the kingly prerogative, but only acting by a delegated authority for local administration, as in the case of Justices of the Peace appointed by the Lord Chancellor, there is no analogy. Therefore any claim for immunity for acts done in local summary courts cannot be based on the fact of the immunity of the Supreme Court judges. That the highest courts of justice are designated "Supreme Courts," of itself indicates the distinction. The Supreme Courts have power to right wrongs done in the inferior courts, their jurisdiction being universal, and their duty being to see justice done throughout the land. The other courts have no jurisdiction beyond their own border, and cannot review the conduct of any other judge within their own border.

Is there, then, any immunity attaching to the judges of the inferior courts for their actings when sitting in judgment? Certainly there is. They cannot be made amenable for words used, however severely they may comment on the conduct of individuals, provided such words are uttered when acting in the exercise of their magisterial functions. Of this the case of *Waterston* is the latest and most emphatic instance. For in that case the magistrate, who was dealing with a charge of crime against a child, sent for the child's father, who was in no way a party to the proceedings, and was not a witness, and used words to him as regarded his conduct in relation to his child, which, while the Court considered them to be highly reprehensible, they held could not be made the ground of an action of damages, the magistrate having at the time been engaged in his official capacity. The principle of this is that the right to express himself freely in dealing with matters before him, must not be hampered by apprehension that he may be sued in a civil court and subjected to damages, as if what he said had been uttered by him as an ordinary citizen, not acting in a public judicial capacity, it being uttered for what presumably at the time seemed to him to be good and just cause.

But while this is so, it is a totally different question whether a magistrate who does official acts when sitting as such which he has no power to do under a statute in accordance with which he is bound to act, and which judicial acts have the effect of restraining the liberty of the subject, and subjecting him to penalty in his person, is immune from civil consequences for the wrong he has done. I do not think that this has ever been held, and the opposite has been held in many cases. Where a magistrate, professing to sit as such, and dealing with a case which he has no jurisdiction to deal with at all, commits what is an undoubted wrong upon a citizen, both by principle and practice he is held liable for the wrong done. If that is so, can it be said that a magistrate who has before him a case which he can competently try, under an Act of Parliament on which the complaint is founded, and who, instead of dealing with the case as it is before him, and on conviction awarding such punishment as the Act prescribes and allows, proceeds knowingly to pronounce a sentence which is not competent under the Act of Parliament, and thereby sends a person to prison contrary to the Act of Parliament—I say, can it be said that he is in any more favourable position than a magistrate trying a case in circumstances where he has no jurisdiction? In the one case his sentence is illegal, because he has no complaint before him on which he can pronounce a sentence at all. In the other he has a complaint before him, on which he cannot pronounce the sentence which he does pronounce. The wrong is as great in the latter as in the former. For as well might he have no jurisdiction at all as step outside the jurisdiction which he does possess, to do something which he could not do if he held himself within the limits prescribed to him by the law under which he was called to exercise his jurisdiction. The case of *Groome* v. *Forrester*, decided in England, is a forcible illustration of the fact that there may be liability in a magistrate, not merely for acting without jurisdiction, but for doing an act in excess of the jurisdiction he was called upon to exercise. In that case, as here, the magistrate could have pronounced an effective judgment, under which incarceration might have taken place. The mistake made was that while the thing complained of was that an overseer had refused to obey an order of Court by delivering up a certain book, he was committed till he should have delivered up "all and every, the books, etc." In that case the magistrates were held liable in damages for "a clear excess of jurisdiction."

Here I think it is necessary to draw a distinction. It is where the error committed by the inferior magistrate takes effect that his liability to answer for the wrong done arises. It is not for what he has ordered, but for what he has caused another to suffer, that he is amenable to the law. That he has pronounced an illegal sentence is not sufficient to subject him in damages, if nothing has been done upon it. But where it

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has been carried out so that the wrong has been made effective, then he may be answerable. This is illustrated by the English case where an illegal sentence ordering confinement in the stocks was pronounced, but was not carried out, so that the wrong was not suffered. Accordingly it was held that no claim for damages could be sustained.

The principle which I have stated as governing the matter seems to be well established by the authorities. Erskine in his Institutes says: "Where a sentence is glaringly illegal, *lata culpa equiparatur dolo*, the law, from the grossness of the error, presumes a perverse will." The magistrate so acting is presumed to have been led astray by evil motive, or by such rashness and disregard of the citizens' rights as will be held equivalent to direct dole.

It would be difficult to state the matter more concisely and clearly, and it appears to me that the decisions of the Courts are entirely in accordance with the idea that, whatever may be the privileges attaching to a judge of the higher courts, it has never been held to extend to such courts as are called Courts of Summary Jurisdiction, which was the nature of the Court in this case.

Reference was made in the course of the debate to the Act of George the Third, commonly called the Twopenny Act, by which justices of the peace were protected from any award of substantial damages unless it was averred that the acts were done "maliciously and without any reasonable and probable cause." It also enacted that no damages or costs should be recovered by the plaintiff, if the justice could prove his guilt, and that he had not undergone greater punishment than was assigned by law to the offence. I refer to the Act for the purpose of indicating what I think is a plain inference to be drawn from it, viz. that these inferior judges must have been subject to actions of damages by the law as it then existed; otherwise it would have been unnecessary to pass a law limiting their liability. And it is to be noticed that the exemption is a limited exemption. It refers only to a conviction "had or made under any Act or Acts of Parliament," and so had no reference to acts done in administering the common law, as to which it left the liability of justices as it was before. And further, I remark that, although that Act was extended to Scotland by the Act 9 Geo. IV. cap. 29, it could never apply to this case, seeing that the pursuer here did suffer a greater punishment than was assigned by law to her offence, seeing that the Act under which she was tried gave no power to commit to prison without the option of a fine. I notice in passing, with reference to England, that new rules as regards liability of Justices were established by the Act 11 and 12 Vict. cap. 44, and the Twopenny Act, in so far as inconsistent with it, was repealed. But that does not affect what I have already said—that the passing of such Acts proceeded and could only proceed upon the footing that such inferior judges as the Act deals with did not possess the general immunity which attaches to the Supreme Court judges. But I think there is a further and necessary inference to be drawn from it, viz. that the doctrine sometimes stated in English cases, that judges of what are called there "Courts of Record" are immune from actions of damages, did not apply to some Courts. The phrase "Court of Record" is not one which conveys any clear idea to the mind of one not versed in English law and practice. But whatever a Court of Record may mean, and to whatever Courts it might apply, the Twopenny Act plainly indicates that Courts of inferior magistrates were never included in the phrase. Accordingly such actions have been repeatedly sustained. The most notable case is that of *Pollock*.

It only remains to be seen whether, under the legal decisions which have been pronounced, it can be held that in such a case as the present, in which a magistrate sitting in a police court has pronounced a sentence of imprisonment for a term, without the option of a fine, where he had no jurisdiction to do so, he is free from any action. I am unable to find, after an examination of the cases quoted in the debate, that they lead to any such conclusion. The case of *Haggart* was a case similar to *Waterston's* case, being based on remarks made by Lord President Hope about the conduct of an advocate. *Harvey* v. *Dyce* was a case of slanderous words used by a sheriff. The only other case founded on in opening by the reclaimer was the case of *Haggard* in Appeal Cases 1892. That case has no bearing on the present, as the question there turned upon the right of a judge to dismiss a civil case as vexatious. One other case was referred to in reply by the reclaimer—that of *Anderson* v. *Gorrie* [1895], 1 Q.B. 668. That case also has no bearing, being the case of a Supreme Court Judge of a colony, and it was held that his position was analogous to that of a Supreme Court Judge in this country, and that he could not be sued for an act done in his capacity as Judge, whether he acted rightly or wrongly.

On the question whether, in this case, it is necessary to aver specific malice and to put malice in issue, I concur with the Lord Ordinary that the case being one in which the wrong complained of was an entirely *ultra vires* act by the magistrate, it is not necessary for the pursuer to prove malice. I adopt the words of Lord Pitmilly, who said in a similar case: "It is no matter whether it was from error or malice, if . . . . grossly illegal and irregular, the party is entitled to claim damages alike from the private party and the judge."

But I guard myself, as he did, from its being

supposed that any *culpa levissima* would warrant damages against a judge.

This doctrine is emphatically confirmed by Bell in his Principles, where too he says: "He (the magistrate) will also be liable if there be gross irregularity in imprisonment, though no malice be shewn."

I would therefore move your Lordships to adhere to the Lord Ordinary's interlocutor. . . . . *9th July* 1907.

Counsel for Reclaimer, Morison, K.C., Murray; Agents, Macpherson & Mackay, S.S.C.—Counsel for Respondent, G. Watt, K.C., Ingram; Agent, Henry Robertson, S.S.C. J. H. H.

OUTER HOUSE.

(*Lord Mackenzie.*)

96. Mackenzie's M.-C. Trustees *v.* Beveridge's Trustees.

Husband and Wife—Marriage Contract—Assignation by Wife of Acquirenda—Testamentary Provisions by Wife's Father in her Favour—Legitim—Marriage-Contract Trustees not Entitled to Control Wife's Election.

The circumstances of this case and the contention of parties are sufficiently explained in the Lord Ordinary's Note.

The Lord Ordinary *assoilzied* the defenders.

Lord Mackenzie.—The object of this action is to have it declared that the pursuers, the marriage-contract trustees of Mr and Mrs Mackenzie, are entitled, under the conveyance in the marriage contract of the wife's *acquirenda*, to payment of the *legitim* to which she is entitled from her father's estate. By the marriage contract, dated in 1873, the husband made certain provisions for his wife which are set out on record. The wife's father was not a party to the marriage contract. On her part she conveyed, assigned, and disponed to the trustees her whole means, estate, and effects then belonging to her, or to which she had right, or to which she might succeed or acquire right during the subsistence of the marriage, and bound and obliged herself to complete titles in her person to said means, estate, and effects, and to execute and deliver all such further deeds in favour of the trustees as might be necessary for carrying out the purposes of the trust.

The trust purposes were (2) for payment of the income to her; (3) on her death for payment of the income to her husband should he survive her; (4) on her death, but subject to her husband's liferent, for the children of the marriage in such proportion as the spouses should direct, or failing appointment, equally. There were two children, Robert Duncanson Mackenzie and William Beveridge Mackenzie. The wife, at the date of the action, had contributed nothing but a legacy of £50 to the marriage trust.

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The wife's father died on 23rd January 1905, leaving a trust disposition and settlement by which he conveyed his estate to the defenders in this case.

By the seventh purpose of his settlement he left Mrs Mackenzie £2000, under the provisions and declarations thereinafter mentioned. A legacy of £2000 was left to the testator's grandson, William Beveridge Mackenzie. One-fifth of the residue was left to Mrs Mackenzie. The testator's grandson, Robert Duncanson Mackenzie, was expressly excluded from any interest in his estate. The trustees were given absolute power and discretion with regard both to the £2000 legacy and the share of residue left to Mrs Mackenzie, to pay or postpone payment, or to retain the same vested in their persons, or to vest the same in other trustees, so that the interest might be paid or applied for her alimentary use during her life, or for such time as the trustees might fix, and so that the capital should be settled on the testator's grandson, William Beveridge Mackenzie, as the trustees might deem expedient.

The purposes of the marriage contract and of Mr Beveridge's settlement were thus at variance as regards (1) the husband's contingent liferent; (2) any interest of R. D. Mackenzie; and (3) the discretionary power to the testamentary trustees over Mrs Mackenzie's capital.

The marriage-contract trustees (with one exception) resolved to claim payment of Mrs Mackenzie's *legitim* to which she became entitled on her father's death. Mrs Mackenzie was called on by the pursuers to concur in this claim, but declined, and is a defender in the case.

The *legitim* will not exceed £13,000. The testamentary provision is at least £14,500. It was pointed out that as payment of this is postponed till the widow's death, the *legitim* may prove to be as valuable. In the event of either of Mrs Mackenzie's brothers predeceasing her mother without issue, the testamentary provisions will be at least £27,000, and may amount to over £43,000.

It was argued on behalf of the pursuers that on the death of Mrs Mackenzie's father on 23rd January 1904 a right to *legitim* vested in her, that she had by her marriage contract conveyed her whole *acquirenda* to the trustees, that the right to *legitim* which had vested in her passed under this conveyance to them, and that she could do nothing to defeat the right they had so acquired. This argument was stated by counsel for the pursuers to be independent of any question of the amounts of the legal and conventional provisions respectively. It was maintained that, where the trusts upon which conventional provisions are to be held are inconsistent with the

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trusts of the marriage contract, it is then not merely the right, but the duty, of the trustees under the marriage contract, which contains a conveyance of *acquirenda* such as the present, to demand payment of *legitim*. According to this argument a wife, by becoming a party to a marriage contract such as the present, destroys her right to elect. It might be that the *legitim* would only give the wife £5000, and that a heritable estate worth £5000 a year had been settled on her by her father. The wife, however, could only take what would fall under the marriage contract. She would not be entitled to elect at all, because by her conveyance of *acquirenda* she had already given the £5000 to her marriage-contract trustees.

There is no doubt that *legitim* vests *ipso jure* by mere survivance. It was pointed out in *M'Murray* v. *M'Murray's Trs.* (1852, 14 D. 1048) that this had been settled since 1843, by *Fisher* v. *Dixon* (1843, 2 Bell's App. 63). Although, however, it is true that the right to *legitim* vests, it is equally true that another right completely vests, and that is the right to the testamentary provisions. This is emphasised by Lord Moncreiff and Lord Gillies in their opinion in *Stevenson* v. *Hamilton* (1838, 1 D. 181 at p. 197), where they say: "That right" (to the testamentary provision) "is perfect and effectual to herself" (the wife), "unless the claim to *legitim* can be put forward in her right. A choice is to be made between these rights; and the material question is, Who shall be entitled to make this election?" The question in *Stevenson's* case was whether the creditors of the husband were entitled to maintain that all the personal rights of the wife became vested in him *jure mariti*, and that the right to the *legitim* having passed to him by the legal assignation of the marriage, he had an absolute right to claim it. The minority there held that the interest of the husband in the wife's *legitim* was one which she could not surrender, and the grounds upon which this view was put support the pursuer's argument in the present case. The Court, however, negatived this view, upon the ground that the husband's *jus mariti*, though it has many of the effects of a right of property, is, in its proper nature a right of administration only. It was held that the right to elect was primarily in the wife, and that if the husband forced his wife, to her injury, to reject a testamentary provision which excluded the *jus mariti*, the Court would interfere. The interlocutor bears that as the mutual claims of the husband and his creditors and of the wife did not admit of adjustment and division of the fund between them being made by the Court, the wife's claim was sustained. *Stevenson's* case is referred to in the *Duchess of Buckingham* v. *Winterbottom* (1851, 13 D. 1129), and was followed in *Lowson* v. *Young* (1854, 16 D. 1098; see also *Macdougal* v. *Wilson*, 1858, 20 D. 658). In the case of *Aikman* (1893, 30 S.L.R. 804) it was held by the Lord Ordinary (Lord Low) that an undischarged bankrupt was not entitled to reject his *legitim* and take instead testamentary provisions from which his creditors were purposely excluded. This was upon the ground that a right to *legitim*, which vested in the bankrupt after the date of the sequestration, and while he was undischarged, was clearly "estate" as defined in sect. 103 of the Bankruptcy Act, and that therefore the trustee was entitled to the vesting order asked. It was pointed out that the decisions of *Stevenson* and *Lowson* were not applicable to such a case.

It was argued in the present case that as a claim to *legitim* cannot be given up to the prejudice of ordinary creditors, neither can it to the prejudice of marriage-contract trustees who are in the position of creditors also. No doubt, in regard to what the marriage contract includes, it is onerous in the highest degree. The right of election, however, is personal and not transmissible, and until it is exercised by the only person who is entitled to do so, it cannot, in my opinion, be said that within the meaning of the conveyance in the marriage contract the wife has succeeded to the *legitim* more than to her testamentary provisions. It appears to me that the right to elect remains, notwithstanding the terms of the conveyance. The wife may be barred from exercising that right, *e.g.*, if she has granted a specific conveyance of her legal rights. Or again, if she has become bankrupt, in like manner she would forfeit her right. I think, however, that unless there is something in the contract to bar her election, her right to elect remains. I am not able to hold that the terms of the marriage contract under consideration are sufficient to operate as a bar.

Nor do I think that there are circumstances in the case which necessitate the interference of the Court.

I am accordingly of opinion that the defenders are entitled to be assoilzied, with expenses.—22*nd June* 1907.

Counsel for Pursuers, Dickson, K.C., Jameson; Agents, Boyd, Jameson & Young, W.S.—Counsel for Defenders, Clyde, K.C., Chree; Agents, J. & A. Peddie & Ivory, W.S. A. M. H.

EXTRA DIVISION.

(Lords M'Laren, Pearson and Ardwall.)

97. Boal *v.* The Scottish Catholic Printing Company Limited.

Slander—Newspaper — Innuendo — Fair Comment—Comment on Appeal for Subscriptions for Charity.

Reclaiming Note against an Interlocutor of Lord Salvesen.

This was an action at the instance of Samuel Boal, journalist and lecturer, 574 Cathcart Road, Glasgow, against The Scottish Catholic Printing Company Limited, the proprietors of the "Glasgow Observer," concluding for £1000 as damages for slander contained in the issue of the defenders' newspaper of 1st December 1906.

The pursuer averred, *inter alia*:—

Cond. 1. The pursuer for many years had been engaged in the publishing of tracts dealing with Protestantism as opposed to Roman Catholicism, and he regularly delivered lectures to the public in various parts of the United Kingdom. In the city of Glasgow the pursuer was generally known as Pastor Boal, and as such he addressed meetings in a hall engaged by the Glasgow Protestant Truth Society at 379 Parliamentary Road. The pursuer was also widely known by name and reputation throughout Scotland and the north of Ireland.

Cond. 2. The defenders were the proprietors of the "Glasgow Observer," a weekly newspaper, which was the recognised organ of the Catholic faith in Scotland. The paper had a wide circulation throughout Scotland and Ireland, and was read alike by Catholics and Protestants. Frequently, in the issues of said paper, the lectures and statements of the pursuer had been maliciously commented upon, and the articles dealing with such matters had been of the most hostile nature to the pursuer and his views, and had exhibited ill-will and hatred towards the pursuer.

Cond. 3. In the issue of the defenders' newspaper of Saturday, 1st December 1906, the defenders printed and published, in a column headed "Glasgow Gleanings"—the type used being large and prominent as compared with the rest of the letterpress—the following statements:—

"We have received a printed note appealing for donations of money or gifts of material for the fitting and furnishing of a 'Home' at 11 Old Govan Road, Paisley Road, Glasgow, S.W. 'The Rev. G. Thompson Diver' is stated to be the 'General Superintendent,' and somebody called Boal appears to have scribbled a note saying, 'We will be pleased to receive a small donation.' . . . .

"Of that we have not the least doubt. . . . .

"In the public interest we beg to inquire: When was this 'Home' started? What has been the number of inmates sheltered in it since then? Is there a balance-sheet? and what guarantee is there that the money subscribed does not go to the private profit of the Rev. G. Thompson Diver or the scribbling Boal?"

Cond. 4. The pursuer believed that it was true that a Home had been opened at 11 Old Govan Road, and that a person known as the Rev. G. Thompson Diver was the superintendent thereof, and had appealed for subscriptions. At no time had the pursuer had any connection with the Home in question, nor had he ever written a note asking for subscriptions for same. The pursuer had in no way interested himself in said Home, and the said article associated him with it for the purpose of creating a pretext for maligning his private character. . . . .

In answer to Cond. 4 the defenders averred:—

Explained that a printed note regarding the said Home was, in or about the end of November 1906, sent to and received by the defenders. The said note is in the following terms:—

"Scottish Protestant Association and Bible Christian Union.

General Superintendent— Rev. G. Thompson Diver. Head Office: 83 Jamaica Street, Glasgow.

"Dear Sir or Madam,—In connection with the above, arrangements have been made to open a Rescue and Industrial Home for Women and Girls. For this purpose suitable premises have been secured at 11 Old Govan Road, Paisley Road Toll, Glasgow, S.W.

"For the fitting and furnishing of the Home, and the carrying on of this work, an appeal is hereby made to the charitably disposed public. Donations of beds, bedding, furniture, and cast-off clothing, as well as donations of money, will be thankfully received and acknowledged.

"If householders desiring to give any of the above-mentioned articles will kindly drop a post-card it will have our immediate and grateful attention. All communications to be addressed to the General Secretary at the office of the Association.—Yours faithfully,

"G. Thompson Diver."

At the top of the note an appeal for a subscription from the defenders is written in a scribbling form of hand-writing, and in these terms:—"We will be pleased to receive a small donation.—S. Boal." It is believed and averred that the said scribbled hand-writing is that of the pursuer.

With reference to Answer 4 the pursuer referred to the note and hand-writing for their terms.

The pursuer further averred:—

Cond. 5. The said statements of and concerning the pursuer were false and calumnious. They were printed and published, or caused to be printed and published, by the defenders without probable cause, and in order to gratify feelings of ill-will and hatred towards pursuer, who held contrary views on religious topics to those advocated by the defenders' said newspaper.

Cond. 6. The said statements complained of meant and implied, and were intended to mean and imply, that the pursuer was an untrustworthy person, or a person not worthy of public trust or confidence in the administration of charitable funds, and was capable of appropriating funds collected for charity to his own uses and purposes.

The Lord Ordinary *approved* the following issue:—

Whether the defenders were at December 1st 1906 the owners of, and printed and published, or caused to be printed and published, the "Glasgow Observer," dated December 1st 1906, containing the article printed in the schedule attached hereto, and whether said article is of and concerning the pursuer, and falsely and calumniously represents the pursuer as a person capable of appropriating funds collected for charity to his own purposes, to the loss, injury and damage of the pursuer?

Damages laid at £1000 sterling.

Extra Division.

Boal v. The Scottish Catholic Printing Co. Ltd.

Lord Salvesen.—This is an action of damages for slander said to be contained in a paragraph published in the "Glasgow Observer" on 1st December 1906. The paragraph itself is printed in Condescendence 3. The pursuer proposes two issues—one the ordinary issue of slander, and the other an issue in which he propounds the question whether the statements complained of were false, and exposed the pursuer to public hatred and contempt. The latter issue has very rarely been allowed in Scotland, and only under exceptional circumstances, none of which exist here. I shall accordingly disallow it.

The innuendo proposed in the first issue is whether the article falsely and calumniously represented the pursuer as a person unworthy of public confidence in the administration of charitable funds, and capable of appropriating funds to his own uses and purposes. The defenders say that the article is not capable of having this meaning attached to it; that all that they did was to comment on a matter of public interest, and that the article amounts only to an enquiry with regard to an unknown charitable institution as to what guarantees there are that it was efficiently and properly managed. It is open to the defenders to convince the jury that that is the true meaning of the article, and that it contains no imputation on the pursuer's character. But in my opinion the meaning which the pursuer says the article was calculated to convey is not so plainly unreasonable as to warrant me in refusing him an issue. There is no doubt that the article is intended to disparage the pursuer in public estimation. It talks of him as "the scribbling Boal," and amongst the enquiries which it makes with regard to the charity for which he is said to have solicited subscriptions, it asks "what guarantee is there that the money subscribed does not go to the private profit of the scribbling Boal?" This enquiry follows a series of questions which were probably quite legitimate, but which suggest a doubt as to the existence of the "home," or at least of its usefulness as a charitable institution. When the writer goes on to suggest that the money subscribed may go to the private profit of the pursuer, he does not appear to me to be in the region of legitimate comment on a matter of public interest, but to have exposed himself to the charge of attacking private character. If the article meant that under the guise of collecting money for a charitable object the pursuer was really seeking to obtain profit for himself, I cannot doubt that it is actionable. I shall therefore allow the pursuer an issue; although I think the inneundo might be better expressed, for I do not find any suggestion in the article that the pursuer was connected with the administration of the society. The proper innuendo seems to me to be that the article represents the pursuer as a person capable of appropriating funds collected for charity to his own purposes.

The defenders *reclaimed*, and *argued* that the pursuer's averments were irrelevant.

The following authorities were referred to:—*Archer* v. *Ritchie & Co.*, 1891, 18 R. 719; *Gray* v. *Society for Prevention of Cruelty to Animals*, 1890, 17 R. 1185; *Falconer* v. *Docherty*, 1893, 20 R. 765.

The Court *adhered*.

Lord M'Laren.—I am not surprised that the defenders should have raised the question of the relevancy of this record, as they have done, because in such cases one has not implicit confidence in the view that may be taken by a jury, especially where the elements of political or religious prejudice come into play. But what we as a Court have to consider is, whether the words published regarding the pursuer are capable of bearing the interpretation or innuendo which is sought to be put upon them. Now the Lord Ordinary has held that they are capable of being put in issue with the innuendo which he accepts as a possible meaning, and I cannot say that I entertain any doubt upon this subject. I adhere to all that I said in my judgment in the First Division in the case of *Archer* v. *Ritchie & Co.*, 18 R. 719, and wherever a critique, however severe it may be in its terms, is, in the opinion of any fair-minded reader, nothing but criticism of public conduct, I should be against sending such a case to a jury. But I am unable to say that the paragraph complained of here is of that character. I therefore agree with the Lord Ordinary, and I concur in everything he has said in his opinion, with one slight reservation as to the passage where he says:—"When the writer goes on to suggest that the money subscribed may go to the private profit of the pursuer, he does not appear to me to be in the region of legitimate comment in a matter of public interest, but to have exposed himself to the charge of attacking private character." It is only necessary for me to say that I think that the observation with regard to subscriptions going to the private profit of the pursuer is not so clearly within the region of legitimate comment that the case should be withheld from the jury. I think it is for the jury to say whether the intention was to point out that the public were in danger of being defrauded by a system of appeals for subscriptions without the publication of accounts or any other guarantee as to the proper application of the funds subscribed, or whether the intention was to say that Mr Diver and Mr Boal were persons who sought for money for the purpose of converting it to their private profit. Even if the writer had not named any person, but, having taken the appeal for subscriptions as his text, had gone on to ask what guarantee was given that money so subscribed did not go to the private profits of those appealing for it, I think he would have come perilously near to the region of attacking private character. Here, however, the defenders do not even give themselves the chance of escaping on the ground that they have made no attack on anyone, for the names of the two gentlemen, to whom they suggest that their criticism is applicable, are given. I have no doubt, therefore, that this case must go to a jury.

Lord Pearson.—I also think that the Lord Ordinary is right in the decision he has come to, and I agree with all that the Lord Ordinary

has said, subject to the qualification which your Lordship has pointed out.

Lord Ardwall.—I also agree with the Lord Ordinary, subject to your Lordship's remarks on his opinion. I think it cannot be said that the article in question might not be interpreted as suggesting that the persons therein referred to are persons capable of putting money subscribed for a charity into their own pockets. It is indeed true that the sentence complained of takes the form of an interrogation and not of an assertion, but I cannot think that that makes any real difference. It is no better than if it had consisted of an assertion that there was no guarantee that the money subscribed did not go into the pockets of Diver and Boal. The pursuer is in my opinion entitled to lay such a statement before a jury and ask them if it can bear the innuendo suggested by him. I therefore agree with your Lordships that this case must go to trial.—6*th July* 1907.

Counsel for Reclaimers, Morison, K.C., Munro; Agents, Bryson & Grant, S.S.C.—Counsel for Respondent, Crabb Watt, K.C., Trotter; Agent, E. Rolland M'Nab, S.S.C. A. M.

OUTER HOUSE.

(*Lord Dundas.*)

98. North British Railway Company *v.* The Budhill Coal and Sandstone Company and Others.

Outer House. *Lord Dundas.*

North British Railway Co. v. The Budhill Coal and Sandstone Co. and Others.

I. Railway—Mines and Minerals—Sandstone—Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sect. 70—"Coal, Ironstone, Slate or Other Minerals"—Held That Sandstone Falls Within Minerals Excepted by sect. 70 from Conveyances of Land to Railway Companies.

II. Railway—Mines and Minerals—Sandstone—Merchantable Value—Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sect. 70—"Coal, Ironstone, Slate or Other Minerals"—Observations on What is the True Test of Whether a Stone is a Mineral in the Sense of sect. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845.

III. Railway—Mines and Minerals—Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sect. 72—Right to Work Minerals for Which Company Has Not Agreed to Pay Compensation—Held that Owners of Minerals for Which the Company Has Not Agreed to Pay Compensation Are Not Prohibited, by sect. 72 of the Railways Clauses Consolidation (Scotland) Act 1845, From Working Them Though the Result be to Injure or Bring Down the Surface of the Company's Land.

IV. Railway—Mines and Minerals—Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sect. 71—Notice of Intention to Work Minerals—Mala Fides—Circumstances in Which Held That Notice of Intention to Work Minerals Not Given in Mala Fide and for Purpose of Rearing Up a Fictitious Claim Against Company.

This was an action at the instance of the North British Railway Co. against the Budhill Coal and Sandstone Co. and the individual partners thereof, as such partners and as individuals; and also against William Mather and Reston Mather, both farmers near Shettleston, and James Mather, engineer, there. The action concluded for declarator: (*First*), that the pursuers, as proprietors of certain lands, marked respectively Nos. 1, 2 and 2a, 3 and 4, at and adjoining Shettleston Station, in the parish of Shettleston and county of Lanark, were proprietors of (*a*) the soil, (*b*) the clay, (*c*) the sand, and (*d*) the other substances presently being worked and removed by the Budhill Coal and Sandstone Co., lying in, under or upon the said lands, and that the said clay, sand, and other substances were not included either (1) in the mines of coal, ironstone, slate or other minerals deemed to be excepted in terms of sect. 70 of the Railways Clauses Consolidation (Scotland) Act 1845, out of the conveyances of the said lands held by the pursuers, so far as the said conveyances were granted under the said Act, or (2) in the mines or minerals expressly excepted out of the said conveyances so far as mines or minerals were expressly excepted therefrom; (*second*), that the defenders were not entitled to work or remove any parts or portions of the said soil, clay, sand or other substances presently being worked or removed by them; and (*third*), that the defenders were not entitled to work or remove any parts or portions of the soil, clay, sand, or such other substances as aforesaid, in, under, or from the lands adjacent to the said lands marked Nos. 1 and 4 on the said plan, so as to injure the said lands belonging to the pursuers, or the railways or station or works on these lands owned by the pursuers, or so as to interrupt or interfere with the working of the traffic on these railways or at the said station; and the defenders, the Budhill Coal and Sandstone Co., ought and should be interdicted from working or removing the said soil, clay, sand, or other substances in, under, or from the said adjacent lands, so as to injure the

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said lands marked respectively Nos. 1, 2, 2A, 3, and 4 on said plan, or the railways or station or works on these lands owned by the pursuers, or so as to interrupt or interfere with the working of the traffic on these railways or at the said station.

The lands, which were the subject-matter of this action, were acquired by the pursuers from the defenders the Mathers for the purposes of their undertaking. In the case of the said lands marked Nos. 1, 2 and 2A on the said plan, all mines of coal, ironstone, slate, or other minerals under these lands were excepted out of the Conveyance thereof held by the pursuers by virtue and in terms of the Railways Clauses Consolidation (Scotland) Act 1845. In the case of the lands marked No. 3 on the said plan, the disposition held by the pursuers contained a reservation in the following terms:—

"But excepting and reserving from the foresaid conveyance the whole coal, ironstone, limestone, and fireclay, and whole other metals and minerals in the lands above disponed, in so far as forming part of the lands of Budhill, with full power and liberty to those in right thereof, and their heirs and successors and their tenants, to search for, work, win, and carry away the same, so far as not already done, but so as not to enter upon the surface of said lands, declaring that we and our heirs and successors shall not be liable or responsible in any way to our said disponees or their foresaids for any damage which may be occasioned to the said lands or to the buildings or erections which may be erected thereon by the working and carrying away the minerals and others before reserved, or those in any adjoining land belonging to us. . . ."

In the case of the said lands marked No. 4 on the said plan, the disposition thereof held by the pursuers contained the following reservation:—

"Reserving always from this conveyance the whole coal mines and minerals in and under the piece of ground hereby disponed, and full right and liberty to work the same, but only by pits sunk outside of the piece of ground hereby disponed, and subject to and in terms of the provisions of The Railways Clauses Consolidation (Scotland) Act, 1845."

Proof was led before the Lord Ordinary, the substance of which and the facts of the case appear from the Lord Ordinary's Note.

The Lord Ordinary issued the following interlocutor:—

"Finds (1) That the pursuers have failed to prove that the notice (No. 8 of process) served upon them by the defenders, the Budhill Coal and Sandstone Co. and others, was given *mala fide* for the sole purpose of compelling the pursuers to compensate the said defenders, and that the workings of the said defenders have been proceeded with *mala fide*, not in the ordinary course of working, but merely to rear up a fictitious claim against the pursuers; (2) that the pursuers have failed to prove that the substances, other than soil and clay, presently being worked and removed by the said defenders, are not such as to fall within the exception contained in sect. 70 of the Railways Clauses Consolidation (Scotland) Act 1845; (3) that it is unnecessary to decide whether or not the substances lying beneath the surface of the lands marked and coloured No. 3 pink on the plan produced (No. 7 of process) are such as to fall within the exception and reservation contained in the pursuers' title to the said lands in respect there is no evidence that the said defenders intend to proceed to work the said substances in said area; (4) that there are neither averments nor proof to support the pursuers' conclusion for lateral support. With these findings, dismisses the whole conclusions of the summons, and decerns."

Lord Dundas. — The pursuers, the N.B. Railway Co., are proprietors of certain lands which are marked and coloured upon the plan produced as No. 1 brown, Nos. 2 and 2A crimson, No. 3 pink, and No. 4 red respectively, which they or their authors have acquired from time to time for the purposes of their undertaking.

The station of Shettleston and various railway lines, including a portion of the main line between Glasgow and Hamilton, are situated upon these lands, mainly upon those coloured brown. The lands were purchased from persons named Mather, whose family have been proprietors of the estate of Budhill since about the year 1790. In regard to the lands Nos. 1, 2 and 2A respectively, all mines of coal, ironstone, slate or other minerals under the same are excepted out of the conveyances to the Company by virtue and in terms of the Railways Clauses Consolidation (Scotland) Act 1845; and the conveyance of No. 4 is practically similar. The conveyance of No. 3 is in common law form, and contains an exception and reservation of minerals which is quoted at length in Art. 3 (*c*) of the Condescendence. The defenders to this action are the Messrs Mather, who claim to be proprietors of the minerals lying under the whole of the said lands, and the Budhill Coal and Sandstone Co. and its partners, who are lessees under an agreement of lease between them and the Mathers (No. 421 of process), dated 11th and 18th December 1905, for nineteen years from Whitsunday 1906, of (first) the freestone metals and all other minerals within a depth of 120 feet from the surface of an area coloured blue upon the plan produced, and of the surface thereof; and (second) the freestone metals and all other minerals within a depth of 120 feet from the surface in the said areas coloured brown, crimson, pink, and red respectively on said plan, and also in an area coloured purple thereon, the surface of which has been feued by the Mathers to the Acme Manufacturing Co. Ltd.

The proximate cause of the action was a notice by the defenders, the said lessees, to the pursuers, dated 27th December 1905, which is printed at length in Art. 4 of the Condescendence, whereby they intimated, in terms of sect. 71 of the

Railways Clauses Consolidation (Scotland) Act 1845, that they intended, after the lapse of thirty days from the service of the notice, to work the minerals contained in their lease under that portion of the railway shown upon the accompanying plan, it being their intention (without prejudice to their right to vary the order of working) to commence to work the sandstone at or near a stated point in the area coloured blue and to work it in a northerly and north-westerly direction, the seam of sandstone being about twelve feet thick; and thereafter to work the building rock underlying the said sandstone, and thereafter the seam of coal thereunder, and the fireclay associated therewith. The pursuers served no counter notice, and the said defenders commenced operations at or near the point indicated by sinking a mine and carrying their workings under a portion of the ground coloured brown, as shown on the plan, with the result that a certain amount of subsidence occurred at and near Shettleston station.

During the proof, and in the arguments, a variety of questions of general importance were developed. I shall endeavour to deal with these; but I do so under the protest that the summons is not, as I shall presently explain, so framed as, in my opinion, to raise them sharply for decision.

The pursuers' counsel argued that sandstone is not a mineral within the meaning of the conveyances to the railway company, or any of them; and further that, in any event, what the defenders are at present working and removing is not of that character. It is, I think, absolutely concluded by authority, so far as I am concerned, that the exception of "mines of coal, ironstone, slate, and other minerals" in sect. 70 of the Railways Clauses Consolidation (Scotland) Act 1845 covers freestone, including in that generic term sandstone and limestone. That was decided in the recent case of *G. and S.-W. Railway* v. *Bain*, 1893, 21 R. 134. But *Bain's* case does not stand alone. In *Jamieson*, 1868, 6 S.L.R. 188, the Lord Ordinary (Kinloch) so decided in regard to limestone, and his decision, which was acquiesced in, was expressly approved by the Inner House in *Nisbet Hamilton*, 1886, 13 R. 454, and by some, at all events, of the judges in *Farie*, 1887, 14 R. 346. It is true that the last cited case was reversed on appeal by the House of Lords (1888, 15 R. (H.L.) 94), but I observe that Lord Watson, who was one of the majority in that House, said (at p. 101): "The important question still remains, What are the minerals referred to, other than coal, ironstone, or slate? My present impression is that 'other minerals' must necessarily include all minerals which can reasonably be said to be *ejusdem generis* with any of those enumerated. Slate being one of them, I do not think it would be possible to exclude freestone or limestone strata." In *Bain's* case (*supra cit.*) the Lord Justice-Clerk said: "Accordingly, in the case of *Farie*, in the House of Lords, it appears to have been regarded as impossible to exclude freestone and limestone, when slate was included." I may also refer to the decision of the House of Lords in *Midland Railway Co.* 1889, 15 A.C. 19, which is to the same effect. It was, indeed, argued for the pursuers that the exception in sect. 70 does not include stone at all. This argument was based upon certain *dicta* by Lord Macnaghten in *Farie's* case (15 R. (H.L.) at pp. 110, 111), where his Lordship, in developing his view (which has since been overruled, *e.g.* in *Midland Railway Co.*, *supra cit.*) that "mines" do not include open-cast workings, dealt with sects. 25 to 36 of the Scots Act of 1845, "with respect to the temporary occupation of land." I doubt whether Lord Macnaghten's *dicta*, which of course must be regarded as of great weight, go the length of supporting the pursuers' argument; but if they do so, then I think that they must give way to the series of decisions already referred to, which directly negative the pursuers' proposition. The pursuers' counsel further founded upon the cases of *Menzies* v. *Breadalbane*, 10th June 1818, F.C., affirmed 1822 1 Shaw App. 225, and *Duke of Hamilton*, 1841, 3 D. 1121. In the first of these—the "Bolfracks" case—the rubric in the Court of Session report is: "Found that a reservation by the superior in a feu-charter of 'the haill mines and minerals, of whatever nature and quality' does not comprehend a quarry of fine stone, of peculiar qualities, useful for building." The report describes the subject in dispute as "a vein of stone of a rare species, peculiarly fitted for architectural purposes, by its admitting of ornamental finishing, and by its resisting the weather." The defender there argued that "in a feu grant, particularly of a Highland property, the parties must have intended to convey all the rocks of which the property was composed, because, in many districts, the property consists of little else." The Lords, by a majority, and reversing the Lord Ordinary (Pitmilly), found as above. The judgment was affirmed by the House of Lords. The rubric in 1 Shaw App. 225 broadly describes the subject as "a quarry of freestone." The briefly reported opinion of the Lord Chancellor (Eldon) proceeds upon the distinction between the canons of construction applicable to leases and feu-charters respectively, and concludes thus: "It does appear to me to be the better opinion that mines and minerals in this feu did not mean stone-quarries, and that the opinion of the majority of the judges is therefore right." The *Duke of Hamilton's* case decided in conformity with the case of *Menzies* v. *Breadalbane*, "that a reservation in an excambion of the liberty of working coal and other metals, fossils, and minerals did not comprehend freestone." The learned judges evidently regarded *Menzies'* case as establishing a general principle to the effect stated, a view which, with all respect, I think might require to be reconsidered if a

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similar question should arise. But it is sufficient for present purposes to observe that cases decided upon the construction of feu-charters or other agreements between parties can afford little or no assistance in determining the true meaning of a statutory conveyance, embodying the statutory exception of mines and minerals. This has been repeatedly enunciated by the highest authorities, and is perhaps nowhere more clearly laid down that it was by Lord Herschell in *Midland Railway Co.*, 1889, 15 A.C. at page 27. So far, therefore, as the pursuers' conveyances of the lands Nos. 1, 2, 2A and 4 are concerned, I am of opinion that sandstone is within the exception expressed in sect. 70, and impliedly embodied in the deeds.

It may be open to question whether a similar proposition can be affirmed in regard to the pursuers' title to the pink lands No. 3. But I see no reason to decide that matter one way or the other, because there is no suggestion that the defenders are about to carry their workings under that area, and there are obvious reasons which render such a course improbable.

I turn now to the pursuers' subsidiary argument, viz. that what the defenders are at present removing by their workings is not sandstone within the meaning of the said exceptions in their titles. There is, I think, no dispute that there is a large amount of undoubted sandstone in this district, though its quality is said to vary from part to part. The defenders are at present engaged in blasting the upper portion of the material, and converting it into moulders' sand, for which it appears to be suitable. They state that their intention is, when they reach what they allege to be harder sandstone, suitable for building, to work that for sale by open-cast quarry. The question raised by the argument must, I consider, be looked at in the light of the whole evidence as to the character of the subjacent materials in the vicinity of the defenders' workings. The pursuers' witnesses describe the material which is now being got out as "a peculiar kind of rotten stone, decomposed stone"—"consolidated sand and clay"—"rotten sandstone"—"a soft, rotten rock"—"stone by courtesy, not building stone," and so forth. The defenders' witnesses, on the other hand, say that what is presently being wrought is suitable for moulders' sand, and that below there is a quantity of good building sandstone.

Some of them describe the latter more modestly as "an ordinary building freestone poor of quality"—"a poor variety of building stone, but could be used as such"—"a first-class quarry of good working freestone for speculative building purposes"—"the usual building stone. I would not compare it with the best, such as Craigleith," and so forth. The pursuers' counsel argued, as I understood him, that neither the softer stuff now being wrought (with which alone the summons deals) nor the alleged harder material below (which appears to be included in the language of his first plea in law) can be dealt with as minerals, because, as he put it, they are of no merchantable value, not being capable of being wrought to profit. I pause to observe that I do not think that capacity of earning profits is the true test of whether or not a stone is "merchantable," and is therefore a mineral, in such a question as this. For example, if a person owned a small seam of coal under a railway, I do not imagine that the Company would be entitled to prohibit him from removing it, merely because he might not be able to sell it at a profit. The proposition which the pursuers contend for is said to have been laid down in *Nisbet Hamilton*, 1886, 13 R. 454. In that case, a proprietor sought payment for rock removed by a railway company from the sides of a railway cutting, within the limits of the land compulsorily acquired from him by the Company. The latter argued in defence (*a*) that the rock did not belong to the pursuer but to the Company, because by their conveyance they acquired the land, and all that might be in it, within the limits of the conveyance, down to formation level; (*b*) that the rock was not a mineral within the meaning of sect. 70; and (*c*) that nothing had been removed except what was necessary for the safe working and maintenance of the line. The Lord Ordinary (Fraser) decided in favour of the Company, solely upon the third ground. Lord Adam, who pronounced the opinion of the Court in the First Division, had some doubt about this ground of decision, but he decided for the Company upon the broad general argument first above stated. Nothing else was necessary to the judgment; but Lord Adam, in considering the second of the Company's contentions, did express an opinion that "while the stone was of some value to the defenders for making or repairing embankments . . . . it was of no merchantable value whatever." By this I do not think his Lordship intended to express or imply that in order to come within the exception in sect. 70 it is necessary that stone should be wrought, or capable of being wrought, at a profit. I am confirmed in this view by what the same learned judge said in *Farie's* case (14 R. at pp. 366, 367). Lord Adam there quoted with approval the tests applied by English judges, viz. that the material should be "of some value" or "of commercial value"; and he also referred to the opinion of Lord Romilly, M.R., in *Chechley* (L.R. 1867, 4 Eq. 19), where his Lordship used the words, "anything . . . . which is useful for any purpose whatever." If I have rightly interpreted Lord Adam's meaning, it appears to be in harmony with the views upon this matter of the learned Lords in *Farie's* case, and particularly with that expressed (15 R. (H.L.) at p. 96) by the Lord Chancellor (Halsbury). I observe that in a recent English case his Lordship reiterated his

opinion upon the point, and said (during the course of the argument): "I think it is absolutely wrong to say that the question whether a thing can be worked at a profit or not is to determine whether it is a mineral or not" (*Todd, Birleston & Co.* [1903], 1 K.B. 603, at p. 606). I refer also to Lord Herschell's explanation in *Midland Railway Co.*, 1889, 15 A.C. at pp. 26, 27, of his opinion in *Farie's* case (15 R. (H.L.) at p. 105). But I need not labour this matter further, because I think it clear, looking to the mass of evidence *hinc inde* contained in the proof, I am not in a position here and now to affirm, even to the restricted extent and effects which the summons contemplates, that the "substances presently being worked" are not such as fall within the exceptions referred to; and still less, that such is the case as regards the "similar substances in the remainder of said lands" to which the pursuers' first plea in law seems to extend.

I believe that this is the stage at which I ought to notice an argument which was strenuously advanced for the pursuers, but of which I can find no trace upon the record. It was to the effect that, even assuming that the substances which the defenders have begun to work out are minerals within the exception contained in sect. 70, they have no right so to work them as to injure or bring down the surface of the pursuers' land. It was conceded that the contrary was decided forty years ago by the House of Lords in the English case of *Bennett*, 1867, 2 E. and I. App. 27, which has not only been followed by numerous decisions in England, but has hitherto been regarded as good law in Scotland. (See, for example, *Haunchwood Brick, etc. Co.*, 1882, 20 Chan. Div. 552; *Ruabon Brick, etc. Co.* [1893], 1 Chan. 427; *Blades* [1901], 2 Chan. 624; *Todd, Birleston & Co.* [1903], 1 K.B. 603; *Farie's* case, *supra cit.*; *Dixon*, 1879, 7 R. 216 (per Lord Adam)—referred to in *Farie's* case by L.P. Inglis and Lord Adam, 14 R. at p. 353 and p. 365, and by Lord Herschell in *Midland Railway Co.*, 1889, 15 A.C. at p. 32; Ferguson's Deas on Railways, p. 192.) It is, however, now urged that there is a vital, though hitherto unnoticed, distinction between the language of sect. 79 of the English Act and the corresponding sect. 72 of our own statute. I am satisfied, upon a careful study of the two sections, that this is an entirely mistaken idea. The language of the sections is, for some reason, different, but the meaning appears to me to be the same. The scheme of the English section is that if before the expiration of the thirty days the Company do not state their willingness to treat with the mine-owner or lessee for payment of compensation, it shall be lawful for the latter to work the mines, or any part thereof for which the Company shall not have agreed to pay compensation, "so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate"; and then the section proceeds—quite intelligibly, though perhaps tautologically—to provide that if any damage be occasioned to the railway by "improper working of such mines," the same shall be repaired and made good by the mine-owner, etc., at his own expense. Sect. 72 of the Scots Act is not, to my thinking, substantially different. It provides that, upon the same hypothesis, it shall be lawful for the mine-owner or lessee to work the mines, or such parts thereof for which the Company shall not have agreed to pay compensation, up to the limits of the mines for which they shall have agreed to make compensation, "in such manner as such owner, lessee, or occupier shall think fit, for the purpose of getting the minerals contained therein." The words quoted seem to me to be substantially equivalent to those which I quoted from the English section, the idea of both being, as I think, proper as contrasted with improper mining operations; and the section proceeds, perhaps unnecessarily, as in the case of the English section, to state the converse proposition, viz. that, if any damage be occasioned to the railway "by the working or getting of any such minerals which the Company shall so have required to be left unworked, and for which they shall so have agreed to make compensation"—and this is, I think, the analogue of the "improper working" of the English section—the damage shall be made good by the owner or lessee at his own expense.

If the views which I have now expressed, perhaps at too great length, are correct, I think it is manifest that no practical effect can be given to the first declaratory conclusion of the summons. There is no evidence that the defenders are removing "soil" or "clay," except very thin streaks of clay, the removal of which would be a necessity of working the sandstone, assuming that the defenders are entitled to work out the latter. As regards "sand" and "other substances," the summons is not framed so as to meet in any adequate manner the evidence and arguments to which I have referred, and in regard to which my opinion is substantially adverse to the pursuers. Nor, in my opinion, can the second declaratory conclusion, and the interdict relative to it, receive practical effect, if the views already expressed are sound—unless, indeed, the allegation of *mala fides* on the part of the defenders, to which I shall presently allude, is well founded.

The third declaratory conclusion can, in my judgment, be disposed of in a few words. It is really based upon a claim by the pursuers for adjacent support; and their counsel referred to the recent case of *Turners Ltd.*, 1904, 6 F. 900. But, assuming everything else in the pursuers' favour, it seems sufficient to say that there is nothing, so far as I can see, in the record or in the evidence to warrant the conclusion.

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I now come to a question which, if I do not mistake, lies at the very core of the pursuers' case, but which, oddly enough, is not specifically referred to in their summons, though it might probably be given effect to, if necessary, under the conclusions for interdict.

The point is sharply enough raised by the pursuers' third plea in law, and is to the effect that the defenders' notice was "given *mala fide* for the sole purpose of compelling the pursuers to compensate the said defenders," and that their workings have been proceeded with *mala fide*, "not in the ordinary course of working the said substances, but merely to rear up a fictitious claim against the pursuers." I do not doubt that, now and again, unfounded claims are brought against railway companies, with the sole object, in the words of the pursuers' witnesses, of "harassing" or "getting at" the Company; nor that, if such a case were fairly proved, the Court would be entitled and bound to interfere on the Company's behalf. But I think that very clear proof would be required to justify such intervention. A case of this sort was presented, but failed, in *Midland Railway Co.*, 1887, 37 Chan. Div. 386, affd. 1889, 15 A.C. 19. In that case there had been no workings, nor had any lease of the minerals been granted. I entirely accept the law there laid down by Cotton, L.J., and quoted with approval by Lord Herschell, that "there must be not only an expression of desire but an honest actual existence of the desire to work, either by himself or his lessee, to justify an owner in giving such a notice. If he gave the notice when it was obvious that there were no minerals, or that he could not possibly intend either to let or work them himself, that would be vexatious, and the Court would not allow that to be acted upon." But the pursuers' case falls, in my judgment, far short of the sort of case there supposed. It depends upon the evidence as to the history of the Mathers' estate, and of its minerals; upon the method resorted to by the lessees for mining out the "rotten rock" for moulders' sand; and upon the opinions of the pursuers' skilled witnesses as to the impossibility of working any of the subjacent materials to a profit. The pursuers' case is, I think, at its best, one of suspicion. On the other hand, I saw no reason, so far as their demeanour was concerned, to doubt the honesty of the evidence given by Mr Mather and the Messrs Loudon. Further, I find it difficult to suppose that a scheme which is being carried on under the auspices and with the approval of Mr Rankine—a witness upon whose experience and integrity the Court is accustomed to rely—is one of the *mala fide* character which is alleged against it. Mr Rankine depones that he "had nothing to do with the actual looking out for a tenant"; but after the tenants were accepted, the matter came before him. He "unquestionably approved of the sandstone being let in the area in question." He considers that the defenders' mine, the sinking of which was accomplished before his advice was sought, is "an excellent means of ascertaining what is there," and says that "what has been done in the way of opening out the stone here has been properly done with a view to the getting of the material in the shape of sandstone in this ground, although I would regard it as preliminary to open-cast for the harder material." Other witnesses of experience in their respective lines of business, such as Mr M'Laughlan and Mr Barlas, speak confidently as to the future prospects of the concern; and there is a considerable body of evidence to the effect that the defenders' sandstone is at least nowise inferior to that obtainable at Haughyett quarry, the contents of which appear to have been regarded in *Bain's* case (21 R. 143) to be good workable freestone. Mr Tatlock, the well-known analyst, also depones: "The harder rock which I saw recently appears to be fair building rock. It would not rank with the best, such as Craigleith, but it is quite as good as well-known building stones that I have had to examine." I may observe, in passing, that Mr Tatlock's earlier reports upon the samples submitted to him seem to me to have as little to do with the real merits of this case as Mr Marshall's much-vaunted bottle of muddy water (No. 512 of process). I do not refer to these witnesses for the defenders as indicating that I agree with their evidence, but merely for the purpose of showing why I cannot accept the view that this claim is a wholly *mala fide* and vexatious one. I carefully refrain from making the smallest indication of any formed opinion as to the value, if any, of the defenders' subjacent materials. That is a question which, in my judgment, must, failing agreement, be decided by arbiters or an oversman, and not by this Court. All that I now say is that I am not prepared, upon the evidence before me, to sustain the pursuers' third plea in law. In conclusion, I may refer to a passage in the opinion of Chitty, J., in the *Midland Railway* case (37 Ch. Div., at p. 392) as fairly representing my views upon this point, and perhaps affording some answer to Mr Hall Blyth's complaint as to his experience of "inflated damages."

I do not think that there is any other point which requires to be dealt with. Upon the whole matter I am satisfied that the action must be dismissed, with expenses. The chief regret which I entertain is that it should have been necessary to deliver so long an opinion in regard to a summons which does not directly raise any of the issues with which I have thought it my duty to deal.—22*nd June* 1907.

Counsel for Pursuers, Cooper, K.C., Macmillan; Agent, James Watson, S.S.C.—Counsel for Defenders, Clyde, K.C., C. H. Brown; Agents, Smith & Watt, W.S. A. M.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

99. The Bank of Scotland *v.* Gardiner and Others.

Bankruptcy—Act 1621, cap. 18—"Conjunct and Confident Person"—Bond in Name of Confident Person—Declaration of Trust by Confident Person in Favour of True Creditor — Holders of Bond Ranked — "True, Just, and Necessary Cause"—Bond and Disposition in Security —Account at Date of Bond — Whether Adjustment of Indebtedness Necessary as at Date of Bond—Account Current—Payments to Account — Appropriation of Payments.

(*Reported ante, Vol. XIV.* p. 146.)

Reclaiming Note against an Interlocutor of Lord Dundas.

The claimant Howard *reclaimed.*

The following authorities were referred to:—*Matthew's Trs.*, 1867, 5 M. 957, at p. 961; *Miller*, 1892, 19 R. (H.L.) 43; Act 1621, cap. 18; II. Bell's Com., 172, 180; *Lang*, 1859, 22 D. 113; *Jackson*, 1870, 8 M. 408; *Scott's Trs.*, 1884, 11 R. 407; *Cuthill*, 1894, 21 R. 549.

The Court *adhered.*

The Opinion of the Court was delivered by Lord Low.

Lord Low.—In regard to the question whether the bond and disposition in security granted by Gardiner to Pitcher is challengeable under the Act 1621, cap. 18, I agree with the Lord Ordinary, and I am quite satisfied with the grounds upon which his judgment is rested.

There is, however, another question upon which the Lord Ordinary did not consider it necessary to express a decided opinion. The claimant Howard maintains that if the bond and disposition in security in favour of Pitcher should be held to be good, the debt of £8689, in security of which it was granted, has been extinguished to the extent of some £3400 by indefinite and unappropriated payments. The rule of law upon which that contention is founded is that where, in an account current, there is no appropriation of payment to any particular debts, the law makes an appropriation according to the order of the items in the account. I am of opinion that there is no room in this case for the application of that rule. There is here no account current between the parties in the sense in which that expression is used in the rule. What Howard founds upon as an account current is the account No. 240 of process. That is an account which was made up by Pitcher, for the purposes of this case, from memoranda, jottings, letters, cheques and bank pass-books. It contains on one side sums advanced to Gardiner, and on the other payments received from him, and to that extent it is somewhat in the form of an account current. It does not, however, represent any account current which was actually kept between Gardiner and Pitcher or Biss.

That, however, might not have been conclusive if the fact had been that advances having been made by Biss through the agency of Pitcher to Gardiner, the latter had from time to time made indefinite payments to account of his general indebtedness. But that was not what took place. [*His Lordship examined the evidence regarding the various items of payments, and continued.*]

The result is that, in my opinion, it is quite plain that none of the sums credited to Gardiner after the date of the bond, were indefinite payments to account of his general indebtedness. . . . .—*9th July* 1907.

Counsel for Reclaimer Howard, Kennedy, K.C., W. Thomson; Agents, Carmichael & Miller, W.S.—Counsel for Respondents Pitcher and Biss, Morison, K.C., Garson; Agents, Webster, Will & Co., S.S.C. J. H. H.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Low.*)

100. Turnbull *v.* Fleming (Turnbull's Trustee).

Succession — Testament — Presumption as to Childbearing — Failure of Trust Purposes—Fee to Children Nascituri of Lady Unmarried and Now Fifty-Eight Years of Age — Denuding in Favour of Pursuer on Finding Security to Repeat in the Event of a Child being Born.

(*Reported ante, Vol. XIV. p.* 405.)

Reclaiming Note against an Interlocutor of Lord Dundas.

The Lord Ordinary having assoilzied the defender from the conclusions of the action, the pursuer *reclaimed.*

Counsel for the pursuer stated that the pursuer did not insist in claiming payment of the estate as a matter of right. The pursuer offered security to repeat in the event of a child being born; and in these circumstances the Court were in practice to authorise the trustee to denude. In addition to the cases quoted in the Outer House, counsel referred to *Blackwood* v. *Blackwood's Trs.*, 1833, 11 S. 699; *In re*

2nd Div. Turnbull v. Fleming (Turnbull's Trustee).

Loman [1895], 2 Ch. 348, per Lindley, L.J., at p. 366; *Munro* v. *Macarthur*, 1878, 16 S.L.R. 126.

The Court *recalled* the interlocutor reclaimed against, and *allowed* a proof before answer of the averments as to the failure of the trust purposes by the deaths of the whole persons who would have been entitled to the residue of the estate failing issue of the pursuer.

The Lord Justice-Clerk.—There is no doubt that it has long been a fixed doctrine in our law—and the same seems to be the case in England—that there is no age at which a woman is presumed to be incapable of childbearing. Nevertheless, the Court have in several cases considered themselves able to allow property, which is to all intents tied up, when there is practically no possibility of children being born, to be divided on security being found to make repetition in the event of a birth taking place. I think we may follow these cases on the present occasion. I therefore propose that we recal the interlocutor of the Lord Ordinary and allow a proof before answer of the averments for the pursuer contained in Articles 6 and 7 of the Condescendence.

I should add that, while we recal the interlocutor of the Lord Ordinary, I do not think his Lordship could have treated the present case otherwise than he has done.

Lord Stormonth-Darling.—I quite agree. It is to be understood that we agree with the Lord Ordinary in his view that he could not, in this case, have done anything but what he has done. It has been argued that we ought to follow the decisions which have been cited to us, and which lay down a rule which does not constitute a rule of law but a rule of practice. We think this is a suitable case for applying that rule.

Lord Low.—I am of the same opinion.—11*th July* 1907.

Counsel for Pursuer, Howden, J. H. Henderson; Agent, William Considine, S.S.C.—Counsel for Defender, MacRobert, C. A. Macpherson; Agents, M'Leod & Rose, S.S.C. F. A. U.

OUTER HOUSE.

(*Lord Salvesen.*)

101. Costa and Others *v.* Lumley.

I. Slander — Innuendo—Fraud — Charge of Running Dog in a Race Under a Wrong Name—Language Held Not to Bear Innuendo.

II. Slander—Privilege—Referee at Dog Race Meeting—Right of Referee to Give Reasons for Disqualifying Competitors—Malice—Facts and Circumstances—Relevancy.

III. Slander—Fraud—Charge of Fraud in a Printed Notice in General Terms—Averments That Charge Intended to Apply to Pursuers—Form of Issue.

The pursuers in this action were four working men in Edinburgh who were joint owners of a racing whippet dog named "Music." The defender was the promoter of athletic and sporting competitions at Powderhall, Edinburgh, and damages for slander were here claimed from him (1) for statements made by the defender concerning the pursuers at a race meeting at Powderhall on 31st December 1906; and (2) for statements in a notice printed on the back of the official programme issued by the defender in connection with a dog handicap to be run on 2nd February 1907.

The circumstances in which the alleged slanderous statements were made are sufficiently set forth in the Opinion of the Lord Ordinary.

The first issue proposed by the pursuer was:

Whether [at the time and place mentioned, and in presence of certain named persons] the defender falsely and calumniously said of and concerning the pursuers, or any of them and which of them, 'It's a wrong dog. Get off this track, or I will have you arrested,' or used words of the like import and effect, meaning thereby to represent that the pursuers had been guilty of fraud, to the loss, injury, and damage of the pursuers.

The second issue proposed was as follows:

Whether in the end of January 1907 the defender issued to the public programmes containing a notice in the terms set forth in the schedule hereto annexed, and whether the said notice is of and concerning the pursuers, or any of them and which of them, and is false and calumnious, to the loss, injury, and damage of the pursuers?

Damages laid at £200 for each of the pursuers.

Schedule referred to:—

"Important Notice."

"The practice of dog owners assuming a number of names having become so mystifying to the promoter and handicapper, notice is hereby given that in future all dogs must be entered in the actual owner's name, who will, however, if desired, be allowed to register a name under which all his nominations will appear in future. Anyone failing to act in accordance with this notification will be liable to have their dogs disqualified.

"Mr F. A. Lumley desires to thank dog owners and followers of the sport for the liberal patronage bestowed upon his promotings during the past year. The healthy state of the sport has encouraged him to set aside a number of dates during the forthcoming season for dog racing. The only regrettable feature in the past season's racing has been the tendency to bring dogs from other racing districts such as Oldham, Newcastle, etc., and to enter them under another name as a local dog without giving any details of past performances. Handicaps have been won? (stolen is perhaps the proper word to use) in this way, and the dog has been immediately returned to its rightful owner. The promoter is aware that

unless some effort is made to check this abuse it will ultimately succeed in killing the sport. He therefore desires to get the co-operation of owners and others in the efforts he intends to make during the incoming season to stamp it out.

"In future all first entries must be made upon a form which will be supplied at the office on the ground or at 163 Leith Street. All particulars asked for must be given in full (written in ink) and signed by the actual owner of the dog, and will be used in evidence against him should the promoter at any time find misleading information has been given."

The defender pleaded (1) that the language complained of was not calumnious; (2) that the occasion was privileged, and that facts and circumstances were not relevantly averred from which malice could be inferred; and (3) in regard to the second issue, that the notice was issued to the public in general terms, and was not of and concerning the pursuers or any of them.

The Lord Ordinary *disallowed* the first issue, and allowed the second issue in the following amended form:—

Whether in the month of January 1907 the defender issued to the public programmes containing a notice in the terms set forth in the schedule hereto annexed, and whether the said notice or any part thereof is of and concerning the pursuers, or any of them and which of them, and falsely and calumniously represents that they or any, and which of them, had been guilty of fraud in substituting another dog for their dog "Music" at Powderhall races, to the loss, injury, and damage of the pursuers?

Damages laid at £200 sterling for each of the pursuers.

Schedule annexed as quoted above.

Lord Salvesen.—Two issues have been proposed in this case, the one based upon an alleged verbal and the other on an alleged written slander of the pursuers. The defender maintained on somewhat different grounds that neither of these issues should be allowed, and it is accordingly necessary to scrutinise the pursuers' averments.

There are four pursuers—Costa, M'Manus, White, and Paterson—and each claims damages to the extent of £200. They claim to be joint owners of a whippet dog named "Music." In November they arranged to enter this dog for the New Year Powderhall Handicap of 190 yards, the first prize in which was £40. To qualify the dog for this race it was sent to Middleton, near Oldham, for six weeks' special training, and on 14th December the dog was entered for the handicap by the pursuer Costa in the name of the pursuer White, and was by request placed in the first string of No. 1 heat. The first heat was to be run on 31st December at 2 p.m., and prior to that hour three of the pursuers, along with their trainer, were upon Powerhall course. When the race was just about to commence the marksman said to the pursuer Costa, "A very good imitation, but you shan't run here. The right 'Music' was a wee bit browner between the strokes." Some other conversation took place, and Costa then fetched the defender. On his asking the marksman what was the matter in dispute the latter replied, "It's not the one." The defender then said to the marksman, "You know what to do," and on his return to the winning line he ordered the dog's number to be taken down from the number board, and so disqualified it. The pursuer Costa then went to defender at the winning line and asked him why the dog was not allowed to run, and the latter replied, "It's the wrong dog. Get off this track or I will have you arrested."

These are the words which are put in issue, and although addressed only to the pursuer Costa, they are said to represent that all the pursuers had been guilty of fraud, the fraud consisting in their having substituted another dog for the genuine "Music" in order to increase their chance of winning the prize.

It is admitted by the pursuers that the defender was in sole control of the races in every way. It was, therefore, part of his duty to disqualify any dog to which a valid objection was taken, and it is not contended by the pursuers that for any mistake which he might make in performing this duty he would incur any liability. The right to disqualify seems also to imply a right in the arbiter to state the reason if he is appealed to. At all events, I think it is plain that he is privileged in doing so, and indeed that the case is one of somewhat high privilege. It is difficult to see in what simpler language the defender could have given his reason for the disqualification than the words attributed to him. If, as the pursuers contend, the threat to have Costa arrested could be read along with the other words "It's a wrong dog," it might be possible to innuendo the words as implying a charge of fraud against Costa. In my opinion they cannot be so read. The words "Get off this track, or I will have you arrested," appear to have no possible connection with the alleged fraud, but refer to an obstruction of the track by the pursuer and a threat to have him dealt with if he did not remove himself. The contention that the words complained of, "It's a wrong dog," necessarily imply a charge of fraud, not merely against Costa, to whom they were addressed, but against other persons who are said to have had an interest in the dog, seems to me untenable. I presume a dog may be rightly disqualified though its owner has not been guilty of fraud, and I therefore propose to disallow the first issue. I may add that I think this is a case in which even if the words could be construed as calumnious, malice would require to go into the issue, and that the issue falls to be disallowed on the further ground that there are no facts and circumstances from which such malice can be inferred.

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The second issue is based on a printed notice which the defender issued in the end of January 1907. The notice relates, *inter alia*, to fraud or attempted fraud in connection with racing. It states that dogs have been brought from other racing districts and entered as local dogs under false names, and "that handicaps have been won (stolen is perhaps the proper word to use) in this way." The words here are perfectly general, and contain no direct reference to pursuers, and it is not said that such things as those referred to have not occurred in connection with the racing of whippet dogs. The pursuers, however, aver, and offer to prove, that the objectionable paragraph of the notice was directed against them, and that it was so understood by large numbers of the public. This perhaps by itself would not be enough, but there are some circumstances which they found on as indicating that the writer of the paragraph had the case of the pursuers specially in his mind. Their dog "Music" had come from Oldham as a pup and had been trained there, and Oldham is the first place that is mentioned as an outside racing district from which dogs that have been given false names and descriptions had been brought. Further, the notice refers to "the past season's racing as having been characterised by this regrettable feature." What is even more important is that the disqualification of "Music," which is said to have attracted great interest at the time, had taken place within a month of the publication of the notice. All these circumstances lend some colour of probability to the suggestion that the notice was directed against the pursuers. If so, it certainly is capable of being construed as imputing an attempt to commit fraud to the persons who were responsible for entering "Music" in the New Year Powderhall Handicap. Indeed, for all that appears, the pursuers may have been the only persons that the defender had in his mind when he issued the notice; and if that were proved it might be accurately described in the words of the issue as being "of and concerning the pursuers." I shall accordingly allow an issue based upon the notice, but the pursuers must innuendo the paragraph of which they specially complain.—*22nd June* 1907.

Counsel for Pursuers, W. J. Robertson; Agent, John Robertson, Solicitor.—Counsel for Defender, W. Thomson; Agent, Norman M. Macpherson, S.S.C. J. W. F.

OUTER HOUSE.

(*Lord Salvesen.*)

102. Glasgow Parish Council *v.* The United Collieries Limited.

Arbitration — Procedure — Appointment of Oversman—Failure of Arbiters to Agree—Jurisdiction of Court to Make Appointment — Arbitration (Scotland) Act 1894 (57 and 58 Vict. cap. 13), sect. 4.

This was a petition by the Glasgow Parish Council (Glasgow District Lunacy Board) for the appointment of an oversman in an arbitration between them and the respondents, who were the lessees of the minerals on lands belonging to the petitioners. The clause in the lease providing for arbitration was in the following terms:—"In case any disputes shall arise between the parties with regard to the import of this lease and regulations prescribed, or with regard to any question arising out of the agreement betwixt them, as to the minerals hereby let, which this lease does not sufficiently explain or as to which it is silent, every such dispute or misunderstanding shall be referred to two arbiters to be mutually chosen by the first and second parties; or in the case of the parties not agreeing on arbiters, by two arbiters to be named by the Judge Ordinary; and in case of the arbiters not agreeing in opinions, by an oversman to be chosen by the arbiters; and it is provided that the award or awards, interim and final, which may be pronounced shall be final and binding on both parties." The opinion of the Lord Ordinary, who granted the prayer of the petition, and appointed Mr John Chisholm, K.C., Sheriff of Roxburgh, Berwick and Selkirk, as oversman, sufficiently reports the case.

Lord Salvesen.—The petitioners are proprietors of certain lands, the minerals in which are at present worked by The United Collieries Co. Ltd., under a lease to which they have acquired right by various transmissions. Certain disputes have arisen as to the working of the minerals, which fall to be settled by arbitration in terms of the clause of the lease quoted in the answers. Each party accordingly nominated a mining engineer as his arbiter, and each of them accepted office. Before proceeding with the reference the two arbiters, in accordance with what has now become an almost universal practice in similar references, agreed to nominate Mr Dixon, M.E., as oversman. Mr Dixon at first accepted office, but afterwards withdrew his acceptance; and the arbiters have failed to agree on the nomination of any other oversman to take his place. The respondents explain that the difference between the parties is one of principle, the petitioners pressing for the appointment of a legal man and the respondents for that of a practical man as oversman. After some correspondence, Mr Gemmel, the respondents' arbiter, suggested that, as the arbiters had failed to agree upon an oversman, application should be made to the Court; and the present petition has accordingly been brought.

The respondents plead that the petition is

incompetent, or at least premature. They contend that, under the clause in the lease which provides for arbitration, it is not competent for the Court to appoint an oversman until the arbiters have differed in opinion as to the merits. They say that, in the event of their agreeing, no oversman need ever be appointed; and that in that event it will be a hardship that the expenses of an unnecessary petition should be expenses in the arbitration which, in the event of their being unsuccessful, they might have to bear. The validity of this argument depends on the true construction of sect. 4 of the Arbitration (Scotland) Act 1894, which is in these terms: "Unless the agreement of reference shall otherwise provide, arbiters shall have power to name an oversman on whom the reference shall be devolved in the event of their differing in opinion. . . . Should the arbiters fail to agree in the nomination of an oversman, the Court may, on the application of any party to the agreement, appoint an oversman." The former part of this clause is inapplicable here, because the arbiters are expressly empowered to choose an oversman; and it is conceded that the arbiters may also proceed to name an oversman before the reference commences. The propriety of their doing so was expressly decided in the case of *Crawford* (1858, 20 D. 488). It being further conceded that the arbiters have failed to agree in the nomination of an oversman, the section quoted seems to make it competent for the Court to appoint one; for I see no ground for limiting its powers under this section, in a way in which the powers of the arbiters themselves are not limited. The contention that this case falls under the proviso at the commencement of the section is, in my opinion, untenable; for although the reference cannot be devolved upon the oversman unless the arbiters differ in opinion, I do not find anything in the clause to prevent the arbiters making provision for the event, which is almost invariable, of their failing to come to an agreement on the merits.

As to the matter of expenses, these are not asked against the respondents except in the event of their opposing the petition. If the application is competent—as I find it to be—then it was quite proper to ask that the expense of nominating the oversman should be found to be expenses in the arbitration. Whether the respondents will have to pay this, will of course depend upon the results. It would, I think, be very unfortunate if it should be held that the Court could not appoint an oversman before the arbiters had actually differed in opinion; because it is now matter of daily practice, with a view to the ultimate saving of expense, that the oversman should sit along with the arbiters and hear the evidence, in case of the reference being devolved upon him.

As both the arbiters are men of practical experience, I concur with the petitioners that the oversman should be a gentleman with legal qualifications.—10*th July* 1907.

Counsel for Petitioners, Orr Deas; Agents, Mackenzie, Innes & Logan, W.S.—Counsel for Respondents, C. D. Murray; Agents, Mackenzie & Wyllie, W.S. J. W. F.

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FIRST DIVISION.

(Exchequer Cause.)

(*Lords M'Laren, Kinnear and Pearson.*)

103. Harris *v.* City of Edinburgh.

Revenue — Income Tax — Assessment — Income Tax Act 1842 (5 and 6 Vict. cap. 35), sect. 60, Schedule A, No. 1, General Rule, and Schedule A, No. III., Rule 3 — Slaughterhouse, Property of Municipal Authority With Restricted Powers of Profit Earning, Assessed Under Schedule A, No. 1, General Rule.

Stated Case under the Taxes Management Act 1880.

This Case set forth as follows:—

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts, and for executing the Acts relating to the Inhabited House Duties for the county of Edinburgh, held at Edinburgh on the 18th day of October 1905;

The Lord Provost, Magistrates, and Council of the City of Edinburgh (hereinafter referred to as "the Corporation"), per Mr Robert Paton, their Chamberlain, appealed against an assessment made upon the Corporation, for the year ending 5th April 1905, of £91, 19s. of duty, being income tax at the rate of 1s. per pound on £1839, the net annual value for that year of premises at No. 119 Fountainbridge, Edinburgh.

The assessment was made under the Acts 5 and 6 Vict. cap. 35, sect. 60, schedule A, No. 1 General Rule; 16 and 17 Vict. cap. 34, sect. 2; and 4 Edw. 7 cap. 7, sect. 7.

The Corporation claimed, as regards the Act 5 and 6 Vict. cap. 35, to have the assessment made as in all previous years under No. III., Rule 3, of Schedule A, and the Rules of Schedule D of that Act.

1. The following facts were admitted or proved:—

(*a*) The premises consist of slaughterhouses and houses accessory thereto. They are owned and occupied by the Corporation. They were erected by the Corporation under "The Edinburgh Slaughterhouses Act 1850" (13 and 14 Vict. cap. LXX.), which authorised the Corporation to provide public slaughterhouses for the city of Edinburgh, regulate their use, and charge the rents and dues therein set forth.

(*b*) The annual value of the premises, as appearing in the Valuation Roll for the City of Edinburgh for the year 1904–05, made up by the assessor appointed by the Magistrates of said city under the Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. cap. 91), is £2425. The Commissioners adopted that annual value for the purposes of the Income Tax Acts; and after making the deductions allowable

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under these Acts, fixed the net annual value of the premises at £1839. The Assessor is not an officer of Inland Revenue.

(*c*) The Corporation levy and take, as authorised by the Act of 1850, from every flesher to whom a booth or share of a booth in the slaughterhouses is allocated, over and above the dues on cattle slaughtered therein, a yearly rent, payable half-yearly at Whitsunday and Martinmas. The booths are occupied in some cases solely by one flesher, in other cases by two fleshers, and in other cases by three fleshers. The rent of each booth is £8 per annum; and where a booth is occupied by more than one flesher, each of them pays a proportionate part of the rent of £8. The dues at present payable by a flesher renting a booth or share of a booth vary from one penny to sixpence per head of cattle.

The dues payable by a flesher using the slaughterhouses and not renting a booth or share of a booth are double the amount of the dues payable by a flesher renting a booth or share of a booth.

(*d*) The revenues derived from the slaughterhouses, including therein the dues on carcases brought into the city, and the dues on the sale of hides, skin and tallow, and the sums received for the blood, dung, and other refuse arising in the slaughterhouses, and all incidental revenue, are, as directed by the Act of 1850, employed (1) in defraying the necessary expenses of collection, management, and repairs, and all other annual burdens; and (2) in payment to the Corporation of a permanent annuity of £1000 (being interest at the rate of 5 per centum per annum upon the capital sum of £20,000 advanced or borrowed by the Corporation for the erection and completion of the slaughterhouses); and any surplus of the revenuues, or any deficiency thereof, is, as directed by the Act of 1850, carried forward in the accounts until the first periodical investigation after the arising of such surplus or deficiency. The state of the accounts and of the slaughterhouses is investigated triennially, with the view of determining whether the dues at the rates then current shall be continued, or whether they shall be increased or diminished; and the Corporation may, if necessary, increase or diminish the dues from time to time, in order that the requisite income may be realised, taking into account any deficiency or surplus of revenues.

(*e*) For the year to 15th May 1905 the gross revenue, as detailed in the City Accounts, is, ... £4948 12 3

And the gross expenditure is . . . £4506 2 4

Deficiency of Revenue at beginning of year. 310 19 1

4817 1 5

Surplus Revenue at close of year to 15th May 1905 . . . . £131 10 10

2. The Corporation contended:—

(1) That the slaughterhouses were assessable, not in respect of the annual value of the premises, but only in respect of the profits derived therefrom; and therefore that the assessment should have been made according to the rules of Schedule D of the Act 5 and 6 Vict. cap. 35, under No. III., Rule 3, of Schedule A of that Act, as amended by sect. 8 of the Act 29 and 30 Vict. cap. 36, the slaughterhouses being "concerns of the like nature" with those described in said Rule 3 (*Adam* v. *Maughan*, 1889, 27 S.L.R. 64, 2 Tax Cases 541; *Webber* v. *Corporation of Glasgow*, 1893, 30 S.L.R. 255, 3 Tax Cases 202). Under the Act of 1850 there are and can be no profits earned from the slaughterhouses over and above the said sum of £1000 payable annually to the Corporation.

(2) That if the slaughterhouses were assessable under No. 1 General Rule of Schedule A, the valuation of £2425 was excessive, and should be reduced to £1000—the amount of the annuity paid to the Corporation.

And (3) That the Assessor for the City of Edinburgh, not being an officer of Inland Revenue, the annual value of the slaughterhouses appearing in the Valuation Roll, made up by the Assessor, was not binding on the Commissioners (*Menzies*, 1878, 5 R. 531, 1 Tax Cases 148).

3. The Surveyor of Taxes (Mr Edward Harris) maintained:—

(1) That the slaughterhouses were capable of being let at an annual rent, and should be dealt with as ordinary trade premises, the annual value thereof being assessable under No. 1 General Rule of Schedule A of the Act 5 and 6 Vict. cap. 35; and the profits derived therefrom being assessable under Case 1 of Schedule D of that Act, on the three years' average, the annual value being deductible as a trade expense in arriving at the amount of the profits assessable under Schedule D.

(2) That the slaughterhouses, not being of the like nature with the concerns described in No. III., Rule 3, of Schedule A, and not being specifically mentioned therein, were properly assessable under No. 1 General Rule of Schedule A.

And (3) That the fact that the Assessor for the City of Edinburgh was not an officer of Inland Revenue did not preclude the Commissioners from adopting, if they thought fit, for the purposes of the Income Tax Acts, the valuation of the slaughterhouses made by the Assessor.

4. The Commissioners, upon a consideration of the facts and arguments submitted to them, were of opinion that the slaughterhouses were assessable by relation to the profits derived therefrom, in accordance with the provisions of the Act 5 and 6 Vict. c. 35, s. 60, Schedule A, No. III., Rule 3, and the Rules prescribed by Schedule D of that Act, and were not assessable under No. 1 General Rule of Schedule A.

The Commissioners accordingly sustained the appeal and vacated the assessment.

5. Whereupon the Surveyor of Taxes declared his dissatisfaction with the determination of the Appeal as being erroneous in point of law.

Argued for the Appellant: This was not a concern of a like nature to those enumerated in No. III., Rule 3, Schedule A. The essential feature of those concerns was their profit-earning capacity. The slaughterhouse was precluded by the terms of its constituting Act from earning profits (*Edinburgh Southern Cemetery Co.* v. *Surveyor of Taxes*, 1889, 17 R. 154; *Ystradyfodwg Sewerage Board* v. *Benstead* [1896], 1 K.B. 294, and [1907], 1 K.B. 490, at p. 498.

Argued for the Respondents: The utilisation of land in connection with the earning of profits was the distinguishing feature of the concerns enumerated in Rule 3. The slaughterhouse was a concern which possessed these features. It did in fact earn profits to the extent of £1000 per annum on which it had been hitherto assessed. It was not necessary that the profits should be

unlimited. The position of gasworks, one of the enumerated concerns, was precisely similar to that of the slaughterhouse in this respect.

The Court *reversed* the determination of the Commissioners, and remitted to them to refuse the appeal and confirm the assessment.

Lord M'Laren.—The question in this case relates to the mode of assessment under which the Corporation of Edinburgh are to be assessed for income tax for the slaughterhouses which are the property of the Corporation.

The Surveyor of Taxes claims that these subjects should be assessed under Schedule A, No. 1 General Rule, which is the ordinary rule for the assessment of lands and heritages not falling under any special rule. The Corporation claims to have the assessment made under No. III., Rule 3, of Schedule A and the rules of Schedule D of the principal Act, which by a later statute are made applicable.

The slaughterhouses and houses accessory thereto were erected by the Corporation under the Edinburgh Slaughterhouses Act 1850. The mode of occupation and the particulars of the revenue derived by the Corporation from the persons who make use of the slaughterhouses are set forth in the case and relative appendix, and it is not necessary to the explanation of the grounds of my opinion that I should enter into particulars on this subject. But I must direct attention to the provisions of the Act of Parliament which regulate the application of the revenue to be derived by the Corporation for the use of the slaughterhouses.

Under sects. 12 and 13 the Corporation is empowered to advance the capital required for the construction and equipment of these buildings, and for that purpose to borrow money on the security of the property to an extent not exceeding £20,000.

By sect. 21 the revenues derived from the slaughterhouses are to be employed, first, in defraying the necessary expenses of collection, management and repairs, including certain charges therein specified; secondly, in paying an annuity, originally at the rate of £7 10s. per cent., on the capital provided, but eventually reduced to £5 per cent.; and it is further provided that any surplus of the said revenues, after satisfying the foresaid purposes, or any deficiency thereof for such purposes, shall be carried forward in the said accounts until the first periodical investigation to be made after the arising of such surplus or deficiency.

The periodical investigation here referred to is the subject of sect. 23, and it is to be repeated at intervals of three years. Without entering into further detail, it may suffice to say that under the fifth head of this section the Magistrates and Council are to take into consideration the reports obtained by them, and to determine whether the dues on cattle shall be continued as formerly, or whether and to what extent the same shall be increased or diminished. Under sect. 24 there is a qualified appeal to the Sheriff. The Act gives no power to the Magistrates and Council to appropriate any part of the revenue of the slaughterhouses other than the annuity or interest on the capital provided; and it is perfectly clear that the slaughterhouses are intended to be self-supporting, but that the dues are to be so fixed that no permanent profit can be derived from them.

If it appears that a surplus has arisen in any triennial period after providing for annual outgoings and extraordinary repairs, if any, then the dues must, in accordance with the statute, be so fixed that this surplus shall be extinguished in subsequent years; and if there is a deficiency, this is to be made up by levying dues at a higher rate in subsequent years. The result of the administration prescribed by the statute is, as I conceive, that the undertaking is not carried on with a view to profit, and that there can be no perception of profits by anyone, although there may be an apparent profit on certain years which is to compensate the deficiency in the accounts of other years.

It appears to me that the undertaking carried on under such conditions cannot, in sound construction, be brought within the scope of the provisions of No. III., Rule 3, of Schedule A.

If we put together the introductory part of No. III. and the Special Rule 3, the statutory provision will read as follows:—

"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited . . . .; (3) of ironworks, gasworks, ... and other concerns of the like nature, from, or arising out of, any lands, tenements, hereditaments, or heritages, on the profits of the year preceding."

I have not quoted the enumeration of the different species of works contained in Rule 3, because in my view we do not need to consider whether slaughterhouses are concerns of the like nature with the works enumerated. One can never be quite sure as to the principle of an enactment in a taxing Act; but in this case I think the principle is reasonably clear, and it is that in the case of ironworks and the other works emunerated, which are carried on with a view to profit, it is impossible, or at least extremely difficult, to separate the profit derived from the use of the land from the profit derived from the mercantile undertaking carried on by means of the land or its produce, and therefore the two things are massed together and are assessed as a going concern. The supplementary part of No. III. directs that the duty is to be charged on the person, corporation, etc., "carrying on the concern," and the Act 29 and 30 Vict. cap. 36, sect. 8, directs that the assessment is to

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be made according to the rules prescribed by Schedule D of the principal Act. Now, if I am right in my conclusion that these slaughter-houses are not carried on with a view to profit, and that no profit in any true sense is made, the provisions of No. III., Rule 3, are inapplicable. But it does not follow that the subject is to escape taxation; because the only result of excluding No. III. and all its rules, is to put the subject into the category of property in the natural occupation of its owner who is not using it as a profit-yielding investment, and it is thus chargeable according to the General Rule No. 1 of Schedule A upon the rent "at which the same are wont to be let by the year."

This is the principle of the decision of Mr Justice Walton in the case of the *Ystradyfodwg Sewage Board* (1906, 1 K. B. 308), where the learned judge considered it to be perfectly clear that the mode of assessment prescribed by No. III., Rule 3, of Schedule A could not be applied to undertakings that were not established or carried on with a view to profit. The contrary contention seems to have been abandoned in the later stage of the case reported in 1907, 1 K.B. 490, and subsequently affirmed in the House of Lords, because, if I rightly follow the report, the only question raised was whether a main sewer was assessable under General Rule No. 1, or was not assessable at all.

A separate point was made as to the amount of the assessment. I see no reason to doubt that the Inland Revenue Department is entitled to found on the valuation made under the Lands Valuation Act, although that valuation is not necessarily binding on them. No other valuation consistent with General Rule No. 1 is suggested in the case. The assessable income for the year 1904–1905 accordingly after making the deductions allowed under the Income Tax Acts, is £1839, and in my opinion the appeal should be allowed, and it should be found that the subjects are assessable under No. 1 General Rule of Schedule A upon a net annual value of £1839.

Lord Pearson.—I also am of opinion that the original assessment by the surveyor was right, and that the appeal must be sustained. It would be a singular and, as I think, an unexpected result, if the public slaughterhouses of the city were, in the circumstances disclosed to us, to be assessable to income tax under the rules of No. III. of Schedule A. I do not say that in no circumstances could a slaughterhouse be brought within the category of works specified in the third rule of No. III. But one thing is clear, that in all cases falling under that rule the charge is to be on the amount of yearly profits, calculated either on the year preceding, or on an average of a specified number of years. The undertakings, or "concerns" as the statute calls them, are regarded as going concerns, carried on for the purpose of earning profits. Of course it is always possible that even a concern to which the rule undoubtedly applies may in any given year or period of years earn no profit; in which case there will be nothing to assess. But I am unable to see how the rule can apply to a concern which not merely earns no profits, but which is not run for the purpose of profit, and which, moreover, being created by statute, is expressly debarred by its statute from earning anything which can really be called profit. That is the position of the Edinburgh City Slaughterhouses. They were built at the expense of the common good of the city at a cost of £20,000; and a perpetual annuity of £1000 a year is payable out of the slaughterhouse returns, to square the account. Beyond that, they are forbidden by statute to make a single penny of profit; and they are enjoined so to adjust their rates periodically as to secure this result. I cannot recognise such a concern as falling within No. III. of Schedule A; and the alternative must be that the subjects are assessable under No. 1 General Rule of Schedule A, which provides for an assessment on the annual value of lands, tenements, and hereditaments generally. How that annual value is to be arrived at in the particular case is another matter; but the Commissioners fixed the net annual value of the premises at £1839, which I presume will be allowed to stand for the year of assessment.

Lord Kinnear concurred.—16*th July* 1907.

Counsel for the Appellant, Cullen, K.C., A. J. Young; Agent, P. J. Hamilton Grierson, Solicitor of Inland Revenue.—Counsel for Respondents, Cooper, K.C., Macmillan; Agent, Thomas Hunter, W.S., Town Clerk. W. A. R.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling and Low.)

104. Brydon *v.* Brydon.

Parent and Child—Custody of Child—Child in Mother's Custody—Action of Separation Raised—Court Refused to Make Order in the Meantime—Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), sect. 5.

Petition.

The petitioner craved the Court to find that he was entitled to the custody of his child, and to ordain his wife, the respondent, to deliver the child to him.

The petitioner stated:—

The petitioner was married to his wife on 1st August 1898. There is one child of the marriage—Robert Brydon—born 6th September 1902. The parties lived together in Edinburgh. Their domestic relations were of a satisfactory nature down to about the end of 1902, although even during that period

friction arose from Mrs Brydon's frequent absences from home on visits to her parents. . . .

In July 1904 Mrs Brydon went off to Lilliesleaf without her husband's knowledge and consent. While there she consulted a lawyer in Hawick with a view to the arrangement of a separation from her husband. The petitioner thereupon consulted his present agents. Through their intervention a reconciliation was effected, and the relations between the parties continued satisfactory for about a couple of years. . . .

On or about 2nd October 1906 the petitioner, on returning from business, found that his wife had left home, taking the child with her, and carrying off numerous household furnishings, but without leaving any intimation as to where she had gone.

On 6th October 1906 the petitioner was served with a summons in the Small Debt Court at Edinburgh at the instance of "Mrs Elizabeth Little or Brydon, presently residing at 12 Guildhall Street, Dunfermline, 'for twelve weeks' aliment at the rate of 15s. per week,' pending judgment in an action of separation and aliment about to be raised in the Court of Session," as the summons bears. On 17th October 1906 the Sheriff-Substitute (Guy) allowed Mrs Brydon 10s. per week for a period of six weeks, and the amount was duly paid. At the same time the petitioner's agents informed the respondent's agent that they would accept service of the summons in the threatened action of separation and aliment, and requested that the boy should be handed over to his father's custody. After the expiry of a period of about twelve weeks, during which no action was taken by the respondent, the petitioner visited Crossford on Saturday, 29th December 1906, in the hope of being able to obtain delivery of his child. The boy, however, was not persuaded to accompany his father, and still remains in his mother's keeping.

Though several months have since elapsed, the threatened action of separation and aliment has not yet been brought into Court.

The petitioner is anxious to have the custody of the said child of the marriage. He is in a position to maintain it, and to provide for it in every way.

The respondent stated:—

Admitted that the petitioner and respondent were married on 1st August 1898, and that there is one surviving child of the marriage—a son—who was born on 6th September 1902. Admitted that prior to 1902 friction arose between the spouses. The causes of such friction assigned by the petitioner are denied, and explained that it was entirely due to the petitioner's intemperate habits, and to the way in which he neglected and ill-treated the petitioner, as hereafter described.

Admitted that in July 1904 the respondent went to her parents' house at Lilliesleaf, that while there she consulted a solicitor regarding a separation from the petitioner, and that a reconciliation was ultimately effected. Explained that the respondent's actions were due to the petitioner's intemperance and ill-treatment, and that she returned to him on his promising to become teetotal, which promise he did not keep. . . . . Admitted that . . . . on 7th October 1906 she had again to leave him in consequence of his conduct.

Admitted that she thereafter raised an action against the petitioner for aliment and obtained a decree, and that the aliment was paid. Admitted that the respondent intimated she was to raise an action of separation and aliment. Explained that such an action is now in process of being raised. Admitted that the petitioner visited Crossford in December 1906. Explained that he never asked the respondent to return to him.

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Quoad ultra, the statements in the petition are denied. Explained that immediately after marriage the petitioner began to be very intemperate in his habits, and to spend his evenings away from home, returning in a state of intoxication. While in that condition he lost all power of self-control, used abusive language to the respondent, and threatened her with personal violence. His conduct grew worse in the early part of 1904, when time and again when he came home at night the respondent had to take refuge with her child in a neighbour's house. On one occasion he was only prevented from striking the respondent by a friend who accompanied him holding him back. It was in these circumstances that the respondent left him and went to Lilliesleaf. As a condition of her returning to him the petitioner promised to become teetotal, but he only kept his promise for a few months, when his conduct became worse than ever. Even when the respondent's parents were living in the house, the respondent had to ask the neighbours to come in and restrain her husband from violence. The petitioner's misconduct again culminated after the respondent returned from Dunfermline. On 1st October 1906 he came home about midnight much the worse of drink, and continued for nearly two hours to use abusive and threatening language to the respondent. He threatened to strike her more than once, and told her to leave the house and take her child and belongings with her. The respondent was afraid of the safety of herself and her child, and accordingly left the house next morning.

It would be detrimental both to the physical and moral welfare of the child to return home to his father. He is a delicate boy, subject to recurrent attacks of croup, and requires constant attention and fresh air. These necessities the petitioner, apart from his habits, cannot give the child, as he is at his work all day. In any case his habits of intemperance have become so confirmed, and his conduct when intoxicated is so outrageous, that he is utterly unfit to be the guardian of a child of such tender years, and it would endanger the moral upbringing, the health, and even the safety of the boy, to entrust him to the petitioner's care.

Argued for Petitioner: The answers contained no averment of cruelty on the part of the petitioner. The wife had been guilty of inexcusable delay in bringing her action of separation. The action was only raised on 5th July, when the petition was coming on for hearing. She had left her husband's house on 2nd October 1906, and she ought to have raised her action at once. The child was almost five years of age, and would have to go to school in September. He should go from his father's house. The old law of the father's right to the custody of his children was not abolished by the Guardianship of Infants Act. The father's house was his proper residence (*M'Kellar* v. *M'Kellar*, 1898, 25 R. 883, per Lord M'Laren; *Reid* v. *Reid*, 1901, 3 F. 330; *Rintoul* v. *Rintoul*, 1898, 1 F. 22; *A. C.* v. *B. C.*, 1902, 5 F. 108; *Sleigh* v. *Sleigh*, 1893, 30 S.L.R. 272, per Lord M'Laren).

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Argued for Respondent: Looking to the Guardianship of Infants Act it could not be questioned that the respondent had stated relevant answers to the petition. Pending enquiry into the facts the custody should not be changed. The action of separation would proceed, and enquiry would most conveniently take place in that action. If there was delay in taking action the delay was on the part of the husband. The present petition was not presented until 7th June. It was not the business of the wife to take action against her husband. If he was wrongfully deprived of the custody, it was his duty to claim it. *Rintoul* was disposed of on relevancy. This case was more like *Reid*, where the wife had been ordered to leave the house.

The Court *sisted* the petition *hoc statu*.

The Lord Justice-Clerk.—I do not think that this is a case in which we should pronounce such an order as the petitioner asks for. We have a statement by the respondent's counsel that he has advised his client as to proceeding with the action of separation and aliment, and that the action will be proceeded with as rapidly as possible. In these circumstances I think that it would be wrong to do anything on this petition in the meantime.

Lord Stormonth-Darling.—I agree.

Lord Low.—I concur.—13*th July* 1907.

Counsel for Petitioner, F. C. Thomson; Agents, J. B. M'Intosh & Son, W.S.—Counsel for Respondent, Constable; Agents, Galbraith-Stewart & Reid, S.S.C. F. A. U.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

105. M'Laren's Trustees *v.* M'Laren.

I. Succession — Trust Disposition and Settlement — Accretion — Gift to Members of Family — Death of One Member—Terms of Settlement Held Not to Imply Accretion to Other Members—Paxton's Trs., 1886, 13 R. 1191, Followed.

II. Succession — Trust Disposition and Settlement — Vesting — Vesting Subject to Defeasance—Clause Declaring Period of Vesting—Held (Diss. Lord Low) Vesting Suspended till Period Named.

Special Case.

John M'Laren died in 1900, leaving a trust settlement, the third purpose whereof was in the following terms:—

(Third) Subject to the foregoing provisions and payment of any further provisions or legacies I may hereafter make or leave, I appoint my trustees to hold the free residue and remainder of my estate, heritable and moveable, real and personal, above conveyed, and to apply the same for behoof of my sister Mary M'Laren or M'Alpine, wife of John M'Alpine, Grafton Square, Glasgow, and her children or such of them as shall be alive at my death, in manner following; That is to say, the said residue and remainder of my said estate shall be divided into eight equal parts or shares, and the said Mrs Mary M'Laren or M'Alpine shall be entitled to one of said shares, and her children, John M'Alpine, Robert M'Alpine, Elizabeth M'Alpine, and Grace M'Alpine shall each be entitled to one of said shares, and the said Mary Hastie M'Alpine and Agnes Roy M'Alpine shall be entitled equally between them to three of said shares, and that over and above the provisions in their favour contained in article second hereof; but providing and declaring that by acceptance of the provisions herein contained the said Mary Hastie M'Alpine and Agnes Roy M'Alpine shall not be entitled to make any claim after my death against my estate for wages for any period prior to my death; and my trustees shall, to such extent as the provisions contained in article second hereof will permit, pay or make over to the children of my said sister Mrs Mary M'Laren or M'Alpine, his or her share in the case of sons on their respectively attaining or having attained the age of twenty-five years, and in the case of daughters on their attaining or having attained said age or being married, whichever of said events shall first happen, but said provisions of residue in favour of the children of my said sister shall not vest until they respectively attain the said age, or being daughters respectively attain said age or be married; and I provide and declare that, in case any of said children shall predecease me or die before his or her share of residue becomes vested, leaving lawful issue alive at the period for vesting, such issue shall be entitled, and that equally amongst them if more than one, to the share or respective shares which his, her, or their parent would have taken if alive, and the same shall become payable and transferable to them at the first term of Whitsunday or Martinmas after such share or shares would have become payable to their parent or parents; and providing and declaring that it shall be in the power of my trustees, if they see fit, to apply the free proceeds or income of the presumptive share of any child or lawful issue foresaid, or so much thereof as my trustees may consider proper, towards his or her maintenance, education, or advancement in life.

Mary Hastie M'Alpine, one of the truster's nieces named in the settlement, died in 1902, intestate, unmarried, and under the age of twenty-five. This special case was presented to determine the rights of parties in the share destined to her. The share in question was heritable.

The second party was the heir at law of the truster. He *maintained* and *argued* that Mary Hastie M'Alpine had died without taking any vested right in her share, and that her share did not accresce to her mother and brothers and sisters, but fell into intestacy, and now belonged to him.

The fourth parties were Mary Hastie M'Alpine's brothers and sisters, and the third party was her

mother. They *maintained* and *argued* that their sister's share accresced to them. Alternatively, that their sister's share vested in her *a morte testatoris*, subject to defeasance in the event of her leaving issue, and that it now fell to them as her intestate heirs.

The following cases were referred to: (1) on question of accretion: *Paxton's Trs.*, 1886, 13 R. 1191; *Muir's Trs.*, 1889, 16 R. 954; *Menzies*, 1898, 1 F. 128; *Roberts*, 1903, 5 F. 541; (2) on question of vesting: *Young*, 1862, 4 Macq. 314; *Popham's Trs.*, 1883, 10 R. 888; *Simpson*, 1873, L.R. 16 Eq. 208; *Williams*, 1871, 6 Ch. Ap. 782; *Snell's Trs.*, 1877, 4 R. 709.

The following questions were submitted for the opinion and judgment of the Court:—

First.—Does the share of the trust estate destined under the settlement to the deceased Mary Hastie M'Alpine fall to be dealt with as intestate succession of the truster John M'Laren; and if so, does it now fall to the second party as heir in heritage of the truster, or equally to him and the third party as sole next of kin of the truster?

OR,

Second.—Does the said share of the trust estate accresce to and fall to be divided amongst the parties hereto of the third and fourth parts according to their respective interests in the residue of the estate, to the exclusion of all others claiming an interest in said residue?

Third.—Did the said share of the trust estate vest in the said Mary Hastie M'Alpine on the death of the truster, and does it now fall to be dealt with as her intestate succession?

The Court (*diss.* Lord Low) *answered* the first part of the first question in the affirmative, and the remaining portion of the first question, and the second and third questions, all in the negative

Lord Stormonth-Darling.—Mr John M'Laren, grocer, Dunblane, died in 1900, leaving heritable estate of the net value of £1850 and moveable estate (after deduction of debts) amounting to about £200. He was survived by an only brother who was his heir in heritage. This brother and an only sister, Mrs M'Alpine, were the testator's sole next of kin. Mrs M'Alpine had a family of two sons and four daughters who all survived the testator, and these persons (Mrs M'Alpine and her children) were the sole beneficiaries under Mr M'Laren's trust disposition and settlement. The event which has led to this special case being presented is that one of them, Mary Hastie M'Alpine, died in 1902, without having been married, and before her attainment of the age of twenty-five years, which was expressly declared by the testator, in the case of each of his residuary legatees, to be the date before which their provisions of residue should not vest.

The clause dealing with residue begins with appointing the trustees "to hold the free residue and remainder of my estate, heritable and moveable, real and personal, above conveyed, and to apply the same for behoof of my sister Mary M'Laren or M'Alpine, wife of John M'Alpine, Grafton Square, Glasgow, and her children or such of them as shall be alive at my death in manner following; that is to say, the said residue and remainder of my said estate shall be divided into eight equal parts or shares, and the said Mrs Mary M'Laren or M'Alpine shall be entitled to one of said shares, and her children John M'Alpine, Robert M'Alpine, Elizabeth M'Alpine, and Grace M'Alpine, shall each be entitled to one of said shares; and the said Mary Hastie M'Alpine and Agnes Roy M'Alpine shall be entitled equally between them to three of said shares, and that over and above the provisions in their favour contained in article second hereof." I pause here to say that the second article of the deed had provided that these two ladies and the survivor of them should have the use and occupation, while unmarried, of such one of the testator's dwelling-houses as his trustees might think proper, and also the use and enjoyment of the household furnishings in his usual dwelling-house at the time of his death, with some other directions applicable to the marriage or death of either; and the testator's reason for this preferential treatment of these two sisters is indicated by a provision which immediately follows the words quoted above, declaring that, by acceptance of the provision therein contained, the two sisters were not to be entitled to make any claim against his estate for wages for any period prior to his death.

The clause of residue then goes on to provide that "my trustees shall, to such extent as the provisions contained in article second hereof will permit, pay or make over to the children of my said sister, Mrs Mary M'Laren or M'Alpine, his or her share, in the case of sons on their respectively attaining or having attained the age of twenty-five years; and in the case of daughters, on their attaining or having attained the age of twenty-five years, or being married, whichever of said events shall first happen, but said provisions of residue in favour of the children of my said sister shall not vest until they respectively attain said age or be married; and I provide and declare that, in case any of said children shall predecease me, or die before his or her share of residue becomes vested, leaving lawful issue alive at the period for vesting, such issue shall be entitled, and that equally amongst them if more than one, to the share or respective shares which his, her, or their parent would have taken if alive." The deed goes on to give power to the trustees, if they see fit, to apply the free proceeds or income of the "presumptive" share of any child or lawful issue foresaid, or so much thereof as they might consider proper, towards his or her maintenance, education, or advancement in life. These are, I think, all the provisions of the deed which need be referred to.

On the construction of the clause of residue

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two main questions seem to arise—one being the question on which the special case was originally brought, viz., as between intestacy of the truster so far as the share destined to Mary M'Alpine is concerned, and accretion of that share to the surviving legatees; and the other being the question which the M'Alpine family, with consent of the heir of the truster, were allowed to add to the case, viz., whether vesting in Mary M'Alpine took place *a morte testatoris*, with the result that the consequent intestacy is on her part and not on the part of the truster. It was not maintained by counsel for the third party (Mrs M'Alpine) that, if there was intestacy of the truster, any but the heir was entitled, and so she made common cause with her children who contended for accretion.

The first of these questions is governed, in my opinion, by the leading case of *Paxton's Trs.* v. *Cowie*, 13 R. 1191. The bequest here, though one of residue, is in favour of seven persons named; they are thus within the description of "a plurality of persons," each of whom is "entitled to his own share and no more"; and the case is to my mind *a fortiori* of *Paxton's Trs.*, because the share which each is to receive, instead of being an equal share with the others, is, in the case of two of them, a larger share than the others. It was argued by Mr Cochran-Patrick that the surviving beneficiaries were a class. I do not know that this is of any particular significance where the beneficiaries are named, because, after all, the question in a case of this kind must always be whether the testator intended a joint bequest or a series of separate bequests, and it is only as favouring the former of these inferences that the fact of their being a class is important. But in my opinion it is vain to contend that a body of beneficiaries which includes a mother and six children can rightly be described as "a class," even apart from the consideration that the shares allotted to them are of varying amount. The cases cited in which the rule of *Paxton's Trs.* has not been followed are all outside the rule as carefully defined by Lord President Inglis. *Muir's Trs.*, 16 R. 954, fell outside the rule because, as explained by the same learned judge, "the first condition for the application of that rule is that the persons to whom the legacy is left must either be named or sufficiently described for identification," and "it cannot therefore apply to a class of persons of unascertained number." The rule may also be controlled or avoided by the use of other expressions by the testator importing an intention that there shall be accretion in the event of the predecease of one or more of the legatees. Now, *Menzies*, 1898, 1 F. 128, and *Roberts' Trs.* v. *Roberts*, 1903, 5 F. 541, were both cases in which the Court found other expressions in the will indicating that the testator meant that the bequest should be a joint one. I can find no such expressions in this case, and therefore I think there was no accretion.

There remains the other question raised by the added query whether Mary M'Alpine's share of residue vested in her *a morte testatoris* and now falls to be dealt with as her intestate succession. I quite admit that courts of law are always anxious to avoid such a construction of a will, particularly a will purporting to dispose of a man's whole estate, as will lead to even partial intestacy. I also admit that it is a probable enough conjecture that this testator preferred his nephew and nieces to his heir at law, whom he never mentions throughout his settlement. Still, all presumptions and conjectures must yield to a testator's plain words, and what I cannot get over in this case is that Mr M'Laren not only provided that the shares of residue should be paid to the daughters of Mrs M'Alpine on their attaining the age of twenty-five or being married, whichever of these events should first happen, but expressly declared that their provisions should not vest until they respectively should attain that age or be married. No doubt, when you read on, you find that the testator provides for the issue of any of them taking their parent's share in the event of the parent predeceasing either the testator himself or the period of vesting, and that there is no other contingency expressly provided for. But that is hardly a reason for inferring that the testator had nothing else in view when he postponed vesting—or, in other words, that his postponement of vesting was not, to some extent at least, personal to the legatee. When the question of vesting is a matter of legal construction from the whole terms of a will, such inferences may be permissible, but not, in my judgment, when the testator has himself prescribed the time of vesting and has thus shown that he draws a distinction between vesting and payment. The fact that he makes this distinction seems to me entirely to supersede the necessity of considering those cases in which vesting has been held to mean only what has been termed "vesting in possession," that is to say, the actual enjoyment rather than the obtaining of a right. That the latter—the obtaining of the right as distinguished from its actual enjoyment—is the ordinary meaning of the word "vesting," is fully conceded by Lord Cranworth in the well-known case of *Young* v. *Robertson* (1862, 4 Macq. 314) to which reference was made. I see no reason to doubt that this testator used the word in its ordinary sense, else why did he not content himself with the positive direction to his trustees to pay and make over the shares of daughters on marriage or attainment of twenty-five, and why did he think it necessary to add the negative direction that the shares should "not vest until" the occurence of one or other of these events? Either this addition meant what I say it means (and what it usually means), or it was mere

surplusage, and had no meaning at all. To say that when he directed that the provisions of daughters should *not* vest till marriage or the attainment of twenty-five, he meant that vesting should take place *a morte*, subject only to defeasance in the event of their afterwards having children, looks to me very like a contradiction in terms.

Ingenious as the argument for the M'Alpine family is, I think it lays too much stress on the testator's supposed reasons for what he did and pays too little heed to his express words, whatever his reason may have been. I have always understood that when a testator makes positive directions as to vesting, a court of construction is relieved from the necessity of speculating about his reasons, and has only the duty of interpreting his directions in their ordinary and natural sense so as to give, if at all possible, full value to every clause in his will. If such a mode of interpretation should have the effect of letting in the heir at law, then the heir has at least this to say for himself, that though there may be a certain presumption against intestacy, there is no presumption in favour of disinherison. But however that may be, I base my opinion on the simple ground that the words of the clause about vesting distinguish between vesting and payment, and therefore can only be read as importing a suspensive and not a resolutive condition.

I am accordingly in favour of answering the first part of the first question in the affirmative, the second question in the negative, and the third question also in the negative. Owing to the concession of the third party made at the bar, it is unnecessary to answer the second part of the first question.

Lord Low.—I am of opinion that the share of the residue of the trust estate destined to the deceased Mary Hastie M'Alpine did not accresce to her surviving brother and sisters, but that if no right to the share vested in her it became intestate succession of the truster. So much, I think, is quite clear, and I agree with what has been said by Lord Stormonth-Darling on that point. But the question whether any right to the share vested in Mary Hastie M'Alpine appears to me to be one of novelty and difficulty, upon which I fear that I have the misfortune to have arrived at a different conclusion from that favoured by your Lordships.

It is said that right to the share could not possibly have vested in her because it is expressly declared that the provisions to the children of the truster's sister "shall not vest" until the period of payment. Of course I recognise the force of that consideration, but as I read the settlement the declaration in regard to vesting is, if read as meaning that the children should take no right of any kind to their shares until the period of payment, inconsistent both with the initial gift and with all the other provisions of the settlement.

The residuary clause practically includes the whole of the truster's estate, and the way in which he deals with it is this. He appoints his trustees to "hold" the residue, "and to apply the same for behoof of" his sister Mrs M'Alpine "and her children, or such of them as may be alive at my death, in manner following." The truster then directs his estate to be divided into eight equal parts or shares, and declares that Mrs M'Alpine "shall be entitled" to one share, that four of her children (who are named) "shall each be entitled" to one share, and that the remaining two children, the deceased Mary Hastie M'Alpine and Agnes M'Alpine, "shall be entitled equally between them" to three shares.

It is plain that the division of the estate into eight shares was to take place at the truster's death. It is also plain that Mrs M'Alpine was to be entitled to immediate payment of her share. It is true that there is no express provision to that effect, but it is implied, because the postponement of the period of payment is limited to the shares destined to the children.

It is therefore beyond dispute that when the truster declares that, at his death, Mrs M'Alpine "shall be entitled" to one share, he means that she is then to take an immediate right to that share, and presumably when he uses precisely the same language in regard to the children's shares, he means the same thing—that is to say, that each child shall take an immediate right to his or her share, although such right may be subject to a resolutive condition and payment of the share may be postponed. I should have come to the same conclusion if the children alone had been beneficiaries, because for a testator to say that at his death a certain person is to be *entitled* to a certain sum, means, according to the ordinary use of the word, that that person is then to have right to the sum, and such a declaration is inconsistent with the idea that unless the beneficiary survives an event which may or may not occur, he shall have no right whatever. I need hardly add that the fact that there is no direct gift to the children, but only a direction to the trustees, is immaterial, because it is the nature of the right, and not the form in which it is given, which is to be regarded.

If the declaration in regard to vesting be left out of view, the clauses of the settlement following the initial gift point in the same direction.

There is, first, a declaration to the effect that the provisions in favour of Mary Hastie M'Alpine and Agnes M'Alpine should be in full of any claim they might have for wages. Mr Craigie founded on that clause as showing that an immediate right was intended to be given, on the ground that a provision to which these beneficiaries might never have a right was not an appropriate or natural way of satisfying a claim for immediate payment of a sum of money in name

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of wages. That is a legitimate enough observation, but I think that the most that can be said in regard to the clause is that it is not inconsistent with the idea that an immediate gift was given.

There is then a direction to the trustees to pay the children's provisions, in the case of sons upon their attaining twenty-five years of age, and in the case of daughters upon their attaining that age or being married. I need hardly say that that direction is in no way inconsistent with vesting *a morte testatoris*.

Omitting in the meantime the declaration as to vesting, the next clause is a declaration that in the event of a child dying "before his or her share of the residue becomes vested, leaving lawful issue alive at the period of vesting," such issue shall take their parent's share, which shall be payable to them at the first term of Whitsunday or Martinmas after the share would have become payable to their parent.

The first remark which I have to make upon that clause is that its object plainly is to protect the right of possible issue of a child dying before the period of payment leaving issue; and I think that it may be regarded as settled that the effect of such a clause is not to prevent vesting *a morte* in the child, but to make the right of that child defeasible in the event of his or her predeceasing the term of payment leaving issue.

I have further to remark upon the clause that the only case provided for is the death of a child before the period of payment survived by issue who in turn survive the period of payment. There is no provision for the case of a child dying before the period of payment without leaving issue, or of such issue also dying before the period of payment. It is certain that the testator did not intend to die intestate in either of those events, or indeed in any event, and it is difficult to believe that when the conveyancer who prepared the settlement was providing for the event of a child dying leaving issue, it never occurred to him that a child might die without leaving issue, although that was the more probable event of the two. Still more unlikely is it that when he provided that issue of a child predeceasing the period of payment should only take if they themselves survived that period, he should not have considered the question what was to become of the share if neither child nor issue survived. I think, therefore, that the inference is that these events were regarded as having been already provided for, which would be the case if the children took right *a morte testatoris*, subject only to divestiture in the event of their death before the period of payment leaving issue who survived the period of payment.

The last clause which has any bearing upon the present question declares—"That it shall be in the power of my trustees, if they see fit, to apply the free proceeds or income of the presumptive share of any child or lawful issue foresaid, or so much thereof as my trustees may consider proper towards his or her maintenance, education, or advancement in life."

I think that a direction or a discretion to trustees to apply the income of a sum destined to a beneficiary for that beneficiary's behoof prior to the period of payment, raises a presumption, more or less strong, that a right to the sum has already vested in the beneficiary. It was said that that was not so in the present case, because the share of a child is described as being "presumptive." That description is perhaps more appropriate to a provision which has not vested to any extent, than to one which has vested subject to divestiture; but I think that a provision which has not vested absolutely and indefeasibly may fairly enough be described as "presumptive."

Now if the settlement had contained nothing more than the clauses which I have been considering, it seems to me that it would have been clear beyond dispute that the shares destined to the children of Mrs M'Alpine vested in them *a morte testatoris*, subject to the condition protecting the right of possible issue.

But there is the declaration as to vesting. It forms part of the clause postponing payment until the attainment of twenty-five years of age, or marriage, and is in these terms: "But said provisions of residue in favour of the children of my said sister shall not vest until they respectively attain the said age, or, being daughters, respectively attain said age or be married."

That is unequivocally a declaration that vesting shall not take place until the period of payment; and if the words "shall not vest" must be read as being equivalent to "shall not take any right whatever," then it seems to me that there is repugnancy between the declaration and the rest of the settlement, and especially what I have called the initial gift. I have already given my reasons for thinking that that gift, according to the natural meaning of the language used, imports that an immediate right is given to the children in the shares allotted to them respectively, and that the other clauses (apart from the declaration as to vesting) are not only consistent with that view, but are inconsistent with any other view, except in so far as the children's right is made subject to a resolutive condition in favour of issue.

In these circumstances it seems to me that if the declaration is capable of being construed so as to make it consistent with the rest of the settlement, that construction must be adopted. But is it capable of construction? It was argued with great force that the word "vest" when used in a testamentary settlement has come to have a definite meaning, and that when a testator says that a provision shall not vest until a certain date or event, he means that the beneficiary shall take no right at all until that date or event occurs. That is undoubtedly true in the general case, but still I think that the

word "vest" may be used in a more limited sense, and may be so construed if to do otherwise would be inconsistent with the initial gift or direction to the trustees, and with the general scheme of the settlement. That appears to me to have been recognised in the House of Lords in the case of *Young* v. *Robertson* (4 Macq. 314). Lord Westbury assented to the view that the word "vest," when used in reference to a share of an estate destined to a beneficiary, might, according to the context, mean either that the right to the share had become absolute, or that the share had come into possession, these being the opposing views for which the appellants and respondents respectively contended. In the same case Lord Cranworth said: "The word 'vest' is of at least ambiguous import"; and then he went on to say that "by long usage 'vesting' is ordinarily understood in contradistinction to the not having obtained anything like an absolute and indefeasible right—it is the having obtained the absolute indefeasible right."

Now, in this case substitute for the word "vest" what Lord Cranworth says it has by long usage come to mean, namely, the words "obtain an absolute and indefeasible right," and the difficulty is solved, because a declaration that the children should not obtain an absolute and indefeasible right until the period of payment, would be quite consistent with the rest of the settlement, by which the children are given a right to their shares *a morte*, defeasible, however, in the event of a child dying prior to the period of payment leaving issue.

It seems to me that that construction gives effect to all the clauses in the settlement, and can be adopted without doing violence to the language used. I prefer such a construction to one which makes the testator say first that the children shall be entitled to their shares at his death, and then that they shall not be entitled to them unless and until they attain the age of twenty-five. The latter construction in my judgment not only makes the testator contradict himself, but upsets the whole scheme of his settlement, and gives a result which he certainly never contemplated.

My opinion therefore is that the third question should be answered in the affirmative.

Lord Ardwall.—In this case the share of the trust estate of the deceased John M'Laren destined to the deceased Mary Hastie M'Alpine is claimed by the third parties on two grounds—*first*, that on the death of Mary Hastie M'Alpine her share accresced to the other legatees mentioned in the third purpose of the trust along with her; and *second*, that the said share vested in the said Mary Hastie M'Alpine *a morte testatoris*, and falls to be dealt with as part of her intestate succession. On the other hand, the said share, which is heritage, is claimed as intestate succession of the said deceased John M'Laren by the second party, Robert M'Laren, as his heir in heritage.

I am of opinion that the claim of the heir-at-law should be given effect to.

With regard to the claim of the third and fourth parties founded on the doctrine of accretion, I am of opinion that the principle of the case of *Paxton* (13 R. 1191) applies, and that in point of fact this is a stronger case for not applying the doctrine of accretion than *Paxton's*. In *Paxton's* case there was a more homogeneous class consisting of brothers and sisters of the testator; here, on the other hand, the legatees consist of a mother and her children, being a sister and certain nephews and nieces of the testator, who are all named. But, further, these legatees do not take equal shares of the residue. On the contrary, two of them take each a share and a half, one of these two being the deceased Mary Hastie M'Alpine whose one and a half share is in dispute, and counsel for the fourth parties did not seem very certain whether, in the case of accretion being held to apply, the other more favoured niece of the testator should get one and a half shares of the lapsed share or only one. In short, the whole clause, I think, shows that what was given by the testator was a distinct, separate gift to each of the individual legatees named, and there are no indications to show that in the event of any of the legatees dying before payment of her share that share was intended to be divided among the remaining legatees.

With regard to the second ground on which the fourth parties found their claim to Mary Hastie M'Alpine's share, namely, that it vested in her *a morte testatoris* and that they are now entitled to it as her next of kin along with her father in the proportions fixed by the Intestate Moveable Succession Act 1855, I am of opinion that on this ground also the claim is not well founded. The deed itself expressly provides that the provisions of residue in favour of the nieces and nephews of the testator should not vest until they respectively attain the age of twenty-five, or in the case of daughters respectively attain the said age or be married; and even with regard to issue of nephews and nieces of the testator this somewhat remarkable provision is made: "And I provide and declare that in case any of said children shall predecease me or die before his or her share of residue becomes vested, leaving lawful issue alive at the period for vesting, such issue shall be entitled, and that equally amongst them if more than one, to the share or respective shares which his, her, or their parent would have taken if alive, and the same shall become payable and transferable to them at the first term of Whitsunday or Martinmas after such share or shares would have become payable to their parent or parents; and providing and declaring that it shall be in the power of my trustees, if they see fit, to apply

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the free proceeds or income of the presumptive share of any child or lawful issue foresaid or so much thereof as my trustees may consider proper, towards his or her maintenance, education, or advancement in life." From this last clause it appears that, supposing one of the nephews of the testator had married at twenty and had left a child, yet if that child had died before his father, if alive, would have attained twenty-five, he would not take what is called in the clause just quoted his "presumptive share." I think accordingly that the testator intended that there should be no vesting of their shares in any of his nephews and nieces till they had attained the age of twenty-five, or, in the case of daughters, had been married before that age.

It is suggested, however, that the above declaration as to the date of vesting was only intended to protect the interests of issue; but, looking to the clause I have quoted, I do not think this can be successfully maintained.

But it is said that this declaration is not to be given effect to because it appears from the original words of gift in the deed that, in point of law and on a sound construction of the deed, the shares of residue vested *a morte testatoris* subject to defeasance. I cannot assent to this argument. The trustees are directed to hold the free residue and remainder of the truster's estate, and to apply the same for behoof of his sister and her children, or such of them as shall be alive at his death, in "manner following." And when we come to the "manner following" we find *in gremio* of the directions to his trustees this declaration about the postponement of vesting. Now, when there is in a deed a clear declaration as to the period of vesting, and all that can be put against that is a doubtful inference from certain other expressions in the deed, I think the plain words of the deed must be preferred, unless it is clear that by adopting that course the true intention of the testator would be defeated, which I do not think can be said in the present case. Had it not been for the direct declarations above quoted as to the period of vesting, I think that this case would have fallen within the rule of *Snell's Trs.*, 4 R. 709; but here, again, I hold that the clearly expressed intention of the testator must prevail over an artificial though useful rule of construction, the introduction of which can only be defended in cases where, unless it is applied, the intentions of the truster cannot be given due effect to.

I therefore am of opinion that the first question should be answered in the affirmative as regards its first alternative, and in the negative as regards its second alternative, and that the second and third questions should be answered in the negative.

The Lord Justice-Clerk.—Knowing that there was a difference of opinion in the Court as to the proper decision to be given in this case, I have considered it the more anxiously, but have in the end come to be of opinion that the view taken by the majority of your Lordships is that which should prevail. Agreeing as I do with what Lord Stormonth-Darling has said upon the question of gift to a class, I add nothing upon that matter. As regards the question of intestacy I am entirely in sympathy with the view that where a testator seems to indicate in his will an intention to deal with his whole estate, that intention must be given effect to, wherever it is possible to do so consistently with the provisions of the will itself. But on the other hand, the Court must not seek to make a will effectual to the uttermost according to a supposed intention, where no intention has been so expressed in detail as to be reasonably—or rather indeed necessarily—taken from the words used. In this case I find no such declaration of intention which must be set aside if the second question put to the Court is to be answered in the negative. On the contrary it appears to me that it can only be by a straining of words out of their ordinary accepted and intelligible sense, if vesting *a morte testatoris* is to be held expressed as an intention of the deceased. I go so far with Lord Low as to hold that there may be cases in which the mere use of the word "vest" as applied to a particular event might not be held to be of crucial importance, but that can only be where there are other expressions in the will of such clear import as would create a plain repugnancy if the word "vest" were held to dominate in its ordinary sense. In this case there is nothing to indicate that the testator, in declaring that certain provisions should not vest until the occurrence of a certain event, meant something different, such as "pay over" or "put into possession." The direction is distinct and positive and must, I think, receive effect, even although the consequence be, contrary to what the testator may have had in his mind, to throw part of his estate into intestacy in the circumstances which have occurred. To hold otherwise would be, in my opinion, to make a different will for the testator than that which he has in fact made—in short, not to carry out an intention which can be spelled out of his deed, but to make a new deed to express what he may have wished to express, but has not really expressed by the writing under his hand, which the Court has to construe.—16*th July* 1907.

Counsel for Second Party, Kippen; Agents, Wishart & Sanderson, W.S.—Counsel for Third Party, Bartholomew; Agent, Robert Cunningham, S.S.C.—Counsel for Fourth Parties, Craigie, K.C., Cochran-Patrick; Agents, W. & W. Finlay, W.S.

J. H. H.

EXTRA DIVISION.

(Lords M'Laren, Pearson and Ardwall.)

106. Lawson's Executors *v.* Watson, *et e contra.*

Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), sects 3 (1) and (2), and 20—"Inchoate Instrument"—Evidence—Debt—Document Having All Requisites of Bill of Exchange Except Signature of Drawer Found in Deceased's Repositories—Held that the Document, Though Not a Bill of Exchange, Could Be Sued On as a Voucher of Debt.

Appeal from the Sheriff Court of Orkney at Kirkwall.

The executors of Charles Lawson, Mains of Cults, Aberdeen, raised an action in the Sheriff Court at Kirkwall against Robert Watson, horse proprietor, Kirkwall, for payment of £182, made up, *inter alia*, of the sums of £60 contained in a document dated 11th March 1901, quoted in Lord M'Laren's opinion, and of £32 contained in a bill dated 1st November 1901, drawn by Lawson and accepted by Watson.

Following on the raising of this action, Watson raised a counter-action against Lawson's executors concluding for £61, 10s., being the balance brought out as due to him by Lawson's executors in a statement produced in the action. The actions were conjoined, and proof was led before the Sheriff-Substitute (Harvey).

The document dated 11th March 1901, which was in the form of a bill of exchange for £60 blank in the drawer's name, and the bill for £32 dated 1st November 1901, were found in Lawson's repositories after his death. Watson admitted his liability for the bill for £32. As regards the inchoate bill for £60 he admitted on record and in the proof that he signed it, but explained that in July 1901 he paid Lawson £28 to account of said bill, and thereafter granted the bill for £32 in settlement of the balance unpaid of the bill for £60.

The Sheriff-Substitute issued an interlocutor finding, *inter alia*, that the instrument dated 11th March 1901 was not filled up so as to be converted into a bill within a reasonable time, and was not enforceable against Watson, and in the whole matter granting decree against Lawson's executors for £50.

On appeal the Sheriff (M'Lennan) issued the following interlocutor:—

Recals the interlocutor of the Sheriff-Substitute: Finds in fact . . . . (3) that the defender Watson admits liability to the pursuers for the sum of £32 due under the bill dated 1st November 1901; (4) that on 11th March 1901 the defender signed his name as acceptor on the stamped bill paper, and delivered it to the said Charles Lawson, authorising him to fill it up as a bill in his own favour for £60, being the agreed on hire of a stallion "Lambton Lad," then hired by the defender from the said Charles Lawson for the season 1901; (5) that in accordance with the authority then given the said document was, on or about the said date, filled up as a bill for £60 in the terms which it now bears by the witness Charles Lawson, junior, but that the said Charles Lawson, senior, died on 5th May 1905, without having inserted his name as drawer of the said bill, and that the said bill has been produced in judgment without any name of a drawer being inserted therein; (6) finds in law that the said document constitutes a valid voucher for a debt of £60 incurred by the defender to the late Charles Lawson, and that the defender has failed to prove that the said sum or any part thereof has been paid by him to the said Charles Lawson or to the pursuers as his representatives; . . . . decerns against the defender for payment to the pursuers of the sum of £10.

Note.—Three points were argued under the appeal—(1) whether the document, No. 13 of process, constitutes a valid and subsisting document of debt for the sum of £60, due by the defender Watson to the pursuers, the executors of the late Charles Lawson. The Sheriff-Substitute has decided that the document is inoperative. . . .

The first point raises a question of difficulty, on which there appears to be no recent authority. It is admitted by the defender in his evidence that on 11th March 1901 he visited the late Charles Lawson at his farm at Mains of Cults, Aberdeenshire, and arranged with him to hire for the season Mr Lawson's stallion "Lambton Lad" at a hire of £60, and that on the same date he signed the bill stamp No. 13 of process, which he asserts was then blank, except that the sum of £60 may have been written on it, and delivered the bill stamp to Mr Lawson. He does not, either on record (see Condescendence 2) or in his evidence, dispute that the blank acceptance was handed to Mr Lawson for the purpose of being filled up as a bill for £60; and from the evidence of Charles Lawson, junior, the son of the late Mr Lawson, it appears that the document was filled up in his handwriting. It is in these terms [His Lordship read the document].

There appears to be no room for doubt that the document was filled up strictly in accordance with the authority given; but although Mr Lawson survived until 5th May 1905, he never inserted his name as drawer. The pursuers, his executors, have not inserted their names as drawers prior to raising the action, and the question is whether the document in its present state constitutes an enforceable document of debt.

The learned Sheriff-Substitute has decided against its validity, on the ground that it was not filled up so as to be converted into a bill within a reasonable time, and he relies on sub-sect. 2 of the 20th section of the Bills of Exchange Act 1882. It appears to me that the sub-section does not apply to the case, for the reason that it deals exclusively with instruments which have been completed, and not with the effect of an instrument left, like the present, in an incomplete condition. I think it must be conceded that the document in question does not comply with the definition of a bill of exchange given in sect. 3 of the Act, in respect that it does not require the person to whom it is addressed to pay a sum of money "to or to the order of a specified person or to bearer."

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Accordingly, whatever be the proper solution of the difficulty, I do not think that the ratio of the Sheriff-Substitute is satisfactory. The real question is, whether the document, not being a valid bill of exchange, is enforceable as a voucher of debt.

Now, if this question is to be decided in accordance with the Scots authorities prior to the Bills of Exchange Act, there cannot, in my judgment, be room for doubt regarding the answer. By a series of decisions, whereof the clearest is *Macdonald's Trs.* v. *Ranken*, 13th June 1817, F.C., action has been held competent on a bill found in the repositories of a defunct blank in the drawer's name. I have carefully examined the Session Papers in this case, and find that the bill, when sued upon and produced in judgment by the trustees of the defunct, was in the same condition as the bill in the present case—that is to say, no name at all was inserted as drawer. The Session Papers also disclose that the Lord Ordinary (Lord Alloway) sustained the validity of the document as a voucher of debt, in respect that the subscription of the defender to the document was not denied, and that the action was an ordinary action brought for constitution of a debt. In his note he relied on the cases of *Drummond* v. *Drummond's Creditors*, 1785, M. 1445; *Hare* v. *Geddes*, 1786, M. 1446; and *Fair* v. *Cranston*, 1801, M. 1677, as having completely altered the older practice of not sustaining action on a bill when the drawer's name was left blank. He added: "There seems to be as little doubt in this case, as in the case of *Fair*, that Glencoe (*i.e.* Macdonald of Glencoe, the pursuer's author) was meant to be the drawer of the bill, and the representers have not even denied that fact. . . . According to the doctrine laid down in *Fair's* case, therefore, there is nothing to prevent the pursuers, as standing in the place of Glencoe, to have subscribed the bill or to bring an action, as has been done in the present case." The Faculty Collection Report bears that the Court ultimately allowed a condescendence as to the state of accounts between the parties; but from the Session Papers I infer that this condescendence related to a plea of compensation founded by the defenders on bills granted in their favour by Macdonald. In addition to the case of *Macdonald's Trs.*, and the authorities mentioned in Lord Alloway's note, I may also refer to *Ogilvie* v. *Moss*, 1804, M. "Bills of Exchange," Appendix No. 17; *Fairlie* v. *Brown*, 1834, 3 S. 5 (N. E. 4)—(a case in which the Session Papers show that the bills when sued upon were still blank in the drawer's name); Lord Ivory's Note to Erskine's Institutes, III. 2, 28; and Dickson on Evidence (Grierson's edition), sect. 807. From these authorities it appears that the statement of Erskine (Institutes, III. 2, 28) puts the matter too strictly.

The case of *Elde* v. *Marshall* (1830), 9 S. 133, I have omitted from the authorities relied on, because the bills which were there produced blank in the drawer's name were prescribed, and the debt was held to be proved by holograph letters of the acceptor. There being in the present case no doubt that the document was signed by the defender, and that it was intended to constitute a document of debt for £60 in favour of the late Mr Lawson, it appears to me that upon the authorities above cited it must be sustained, unless rendered nugatory by the Bills of Exchange Act. The common law in England appears to have been different, and prior to the Act action was denied on an acceptance bearing to be "payable to my order," where the drawer's signature had not been inserted (*M'Call* v. *Taylor*, 34 L.J. C.P. 365; *Stoessiger* v. *S.-E. Rly. Co.*, 1854, 3 E. & B. 549, and other authorities quoted in Byles on Bills, 16th Ed., page 99). Since the Bills of Exchange Act it has been held in England that endorsees of a bill had no right of action against the acceptor where the drawer had omitted to sign his name as drawer, although he had endorsed the bill, and although it expressly bore to be drawn to his order (*South Wales and Carnock Chase Coal Co.* v. *Underwood & Son*, 1899, 15 T.L.R. 157). Probably a similar judgment would have been given in our Courts, seeing that the action was based upon the document as a complete and negotiable bill, and not merely as a voucher of a debt between debtor and creditor. But once it is conceded, as I think it must be, that the document here in question does not constitute a bill of exchange in any proper sense, there appears to be no reason, notwithstanding the statute, why its validity as a voucher of debt should not be regulated by the common law of Scotland. In England, as well as in Scotland, an I.O.U. is enforceable by the person to whom it is delivered, although it does not bear to be addressed to any person (*Curtis* v. *Richards*, 1840, 1 Manning and Granger (C.P.), 46; *Macpherson* v. *Munro*, 1854, 16 D. 612).

If I am right in holding the document valid as a voucher of debt, I think it follows that its discharge can be proved only by the writ or oath of the creditor (*Robertson* v. *Thomson*, 1900, 3 F. 5; *Thiem's Trs.* v. *Collie*, 1899, 1 F. 764). In *Robertson's* case it was held that no alteration of the requirement for a written discharge in the case of a bill is introduced by the 100th section of the Bills of Exchange Act. Further, that section must be inapplicable if the document is not a valid bill. Under a mistaken view regarding the scope of that section, however, it appears that parole evidence of payment to account of the £60 has in the present case been allowed without objection; and, this being so, there is authority (*Simpson* v. *Stewart*, 1875, 2 R. 673; *Kerr's Trs.* v. *Ker*, 1883, 11 R. 108) that the proof led must be considered notwithstanding its incompetency. The proof led, however, consists solely of the statement of the defender, supported to a limited extent by his wife, to the effect that in July 1901, when he returned the stallion to Mr Lawson, he paid £28 to account without receiving a receipt. This evidence seems to me quite inadequate as proof of payment to account of a money obligation constituted by writing. The defender asserts that he gave the bill No. 14 of process for £32, which he admits to be due for the balance of the hire of the stallion. That bill was not granted till 1st November 1901, more than three months after the alleged payment; and, if his story be correct, it is curious that he did not demand delivery of the original document for £60 when he granted the £32 bill, particularly as he had no reason at the time to suppose that the original document had not been completed by Mr Lawson's signature as drawer. It is no doubt curious that the pursuers are unable to explain in respect of what other transactions the £32 bill was given, but there were admittedly a number of transactions between the parties, and I do not think that there is any *onus* upon the pursuers to explain the ground of indebtedness for which an admitted bill was given. I am therefore of opinion that the Sheriff-Substitute's judgment must be altered on this question of the £60.

Watson *appealed* and *argued*: (1) The document dated 11th March 1901 was not a bill, because it was not signed by the drawer (Bills

of Exchange Act 1882, sect. 3), and had not been completed in terms of sect. 20 of the Act. Consequently no action could be founded on the document as a bill. (2) Neither could it be sued on as a valid voucher of debt. The authorities quoted by the Sheriff showed that prior to 1882 it could have been, but the Bills of Exchange Act had altered that. Prior to the Act of 1882 a document blank in the drawer's name could be described as a bill, since the Act it could not (Erskine's Inst., III. 2, 28; Act 1696, ch. 25). The old cases quoted by the Sheriff were distinguished from this case, because in them the documents were holograph of the drawer, and it was clear from the documents who the drawer was. (3) It was true that the appellant admitted on record and in the proof that he had signed the document, but the admission was qualified by his averment that he had satisfied the debt. An admission must be taken subject to the qualification under which it was made (*Kerr's Trs.* v. *Ker, etc.*, 1883, 11 R. 108). The admission was thus a proof of the constitution of the debt, not that it was resting owing. The evidence sufficed to show that the debt had been satisfied by payment of £28 and the substitution of the bill for £32 for the balance.

Argued for Respondents: (1) The document was a promissory note (Bills of Exchange Act 1882, sect. 5 (1) and (2)), and could be sued on as such unless it was proved by competent evidence to have been discharged. (2) Admitting that the document was not a bill, it could still be sued on as a valid voucher of debt. The action was really for payment of an account, one item of which was £60 vouched by this document. The old authorities quoted by the Sheriff thus ruled this case, as in them the documents were not treated as bills but as vouchers of debt. (2) Parole evidence of the payment of this item should not have been allowed (*Thiem's Trs.* v. *Collie*, 1899, 1 F. 764; *Robertson* v. *Thomson*, 1900, 3 F. 5), and should not be looked at. If the evidence was looked at it did not prove that the debt had been discharged.

The Court affirmed the interlocutor appealed against.

Lord M'Laren.—I cannot say that the result of the argument has been to displace the inference that the Sheriff's interlocutor was the true solution of these cases. The two actions relate to transactions between the two parties, Mr Lawson, now deceased, farmer in Aberdeen, and Mr Watson, who is a horse proprietor and carter. The parties seem to have trusted each other, and not to have been particular as to vouchers or as to the forms of their accounts. The result of the action, brought in order to clear up the accounts, was to settle all outstanding disputes except what relates to a document in the form of a bill for £60, dated 11th March 1901, which was in this form:—

"(Stamp 1s.)
"£60 stg.

"Mains of Cults, Aberdeen,
"11th March 1901.

"On demand pay to me or my order within the North of Scotland Bank at Aberdeen the sum of Sixty pounds stg. for value received, in season of Shire stallion.

"Robert O. Watson.

"Mr R. O. Watson,
"Broad Street,
"Kirkwall, Orkney."

Now, from the date and address it may naturally be inferred that this bill was to be drawn by the deceased Mr Lawson on Mr Watson. It is addressed to Mr Watson, and is signed by Mr Watson personally as acceptor, but it wants the signature of the drawer.

Along with this we have to consider another bill of later date for £32, 1st November 1901, in the following terms. [His Lordship read the terms of the bill.]

The result of the judgment of the Sheriff is that effect is given to both these documents. No exception is taken to the bill for £32, but exception is taken to the bill for £60, on the ground that it cannot be founded on as an obligatory document after Mr Lawson's death. But then Mr Watson depones that he made a payment to Mr Lawson in July 1901 of £28, and that he granted the bill of 1st November 1901 for the unpaid balance of the £60. The effect of this would be to displace the £60 bill by a kind of *novatio*.

It is impossible to treat the £60 bill as a bill of exchange, because it is not drawn by anyone, and does not bear to be payable to anyone. Notwithstanding some authority to the contrary, I venture to doubt whether executors could supply the signature of a drawer after his death. But then the Sheriff has allowed the document effect as an acknowledgment of debt, on the authority of certain cases quoted in his note. The principle of these cases is that, by whatever name you may design an uncompleted bill, the two facts that the debtor has put his signature on a document of this description, and that the document is found in the repositories of the creditor, constitute it, if not an acknowledgment, at all events a proof of debt. It was contended by Mr Crabb Watt that, at least in two of these cases, there were other distinct means of satisfying the Court that the document was intended to be completed by the drawer's signature; in this case the only evidence is that it is found in the deceased's repositories, and that it is stated *in gremio* to be for value therein described. But in two cases, *Macdonald's Trs.* v. *Ranken*, 13th June 1817, F.C., and *Fair* v. *Cranston*, 1801, M. 1677, which do not turn upon specialties, it was distinctly laid down that the debtor's acceptance would be evidence of his

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indebtedness although the drawer had not also signed.

Accepting the authority of these decisions, we are not left to depend entirely for proof of the indebtedness on this inchoate bill for £60, because we have the facts that Mr Lawson had yearly transactions with Mr Watson, that bills were frequently used between the parties, and that an action of accounting between them has been found necessary. These facts are sufficient for the application of the principle of *Macdonald's* case.

Mr Watson has attempted to displace this liability by evidence of payment. No answer could be more satisfactory, if payment were proved. The only evidence of payment is that of the debtor, partially corroborated by that of his wife. For Mr Watson it was contended that this evidence could not now be rejected as incompetent, because no objection was taken to it at the proof. Now, I am not prepared to hold that absence of objection would exclude a party from founding on the incompetency or insufficiency of evidence on appeal. An appeal from the Sheriff Court brings up the whole case, just as in the old process of advocation; and, while it might be competent to found on such evidence with regard to collateral matters, I cannot hold the evidence of the debtor to be in itself good evidence of payment, nor is it sufficiently corroborated.

There being, then, an unexplained acknowledgment of indebtedness found in the creditor's possession, and there being no proof of payment, it follows, in my view, that the sum of £60 must be allowed as an item of credit to the executors of Mr Lawson, and that the judgment of the Sheriff is right and must be affirmed.

Lord Pearson.—This is a small case as regards amount, but it raises a question of some nicety. I agree that the Sheriff is right. There are two questions in the case: first, as to the uncompleted bill for £60; and secondly, as to the alleged payment of £28 by the appellant to Lawson.

As regards the bill, it is practically admitted that it is not a bill within the meaning of the Bills of Exchange Act 1882. It could have been made a valid bill; all that was required was the signature of the drawer. He died without signing it; and though it is an open question whether his executors could have signed it after his death, they did not do so, and the question does not arise.

But though not a bill, this document is sued on as a voucher of debt. A number of authorities were quoted showing that in such a case an incomplete bill may be so used, not having all the attributes of a bill, but yet having the capacity of being used in an ordinary action as proof of the existence of a debt. It is said that the Bills of Exchange Act 1882 has changed all that, but I am not of that opinion. It is clear from the authorities referred to that down to 1882 a document such as this was a good ground for suing and recovering a sum of money. The best authority is perhaps *Macdonald's Trs.* v. *Ranken*, 13th June 1817, F.C. There the question was whether a document of this nature found in the repositories of the deceased blank in the drawer's name could be sued on in an ordinary action for debt. This question was regarded as so well settled that the Court would not order answers to the petition against the Lord Ordinary's judgment sustaining the action, lest it should be conceived they had a doubt on the point.

There is, however, a second point in the case. It is said that even if the document can be sued on, the debt therein has been paid or satisfied, first, by the payment of £28 in cash, and secondly, by the substitution of another bill for £32 for the balance. I agree with the Sheriff that the payment of £28 has not been competently proved. As to the £32 bill, there is some difficulty on each side, for the debtor did not get up the £60 bill in exchange for it, while the creditor is unable to point out any other transaction to which this £32 bill can be attributed. But I think that here also the Sheriff has come to a right conclusion.

Lord Ardwall.—I agree with your Lordships that the Sheriff's judgment should be affirmed. These two conjoined actions practically resolve themselves into an action of accounting between the parties. There are now two points in dispute in the accounting; first, as to a sum of £60 alleged to be contained in a document which we may call an incomplete bill; and second, as to whether the appellant is entitled to credit for an alleged payment of £28.

It is said that the document in which the £60 is contained is not a bill, and I agree that this is so. It was found in the repositories of Mr Lawson after his death; it was not originally signed by the drawer, and was never completed in terms of sect. 20 of the Bills of Exchange Act 1882. Now, I do not think that the Act of 1882 innovates on the old law of Scotland so as to render the principles established in the numerous decisions quoted by the Sheriff inapplicable or obsolete. The Sheriff-Substitute apparently holds that a change was made by sect. 20 of the Act. But sect. 20 merely gives power to the holder of an inchoate bill to fill it up and complete it. But that is a power which was always possessed by the holder of a bill, as is clear from the passage in the case of *Macdonald's Trs.* v. *Ranken*, 13th June 1817, F.C., quoted by the Sheriff as follows:—"There seems to be as little doubt in this case as in the case of *Fair* that Glencoe (*i.e.* Macdonald of Glencoe, the pursuer's author) was meant to be the drawer of the bill, and the representatives have not even denied that fact. . . . According to the doctrine laid

down in *Fair's* case, therefore, there is nothing to prevent the pursuers, as standing in the place of Glencoe, to have subscribed the bill, or to bring an action, as has been done in the present case." Accordingly, under the law as it stood before the Bills Act of 1882, it was open to any holder of a bill in which the drawer's name was blank to fill it up, and sect. 20 does not alter the law at all.

The question, then, is:—Is there anything to prevent the document in this case being regarded as a document of debt? The authorities make it clear that there is not. Mr Crabb Watt endeavoured to differentiate this case from the cases quoted, by urging that in them it clearly appeared who the drawer of the document was. But in this case also there is no doubt who was in right of the obligation, and whose name should have been inserted as the drawer. In the first place the document is stamped and is addressed "Mains of Cults, Aberdeen," Mr Lawson's home; and then it bears *in gremio* to be "for value received, in season of Shire stallion." That being so, it is vain to say that the identification of the drawer is not perfectly established by the document itself. Then Mr Watt says the document is not holograph; but in the case of such a document as this, that can make no difference. I therefore think that Lawson's executors are entitled to credit for the £60 contained in the document in question, because that document, although not a bill in the sense of the above-mentioned Act, is valid as an acknowledgment of debt.

As to the alleged part payment of £28, I am of opinion that it has not been proved. I quite agree with what has been said by your Lordship, that we must not scan too critically proofs coming up from the Sheriff Court. But where a proof *prout de jure* is allowed in an action of accounting, it does not follow that each item must not be proved *habili modo*. The evidence of the debtor, partially corroborated by his wife, is not habile to prove payment or part payment of such a debt as is here in question. I therefore am of opinion that Watson is not entitled to credit for the said sum.

On the whole matter, I agree with your Lordships that the Sheriff's interlocutor should be affirmed.—12*th July* 1907.

Counsel for Appellant, Crabb Watt, K.C., Moncrieff; Agents, Simpson & Marwick, W.S.—Counsel for Respondents, A. R. Brown; Agents, Finlay, Rutherford & Paterson, W.S.

A. M.

OUTER HOUSE

(*Lord Mackenzie.*)

Outer House. *Lord Mackenzie.*

Robertson v. Robertson and Others.

107. Robertson *v.* Robertson and Others.

Succession—Collation—Intestate Moveable Succession Act 1855 (18 and 19 Vict. cap. 25), sect. 2—"Heir in Heritage"—Heirs Portioners—Heirs in Heritage, Being Representatives in Heritage of Heirs Portioners of Deceased, but Not Being Next of Kin or Parties Entitled to Take by Representation under sect. 1 of the Act—Right to Collate and Claim Share of Moveables.

This was a multiplepoinding relating to the succession to Miss Ann Stewart, who died intestate on 25th March 1905, leaving heritable and moveable property.

The table on the following page shews the relationship to the said Miss Ann Stewart of the persons entitled to her succession. In the table the word "predeceased" refers to predecease of her. The letter H marks her heirs in heritage, the letter K her next of kin, and the letter C those persons who, without being heirs in heritage or in moveables, were admitted to a share of the mixed estate under sect. 2 of the Intestate Moveable Succession Act 1855.

The following statement of the facts of the case is taken from the Lord Ordinary's Opinion.

"The succession in question here is to Miss Ann Stewart, who died intestate on 25th March 1905, leaving heritable and moveable property.

"The heritage descends through three aunts, sisters of her father, who would, had they survived the intestate, have been her heirs portioners. Each stirps is therefore entitled to one-third of the heritage.

"The three aunts were: 1, Mrs Robertson, whose heir in heritage is her eldest son, John Robertson; 2, Mrs Dow, whose heirs in heritage are (1) her grandson, John Aitken, as representing his mother, Mrs Annie Dow or Aitken, (2) her daughter, Mrs Janet Dow or Scott, (3) her granddaughter, Margaret Methven, as representing her mother, Mrs Mary Dow or Methven; and (4) her daughter, Mrs Christina Dow or Gillies; and 3, Mrs Stewart, whose heir in heritage is her grandson, Ewan C. Stewart, son of her only son, Donald Stewart.

"The next of kin of the intestate are, 1, the said John Robertson; 2, his sister, Mrs Robertson; 3, the said Mrs Elizabeth Dow or Scott; 4, the said Mrs Christina Dow or Gillies; 5, Mrs Mary Stewart or Drummond; and 6, Mrs Elizabeth Stewart or Dow, both daughters of the said Mrs Stewart.

"There are thus two groups of heirs in heritage, the *first* composed of the three individuals who are heirs in heritage and are also next of kin;

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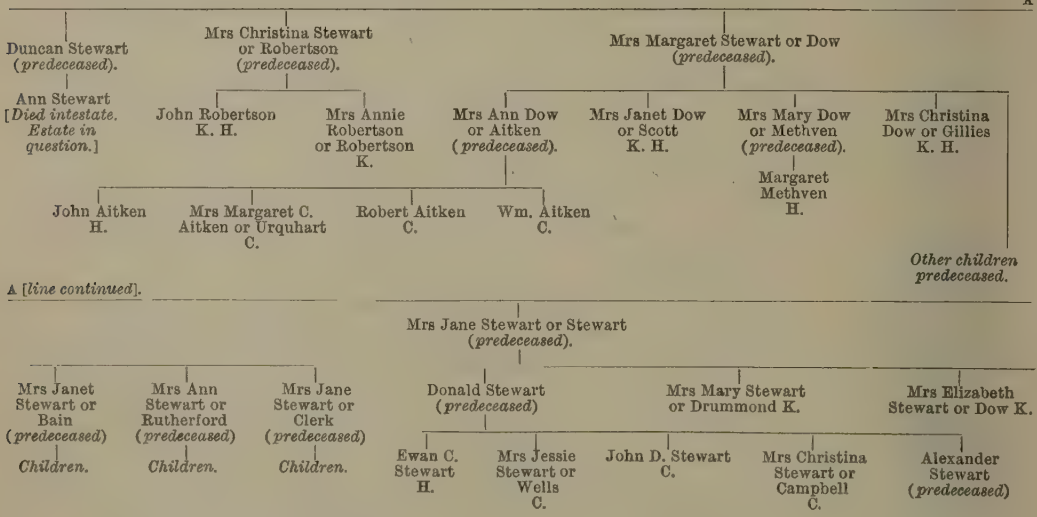
the *second* composed of John Aitken, Margaret Methven, and Ewan C. Stewart, who are heirs in heritage but are not next of kin. The question raised is whether there is here a right of collation to the effect of entitling the heirs in heritage, including those who are not, as well as those who are, next of kin, to collate, to the effect that the whole estate, heritable and moveable, will be divided into one-ninth shares."

There were also three persons—Mrs Robertson, Mrs Mary Stewart or Drummond, and Mrs Elizabeth Stewart or Dow—who were next of kin but not heirs in heritage.

The Intestate Moveable Succession Act 1855, section 1, enacts:—"In all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who had he surdeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate; and daughters of the predeceaser being heirs portioners of the intestate shall be entitled to collate to the like effect; and where in the case aforesaid the heir shall not collate, his brothers and sisters and their descendants in their place shall have right to a share of the moveable estate equal in



vived the intestate would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children, or of any descendant of such child or children who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children or of such issue if he had survived the intestate would have been entitled; provided always that no representation shall be admitted among collaterals after brothers and sisters' descendants, and that the surviving next of kin of the intestate claiming the office of executor shall have exclusive right thereto in preference to the children or other descendants of any predeceasing next of kin, but that such children or descendants shall be entitled to confirmation when no next of kin shall compete for said office."

Sect. 2 enacts:—"When the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate; and daughters of the predeceaser being heirs portioners of the intestate shall be entitled to collate to the like effect; and where in the case aforesaid the heir shall not collate, his brothers and sisters and their descendants in their place shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation."

The Lord Ordinary *found*:—(1) That the claimants are the children of persons who, had they survived the intestate Miss Ann Stewart, would have been her heirs in heritage, and are therefore entitled to collate in terms of section 2 of the Intestate Moveable Succession Act 1855; (2) that the whole estate, heritable and moveable, is divisible into one-ninth shares falling to, 1, the said John Robertson; 2, his sister, Mrs Robertson; 3, John Aitken, his sister Mrs Margaret C. Aitken or Urquhart, and his brothers Robert Aitken and William Aitken; 4, the said Mrs Janet Dow or Scott; 5, the said Margaret Methven; 6, the said Mrs Christina Dow or Gillies; 7, the said Ewan C. Stewart, his sisters Mrs Jessie Stewart or Wells and Mrs Christina Stewart or Campbell, and his brother John D. Stewart; 8, Mrs Mary

Stewart or Drummond; and 9, Mrs Elizabeth Stewart or Dow, both daughters of the said Mrs Stewart; and (3) that each of the one-ninth shares which would have fallen to Mrs Annie Dow or Aitken and Donald Stewart had they survived the intestate, fall to be divided in terms of section 2 of the Act.

Lord Mackenzie [after the narrative given above].—It is contended on the one hand that the decision in *Jamieson* v. *Walker* (1896, 23 R. 547) in terms applies to the present case. It was there decided that the only daughter of an uncle of the intestate being his heir in heritage was entitled, under section 2 of the Intestate Moveable Succession Act 1855, to call upon the next of kin to collate, although in consequence of the proviso in section 1, that no representation shall be admitted among collaterals after brothers' and sisters' descendants, she would not have been entitled under that section to a share of the moveable estate. It was maintained, on the other hand, by Mr Christie, counsel for Mrs Scott, who is both one of the heirs in heritage and one of the next of kin, that *Jamieson* does not in terms decide the present case, and he contended that the heirs in heritage here who are not next of kin, have no right to share in the moveables. His argument was that in *Jamieson* the question arose in regard to a proper heir in heritage, but here in regard to heirs portioners; and that the expression the heir in heritage in sect. 2 should not be extended so as to include heirs portioners. Attention was directed in the course of the argument to the considerations which were urged in *Jamieson's* case against the view taken by the Court of the relation of section 2 to section 1. I do not think, however, that I can go back in any way upon what was there decided. Accordingly I must take it that section 1 and section 2 deal with separate matters, and are intended to effect changes in the law distinct from each other. Section 2 was there held to be a substantive provision which introduced the right of an heir in heritage who was not one of the next of kin to the benefit of collation.

The question is whether "the heir in heritage" includes heirs portioners. It was argued that heirs portioners in the proper sense of the term means the class that takes through females, but that in a looser sense the term is used to denote females who take through a male. As regards proper heirs portioners under the law as it existed prior to 1855, the question of collation was excluded, or rather it was unnecessary to consider it, because the heirs portioners were also all of them executors. This is referred to in *Anstruther* v. *Anstruther* (1836, 14 S. 272, at p. 292). It was impossible there could be collation because the succession did not divide into separate channels. The case of *Riccart* (1720, M. 2378) is an illustration of this. As regards heirs portioners, using the term in what was termed in argument the looser sense, there might be room for applying a principle which would have the same effect as collation. The succession might devolve on heirs portioners who were not the sole next of kin. The *Scotstarvet* case (*Balfour* v. *Scott*, 1787, M. 2379) is an illustration of this. Under Mr Scott's settlement his heritage went to the elder daughter of his brother. He was also survived by children of his sister. It was held that the niece who took the heritage was not entitled to any part of the executry of her uncle without collating the heritable estate. The reason was that she was not, as was the case in *Rickart*, competing with heirs portioners only, but with other next of kin.

It was in the present case argued that section 2 of the Act of 1855 did make provision for the latter class of heirs portioners in that part of the clause which provides that "daughters of the predeceaser, being heirs portioners of the intestate, shall be entitled to collate," but made no express provision for the event of the predecease, not of one individual, the heir in heritage, but of several individuals, who are heirs portioners. Stress was laid on the fact that, if heirs portioners in the proper sense of the term were admitted, then the class who might be entitled to come in and share the moveables with the next of kin might be increased to an extent never contemplated by the judgment in *Jamieson*. In point of fact that is so. The question, however, is whether, standing the judgment in *Jamieson*, the term heir in heritage can be limited so as to exclude heirs portioners. I do not think it can, and I refer to the opinion of the Lord President in *Turner and Others* (1869, 8 Macph. 222). In that case it was held that one of the heirs portioners of the intestate was not entitled to take a share of the moveable estate as one of the next of kin without collation. No doubt in that case section 1 of the Act did not apply, because none of the next of kin had predeceased. On the question, however, whether "heir in heritage" includes "heirs portioners" in a question of collation arising at common law, the Lord President says: "In that event the common law says quite unmistakably that the heirs in heritage, whether the heir be a single heir, or whether they be heirs portioners, cannot take a share of the moveable estate along with the other next of kin without collating the heritage. I do not think it is suggested that that rule does not apply equally to heirs portioners as to a single heir."

The Court declared in *Jamieson's* case that the right of collation, existing at common law, should be extended so that when the person who would have been heir in heritage of an intestate, predeceased the intestate, his child (being the heir in heritage of the intestate) should have the same right to collate which his parent would have had had he survived. The opinion above quoted in *Turner's* case is sufficient, I think, to

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warrant the conclusion that the necessary consequence of the decision in *Jamieson* is that the whole of the heirs in heritage here are entitled to collate.

I understand that they all wish to do so, and that it is therefore desired that a finding should be pronounced to the above effect. In the view taken, the subsidiary questions argued do not arise. The case of *Innes* v. *Coghill* (1897, 25 R. 23) lays down the rule for applying the principle. —25*th June* 1907.

Counsel for the Claimants John Robertson and Others, M. P. Fraser; Agent, Andrew Urquhart, S.S.C.—Counsel for Claimant John Aitken, D. Anderson; Agent, Andrew Urquhart, S.S.C. —Counsel for Claimant Miss Margaret Methven, Kemp; Agent, Andrew Urquhart, S.S.C.—Counsel for Claimants Mrs Margaret Clara Aitken or Urquhart and Others, D. Anderson; Agent, Andrew Urquhart, S.S.C.—Counsel for Claimant Mrs Janet Dow or Scott, Christie; Agents, Gordon, Falconer & Fairweather, W.S.—Counsel for Claimants Mrs Mary Stewart or Drummond and Another, Macdonald; Agent, John C. Sturrock, Solicitor. A. M. H.

EXTRA DIVISION.

(*Lords M'Laren, Pearson and Ardwall.*)

108. William Morton & Company *v.* Muir Brothers & Company.

I. Contract—Implied Condition—Custom of Trade — Condition Reasonably Arising from Nature of Contract—Proof of Custom.

II. Bankruptcy — Vesting of Bankrupt Estate in Trustee—Tantum et Tale—Moveable Property Held by Bankrupt Under Personal Limitation — Held That Property Vests in Trustee Subject to Limitation Under Which It Was Held by Bankrupt.

III. Bankruptcy—Purchase by Third Party of Moveable Property Held by Trustee in Bankruptcy Subject to Restriction—Circumstances in Which Held that Property Passed to Purchaser Subject to Same Restriction.

Appeal from the Sheriff Court of Ayrshire.

This was an action at the instance of William Morton & Co., Lace Manufacturers, Newmilns, against Muir Brothers & Co., Lace Manufacturers there, concluding for interdict against the defenders from using for their own behoof in the manufacture of lace curtains and curtain nets, the cards in their possession made from designs belonging to the pursuers, and from selling curtains and curtain nets made from said designs.

Proof was led before the Sheriff-Substitute (Mackenzie), the import of which, and the facts of the case, sufficiently appear from Lord M'Laren's Opinion.

The Sheriff-Substitute *issued* the following interlocutor:

Finds (1) that the pursuers and defenders are lace manufacturers at Newmilns; (2) that for some years the pursuers were in the habit of employing the firm of Robert Muir, lace manufacturer, to manufacture curtains and curtain nets to their order, and that designs for that purpose were supplied to the said firm of Robert Muir; (3) that from these designs so supplied by the pursuers the said firm of Robert Muir had cards punched as a necessary process in the manufacture of said curtains and curtain nets; (4) that the designs for curtains and curtain nets enumerated in the prayer of the petition were so supplied by the pursuers, and were their property; that orders were given at various dates for curtains and curtain nets to be made from these designs, and that the cards therein mentioned were made from these designs; (5) that the contract between the pursuers and the said Robert Muir was constituted by letters giving orders for certain quantities of curtains and curtain nets, under reference to the custom of trade hereinafter explained, and also by verbal communications by the managing partner of the pursuers' firm to the manager of the said firm of Robert Muir; (6) that Nos. 33/1/6/7 of process are orders given respectively on 2nd May, 7th June and 5th August 1904; (7) that in giving said orders the pursuers' managing partner drew the attention of the manager of the firm of Robert Muir to the fact that they were only to be used for their (the pursuers') orders, and that the said managing partner replied that he quite understood that; (8) that the district in which the pursuers' manufactory is situated, and which is referred to in the evidence as "The Irvine Valley," is an important centre of the lace curtain manufacturing industry; (9) that it is proved that in that district there prevails a custom of trade to the effect that when designs are handed, as above, by one manufacturer to another for the purpose of having curtains made from them, there is an implied understanding that curtains from these designs are not to be made or sold by the second manufacturers, except to the orders of the first, or with his express consent; (10) that in Nottingham, which is also an important centre of this industry, the custom of trade to this effect is not so well defined, but that it is not wholly inconsistent with the above understanding; (11) that said custom of trade or understanding was known to both the pursuers and the firm of Robert Muir, and that it formed an implied condition of the contracts between them, entered into as above; (12) that the estates of the said Robert Muir were sequestrated on 14th November 1904, and Alexander Mitchell, chartered accountant, Glasgow, was appointed trustee thereon; (13) that the said Alexander Mitchell had carried on the business of the said firm for the period from 3rd September 1903 to 26th July 1904; (14) that on 15th March 1905 the factory belonging to the estates of the said Robert Muir, known as the Annabank Factory, was exposed to public roup in terms of the Articles and Conditions of Roup and Sale (No. 12 of process), and that the said factory was purchased by the defenders, with entry as at 31st March 1905; (15)

that by the tenth clause of said Articles and Conditions of Roup and Sale, it is provided that the purchaser of said factory should have the option, within fourteen days after the date of sale, to purchase and take over at mutual valuation the stock of cards in or about the said factory, whether in actual use at the date of entry or not, including, *inter alia*, such as might fall to be dealt with under an agreement between Messrs Heyman & Alexander, manufacturers, Stoney Street, Nottingham, and Samuel Ross, manufacturer, Newmilns, then sole trustee of the said Robert Muir, dated 4th and 5th June 1896, or under any other similar agreement with them or any other person, and that, if the purchaser should elect to take over and purchase said cards, he should only be entitled to use the same subject to his implementing the obligations undertaken by, or incumbent on, the second party to said agreement, or his successors, in relation to said cards, or under any other similar agreement in connection with said cards, or any of them; (16) that the said agreement with Messrs Heyman & Alexander is No. 42 of process, and that the second party thereto agreed not to manufacture any goods according to designs supplied to them by the said Heyman & Alexander (the first party thereto) except to the order of the first party, and not to show or communicate or deliver such designs or anything used in the manufacture of such goods to any other person, and on the other hand the first party agreed not to have goods manufactured from any designs supplied to the second party by any manufacturer other than the second party; (17) that the agreement between the pursuers' firm and the said Robert Muir, with regard to the designs and cards mentioned in the prayer of the petition, including the condition referred to by the pursuers' managing director in conversation with the manager of the said firm of Robert Muir, above referred to, which condition was implied by the custom of trade in the circumstances, constituted a "similar agreement" within the meaning of the said tenth clause of the Articles of Roup and Sale; (18) that said condition implied by the custom of trade was known both to the said Alexander Mitchell and the defenders; (19) that the defenders purchased the whole stock of cards from the said Alexander Mitchell and paid for the same; (20) finds that since purchasing the said stock of cards, the defenders on receiving a cancelling order from the pursuers for certain goods then on order, on 22nd March 1905, wrote to them the letter, No. 5 of process, in which they say: "We have a number of your patterns here, and assuming they are worthless, we propose destroying them"; (21) that the pursuers replied through Mr Coubrough, their salesman, that defenders were not to destroy the cards, to which they agreed; (22) that in the month of April following, some negotiations took place for a repeat order, but the parties did not agree as to terms; (23) that in the following month it came to the pursuers' knowledge that the defenders were manufacturing and putting on the market curtains made from some of the cards mentioned in the prayer of the petition, otherwise than to their order, and that the goods so manufactured were being offered at lower prices than those charged by them; (24) that the defenders assert a right to so manufacture goods from said cards, and have intimated their intention of continuing to do so. Finds in law that the rights acquired by the defenders in the said cards by the said sale from the trustee were subject to the implied condition constituted by the said custom of trade, and that the pursuers have a right and title to interdict the defenders as craved. Therefore repels the defences and grants interdict in terms of the prayer of the petition.

The defenders *appealed* and *argued*: (1) It was not proved that there was a custom of trade such as the pursuers contended for. A custom to be upheld by the Court must have three essential conditions, which were lacking in this case. It must be (*a*) uniform throughout the trade (*Armstrong & Co.* v. *M'Gregor & Co.*, 1875, 2 R. 339; *Brown* v. *M'Connell*, 1876, 3 R. 788; *Holman* v. *Peruvian Nitrate Co.*, 1878, 5 R. 657; *Morrison* v. *Allardyce*, 1823, 2 S. 434; Bell's Prin., sects. 83 and 101); (*b*) uninterrupted for a long space of time (*Clacevich* v. *Hutcheson & Co.*, 1887, 15 R. 11); (*c*) not contrary to any rule of law (*Anderson* v. *M'Call*, 1866, 4 M. 765; *Woolley* v. *Broad* [1892], 1 Q.B. 806). The effect of this alleged custom would be to give the pursuers the same protection for their designs as the law gave them by registration, and was meant to be given by registration alone. (2) Assuming the custom proved and that the bankrupt firm held the cards under a restriction, that restriction flew off when the cards were transferred to the trustee in bankruptcy, or, at any rate, when they were sold by him to the defenders, who were *bona fide* onerous purchasers. No *vitium reale* attached to corporeal moveables in Scotland (*Scottish Widows' Fund* v. *Buist, etc.*, 1876, 3 R. 1078; Bell's Com., 7th ed., pp. 302, 304, and 306). The seller of a corporeal moveable could give a better right than he himself possessed. This case was distinguished from *M'Cosh* v. *Crow & Co.* (1903, 5 F. 670), because the copyright in the negative remained with the sitter (Fine Arts Copyright Act 1862, 25 and 26 Vict. cap. 68), sect. 1; and secondly, because a photograph obviously belonged to the sitter as his features were on it. Copyright could only be acquired by a written transfer. (3) It was argued that the pursuers had a *jus quæsitum* under the articles of roup by which the cards were sold to the defenders. But a *jus quæsitum tertio* did not emerge out of an agreement unless the condition was irrevocable (*Peddie* v. *Brown & Co.*, 1857, 3 Macq. 65; *Henderson* v. *Stubbs Ltd.*, 1894, 22 R. 51; *Finnie* v. *Glasgow and South-Western Railway Co.*, 1857, 3 Macq. 75). Here the condition was subject to alteration between the parties to the sale. Also the *tertius* must be designed, which here was not done (*Welsh & Forbes* v. *Johnston and Others*, 1906, 13 S.L.T. 805).

Argued for Respondents: (1) The alleged custom of trade was proved, and was such a custom as the Court would uphold (*Bruce* v. *Smith*, 1890, 17 R. 1000). The case was analogous to that of *M'Cosh* v. *Crow & Co.*, *cit.* The photographer had a similar limited right of property in a negative as the defenders had in the cards (Pollock on Contracts, 7th ed., p. 253). (2) The bankrupt firm held the cards

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sub modo, and they were conveyed to the trustee in bankruptcy *tantum et tale*, and from him to the defenders (*Heritable Reversionary Co. Ltd.* v. *Millar*, 1892, 19 R. (H.L.) 43) The defenders could not not say that they got the cards subject to no limitation, because they were themselves in the trade, and must be held to have known of the existence of the custom.

The Court pronounced the following interlocutor :—

"Recal the ninth finding in fact of the Sheriff-Substitute's interlocutor of 30th May 1906, and in place thereof find that it is proved that in 'The Irvine Valley' there prevails a custom of trade to the effect that, when designs are supplied by one manufacturer to another for the purpose of having curtains made from them, it is an implied condition of the contract that curtains are not to be made or sold by the second manufacturer from such designs otherwise than to the orders of the first, except with his consent, either express, or implied from a refusal to give further orders, or from the cessation of orders for a year ; *quoad ultra*, find in terms of the findings in fact and in law in the said interlocutor ; therefore dismiss the appeal and affirm the judgment of the Sheriff-Substitute in said interlocutor, and decern ; of new, repel the defences and grant interdict in terms of the prayer of the petition, and decern."

Lord M'Laren.—The question in this case relates to the legal construction of a form of contract which appears to be in general use in a branch of the weaving industry, *videlicet*, the manufacture of lace curtains as carried on in Irvine and the neighbourhood. According to the evidence, it is a case of very frequent occurrence that a manufacturer who is unable to overtake all the work that he has in hand, commissions another manufacturer to weave a stated number of curtains according to a design which he supplies. The lace design is wrought out by means of the well-known apparatus of the Jacquard loom ; and I need hardly add, in speaking of such a very familiar process, that to the production of any given design it is necessary to prepare a system of perforated cards by means of which the threads of the warp are shifted in the process of weaving so as to produce the required design.

When an order is given, the manufacturer who accepts the order has to prepare a system of cards corresponding to the design supplied to him. The preparation of the cards is a very material element in the cost of production. The weight of the evidence is to the effect that the maker, in estimating for the cost of the number of curtains ordered, includes the whole cost of preparing the cards, although some witnesses say that such estimates do not always cover the entire cost of preparing the cards, and that to a certain extent the manufacturer trusts to the chance of getting what is termed a "repeat order" to indemnify him completely for his outlay. It would thus appear that in general it is for the interest of both parties that such repeat orders should be given. The manufacturer who gives the original order (and who in this transaction may be regarded as a merchant employing the other manufacturer) will naturally wish to sell as many copies as possible of his design, and the maker of the curtains will wish to supply as many as possible, because then his original outlay in making the cards is spread over a larger quantity of goods.

The practice seems to be (I am not now considering its legal effect) that at least for the season in which the order is given the cards are held at the disposal of the person who gives the order, and are only used for orders given by him. But as the cards are the maker's property, it is considered that when the person giving the order has no further use for them, *e.g.*, if he intimates that he is not going to give a repeat order, the maker of the cards may use them for the purposes of his own business, or, it may be, for the execution of orders received from other parties. This practice is said to flow from, or at least to establish, an implied condition of the contract for the supply of the goods.

In this connection one other feature of the trade may be noticed. I have hitherto spoken of the case where a manufacturer being unable to overtake all the work he desires to execute, employs another maker in his own branch of the trade to weave for him. But it is explained that in Nottingham, which is or was the chief seat of the lace industry, there are makers who do not manufacture lace-goods on their own account, but make their living by doing work for other manufacturers. This is called by the witnesses the "brown trade," because the goods are in the brown or unbleached condition while they are in the hands of these auxiliary makers. I only mention this circumstance because it entered into the arguments. But, as I understand, there has only been one maker of the "brown trade" in Irvine, and in my opinion the distinction is of no consequence for the purposes of the present action.

The respondents, William Morton & Co., employed Robert Muir, now insolvent, to make lace curtains for them according to designs which they supplied. The work was executed on the usual terms ; that is to say, the price charged to Messrs Morton was understood to cover the preparation of the cards, and the cards were the property of Robert Muir, and passed to the trustee on his sequestrated estate.

The trustee sold the machinery and plant by auction ; and in the articles of roup a special condition was inserted regarding the cards which were disposed of, which I shall afterwards consider, because it is a disputed point whether that condition applies to the cards made by Robert Muir to the order of Morton & Co. To complete the narrative of the facts of the case, I have only further to say that Messrs Morton, respondents

in the appeal, who wished to make further use of the cards which had been made by Robert Muir in pursuance of their orders, found that the appellants were using these cards for their own purposes, in contravention of the preferential right which they assert, and they instituted this process of interdict in the Sheriff Court to have the appellants interdicted from using the cards made from their designs for the manufacture of lace curtains, and from selling the lace curtains which they had made from the said cards.

In these circumstances the following are the questions which, as I think, arise for decision:—

1. Is the condition alleged by the respondents within the region of usage of trade, or customary implied condition, and is this customary condition proved?

2. Assuming that a trustee in bankruptcy takes no higher right than that of a gratuitous alienee (which I take to be the meaning of the expression *tantum et tale*), was the trustee in this case affected by the condition that the cards made to Messrs Morton's order were not to be used without their consent?

3. Are the appellants, who are purchasers from the trustee, affected by the condition?

On the first question, I may begin by stating what I take to be the fair result of the evidence, *videlicet*, that according to the general understanding of the trade in Scotland, a maker who works to a design supplied to him has not an unqualified right to the use of the cards which he makes from that design, but is held to have received the design for the purposes of the order given to him and any further orders from the same manufacturer or merchant. The witnesses naturally vary to some extent in their way of expressing the condition which limits the use that may be made of the cards; but the substance of their evidence is that the maker of cards to a design which is not his own is subject to a two-fold condition: first, that the cards are to be kept unused for a reasonable time to admit of the merchant or purchasers of the goods giving repeat orders if he so desires; second, that the cards are not to be used by the maker for his own purposes unless and until the merchant or purchaser has no further use for them. I do not propose further to analyse the evidence on this subject, because I hold that its import is reasonably clear, and because, as I understand, this appeal has been taken mainly in the view of getting a decision in the legal questions arising out of the case. I proceed, therefore, to consider what are the limitations on the right of ownership in the cards which may reasonably be implied from the nature of such contracts, and the usage which has prevailed in carrying them into execution.

The conception of an implied condition is one with which we are familiar in relation to contracts of every description, and if we seek to trace such implied conditions to their source, it will be found that in almost every instance they are founded either on universal custom or in the nature of the contract itself. If the condition is such that every reasonable man, on the one part, would desire for his own protection to stipulate for the condition, and that no reasonable man, on the other part, would accede to it, then it is not immaterial that the condition should be taken for granted in all contracts of the class without the necessity of giving it formal expression. A very good illustration of such an implied condition is the case of photographic portraiture referred to in the argument, and which was the subject of decision in the case of *M'Cosh* v. *Crow & Co.*, 5 F. p. 670. It was there held that while the property of the negative portrait is in the photographer, he is not entitled to make copies from it for sale or exhibition without the consent of the person giving the order. This is a decision of our own Court; and from the authorities there cited, and particularly the opinion of Mr Justice North, which is quoted by Lord Moncreiff, I have no doubt that the law of England is to the same effect as our own. Indeed the laws could not well be different. The decision is an adaptation to the comparatively new process of photography of the established principle that an artist who paints a portrait to order is not entitled to multiply copies of it without the purchaser's consent. But the interest of the decision as bearing on the present case depends on the peculiarity that photographic prints are obtained by means of an intermediate production, the negative plate, through the instrumentality of which the positive plates are produced, just as in the process of weaving the lace curtain is produced by the action of the perforated cards on the warp in the loom. The cases have also this element in common, that they relate to the multiplication of an artistic design by mechanical methods.

I should desire, however, to guard myself against too readily accepting the suggested analogy and applying it to a special industry like the weaving trade; and without proposing to rest the decision on what is technically known as usage of trade, I think that evidence of the general understanding of the trade may very usefully be considered in determining whether there is or is not an implied condition in such contracts, whereby the merchant who furnishes the design reserves to himself a certain control as to the use to be made of the cards which are prepared from his design.

If I had to consider the question without the aid which this evidence affords, I should think it a very unreasonable result of the bargain, that the manufacturer, as soon as he had furnished the number of lace curtains that were ordered, should be at liberty to make use of the design and the cards prepared from the design to make an equal number of pieces for himself and so to compete in the market with his employer. I should not

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consider that the non-registration of the design made any difference; because the employer might be prepared to take the risk of numbers of the public copying his design and making sets of cards for themselves, and might yet consider himself protected by the nature of his contract against such a breach of confidence as is implied in the act of competing with him by the sale of goods made directly from his design and from the cards for which he had paid. If the employer had intimated that he had no further use for the cards, and especially if a sufficient time had elapsed to enable him to dispose of the goods supplied to his order, I should not be prepared to hold that the owner of the cards was put under any further implication not to make use of them. But now, when I learn from the evidence that what I should suppose to be a reasonable implication, from the nature of the contract, is in exact accordance with the understanding of the trade, uniformly accepted and acted on, although not hitherto brought to the test of a legal decision, I think the implication is very much strengthened. The two grounds of judgment are not distinct; they support each other. First, the condition must be one which the law will regard as reasonably arising from the nature of the contract when fully understood. But as the Court is not conversant with the details of commercial business, we receive evidence on this subject, and the result of the evidence on my mind is that I am satisfied that such a condition is implied; in other words, that no merchant would furnish a design and give an order except on the understanding that the maker of the goods was not to make use of his design to compete with him in the market.

On the second question which I have put I shall say very little, because I think it is perfectly clear that the trustee in bankruptcy is bound by any personal condition which limits the right of the bankrupt. The argument that was rejected by the House of Lords in the case of *The Heritable Reversionary Co.* v. *Millar* was that the trustee was only bound by conditions which entered into the real right. The bankrupt was the manager of a loan company, for whose convenience the titles to their securities are taken in the manager's name. The trustee on the bankrupt's estates proposed to sell these securities for the benefit of creditors, but the decision was that as the bankrupt held the properties in trust, although the trust was not reduced to writing, the creditors took nothing but the legal estate. In the present case, if we are right in holding that Robert Muir could not conscientiously use these cards for his own purposes, standing Messrs Morton's right in them, it follows that the trustee was under a similar disability.

There remains for consideration the third question, whether the appellants, who are purchasers from the trustee in bankruptcy, are affected by the implied condition? Now I think it is quite possible that a trustee on a sequestrated estate, like any other owner of restricted property, might be able to give an unrestricted title to a *bona fide* onerous purchaser without notice of the restriction. This, however, could hardly ever occur in the ordinary course of business; because, first, unless we suppose fraud or incredible ignorance on the part of the trustee, he would certainly give the purchaser notice of the restriction affecting the subject of sale; and secondly, even if there was no express notification, in the case of a sale of moveables the purchaser would most probably discover the restriction for himself.

In the present case the articles of roup contained a special stipulation as to the cards. I should here state that one of the firms (Messrs Heyman) that had given orders to Robert Muir, had put him under an obligation in writing not to use the cards made from their designs to their prejudice. Now with reference to the sale of the stock of cards pertaining to the sequestrated estate, the articles of roup contain this clause: "The purchaser shall only be entitled to use the same, subject to his implementing the obligations undertaken by or incumbent on the second party to said agreement (Heyman's agreement) or under any other similar agreement in connection with said cards or any of them."

I think that the effect of this clause was that the trustee did not profess to give an unqualified right to the use of any of the cards sold, and that the purchasers are put on their enquiry as to the existence of any similar agreement affecting cards other than those which belonged to Messrs Heyman. That the purchasers so understood the clause I do not doubt, because the price paid was only £1 per ton, which according to the evidence is the value of the cards as waste paper. The appellants in a sense were *bona fide* onerous purchasers, but then the price which they paid is not consistent with the supposition that they bought the cards with a right to use them for the manufacture of curtains for themselves. I do not, however, attach much weight to this consideration, because we know that bankrupt stock is often purchased for a sum much below its intrinsic value, and this was a sale by auction. But on the question whether the purchasers had notice of the condition affecting the use of the cards, I think that the expression "or under any other similar agreement," was sufficient notice that other persons in a similar position to Messrs Heyman had claims of a like nature on the cards made to their designs; and as the appellants purchased the stock and plant, including the cards, with the intention of continuing the business carried on by Robert Muir, or engaging in a new business of the like nature, they must be held to have had knowledge of the customary conditions under which the designer has a preferential right to the use of the cards.

For these reasons I am unable to affirm that the appellants acquired the cards free from the conditions affecting their use.

According to the uncontradicted evidence of Mr Morton, he in April 1905 asked the appellants for a quotation for the making of certain nets applicable to certain of his designs. The price quoted was 20 per cent. higher than he had previously paid, and he did not see his way to giving a repeat order. He afterwards learned that the appellants had offered the same goods to another trader at a lower price. I think that this action of the appellants was inconsistent with the respondents' rights as designers of the pattern, and that interdict must follow. In granting interdict in this case, we do not in any way disaffirm the claim of the makers of such cards to make use of them in the case where the designer or owner of the design has intimated that he has no further use for them, or in the case where a reasonable time has elapsed (which the witnesses put as a year), without a repetition of the original order having been given.

I have only further to say that I do not think that the case of the respondents requires that they should have a *jus quæsitum* under the articles of roup. If these articles had proposed to give a new right, or to create a new restriction as to the use of the cards, the question would arise whether the respondents, who are not named in the articles, could claim the benefit of the right. But the object of the articles is the conservation of existing rights, and the motive of the trustee who put forward the articles was to protect himself against claims which might have arisen against himself if he had professed to give a higher right than he himself possessed. In such a case the party who founds on the implied condition does not found on any right arising out of the articles of roup. He only refers to the articles for the purpose of shewing that the purchaser had notice of a claim inconsistent with the full right of property which he asserts. For this purpose the respondents may refer to the articles of roup without founding on the instrument as a source of title or right.

In all the circumstances, I am of opinion that the decree of the Sheriff should be affirmed.

Lord Pearson.—This is an action of interdict, of a somewhat peculiar nature. The question raised is as to the extent to which the defenders, who are lace manufacturers, are entitled to make use of certain loom pattern cards now belonging to them in the manufacture of lace curtains for their own behoof. These cards originated from patterns designed for and belonging to the pursuers, none of which, however, were registered under the statutes as to the registration of designs. Each design requires to be translated from the design sheet into a set of pattern cards, so as to reproduce the pattern in the web. When occasion requires, as, for instance, when a manufacturer has more work in hand than his looms can overtake, he agrees with some other manufacturer to undertake part of the work for him, forwarding at the same time the design which he desires to be reproduced. The other manufacturer prepares a set of cards from the design, and he then sends back the design, and keeps the pattern cards to be used in the fulfilment of the order.

The question now arises as to the right of the second manufacturer to use the cards thus obtained in making curtains of the same pattern for himself or for a third manufacturer, so as to compete with the firm from whom he got the design for the special purpose I have described. It is obvious that by using the patterns for his own behoof, or for behoof of a third party, he might easily compete with and undersell the manufacturer who entrusted the design to him.

Although the pursuers aver on record that the cards are their property, that is not the form of their claim, nor is it any part of their case. On the contrary, the conclusions of the summons are framed on the footing that the cards themselves are the property of the defenders. Accordingly the pursuers do not ask for delivery of the cards. The decree which they seek is an interdict against the defenders using the cards in question for their own behoof, in the manufacture of lace curtains and curtain nets, and also against their selling curtains and curtain nets made from the said cards.

Accordingly it is incumbent on the pursuers to establish that the defenders' admitted right of property in the material of the cards themselves does not carry with it an absolute right of user, but is subject to some qualification or restriction in the pursuers' favour.

The case is further complicated by the fact that the defenders, Muir Brothers & Co., were not originally parties to the contract. That was entered into between the pursuers, on the one hand, and a firm designed as Robert Muir, lace manufacturer, on the other. The estates of that firm were sequestrated in the year 1904, and the trustee in the sequestration (Mr Alexander Mitchell, C.A., Glasgow), proceeded to sell the business and the factory, and also the stock of cards which were in the hands of the sequestrated firm, including the cards now in question.

There are therefore two distinct questions raised. The first is, Did the firm of Robert Muir, with whom the pursuers entered into the original contract, hold the cards under any qualification or restriction enforceable by the pursuers as to the use they could make of them; and in particular, were they at liberty to use them for the production of curtains which might be put on the market so as to compete with the pursuers? The second question is, Whether in the circumstances under which the defenders Muir Brothers & Co. acquired the business and

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the cards, they are affected by any such restrictions or qualifications as to the use of the cards, which might have been enforceable as between the original parties?

One argument which was urged for the defenders I may notice at this stage. It was pointed out by the defenders that the patterns being unregistered designs had no protection, and became public property when once they were put on the market; and it was argued that the pursuers are here attempting to get the benefits of registration by means of private agreements. I must say that this does not strike me as an accurate or fair representation of the pursuers' position. I think they are entitled by private agreement to limit the area of publicity as much as they can, and so to arrange matters by contract that their own patterns shall not be used against them in the trade through any act of the firm to which they have entrusted them for a specific purpose. That position seems to be quite reasonable, and all the more so because the arrangement is really for the advantage of both parties. It was represented as an arrangement by which the defenders were said to have bound themselves not to take advantage of these patterns as public property, which all the rest of the world were entitled to do. But it is to be remembered that the arrangement is for mutual advantage. It is entered into when one manufacturer has his mill running full, and another has not. The former sends his own new and private patterns, prepared (as the proof shows) at considerable cost; and with them he sends an order for so many hundred or thousand pairs of curtains. The other is perfectly free to decline the business; but if he does not, he makes an offer to manufacture the goods at so much per pair, allowing for the cost of preparing the pattern cards. It is obvious that if, in addition to the agreed quantity, he were to manufacture from the same cards for his own private business, or for a third party, he might do a great deal of harm to the firm which owned the patterns. He himself, having no outlay on patterns, could undersell the firm in that pattern of goods in the general market; or he might put other firms in a position to compete with them. So far, therefore, from there being anything undue or unfair in the pursuers' contention, it seems to me to be quite fair and natural that it should be part of the contract, that so long as the manufacturer who so employs the other has it in contemplation to continue his orders, that other shall not be entitled to make any other use of those cards; but that he is free so to use them if the other party either notifies that he is done with his orders, or has allowed a whole season to elapse without renewing them.

The pursuers put their case alternatively, maintaining that a contract of such a nature would of itself imply some such limitation, but that in any view there is a custom of trade to that effect. I am disposed to think that the first alternative would suffice for the pursuers' case, and that the contract between the parties really constitutes one of those confidential business relationships in which one party is entrusted with something which he is to use for a specific purpose and no other—as where private patterns are handed to an ironfounder, or confidential papers to a typewriter. But it is not necessary, in my view, to decide the case on this ground; for the pursuers have averred, and in my opinion quite satisfactorily proved, the existence of a custom of trade to the same effect. On this point I consider it sufficient to refer to the careful and accurate analysis of the evidence by the Sheriff-Substitute. I hold that the terms which the pursuers seek to import into this contract by usage of trade are (to use the words of Sir Frederick Pollock), "proved to be an accustomed part of such contracts made between such persons as the Court has before it."

The second question in the case, as to whether the defenders, who come in as purchasers from the trustee, are bound by the contract to this effect, is, I think, a question of some difficulty. I do not refer to the question whether the trustee in the sequestration is so bound, for I think it clear that he is. But the contract must be transmitted against the purchasers. Now, I think it is proved (1) that the purchasers took up and completed all the pursuers' orders which were actually in hand at the transfer; (2) that as regards current orders not actually in hand, they accepted from the pursuers a cancellation of so much of them as applied to nets, but not of the others; and (3) that in response to their suggestion that they should destroy the pursuers' cards in stock, they were requested by the pursuers not to do so, which was tantamount to leaving those cards open for further orders. The defenders, however, instead of waiting till the end of the season, set about immediately to manufacture curtains from those cards and to put them on the market in competition with the pursuers. This I hold they were not entitled to do, inasmuch as upon the proved facts they had adopted the original contracts, with all their terms, express and implied.

Lord Ardwall.—The pursuers and defenders are both manufacturers of lace curtains and curtain nets at Newmilns in Ayrshire. About three or four years ago the pursuers, finding that they had more work ordered in the way of making curtains and nets than they could overtake in their own factory, commenced to employ the now defunct firm of Robert Muir to manufacture curtains and nets for them from their designs. It may be explained that the firm of Robert Muir were engaged in what is referred to in the evidence as the "brown trade," which merely means that they carried on the manu-

facture of lace curtains and nets up to the stage when these articles had passed through the looms, but had not been bleached and finished, whereas, what are known as manufacturers in the "white trade" not only do all that the "brown" manufacturers do but complete the finishing of the curtains and nets so as to make them fit for the market. The said designs had either been designed in their own factory by the pursuers' designer, or had been purchased from outside designers and paid for by the pursuers.

It is proved that it is a common practice amongst lace manufacturers when one firm cannot fulfil their orders quickly enough, that they should employ other firms of manufacturers, either in the "brown" or "white" trade, to manufacture curtains and nets for them up to a certain stage. The process of manufacturing curtains from designs is as follows:—

After a design has been drawn it is transferred to what is known as a "draft," which is a large sheet of paper covered with lines crossing each other at very short distances, and showing the texture of the lace at different places by various colours and shades of colours. When the "draft," or, as it is sometimes called, the "pattern," is handed to the manufacturer who is to make the curtains or nets, his first process is to put that pattern on to cards. With a view to this the design is first "read" on to strings, and after these strings have been placed in proper positions on a large card or piece of pasteboard it goes to the punchers, and under the guidance of these strings the cards are punched with holes in such positions as to produce from the looms curtains according to the desired design. It requires a greater or less number of punched cards to carry out a design, and when these cards are placed in a loom the manufacture of the lace curtain or net commences and proceeds till the articles are completed. So far as the loom is concerned, they are then ready for bleaching and finishing. The numbers set forth in the prayer of the Note are the numbers of the designs handed by the pursuers to the said Robert Muir for the purpose of manufacturing curtains and nets according thereto, and the cards mentioned in the prayer of the Note are cards punched from these designs and intended for the purpose of manufacturing curtains and curtain nets in conformity with such designs. It is matter of admission by both parties that the material of the cards belong to the manufacturers who supplied and punched them. The question at issue is as to the use of the cards.

The estates of the firm of Robert Muir were sequestrated on 14th November 1904, and Alexander Mitchell, C.A., Glasgow, was appointed trustee thereon. He had previously carried on the business of the said firm for the period from 3rd September 1903 to 26th July 1904, under a family arrangement. On 15th March 1905 the factory belonging to the estate of Robert Muir was exposed to public roup, along with the moveable contents thereof, and the defenders, Muir Brothers & Co., became proprietors of the factory and of the cards in question by purchase. I shall afterwards refer particularly to the circumstances and conditions under which these cards were taken over by the defenders.

Since the defenders got possession of the said factory and cards they have been manufacturing for their own behoof lace curtains and curtain nets from cards made in conformity with the pursuers' designs, and have been selling them or offering them for sale. In these circumstances the present action of interdict was raised.

It will be convenient to consider the pursuers' case under two distinct heads, and to enquire, first, whether the firm of Robert Muir got possession of these designs and held the cards made from them under a contract which prevented them from using them otherwise than for executing the pursuers' orders or repeat orders; and, second, assuming that this was so, whether the defenders as purchasers of these cards are barred by delegation, adoption, or otherwise from repudiating the conditions of the contract under which Robert Muir held these cards.

The contract under which the designs in question were handed over to Robert Muir was one of a simple description. The designs were sent along with an order for curtains or nets, which took the form of a letter setting forth the numbers of the designs sent, the number of pairs of curtains or lengths of net wanted, the quality, and the price at which they were to be manufactured. It is proved that in accepting orders or estimating for the manufacture of curtains the manufacturer who is to weave them is accustomed to take into consideration the cost of making the cards necessary to carry out the designs. It is maintained for the pursuers that in all such contracts there is an implied term arising from the custom of the trade to the effect that the manufacturer to whom designs are sent by another manufacturer in order that the first manufacturer may weave curtains and curtain nets therefrom for behoof of the second manufacturer, is not entitled to utilise cards punched for the purpose of carrying out the designs of the manufacturer who gave him the order, except for the orders or repeat orders of such manufacturer; or, to put it more shortly, that a manufacturer employed to carry out a design furnished to him by another manufacturer for the purpose of executing orders for him, is not entitled to utilise these designs or the cards made from them for his own purposes. This custom, of course, may be expressed in a variety of ways applicable either to the use of the designs on the cards or the curtains and nets manufactured from them, but the above statement of it sufficiently sets forth the custom as averred by the pursuers.

EXTRA DIVISION.

William Morton & Co. v. Muir Brothers & Co.

Lord Ardwall.

In considering whether the alleged custom of trade has been proved to exist, I think it is of importance to observe that, apart from such custom altogether, and assuming nothing to have been said or done beyond the handing over of the design and the giving of the order, it seems to be a condition necessarily implied in a contract of a confidential nature, such as that in question, that a manufacturer to whom a design is entrusted by another manufacturer for a particular purpose should not make use of that design for any other purpose than that for which it was given to him; and in particular should not, having been entrusted with the design for a particular purpose, endeavour to turn it to his own benefit contrary to the trust under which he received it. A number of analogous cases may be given; *e.g.*, when a person hands a manuscript intended only to be printed for his own use or for private circulation to a printer, such printer would not be entitled to print and then publish copies taken from that manuscript; and again, suppose an inventor of some new machinery or the like sends a rough model of his invention to some one more skilled than himself in the same trade, and employs him to make drawings from it with a view to taking out a patent, it would necessarily be implied that the person so trusted with such model should not employ it for the purpose of taking out a patent himself or selling the invention to some other person. All this, I think, holds good in regard to such confidential contracts even where no patent has been taken out, or no trade mark or design has been registered, or no printed matter has been entered at the Stationers' Hall. It is, I think, entirely beside the point to say that the present interdict is an attempt to get the benefit provided by the Designs Act without applying for registration; and it is out of the question, in my opinion, to say that such a custom of trade as that alleged, or such a condition of contract, is to any extent illegal or contrary to public policy.

Now if the limitation of the rights of a maker of cards for a design is so natural and reasonable as almost to amount to an implied condition of contracts such as those in question, it does not require a great deal of evidence to prove that such a limitation has become crystallised into a recognised custom of the trade.

The Sheriff-Substitute has set forth in his note an excellent analysis and criticism of the evidence, and I do not think it is necessary for me to go into it further than he has done. I agree generally with the view that he has taken with regard to the district in question, which it now seems is the centre of the lace curtain trade, to the effect that the custom is undoubtedly proved to exist there; while with regard to Nottingham and other places, it seems certain that whatever the witnesses may say as to the particular wording of the condition which custom is understood to imply in contracts of this kind, they all practically admit that when one manufacturer hands a design to another to carry out, that other manufacturer gets possession of the design and makes cards from it subject to certain conditions more or less stringent in favour of the person from whom he received the design; but I may observe that the greater part of the evidence from Nottingham is inapplicable to the present case, for the cases which are spoken to by the witnesses from that district are for the most part cases arising between manufacturers and merchants, where the circumstances are very differnt from the present case, inasmuch as a merchant who has either made or bought a design is only concerned to have a certain number of curtains made from it, generally only for a season; he keeps no stock of cards, and no warehouse to put them in, and when once he has got as many curtains to dispose of as he requires for the season, the cards are of no further value to him, and indeed, would be probably an incumbrance, and therefore, as might be expected, the rules regarding merchants are not nearly so stringent as those regarding manufacturers.

Taking the evidence as a whole, I am of opinion, without any serious doubt or difficulty, that the pursuers have established that there is a custom of trade in virtue of which there is an implied condition such as they contend for in all contracts where designs are handed by one lace manufacturer to another for the purpose of executing his orders, that condition being that the manufacturer to whom the designs are entrusted is not entitled to use them or the cards made for the purpose of carrying them out except for the purpose of executing the orders of the manufacturer from whom the design was received. It follows that I hold that the firm of Robert Muir received the designs and held the cards made therefrom, subject to the said implied condition.

It is almost unnecessary to observe that the evidence shows that if the manufacturers to whom the designs belong either expressly or impliedly notify the holder of the cards that they do not intend to manufacture from these designs any more, the holders of the cards are entitled to use them as they please. Such notification is frequently held to be implied from long abstention from giving orders for curtains of a particular design.

The second, and perhaps more difficult, question in the case, is whether the defenders are affected with the condition under which the firm of Robert Muir held the cards. In answering this question some attention requires to be paid to the circumstances under which the defenders took over these cards. Robert Muir's trustee in bankruptcy, Mr Mitchell, had for some time before the sale to the defenders been carrying on the factory belonging to the sequestrated estate, and it is noticeable that he had, as a trustee has a right to do, adopted the current con-

tracts which the pursuers had with Robert Muir, because, up to the time of the factory being handed over to the defenders, he was manufacturing goods from the pursuers' designs in fulfilment of orders given by them. This appears from the evidence of Mr Bryson, a partner of the defenders' firm, and it also appears from the same evidence that the defenders took over these contracts from the trustee. Mr Bryson says: "When we had fixed the price of the cards with Mr Mitchell, we made an arrangement with him with regard to the orders in the books. We agreed to execute them without making any claim against the trustee. . . . Among these orders were certain orders for the pursuers." He then goes on to say that they received a general cancellation of all work for the pursuers, and then they wrote the letter of 22nd March 1905, which is in these terms: "We accept with pleasure your cancellation of goods and orders, excepting those made and on machine. We have a number of your patterns here, and, assuming they are worthless, we purpose destroying them." Following on which the pursuers instructed the defenders not to destroy them in the meantime. I think this must be taken to mean that they might require to give them further orders, and the result was that Mr Robert Muir, junior, who was then in the employment of the defenders, answered verbally on their behalf that it was all right, and that they would not be destroyed.

The importance of all this is that it appears that first the trustee and then the defenders adopted the current contracts between the pursuers and the firm of Robert Muir, and I think it is not unfair to the defenders to hold that they undertook to retain the cards in question under the same conditions as the firm of Robert Muir had held them. As throwing light upon this, it is noticeable that the price at which the cards were sold was fixed at £1 per ton, which is the price at which waste cards and waste paper is usually sold. So far from their observing the conditions under which these cards were held by Robert Muir, the defenders proceeded to compete with the pursuers in the market, for about the beginning of April 1905 Mr Morton of the pursuers' firm asked them for a quotation for the making of curtain nets according to certain of the designs. The price quoted was 20 per cent. higher than the pursuers had previously paid, and they accordingly did did not give a repeat order. In the following month a customer came asking for a quotation for one of the designs mentioned in the prayer of the note, and when Mr Morton quoted the price he was told that the customer could buy the same number from the defenders at 4d. per pair less. The pursuers at once found fault with what was being done, and after certain correspondence, and receiving no satisfaction from the defenders or any undertaking from them that they would cease to compete with them in curtains made from their own designs, they gave instructions for the raising of the present action of interdict.

In the whole circumstances I am of opinion that first the trustee in bankruptcy of Robert Muir, and then the defender's firm, adopted the current contracts between the pursuers and the firm of Robert Muir, and must therefore be held to be bound by the same conditions as those under which the firm of Robert Muir had received the designs and held the cards. I consider there is considerable force in the view taken by the Sheriff-Substitute that under the articles of roup there was a *jus quæsitum* in favour of the pursuers, but I prefer to put my decision upon the ground that the defenders adopted the contract between the pursuers and Robert Muir, and after recognising that the pursuers had rights in the designs and cards made therefrom, proceeded, in breach of the condition of the contract, to compete with the pursuers by offering for sale curtains made from their designs at a lower price than they were quoting to the pursuers for the same curtains made from their own designs.

For these reasons I think the Sheriff-Substitute's decision ought to be affirmed.—13*th July* 1907.

Counsel for Appellants, Dickson, K.C., Munro; Agents, Cuthbert & Marchbank, S.S.C.—Counsel for Respondents, Clyde, K.C., Macmillan; Agents, Macpherson & Mackay, S.S.C. A. M.

EXTRA DIVISION.

(*Lords M'Laren, Pearson and Ardwall.*)

109. Brownlee's Executor *v.* Robb.

I. Assignation—Construction—Evidence of Surrounding Circumstances—Donation—"I Hand Over My Life Policy To"—Held Effectual as an Assignation of Policy and Sums Due Under It.

II. Assignation—Policy of Insurance—Intimation—Assignation Without Intimation Held to Confer on Assignee a Right Effectual Against Cedent and his Representatives.

III. Writ — Testament — Informality of Execution — Witness Subscribing Ex Intervallo and After Death of Testator—Witness a Beneficiary Under Testament — Tener's Trustees v. Tener's Trustees (1879, 6 R. 1111) Commented on.

Reclaiming Note against Interlocutor of Lord Johnston.

The following narrative of the facts is taken from the Lord Ordinary's Opinion:—

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This action of multiplepoinding has been raised to determine the rights of parties in the contents of a policy of insurance with the Scottish Provident Institution on the life of the late Joseph Robb. These amount, with bonus additions, to the sum of £160 odds. The claimants are George Brownlee, dairyman, Davidson's Mains, the husband and executor of the late Elizabeth Scott Robb or Brownlee, a daughter of the deceased, founding upon the document No. 7 of process, dated 9th December 1901, and alleged to be a deed of gift of the policy and its contents by the deceased to his daughter Mrs Brownlee. The deceased's widow, Mrs Mary Scott or Robb, also claims the fund *in medio* as executrix-dative of the deceased, having been appointed such, *qua* relict of her deceased husband, on 2nd June 1905.

The action, as things stand on the record, might be disposed of by determining the question merely of the validity of the alleged assignation in favour of Mrs Brownlee, as, if that document is not effectual as an assignation, Mrs Robb, as executrix, must take the fund for the purposes of administration. But the case is really intended to raise the whole question of the proper distribution of the proceeds of the policy, which, in direct competition with Mrs Brownlee's executor, are claimed by the widow under an alleged will of the deceased, No. 16 of process, and in which, in any view of the alleged assignation in favour of Mrs Brownlee, the widow claims her legal rights. Though the record is not well drawn to raise all the questions at issue, it is only fair to the parties interested in this small succession, to decide, if possible, all questions among them. And though the sum at stake is small, these questions present considerable difficulties, both in fact and in law, and particularly in fact.

I shall deal with the questions in fact first. Mr Robb, who had been a flesher in Edinburgh, and was apparently in his later years a small carting contractor, died on 8th March 1905. For some years he had been addicted to drink, which had led to periods of separation between himself and his wife, and to disagreements between himself and other members of his family. So far as the facts can be ascertained from the loose statements of the witnesses, a serious quarrel between Mr and Mrs Robb took place in July 1899, which led to Mrs Robb going out to Davidson's Mains, where her daughter Elizabeth, who in 1895 had married George Brownlee, then resided. She was followed by her husband, and a scene there occurred which justifies my saying that it is no discredit to Mrs Robb or her daughter Josephine if their recollection of the events of the afternoon is indefinite and uncertain. But there occurs here one of the discrepancies between the claimants' witnesses for which it is very difficult to account. Mrs Jane Wallace and her son James, witnesses for the defender and real raiser, assert that when the deceased was struggling with some men who were trying to control him, Mrs Robb took from his pocket papers assumed to be his policy of insurance, gave them to her to keep for the night, and took them away next morning. On the other hand, Mrs Robb and her daughter Josephine both assert that no such thing occurred, and that it could not have done so, as the policy was never out of a desk in her possession both before, during, and after the periods when her husband left her.

As I gather, this episode in 1899 did not lead to an immediate separation between Mr and Mrs Robb. But his habits did induce such separation, from about October 1901 to the middle of June 1902, and again from July 1904 till his death on 8th March 1905. During this first period of separation the deceased, on the allegation that he had lost the original of his policy of insurance, obtained, on 3rd October 1901, a certified copy thereof from the Scottish Provident Institution. He then, while, more or less, living with his daughter Mrs Brownlee, on 9th December 1901, executed the alleged deed of gift No. 7 of process. This is spoken to by James Girvan, police constable, Davidson's Mains, whose evidence is very clear and distinct. He speaks to its preparation and to its execution with greater formality than, under the circumstances, was to be expected, and he makes it quite clear that, whatever the intention of the deceased, and the virtue of the document he executed, he was not, ostensibly at least, giving his daughter the custody only of the certified copy policy. He indicated that he was due her recompense for services and attention, and in handing the paper to Mrs Brownlee he said, "That is yours, keep it, give it to no one." In this evidence Girvan is otherwise supported. With the document No. 7 of process, the certified copy of the policy of insurance was also handed over to Mrs Brownlee and retained by her till after her father's death. She herself only survived him a few months. The document No. 7 of process bears, "I, Joseph Robb, hand over my life policy to my daughter Elizabeth Scott Robb, now wife of George Brownlee, dairyman, Bonnyfield." It is not disputed that it was signed by the deceased, and attested by Mrs Brownlee and her husband and three other persons.

Mrs Robb's evidence is that her husband imposed upon the Scottish Provident Institution, and obtained from them the certified copy of the policy, knowing perfectly well, not only that the policy was not lost, but where it was all the time; that he admitted the imposition, and told her that what he had done would never avail the Brownlees.

The last episode referred to in the proof was the execution of the deceased's will, No. 16 of process, on 5th January 1904. There is no doubt that it was written by the deceased's son Walter, then a lad of thirteen or fourteen, to his father's dictation, while his father was still in the house recovering from a bout of drinking; that it was signed by his father, and witnessed on the spot by James Hay, a young lad of about seventeen, a friend of young Walter Robb. No other witness signed at the time, or was present at the execution, but, on the advice of her agent, Mrs Robb, who had been present at the execution, signed it as a second witness after her husband's death. The assertion of the two lads, James Hay and Walter Robb, that the document was witnessed by Mrs Robb shortly after its execution, is contrary to that of Mrs Robb and her agent, and is quite inexplicable. But I cannot attribute to either of the lads concerted falsehood. On the contrary, their demeanour led me to think that their evidence was truthful, to the best of their knowledge and apprehension. But it is proved that the important words which terminate Mr Robb's alleged will, viz., "Also insurance papers go to Mary Scott Robb," were not the spontaneous dictation of the deceased, but were suggested by Mrs Robb, and, though written before execution, were written after a little interval. As, however, the will remained from the date of its execution in Mrs Robb's possession, though I believe the above to express the truth of the matter, it must always remain open to the suspicion that these words were written by young Robb on his mother's suggestion, after the will was signed, if not after the deceased's death. And to this suspicion I admit that the writing itself, and the

collocation of the words in question with the signature, lend some support.

On 30th July 1906 the Lord Ordinary pronounced the following interlocutor:—

The Lord Ordinary having considered the cause, Finds that the alleged Deed of Gift No. 7 of process did not validly or effectually transfer the deceased Joseph Robb's policy of insurance with the Scottish Provident Institution to the deceased Elizabeth Scott Robb or Brownlee, wife of the claimant George Brownlee, either as an *inter vivos* or a *mortis causa* assignation or donation. . . . Finds that the alleged will of the late Joseph Robb, No. 16 of process, was improbative at the date of his death, and was not rendered probative by the signature of Mrs Robb, his widow, and substantially his universal legatory, after his death, and therefore that the said alleged will, No. 16 of process, is invalid and ineffectual: Finds that the proceeds of said policy of insurance were intestate succession of the late Joseph Robb, and fall to be administered by the claimant Mrs Robb as his executrix-dative; therefore sustains the claim for her as executrix-dative, No. 21 of process. . . .

Lord Johnston [after the narrative quoted above].—I am convinced that the policy being the only asset that the deceased had, was during his lifetime a bone of contention among those connected with him, and at the same time a convenient and useful instrument in the old man's hands; that he found himself liable to fall between two stools—his wife on the one hand, and his daughter and her husband, Brownlee, on the other; that he had no real quarrel with, or animosity to, his wife, who had borne him, I think, thirteen children, of whom six or seven were alive, and against whom there is no imputation, except that in the end of the day she found his intemperate and violent habits past bearing; that he was under pretty rough pressure from Brownlee; and that he took the expedient to keep himself fair with Brownlee and his wife, on whom he was sometimes dependent, without, as he thought, putting his one asset beyond his control, or defeating his wife's legitimate claims, by pretending to the insurance association that he had lost his policy, and so getting a duplicate, which he made the basis of a somewhat ostentatiously formal gift to Mrs Brownlee, while knowing all the time that the policy was not really lost, but was in his wife's keeping, and never intending to divest himself of the control of it. I may add that I have no belief in, though I cannot explain, the story of Mrs Robb having taken from her husband's pocket in 1899 the policy papers; I believe it to have been, to her husband's knowledge, in her custody throughout.

In these circumstances the following questions arise:—

First.—What was the effect of the so-called deed of gift, No. 7 of process, in Mrs Brownlee's favour?

It bears: "I, Joseph Robb, hand over my life policy." In one view it has reference only to the actual document handed over *unico contextu*, which was not Joseph Robb's life policy, but only a certified copy. In another, it is an informal assignation of what, by extrinsic evidence, can be proved to have been his only life policy, and therefore the one intended to be transferred. In the view which I take of the evidence, and the inference which I draw from it, I accept the former interpretation, and therefore conclude that the so-called deed of gift was never meant to carry and did not carry the real policy or its contents. But it is right that I consider also the opposite view. Assuming that the deceased intended by "life policy" to indicate his real interest under the insurance (and under the insurance it was "his heirs, executors, administrators and assignees" who were to be entitled to payment), what is the effect of the document? Was it an assignation? Was it an *inter vivos* or a *mortis causa* assignation? And was the transference completed by its delivery with a copy of the policy, and intimation made subsequently to the death of the assured?

An assignation transfers "the right to receive, and if necessary to raise action or suit for recovering from a third party, a sum of money due on a bond," or other obligation (Bell's Lectures on Conveyancing, Title II., chapter 1). Short forms are introduced by The Transference of Moveable Property Act 1862 (25 and 26 Vict. cap. 85), and a special form for the assignation of policies by the Policies of Insurance Act 1867 (30 and 31 Vict. cap. 144), from both of which it is clear that it is competent to assign the contents of a "policy of assurance" by merely assigning the policy, without saying anything about the sums due or to become due under it. It is also, I think, clear that the word "assign," or other *vox signata*, need not be used. "The letter of the late Robert Strachan to her (Miss MacDougle), and the delivery of the policy, I have no hesitation in considering to be equal to an assignation," per Lord Balgray in *Strachan* v. *MacDougle*, 1835, 13 S. 954; but then the letter clearly disclosed the purpose of "sending" the policy. And the same may be said of the letter in *Caledonian Insurance Company* v. *Beattie*, 1898, 5 S.L.T. 349, where the same words as here, "I hand you," were used. And the question is, Do the terms used in the present case, which in themselves have no defined significance, disclose a purpose of assignation or transfer of the right to receive the proceeds; and if they do not, can they be supplemented by parole evidence? The former they certainly do not. As to the latter, had the same thing been expressed verbally, no supplementary proof of intention would have raised the verbal expression into an effectual assignation, at least in Scotland (*Scottish Provident Institution* v. *Cohen & Co.*, 1888, 16 R. 112), and I do not think that the fact that the words which, if spoken, could not have been supplemented so as to make them effectual, when written would be any more effectual, or could be permitted to be explained by extrinsic evidence. But even if I could admit extrinsic evidence, for the reasons already explained, I do not think that the evidence led is sufficient to satisfy the onus on the party standing upon the alleged deed of gift, to prove that assignation was intended. I come, therefore, to the conclusion that the document No. 7 of process cannot be regarded as an assignation. I am therefore relieved from determining the questions whether it was an *inter vivos* or *mortis causa* assignation, and whether the transference was completed.

Second.—It was maintained that, even if the document No. 7 of process was a *mortis causa* assignation or donation, it did not affect the legal rights of the widow and children; and

Third.—It was maintained, on the same assumption, that the *mortis causa* donation was revoked by the document No. 16 of process, whether that document was valid as a will or not.

These questions also, in the view which I take, I do not need to consider.

Fourth.—There remains the question whether the document No. 16 of process is a valid will. I have

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come to the conclusion that it is not. At the date of Mr Robb's death the document in question bore the signature of only one witness, and was therefore improbative. After his death, on the advice of her agent, Mrs Robb signed as an additional witness. At one time it was held that women, particularly married women, were incapable of acting as instrumentary witnesses, and they were not in use to be accepted as such. But that view and practice has been departed from, and in the case of many deeds a wife may be a witness to her husband's signature, but it is another thing to accept her signature as attesting a deed where she herself is interested, and here she is substantially the universal legatory. I think that even had she signed as a witness at the time of execution, the validity of the attestation would have been more than doubtful; but I think that it is quite impossible to admit her signature as witness *ex post facto*, as validating a deed entirely in her own favour, which was left improbative by her husband at his death. I therefore think that the document No. 16 of process was invalid and ineffectual as a will.

The result therefore is, that the proceeds of the policy of insurance are intestate succession of the deceased Joseph Robb, which fall to be administered by Mrs Robb as his executrix for the benefit of his representatives, that is, of his widow and children. Mrs Robb will take her *jus relictæ*, and his children who survived him the legitim and dead's part.

The claimant George Brownlee reclaimed.

Argued for Reclaimer: The deed of December 1901 was an assignation of the insurance policy in favour of Mrs Brownlee (Policies of Insurance Act 1867, 30 and 31 Vict. cap. 144, sects. 1 and 5, and schedule; *Strachan* v. *MacDougle*, 1835, 13 S. 954; *Carter* v. *M'Intosh*, 1862, 24 D. 925; *Caledonian Insurance Co.* v. *Beattie*, 1898, 5 S.L.T. 349). If this were doubtful *ex facie* of the deed, the parole evidence showed that a gift was intended. Intimation was not necessary to obtain a right which would be good against the cedent or his representatives (Bell, Prin., sect. 1462; *Lillie's Trs.* v. *Gray and Others*, 1828, 6 S. 489).

Argued for the Respondent: There was a strong presumption against donation (Ersk. III. 3, 92; Dickson on Evidence, sect. 158; *Jamieson* v. *M'Leod*, 1880, 7 R. 1131; *Sharp* v. *Paton*, 1883, 10 R. 1000; *Dawson* v. *Mackenzie*, 1891, 19 R. 261). The deed of December 1901 was not a deed of gift, but was intended only to preserve evidence of the fact of the policy having been handed over. (2) Parole evidence to prove intention was incompetent, but the evidence showed that no gift was intended. (3) If the deed were to be read as an assignation, it had not been intimated until after the death of the assured, and his executrix had right to the policy (*Strachan* v. *MacDougle cit.*; *United Kingdom Life Assurance Co.* v. *Dixon*, 1838, 16 S. 1277; Bell, Lect., bk. II. tit. 2 cap. 1). (4) If the deed constituted a gift at all, it was a *mortis causa* gift (*Blyth* v. *Curle*, 1885, 12 R. 674). If so, it was revoked by the deceased's will. That was so even if the will were invalid as a will, because it was plain that the granter intended to revoke the deed of gift. *Kirkpatrick's Trs.* v. *Kirkpatrick* (1874, 1 R. (H.L.) 37) and similar cases were distinguishable, the intention to revoke not being clear. But, in point of fact, the will was valid (*Tener's Trs.* v. *Tener's Trs.*, 1879, 6 R. 1111; *Simsons* v. *Simsons*, 1883, 10 R. 1247; *Beattie* v. *Bain's Trs.*, 1899, 6 S.L.T. 277). (5) In any event, a *mortis causa* gift being revocable, could not exclude legitim and *jus relictæ* (*Morris* v. *Riddick*, 1867, 5 M. 1036).

The Court *pronounced* the following interlocutor:—

"Recal the interlocutor of the Lord Ordinary dated 30th July 1906: Find that the deed No. 7 of process is a valid assignment of the deceased Joseph Robb's *jus crediti* in the policy of assurance (which he held from the Scottish Provident Institution) in favour of the claimant's wife Mrs Elizabeth Scott Robb or Brownlee, and that the same is now vested in the claimant George Brownlee; therefore sustain the claim of George Brownlee, and repel the claim of Mrs Robb.

Lord M'Laren.—This is an action of multiplepoinding raised in the name of the Scottish Provident Institution to determine the competition as to the right to the sum assured by a policy of assurance between George Brownlee, as representing his deceased wife, who is said to be assignee under a deed of gift, and Mrs Mary Scott or Robb, who claims under the double title of legatee under her husband's will, and alternatively as his widow and executrix-dative. The Lord Ordinary has held that neither the alleged deed of gift nor the testamentary paper is valid or effectual to pass the policy of assurance, and has sustained the claim of Mrs Robb in the character of executrix-dative.

The first question for consideration, in logical order, is obviously the validity of the deed of gift, because if this were effectual as a transfer of the right to the policy of assurance in the lifetime of the assured, it is unnecessary for the purposes of the competition to consider whether the writing purporting to be a testamentary gift was effectual, or capable of taking effect upon the sum assured.

The deed of gift is in these terms:—

"Bonnyfield, etc., 9th December 1901: I, Joseph Robb, hand over my life policy to my daughter, Elizabeth Scott Robb, now wife of George Brownlee, dairyman, Bonnyfield. Signed, Joseph Robb. Witnessed by" (here follow the names and designations of the witnesses).

The writing is not holograph, but it is subscribed by the granter and five witnesses. Mrs Brownlee was a daughter of the granter. She and her husband were among the subscribing witnesses, and their attestation is open to the observation that they were interested parties. A third witness is said to have signed *ex intervallo*. As to the other two witnesses, no objection is taken, and it is proved by their

own statements, corroborated by other persons who were present, that they saw the granter subscribe, and were asked by him to witness his subscription. It is also proved that the deed of gift was delivered to Mrs Brownlee the grantee immediately after subscription, and that it remained in her possession during the remainder of her father's lifetime. It follows in my opinion that this must be taken to be a valid and a delivered deed, and the only question for consideration is, What is the import of the deed?

On behalf of Mr Brownlee it is urged that no formal words of assignment are necessary to transfer a moveable right or *jus crediti*, and that the expression "hand over" is equivalent to assign or make over. A modified statement of this proposition is, that the words used are capable of operating as an assignment, provided they were used with this intention; but the intention must be evidenced by the deed itself taken in connection with the external circumstances in which it was prepared, executed and delivered.

On behalf of Mrs Robb, the executrix, it is contended that the expression "hand over," when used with reference to a policy of assurance, transfers nothing but the paper on which the policy is written, and that its only legal effect is to put the grantee into the position of custodier of the policy of assurance.

In my opinion the true principle of construction is that which I have indicated in the modified form of Mrs Brownlee's argument; because, if no words of style are necessary to the assignment of a moveable right, it follows that effect must be given to the words of gift according to the intention with which they were used. I therefore proceed to consider whether there are legal grounds for inferring, in relation to this deed, that the words "hand over" were used with the intention of transferring the *jus crediti* in the policy.

It is made clear by the terms of the Policies of Insurance Act 1867 (30 and 31 Vict. cap. 144) and relative schedule, that words purporting to assign the policy are sufficient for the purpose of assigning the right to the money assured. This removes one difficulty in the construction, but we have still to consider the meaning of the words "hand over." It is proved that on the morning of the day when the deed was executed Mr Robb called on the witness, James Girvan, a police constable, who was supposed by Mr Robb to have more knowledge of business than he himself possessed, and asked Girvan to write a paper in favour of his daughter. If Girvan is to be believed, and I do not think his testimony is in any way impeached, he understood that what Robb wanted him to write was a gift to his daughter. Not being a lawyer, Girvan very sensibly confined himself to the business of an amanuensis, and wrote the paper in the terms dictated by Robb. Now if this were a question as to a will—*e.g.* whether the paper in question was a will or a mere paper of instructions or mandate—I cannot doubt that it would be competent to interrogate the solicitor who prepared it as to the nature of the instrument which he was called in to prepare. We cannot have direct evidence of the granter's intention, *i.e.* as to the meaning of the words to which he has put his signature; but under the head of what are called "surrounding circumstances" we may at least begin by enquiring what kind of deed or instrument the granter proposed to make. In the next place we know that the granter meant some purpose which could only be carried into effect by a formal deed, because, instead of at once signing the paper which the constable had written for him, he made arrangements for executing it at a later hour of the day when witnesses should be present to attest his subscription. We have also the fact that, as Mr Robb was not in possession of the policy of assurance, he had previously obtained from the Scottish Provident Institution a certified copy of the policy which he thought would serve his purpose, and this certified copy together with the deed of gift was delivered to his daughter in presence of the witnesses. I cannot conceive that he would have taken all this trouble if his intention were to transfer to his daughter only a worthless piece of paper; but, if his intention were to transfer the right to the policy, the precautions taken were just what the law required, except that he might have done the business a little better if he had not employed a constable to do the work of a solicitor.

It is further proved that when Robb handed the deed and the copy of the policy to his daughter he said, "That is yours; keep it and give it up to no one," or words to this effect. I have some difficulty in acting on this evidence, because it comes very near to direct evidence of intention. But it is part of the *res gestæ*, and the words "that is yours" are entirely consistent with the notion that Robb believed he was giving something that was of value, and are quite inconsistent with the idea that he was making a gift of a piece of paper, or handing the paper over for safe keeping. But I think the best evidence of the intention to make a gift is the deed itself, because, unless we hold that "hand over" is equivalent to assign, we deny effect to the deed altogether, and that is a conclusion which can never be reached if the words used admit of an intelligible and effective meaning. I have only further to add that by a well-known rule of construction, which I give in the words of Lord Blackburn (*Fowkes* v. *Manchester and London Life Assurance and Loan Association*, 1863, 3 B. & S. 929):—"In all deeds and instruments the language used by one party is to be construed in the sense in which it would be reasonably understood by the other,"—I think that the granter's daughter, when she

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received this deed, would in reason understand it to mean that she was assigned into the benefit of the policy.

This being premised, it follows in my opinion (1st) that this was a transfer *inter vivos*, and not a testamentary gift, because the deed was delivered to the transferee; (2nd) that no opinion which we may form as to the character, conduct or motives of the granter of the deed can have any effect in controlling the right of the assignee, which is founded on written title followed by delivery of the writing.

Against the effect of the assignation it was argued that the transfer was incomplete because it was not intimated to the assurance company in Mr Robb's lifetime, but I think this argument is founded on a misapprehension. Intimation is necessary to give a real right to the subject assigned. All the authorities who speak to the importance of intimation limit its effect in this way, and I can see no reason for doubting that an assignment of a policy of assurance, like any other deed purporting to give a contract right, is binding on the granter and his heirs. The law is so stated in Bell's Principles, sect. 1462, and unless this were the law there never could be an effectual intimation, because intimation always presupposes a valid contract right which is to be notified to the debtor. It follows that the executrix being under obligation to warrant the assignment, cannot set up her title in opposition to that of the assignee.

In the view I take of the case it is unnecessary to consider the question of the validity of the so-called will. It was signed by one witness at the time when the testator signed, and by another, the executrix, after her husband's death, and months after the execution of the will. This is said to be a good subscription on the authority of the case of *Tener's Trs.*, 1879, 6 R. 1111. I am not quite clear as to the ground of decision in the case of *Tener's Trs.*, but if it supports the contention of the executrix in this case, I hope the question may be hereafter reconsidered by a larger Court; because I cannot admit that a witness who does not sign the deed is an instrumentary witness, or that the omission to sign is an informality of execution which can be corrected or supplied after the death of the maker of the deed.

I am of opinion that Mr Brownlee is entitled to be ranked and preferred in terms of his claim.

Lord Pearson.—The fund *in medio* is the sum due under a paid-up policy of insurance on the life of the late Joseph Robb; and the first and most important question is, whether the proceeds of that policy are *in bonis* of the deceased, or were effectually assigned by him to his eldest daughter Mrs Brownlee by the writing No. 7 of process, dated 9th December 1901. That writing bears: "I, Joseph Robb, hand over my life policy to my daughter Elizabeth Scott Robb, now wife of George Brownlee, dairyman, Bonnyfield." The writing is duly attested; and it was delivered to Mrs Brownlee, along with a certified copy of the policy, and remained in her possession until his death. The question is, whether the terms of the writing import an assignation of the policy, or are merely an expression of the fact that a copy of the policy was handed to Mrs Brownlee. Taking the question as one of the construction of the words used, I do not think it can be maintained that they are not capable of the larger construction. Nor do I think that it aids the solution to say that they are capable of the narrower construction, unless it can be made out either that that is the sound construction in law, or that the words used are so ambiguous that it is impossible to say what they mean. The Lord Ordinary says the words have in themselves no defined significance; and it is true that they are not words of art such as lawyers would use. The writing was drafted and written out by the village constable, who repeated in the writing the language used to him by Mr Robb. Now, in my opinion, the words used are not only capable of importing the transfer of the beneficial right, but they are apt words to do so according to their common colloquial use by ordinary Scotch people in that position in life. I am convinced that a large majority of such people, on a perusal of the writing itself, would at once attribute that meaning to it. That to my mind is conclusive as to the sense in which it was intended by the grantor and received by the grantee, unless perhaps it could be made out by competent evidence that there were surrounding circumstances which compelled a different construction. But so far is this from being the case, that I think all the surrounding circumstances (assuming that it is competent to regard them) strongly support the view I have expressed; but, as your Lordship has fully treated that aspect of the case, I content myself with expressing my concurrence in what you have said, and also as to the alleged necessity for intimation. But, as I have said, I hold that according to the natural and ordinary construction of the words used, as these would be construed by the parties concerned, they are apt and sufficient to pass the beneficial right in the insurance policy. I am further of opinion that no case is made out for regarding the assignation as a gift *mortis causa*, or as being affected by the operation of the will, if the will is to stand.

Lord Ardwall.—In this case I have the misfortune to differ from the views expressed by your Lordships.

This action of multiplepoinding has been raised in name of the Scottish Provident Institution for the purpose of determining who is entitled to the proceeds of an insurance policy on the life of the deceased Joseph Robb.

The widow of the deceased claims it now only in the character of executrix-dative of her husband; Mr George Brownlee claims it as executor of his wife, who was a daughter of the deceased, and who, he maintains, acquired right to the policy by a valid assignation executed by the deceased.

The deed by which it is maintained that the assignation was accomplished is in these terms:—"Bonnyfield, etc., 9th December 1901: I, Joseph Robb, hand over my life policy to my daughter, Elizabeth Scott Robb, now wife of George Brownlee, dairyman, Bonnyfield. Signed, Joseph Robb. Witnessed by" (here follow the names and designations of the witnesses).

I may observe that in the Print of Documents the claimant Mr Brownlee thus titles this document, "deed of gift," but these words do not appear on the document itself, and are apt to be misleading as begging the question. I prefer to call it a deed of transfer, and the first and most important question in the case is whether it operates as a valid assignment of the rights under the contract of insurance so as to defeat the rights of the deceased's legal representatives, who, but for it, would be entitled to the proceeds of the policy in terms of the destination contained in the policy itself.

The Lord Ordinary has repelled Mr Brownlee's claim and sustained Mrs Robb's, and I am of opinion that his judgment is well founded.

A proof at large before answer was allowed and led, but except for the purpose of laying before the Court the circumstances under which the said deed was made and delivered, I am of opinion that the parole proof, so far as regards the point now under consideration, is incompetent and irrelevant. It was pleaded for the claimant Brownlee that this was a donation, and that a donation could be proved by parole evidence, and the Court was referred to a number of cases regarding deposit receipts in support of this view. Parole evidence undoubtedly is admissible for the purpose of shewing whether a sum of money or a deposit receipt, which is practically in the same legal position, has been handed by one person to another *animo donandi* or not; but when it is maintained that a donation has been constituted by a written deed, I am of opinion that the question whether such donation was constituted or not depends on the construction of the deed. I think it is as incompetent to refer to parole evidence in order to shew what intentions the granter expressed to the donee or other people, as it would be to refer to similar evidence for the purpose of construing a contract that had been reduced to writing or of interpreting the will of a person deceased.

I shall now proceed to consider whether the deed of transfer on a sound construction thereof does or does not constitute a valid assignation of the policy in question.

It is common ground that according to the law of Scotland the execution and delivery of an assignation is the appropriate method of transferring a contract of assurance contained in a policy, and all sums of money due or to become due in respect thereof. The mere corporeal handing over of the paper on which the policy is engrossed, or a certified copy of it failing the principal, gives no right to the contract of assurance contained in a policy, or any sums of money due or to become due under that contract. This is trite law in Scotland, though apparently a different rule prevails in England. (See *Scottish Provident Institution* v. *Cohen*, 1888, 16 R. 112.)

What purports to be handed over in the deed of transfer is "my life policy." Now while I agree with the Lord Ordinary that, having regard to the terms of the Transference of Moveable Property Act 1862 (25 and 26 Vict. cap. 85) and the form for the assignation of policies introduced by the Policies of Insurance Act 1867 (30 and 31 Vict. cap. 144), it is competent to assign the contents of a policy without saying anything about the sums due or to become due under it, I must yet observe that the words "my life policy" would quite aptly describe the corporeal document on which the contract of assurance was written, and might apply to it as well as to the rights which the policy represented.

Coming to the alleged words of assignation, which are simply "hand over," the question arises whether these words in themselves are words of assignation and are to be held as equivalent to "make over" or "assign."

In the first place, it must be observed that the phrase "hand over" is capable of two meanings: the first is the primary, simple, and literal meaning, and signifies simply to pass a thing from the hand of one person to that of another; it has also, however, undoubtedly come to have a secondary or figurative meaning, namely, to assign or transfer. This meaning most frequently attaches to the phrase when used as a merely colloquial one, as, for instance, when we speak of a father handing over his estate or his business to his son. Now, *prima facie*, the simple and primary meaning of a phrase is to be accepted as its true interpretation, unless there is something in the context or in the circumstances to shew that it ought to bear its secondary meaning. So far, however, from that being so in the present case, it appears to me that a consideration of what actually was done at the time this alleged assignation was made and delivered is entirely in favour of the primary meaning being adopted as the true one, because what was done was this, that at the time the so-called deed of gift was delivered a certified copy of Joseph Robb's life policy was *de facto* handed over to his daughter. As we have seen, the words "my life policy" are quite appropriate to describe the document itself, and I therefore arrive at the conclusion that this deed of transfer merely

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records in writing what was done at the time, namely, the handing over of his life policy by Joseph Robb to his daughter. Accordingly, I am of opinion that in the deed under consideration the words "hand over" must receive their primary and literal meaning, there being nothing inconsistent with that meaning in the remainder of the deed, and there being everything consistent with it in what was actually done at the time. The cases of *Strachan* v. *M'Dougle*, 1835, 13 S. 954, and the *Caledonian Insurance Co.* v. *Beattie*, 1896, 5 S.L.T. 349, where the word "hand" was used, were founded on by the claimant Brownlee, but an examination of these cases shews that the intention to make an assignation clearly appeared from the terms of the documents of transfer, from which it was apparent that nothing less than a transference of the policy and of the rights under it was meant.

Some difficulty, however, is presented by the fact that the deceased thought it necessary, not only to hand over the policy, but at considerable trouble to record the fact in a carefully witnessed deed. It was argued that his having done so raises a presumption that he must have intended something more than a mere handing over of the corpus of the policy. I think that, on the assumption that Joseph Robb was acting honestly in the matter and not with intent to deceive his daughter or her husband, as the Lord Ordinary holds, the answer to this difficulty is, that at the time he handed over the policy and executed the deed in question, he really believed that in doing so he was transferring to his daughter not merely the policy, but all the rights under it, and he therefore thought it sufficient to hand over the document and record the fact in his deed, without any words which in law are sufficient to import an assignation. Obviously this does not aid the reclaimer's case, because although what Joseph Robb did may have been done with the intention of making an assignation in favour of his daughter, yet, if what he did is not sufficient in law to effect such assignation, no valid transference of the right to the contract in the policy and the sums that might become due thereunder was completed.

I therefore arrive at the conclusion that, assuming the deed of transfer to represent an honest transaction, it amounts to nothing more than this, that the deceased handed over the corpus of the policy to his daughter; and that cannot give her or her executor a good title to the proceeds of the policy in competition with those who, failing an assignation, are described *in gremio* of the policy as the parties having right to it. In other words, the title to the incorporeal rights secured by the policy was not transferred from the deceased and his legal representatives to Mrs Brownlee by the delivery to her of the policy and a deed recording that fact.

But if I am mistaken in my opinion as to the admissibility or relevancy of parole evidence in this case, and if the evidence of the deceased's true intentions is to be gathered from evidence of what he is reported to have said in regard to his policy of insurance to police constable Girvan, the deceased Mrs Brownlee and other people, I think it is plain that the whole parole evidence in the case, so far as bearing on the intentions of the deceased with reference to his life policy, must be examined. That evidence shows that the original policy was all along in the custody of Mrs Robb, from the day she got it from the insurance company till she took it to the insurance company after her husband's death. It further appears that the deceased knew that the policy was in his own house and under his wife's control all along, and that he obtained the certified copy he got from the insurance office by telling them a falsehood. All this, while spoken to by Mrs Robb, is established by the actual facts of the case as to the custody of the policy. The story told by neighbours of the claimant Brownlee about the policy being taken from Mr Robb's pocket by Mrs Robb seems to me to be manufactured evidence. Then Mrs Robb says that her husband told her that he had given the paper he had got from the insurance company to Mrs Brownlee, but that he said that "they would never get the money, for it was no use to them," the words used being, "Don't put yourself about, old one; they will never get the money."

She further says that when he signed the will he said that she was all right as to getting the assurance money. This last piece of evidence is corroborated by James Hay, who says that when Joseph Robb on his death-bed was asked by his wife what about the insurance, he said, "Oh, you will be getting that," and she replied, "You had better put it down," and thereupon the last words to that effect were added to his will. Walter Robb also corroborates this evidence, and says that his father told him to write down the words, "also insurance papers go to Mary Scott or Robb." This last piece of evidence confirms the view I have already expressed, to the effect that Mr Robb regarded the possession of the insurance papers as an important matter in claiming the insurance money, and thought that so long as his wife had the original policy she was quite safe, and that the handing over of the copy of the policy to his daughter did not matter.

I agree with the Lord Ordinary that the whole of the deceased Mr Robb's conduct with regard to the policy of assurance and Mrs Brownlee was attributable to the fact that he found it convenient, during or after some of his drinking bouts, to escape from his wife's supervision and reproaches by going to the Brownlees, and that he went through the solemn farce of executing a deed purporting to hand over his insurance

policy to Mrs Brownlee merely for the purpose of ingratiating himself with her husband, who, according to the Lord Ordinary's opinion, was a sort of man who would not be likely to give anything for nothing. But all along he believed that the interests of his wife and the rest of his family were secured by the former possessing the policy of assurance which at first had been issued to him by the insurance office.

I do not go further into the evidence, as I adopt entirely the Lord Ordinary's remarks upon it and upon the surrounding circumstances. The matter could not, I think, be better put than by the Lord Ordinary when he says that "Robb took the expedient to keep himself fair with Brownlee and his wife, on whom he was sometimes dependent, without, as he thought, putting his one asset beyond his control or defeating his wife's legitimate claims, by pretending to the insurance association that he had lost his policy and so getting a duplicate which he made the basis of a somewhat ostentatious gift to Mrs Brownlee, while knowing all the time that the policy was not really lost, but was in his wife's keeping, and never intending to divest himself of the control of it." Accordingly, on the assumption that parole evidence is competent in this case to explain the intentions of the deceased, I arrive at the same conclusion as I do on the deed itself, that Mr Brownlee's claim must be rejected.

With regard to the will, it is unnecessary to go into that matter, as counsel for Mrs Robb has intimated that he is satisfied with the Lord Ordinary's interlocutor and content to accept the policy as forming intestate succession of the deceased Joseph Robb, and that his client should administer it as his executrix-dative.

I accordingly am of opinion that the Lord Ordinary's decision was well founded.—19*th July* 1907.

Counsel for Reclaimer, Cooper, K.C., A. A. Fraser; Agents, Allan Lowson & Hood, S.S.C.—Counsel for Respondent, T. B. Morison, K.C., Dunbar; Agent, R. S. Rutherford, Solicitor.

J. S. M.,
for A. M.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Low.*)

110. Jenkins *v.* Gascoigne.

Sheriff—Summary Application—Act of Sederunt 10th July 1839, sect. 137—Lease—Repair of Fences—Circumstances of a Fugitive Nature.

Appeal against an Interlocutor of the Sheriff-Substitute of Argyllshire at Oban.

The pursuer in this action was tenant of the farm of Gartcharron, of which the defender was proprietor. The tenancy was under missive letters dated in 1904, under which the duration of the lease was five years from Whitsunday in that year, with a mutual break at the end of the first three years. The pursuer presented this petition in the Sheriff Court under sect. 137 of the Act of Sederunt of 10th July 1839. He craved the Court—

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"To remit to a person of skill to visit the farm and lands of Gartcharron, in the parish of Craignish and County of Argyll, as occupied by the pursuer as tenant under the defender, and to inspect the fences thereof, and to report to the Court the condition thereof, and whether they are in a properly tenantable, habitable, and sufficient condition, and fit for the purposes of the said farm, and if not, what repairs, alterations, and works are necessary to put the said fences into said condition, and thereafter to ordain the defender to make and execute such repairs, alterations, and works on said fences, at the sight and to the satisfaction of an inspector to be appointed by the Court or otherwise, or failing the defender doing so within such period as the Court shall appoint, to grant warrant to the pursuer to make and execute said repairs, alterations, and works, at the sight and to the satisfaction of said inspector; and, on the cost thereof being ascertained, to ordain the defender to pay the same to the pursuer, including the costs of said report, and the expenses incurred to and by said inspector in the premises";

and the petition contained an alternative crave to ordain the defender to concur with the pursuer in entering into a reference to arbiters in reference to said fences, and an additional crave for damages.

The pursuer averred, *inter alia*:—

Cond. 6. In terms of said missive letters, and also at common law, the defender was, as at the said term of Whitsunday 1904, *inter alia*, bound and obliged to put the fences on said farm in a properly tenantable, habitable, and sufficient condition, and fit for the purposes of the farm, in order that the pursuer, in his continued tenancy of the subjects, might receive the full use and enjoyment thereof, and be able to manage and cultivate the same in a regular and proper manner.

Cond. 7. Notwithstanding the defender's said obligation to so put the said fences in order, the same, in so far as attempted to be repaired, or to be put up and in order by the defender (by substituting iron fences for the former old rotten wooden fences, which he has entirely removed), are totally insufficient and useless for the purposes of the farm in keeping in the pursuer's cattle and sheep, and protecting his crops, and enabling him to manage and cultivate the farm in a regular and proper manner. . . . The pursuer has thus, in consequence of the defender's wrongful failure to properly and timeously repair the said fences, sustained, and continues to sustain, serious loss and damage, for the recovery of which (and under reservation of his claim for which he paid his Martinmas 1905 rent) he reserves all right of action competent to him against the defender in the event of the same not being settled under the proposed reference. Since the present action was raised the defender has had two men working on the fences and trying to put them right for about three weeks, but the work was originally so defective and the material

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used so unsuitable as almost to baffle improvement, and the fencing still remains insufficient.

Cond. 8. The pursuer has repeatedly since Whitsunday 1904 remonstrated with the defender and his factor and law agent, and with his estate manager, against the insufficiency of said fences, and the serious and undue delay in putting them in proper order; but, notwithstanding this, the defender, in breach of his said obligation, refuses or delays to put the same into proper order, and has thus rendered this application necessary.

Cond. 9. The pursuer offered, in terms of the said conditions of lease, to refer the matters in dispute between him and the defender to arbitration, but the defender refused to do so. The offer is hereby repeated, and the draft deed of submission and reference proposed by the pursuer is herewith produced, and will fall to be adjusted by the Court, if necessary.

The defender denied that he was bound to repair the fences; but stated that he had, in fact, repaired them, and that the work was done in a workmanlike manner; that it was completed in April 1905, and that the fencing was then in a proper tenantable condition.

The petition was presented on 3rd April 1906; and on 7th November 1906 the Sheriff-Substitute dismissed the petition.

The pursuer appealed to the Court of Session. The defender took advantage of the break in the lease to put an end to it at Whitsunday 1907; and the pursuer, at the hearing, only insisted in the prayer of the petition to the effect of asking a remit as craved.

Argued for Pursuer: The process was suited to the condition of affairs at the time when the petition was presented. The fact that the landlord had altered the pursuer's position into that of an outgoing tenant should not prejudice his position. The condition of the fences was a circumstance of a fugitive nature. The fact that the pursuer was no longer in occupation of the farm made it all the more incumbent on the Court to assist him in having the condition of the fences determined, as he was no longer in right to go on the land and inspect them himself. Counsel referred to *Barclay* v. *Neilson*, 1878, 5 R. 909; *Gordon's Trs.* v. *Melrose*, 1870, 8 M. 906; *Dickson* v. *Graham*, 1877, 4 R. 717; *Davidson* v. *M'Pherson*, 1889, 30 S.L.R. 2, per Lord Justice-Clerk at p. 5; *Magistrates of Kilmarnock* v. *Reid*, 1897, 24 R. 388, per Lord President Robertson at p. 392.

Argued for Defender: This was really an action, not for remit, but for implement of the conditions of the lease. In such an action a remit was incompetent (*Sutherland* v. *Squair*, 1898, 25 R. 656). Further, a remit would be of no use. It was suited only to a matter of a fugitive nature, and a remit now would not be of any use to shew the state of the fences during the three years of the lease, which was the only matter in question. The remedy asked was a very special one, and it was not reasonable to ask a remit now. It came much too late (*Baird* v. *Mount*, 1874, 1 R. 1119).

The Court *dismissed* the appeal.

Lord Stormonth-Darling.—This is an ordinary action in the Sheriff Court brought during the currency of a short farm lease in Argyllshire by a tenant against his landlord, the conclusions of which are to have the fences of the farm inspected and reported upon by a person of skill as to whether these fences are in a tenantable condition, and if not, what repairs and alterations are necessary to make them so. There are also consequential conclusions to have the landlord ordained to make such repairs at the sight and to the satisfaction of an inspector to be appointed by the Court or otherwise, and failing his doing so, for warrant to the pursuer to make such repairs at the expense of the defender. The Sheriff-Substitute has dismissed the petition with expenses, finding that certain conditions of a former lease founded on by pursuer and not admitted by the defender are not applicable to the case and do not warrant the procedure craved. It is admitted that since this interlocutor was pronounced on 7th November last the situation has changed, because the landlord has availed himself of a break in the lease and brought the tenancy to an end, and the pursuer is no longer in occupation except of a small portion of the arable land. Any question which still remains to be decided between the parties must necessarily therefore be simply a claim of damages. In these circumstances the question arises whether this is a proceeding with any sort of application to the pursuer's case. I humbly think not. An inspection by a man of skill would not serve any useful purpose, for his report would not settle anything conclusively, and it would not be competent for us to delegate to him the right of ordering repairs and compelling their execution. Cases were cited to us in some of which use had been made of the summary procedure allowed by the Act of Sederunt of 10th July 1839, which relates to "cases requiring extraordinary dispatch and where the interest of the party might suffer by abiding the ordinary induciæ." There are cases like *Baird* v. *Mount*, 1 R. 1119, in which Lord Ardmillan admitted the competency of such application with regard to buildings, fences, drains, and the like, where it is important to preserve evidence of their condition *at the time*; but in that case the petition was thrown out, because it was six months too late. Of the same class was the case of *Gordon's Trs.* v. *Melrose*, 8 M. 906, in which it was held competent for a landlord to present a petition of this summary kind at the tenant's outgoing to have the state of the fences reported on, in order to determine, under reservation of all pleas of parties, a question of the tenant's liability under the lease. In the *Kilmarnock* case, 24 R. 388, to which we

were referred, Lord President Robertson conceded the competency of application "in cases of a somewhat limited class," where the facts to be ascertained were of a fugitive nature—to use Lord Neaves's expression in *Gordon's* case—but he held such an application quite inappropriate to the case before him. I say the same here. I do not see of what use to either party an inspection by a skilled reporter would be, and I therefore agree with the Sheriff-Substitute that the petition is inapplicable to the circumstances—in fact, even more so than when the Sheriff's interlocutor was pronounced—and accordingly that the petition should be dismissed.

Lord Low.—I am of the same opinion.

The Lord Justice-Clerk.—I am of the same opinion also.—13*th July* 1907.

Counsel for Pursuer, Crole, K.C., Ballingall; Agent, W. B. Rainnie, S.S.C.—Counsel for Defender, Cullen, K.C., Hon. W. Watson; Agents, J. & A. F. Adam, W.S. F. A. U.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling and Low.)

111. Rosslund Cycle Co. *v.* M'Creadie.

Diligence—Bill of Exchange — Bill Signed by All Partners of Firm—Partnership Debt—Summary Diligence Against Partnership Property.

Appeal from an Interlocutor of the Sheriff-Substitute of Ayrshire at Ayr.

The pursuers in this action, the Rosslund Cycle Company, and Thomas Ross and Simon Lundy, the sole partners of that firm, sought to have the defender interdicted from selling certain goods poinded by him under a warrant of sale granted by the Sheriff-Substitute of Ayrshire at Ayr.

The pursuers, Thomas Ross and Simon Lundy, accepted a bill of exchange drawn upon them by the defender. On 4th July 1905 the defender protested the bill for non-payment, and charged Ross and Lundy for the contents thereof on 10th July. On 18th July, the days of charge having expired, the defender poinded the goods to which the present action referred. On 27th July a warrant was granted by the Sheriff-Substitute at Ayr for the sale of the poinded goods, and the sale was appointed to proceed on 7th August. The goods poinded were the property of the firm, the Rosslund Cycle Company, and it was held to have been proved in this case that the bill of exchange was granted for a partnership debt.

The Sheriff-Substitute, after a proof, refused the prayer of the petition.

The pursuers appealed to the Court of Session.

Argued for Pursuers: The poinding and sale were not justified, because the debt was a debt of the individuals, and the goods were the goods of the firm. No doubt the individuals were the sole partners, but the name of the firm was not on the bill, and, that being so, summary diligence against the firm's goods was incompetent. It was necessary, in order to do diligence against the firm's goods, to bring an action against the firm and constitute the debt against them (*Jack* v. *M'Caig*, 1880, 7 R. 465, per Lord Deas at p. 468). Under the Debtors (Scotland) Act 1838 it was the person charged whose goods were to be sold. There was no warrant to charge the firm, only the individuals whose names were on the bill. An action might be brought to shew that it was signed for the firm (*British Linen Co.* v. *Alexander*, 1853, 15 D. 277), but, unless the person against whom diligence was done was plainly the same as the person whose name was on the bill, diligence was incompetent. Summary diligence was not competent where there was any doubt (*M'Rostie* v. *Halley*, 1850, 12 D. 816; *Summers* v. *Marianski*, 1843, 6 D. 286; *Whitehead* v. *Henderson*, 1836, 14 S. 544). Summary diligence against the goods of the firm, when the firm's name was not on the bill, was making the messenger-at-arms the judge of whether the firm was liable on the bill.

Argued for Defender: (1) The cases quoted for the pursuers were cases where there was a defect on the face of the bill. There was no such defect in the present case. There was no case where the bill had been signed by all the partners of the firm, and it was held that the firm's goods were not liable to be poinded therefor. A firm's goods could not be poinded for the debt of one or more partners, being less than the whole number, because the firm's goods were in that case not the property of all the debtors in the bill. But where the whole partners signed, the goods of the firm were the goods only of the persons liable on the face of the bill. The property belonged to them jointly, and their liability on the bill was joint (*Parnell* v. *Walter*, 1889, 16 R. 917, per Lord Kinnear at p. 924). (2) The present action was incompetent. After the Sheriff had granted warrant for sale, it was incompetent to apply to him to interdict proceedings on that warrant (Mackay's Practice, Vol. II. p. 211; Graham Stewart on Diligence, p. 354, and cases there cited). The pursuers ought to have appeared before the Sheriff and objected to the warrant being granted. It was competent so to appear in the poinding (*Lamb* v. *Wood*, 1904, 6 F. 1091).

The Court *dismissed* the appeal.

Lord Low.—The main ground upon which the appellants seek to have the interlocutor of the Sheriff recalled and interdict granted in terms of the prayer of the petition, is that the articles

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which were poinded, and which are enumerated in the prayer, were the property of the Rosslund Cycle Co., and not of the individual appellants.

The appellants, Ross and Lundy, were joint acceptors of the bill in question, and, of course, are jointly and severally liable thereon, and they carry on business together under the name of the Rosslund Cycle Co., of which they are the sole partners. Now when all the partners of a firm carrying on business under a descriptive name grant a bill, I see no reason in principle why the bill should not be a good ground of diligence against the assets of the firm, if it was in fact granted for the purposes of the firm. In such a case I think that the presumption rather is that the bill is granted for trade purposes (*Yorkshire Building Co.*, 5 C. P. Div., p. 109), but it is open to the granters to prove the contrary. That is what the appellants undertook to do in this case, because they aver in the condescendence that the bill was accepted by them in their individual capacities. Not only have they failed to prove that averment, but it is established, and is not now disputed, that the bill was granted in consideration of assistance which the respondents gave them for the purpose of enabling them to obtain stock in trade and tools for their business. I am therefore of opinion that the interlocutor of the Sheriff-Substitute should be affirmed.

The Lord Justice-Clerk and *Lord Stormonth-Darling* concurred.—16*th July* 1907.

Counsel for Pursuers, Hamilton; Agents, Gardiner & Macfie, S.S.C.—Counsel for Defender, T. B. Morison, K.C., MacRobert; Agent, James Ayton, S.S.C.

F. A. U.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Johnston.*)

112. Mackintosh and Others (Mackintosh's Trustees) *v.* Mackintosh and Others.

Succession—Vesting—Vesting a Morte—Joint or Several Legacy—Legacy to a Class—Accretion—Terms of Bequest of Residue to Children in Which Each Held to Take a Several Share a Morte Testatoris.

Special Case.

This was a Special Case presented for the determination of certain questions arising on the will of the late Hugh Mackintosh, shipowner in Nairn. The parties to the case were (1) the trustees of the testator, of the first part; (2) five surviving children of the testator, of the second part; and (3) the testator's widow as executrix-dative of a son of the testator who had survived his father but died in 1905, of the third part. The case set forth the facts as follows:—

1. Hugh Mackintosh, shipowner in Nairn, hereinafter called the testator, died on 19th October 1900, leaving a trust disposition and settlement by which he nominated and appointed the first parties to be his trustees and executors.

2. By the second purpose of the said trust disposition and settlement the testator directed as follows:—"(*Second*) That my trustees shall pay to my said wife (the said Mrs Henrietta Isabella Lawton or Mackintosh), in the event of her surviving me, the allowance for mournings, interim aliment and alimentary annuity provided to her under our contract of marriage, and shall also deliver over to her as her property the whole household furniture, plenishing and effects that may be in and about our dwelling-house at the time of my death, including linen, china, plate, books, pictures and liquors." The allowance to the testator's wife for mournings and interim aliment provided in the said antenuptial contract of marriage is £30, and the alimentary annuity is £100, and these provisions are declared to be in full of the widow's legal rights.

. . . . . .

4. By the fourth purpose of the said trust disposition and settlement the testator directed:—"(*Fourth*) That as soon as conveniently may be after my death, my trustees shall set aside an amount equal to what they shall deem to be one-sixth of the residue of my means and estate, valued as at the date of my death, and ascertained after deducting the capital required to be held to meet the foresaid annuity to my widow, and shall hold and invest said one-sixth share of residue for behoof of the said Henrietta Isabella Lawton or Mackintosh, if and so long as she shall survive me and remain in viduity, paying to her the free income of the sum so to be set aside and invested, and that half-yearly, or at such other terms and periods as may be found convenient and suitable: Declaring that on the death or second marriage of my said wife, said capital sum shall fall back into residue, and be held and applied for my children as after mentioned."

5. By the fifth purpose of the said trust disposition and settlement the testator directed:—"(*Fifth*) That subject to payment of said annuity to my widow, and subject also to fulfilment of the fourth purpose hereof, my trustees shall hold and apply the rents, interests and other income of the residue of my means and estate, heritable and moveable (including the capital sum required to meet said annuity, if and when set free by the death of my widow, and the foresaid sixth part of residue to be invested for her as above mentioned, if and when set free by her death or second marriage), or such part of said income as my trustees may deem necessary for the maintenance, education and advantage of my children until payment of their shares of capital as hereinafter mentioned, and that in such proportions as my trustees may think proper, and the sum so to be allotted for the maintenance and education of my children while they live in family with my widow shall include such an allowance to her for their board as shall be suitable to her and their circumstances in life."

6. By the last purpose of the said trust disposition and settlement the testator directed:—"(*Lastly*) That the fee or capital of the whole residue of my said means and estate shall be held, applied and

paid by my trustees to and among my six children [*nominatim*] and any other children to be hereafter born to me who may survive me, equally among them, each of them being entitled to his or her share, or so much thereof as my trustees may be in a position to divide, on attaining twenty-five years of age; declaring that while my said wife survives and remains entitled to said annuity and the income of the capital sum to be set aside for her behoof as aforesaid, payments of capital to children shall be made on the footing not only of retaining the full amount of capital required at the time to meet said annuity and the sixth share of capital to be set aside as aforesaid, but also such further capital sum, if any, as my trustees shall deem it prudent to retain for the purposes of said annuity, and to guard against any shortcoming in respect thereof; and it is further provided and declared that notwithstanding the foregoing provision as to the period at which children shall become entitled to their shares of capital, my trustees shall have power to make advances of capital to or for behoof of any of my children at an earlier period than the attainment of twenty-five years, and even during minority, for their advancement or settlement in life, or otherwise for their advantage, in the discretion of my trustees, such advances to form deductions from the ultimate shares of the children receiving the same, or for whose behoof the same are made; and the receipts of minors for such advances or of third parties to whom payments are made for behoof of minors under this provision shall sufficiently discharge and exonerate my trustees for the same respectively."

. . . . . .

8. The testator was survived by the six children mentioned in the said trust disposition and settlement, as well as by his widow, the said Mrs Henrietta Isabella Lawton or Mackintosh. The amount of the trust estate in the hands of the first parties amounts to £23,000 or thereby. [One child], Hugh Harold Mackintosh died while still in minority on 25th December 1905, intestate, and the third party was appointed executrix dative *qua* mother to him. Of the surviving children, [three] are in minority, and [two] are in pupillarity.

9. Questions have arisen with reference to the share of the trust estate destined by the said trust disposition and settlement to the said Hugh Harold Mackintosh. The third party maintains that the said share vested in the said Hugh Harold Mackintosh *a morte testatoris*, and that (all the parties being agreed that the said share is to be regarded as moveable estate) it has now passed to her as his executrix-dative foresaid, and is divisible between her, to the extent of one-third, and the second parties, equally among them, to the extent of the remaining two-thirds. The second parties maintain that the said share has either fallen into intestacy and is divisible among them equally as the testator's heirs *in mobilibus*, his widow's rights having been excluded by the said antenuptial contract of marriage, or that the said share has accresced to their original shares of the trust estate.

10. Questions have also arisen as to the period of division of the said share of the trust estate. The first parties maintain that in any view the whole trust estate must be retained by them, in order that they may distribute the income among the children in terms of the fifth purpose of the said trust disposition and settlement and "in such proportions as they may think proper." The second parties maintain that in the event of the said share being held to be intestate succession of the testator, it falls to be divided among them immediately, so far as it is not required to provide the marriage-contract provisions and the sixth part of the trust estate set aside for the widow. The third party maintains that in the event of the said share being held to have vested in the said Hugh Harold Mackintosh a *morte testatoris*, it falls to be immediately paid over to her as executrix-dative foresaid, so far as it is not required for the purposes foresaid.

The Questions of Law for the opinion of the Court were as follows:—

1. (*a*) Did the share of the said trust estate destined to the said Hugh Harold Mackintosh under the said trust disposition and settlement vest in him *a morte testatoris*, and has it now passed to the third party as his executrix-dative, divisible between her, as an individual, to the extent of one-third, and the second parties, equally among them, to the extent of the remaining two-thirds; or (*b*) has the said share fallen into intestacy; or (*c*) has it accresced to the shares destined to the other children of the testator by his said trust disposition and settlement?
2. In the event of it being held that the said share vested in the said Hugh Harold Mackintosh *a morte testatoris*, does the said share fall to be paid immediately to the third party as executrix-dative of the said Hugh Harold Mackintosh, so far as it is not required to provide the marriage-contract provisions and the sixth part of the trust-estate set aside for the widow, or must the said share be retained by the first parties, in order that they may distribute the income among the testator's children in terms of the fifth purpose, and in such proportions as they may think proper?
3. In the event of the said share being held to have fallen into intestacy, does the said share fall to be paid immediately to the second parties so far as it is not required for the foresaid purpose, or must the said share be retained by the first parties in order that they may distribute the income in manner foresaid?

The following cases were cited by counsel at the discussion:—*Menzies' Factor* v. *Menzies*, 1898, 1 F. 128; *Roberts' Trs.* v. *Roberts*, 1903, 5 F. 541; *Taylor's Tr.* v. *Christal's Trs.*, 1903, 5 F. 1010; *Adam's Trs.* v. *Carrick*, 1896, 23 R. 829; *Waters' Trs.* v. *Waters*, 1884, 12 R. 253.

The Court *answered* questions 1 (*a*) in the affirmative, 1 (*b*) and 1 (*c*) in the negative, the first alternative in question 2 in the affirmative and the second alternative in the negative, and *found* it unnecessary to answer the third question.

Lord Stormonth-Darling.—This special case raises questions as to the construction of the

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trust disposition and settlement of Hugh Mackintosh, shipowner in Nairn, who died in October 1900, survived by his wife and six children. Of these six children one (Hugh) died in 1905 while still in minority; and the main difficulty arises from the fact that the residuary clause provides that "the fee or capital of the whole residue of my said means and estate shall be held, applied, and paid by my trustees to and among my six children" (naming them) "and any other children to be hereafter born to me who may survive me equally among them, each of them being entitled to his or her share, or so much thereof as my trustees may be in a position to divide, on attaining twenty-five years of age"; and then follows a declaration that, so long as his wife survives and remains entitled to her marriage-contract and other provisions, payments of capital to children are only to be made on the footing of the trustees retaining the full amount which they may think prudent to retain for these purposes, and also a further declaration that the trustees are to have power to make advances of capital to or for behoof of any of his children at an earlier period than the attainment of twenty-five years, and even during minority, for their advancement or settlement in life, such advances to form deductions from the ultimate shares of the children receiving the same, or for whose behoof the same are made. It will thus be seen that the gift of residue is in the form of a direction to the trustees to "hold, apply and pay," and that, although the direction to pay is only to those children who may survive the testator on attaining the age of twenty-five, there is no clause of survivorship among the children themselves, no conditional institution of issue, and no express declaration as to vesting, as we had in the case of *M'Gregor's Trs.* decided yesterday.

In these circumstances, the second parties, who are the surviving five children of the testator, maintain, with regard to the share of residue destined to Hugh, that it has either fallen into intestacy and is divisible equally among them as the testator's heirs *in mobilibus* (his widow's rights having been excluded by marriage contract), or that the bequest of residue was a joint bequest, not a series of several bequests, and therefore had accresced to survivors. The third party, on the other hand (being the executrix-dative of the deceased child Hugh), claims that Hugh's share vested in him *a morte testatoris*, then passed to his executrix, and is now divisible between her, as an individual, to the extent of one-third, and the second parties, equally among them, to the extent of the remaining two-thirds.

I am of opinion that the latter is the sound view. There being no time of vesting prescribed by the testator himself, it must depend simply on the legal inference to be derived from the general directions of his trust deed. The primary inference is that vesting took place *a morte testatoris*, in the absence of anything to displace it. I can find nothing to displace it, unless it be the direction that each of the children are to be entitled to his or her share "on attaining twenty-five years of age." But a direction of this kind has again and again been held to be a mere postponement of payment and not of vesting, particularly where there is no destination over. One of the purposes of this postponement of payment is expressly said to be "to guard against any shortcoming in respect of" the provisions in favour of the testator's wife. The postponement is therefore, at least to a large extent, for a purpose not personal to the legatees themselves, which is always an element favourable to early vesting, and so far as the personal interests of the legatees are concerned, the testator shews that he has no rooted objection to them receiving payment before their attainment of the age of twenty-five, so long as such payments can be made with due regard to the safety of the widow's provisions, for he gives power to his trustees to advance capital at an earlier period, and even in minority, "for their advancement or settlement in life, or otherwise for their advantage," and declares that such advances, if made, shall form deductions from their "ultimate" shares. All this is consistent with immediate vesting, and not consistent with vesting being postponed to any later period.

The other suggestion made by counsel for the second parties as an alternative to the lapse of Hugh's share, viz. that it had accresced to the surviving brothers and sisters, is, I think, equally inadmissible, for there could be no accretion unless the bequest of the residue was a joint one, and there is nothing in the language of the deed to indicate that it was other than a several one.

I am therefore for answering question 1 (*a*) in the affirmative and 1 (*b*) and (*c*) in the negative.

The only other question which requires to be answered on the footing of vesting having taken place *a morte* is the second, which, in my opinion, ought to be answered in the affirmative, so far as the first alternative is concerned down to the words "set aside for the widow," and in the negative so far as regards the second alternative. The third question is superseded.

Lord Johnston.—The question in this case has been represented as one of several or joint legacy, involving the result of lapse or accretion respectively, in the event of the predecease of an individual legatee. I think that the case has been somewhat misconceived by the parties, and that the real question is one of vesting in a class, and that it is a very simple one.

I have used the word "predecease" advisedly, as it is a necessary element in the question either of lapse or of accretion. But then predecease involves the determination of the point of time to which it is to be referred (*Young* v.

Robertson, 1862, 4 Macq. 314). Now, once that point of time in the present case is ascertained, I think that the key to the determination of the question at issue is found without the necessity of solving such difficult questions as the Court had to deal with in *Menzies'* case (1898, 1 F. 128) and the other cases cited by counsel.

Turning to Mr Mackintosh's settlement, we find that after providing for implement of his marriage-contract obligations to his widow, and disposing specially of his share of his father's estate, which had not yet fallen in to him, he practically makes a settlement of residue only. Thus, in the fourth place, he directs his trustees to set aside a sixth of the residue of his estate and to hold and invest it for behoof of his widow, paying her the free income of the same, the capital to fall back into residue on her death or second marriage, and to be held and applied for his children as after-mentioned. Then, in the fifth place, subject to such payment to his widow, he directs his trustees to apply the proceeds of the residue of his means, including therein the capital required to meet his widow's marriage-contract provision, and the sixth of residue to be invested for her liferent, if and when set free, or such part of said income as his trustees should deem necessary "for the maintenance, education, and advantage of my children until payment of their shares of capital as hereinafter mentioned, and that in such shares as my trustees may think proper." And then, in the last place, he directs that the fee or capital of the residue of my whole "means and estate shall be held, applied, and paid by my trustees to and among my six children, Hugh, Charles, Annie, Margaret, James, and Jane, and any other children to be hereafter born to me, who may survive me, equally among them, each of them being entitled to his or her share, or so much thereof as my trustees may be in a position to divide, on attaining twenty-five years of age."

The important words appear to me to be "who may survive me." There is a postponement of payment till the children attain twenty-five in any case, and possibly longer, so far as capital requires to be retained in their mother's interest; but on the testator's death not only is the class which is to take, but also the members of the class who are to take, definitely ascertained. At the date when he wrote his settlement, there were children *nati*, who therefore could be named, and also children who might be *nascituri*, but it was conditioned in either case that they should survive him. Hence during his life the gift was joint, and there would be accretion, in a sense, in the event of any predeceasing him; but on their survivance of him there was no further room for accretion; from that point of time onwards their interests then became several. The postponement of payment did not make the children's interests conditional or postpone vesting, so as to admit of accretion. That there should be any subsequent accretion, something must be found equivalent to a survivorship clause, but then there is none such. In fact, there is no point of time to which a survivorship clause could relate except the testator's own death. And the result is what I have already stated, that the children took interests in severalty as at that date.

The rest of the deed confirms this. I pass over the provision which immediately follows, because it has merely reference to the necessity of retaining the full amount of capital during her life, in the widow's interest. But there are other provisions which have an important bearing on the question at issue. In the first place, as already mentioned, until the period of payment of the children's shares arrives, the income of the whole or of what remains undistributed, is thrown into hotch-pot and directed to be applied for the benefit of the children who have not yet received their shares. This at first sight does not appear consistent with a vested interest in a several share *a morte*. But it is not so inconsistent as not to be intelligibly explicable and as to override the further consideration that power is given to the trustees, "notwithstanding the foregoing provisions as to the period at which children shall become entitled," not to take a vested interest in but merely to payment of their shares of capital, to make advances of capital to them before they attain twenty-five and even during minority, "such advances to form deductions from the ultimate shares of the children receiving the same." I cannot read "ultimate" as equivalent to "prospective," and I cannot understand how a deduction could be made from an ultimate share of a child who should subsequently predecease twenty-five, if that share never was or became his but is to accresce to those who survive him. Lastly, the provisions in favour of the children are to be in satisfaction of legitim, and as legitim vests *a morte* this also indicates, though not by itself conclusively, that the provisions given in satisfaction are given *a morte*. This, therefore, adds weight to the last-mentioned consideration.

I have considered the cases of *Paxton's Trs.* (1886, 13 R. 1191), *Menzies' Factor* (1898, 1 F. 128), and the other cases cited, but while I do not think that reference to them is necessary for the judgment, nothing in these decisions appears to me to conflict with the opinion which I have formed.

I therefore answer the first question in its first alternative in the affirmative, and in its second and third alternatives in the negative, the second question in its first alternative in the affirmative, and in its second alternative in the negative, and find it unnecessary to answer the third query.

The Lord Justice-Clerk.—I concur in the

2nd Div. opinion of Lord Stormonth-Darling.—17*th July* 1907.

Mackintosh and Others (Mackintosh's Trustees) v. Mackintosh and Others.

Counsel for the First Parties, Forbes; for the Second Parties, R. S. Brown; Agents, Cumming & Duff, S.S.C.—Counsel for the Third Party, Mercer; Agent, R. F. Calder, Solicitor.

F. A. U.

The Lord Justice-Clerk.

HIGH COURT OF JUSTICIARY.

(The Lord Justice-Clerk, Lords Stormonth-Darling and Ardwall.)

113. Motion *v.* M'Ginnes.

Justiciary Cases—Summary Procedure—Instance—Public or Private Prosecutor—Inspector of Poor—Right of Inspector to be Represented by Law Agent—Poor Law (Scotland) Act 1845 (8 and 9 Vict. cap. 83), sect. 80—Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. cap. 33), sect. 9 (1)—Wilson v. M'Laughlin (1907, 14 S.L.T. 850) Followed — M'Murdo v. M'Cracken (1906, 14 S.L.T. 418) Distinguished.

Bill of Advocation.

John M'Ginnes was charged in the Sheriff Court at Glasgow on a complaint under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, at the instance of, and signed by, James Russell Motion, Inspector of Poor of the Parish of Glasgow, setting forth that the accused had contravened the Poor Law (Scotland) Act 1845, sect. 80, by deserting or neglecting to maintain his wife and his child.

The Poor Law (Scotland) Act 1845 (8 and 9 Vict. cap. 83), sect. 80, enacts—

"Every husband or father who shall desert or neglect to maintain his wife or children, being able so to do, and every mother and every putative father of an illegitimate child, after the paternity has been admitted or otherwise established, who shall refuse or neglect to maintain such child, being able so to do, whereby such wife or children or child shall become chargeable to any parish or combination, shall be deemed to be a vagabond under the provisions of the aforesaid Act of the Scottish Parliament passed in the year 1579, and may be prosecuted criminally before the sheriff of the county in which such parish or combination or any portion thereof is situate, at the instance of the inspector of the poor of such parish or combination, and shall upon conviction be punishable by fine or imprisonment, with or without hard labour, at the discretion of the said sheriff."

The minutes of procedure bore as follows:—

"At Glasgow, the 7th day of February 1907, in presence of Alastair Oswald Morison Mackenzie, Esquire, advocate, Sheriff-Substitute of the county of Lanark, appeared John M'Ginnes, complained against. On the case being called, the Sheriff-Substitute enquired of Mr Lamond, writer, who appeared to conduct the prosecution, whether the inspector of poor was present, and being informed that he was not, he asked Mr Lamond whether it was competent to proceed in his absence. Mr Lamond produced a letter from Mr Motion appointing him his deputy to prosecute for him under sect. 80 of the Poor Law Act 1845, and was heard on the competency.

"*Eo Die.*—The Sheriff-Substitute dismisses the complaint as incompetent in the absence of the inspector of poor."

"The Letter of Authority by Complainer appointing Mr R. P. Lamond, Writer, Glasgow, as his deputy was as follows:—

"Parish Council Chambers,
266 George Street,
Glasgow, 7th February 1907.

"I, James Russell Motion, inspector of poor of the parish of Glasgow, hereby appoint Mr Robert Peel Lamond, writer, Glasgow, whom failing, Mr Robert Lamond, writer in Glasgow, to be my deputy to prosecute for me and in my name all complaints under sect. 80 of the Poor Law Amendment Act 1845, 8th and 9th Victoria, chapter 83.

"Jas. R. Motion,
Inspector and Clerk."

The complainer pleaded, *inter alia*:—

"3. The complainer having been represented at the hearing of the said complaint by a duly qualified law agent, or otherwise having been represented by his duly appointed deputy, the proceedings were competent and regular, and the interlocutor dismissing the same ought not to have been pronounced.

"4. The complainer being a private prosecutor within the meaning of sect. 9 (1) of the Summary Jurisdiction (Scotland) Act 1881, a duly qualified law agent may, in the complainer's absence, appear in Court and conduct prosecutions under the Summary Jurisdiction Acts on his behalf."

The Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. cap. 33), sect 9, subsect. (1), enacts—

"Every complaint at the instance of a private prosecutor or complainer under the Summary Jurisdiction Acts may be signed either by such private prosecutor or complainer or by a duly qualified law agent on his behalf; and such law agent may, in the absence of the private prosecutor or complainer, appear in Court and conduct the prosecution on his behalf."

Argued for the Complainer: (1) This was the first case in which the right of an inspector of poor, prosecuting under sect. 80 of the Poor Law Act of 1845, to be represented by a law agent, had been called in question. If the inspector of a parish like that of Glasgow must of necessity conduct all such prosecutions personally, he would have little or no time for the other and more important duties of his office. Sect. 80 did not in terms require that the inspector should prosecute personally; what the Act said was that the complaint should be "at the instance of" the inspector. All that the Sheriff-Substi-

tute appeared to think necessary was simply the bodily presence of the inspector. Had the inspector been present, the Sheriff-Substitute would apparently have allowed the actual conduct of the prosecution to be in the hands of the law agent. That was to reduce the Act to an absurdity. Presence of a party in court did not necessarily mean bodily presence; a party was quite properly said to be present in court if he was represented by a duly qualified lawyer. (2) The prosecutor here was a private prosecutor, not a public prosecutor, and was therefore entitled, under sect. 9, sub-sect. (1), of the Summary Jurisdiction Act 1881, to be represented by a duly qualified law agent. *Thomson* v. *Scott* (9 S.L.T. 60, 3 Adam 410) and *M'Murdo* v. *M'Cracken* (14 S.L.T. 418, 5 Adam 164) were decisions under the Education (Scotland) Act 1872, and turned on the special terms of sect. 70 of that Act, and were really applications of the rule *delegatus non potest delegare*, as was explained in *Wilson* v. *M'Laughlin* (1907, 14 S.L.T. 850), which last decision shewed clearly that a prosecutor such as an inspector of poor was a private prosecutor, not a public prosecutor.

There was no appearance for the respondent.

The Court *advocated* the cause, *recalled* the interlocutor complained of, and *remitted* to the Sheriff to proceed.

The Lord Justice-Clerk.—I have no doubt that the Sheriff-Substitute is wrong. I confess that I listened to the earlier part of Mr Clyde's speech with some impatience, because it seemed to me so clear that the judgment must be set aside on another ground. If it had been the fact that the prosecutor here was a public prosecutor I must say that I should have had very great difficulty in following Mr Clyde's argument that the personal presence of the prosecutor was not necessary provided he was represented by a qualified law agent. But I do not think that we have to determine any question of that sort here, because I am satisfied that this prosecutor is not a public prosecutor in the sense in which that expression is understood in our law. This is a case of a prosecution for the purpose of preventing what is not in any proper sense a crime, but is simply a *malum prohibitum*. It is just a prosecution under the Summary Procedure Acts. I entirely concur in the views expressed by Lord Ardwall in the case of *Wilson* v. *M'Laughlin* as to the distinction between public prosecutors and private prosecutors, and I also entirely concur in what Lord Ardwall there said in regard to the decisions under the Education Acts. It seems to me that these decisions were absolutely right, because the Act there expressly enacted that the procurator-fiscal or other person appointed by the School Board "shall prosecute," and it was held that the person so appointed had no power to delegate his duties to anyone else in accordance with the rule *delegatus non potest delegare*. There is no question of that sort here. The prosecutor here is not appointed to prosecute by anybody. It is simply a prosecution at the instance of an inspector of poor, and such an officer is not a public prosecutor. Under section 9 of the Summary Jurisdiction Act 1881, therefore, he was entitled to be represented by a duly qualified law agent. I think, therefore, that the complaint should be sent back to the Sheriff to proceed.

Lord Stormonth-Darling.—I agree. I think that the Sheriff-Substitute must have been misled by recollecting that public prosecutors must personally undertake the actual conduct of the trial, or he may have been misled by judgments under the Education Acts; but the fact that confusion has arisen shews the danger of interpreting one Act by the terms of another. The Education Act expressly enacts that the procurator-fiscal or other person appointed by the School Board shall prosecute; and in *M'Murdo* v. *M'Cracken* it was held that a person to whom was thus delegated the duty of prosecuting could not delegate that duty to another. Personally I adhere to every word of the judgment in *M'Murdo* v. *M'Cracken*. I observe that I there limited my own opinion to this: "When he" (that is, the person deputed by the School Board to conduct a prosecution) "is so deputed, I hold that he is a public prosecutor, and that he cannot at his own hand delegate his duty to some one else." To that I adhere, but in the case now before us there is no question as to this gentleman being deputed by any one to prosecute. He is simply an inspector of poor prosecuting as such under the statute. He is not necessarily, or even probably, a trained lawyer. I agree with what my brother Lord Ardwall said in *Wilson* v. *M'Laughlin*. I think that the Sheriff-Substitute went too far in refusing to go on with the trial in the absence of the inspector, and that the inspector having given his name to the instance, was entitled to be represented by a duly qualified law agent under section 9, sub-section (1), of the Summary Jurisdiction Act 1881.

Lord Ardwall.—I agree. Section 80 of the Poor Law Act of 1845 enacts that a prosecution of a parent for failure to maintain his child "shall be at the instance of the inspector of the poor" of the parish or combination. That gives the inspector this advantage, that he is entitled to prosecute without obtaining the concurrence of the procurator-fiscal, but that does not make him in any sense a public prosecutor; and that being so, he is entitled as a private prosecutor to the benefit of section 9, sub-section (1), of the Summary Jurisdiction 1881, and may be represented by a duly qualified law agent. The case of *Wilson* v. *M'Laughlin* (9th March 1907, 14 S.L.T. 850) has been referred to on the subject of the employment of law agents by certain classes of private

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prosecutors, and I need therefore say no more, but refer to my opinion in that case.—18*th July* 1907.

Counsel for Complainer, Clyde, K.C., Macmillan; Agents, Mackenzie, Innes & Logan, W.S.

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(The Lord Justice-Clerk, Lords Stormonth-Darling and Ardwall.)

114. **Reid** *v.* **Neilson.**

I. Justiciary Cases — Complaint — Relevancy—Possession of Article Without Being Able to Give a Satisfactory Account Thereof—Discrepancy Between Complaint and Proof—Locus—Glasgow Police (Further Powers) Act 1892 (55 and 56 Vict. cap. clxv.), sect. 25.

II. Justiciary Cases — Trial — Record of Proceedings—Failure to Note Documents — Police Charge Book — Summary Procedure Act 1864 (27 and 28 Vict. cap. 53), sect. 16—Avery v. Hilson (1906, 13 S.L.T. 913, 5 Adam 56) Distinguished.

Bill of Suspension.

Thomas Rice Reid was charged in the Northern Police Court at Glasgow on a summary complaint at the instance of the procurator-fiscal, setting forth as follows:—

"That Thomas Rice Reid, presently in custody, a known thief, was, about half-past six o'clock on the morning of 7th July 1907, found in Garscube Road, at Lyon Street, Glasgow, in possession of a revolver loaded with ball cartridges, without being able to give a satisfactory account of his possession thereof, contrary to the Glasgow Police Acts, particularly The Glasgow Police (Further Powers) Act 1892, sect. 25, whereby the accused is liable to be imprisoned for a term not exceeding sixty days."

The Glasgow Police (Further Powers) Act 1892 (55 and 56 Vict. cap. clxv.), sect. 25, enacts—

"Every known or reputed thief, or associate of known or reputed thieves, who is found in or on any house or building or part of a house or building or enclosed space, or in any street or place adjacent, with intent to commit any crime, or who is found in possession of any picklock, key, crow, jack, bit or other implement usually employed in housebreaking, or who is found in possession of any money or article without being able to give a satisfactory account of his possession thereof, may be apprehended, and on conviction be imprisoned for a term not exceeding sixty days; and it shall not be necessary in proving the intent to commit a crime to prove that such person did any particular act or acts tending to shew his purpose or intent, and he may be convicted if from the circumstances of the case and from his known character, as proved to the magistrate, it appears to such magistrate that his intent was to commit a crime. Any money or article found upon the accused, if not claimed by the owner within twelve months, may be forfeited and applied for the purposes of the Police Commissioners. For the purposes of this section the word 'crime' means any description of theft, robbery, housebreaking, reset of theft, and any similar offence involving dishonesty."

On 10th July 1907 the magistrate adjourned the diet until the following day. On 11th July the agent for the accused objected to the relevancy of the complaint, on the ground that the statements libelled did not amount to a contravention of the Act. The magistrate repelled the objection. The accused then pleaded not guilty, and witnesses were examined in support of the complaint and also in exculpation, after which the magistrate convicted the accused and sentenced him to be imprisoned for sixty days.

He presented a Bill of Suspension, in which he stated:—

"1. About half-past six o'clock in the morning of Sunday, 7th July 1907, the complainer was apprehended in Garscube Road, at Lyon Street, Glasgow, by Constables Robert Watson and James Smith of the Glasgow Police (Northern District), and conveyed by Constable Watson to the Northern Police Office, Maitland Street, Glasgow, where he was locked up and detained for inquiry as to having, on 13th or 14th July 1906, broken into premises in Dundee and stolen £515, 18s. 6½d.; (2) on 20th or 21st January 1907, broken into the Pavilion Theatre in Renfield Street, Glasgow, and stolen £301; and (3) on 5th or 6th November 1906, broken into a pawn office at 15 Main Street, Bridgeton, and stolen £76,600 gold rings, and a quantity of other jewellery; and (4) on 7th inst., been found in Lyon Street with intent to commit crime.

"2. On the morning of Monday, 8th July 1907, he was brought before the magistrate officiating in the Northern Police Court, Glasgow (Edward Guest, Esquire), and on the motion of the acting fiscal, was remanded for forty-eight hours for inquiry into the second, third, and fourth of said charges.

"3. On Wednesday, 10th July 1907, the complainer was again brought before said Court and magistrate, when" the complaint above quoted was presented.

"5. The said complaint at the instance of the respondent was and is irrelevant, and the conviction and sentence following thereon are illegal and inept. The complaint does not set forth, as it should, that the complainer was ever asked to account for his possession of the revolver referred to, or that he was apprehended in respect that he was found in possession of it without being able to satisfactorily account for his possession of it. As a matter of fact it was admitted by the respondent, and was proved by the witnesses Macphater and Watson [two police officers], that the complainer never was asked to explain how the revolver came into his possession, and it was further proved by them that the complainer's possession of said revolver was not discovered until he was searched in the police office after his apprehension in connection with the charges then preferred against him as aforesaid. It was further admitted, and it was proved, that no intimation was made to

the complainer that any charge was to be made against him in respect of said revolver until the said complaint was presented to the magistrate on 10th July as aforesaid. It was proved by the witnesses examined in exculpation that the said revolver was on 11th April 1907" the property of one of these witnesses, that he had recently sold it to another of these witnesses, who had given it to the complainer on 6th July 1907 in order that the complainer might clean it.

"6. Notwithstanding the foregoing facts, the respondent maintained that in order to escape conviction it was incumbent upon the complainer, not only to account satisfactorily for his acquisition of said revolver, but to explain to the satisfaction of the magistrate why he had acquired it and the purpose to which he proposed to put it, and to shew that his purpose was a lawful one, and the magistrate accepted these views, and convicted the complainer."

"9. The witness Donald Macphater produced in evidence the blotter in use at said Northern Police Office at the time of the complainer's apprehension, containing particulars of the charges against him, but no note of such documentary evidence appears in the record, as directed by sect. 16 of The Summary Procedure (Scotland) Act 1864. Said blotter was put in evidence by the respondent. . . . The parties requested the magistrate to have the proceedings noted under the Summary Jurisdiction Acts, and the magistrate ordered accordingly."

The complainer pleaded, *inter alia*:—

"1. The said conviction and sentence ought to be suspended *simpliciter*, and the complainer set at liberty, in respect (1) that the complaint against him is irrelevant on the grounds stated in the objections thereto and as herein founded on; (2) that on the facts proved in evidence, and admitted by the respondent, the charge against the complainer was disproved; and (3) that the complainer, having satisfactorily accounted for his acquisition of the revolver in question, fulfilled every duty thereanent imposed by said statute upon him, and that the question of use was irrelevant.

"2. *Separatim*, the said conviction and sentence ought to be suspended in respect that documentary evidence produced in the complainer's trial has not been noted in the record of the proceedings, as required by sect. 16 of The Summary Procedure (Scotland) Act 1864.

The procurator-fiscal lodged answers in which he stated:—

"1. Admitted. Explained that suspender is a notorious housebreaker, who has undergone many sentences for crimes as shewn in the extract conviction, with previous sentences, put in process at the trial. These include" three sentences to penal servitude.

"2. Admitted, under reference to the minutes of procedure."

"5. The complaint is referred to for its terms. *Quoad ultra*, denied. Explained that it was proved at the trial that about half-past six on Sunday morning, 7th July, suspender, who was suspected of having committed various acts of theft by housebreaking, and of being in Lyon Street with intent to commit crime, was, in terms of general police powers, and particularly of Glasgow Police Act 1866, sect. 88, apprehended when walking out of Lyon Street into Garscube Road. On being taken to the Northern Police Office and being searched, there was found upon his person a five-chambered revolver fully loaded with ball cartridge. The lieutenant on duty at the bar of the police office was Dugald Macphater. Immediately on seeing the revolver brought from suspender's pocket Macphater asked him what he had the revolver for. He answered that it was to protect him from 'these hooligans and ruffians.' He also stated that he would not use it on the police but might do so on ''tecs.' This explanation was not adhered to at the trial, for the suspender gave evidence and tendered other witnesses to endeavour to prove that the revolver had been handed to him on the preceding Saturday for the purpose of being cleaned. The magistrate held, after hearing the whole evidence, that the suspender had not been able to give any satisfactory account of his possession of the said revolver. . . ."

"9. Denied. Explained that said blotter was not produced or put in evidence either by the suspender or by the respondent. The witness Macphater, when under cross-examination about the original grounds of suspender's apprehension, was incidentally asked by the agent for the accused to shew him the entry made on the blotter at the time, and the book was therefore sent for and shewn to contain the entries to which Macphater had spoken, and which are set forth by the suspender in Article First of his Statement of Facts. Neither party put in the book or any extract from it, and it was never laid before the magistrates. . . ."

Argued for the Complainer: The complaint was irrelevant. It did not set forth that the accused was ever asked to give an account of his possession of the revolver. Further, the facts admitted by the respondent disproved the charge in the complaint. The charge was that the accused was, at about half-past six in the morning of 7th July, found "in Garscube Road at Lyon Street," in possession of a loaded revolver without being able to give a satisfactory account thereof. Now the prosecutor admitted that the accused was not found at the place specified in the complaint in possession of a loaded revolver, for the revolver was not found until the accused was being searched in the police office. The conviction therefore was bad, because the *locus* libelled was not the *locus* proved. The conviction was bad on the further ground that the production of the police book was not noted in the record of the proceedings. (*Avery* v. *Hilson*, 7th March 1906, 13 S.L.T. 913, 5 Adam 56).

The Court *refused* the bill.

The Lord Justice-Clerk.—I have no hesitation in holding that this suspension cannot be sustained. Under section 25 of the Glasgow Police (Further Powers) Act 1892, where a person of a certain character is found in possession of an article without being able to give a satisfactory account of his possession thereof, he may be apprehended, and on conviction may be imprisoned for a term not exceeding sixty days. I see nothing in the statute to indicate that it is the duty of the police officer

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to ask the man whether he can give a satisfactory account of his possession of the article. That is not a question for the police officer but for the magistrate. The police officer would not be entitled, after apprehending the man, to liberate him because he thought the explanation given by the man was satisfactory, unless, indeed, the explanation was capable of instant verification then and there. But this is not a case of that kind at all. The complainer was not apprehended on account of the possession of the loaded revolver on account of which he was ultimately charged. He was apprehended on account of serious charges of another character altogether, and it was only when he was being searched in the police office that he was discovered to be in possession of the revolver. Whether he gives his explanation of the possession at the police office or at the trial is immaterial; if his account of his possession is satisfactory in the opinion of the magistrate, he is entitled to be acquitted. He was charged in the Police Court on the 10th of a particular month, when the magistrate adjourned the diet till the following day. The magistrate then heard evidence for the prosecution, and also for the defence, and he must have held that the accused had not given a satisfactory account of his possession of the revolver, for the magistrate convicted the accused and sentenced him to be imprisoned. Now, all that was absolutely regular, and does not present any ground whatever for suspending the conviction.

The only remaining question arises in this way. In the course of the trial the agent for the accused asked to see the police book containing the particulars of the charges against the accused, and it is said that this request having been complied with, the book was documentary evidence which must be noted in the record of the proceedings in terms of section 16 of the Summary Procedure Act 1864. I am quite clear that this book was not a production *in causa*. It was no more a production than the note-book of a policeman would be a production which he might use in order to refresh his memory and which he takes away as soon as his evidence is over. The case of *Avery* v. *Hilson*, to which Mr Trotter referred, was very different from the present. That case related to a letter which plainly might have a very important bearing on the case as evidence. The failure to note the production of that letter in the record of the proceedings was obviously fatal to the conviction.

On the whole matter I see no ground for suspending this conviction.

Lords Stormonth-Darling and *Ardwall* concurred.—18*th July* 1907.

Counsel for Complainer, Crabb Watt, K.C., Trotter; Agents, Bryson & Grant, S.S.C.—Counsel for Respondent, T. B. Morison, K.C., M. P. Fraser; Agents, Campbell & Smith, S.S.C.

F. A. U.

HIGH COURT OF JUSTICIARY.

(The Lord Justice-Clerk, Lords Stormonth-Darling and Ardwall.)

115. **Anderson *v.* Begg.**

JUSTICIARY CASES—SUMMARY JURISDICTION — SENTENCE — IMPRISONMENT WITH HARD LABOUR—COMPETENCY OF SENTENCE TO IMPRISONMENT WITH HARD LABOUR AS A MEANS OF ENFORCING PECUNIARY PENALTY—PRISONS (SCOTLAND) ACT 1877 (40 AND 41 VICT. CAP. 53), SECT. 44.

Bill of Suspension.

Thomas Anderson, farmer, residing at Biggings, and Thomas Isbister, farmer, residing at Northhouse, both in the parish of Harray, Orkney, were charged in the Sheriff Court at Kirkwall on a summary complaint at the instance of the procurator-fiscal.

The complaint, which was headed "Under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and Criminal Procedure (Scotland) Act 1887, and the Trout (Scotland) Acts 1845–1902," set forth—

That the accused "on the 19th day of April 1907, in the Loch of Harray, in the said Parish of Harray, did take with a set line or lines seven trout weighing in all 6 lbs. or thereby, contrary to the Trout (Scotland) Act 1860 (23 and 24 Vict. cap. 45), section 1, as amended by the Freshwater Fish (Scotland) Act 1902 (2 Edward VII. cap. 29), sections 2 and 5, whereby the said Thomas Isbister and Thomas Anderson are each liable to a penalty not exceeding £5, together with the full expenses of the conviction as restricted by the Summary Jurisdiction (Scotland) Act 1881, section 4, and in default in payment of the said penalty and expenses, to imprisonment in terms of the Summary Jurisdiction (Scotland) Act 1881, section 6, and in addition to the said penalties, expenses or imprisonment, to the forfeiture of the said trout, and also every boat, tackle, instrument, or other article in or by which the said offence was committed.

"May it therefore please your Lordship to grant warrant to cite the said Thomas Isbister and Thomas Anderson to appear before you to answer to this complaint, and thereafter to convict them of the contravention charged, and to adjudge them to suffer the penalties provided by the said Acts."

The accused pleaded not guilty, but after evidence had been led the Sheriff-Substitute (Harvey) convicted them.

The conviction and sentence against Anderson was in the following terms:—

"At Kirkwall, the 13th day of May 1907 years, the Sheriff-Substitute, in respect of the evidence adduced, finds the said Thomas Anderson guilty of the contravention charged, and therefore fines and amerciates the said Thomas Anderson in the sum of £4 sterling of penalty, with 16s. 6d. of expenses, to be paid to the Procurator-Fiscal of Court, and in default

of immediate payment thereof, sentences and adjudges him to be imprisoned for the space of one month with hard labour from this date unless said fine and expenses shall be sooner paid, and grants warrants to officers of the law to convey him from the bar to the prison of Kirkwall, thereafter to be dealt with in due course of law; and declares the trout, boat and implements forfeited, and directs the expenses of the complainer's witnesses to be paid out of said penalty."

Anderson brought a suspension in which he pleaded, *inter alia*:—

"2. The sentence and warrant of imprisonment with hard labour, being unauthorised by statute, was incompetent and illegal."

[A similar conviction and sentence was pronounced against Isbister, but at the hearing before the High Court the procurator-fiscal admitted that this conviction could not be supported on account of an addition thereto which had not been authenticated by the Sheriff-Substitute.]

Argued for the Complainer: The only place in which hard labour was mentioned in any of the Acts libelled in the complaint was sect. 18 of the Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), but sect. 18 authorised a sentence to imprisonment with hard labour only where the Acts founded on authorised a sentence to imprisonment with hard labour, which the Trout Fisheries Acts here founded on did not do. The Prisons (Scotland) Act 1877, sect. 44, on which the respondent now endeavoured to support the conviction, did not apply. In the first place, that Act was not mentioned in the complaint, and it was settled that where an Act was to be founded on in proceedings under a summary complaint, the Act, and as a rule the particular section or sections, must be specified in the complaint (*Jackson* v. *Stevenson*, 6th February 1897, 4 S.L.T. 277, 2 Adam 255; *M'Kenzie* v. *Cadenhead*, 17th December 1897, 5 S.L.T. 228, 2 Adam 443). In the second place, the Prisons Act of 1877 dealt solely with matters of prison administration, and had nothing to do with the sentences that were competent in proceedings under the Summary Jurisdiction Acts, which were intended to be an exhaustive code. The scale of imprisonment set forth in sect. 6 of the Summary Jurisdiction Act of 1881 was obligatory in all proceedings under the Summary Jurisdiction Acts (*Gray* v. *Dewar*, 18th July 1889, 2 White 290).

Argued for the Respondent, the Procurator-Fiscal: The first branch of the first sentence of sect. 44 of the Prisons Act of 1877 did not relate to a matter of prison administration, because it in terms conferred powers on courts of law. There was nothing to exclude courts of summary jurisdiction from its scope. In effect it enacted a general statutory addition to the powers conferred on such courts by the Summary Jurisdiction Acts.

The Prisons (Scotland) Act 1877 (40 and 41 Vict. cap. 53), sect. 44, enacts—

"A court of law having jurisdiction to sentence to imprisonment may also sentence to hard labour, either for the whole or a portion of a sentence, and the Secretary of State may make any general or special regulations in regard to carrying out sentences of hard labour, and may from time to time vary any regulation so made. In making any regulations in pursuance of this section, the Secretary of State shall have regard to the previous convictions, the industry, and the conduct of the prisoners."

The Court *passed* the bill and *quashed* the conviction.

Lord Stormonth-Darling.—This is a bill of suspension brought against a conviction for illegal trout fishing by set lines under the Trout (Scotland) Act 1860 and the Freshwater Fish (Scotland) Act 1902, in respect that the suspenders were convicted and sentenced to £4 of penalty with 16s. 6d. of expenses, and in default of immediate payment thereof, to be imprisoned for the space of one month with hard labour. The objection is not to the conviction or to the penalty imposed, which are admitted to have been within the power of the Sheriff-Substitute, but is limited to that part of the sentence which adjudges him to be imprisoned for the space of one month with hard labour in default of payment; and the objection which has been stated by Mr Mair is that the Summary Jurisdiction Acts under which the complaint was brought do not authorise or empower the Sheriff to impose a sentence of imprisonment with hard labour as in default of payment of a penalty.

The part of the sentence objected to is attempted to be supported, not on the ground that the Summary Jurisdiction Acts do justify that part of the sentence, but because it has been discovered that the Prisons (Scotland) Act of 1877 contains a clause in these terms:—"A court of law having jurisdiction to sentence to imprisonment may also sentence to hard labour either for the whole or a portion of the sentence," and then it goes on to enact that special or general regulations in regard to the carrying out of sentences of hard labour may be made by the Secretary of State, who, in making these regulations, shall have regard to the previous convictions, the industry, and the conduct of the prisoners.

Now, the accused replies that that section, which occurs in the Prisons Act, and not in any summary jurisdiction Act, relates not to summary procedure at all, but to a matter of prison administration, and is intended simply to regulate questions of prison administration.

I am of opinion that that objection is a good one. Moreover, I think that, reading the words of the section in their natural and reasonable sense, the section is intended to cover a case of imprisonment where that is inflicted as the sentence for the crime, and not as a mere

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means of enforcing a pecuniary penalty. The imprisonment referred to, therefore, is no part of summary procedure, nor is the section intended to regulate summary procedure. The imprisonment is simply the sentence that may be imposed, as a part of the sentence for the crime—or rather, *is* the sentence for the crime. All the rest of the Act is devoted to matters of proper prison administration and discipline, which is what one would naturally expect in a Prisons Act. I admit that the 44th section (which is in the portion of the Act headed "As to Miscellaneous Matters") does deviate into matters relating to the functions of the judge who has to consider the sentence to be imposed, but it immediately returns in the latter part of the section to its proper business of regulating how sentences are to be carried out, for it gives the Secretary of State power to make these regulations, and does so in a way which clearly shews that the sentence referred to in the first part of the section is a sentence for the crime itself, and not a mere alternative to payment of a fine. Who ever heard of imprisonment of this latter kind having anything to do with either "previous convictions" or the "conduct of the prisoners"?

That of itself is sufficient for sustaining this bill of suspension, and therefore I am of opinion that this sentence must be quashed as *ultra vires* of the Sheriff-Substitute.

Lord Ardwall.—I agree with what has been said by Lord Stormonth-Darling. I think the section of the Prisons Act referred to may possibly apply generally to sentences of imprisonment for common law crimes, but I think it is impossible to hold that it has the effect of putting it in the power of any judge, administering statutes under which persons are tried under the Summary Jurisdiction Acts, to pronounce a sentence of imprisonment with hard labour in cases where no such sentence is specially authorised by statute. A very much more specific and distinct enactment would be required to infer such an alteration in the law, and I think it is certain that such an alteration was never intended to be introduced by an Act which really deals with matters of prison discipline, and by a section which seems to be designed for the purpose of providing for the Secretary of State making due provision for sentences of hard labour being carried out in the prisons under his control. I think, therefore, that the section referred to does not apply so as to make imprisonment with hard labour competent under Acts which only prescribe a sentence of imprisonment failing a fine.

The Lord Justice-Clerk.—I entirely concur, and have nothing to add.—18*th July* 1907.

Counsel for the Complainer, Mair; Agent, James Ayton, S.S.C.—Counsel for the Respondent, Orr, K.C., A.-D., Adam, A.-D.; Agent, W. S. Haldane, W.S., Crown Agent. F. A. U.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

116. Knox's Trustees *v.* Knox and Others.

Succession—Trust Disposition and Settlement—Revocation—Conditio si Testator sine Liberis Decesserit—Presumption—Elder's Trustees v. Elder (1895, 22 R. 505) followed.

Special Case.

This was a Special Case presented in the following circumstances:—Robert William Knox, thread manufacturer, Kilbirnie, Ayrshire, died on 19th June 1905, and was survived by a widow and three children of the marriage, viz. (1) William, born 9th April 1888; (2) Annie Montgomerie, born 28th June 1891; and (3) Barbara Jean, born 22nd July 1897. The deceased had not been previously married, he had no child who predeceased him, and he had no marriage contract. He left a trust disposition and settlement, dated 14th January 1896, by which he conveyed his whole estates, heritable and moveable, to his widow, the fourth party to this case, and to certain trustees, the first parties to this case, and appointed the trustees to be his executors and tutors and curators to such of the beneficiaries under his will as should be in pupillarity or minority at the date of his death. This will was prepared by Messrs Fulton & Kirkhope, writers, Dalry, from certain jottings in the testator's own handwriting, and after its execution remained in their hands until 16th September 1904, on which date it was sent by them to the testator at his verbal request. The jottings remained in Messrs Fulton & Kirkhope's hands.

In 1894 Messrs Love & Williamson, writers, Beith, received instructions from the testator to prepare a trust disposition and settlement for him, and a draft was prepared and sent to the testator. This draft was never completed. It was retained by the testator. On 4th February 1901 the testator gave verbal instructions for the preparation of a fresh draft, and on 6th February 1901 he returned the 1894 draft to Messrs Love & Williamson by letter, in which he said: "I enclose draft trust disposition, dated 1894, which please go over and alter on the lines spoken of on 4th curt., or draft a new one if needed. Should you want more details than spoken of, I will call." In compliance with these instructions Messrs Love & Williamson re-drafted the 1894 draft, and on 28th March 1901 sent the new draft to the testator under a covering letter in these terms:—"As recently instructed, we enclose draft of trust disposition and settlement for your consideration. The purposes as ex

pressed will probably not give effect to what you decide on doing, but may afford assistance in coming to a conclusion." The 1894 draft was not returned to the testator, but remained in Messrs Love & Williamson's custody until his death. It was endorsed, "Drafted afresh 1901," and bore various jottings and alterations made by Messrs Love & Williamson after it had been returned to them with a view to the preparation of the new draft. These jottings and alterations were never seen by the testator.

The completed will of 1896 made provision for the widow of the testator and for the two children of the marriage existing at the date of its execution, and no provision was made for any other child or children of the testator. On 22nd July 1897, eighteen months after the date of the execution of the 1896 will, the third child, Barbara, was born. The uncompleted draft made provision for all the children of the marriage.

The testator died suddenly on 19th June 1905, and in his repositories were found (1) an envelope addressed in the handwriting of Mr Robert Fulton, one of the trustees named in the 1896 will, containing an endorsement in pencil by the testator himself, "Trust Disposition and Settlement, 1896"; (2) another envelope addressed in the handwriting of Mr Williamson of Messrs Love & Williamson, containing the 1901 draft. No other testamentary document, either complete or incomplete, was found.

In consequence of the testator's death questions arose as to the validity of the 1896 will, and the following question of law was submitted for the opinion and judgment of the Court:—

Was the said trust disposition and settlement of the said deceased Robert William Knox, dated 14th January 1896, revoked by the subsequent birth of his daughter the said Barbara Jean Knox, either (*a*) in whole, including the appointment of trustees and executors and tutors and curators, or (*b*) in so far only as it disposes of the testator's estate in favour of the beneficiaries therein named?

Argued for the First and Second Parties: The trust disposition and settlement of 1896 was valid, notwithstanding the subsequent birth of the third party, and it effectually disposed of the testator's whole estate. Although there was authority in favour of the presumption of the will being revoked by the subsequent birth of the third child, the particular circumstances of this case were sufficient to rebut the presumption. The testator left the 1896 will unaltered and undestroyed for nearly ten years, and also had the draft for a new will before him, but never completed it.

Argued for the Third and Fourth Parties: The birth of the testator's third child Barbara, subsequent to the execution of the 1896 will, revoked that will in whole, or at any rate in so far as it disposed of the deceased's estate in favour of the beneficiaries therein named; and the deceased's estate, heritable and moveable, was thus undisposed of and should be divided according to the rules of intestate succession.

The following cases were referred to: *Elder's Trs.* v. *Elder*, 1895, 22 R. 505; *Colquhoun* v. *Campbell*, 1829, 7 S. 709; *Millar's Trs.* v. *Millar*, 1893, 20 R. 1040; *Stuart-Gordon* v. *Stuart-Gordon*, 1899, 1 F. 1005; *Adamson's Trs.* v. *Adamson's Exrs.*, 1891, 18 R. 1133; *Rankin* v. *Rankin's Factor*, 1902, 4 F. 979; *Hughes* v. *Edwards*, 1892, 19 R. (H.L.) 33; *Crow* v. *Cathro*, 1903, 5 F. 950; *Dobie's Trs.* v. *Pritchard*, 1887, 15 R. 2.

The Court *answered* the question in its first alternative in the affirmative, holding that the 1896 will was revoked in all its parts by the subsequent birth of the third child.

The Lord President.—My Lords, the doctrine of law which is involved in the questions put in this special case is, if I may say so, in a somewhat artificial condition; and I think that that springs from the fact that the law of Scotland, and for the matter of that in older times the law of England, seems to have adopted a doctrine from the law of Rome, and at the same time to have rejected the only strict logical basis on which that doctrine rested. But it is impossible at this time of day to treat the question as an open question, and I am of opinion that the case before us is practically ruled by the case of *Elder's Trs.*, 21 R. 704, which is a binding authority upon us, and I can see no good reason for reconsidering that decision by taking it to a larger Court. *Elder's Trs.* for the first time in terms decided that the application of the *conditio si sine liberis decesserit* might take effect equally in a case where the person at the time of the will already had children, as in the case where the person at the time of the will had no children. Now, that being so, we have an undoubted presumption in favour of this will being revoked, and the only question that arises is whether there are special circumstances sufficient to rebut that presumption. I entirely associate myself with the remarks that were made by some of my brethren as to the question of Lord Watson's *dictum* in the case of *Hughes*, 19 R. (H.L.) 33. I do not think it is possible to use Lord Watson's *dictum* in the case of *Hughes* as subversive of the idea that there is any legal presumption. My Lords, I do not find that there are circumstances in this case to rebut the presumption, because truly I think that there is no circumstance tending in that direction except the mere efflux of time. On the contrary, such circumstances as there are seem to me rather to point the other way, because we have the fact that this testator was reconsidering his will, and was reconsidering it in such a way as points, in my opinion, to the idea that he looked upon the will of 1896 rather as a draft for his future will than as his existing will at the time. I cannot help thinking that

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the fact that he sent for the will from the one set of agents, whom he was no longer going to employ in the preparation of his new will, and that he put jottings upon it, and left it in his repositories in the same place as he left the draft of the second or new will, which he never made, all points to the idea that he practically looked upon his old will as merely material for the making of his new will and not as an existing will. I am not at all by these observations meaning to throw any doubt upon the fact that the old will was a will, because it would be impossible to dislodge the general doctrine that when a man leaves in his repositories a testamentary document duly signed, that is a delivered document, although it is in his own repositories. We cannot go back upon that at this time of day, but nevertheless, I mean that so far as presumption is concerned, the circumstances I have referred to, so far from tending to rebut the general presumption which is laid down in *Elder's Trs.*, and the cases which preceded it, rather go to support the observation that was made by the learned counsel on the other side, which I thought a weighty one. They said, and I think with force, that if this gentleman had been given his choice, under the circumstances which have now happened, as to whether he would sooner have his estate divided under the rules of intestacy or whether he would sooner have his old, and in his own view imperfect, will carried into effect, he would have preferred the latter alternative; because it would have given a certain preference to his son, which, so far as all his attempts at testing were concerned, seems to have been *enixa voluntas*. It would have given that preference to his son which a distribution under intestacy would have denied. My Lords, if the question is put in that way, "Which, under the circumstances that have arisen, he would sooner have done?" I agree with the learned counsel; but then that is not really the question. The question is, What was his state of mind at the time? Now, I think it is quite in accordance with human experience that a man, if asked after the event, if such a thing could be possible, "Would you prefer to die testate or intestate?" would always say "I would prefer to die testate"; yet he may have died in a state of conscious intestacy, with the view of probably making a will. In other words, I think that probably the state of mind of every man who commences operations for a new will by tearing up his old one, is that he does not at all mean to die intestate when he is sitting down to write his new will. But he puts it off and death surprises him; and he may put it off, according to the nature of his dilatoriness, for a very long time. I think that was the case here. I think this man undoubtedly meant to make his new will, and he was surprised by death. That, I think, is quite consistent with the idea that he knew for the moment that he was in a state of intestacy, although I agree that if you could ask him now he would probably prefer that he should have died testate, even with the old will, than intestate. My Lords, while I make these observations, I base my decision upon this, that the case is really ruled by the case of *Elder's Trs.*, and there are no special circumstances to overcome the presumption. I am therefore for answering the first portion of the question in the case in that sense. As to the other question that was mooted, I have no doubt that the revocation is a complete one.

Lord Kinnear.—I am of the same opinion. If the question were open, I should think it one of some difficulty; but I am of opinion with your Lordship that the case is ruled by authority, and we must follow it.

Lord Dundas.—I agree with your Lordships, and have nothing to add.—10*th July* 1907.

Counsel for First and Second Parties, Johnston, K.C., Cochran-Patrick; Agents, Webster, Will & Co., S.S.C.—Counsel for Third and Fourth Parties, Cullen, K.C., Constable; Agents, Graham, Johnston & Fleming, W.S.

J. W. M.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

117. Magistrates, etc. of Motherwell *v.* Colville.

Local Government—Rating—Water Rate—Assessment—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sect. 264—Motherwell Water (Additional Supply) Act 1900 (63 and 64 Vict. cap. lxii.), sect. 25—Burgh Sewerage, Drainage and Water Supply (Scotland) Act 1901 (1 Edw. VII. cap. 24), Part I., sect. 2—Party Being Owner and Occupier of Works and Paying for Water Supplied to Works by Meter Under Special Arrangement, Held Not Liable to be Also Charged as Owner for Owner's Share of Water Assessment on Valuation of Works.

Special Case.

The parties represented in this Special Case were the Town Council of the Burgh of Motherwell, acting under the Burgh Police (Scotland) Acts 1892 to 1903 and as Water Commissioners under the Motherwell Water (Additional Supply) Act 1900, of the first part, and David Colville & Sons Ltd., the owners and occupiers of works within the burgh, of the second part. The question raised was whether the first parties were entitled to assess the second parties *qua*

owners for an owners' proportion of the water rate, and also to charge them *qua* occupiers for water supplied to their works by meter under special arrangement.

The case contained the following statements :—

3. The Acts of Parliament which affect or may affect the question now raised are :—

1. The Burgh Police (Scotland) Act 1892, 55 and 56 Vict. cap. 55 (herein called "the Act of 1892").
2. The Public Health (Scotland) Act 1897, 60 and 61 Vict. cap. 38 (herein called "the Act of 1897").
3. The Act of 1900.
4. The Burgh Sewerage, Drainage and Water Supply (Scotland) Act 1901, 1 Edw. VII. cap. 24 (herein called "the Act of 1901").

4. The Act of 1892, *inter alia*, enacts as follows :—

Sect. 264. ". . . . It shall be lawful for the Commissioners to contract with any person or persons within the burgh to supply any public baths and wash-houses, works, manufactories, or other premises within the burgh with water at such rate and upon such terms and conditions as may be agreed on ; or, in the event of disagreement, either as to the ability of the Commissioners to give the supply, or as to the rate, terms, or conditions on or in respect of which the supply is to be given, the same shall be fixed by the Sheriff upon summary application by either of the parties, and the decision of the Sheriff shall be final: Provided that when water is thus supplied . . . . it shall not be lawful for the Commissioners to charge the parties obtaining the same both with the [portion of the burgh general assessment applicable to water supply] and also for the supply of water obtained by them ; but the Commissioners may either charge the said assessment leviable on such premises or charge for the supply of water furnished to the same as they shall think fit."

By sect. 4 (2) of the Act of 1901 the words in brackets are repealed, and the words "water assessment" are substituted.

Sect. 359. "Whenever the Commissioners in any burgh shall resolve, in manner hereinbefore provided for, to make provision for the general improvement of the burgh, it shall be lawful for them to charge, in equal proportions, all owners and occupiers of lands or premises within such burgh, with reference to the said Valuation Roll, and to all the provisions of this Act applicable to the burgh general assessment, which shall apply to the improvement assessment as if they were here repeated, with a special assessment not exceeding threepence in the pound of the gross rent or yearly value of such lands or premises, over and above any other assessment or rate to which such persons may be liable under this Act; and such special assessment shall, for the purposes of this Act, be called 'the general improvement rate,' and shall be leviable either from the owner or occupier of such lands or premises in equal proportions, or in whole from the occupiers thereof, but in the latter case the occupier shall be entitled on payment thereof to deduct from his rent the proportion payable by the owner ; and such assessment, so far as the occupier is concerned, shall be recoverable in the same manner as the burgh general assessment is authorised to be recovered."

5. By the Act of 1897, sect. 136, it is enacted that the public health general assessment "shall be assessed, levied, and recovered in like manner and under the like powers, but without any limit, except as in the immediately succeeding section provided, as

> "The general improvement rate under the Burgh Police (Scotland) Act, 1892, or when there is no such rate, by a rate levied in like manner as the general improvement rate under the last mentioned Act."

6. By the Act of 1900 it is, *inter alia*, enacted as follows :—

Sect. 25. "The Commissioners may furnish to any person within the limits of compulsory supply a supply of water for other than domestic purposes . . . . or for any trade, manufacture, business, or occupation, either in bulk or otherwise, such respective supplies being so furnished at such rates and upon such terms and conditions as may be agreed on ; or in the event of disagreement either as to the ability of the Commissioners to give the supply or as to the rate or terms or conditions on or in respect of which the supply is to be given, the same shall be fixed by the Sheriff upon summary application by either of the parties, and the decision of the Sheriff shall be final: Provided always that so far as possible the rate for such supply of water shall be uniform to all persons in the same circumstances, and requiring the same extent of supply, and the charges for such supply shall be recoverable in the same manner as any other water rates or charges may be recovered under the authority of this Act: Provided further, that when water is so supplied the Commissioners shall not charge the persons obtaining the same with the domestic water rate and also charge for water supplied under this section, but the Commissioners shall have the option either to charge the persons obtaining such supply with the domestic water rate in respect of the premises for which such supply is given, or to charge for the same by meter, or to charge the special rates as may be fixed as aforesaid for water supplied for the purposes or any of them in this section mentioned."

7. In 1902 the burgh of Motherwell adopted the Act of 1901, which provides, Part I., sect. 2 :—"In any burgh, or in any special or separate drainage district formed therein under any Act, the expense incurred, either before or after the passing of this Act, for sewerage and drainage or water supply, as the case may be, within the same, or for the purposes thereof, and the sums necessary for repayment of any money borrowed therefor either before or after the passing of this Act, together with the interest thereof, shall be paid out of a sewer assessment or water assessment, as the case may be, which the town council of the burgh shall raise and levy on and within such burgh or (in the case of the sewer assessment) within such special or separate district, in the same manner, and with the same remedies and modes of recovery and incidents as are provided for the public health general assessment therein."

9. From 1893 to 1902 the first parties elected to charge the second parties for water in terms of the agreement before mentioned, and not to charge the burgh general assessment, so far as applicable to water, for water supplied for business purposes.

10. Since the adoption by the first parties of the Act of 1901 the second parties have continued to be charged under the agreement for the supply of water to their works. In addition, the first parties claim to charge the second parties as owners with the owners' half of the water assessment under sect. 2 of the Act of 1901 on one-fourth of the annual value of their works as appearing in the Valuation Roll. This claim is denied by the second parties.

11. Accordingly in November 1905 the first

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parties professed to levy on the second parties, by the following notice, a water assessment in respect of their being owners of said works:—

"Water Assessment and Domestic Water.

"Rate, 1s. 1d. per £ on Rental of £3062, 10s., £165, 17s. 8½d."

12. The second parties appealed to the first parties against this assessment, on the ground that it was incompetent to charge them under the statutes the sum they paid under the said agreement and also the said water assessment. It is admitted that this is what the first parties propose to do, and they do not claim the water assessment unless they can also take the sum payable under the said agreement. The appeal was dismissed. It was thereafter agreed between the parties that the question at issue should be adjudicated on by means of this case.

The parties' contentions were thus stated:—

The First Parties contend that by the Act of 1901 the incidence of the water-rate in burghs to which that Act applies or is made to apply (including Motherwell) is altered, so as to subject all owners to liability for one-half thereof, and that the second parties as owners are and must be so liable unless they can shew some exemption in their favour, and no such exemption exists. They further contend that an owner's liability is not affected though the occupier should be charged, not by water assessment but by meter or other special arrangement, because the provisions in the Acts of 1892 and 1900 barring the charge of both a meter-rate or other rate under special arrangement, and also the proportion of the burgh general assessment applicable to water supply or the domestic water-rate, apply only to charges upon the occupier, who alone could be assessed or charged in 1892 and 1900, and are effectual only to prevent a double charge upon the occupier. It is not contended that sect. 264 of the Act of 1892 or sect. 25 of the Act of 1900 is repealed, but it is contended that the election therein prescribed is between the meter or special rate on the one hand and the occupier's assessment on the other, such assessment being then the whole, but now only one-half, of the water assessment; and that the owner's liability for one-half of the assessment arising for the first time in 1902 in terms of the Act of 1901 is absolute and unaffected by the election prescribed in the said sections.

The Second Parties maintain that the 264th section of the Act of 1892 and the 25th section of the Act of 1900 unequivocally forbid the first parties from making the second parties pay both the owner's half of the water-rate and also the sums under the special agreement; and that not only does the Act of 1901 not repeal either sect. 264 of the Act of 1892 or sect. 25 of the Act of 1900, but by Part I. of sect. 4 of the Act of 1901 the 264th section of the Act of 1892 is verbally amended, shewing conclusively that Parliament had full in view that that section was to remain in full force notwithstanding the Act of 1901.

The following Question of Law was submitted for the opinion of the Court:—

Are the First Parties entitled to assess and charge the Second Parties as owners for the owner's half of the water assessment upon one-fourth of the value of their works as appearing in the Valuation Roll, and also to charge the Second Parties as occupiers for water supplied to their works by meter or under special arrangement?

The Court *answered* the question in the negative.

The Lord President.—My Lords, the burgh of Motherwell has a water supply, and that water supply was originally dealt with by a Special Act of 1900. That Act in many ways really repeated the terms of what at the time was one of the general Acts, namely, the Burgh Police Act of 1892. It provided among other things for allowing the Commissioners to furnish to any person within the limits of compulsory supply, a supply of water for other than domestic purposes to shops, factories, etc. And it provided that the supply should be made at such rate for the water as the Commissioners and the person getting it should agree upon; and if they could not agree, then there was power to the parties to apply to the Sheriff summarily to fix the rate for them; and then it goes on: "Provided always that so far as possible the rate for such supply of water shall be uniform to all persons in the same circumstances and requiring the same extent of supply, and the charges for such supply shall be recoverable in the same manner as any other water-rates or charges may be recovered under the authority of this Act: Provided further, that when water is so supplied, the Commissioners shall not charge the persons obtaining the same with the domestic water-rate and also charge for water supplied under this section, but the Commissioners shall have the option either to charge the persons obtaining such supply with the domestic water-rate in respect of the premises for which such supply is given, or to charge for the same by meter, or to charge the special rates as may be fixed as aforesaid for water supplied for the purposes or any of them in this section mentioned."

Now the assessment under the Act of 1900 was on the occupier alone, but in 1901 the Burgh Sewerage, Drainage and Water Supply (Scotland) Act was passed, and by that Act the assessment was altered and was assimilated to the assessment under the improvement rate under the Act of 1892. The improvement rate is an owner and occupier rate, but it is a rate which is one rate, but which may be levied from both owner and occupier, or in the option of the burgh may be levied altogether from the occupier, in which case, however, he is entitled to deduct one-half of the rate from the rent he pays to the owner. The actual incidence, therefore, of it is one-half on the owner and one-half on the occupier. The other clauses of the water Act are in many cases left untouched, and particularly the clause as to exemption. The question has arisen where the parties, as here, are owners and occupiers, and are paying a special rate by agreement, whether they are also to pay their ordinary domestic rate as owners.

My Lords, I have come to the conclusion that they are not so liable. I think the fair reading of the section is, as counsel put it, that it is settled that when water is wanted for more than merely domestic purposes the supply is arranged in respect of the premises for which the supply is wanted, and then the burgh is entitled to get a rate per gallon for the water so supplied, and every gallon is paid for, including in the quantity the gallons that would be used for domestic supply; but the burgh here desire to levy an assessment in addition. Well, if they did that, they would be paid over again for the same water; and the ratio of exemption seems to me to be entirely untouched by the fact that instead of being leviable from the owner entirely the rate is now spread one-half on the owner and one-half on the occupier. I see no reason why the effect should be to allow the burgh to charge twice for the same water. I do not mean by that that the burgh would get anything it is not entitled to; the only result would be that certain other ratepayers would pay less, but there is no reason why certain premises should be penalised under the new Act more than they were under the old. I am therefore of opinion that the question should be answered in the negative.

Lord Kinnear.—I have come to the same conclusion. The argument to the contrary seems to be, that the proviso by which the Commissioners are prohibited from charging two rates for a supply of water, amounts to an exemption in favour of certain ratepayers, and that therefore the only persons who can take benefit from that provision are ratepayers falling within the contemplation of the Legislature when the Act in question was passed. If the clause in question were merely a personal exemption, there might be some force in that argument. But I do not think that is the meaning of the Act. I agree with your Lordship that according to the plain construction of the section, what the Commissioners are allowed to do is to furnish a special supply of water to persons requiring an unusual quantity for the benefit of certain premises, at a price to be fixed by agreement, or, failing agreement, by the Sheriff. They may give this additional supply at what is presumed to be a fair price, and then the statute goes on to provide that the Commissioners are not to "charge the price so fixed and also the ordinary water rate as if no such agreement were made." Now it seems to me that the section deals, not with particular ratepayers but with particular premises which may be supposed to require more than the ordinary supply of water, and with the method by which the proper rate for such exceptional supply should be ascertained. The logical order for considering the matter appears to me to be to ask, first, what is the rate to be charged, and then to consider who are to be liable for it. Now as I read that section the enactment is plain that one rate only is to be charged; and in the event of its being determined to give a special water supply at a price ascertained in terms of the statute, that rate is to be charged and no other. I therefore concur in the opinion your Lordship has expressed.

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Lord Dundas concurred.—12*th July* 1907.

Counsel for the First Parties, Blackburn, K.C., Macdonald; Agents, Bruce, Kerr & Burns, W.S.—Counsel for the Second Parties, Dean of Faculty (Campbell, K.C.), Spens; Agents, J. & J. Ross, W.S.

W. A. R.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling and Low.)

118. Collins' Trustees *v.* Liquidator of Borland & Company Limited.

Company — Winding Up — Ranking of Claims—Company Not Insolvent—Company a Sub-lessee in Premises—Leases Not Taken Over by Liquidator — Lessee Remaining Liable for Prestations in Leases—Held that the Lessee was Not Bound to Value his Claims for Implement of the Prestations of the Leases and Take a Ranking Therefor — Companies Act 1886 (40 Vict. cap. 23), sect. 4 — Companies Act 1862 (25 and 26 Vict. cap. 89), sect. 138—Companies Act 1900 (63 and 64 Vict. cap. 48), sect 25.

Petition.

This was a petition presented by creditors for the determination of certain questions arising in the voluntary liquidation of Borland and Co. Ltd. The circumstances were stated in the petition as follows:—

1. The petitioners are the surviving and acting trustees, original and assumed, of the late Sir William Collins, knight, publisher, Glasgow. Borland & Co., the respondent Company, was incorporated on 31st March 1906, for the purpose, *inter alia*, of acquiring certain paper mills belonging to the petitioners, known as Milton Mills, Bowling, and carrying on the business of paper manufacturers therein.

2. As trustees foresaid, the petitioners were owners of the said Milton Paper Mills, and were in right of certain leases granted to the late Sir William Collins in connection therewith. The said leases included (1) lease dated 1879, between Neil Colquhoun Campbell of Barnhill, Dumbartonshire, on the one part, and the said Sir William Collins on the other part, of certain portions of the Barnhill Reservoir, for the period of forty years from Whitsunday 1879, at a yearly rent of £42; (2) lease dated 1879, between Andrew Muter of Milton of the first part, and the said Sir William Collins of the second part, of a piece of ground to be used for a reservoir, for the period of

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forty years from Whitsunday 1879, at a yearly rent of £21; (3) lease dated 1879, between Andrew Buchanan of Auchentorlie of the first part, and the said Sir William Collins of the second part, of three dams, for a period of forty years from Whitsunday 1879, at a yearly rent of £135; and (4) lease dated 1883, between the said Andrew Buchanan of the first part and the said Sir William Collins of the second part, of the following pieces of ground, parts of the lands of Auchentorlie, viz.: (*a*) a piece of ground for the period of forty years from Martinmas 1879, at a yearly rent of £34, 7s. 6d.; (*b*) a strip of ground for the period from Martinmas 1881 to Whitsunday 1919, at a yearly rent of £25, 9s. 9d.; (*c*) a piece of ground for the period from Martinmas 1881 to Whitsunday 1919, at a yearly rent of £1; and (*d*) that portion of the Barnhill dam belonging to the said Andrew Buchanan, for the period from Martinmas 1879 to Whitsunday 1919, at a yearly rent of £20. Each of the said leases contained, in addition to the obligation for rent, various onerous stipulations upon the tenants with regard to maintenance, restoration and other matters.

3. Upon the respondent Company being formed, the petitioners sold to the Company the Milton Mills, and assigned to it the relative leases by disposition and assignation, dated and recorded in April 1906. The subjects included in the conveyance were disponed under burden in favour of the petitioners of the complete implement of the terms and conditions of the various leases above referred to, including the payment of rent therein stated, which implement was declared to be a real burden affecting the subjects, and was directed to be inserted in all future deeds affecting the subjects. It was further provided that the Company should be bound to make payment of the rents stipulated in the said leases, and to perform the whole other obligations incumbent upon the tenants under the same. The landlords under the various leases were not parties to the assignation granted by the petitioners, and the petitioners are still liable to the landlords for implement of all the obligations in the leases.

4. The Company duly entered into the possession of the mills, in which they proceeded to carry on the business of papermakers, and they also entered into possession of the subjects leased, and paid to the petitioners their proportion of the rents due under the leases at the term of Whitsunday 1906, and to the landlords the rents which fell due at the term of Martinmas 1906.

5. At an extraordinary general meeting of the Company held on 5th January 1907 special resolutions were passed and confirmed at a subsequent extraordinary general meeting held on 23rd January 1907:—(1) That the Company be wound up voluntarily; and (2) that Samuel Greenhalgh be appointed liquidator. The said Samuel Greenhalgh has since administered the affairs of the Company as voluntary liquidator thereof, with a view to winding up the Company. The said proceedings were an entirely voluntary act on the part of the shareholders, and were in no way necessitated by the pressure of creditors or by the financial position of the Company.

6. Shortly after his appointment the liquidator intimated to the petitioners and also to the landlords, under the various leases above mentioned, that he did not intend to adopt any of the said leases. Notwithstanding the said intimation the liquidator proceeded to expose the mill subjects, together with the right to the leases, for public sale, but did not succeed in effecting a sale thereof. He has also taken possession of the stock and materials in the mill premises, and has partially realised the same.

7. The liquidator also advertised for claims of creditors to be lodged before 1st March 1907, and the petitioners replied, intimating that they held the Company bound to continue to implement the tenants' obligations under the leases, and refused to treat their whole bargain with the Company as repudiated. Without prejudice to the position so stated, the petitioners further intimated that their claims as for a breach of future obligations under the said contract by the Company would be £5000.

8. In answer to a request for information by the petitioners, the liquidator stated that he estimated that the Company's estate would realise about £3000, against which there were claims by trade creditors for about £500, and other two claims amounting to about £1000. It accordingly appeared, and is the case, that apart from the petitioners' claims in respect of future obligations under the leases, which claims, as already explained, the petitioners do not desire to make or ask payment of at present, the Company was and is perfectly solvent.

9. A correspondence thereafter took place between the agents for the petitioners and the agents of the liquidator. Shortly stated, the claim for the liquidator was that the petitioners should lodge a formal affidavit and claim, the effect of which would be to compel the petitioners to value and deduct their security, consisting of the real burden imposed upon the mill subjects by the disposition and assignation above referred to. Failing the petitioners lodging such an affidavit and claim, the liquidator refused to give any undertaking that he would not proceed to distribute the assets. The petitioners, on the other hand, maintained that the Company was not entitled, while still solvent by going into liquidation, to repudiate all its future obligations under the disposition and assignation, and to force the petitioners to claim as in a sequestration for breach of all such obligations, but that the petitioners were entitled to hold the Company to its bargain, and to prevent the assets of the Company being distributed among the shareholders, without due provision being made for the relief of the petitioners from these obligations, as they should become prestable.

10. At Whitsunday 1907 rents again become due under the leases, which the petitioners have been compelled to pay to the extent of £109, 12s. 7d., being the half-year's rents, less income tax and owners' proportion of local rates, and they have requested the liquidator to reimburse them for this amount out of the free assets of the Company, but the liquidator refuses to do so unless in this case also a formal affidavit and claim is lodged. The petitioners maintain that as there are free assets available they are entitled to payment without reference to their security.

11. The mill property, which forms the subject of the petitioners' security, is one which it is exceedingly difficult to value, and if the petitioners were bound at once to make a valuation and lodge a claim for the balance of their full claim present and future against the Company, it might result in their failing to obtain payment of 20s. per £. Whereas, if the free assets of the Company are reserved and applied in payment of the rents due under the leases as they accrue, the petitioners are satisfied that the subjects of security would in the end sufficiently protect them against loss. In these circumstances the petitioners have a material interest to object to being compelled to make a claim as in a sequestration for the purpose

of sharing in the assets, unless they are bound to do so. They do not object to the liquidator paying other creditors, but only to his returning capital to the shareholders while the obligations of the Company remain unfulfilled.

Answers were lodged for the liquidator. The only matters contained therein which require to be mentioned were as follows:—

Ans. 5. Explained that the business of the Company was being carried on at a loss, that the Directors were of opinion that to continue the business would result in further loss, and that, the position of affairs having been laid before a meeting of shareholders, they resolved upon liquidation.

Ans. 11. Denied that the petitioners' contentions are sound. The mill property is capable of valuation, like any other property of a similar class. The petitioners are in no worse position in making a claim and valuing their security than they would be in a sequestration. The retention of the free assets, as proposed by the petitioners, would involve keeping the liquidation open for twelve years or thereby. Unless the security subjects are realised soon, they will, through depreciation, become of little value. The petitioners have, for the first time, in this petition taken up the position that they have no objection to the liquidator paying the other creditors of the Company. Hitherto the liquidator has been unable to distribute the assets of the Company, or to pay the Company's debts, in the absence of an affidavit and claim by the petitioners, which would permit of the money value of their claims being ascertained, and in view of the fact that the whole assets of the Company are estimated to realise not more than £3000, without taking into account the paper mill, and machinery and plant therein, over which the petitioners hold a security by way of real burden for the payment and implement of the rents and obligations of the leases of the water rights. If the petitioners' estimate of the money value of their claim be correct, then, looking to the claims upon the Company's assets, the Company would be insolvent, unless the security held by the petitioners would yield £4000. The liquidator has been unable hitherto to pay the debts of the Company in consequence of the petitioners' intimation, and their refusal to lodge an affidavit and claim.

The liquidator respectfully submits that (1) as regards the future and contingent claims of the petitioners, they are bound to lodge a claim, and if they desire to draw a dividend, to have the said claim valued by the liquidator, and that (2) as regards the rents due at Whitsunday 1907, the petitioners are ordinary creditors holding a security, and that they have no excuse for omitting to lodge a claim, and value and deduct their security as in a sequestration.

The questions on which the opinion of the Court was asked were as follows:—

(1) Are the petitioners entitled to refuse to lodge an affidavit and claim as for breach by the Company of its future obligations under the disposition and assignation above mentioned, and at the same time to prevent the liquidator from distributing the assets of the Company among the shareholders without making due provision for the implement of these obligations as they from time to time become prestable?

(2) Are the petitioners entitled, without reference to the security constituted in their favour by the said disposition and assignation, to be reimbursed out of the assets of the Company the amount of the rents due at Whitsunday 1907 under the leases assigned to the Company and paid by the petitioners?

The Companies Act 1886, sect. 4, provides as follows:—

In the winding up of any company under the Companies Acts 1862 to 1886, whose registered office is in Scotland, and where the winding up shall commence after the passing of this Act, the general and special rules in regard to voting and ranking for payment of dividends, provided by the Bankruptcy (Scotland) Act 1856, sections forty-nine to sixty-six inclusive, or any other rules in regard thereto which may be in force for the time being in the sequestration of the estates of bankrupts in Scotland, shall, so far as consistent with the tenor of the said recited Acts, apply to creditors of such companies voting in matters relating to the winding up, and ranking for payment of dividends; and for this purpose sequestration shall be taken to mean liquidation, trustee to mean liquidator, and sheriff to mean the court.

Argued for the Petitioners: A creditor with a contingent claim did not need to claim at once. He might have assets put aside to meet the debt when it arose. He was not bound to value it. He might apply to have it valued if he wanted to rank at once; but that was in his option, there was no obligation on him. Power to wind up might of course be exercised by a solvent company; but sect. 4 of the 1886 Act brought in the procedure in a sequestration only where the creditor wanted to vote or rank, and therefore it applied only when the Company was insolvent (*Gartness Iron Co.*, 1870, L.R. 10 Eq. 412; *Elphinstone* v. *Monkland Iron Co.*, 1886, 13 R. (H.L.) 98; *Gooch* v. *London Banking Association*, 1885, 32 Chan. Div. 41). The petitioners were not to be put in a worse but rather in a better position than they would be in a sequestration. The Companies Acts did not anticipate any more summary proceedings in the winding up of a company than in a sequestration. A company could not simply by going into liquidation get rid of its obligations (*New Oriental Bank Ltd.* [1895], 1 Chan. 753; *In re Panther Lead Co. Ltd.* [1896], 1 Chan. 978). There was nothing in the law of liquidation to compel a creditor, when there were ample assets, to convert his claim from one form to another. There were no liabilities competing with the petitioners. They asked not a ranking but implement of the Company's obligations.

Argued for the Respondent: The position of the petitioners was unreasonable. According to their contention, if the lease was for ninety-nine years the creditor would be entitled to keep the liquidation open all that time and so prevent the Company from being wound up. By going into

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liquidation the Company was in breach of its contracts, and the creditors could no longer demand implement of their debts. The debts must be valued and a ranking taken. The *Gartness Iron Co.* and *Elphinstone* cases were before the 1886 Act. *Gooch* was decided on the ground that there was no machinery in England to enable a contingent creditor to make up his claim properly. The only thing decided in the *Oriental Bank* case was that the lessor was entitled to claim as if the lease was for fourteen years without a break. In *Craig's Claim* [1895], 1 Ch. 267, the question was considered as still open, and it could not therefore be practically decided by the English cases. In the *Panther Co.* case it was held that proof may at once be made of all contingent claims on leases. A contingent creditor must claim in a liquidation, otherwise his claim cannot be proved (*Hardy* v. *Fothergill*, 1888, L.R. 13 A.C. 351). The English cases quoted for the petitioners went no further than to say that, if a claim was put in and the liquidator refused to deal with it, he might be compelled to retain funds to meet it when it became due. In reading these cases it had to be kept in view that sect. 158 of the 1862 Act applied in England only to solvent companies. Insolvent companies were dealt with by sect. 10 of the Judicature Act (Palmer's Company Precedents, II. 439).

The Court *answered* the first question in the affirmative.

Lord Low.—The petitioners are the testamentary trustees of the late Sir William Collins, who was proprietor of certain paper mills near Bowling known as the Milton Mills. In connection with the mills, Sir William Collins had acquired certain leases from neighbouring proprietors, the main object of which appears to have been to obtain a supply of water for the use of the mills. I understand that these leases have still about twelve years to run. The total rental payable under the leases is £278 per annum, of which £215 are due under leases which exclude assignees. All the leases contained obligations undertaken by the tenant in regard to maintenance, restoration, and so forth.

In 1906 the petitioners sold the Milton Mills to the respondents, Borland & Co. Ltd., and assigned the leases to them. It is admitted that as regards the leases in which assignees are excluded, the landlord did not accept the Company as the sole tenant, and accordingly the petitioners remain liable for rent and the other obligations of these leases. The Company, however, bound themselves to relieve the petitioners of all the obligations in the leases, and these were declared to be real burdens upon the mill property.

On 5th January 1907 the shareholders passed a resolution that the Company be wound up voluntarily. The reason for that course being adopted was that the business was being conducted at a loss, and it was thought not to be prudent to continue it longer, but there does not seem to have been anything in the way of pressure by creditors, or any suggestion that the Company was not able to pay its debts. Indeed, apart from any claim which might be open to the petitioners as for a future and contingent debt, it is admitted that, after paying all the creditors, there would be a substantial balance remaining in the liquidator's hands.

In these circumstances this liquidator maintains that the petitioners are bound to lodge an affidavit and claim (as in a sequestration under the Bankruptcy Acts), stating the amount at which they estimate their contingent debt, and valuing and deducting the security by the real burden over the mill property.

The petitioners, on the other hand, contend that, the Company not being insolvent, they cannot be compelled to lodge a claim, as if the proceedings were in bankruptcy, for a debt which is both future and contingent. They are quite willing that the trade creditors should be paid in full, but they demand that any surplus remaining should not be divided among the shareholders, but should be retained to relieve them of any claims on the part of the landlords which they may be compelled to meet.

This is a case in which the petitioners have good reasons for objecting to lodge, for adjudication in the liquidation, a claim estimating the amount which may become due to them. If it were assumed that they would be liable for all the prestations of the leases during the periods still to run, there would, of course, be no difficulty in regard to the money rents, but it is difficult to see how an equivalent in money to obligations to maintain such structures as reservoirs or dams could be arrived at with any approach to certainty, because presumably the extent of such obligations must depend in large measure upon circumstances which cannot be foreseen. On the other hand, although it may be extremely improbable, I suppose that it is not impossible that the mills might be sold, and the leases assigned to a papermaker who would be able to carry on the business to a profit, and who would pay the rents and implement the other obligations of the leases. If that were to happen, the result would be that no debt at all would in fact become due to the petitioners by the Company. Therefore, if the petitioners were compelled to lodge an affidavit and claim and to accept a present payment, they might very likely get either a great deal too little or a great deal too much.

In these circumstances, if the Companies Act 1886 had not been passed, I think the judgment of the House of Lords in *Lord Elphinstone* v. *Monkland Iron and Coal Co.*, 1886, 13 R. (H.L.) 98, would have been a clear authority in the petitioners' favour. That, indeed, was hardly dis-

puted, but it was argued that such considerations as were given effect to in that case are excluded by the provisions of the 4th section of the Act of 1886.

That section provides that in the winding up of any company under the Companies Acts 1862 to 1886, the general and special rules for voting and ranking for payment of dividends provided by sects. 49 to 66 of the Bankruptcy (Scotland) Act 1856 shall "so far as consistent with the tenor of the said recited Acts, apply to creditors of such companies voting in matters relating to the winding up and ranking for payment of dividends."

Now, I agree that if that provision applies to this case, the petitioners must lodge an affidavit and claim, and the liquidator must put a value on their debt as at the date of the valuation. It is plain, however, that the provision is not to be applicable to every winding up under the Companies Acts, because the rules in regard to voting and ranking are only to apply "so far as consistent with the tenor of the Companies Act," and to creditors "ranking for payment of dividends." That being so, it seems to be clear that one case to which the enactment would not apply would be where the shareholders of a solvent company, possessed of ample means to pay all its creditors in full, chose to discontinue business and to wind the company up. Such a winding up would be quite competent under the Companies Acts, but there would be no need to follow the complicated procedure of the incorporated sections of the Bankruptcy Act, because there would be no question of the payment of a dividend only, or of the ranking of creditors. The creditors would simply be paid in full; any surplus assets would be divided among the shareholders; and the company would then be dissolved.

Now, this is not quite a case of the kind which I have figured, because if a present value were put upon the petitioners' claim, it may be that the assets of the company would not be sufficient to pay in full such estimated amount, and also the debts due to other creditors. Any difficulty, however, which that circumstance might have raised seems to me to be removed by the consent which the petitioners give to the other creditors being paid in full. If that be done, I do not think that the shareholders will be really prejudiced by the adoption of the course proposed by the petitioners, because it seems to be very improbable that whatever course is adopted, there will be any surplus for division among the shareholders. It is true that the result of allowing the petitioners' claim to stand over may be to postpone the formal dissolution of the Company for some time, but that would not hurt the shareholders, because postponement of the formal dissolution cannot add in any way to the liabilities and losses which they have already incurred.

I am therefore of opinion that the first question stated in the petition should be answered in the affirmative.

The Lord Justice-Clerk and *Lord Stormonth-Darling* concurred.—20*th July* 1907.

Counsel for Petitioners, Dean of Faculty (Campbell, K.C.), Constable; Agent, Thomas Liddle, S.S.C.—Counsel for Respondent, Hunter, K.C., Munro; Agents, Paterson & Salmon, Solicitors. F. A. U.

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SECOND DIVISION.

(The Lord Justice-Clerk, Lords Low, Stormonth-Darling and Ardwall.)

119. Baird & Company Limited *v.* Stevenson.

I. Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Schedule I. (12)—Review of Weekly Payment—Date from which Payment may be Ended, Diminished, or Increased—Steel v. Oakbank Oil Company (1902, 5 F. 244, 10 S.L.T. 318), and Pumpherston Oil Company v. Cavaney (1903, 5 F. 963, 11 S.L.T. 101), Followed.

II. Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Schedule II. (8)—Registration of Memorandum of Agreement—Rectification of Register by Sheriff—Limits—Petition to Expunge Admittedly Correct Memorandum on Ground that Agreement had Terminated at Date of Registration Held Incompetent.

I. *Stated Case.*

II. *Appeal from Sheriff Court at Ayr.*

Two appeals from the Sheriff Court at Ayr were before the Court. The first was an appeal by William Baird & Co. Ltd. in an arbitration under the Workmen's Compensation Act 1897, between the appellants and David Stevenson, miner.

The Sheriff-Substitute (Shairp) stated the following case:—

This is an arbitration under the Workmen's Compensation Act 1897, in which the said William Baird & Co. Ltd. crave the Court to review the weekly payment of 13s. sterling which they agreed to pay to the said David Stevenson from the 11th day of June 1906 during his total incapacity, as compensation under the said Act, in respect of personal injury caused to the said David Stevenson by accident arising out of and in the course of his employment as a miner in the service of the said William Baird and Co. Ltd. in their Berryhill No. 2 Pit, on or about the 28th day of May 1906, and to end or diminish the said weekly payment as from the 10th day of September 1906, or from any subsequent date, all as

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the Court might see proper, under and in terms of the said Act, first schedule, sect. 12, and to find the said David Stevenson liable in the expenses of the arbitration.

The said William Baird & Co. Ltd. paid the said weekly compensation to the said David Stevenson till and including the 10th day of September 1906.

A memorandum of the said agreement between the parties was on the 3rd day of January 1907 recorded by the said David Stevenson in the special register kept by the sheriff clerk at Ayr in terms of the said Act. On 1st February 1907 the respondent formally claimed compensation from the appellants at the said rate of 13s. per week from and after said 10th September 1906, but appellants declined payment. The application in this arbitration was presented on the 14th day of February 1907. At said date the appellants were making no weekly payment to the respondent.

In the seventh article of the condescendence annexed to said application the said William Baird & Co. Ltd. aver that "defender's (the said David Stevenson's) incapacity by reason of his said injuries did not last beyond 10th September 1906, and at said date he was able to resume his employment, and to earn as much on an average as he earned before the accident. Defender's (the said David Stevenson's) incapacity then terminated, and his compensation should be ended as from that date. Defender (the said David Stevenson) resumed work on 28th November 1906, and has since been earning as good wages as he did before the accident. His compensation should in any case be ended as at 28th November 1906."

In the seventh article of the said David Stevenson's defences the said averments of the said William Baird & Co. Ltd. are denied, except that he admits that on 28th November 1906 he obtained light employment from the said William Baird & Co. Ltd., in which, however, he had not been able to earn anything like the same wages which he earned before the accident, and it is explained "that the defender (the said David Stevenson) having obtained light employment, is agreeable that the compensation payable under said agreement should, until the further orders of Court, be reduced to the sum of 7s. weekly, as from the date when the pursuers (the said William Baird & Co. Ltd.) agree to accept this offer."

The said David Stevenson pleaded that as the said William Baird & Co. Ltd. have refused to pay the compensation due to the said David Stevenson since the said 10th day of September 1906, and were, when the defences were lodged, making no weekly payment to him, the application was incompetent, and should be dismissed, but on 19th March 1907, after hearing parties' procurators, I repelled the said plea, and allowed the parties a proof of their respective averments, and the said William Baird & Co. Ltd. a conjunct probation, and fixed the 27th day of March 1907 as a diet of proof.

On 22nd March 1907 a minute was lodged for the said David Stevenson, stating that "in respect he is now medically advised that he is fit to resume his former employment as a miner, the defender (the said David Stevenson) consents to the weekly payment being ended."

On the first ordinary Court day thereafter, viz., on 26th March 1907, I, in respect of said minute, discharged the said diet of proof, and thereafter heard parties' procurators. At the hearing the law agent of the said William Baird & Co. Ltd. asked for a proof of the said averments contained in the said seventh article of their condescendence. On the authority of *Steel* v. *The Oakbank Oil Co. Ltd.*, 16th December 1902, 5 F. 244, and *The Pumpherston Oil Co. Ltd.* v. *Cavaney*, 23rd June 1903, 5 F. 963, I was of opinion that I was only entitled and empowered by said Act to end or diminish the said weekly payments as at the date of my award in the appellants' application. Accordingly, on 1st April 1907 I issued an interlocutor in which I held that the said averments were irrelevant, and refused the said motion. I also found, in terms of said minute, that the said David Stevenson's incapacity had terminated, and I ended the said weekly payments as from the said 1st day of April 1907. Lastly, I found the said David Stevenson liable in expenses to the said William Baird & Co. Ltd.

The question of law for the opinion of the Court is :—

Whether, in the circumstances before narrated, the said William Baird & Co. Ltd. were entitled to a proof of the averments contained in the said seventh article of their condescendence as craved by their law agent, or whether, on the authority of the above-mentioned cases, I was right in refusing to grant such a proof?

The second appeal was in a petition in the Sheriff Court, in which, founding on Schedule II. (8) of the Workmen's Compensation Act 1897, William Baird & Company craved the Sheriff "to rectify the special register kept by the sheriff clerk of the County of Ayr, at Ayr, for the purposes of the Workmen's Compensation Act, eighteen hundred and ninety-seven, by expunging therefrom a memorandum setting forth an agreement between the pursuers and defender, recorded therein on third January nineteen hundred and seven, or by altering or amending in such manner as to the Court may seem just, the terms of the said memorandum as set forth in the said special register, or by such other means as the Court may deem necessary."

The facts are sufficiently apparent from the narrative of the Sheriff in the stated case *supra*. The pursuers averred, *inter alia* :—

COND. 11. Pursuers desire rectification of said register on the following grounds, viz. :—There was no agreement subsisting between the parties on 1st October 1906, the date when the said memorandum was lodged. In any event, there was no agreement subsisting between the parties at the date when the said memorandum was recorded on 3rd January 1907. The pursuers, in or about the beginning of September 1906, requested the defender to submit himself to examination by Dr Stewart, Auchinleck, a duly qualified medical practitioner provided and paid by them. Dr Stewart reported that the defender's incapacity had ceased, and that he was able to resume work as a miner. The said report was communicated to the defender. Defender did not intimate to the pursuers any dissatisfaction with said report and did not submit himself to examination by one of the medical referees appointed under the Act. Pursuers paid compensation at the rate agreed upon down to 10th September 1906. The defender did not there-

after intimate to the pursuers that he claimed any further compensation until 1st February 1907, when he informed them that he claimed compensation at the rate of 13s. a week, as from 10th September 1906. Pursuers aver that defender's incapacity had ceased at 10th September 1906, and that he was then quite able to resume work. They further aver that on 28th November 1906 defender resumed his work in their employment, and that he has since that date earned the average wage of workmen engaged in the same class of work. The agreement originally made between the parties was that pursuers should pay defender compensation at the rate of 13s. a week during the period of his incapacity. The said period of incapacity had terminated on 10th September 1906, when defender was examined by Dr Stewart, or in any case on 28th November 1906, when defender resumed his work. Accordingly the said agreement had ceased to subsist before the Sheriff granted warrant to record it. The defender has obtained an extract of the memorandum as registered in said special register, and has charged the pursuers thereunder to make payment to him of compensation at the rate of 13s. a week from 10th September 1906 till the date of the charge. In the circumstances above set forth, it has been found necessary to apply to the Court for rectification of the register, and the rectification suggested by the pursuers is that the memorandum recorded in said special register should be expunged or deleted. Admitted that the pursuers have brought a suspension of the charge under the said recorded memorandum, and that they have also applied to the Sheriff as arbitrator, under the Workmen's Compensation Act 1897, to review the amount of the compensation payable to defender.

The Pursuers pleaded :—

"1. The agreement founded upon by pursuers and set forth in the memorandum libelled having ceased to subsist at the date when the said memorandum was presented for registration, the said special register should be rectified accordingly.

"2. The agreement founded upon by pursuers and set forth in the memorandum libelled having ceased to subsist as at the date when warrant was granted to record it, the said special register should be rectified accordingly."

The Defender pleaded *inter alia* :—

"3. The pursuers' averments being irrelevant and insufficient to support their pleas, the action should be dismissed."

On 1st April 1907 the Sheriff-Substitute pronounced the following interlocutor :—

" . . . . sustains the third plea in law stated for the defender, and accordingly dismisses the action . . . ."

Argued for the Appellants : I. In the stated case :—The cases of *Steel* v. *Oakbank Oil Co.* (16th December 1902, 5 F. 244, 10 S.L.T. 318) and *Pumpherston Oil Co. Ltd.* v. *Cavaney* (23rd June 1903, 5 F. 963, 11 S.L.T. 101), which decided that in an application for review under Schedule I. (12), the Sheriff's award could not go back beyond the date of his decision, were wrongly decided, and the present case should be sent to the Whole Court for the reconsideration of these decisions, in which the correct view of the law had been taken by the dissenting judges, the Lord Justice-Clerk and Lord M'Laren, following the decision of the Court of Appeal in England in *Morton & Co. Ltd.* v. *Woodward* [1902], 2 K.B. 276. There were two questions calling for determination. Firstly, Could the Sheriff's award go back to the date of the application for review? It could; see opinions of the Lord Justice-Clerk and Lord M'Laren referred to *supra*, and the decision in *Morton*. Secondly, Could it date back to the period at which the workman's incapacity ceased? It could. This was the reasonable inference to be drawn from the opinions of the Lord Justice-Clerk and Lord M'Laren, and from the opinions in *Morton*, in which the question was not directly raised. The scheme of the Act was to give compensation only during incapacity (see particularly schedule I. (11)), and the Court had always endeavoured to interpret the Act in accordance with that scheme (*Cammick* v. *Glasgow Iron and Steel Co. Ltd.*, 26th Nov. 1901, 4 F. 198, 9 S.L.T. 218; *Beath & Keay* v. *Ness*, 1903, 6 F. 168, 11 S.L.T. 455; *Nimmo & Co. Ltd.* v. *Fisher*, 15 S.L.T. 14; *Colville & Sons Ltd.* v. *Tigue*, 1905, 8 F. 179, 13 S.L.T. 571). Ultimately, it was admitted, the appellants could arrive at the result they desired (viz., the limitation of their liability to pay compensation to the period of incapacity) by means of a suspension. That, however, was calling in a Common Law remedy into statutory arbitration proceedings, and was quite unnecessary, seeing that the "review" provided by sect. 12 of Schedule I. was perfectly general and entirely unlimited as regarded time. The cases of *Niddrie and Benhar Coal Co. Ltd.* v. *M'Kay* (14th July 1903, 5 F. 1121, 11 S.L.T. 275), and *Strannigan* v. *Baird & Co. Ltd.* (7th June 1904, 6 F. 784, 12 S.L.T. 152), were also referred to. II. In the action :—Under Schedule II. (8) the Sheriff was empowered to rectify the register at any time. The expunging of an agreement for compensation which, owing to the recovery of the injured person, was no longer operative, was clearly "rectification." The section was in no way limited. See *Hughes* v. *The Thistle Chemical Co. and others*, 1907, 14 S.L.T. 916, *per* The Lord President.

Argued for the Respondent : I. In the stated case :—The case was ruled by *Steel*, *cit. supra*, and *Pumpherston Oil Co.*, *cit. supra*, which were rightly decided and required no reconsideration. Neither of these cases, not even the opinions of the dissenting judges, afforded any support to the view that the Sheriff's review could date back to the period at which the incapacity ceased. All that the Lord Justice-Clerk and Lord M'Laren said was that in their opinion it could date back to the period at which the application for review was brought, and that was the utmost that was decided by the English case of *Morton*, *cit. supra*. But on this point they were clearly wrong, the recorded memorandum

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of agreement being equivalent to a decree of Court, and remaining in force until an alteration had been effected by the Court, which could only take place at the moment when the Sheriff pronounced his decree. II. In the action:—The petition was incompetent: that was really the opinion of the Lord President in *Hughes*, *cit. supra*—the total "expunging" of a memorandum was not "rectification" within the meaning of Schedule II. (8), rectification being confined to the bringing of the recorded agreement into conformity with the actual agreement. Sect. 8 had nothing to do with the merits of the dispute between employer and workman. The appellants were virtually asking the Sheriff to do that which even the Court of Session could not do, viz., review his own judgment. See *Binning* v. *Easton & Sons*, 1906, 8 F. 407, 13 S.L.T. 783; *Lochgelly Iron and Coal Co. Ltd.* v. *Sinclair*, 1907, S.C. 3, 14 S.L.T. 341; *Blake* [1904], 1 K.B. 503; *Macdonald* v. *Fairfield Shipbuilding and Engineering Co. Ltd.*, 1905, 8 F. 8, 13 S.L.T. 428.

The Court *pronounced* the following interlocutors:—

In the Stated Case: "Answer the question of law therein stated by declaring that the arbitrator was right in refusing to grant the proof asked for by the appellants; therefore affirm the refusal. . . ."

In the Appeal: "Dismiss the appeal and affirm the said interlocutor appealed against. . . ."

The Lord Justice-Clerk.—This case raises the same question which has already been decided in both Divisions of the Court in the cases of *Steel* and *Cavaney*. The decision in both cases was by a majority only, and was contrary to an English decision, and in this Division I dissented from the judgment. Although I have been unable to see ground for altering the opinion which I formed in the case which was decided here, I should be prepared to bow to the decisions pronounced in the Divisions, and in respect of the law laid down in these decisions, to answer the question in this case in accordance with these decisions. But had the present Act of Parliament been still the code dealing with such matters, I might have been moved by the fact that, as I believe, your Lordships shared the doubts I had as to the soundness of these judgments, and might in that view have been inclined to concur in sending the case to be dealt with by the whole Court. But as there is now a new Act under which all such questions can be finally decided for both countries by the House of Lords—which was not possible under the old Act—I agree that it would be wrong to cause more litigation and expense in a case, the decision of which could have no bearing upon any question of interpretation or practice under the new Act.

I therefore concur in what is proposed by your Lordships. I concur also in the view expressed by your Lordships as to the action of the Sheriff-Substitute upon the application to rectify the register.

Lord Stormonth-Darling.—We have here to deal (1) with a stated case under the Workmen's Compensation Act 1897, and (2) with a petition to rectify the Special Register kept by the Sheriff Clerk of Ayrshire for the purposes of that Act. The material facts are, that the accident happened on 28th May 1906; that the employers at once admitted liability under the Act, and agreed to pay the workman at the rate of 13s. a week (being one-half of his weekly earnings) during the period of his incapacity; that these weekly payments were made down to 10th September 1906; that the employers then discontinued them, alleging that incapacity had ceased; that the workman had the memorandum registered on 3rd January 1907; that the employers instituted an arbitration for review of the weekly payments on 14th February 1907; that on 22nd March 1907 the workman lodged a minute stating that he was now medically advised that he was fit to resume his former employment as a miner, and consenting to the weekly payments being ended; and that the Sheriff in that arbitration, on 1st April 1907, found in terms of the said minute, that the workman's incapacity had terminated; and he ended the weekly payments as from the date of his award on 1st April 1907. He fixed that date on the authority of *Steel* v. *Oakbank Oil Co. Ltd.*, 5 F. 244, and *Pumpherston Oil Co. Ltd.* v. *Cavaney*, 5 F. 963. In doing so, there is no doubt that the Sheriff was right, because he was bound by these judgments none the less that one judge in each case dissented (the Lord Justice-Clerk in *Steel's* case and Lord M'Laren in *Cavaney's*), and none the less also that a case in the English Court of Appeal, *Morton & Co., Ltd.* v. *Woodward* [1902], 2 K.B. 276, had been decided the other way, and was accordingly in both *Steel* and *Cavaney* disapproved.

But this stated case is avowedly brought in the hope of getting the two cases in Scotland reconsidered by the whole Court; and undoubtedly the circumstances might well warrant such a proceeding, both on the ground of the importance of the question involved, and also on the ground that there were dissenting opinions in each Division of this Court and a divergence of opinion between the Appeal Courts of the two countries. There are, however, two considerations of a practical kind which I think are sufficient to prevent us from taking that course. The one consideration is that the Act of 1897 is repealed, except to a limited and temporary extent, and the Act of 1906, which has taken its place, provides for an appeal to the House of Lords, which the other did not. There is now, therefore, provision

made for a simpler and more authoritative judgment, on what may be made a test case affecting an imperial statute, than any which could be furnished by a larger tribunal confined to one of the three kingdoms. The other consideration is that although the Act of 1906 does not deal expressly, as it very well might have done, with a question which had been the subject of conflicting decisions in England and Scotland, it does contain a certain number of new provisions which, in the course of working out the new Act, may be found to affect materially the vexed question of when incapacity must be held to have ceased, as affecting liability to pay compensation. It is not necessary to say more about an Act which has just come into operation than that this is a reasonably possible result. I refer particularly to paragraphs 15 and 20 of the first schedule and paragraph 9 (*b*) of the second schedule. At all events, I think it would be a highly inconvenient proceeding to send a case to the Whole Court on the construction of an Act which is no longer law for the future. For these reasons I think we should, in the stated case, find that the Sheriff was right in refusing to allow the proof which the appellants asked.

In the petition to the Sheriff to rectify the register under the proviso at the end of paragraph 8 of the second schedule to the Act of 1897, I think the Sheriff was also right. The appellants' object in presenting that petition was to reach, by a different route, the same end as by their stated case. There are, scattered through the decisions in this country, a few suggestions that the Sheriff's power to rectify the register might be appealed to for this purpose. But it is a significant fact that no single decision in any of the three kingdoms can be cited as supporting that contention; and it seems to me that the very idea of rectifying the register points clearly to correcting some incidental mistake which has crept into the register, and not to altering the whole basis on which the existing entry proceeds. I am therefore for affirming the interlocutor of the Sheriff-Substitute in this action also.

Lord Low.—In regard to the question raised in the stated case, it is plain that the interlocutor pronounced by the Sheriff-Substitute was in conformity with the cases of *Steel* v. *The Oakbank Oil Co.*, and *The Pumpherston Oil Co.* v. *Cavaney*. In both of these cases it was held that in an application for review of weekly payments, the arbitrator can only end, diminish or increase the payments from the date of his decision in the application. The case of *Steel* was decided in this division, and that of *Cavaney* in the First Division, the Lord Justice-Clerk dissenting in the former case and Lord M'Laren in the latter. Further, in *Steel's* case Lord Adam was sitting in this division, the Court consisting of The Lord Justice-Clerk, Lord Young and Lord Adam. The latter was also sitting in the First Division when *Cavaney's* case was decided, and the result was that, taking the two divisions together, four judges were in favour of the view which was upheld and two against it. In these circumstances, as the question is undoubtedly one of great difficulty, and of much importance, I confess that (although I have formed no independent opinion upon the merits) I have much sympathy with the desire of the appellants that the question should be reconsidered. Seeing, however, that judgments to the same effect have been pronounced by both divisions, it is plain that reconsideration would require to be by the whole Court, and I agree with Lord Stormonth-Darling that in the circumstances it is inexpedient that that course should be adopted.

The judgments in *Steel* and in *Cavaney* were pronounced in December 1902 and June 1903 respectively, and since these dates they have been regarded and followed as settling the law so far as the Act of 1897 was concerned, and now that that Act has been repealed and a new Act has come into operation, it seems to me that it would be most undesirable to review a rule which has been in operation for so considerable a period in regard to an Act which has now expired. That consideration might not have been so strong if it had been plain that the question of the date at which an arbitrator can deal with weekly payments was precisely the same under the new Act as it was under the old. In regard to that, it is sufficient to say that changes have been introduced in the new Act which may have an important bearing on the question. Further, even if it should turn out that the question is precisely the same under the new Act as under the old, a judgment of the whole Court would not be final, because under the new Act there is an appeal to the House of Lords.

I also agree that the Sheriff-Substitute was right in dismissing the application for rectification of the register. It is not now disputed that the memorandum which was registered correctly states the terms of a verbal agreement which was come to by the parties, whereby the employers admitted their liability under the Act, and the amount of the weekly payments was fixed. When application was made by the workman for registration of a memorandum the employers disputed its genuineness, and in terms of the Act of Sederunt, the matter came before the Sheriff-Substitute, who, after allowing certain amendments to the memorandum, granted warrant to the Sheriff Clerk to record it.

Now it has been settled by the case of *Binning* v. *Easton & Sons*, 8 F. 407, that the granting or refusing by the Sheriff of a warrant to record a memorandum of an agreement is a ministerial act which cannot be reviewed. It is further to be remembered that if the Sheriff Clerk under the Act, or the Sheriff under the Act of Sederunt, is satisfied as to the genuineness of the memorandum, it is imperative to record it. It must be

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taken, therefore, in this case that the memorandum was properly recorded.

The question, however, is, whether the employers are entitled to have the register rectified by deletion of the memorandum therefrom? There may be cases in which the power given to the Sheriff to rectify the register would justify him in altogether expunging therefrom a memorandum which had been registered, but I do not think that this is one of them. By the agreement the employers agreed to pay the workman a certain amount weekly during incapacity, and they aver that they did so; but that before the memorandum was recorded the incapacity had entirely ceased, and that accordingly they had stopped making the weekly payments. They therefore plead that the agreement set forth in the memorandum having "ceased to subsist at the date when the said memorandum was presented for registration, the said special register should be rectified accordingly"—that is, by expunging the memorandum.

If that plea be well founded, it seems to me that the result would be very anomalous. I have already pointed out that the Sheriff, when he was satisfied that the memorandum was genuine, was bound to grant warrant for its registration, but the employers' contention is that he could at any time thereafter order it to be taken out of the register if he was of opinion that it had been implemented and could no longer be enforced by the workman. I do not think that such a course would be competent, because in my judgment the authority given to the Sheriff to rectify the register does not, in an application to rectify, empower him to determine questions as to the rights and liabilities of parties under the agreement. I agree with the view expressed by Lord Kyllachy in the case of *Binning*, in regard to the statutory register. He said—"Without excluding the common law rights of parties to enforce their agreements in any competent manner, the scheme of the statute was to provide a short and inexpensive road to the statutory register, which, once reached, should confer a *prima facie* right to summary diligence." If that view be sound, then registration of a memorandum of an agreement settled nothing as to the rights and liabilities of the parties, except in so far as it confers a *prima facie* right upon the workman. But after all, that only means that the *onus* is laid upon the employer to show that the agreement has been implemented, and in my opinion his remedies at common law are in no way excluded.

Besides the application for review of the weekly payments and the petition for rectification of the register, we were informed that the employers had brought a suspension of a charge upon the registered agreement which was depending in the Outer House. If we had followed the course of ordinary minutes of debate in the stated case, it would probably have been advisable to do the same thing in the petition and in the suspension, in which case the Lord Ordinary might have been asked to report the latter proceedings. As, however, we are not following that course, there is nothing to be gained by interfering with the ordinary procedure in the suspension.

Lord Ardwall concurred.—17*th July* 1907.

Counsel for the Appellants, The Dean of Faculty (Campbell, K.C.), Horne; Agents, M. J. Brown, Son & Co., S.S.C.—Counsel for the Respondent, Munro, Mair; Agents, Macpherson & Mackay, S.S.C.

A. J. A.,
for J. H. H.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

120. Murray and Others (Dickie's Trustees) *v.* Rutherford and Others (Rutherford's Trustees).

I. Succession — Trust Disposition and Settlement — Revocation — Terms of General Settlement Held to Revoke by Implication Prior General Settlement.

II. Succession — Trust Disposition and Settlement — Direction to Give Effect to Any Writing Truster Might Leave—Prior Trust Disposition and Settlement, Impliedly Revoked But Found Along With Later, Held Not to be Such a Writing.

III. Succession — Trust Disposition and Settlement — Bequest to "Next of Kin According to the Law of Moveable Succession in Scotland"—Sisters and Children of Predeceasing Brother and Sisters Included.

Special Case.

This was a Special Case brought for the determination of various questions arising out of the testamentary writings of Mr James Dickie, solicitor and town clerk of Irvine, who died at Irvine on 23rd January 1906.

After his death there were found in his repositories two validly executed trust dispositions and settlements, one dated 6th July 1860, and the other dated 31st December 1897. No other writings of a testamentary character were discovered.

By the trust disposition and settlement of 6th July 1860, the testator conveyed to Alexander Gilmour, writer in Irvine, as his sole trustee and executor, the whole heritable and moveable means and effects, of whatever kind or description, then belonging or which might belong to him at his death. The trust purposes were that, after

payment of debts, the trustee should "pay the following legacies, viz.: £30 to my brother George, £20 to my sister Mary, £10 to my sister Margaret, and £10 to my sister Jessie . . . . and I beg the said Alexander Gilmour will accept from my means ten guineas as a small token of friendship: and I direct the whole residue of my estate to be divided, in proportion to the sums herein above bequeathed to them respectively, among my brother and sisters above named."

By the said trust disposition and settlement of 31st December 1897, the testator conveyed to certain trustees the whole means and estate, heritable and moveable, which should belong to him at his decease. The purposes of the trust were — First, for payment of his debts and funeral expenses and the expenses of executing the trust; Second, "for payment or delivery of such legacies, bequests, annuities, or other provisions as I may leave, bequeath, make, or provide by any writing under my hand, however informal the same may be, and though found in my repositories or in the custody of any other party undelivered at the time of my decease." The third purpose of the trust was in the following terms:—"In the *third* place, for payment, application, and delivery of the residue of my said means and estate, or the proceeds thereof, including the interest and income thereof, in the way or manner to be directed or appointed by any writing or writings under my hand, however informal the same may be, and though found in my repositories or in the custody of anyone to whom I may have entrusted the same undelivered at the time of my death; and I hereby declare that the writings, for the execution of which provision is made in the second and third purposes of this trust, may be in the form of deeds or of letters addressed by me to my trustees, or memoranda left by me for their instruction, and shall be good, valid, and effectual though executed without a date, or although defective in any legal formality; and my trustees shall comply with, carry out, and make effectual all such directions and instructions as shall be contained in any such deeds, letters, or writings in the same way as if the purposes thereof had been herein contained and expressed; and no one shall have right or power to challenge, quarrel, or impugn any such deeds, letters, or writings on account of any informality or legal defect, or on any other ground whatever, if the same shall be clearly expressive of my wish, will, and intention; and the same shall be held to be part and parcel hereof, and shall have the like force and effect in every respect as if the directions, instructions, or provisions thereof had been herein inserted and expressed, any law or practice to the contrary notwithstanding; and in default of my leaving any such written directions or instructions then my trustees shall dispone convey deliver or pay over the whole of the residue of my means and estate heritable and moveable real and personal to my next of kin according to the law of moveable succession in Scotland."

The testator, who was born on 19th March 1833, was never married. His father died on 17th June 1860, aged 67, and his mother died on 2nd August 1853, aged 60. He was survived by two sisters, namely (*a*) Mrs Mary Dickie or Rutherford, who died on 6th November 1906, and whose testamentary trustees were the parties of the second part, and (*b*) Miss Agnes Orr Dickie, the party to the special case of the third part. He was predeceased by a brother, Mr George Dickie, who died on or about 24th March 1887. Mr George Dickie left four children, all alive at the date of the special case, who were group (*a*) of the parties of the fifth part. The testator was also predeceased by a sister, Mrs Margaret Dickie or Jamieson, who died on 9th June 1891. Group (*b*) of the parties of the fifth part were (1) such of the children of Mrs Jamieson as survived the testator, and (2) the children of a daughter of Mrs Jamieson, viz. Mrs Agnes Jamieson or Campbell, who predeceased the testator, having died on 12th January 1895. The testator was also predeceased by a sister, Mrs Jessie Dickie or Murray, who died on 31st May 1879. Group (*c*) of the parties of the fifth part were such of the children of Mrs Murray as survived the testator. The testator was survived by no brother, and by no sisters other than Mrs Mary Dickie or Rutherford and Miss Agnes Orr Dickie. He was survived by no children of predeceasing brothers or sisters who were not among the parties of the fifth part. The only child of a predeceasing brother or sister who predeceased the testator, leaving issue who survived him, was Mrs Agnes Jamieson or Campbell. George Dickie, the eldest son of the deceased George Dickie, who was the only brother of the testator, was the party of the fourth part as the testator's heir in heritage. The parties of the first part were the testator's testamentary trustees.

The following statement of the questions of difficulty in connection with the testator's writings, and the contentions of parties upon them, is taken from the special case.

"Questions have arisen as to whether said trust disposition and settlement of 6th July 1860 was revoked wholly or in part by the trust disposition and settlement of 31st December 1897; assuming it to have been revoked, what is the true construction of the latter trust disposition and settlement; whether, assuming the former trust disposition and settlement not to have been revoked, or to have been only partly revoked, the latter trust disposition and settlement came into effect; and what is the true construction of both settlements?

"The parties of the second part, as representing Mrs Rutherford, a sister of the testator, who

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survived him, maintain that said trust disposition and settlement of 6th July 1860 has not been revoked, and that under it they, as representing Mrs Rutherford, are entitled to a legacy of £20 and to two seventh parts of the residue. They further maintain that on a true construction of the trust disposition and settlement of 31st December 1897, the remaining five-sevenths of residue fall to be equally divided between them, as representing Mrs Rutherford, and the third party, as claiming to be the testator's sole next of kin at the date of his death; or, alternatively, in the event of its being held that said residue, or any part thereof, has fallen into intestacy, that they are entitled to share therein along with the testator's heirs *in mobilibus ab intestato*.

"The party of the third part maintains that said trust disposition and settlement of 6th July 1860 has been revoked wholly by the latter deed, or, in any case, can now receive effect only to the extent of said legacy of £20. She further maintains that the whole residue of the trust estate, or, in any event, five seventh shares thereof, fall to be divided equally between her and the second parties; or, alternatively, in the event of its being held that said residue, or any part thereof, has fallen into intestacy, that they are entitled to share therein along with the testator's heirs *in mobilibus ab intestato*.

"The party of the fourth part maintains that said trust disposition and settlement of 6th July 1860 has not been revoked, and is still effectual as to said legacy of £20 and two seventh shares of residue; that, in consequence, the residue clause of the trust disposition and settlement of 31st December 1897 cannot receive effect, that five-sevenths of the residue have fallen into intestacy, and that he, as heir, is entitled to five-sevenths of the heritage.

"The parties of the fifth part maintain that said trust disposition and settlement of 6th July 1860 has been revoked, or, in any event, is effectual only as to said legacy of £20 and two seventh shares of residue, and that on a sound construction of the trust disposition and settlement of 31st December 1897, the whole estate, or such part thereof as may be held not to be effectually disposed of by said trust disposition and settlement of 6th July 1860, falls to be divided according to the law of intestate moveable succession, and that they are entitled *per stirpes* to three fifth parts thereof as representing the testator's predeceasing brother and sisters. Alternatively, they maintain, on the ground stated by the fourth party, that five-sevenths of the residue of the estate has fallen into intestacy, and that three-sevenths of said residue, so far as moveable, fall to be divided among them—exclusive of the fourth party—*per stirpes* according to the law of intestate moveable succession."

The following Questions of Law were, *inter alia*, submitted to the Court:—

1. Has the trust disposition and settlement of 6th July 1860 been impliedly revoked by the trust disposition and settlement of 31st December 1897?

OR,

Is it still effectual as to the legacy of £20 and two seventh shares of residue destined to Mrs Mary Dickie or Rutherford, now represented by the second parties, or either and which of the said bequests?

2. In the event of the first alternative of the first question being answered in the affirmative, or of its being determined that the trust disposition and settlement of 6th July 1860 is effectual only as to said legacy of £20, are the parties of the second and third part entitled, on a sound construction of the trust disposition and settlement of 31st December 1897, equally between them to the whole, or to the residue of the estate?

OR,

Does the said whole estate or residue fall to be divided into five equal shares, and is each of the three stirpes forming the parties hereto of the fifth part entitled, as representing the testator's predeceasing brother and sisters, to one of these five shares?

The second parties quoted the following authorities: Upon revocation, *Stoddart* v. *Grant*, 1852, 1 Macq. 163; *Allan* v. *Glasgow*, 1846, 5 Bell's App. 379; upon "next of kin": *Honeyman's Tr.* v. *Donaldson*, 30th January 1900, 2 F. 539, 7 S.L.T. 363; *Fulton's Tr.* v. *Fulton*, 1901, 8 S.L.T. 465; *Connell* v. *Grierson*, 14th February 1867, 5 M. 379; *Tait's Trs.* v. *Neill*, 25th November 1903, 6 F. 138, 11 S.L.T. 438; *Young's Trs.* v. *Janes*, 10th December 1880, 8 R. 242; *Gregory's Trs.* v. *Alison*, 8th April 1889, 16 R. (H.L.) 10; *Tronsons* v. *Tronsons*, 21st November 1884, 12 R. 155; *Gordon* v. *Gordon's Trs.*, 26th July 1882, 9 R. (H.L.) 101; *Ralston* v. *Hamilton*, 1862, 4 Macq. 397, per Lord Chelmsford at 418; the Intestate Moveable Succession (Scotland) Act 1855 (18 and 19 Vict. cap. 23).

The third parties cited: Upon revocation, *Bertram's Trs.* v. *Matheson's Tr.*, 10th March 1888, 15 R. (H.L.) 572; upon "next of kin": *Withy* v. *Mangles*, 1843, 10 C. and F. 215.

The fifth parties cited: *Webster* v. *Shiress*, 25th October 1878, 6 R. 102.

The Court *pronounced* the following interlocutor:—

"Answer the first alternative of the first question of law therein stated in the affirmative, and the second alternative of said question in the negative; answer the first alternative of the second question in the negative, and the second alternative of the said question in the affirmative; find that the foregoing answers supersede the necessity to answer the remaining questions of law."

Lord Low.—The first question to be answered in this case is whether the trust disposition and settlement executed by the deceased Mr James Dickie in 1860 was revoked by a second trust disposition and settlement which he executed in 1897.

The latter settlement contains no express revocation of the former, but I think it is very plain that revocation is implied. Both settlements commence with a statement that the truster's object is to settle his affairs and provide for the disposal of his means and estate after his death; in both he conveys in trust the whole means and estate belonging to him or which may belong to him at the time of his death, and the trustees under the two settlements are different persons; and in both settlements the trust purposes exhaust the estate. The two settlements, therefore, cannot stand together, and accordingly the earlier is superseded and revoked by the later.

It was argued, however, that the settlement of 1860, although it might be revoked as a universal settlement of the truster's means and estate, was to a certain extent effectual as being a writing under his hand of the kind referred to in the settlement of 1897. The question arises in this way. By the second purpose of the settlement of 1897, the truster directed his trustees to pay any legacies which he might leave by any writing under his hand, and, by the third purpose, to dispose of the residue of his estate in the way to be directed by any writing under his hand; and in default of such writing, to pay over the whole residue to his next of kin according to the law of moveable succession in Scotland. Now, by the settlement of 1860 the truster directed his trustee to pay a legacy of £30 to his brother George, of £20 to his sister Mary, and of £10 to each of two other sisters, and to divide the residue among these legatees in proportion to the sums bequeathed to them. All the legatees except Mary (Mrs Rutherford) predeceased the truster, and therefore, even if the settlement had not been revoked, the other legacies and bequests of residue would have lapsed. It was contended for the representatives of Mrs Rutherford (the second parties) that as the settlement of 1860 was a writing under the truster's hand by which a legacy and a share of the residue were left to her, the trustees under the settlement of 1897 were bound, in terms of the second and third purposes of that settlement, to give effect to those bequests.

I am of opinion that that contention is not well founded. I think that the language used by the truster in the settlement of 1897 to describe the writings under his hand to which the trustees shall give effect, makes it sufficiently plain that he referred to writings to be thereafter made by him, and not to writings which he had already made. Further, it seems to me to be impossible to accept the view that when, in the settlement of 1897, the truster directed his trustees to divide the residue "in the way or manner to be directed" by any writing under his hand, he included in that category the former settlement which when he wrote the words he was in the act of revoking. It is to be remembered that it was a mere accident that only one of the legatees under the settlement of 1860 survived the truster. The argument would have been the same if they had all survived, but in that event the result of giving effect to the argument would have been that the only testamentary writing of the testator which had any operative effect would have been a settlement which he had by clear implication revoked.

Except the settlement of 1860, the truster left no testamentary writing, nor any writing giving directions to his trustees; and accordingly the question is, Who are the parties entitled to the residue under the destination in the settlement of 1897 to "my next of kin according to the law of moveable succession in Scotland?"

The circumstances under which that question arises are these:—The truster, who died in 1906, was never married. His mother died in 1853, and his father in 1860. He was survived by two sisters, Mrs Rutherford and Miss Agnes Orr Dickie (the third party to this case), and he was predeceased by a brother, George, and by two sisters, Mrs Jamieson and Mrs Murray, all of whom left children who survived the truster. The question, therefore, is whether, under the destination which I have quoted, the residue fell to be divided between Mrs Rutherford and Miss Dickie, as the only next of kin who survived the truster, or between them and the children of the predeceasing brother and sisters *per stirpes*.

Now it must be regarded as settled that if the destination had simply been to the truster's "next of kin," without any words qualifying that expression, the two sisters who survived the truster would have been entitled to the whole residue, to the exclusion of the children of the brother and sisters who predeceased him. Accordingly, it is necessary to consider what is the meaning and the effect of the words "according to the law of moveable succession in Scotland."

It was contended for the second and third parties that these words were merely explanatory of the term "next of kin," and that all that was meant was that the persons answering to that description should be ascertained according to the law of Scotland. If so, then the words served no practical purpose, but were mere surplusage, because when a domiciled Scotsman makes a testamentary settlement in Scotland, and according to the Scotch form, a bequest to his next of kin necessarily falls to be construed according to the law of Scotland. It is no doubt possible that the truster used words which were entirely unnecessary, and which are altogether inofficious, but the presumption is that such

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words were intended to serve a definite and operative purpose.

It was further argued that the explanation of the words might be found in the fact that the estate consisted partly of heritable and partly of moveable property, the suggestion being that the truster desired to make it clear that the whole estate was to be dealt with as if it had been moveable, and that any claim by the heir in heritage was excluded. I am not impressed with that argument. The direction to the trustees is to "dispone, convey, deliver, or pay over the whole of the residue of my means and estate, heritable and moveable, real and personal, to my next of kin." Even if the direction had stopped there, I do not see how any question of the kind suggested could have arisen, because it is expressly directed that the whole residue, whether heritable or moveable, shall be made over to the next of kin, that is, to all the persons composing the class, without distinction between them. Further, the heir in heritage is necessarily excluded, because the heritage is to be made over to the next of kin; the next of kin are not heirs in heritage. The heir may be one of the next of kin so far as blood relationship is concerned, but he takes the heritage, not as one of the next of kin, but as heir at law, and even if he is one of the next of kin, he takes no share in the moveable estate unless he collates. It is also worthy of observation that neither at the date of the settlement nor at his death was the truster's heir at law one of his next of kin, but was the son of his deceased brother George. I therefore do not think that any weight can be given to the argument founded upon the mixed nature of the estate.

In my opinion the words under construction are both explanatory of the sense in which the truster uses the expression "next of kin," and a direction to his trustees as to the manner in which they are to dispose of the residue—they are "to pay over" the residue "according to the law of moveable succession in Scotland." Of course the words "the law of moveable succession" mean the law of succession in the case of intestacy, because the law only provides for the succession of a person deceased, if he has not done so for himself.

Now, prior to the passing of the Intestate Succession Act, the expression "next of kin" was used to designate the class of blood relations entitled to the moveable succession of the intestate—in fact, the expressions "next of kin" and "heirs *in mobilibus*" were used as synonymous. Now the Intestate Succession Act gave for the first time certain rights to the father and the mother of an intestate dying without issue, but as regarded the next of kin the only change which was made was to admit representation among descendants, and in the collateral line among brothers and sisters and their descendants. Here the question is not complicated by the survival of the father or mother of the truster. He was only survived by two of his next of kin, and by three *stirpes*, each representing a deceased next of kin, and that also was the position of matters when he made the settlement.

In such circumstances, I see no difficulty in understanding what is meant by, or in carrying out, a direction to divide the residue among the next of kin according to the law of moveable succession. I think that it is plainly a direction to divide among the next of kin who were alive at the truster's death and the children (*per stirpes*) who, according to the law of moveable succession, represented and came in place of next of kin who had predeceased him. I may add that the case of *Tronson*, 12 R. 155, appears to me to be an authority for the view which I have expressed, because I do not think that there is any substantial difference between the destination in that case, and the destination under construction.

I am therefore of opinion that the first branch of the first question should be answered in the affirmative, and the second branch in the negative; and that the first branch of the second question should be answered in the negative, and the second branch in the affirmative. If that be done, the remaining questions seem to be superseded.

The Lord Justice-Clerk and *Lords Stormonth-Darling* and *Ardwall* concurred.—20*th July* 1907.

Counsel for the First and Third Parties, Kennedy, K.C., Macmillan, J. H. Henderson; Agents, Morton, Smart, Macdonald & Prosser, W.S.—Counsel for the Second Parties, The Dean of Faculty (Campbell, K.C.), W. Thomson; Agent, G. R. Stewart, S.S.C.—Counsel for the Fourth Party, Grainger Stewart; Agents, Oliphant & Murray, W.S.—Counsel for the Fifth Parties, Cullen, K.C., Chree; Agents, Mackay & Young, W.S.

A. J. A.,
for J. H. H.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

121. The Clyde Shipping Company *v.* Miller.

Ship—Collision—Compulsory Pilotage—Onus of Proof—Onus on Ship Pleading Compulsory Pilotage to Prove Fault on Part of Pilot.

Appeal from the Sheriff Court of Lanarkshire at Glasgow.

In this action the owners of the tug "Flying Wizard" sued the owner of the "s.s. Sunbeam" for £600, the amount of damage alleged to have

been sustained by the "Flying Wizard" in a collision between the two vessels.

The averments upon record were as follows :—

Cond. 2. On or about 13th September last, between 3 and 4 o'clock in the afternoon, while the "Flying Wizard" was lying moored at Partick Wharf with her port side to the quay, the "Sunbeam," which was proceeding to sea in charge of a compulsory pilot, but in an unmanageable and unseaworthy condition, took a sheer to northward and struck the forward starboard sponson of the "Flying Wizard" with her starboard bow, at the same time throwing the tug's port after sponson against the piles of the wharf, whereby the "Flying Wizard" sustained considerable damage. The defender's statements in answer are denied, so far as inconsistent with the pursuers' statements. . . .

Ans. 2. Admitted that at the time mentioned the "Flying Wizard" was lying moored at Partick Wharf, with her port side to the quay, and that the "Sunbeam" was proceeding down the river in charge of a compulsory pilot and a tug, and that she collided with the "Flying Wizard," whereby the latter sustained some slight damage. *Quoad ultra*, denied. The collision occurred owing to the fault of the compulsory pilot in respect that he failed to navigate his vessel in a proper seaman-like manner. The "Sunbeam" was, it is believed and averred, kept too long on her port helm when she was being straightened up in the river, after coming out of the dock. Further, the pursuers were in fault in mooring the tug in the position they did, as it is a dangerous position in which to moor a vessel. . . .

Cond. 3. The collision was due entirely to the fault or negligence of the defender or his servants in failing to put the "Sunbeam" in proper trim before leaving her berth. She had a heavy list to port to which the pilot called attention before leaving, but which the master refused to remedy. In consequence of the list the vessel became quite unmanageable in the river, and collided with the "Flying Wizard" as before described.

Ans. 3. Denied. If the "Sunbeam" was in the unseaworthy condition alleged, the pilot should have refused to proceed.

The Defender pleaded :—

"1. The pursuers not having suffered any loss through the fault of the defender, or anyone for whom he is responsible, absolvitor should be granted, with costs.

"2. Contributory negligence.

"3. The collision having been occasioned, so far as the s.s. 'Sunbeam' is concerned, through the fault of a compulsory pilot, the defender should be assoilzied, with costs."

The Sheriff-Substitute (Balfour) allowed a proof, and thereafter, on 7th July 1907, pronounced an interlocutor finding the defender liable for the damage caused by the collision. The Sheriff-Substitute's note contained the following passage :—

. . . . . .

"The main defence put forward by the defender is that the pilot of the 'Sunbeam' kept her too long on her port helm, but there is no evidence whatever of this. The orders which the pilot gave were 'hard a-port,' 'steady,' and 'hard a-starboard,' but there is nothing to satisfy me that she was kept too long on the port helm. There is practically no evidence on that subject at all, and the pilot himself distinctly says that if he had steadied the helm sooner than he did, and given her the starboard helm sooner, they would not have missed the 'Flying Wizard.' The fact appears to be that the 'Sunbeam' did not answer the starboard helm, but continued going to the north until she struck the 'Flying Wizard.' The only way to account for this movement on the part of the 'Sunbeam' is that she had the heavy list to port, and could not be properly steered, and the various sheers which she took both before and after the collision show that this is the case. With regard to the alleged fault on the part of the pilot, it is strange that the master of the 'Sunbeam' states that the pilot could have done nothing to prevent the collision, but when it is suggested to him that he might have given the starboard helm sooner, he says, in a half-hearted way, that if he had starboarded *half a minute earlier*, they could have cleared the tug. But surely if the master thought that this was a fault on the part of the pilot he would have said so to him, but he never told the pilot that he should have starboarded sooner.

"There was an attempt made on the part of the defender at the eleventh hour to prove by two nautical experts that a list of even eleven degrees in narrow waters was a common enough thing, and did not affect the steering of a ship. This is contrary, not only to all my experience in these cases, but also to the rest of the evidence in the case. These experts say that a list does not affect the steering, but they contradict the pilot and Mr William Niven and many other witnesses; and they further say that the pilot was to blame because he ought to have put his engines ahead, but, in point of fact, the pilot did put his engines full speed ahead to give the 'Sunbeam' steerage way. The defender's own witness William Niven, who was master of the 'Sunbeam' for eighteen years prior to the collision in question, admits that the list would affect the steering a little; and he admits that eleven degrees is a big list, and is within an ace of being dangerous. He says that twelve degrees is undesirable, and is a heavy list, and that nobody wants to go down the river in narrow waters with a heavy list. This evidence appears to me to be practically in conformity with the evidence of reliable witnesses for the pursuers, and to negative the evidence of the experts Burns and Craig.

"It is to be specially noted in this case that, with the exception of the two experts (whose evidence, to my mind, is almost all theory), there is no independent evidence for the defender. On the other hand, we have, on the part of the

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pursuers, the evidence of many neutral reliable witnesses, such as the two deputy harbour-masters, a deck hand on the Govan ferry boat, a boatman at Govan ferry, and James Ritchie, a ship carpenter. Besides these, we have the master of the 'Chieftain,' the pilot of the 'Sunbeam,' and Mr William Orr Warden, the experienced pilot-master, who all, more or less, condemn the 'Sunbeam' with regard to her heavy list and other matters.

"There certainly can be no doubt that, after reading the evidence of Mr Warden, the pilot-master, one cannot but be satisfied that (contrary to the contention of the defender) the pilot was justified in taking the 'Sunbeam' down the river under the special circumstances. But, on the authority of the case of *Mann, Macneal & Co.* v. *Ellerman Lines*, 7 F. 213, even if the pilot was in fault in starting with an unmanageable steamer, that would not absolve the owners from liability. See also Marsden, p. 227.

"On the whole case, I am of opinion that the defender has failed to prove any fault on the part of the pursuers or of the pilot, and that the whole grounds of defence mentioned in the defences have failed."

The defender appealed.

Argued for the Appellant: It was admitted that in the case of a moving ship colliding with one which was stationary the *onus* lay with the moving ship to shew that she was not responsible. The appellant here had sufficiently discharged that *onus* by proving that the vessel was in charge of a compulsory pilot under the Merchant Shipping Act 1894, sect. 633, that the accident was due to faulty navigation, and that the orders of the pilot had been obeyed. It was not necessary for the appellant to prove any definite fault of the pilot to have caused the accident ("*Assyria*," 1903, 5 F. 1089). The *onus* was then transferred to the respondents of proving the fault in whole or in part to be that of the ship (*Clyde Navigation Trs.* v. *Barclay, Curle & Co.*, 1876, 3 R. (H.L.) 44; "*Indus*," 1886, L.R. 12 P.D. 46, per Lord Esher, M.R., at p. 49; Marsden on Collisions at Sea, 4th ed. 260, 261). The respondents had not discharged this *onus*. As regards the list there was no evidence that the "Sunbeam" was otherwise than in ordinary safe trim ("*Argo*," 1859, Swabey 462). In any case the pilot was responsible for the trim of the vessel, having taken her out in knowledge of her condition ("*Strathspey*," 1891, 18 R. 1048; "*Assyria*," *cit. sup.*). The case of *Mann, Macneal & Co.* v. *Ellerman Lines* (1904, 7 F. 213), was distinguished. In that case the defect was one in the vessel's equipment for which the owners were responsible.

Argued for the Respondents: The *onus* lay upon the appellant to rebut the presumption of liability by proving that the accident was due either to no fault of his own ship or to inevitable accident, or was due solely to the fault of the pilot ("*Indus*," 1886, 12 P.D. 46; *Mann, Macneal & Co.* v. *Ellerman Lines*, 1904, 7 F. 213). This *onus* had not been discharged. On the contrary, the evidence shewed that the accident resulted, not from any wrong order given by the pilot, but from the unusual behaviour of the vessel under proper orders, owing to her failure to answer her helm. The pilot was entitled to accept the captain's word that the list would not interfere with the vessel's navigation, and could not be made responsible for its effects.

The Court *adhered* to the judgment of the Sheriff-Substitute, and *dismissed* the appeal.

The Lord President.—My Lords, this is an appeal from one of the Sheriff-Substitutes of Lanarkshire in the matter of a collision which took place in the Clyde. The circumstances of the case are these. The "Sunbeam" was in the Queen's Dock on the Clyde, and was proceeding to go down the river, and in order to do so she had to go out of the Queen's Dock, and, as the Queen's Dock lies at an angle to the river, she had to straighten herself in the river to proceed down. The angle coming from the Queen's Dock is such that, as a boat comes out, she naturally gets upon the south side to begin with, and that, of course, is not the proper side for proceeding down the river, and she has to go forwards to the north side. The "Sunbeam" came out under the charge of a pilot. She got over to the south side, and was put on the port helm to get her head round, being also assisted by a tug which was moored to her bow. By that means she was headed across the river to the north, but she gave a rather violent sort of sheer to the north, and, although her helm was starboarded, she did not properly answer her helm, and plunged into the tug called the "Flying Wizard," which was lying moored on the north side of the river, doing damage to it. The present action is brought by the owner of the "Flying Wizard" against the owners of the "Sunbeam" for the damage so occasioned.

I do not hesitate to say that this case has given me considerable difficulty, for I think the facts are narrow; and I think it is a matter of anxiety to decide whether the case falls on the one side or the other, in the light of the law which has been laid down in decided cases.

The only other fact that I ought to mention as regards the condition of affairs at the time is, that the "Sunbeam" had a considerable list when she left the dock, owing, seemingly, to most of the coal having been put into the port bunkers, and the list extended to eleven degrees. There is a conflict of evidence as between the pilot on the one hand, and the master of the "Sunbeam," who is corroborated by the mate, on the other, as to what exactly passed between the pilot and the officers of the "Sunbeam" as regards this list. The pilot's version is that as soon as he

saw the list he complained of it, and indicated that in his opinion it was not safe, and would affect the steering of the ship; that he got an assurance from the captain that he was well aware of the behaviour of the ship under such a list as the present, and that he assured him that it would not affect the steering, and that he might safely go on; that, going upon that assurance, he took out the vessel, but that, as he feared, the result was that the vessel did not act properly in steering, and that that was the cause of the accident. The captain's and the mate's version does not agree with that of the pilot. They deny that they gave any assurance to the pilot, but they themselves say that there was some conversation upon the subject of the list. They also say that, as a matter of fact, the list had no effect upon the steering, and that they had often gone with such a list before, and that such lists are common.

Now, the learned Sheriff-Substitute has decided the case on this ground,—he has held that the fault lay entirely upon the "Sunbeam," and he has held that the owners of the "Sunbeam" have failed to prove that there was any fault on the part of the pilot, because he holds it proved that the whole accident occurred through the default in the steering capacity of the ship, and that that fault in the steering capacity of the ship was due to the list. The learned Sheriff-Substitute holds that it is an undoubted fact that a ship with a list of eleven degrees will be affected in steering, and that that was an improper condition for a ship to be sent out in. My Lords, I have a little difficulty in going the length the Sheriff-Substitute does on that last ground. I am bound to remark that I think the learned Sheriff has here rather gone on his experience in other cases, and indeed he tells us so. But there is undoubtedly evidence here which cannot be disregarded of quite competent men, who say that a list of eleven degrees is not very uncommon, and that, as a rule, they do not think it will affect the steering. I confess that the result on my own mind of the evidence about that matter is this, that it is not a universal rule that a list of eleven degrees would affect the steering of a ship, but that, on the other hand, it might affect the steering of a particular ship. In other words, I think the matter is one of what I might call special circumstances, as to which probably nobody can be dogmatic, and lay down a general rule which is to apply to all ships. Ships in the matter of steering, we all know, do behave very differently, and behave very differently from reasons which are not always explainable. One ship is quick in answering the helm, another is slow, and I do not think one is able to give a scientific reason for the difference between the one and the other; and the result, to my mind, of the evidence is that, though it cannot be laid down as a general rule that the steering would be affected by a list of eleven degrees, which is not uncommon, yet, on the other hand, it cannot be said that the steering might not be affected.

Now, my Lords, in this state of the facts what is the decision to be come to? I think that the only way to try a case like this is to go very carefully along the lines which have been indicated to us in decided cases, and apply the rules there clearly laid down to the facts of this particular case. I had occasion in a case yesterday to say that the rules for this class of case are very clearly and authoritatively laid down in the judgment of Lord Esher in the case of the "*Indus*" (1886, L.R. 12 P.D. 46). Now, we start here with the fact of the collision, and with the fact that the collision took place between a moving ship and a ship that was lying moored in a place which everybody admits was a perfectly proper place for her to be moored; she was not moored at a place which interfered with or curtailed the fairway of the river, and there is no question as to any contributory negligence on the "Flying Wizard's" part. There was no time or possibility for her to get out of the way. That, I think, according to the decisions in many cases, and among others the "*Indus*," discharges the first *onus* that always is on the pursuers, and puts the blame upon the "Sunbeam"; and then, if the blame is to be taken off the "Sunbeam," that must be done by one of two things, either by shewing that the accident was inevitable, that is to say, by some cause outside the power of those in charge of her, or by shewing that the fault was that of the pilot, he being a compulsory pilot.

Now, my Lords, the "*Indus*" lays down, and I think rightly, that if persons who are *prima facie* in fault want to get off upon statutory exemption, they must bring themselves very clearly within that statutory exemption; in other words, they must shew that the fault was that of the pilot, and nobody else. That does not mean that you must go through the impossible course of disproving every other cause. It may be quite enough if you begin by shewing that it was the fault of the pilot, and then leave the matter there, and leave the other side to extricate themselves by shewing that there were other contributory causes of fault. But none the less you must begin by shewing that it was the fault of the pilot, and shew it in such a way as not to complicate it with any other proximate cause.

The facts of the "*Indus*" were a very good illustration of that. There was no doubt that it was the fault of the pilot in one sense, because the one ship ran into the other. The moving ship was being navigated by the pilot, and accordingly it was his fault, but nevertheless there were certain other contributory causes found in the non-obeyal of a certain order,

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Well, my Lords, when I come here to apply that test, I come to the same conclusion as the Sheriff-Substitute, though in rather a different way,—that the pursuers here have failed to discharge the *onus* upon them, of shewing that the fault was the fault of the pilot. I do not think it is enough merely to say that the accident happened, and that the ship was in the pilot's hands at the time, unless you can shew also that nothing else was happening of an extraordinary character. Now, undoubtedly the ship here did behave in an extraordinary manner, that is to say, it steered very wildly; and I have come to the conclusion that, the *onus* being upon the parties seeking to free themselves, they have not discharged that *onus*, because they have not really shewn here that the accident, such as it was, rested upon the pilot's fault alone.

I do not myself think it necessary to decide the question whether the bad steering was due to the list or not. It may or it may not have been, I cannot tell; but there are one or two things that are undoubted. It is undoubted, I think, as a matter of fact, that the ship did not answer her helm. That is made clear among other things by the log of the chief officer on the "Sunbeam," and I prefer to take these documents to what the witnesses say, because they were made up at a time when people did not know they were to be in Court. He says, describing the accident,—"3.30 p.m. While trying to get squared up in mid-river, tide being two hours ebb, helm hard to starboard, and tug towing to port; wind on port bow, and tide under starboard quarter, owing to which we did not answer our helm"; and in the same way it is very noticeable that the captain himself does not attribute the accident to the fault of the pilot, but puts it down to something that I suppose would come to inevitable accident, because in his deposition he says that, "In deponent's opinion, the cause of the casualty was the sweep of the ebb tide on the starboard quarter and the wind on the port bow"; and in the same way in his evidence in the case, he says, "I do not think the pilot could have done anything that might have prevented the collision in any way." Now that is testimony given by the persons in the boat in fault. It is quite true that their evidence, such as it is, would go to something like inevitable accident; but inevitable accident won't do in this case, because to say that the existence of a very slight breeze—for there was nothing more here—and the existence of a tide in the opposite direction should therefore make it impossible to navigate the Clyde is a conclusion which, of course, is absurd on the statement of it. In other words, their testimony as regards inevitable accident is, I am afraid, not worth much. But it is worth something in this way, that at the time they never thought of saying that the pilot was wrong. Now the learned counsel, of course, tried hard to assimilate this case, not to the "*Indus*," but to the case of the "*Assyria*," 1903, 5 F. 1089, and undoubtedly at first sight there is a great deal of similarity between the two cases. But a distinction between the two cases is this, that in the "*Assyria*" the learned judges came to a decision on the question of fact—and, of course, whether they were right or whether they were wrong, does not matter; it still remains the ground of decision—that the pilot had given a wrong order, because I find that, first of all, in the findings of the Sheriff-Substitute, which were there under appeal, there is this finding: "Finds . . . . that the pilot ordered the engines to be put slow ahead, and afterwards full speed ahead, and when he saw a collision to be inevitable, hard astern; finds that a collision would have been avoided if the order to go astern had been given at first, and that it was unduly hazardous to give the order full ahead in the hope of passing the 'Monmouth.'" Now that was a mistake on the part of the pilot; and in the same way the Lord Justice-Clerk, after describing the accident, says this: "Instead of that, the evidence satisfies me that the pilot caused the collision by giving an order to go ahead when there was risk of collision, and that he, by this error of judgment, caused the collision." Well, then, that of course is a finding directly contrary to what would be warranted here by the evidence of the captain of the "Sunbeam" when he says, "I do not think the pilot could have done anything that could have avoided the collision." In other words, you have there just that initial fault proved on the part of the pilot which I think the evidence fails to prove here, and that, I think, is what creates the distinction between the two cases. There is, of course, a very great similarity about the question of the trim of the vessel. Now, my Lords, upon that matter I do not think it is necessary to discuss whether the *dictum* of Lord Trayner, which certainly goes very far, is in all circumstances justifiable or not, because I think here—although I am not going to say in this conflict of evidence between the pilot on the one side, and the captain and the mate on the other, that I actually believe the one side or the other—it is perfectly clear that there was some talk between them about the trim. That, I think, is abundantly clear from a letter, which is in the papers, from the captain himself. There is a letter from the captain to his own owners, in which he says: "In reply to Pilot M'Millan's written statement, I beg to reply as follows:—On September 13th, about 1 p.m., pilot came on board to take 'Sunbeam' to Greenock. When on bridge with me he passed the remark to me the ship had a heavy list, and asked me if she was safe to go to sea, as he did not think so. I replied to him that I had been in the ship nearly sixteen years, and thought her

quite safe." Now that, of course, is no confirmation of what the pilot says, because what the pilot says is not that he talked about going to sea, but whether the list would make her steer properly or not. But it is near enough to make it, in my mind, perfectly clear that there was some talk between these two people as to the effect of the list, and that, in some way or other, the pilot had, so to speak, complained of the list, and had been assured by the captain that he had better go on. Well, now, I think that takes the case at least out of the sort of case which is figured by Lord Trayner, where the trim, being no doubt *prima facie* a matter for the crew, and not for the pilot, yet the pilot seeing that her trim was wrong, might say, "Either you put this right, or I don't start." Evidently there was some sort of conflict between the two, with the result that some sort of assurance was given to the pilot, and he went on. I mention that to shew that I have not overlooked it, but I do not put my judgment on that; I put my judgment on this, that in the rules laid down in the "*Indus*" it is necessary in some way so far to shew fault on the part of the pilot. The mere fact that there is a collision does not necessarily shew a fault, although, of course, if you show that the collision is the result of orders given by the pilot, and that these orders were obeyed, you probably would not need any more. But here you have a ship that, as a matter of fact, did not answer her helm, and you have persons on board the ship saying that they do not see what the pilot could have done to avoid a collision, and I think the *onus* of proof has not been discharged. I am therefore for adhering to the judgment of the Sheriff-Substitute and refusing the appeal.

Lord Kinnear.—My Lords, I am entirely of the same opinion; and without reviewing the facts, I think all that is necessary for me to say is that I think the case is directly governed by the rule laid down in the case of the "*Indus*." The vessel that was run down was stationary and moored to a pier. The "Sunbeam" coming down the river ran into her, and there is therefore a *prima facie* case of fault on the part of the "Sunbeam." The owners of the "Sunbeam" in the Court below maintained that they had displaced this *prima facie* case by proof that the real fault lay on the "Flying Wizard," because she was moored in a place where she ought not to have been, and was not being properly looked after. But the defence on that ground was abandoned when the case came into this Court, and we were told that the defenders accepted the judgment of the Sheriff-Substitute against them on that point. The only remaining grounds of excuse that they now present are the two that your Lordship has adverted to—either that the collision was caused by inevitable accident, which no precaution on the part of anybody in charge could have avoided, or was caused by the fault of the pilot in charge. The two defences are quite inconsistent with one another; and I agree, without examining the evidence in detail, that the first of these two grounds is untenable, and therefore the question comes to be whether the defenders have shewn that the accident was due to the fault of the pilot, and not to the fault of those in charge of the ship. Now, the case of the "*Indus*," which is entirely in conformity in this respect with other authorities, laid down that in order to take advantage of the statutory exemption which enables a shipowner to set up the fault of a pilot as an excuse for the damage caused by his vessel, he must prove that the damage was caused solely by the fault of the pilot, and not by the joint fault of the pilot and anybody for whom he himself is responsible, and I agree with your Lordship, for the reasons that you have stated, that the defenders have entirely failed to shew that the fault was due solely to the pilot, even if the pilot had not successfully cleared himself from the charge of fault altogether. I may add that the result of the evidence to my mind is, that the direct cause of the collision was that the ship did not answer her helm, and that the only explanation to be found in the evidence of her failure to answer her helm is that she had a list to port to the extent of eleven degrees. I think the evidence is conflicting as to whether the list to port to that extent would necessarily make it unsafe to take her down the narrow waters of the Clyde, but the preponderance of the evidence to my mind shews that that depends upon the ship, and not upon an absolute rule. If it did depend upon the ship, then I am disposed to think, although the evidence is certainly conflicting, that the pilot has shewn that he consulted the master of the ship, who had been sailing in her for a number of years, as to what the effect of this would be, and relied on the master's statement that it would not affect the sailing capacity of the vessel. Whether that can be taken to be proved or not, I think it is certain that the pilot alone cannot be held responsible for taking the ship out of the dock with such a list, because, in the first place, the owners and their master and crew are responsible for the trim of the vessel, and the pilot is not. It may be that if a pilot thinks that the vessel is not in such trim as to be navigable with safety, it lies upon him to say so, but I do not think it is proved that a reasonably prudent and competent pilot must in the actual circumstances have refused to take the "Sunbeam" down the river; and, if that is not proved, there is no evidence of violation or neglect of duty on the part of the pilot in question. But if this were doubtful, it is a sufficient ground of judgment that, even supposing that the pilot was in fault, it has not been proved that the master and crew were not in fault also, that is to

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say, that if the real cause of the ship's failure to answer her helm was the list created by the way in which the port bunkers were loaded, then that is a fault for which the owners were responsible, and therefore, if there was any fault on the part of the pilot at all, which I say again I am not persuaded there was, it is not shewn that the accident was due to his fault solely. I therefore concur with your Lordship.

Lord Dundas.—My Lords, I think this case is a narrow one, and at the first impression a somewhat puzzling one, but after the fullest consideration that I have been able to give it, I have arrived entirely at the conclusion which your Lordships have so fully expressed, and I do not desire to add anything on my own behalf.—10*th July* 1907.

Counsel for the Appellant, Hunter, K.C., Murray; Agents, J. B. Douglas & Mitchell, W.S. —Counsel for the Respondents, Dickson, K.C., Sandeman; Agents, Webster, Will & Co., S.S.C.

W. A. R.

FIRST DIVISION.

(The Lord President, Lords Dundas and Johnston.)

122. Lindsay and Others *v.* Summerlee Iron Company.

BURGH—DEAN OF GUILD—RESTRICTIONS ON HEIGHT OF BUILDINGS—GLASGOW BUILDING REGULATIONS ACT 1900 (63 AND 64 VICT. CAP. CL.), SECTS. 60 AND 62—PRIVATE INDIVIDUAL ENTITLED TO PLEAD PROHIBITIONS OF ACT AS TO HEIGHT OF BUILDINGS—PROPOSED BUILDING ABUTTING ON TWO PARALLEL STREETS HELD TO BE SUBJECT TO PROVISIONS OF SECT. 62 OF ACT.

Appeals from the Dean of Guild Court at Glasgow.

These were two appeals against decisions of the Dean of Guild Court at Glasgow, with reference to a building proposed to be erected in West George Street there.

One appeal was taken in a petition for a lining, and the other in an appeal to the Dean of Guild against a consent of the Corporation with reference to the height of the proposed building. The questions raised were whether an owner of property adjacent to the site of the proposed erection had a title to plead the provisions of the Glasgow Building Regulations Act 1900, which prohibit the erection of a building exceeding a specified height, and whether sect. 62 of that Act applied to the case of a building abutting on two streets parallel to one another.

The circumstances are set forth in the opinion of the Lord President.

The Glasgow Building Regulations Act provides as follows:—

"Sect. 60. (1) . . . . No building other than a church shall, except with the consent of the Corporation, be erected in or adjoining any street of a greater height than the distance between the building lines of such street and one-half more of such distance, and in no case, except with such consent of the Corporation, shall such height exceed one hundred feet. . . .

"(3) Whenever the Corporation consent to the erection of any building of a greater height than that prescribed by this Act, notice of such consent shall within one week after such consent has been given be published in such manner as the Corporation may direct, and such consent shall not be acted on till twenty-one days after such publication, and the owner or lessee of any lands and heritages within one hundred yards of the site of any intended building who may deem himself aggrieved by the grant of such consent may within twenty-one days after such publication appeal to the Dean of Guild, who shall have power to deal with the case as shall seem to him just.

"Sect. 62. Where any building is erected or intended to be erected so as to front or abut upon more than one street, the height of the building shall be regulated by the widest of such streets, not only so far as such building abuts or will abut upon such widest street, but also so far as it abuts or will abut upon the narrowest of such streets to a distance of fifty feet from the side of such widest street. . . ."

The Court *recalled* the interlocutors appealed against *hoc statu*, and *remitted* to the Dean of Guild to consider whether as a matter of fact the consent of the Corporation had been knowingly given to a building which, under sect. 62 of the Glasgow Building Regulations Act, must be held as abutting on two streets, and if he was satisfied that such consent had been so given and did not propose to recal that consent in virtue of the powers given to him by sect. 60 (3) of the said Act, to dismiss the appeal taken to him and grant the lining in the petition therefor.

The Lord President.—My Lords, these are two appeals from the Dean of Guild of Glasgow. The one is an appeal from a pronouncement of his upon a decree of lining; the other is an appeal against a pronouncement of his in respect of the special jurisdiction that is given him as the reviewing authority of the Corporation under the provisions of sub-sect. 3 of sect. 60 of the Glasgow Building Regulations Act. That is the technical position of the two appeals. The subject-matter with which they deal is inextricably mixed up, and in order to make the matter clear I think it is necessary to state exactly what the proceedings were.

The parties applicant were the Summerlee Iron Co. Ltd., and they possessed a stance of ground the front of which faced to West George Street, Glasgow, and the rear of which faced to West Regent Street Lane — West Regent Street Lane being a lane parallel to West George Street. Now, the applicants proposed to put up a high building extending over the whole of their property, that is to say, with its front making an elevation in West George Street, and its back making an eleva-

tion in West Regent Street Lane. In order to do that, they had to make the ordinary application for a decree of lining. But they obviously were affected by the regulations as to height which are contained in the Glasgow Building Regulations Act. Now, the Glasgow Building Regulations Act deals with the matter of height particularly in two sections, in sect. 60 and sect. 62. Sect. 60 provides, by the first sub-section, that no building other than a church shall, except with the consent of the Corporation, be erected in, on, or adjoining any street of a greater height than the distance between the building lines of such street and one-half more of such distance; and then there is a further rider—"and in no case, except with such consent of the Corporation, shall such height exceed one hundred feet." Now, as a matter of fact, this building exceeded one hundred feet. It did not exceed in height one and a half times the breadth of West George Street, but it did exceed in height one and a half times the breadth of West Regent Street Lane. Accordingly, the applicants addressed a letter to the town clerk, in which they enclosed a plan of the proposed building, and they asked for a consent of the Glasgow Corporation. That consent they got; and the first consent which they got was phrased thus:—"The Corporation of the City of Glasgow intimate their consent, in terms of sect. 60 (1) of the Glasgow Building Regulations Act 1900, to the proposal of the petitioners to erect a building at 172/176 West George Street to the height shewn in the plans in Court relative to said petition, said consent being required in respect that the proposed height is greater than the distance between the building lines of West George Street *ex adverso* of said building, and one-half more of such distance." Now, that recital was not true in point of fact, because, as a matter of fact, it was not greater than one and a half times the breadth of West George Street, as I have said. That seems to have been noticed, and, accordingly, that first consent was superseded or supplemented—I do not care which word I use—by another in these terms:—"The Corporation of the City of Glasgow intimate their consent, in terms of sect. 60 (1) of the Glasgow Building Regulations Act 1900, to the proposal of the petitioners to erect a building at 172/176 West George Street to the height shewn in the plans in Court relative to said petition, said consent being required in respect that the proposed height exceeds one hundred feet."

Armed with this consent, they proposed to ask—and did ask—the Dean of Guild for his decree of lining in the ordinary way. And that decree of lining the Dean of Guild was prepared to grant, and did grant. At the same time they had, in terms of sect. 60 in a provision which I have not read, and which it is not necessary to read at length—they had advertised that they had got this consent in order that persons who considered themselves aggrieved might object. The firm of Lindsay, Meldrum & Oates, who have property in the immediate neighbourhood, but not exactly touching the applicants' property, conceived that they were aggrieved, and, accordingly, they presented an appeal to the Dean of Guild against the consent of the Glasgow Corporation. And they presented that appeal in respect of the provisions of sub-section 3 of sect. 60, which is in these terms:—"Whenever the Corporation consent to the erection of any building of a greater height than that prescribed by this Act, notice of such consent shall, within one week after such consent has been given, be published in such manner as the Corporation may direct, and such consent shall not be acted on till twenty-one days after such publication; and the owner or lessee of any lands and heritages within one hundred yards of the site of any intended building who may deem himself aggrieved by the grant of such consent may, within twenty-one days of such publication, appeal to the Dean of Guild, who shall have power to deal with the case as shall seem to him just."

At the same time the same objectors appeared before the Dean of Guild in the ordinary lining process and objected, the ground of their objection in the ordinary lining process being that there had been no proper consent given, and that the building was struck at by the provisions of sect. 60 and sect. 62 of the Glasgow Building Regulations Act. Now, sect. 62, which I have not read as yet, is this:—"Where any building is erected or intended to be erected so as to front or abut upon more than one street, the height of the building shall be regulated by the widest of such streets, not only so far as such building abuts or will abut upon such widest street, but also so far as it abuts or will abut upon the narrowest of such streets to a distance of fifty feet from the side of such widest street." Then there is a proviso that where the whole of the ground upon which any building of the warehouse class is erected or intended to be erected belongs at the passing of this Act to one owner, it shall be allowed.

Now, that being the state of the two litigations, what the Dean of Guild has done is this: In the lining process he has held that the objectors have no title to plead the provisions of the Glasgow Building Regulations Act 1900 at all. He holds that the privilege of pleading these provisions is limited to the Corporation, and, accordingly, he disregarded the objections of the objectors and granted the decree of lining. In the appeal case, under sub-sect. 3 of sect. 60, he went into what may be called the merits, and he said he saw no reason for disagreeing with the consent which the Corporation had given. Both those judgments are brought up to your Lordships, and are objected to by the objectors.

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The Lord President.

Now, taking first the ordinary lining decree, I am bound to say that I cannot agree with the ground upon which the learned Dean of Guild disposed of the objections. I cannot think that the universal proposition that no private individual has ever any title to plead the prohibitions of the Glasgow Building Regulations Act is a just one. It may be that there are many of the provisions of the Glasgow Building Regulations Act which it will not be in the mouth of a private individual to plead, and the reason will be found in want of title or want of interest. The truth is, that title and interest, as your Lordships very well know, although they are different, often very much run into each other. I will make what I mean, I think, completely clear by an illustration which I draw from the observations of Lord Shand in the well-known case of *Pitman*, which was a case where private objectors sought to impose restrictions put by a general statute, and not by the terms of title, upon a person who wished to build. *Inter alia*, the objectors in that case pleaded that there was not sufficient ventilating space in the plans of the Conservative Club according to the provisions of an Edinburgh Police Act. Lord Shand said—and I think said perfectly justly—that those provisions were put in for the sanitary good of the house itself, and that a neighbour somewhere else had either no title or no interest—I do not care which—to plead them. He could not be heard as a sort of general protector of the public health, and he could not shew that it was anything to his house if his neighbour's house was badly ventilated internally. But when you come to other questions, questions of excessive height and so on, where, the truth is, you affect your neighbour far more than you affect yourself, at once I hesitate to say that that neighbour shall have no title to bring forward and found upon the prohibitions of the statute. And therefore, my Lords, so far as that ground of judgment is concerned, I am unable to agree with the learned Dean of Guild.

But the only result of that is, that one must look at the merits. Now, the objectors here pleaded their case as high as this: they said there was no possibility here for a dispensation, because sect. 60 only deals with buildings which are in a street, and this is not a building which is in a street, but it is a building which is in streets—the plural instead of the singular—and that is regulated by sect. 62. My Lords, I think that is a completely erroneous view of the statute; and I think the learned Dean of Faculty, with all his ingenuity, for which he is famous, was really quite unable to give any answer to the view which was put against him. It is perfectly clear that sect. 62 of the Glasgow Building Regulations Act is not a code in itself dealing with streets in the plural, without sect. 60. Sect. 62 does not contain *in gremio* a prohibition at all. But the reason of sect. 62, I think, is clear beyond doubt. Sect. 60 having said that you shall not build a building which abuts on the street of a height exceeding one and a half times the width of that street except with the consent of the Corporation—with which consent you may build as high as a building will go—sect. 62 then deals with the question when a building is to be in two streets instead of one, or, as a matter of fact, in more than two streets, for I do not find that it is limited. You might have a very large building with an elevation in four streets, and it is possible that with a building of the polygonal class of construction you might have it in more than four streets. If it had not been for sect. 62 you might, in any given case, have had a dispute between the proposing builder and the Corporation as to whether the consent of the Corporation was needed or not. The Corporation might have said—"Oh, you need our consent because your building abuts on street B, and exceeds in height one and a half times the width of that street"; to which the other party might have replied—"I do not consider my building abuts on street B; it has got its back to it; I think my building is on street A." You might have had just the sort of question raised and decided in the *Conservative Club* case, where the question was whether the Conservative Club was in Princes Street or in Rose Street Lane.

In order to solve those questions we have sect. 62, and that section says that, when you are in more streets than one, you may settle that, for the purpose of measurement, you consider that your building is in the widest street, subject to this, that that does not mean that you are allowed to say that the whole piece of your ground is in the widest street, but that you may only go 50 feet back from the widest street in ascribing your ground to that street, and that, when you get beyond the 50 feet, you must ascribe the rest of the continuous building to the narrow street. But that leaves the whole question of prohibition standing as it did upon sect. 60. Now, it is a considerable feat to do what the counsel for the objectors here sought to do; they said, "We will read in the prohibition of sect. 60 in so far as it deals with the height exceeding one and a half times the breadth, but we will leave out the consent of the Corporation." The two things are indissolubly connected in sect. 60; and if you read them into sect. 62, you must read them in indissolubly connected. And therefore I think it is clear that although sect. 62 is the section which shews the streets the buildings are in, sect. 60 is the only section that makes a restriction on the height; and sect. 60 says that although there is the restriction on the height—which is to be reached by taking the proportion between the breadth and height of the street and building—yet that is always liable to be overridden by a consent of the Corporation.

Now, my Lords, having settled that, all that is left, of course, is a very narrow point, and that is—has the consent of the Corporation been here given? A little doubt—I do not, personally, think there is much—but a little doubt is thrown upon the matter, because, undoubtedly, the applications in terms bore to be for a building in West George Street, and not a building in West Regent Street Lane. On the other hand, it is perfectly clear that the plans sent to the Corporation disclosed quite clearly that the building did abut on West Regent Street Lane as well as on West George Street. And it is not too much to assume that the parties who dealt with the matter for the Corporation know enough about West Regent Street Lane to know that it is a private street in the technical sense—a street to which all the public are admitted—and is not merely a private enclosure of the parties who own the buildings about it—I mean a private enclosure such as an avenue would be. But, my Lords, I do not care, I think, to decide that question here. What I propose is that, with this explanation of the law—which I hope is clear—the question should go back to the Dean of Guild, in order that the Dean of Guild may consider, in the light of what we have told him about sect. 60 and sect. 62, whether, as a matter of fact, the consent of the Corporation has been knowingly given to a building which, under sect. 62, must be held as abutting upon two streets; where, in other words, if no consent was given, 50 feet of that building would be regulated by the breadth of West George Street, and the height of the remanent part of the building would be regulated by the breadth of West Regent Street Lane. If that consent has been given, and the Dean of Guild sees no reason to interfere with it, then all is right. If that consent has not been knowingly given, then, of course, the Dean of Guild, in his turn, would send it back to the Corporation, in order that they should consider that matter for the first time.

Accordingly, I propose that the interlocutors as they stand should be recalled *in hoc statu*, and that both cases should be sent back to the Dean of Guild in order that, having expiscated the matter in that way, he should proceed as seems just.

Lord Dundas.—My Lords, I am of the same opinion. The case, after all, lies within comparatively narrow limits. In the first place, I am, like your Lordship, not prepared to accept the Dean of Guild's views upon the question of the title of individuals in the matter; but your Lordship has, I think, put that topic upon a proper footing, and I agree with all that you have said. In the second place, I think that the view expressed by your Lordship as to the meaning of sect. 60 and sect. 62 of the Glasgow Building Regulations Act of 1900, and the relations of these two sections to one another, is unanswerably right; at all events, we have had no feasible answer to it stated from the bar. Lastly, my Lords, I concur in thinking that it would be safer, in order to avoid any possibility of error, that the case should go back, in the manner your Lordship has explained, to the Dean of Guild. My Lord, I am content to express my entire concurrence in your Lordship's opinion, without attempting further to add to or develop it.

Lord Johnston.—While I agree in the course which your Lordship proposes to take in this case, I am afraid I differ to some extent as to the grounds upon which we should proceed, because I cannot take the same view of sect. 62 of the Glasgow Building Regulations Act 1900 which I think your Lordships take.

I quite agree that the respondents here have a good title to object, and that the Dean of Guild should have heard them on their objections, on the footing that he was hearing parties who had such a title. There can be no question that, under Acts of this description, coterminous proprietors who have an interest have a title to be heard. And I cannot conceive a greater interest than that of the respondents, the light and air of whose property will be so much affected by this proposed building, more particularly when they must look to it, that if this measure is meted out to the petitioners by the Corporation and the Dean of Guild, they may expect a similar measure to be meted out to other proprietors in the neighbourhood, with the result of gradually solidifying the ground between West Regent Street and West George Street, on to which the back of their property looks into a block of buildings. Accordingly, I think they have a most undoubted interest, and therefore title, to be here. And the reason for which I should send the case back to the Dean of Guild is, that I cannot conceive that either he or the Corporation could have fairly considered the interests of the objectors if they approached the matter on the footing that they had no title to be before them.

But then, when I come to sects. 60 and 62 of the statute, I feel a great deal more difficulty than I think your Lordships have indicated as to their proper application, for this reason: I do not think that they contain a complete code of building regulations in regard to the matter in question, viz. the height of buildings, but that the present case is a *casus improvisus*. I am satisfied that sect. 62 applies only to a case where buildings abut upon two streets which are at an angle to each other—the one a main and the other a side street. The provision therein contained, that "where any building is erected or intended to be erected so as to front or abut upon more than one street, the height of the building shall be regulated by the widest

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of such streets, not only so far as such building abuts or will abut upon such widest street, but also so far as it abuts or will abut upon the narrowest of such streets," would be perfectly intelligible, and might apply equally where the two streets are parallel, as where they are at an angle to one another, if the clause had stopped there. But it continues, "to a distance of 50 feet from the side of such widest street." This makes it quite clear to me that what the statute contemplated was a corner subject, and that the meaning of the enactment is that where a building is to be erected so as to abut upon a main street, and also upon a side street, the height regulated by the width of the main street is to be carried back along the side street to a distance of 50 feet, however narrow the side street may be. It is impossible, in my opinion, to read the provision taken as a whole as applicable to the case of a main street parallel to a back street—in the present case just 100 feet apart.

I do not understand how a building abutting on a wide front street can be raised to the height of one and a half times the said front street, not only so far as it abuts on said front street, but so far as it abuts on a parallel narrower back street 100 feet, and it might be much more, off, *to a distance of fifty feet* from the side of said front street. It humbly appears to me to make nonsense of the section, which is perfectly intelligible if applied to the case of streets at an angle to one another. Consequently, I conclude that sect. 62 does not apply to the question we have to consider, and only applies to a corner block facing a main street and also facing a side street.

If one goes, then, back to sect. 60, I do not think that that section really contemplates the state of matters which arises here where you have a property with two frontages, one to a main street and one to a back street. If you build on that property, the width of the front street regulates the height of your building so far as abutting on it, and the height of the back street regulates such height so far as the building abuts on the back street, and there is nothing to say where, in the intermediate space, the one width ceases to regulate and the other begins. For I can find no help from sect. 62. It may be that it was intended that the width of the front street should regulate the height for 50 feet back from its building line, but neither it nor sect. 62, if it was the intention, so provides. You are therefore, as it seems to me, left with a piece of property facing a main street on the one side and facing a parallel back street on the other side; and if you can give any interpretation to sect. 60 as applicable to that situation, you have the width of the main street to regulate the height of the building as it abuts upon that street, and you have the width of the back street to regulate the building as it faces the back street, but you have nothing to indicate to you to how great a depth from either streets these heights are to extend.

It seems to me, therefore, that this building code, if it may be so called, is not complete; and I feel, therefore, very great difficulty in applying its provisions to the present case. The only way that I can so apply it, although it is not satisfactory, is to hold that the Corporation, and, through them, the Dean of Guild, have, under sect. 60, the power to dispense with any regulation as to height on the whole area, if they so choose, both on the frontage to the main street and on the frontage to the back street, and therefore that it is immaterial how far back the width of either the front or the back street regulates. It is an unsatisfactory conclusion, but the unsatisfactoriness of it is, to my mind, occasioned by the failure of the statute to provide for all circumstances which must arise in connection with such buildings.

The Lord President.—I should like to say with regard to what Lord Johnston has said, that I think his construction of sect. 62 is most unfortunate, because the effect of it would be, then, that where there are parallel streets, the building regulations for these are not dealt with; and also that I, personally, find no difficulty whatever in holding the word "abut" as applying to parallel streets because, I should like to point out, sect. 62 is only introduced where the building is erected or intended to be erected so as to front or abut on two streets—that is to say, it only comes into being in the case of parallel streets if you have one continuous building from the one street to the other. In order to make this quite clear, I do what I very seldom do, and take the opportunity of saying something after my brethren, because I see this is a matter of great practical convenience for the Glasgow authorities, and it is a pity there should be any doubt about it. I think I can make my meaning clear by an illustration. Supposing one was building for the first time between Princes Street and George Street, I can quite understand that if you build a house in Princes Street and add the ground up to George Street, it would be certainly an abuse of ordinary language to talk of the ground that was behind, after you built your house in Princes Street, as abutting on George Street; but if you build one continuous building that goes from Princes Street to George Street, then I do not think it is an abuse of language to talk of any building which is left after you have done that to your Princes Street building as abutting on George Street. It may be that when 50 feet is taken it is rather a small breadth, but that the section applies quite clearly to parallel streets as well as to streets meeting at an angle I have no doubt. It says: "Remember that your building must only come 50 feet back, and the rest is to be considered as abutting on the smaller street for regulation of height."

Then the judgment of the Court will be: Recal the interlocutors *in hoc statu*, and remit both cases to the Dean of Guild to proceed as shall be just.—12*th July* 1907.

Counsel for the Appellants, Dean of Faculty (Campbell, K.C.), Lippe; Agents, Erskine Dods & Rhind, S.S.C.—Counsel for the Respondents, Dickson, K.C., Hon. W. Watson; Agents, Webster, Will & Co., S.S.C. W. A. R.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

123. Magistrates, etc. of Coatbridge *v.* County Council of Lanark. Magistrates, etc. of Airdrie *v.* County Council of Lanark.

I. Local Government—Public Health—Rivers Pollution Prevention Act 1876 (39 and 40 Vict. cap. 75), sect. 20—"Stream"—Held That a Natural Watercourse Did Not Cease to be a Stream Within the Meaning of the Act When Covered in and Used for the Disposal of Sewage.

II. Local Government—Public Health—Rivers Pollution Prevention Acts 1876 (39 and 40 Vict. cap. 75), sects. 3 and 4, and 1893 (56 and 57 Vict. cap. 31), sect. 1—Local Sanitary Authority Charged with Knowingly Permitting Pollution of Streams by Sewage—Defences (1) That Pollution Was Caused by Private Parties With Prescriptive Right to Pollute; and (2) That Polluting Effect of Sewage Matter Neutralised by Chemical Discharges of Third Parties Held Irrelevant.

III. Local Government—Public Health—Rivers Pollution Prevention Acts 1876 (39 and 40 Vict. cap. 75), sects. 3 and 4, and 1893 (56 and 57 Vict. cap. 31), sect. 1—Action at Instance of County Council—Action Against Burgh Sanitary Authority for Contravention of sect. 3 of 1876 Act by Permitting Pollution of Stream—Defence That There Was No Pollution Where Stream Entered Territory of Pursuers—Proof Allowed.

Special Case.

On 25th and 28th August 1905 the County Council of the county of Lanark presented petitions in the Sheriff Court of Lanarkshire at Airdrie against the burghs of Coatbridge and of Airdrie respectively, praying the Court to ordain the defenders to abstain from causing to fall or flow into certain burns or streams, all of which streams flow through certain parishes in the county of Lanark, within the district of the pursuers, and the waters of which ultimately reach the river Clyde, any solid or liquid sewage matter.

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The grounds of action and the parties' averments were, as far as concerns the present decision, practically the same in either case. That against the burgh of Coatbridge is here reported.

The pursuers' averments were to the following effect:—

The pursuers are empowered under sect. 55 (1) of the Local Government Scotland Act 1889 to enforce the provisions of the Rivers Pollution (Scotland) Acts 1876–1893 within the county of Lanark. The defenders have for some time past caused, and are still causing, solid or liquid sewage matter to fall or flow, or have knowingly permitted, and are still permitting, solid or liquid sewage matter to fall or flow or be carried into the said streams, and that by means of certain sewers, the property of the defenders, thereby committing an offence under sect. 3 of the Rivers Pollution Act 1876. The said burns are each a stream within the meaning of sect. 20 of the Rivers Pollution Act 1876.

The defenders lodged a statement of facts which contained the following averments:—

Stat. 1. By sect. 8 of the Rivers Pollution Prevention Act 1876, sanitary authorities are, subject to the restrictions in the Act, empowered to enforce the provisions of the Act in relation to any stream being within or passing through or by any part of their district, and for that purpose to institute proceedings in respect of any offence against the Act, which causes interference with the due flow within their district of any such stream, or the pollution within their district of any such stream, against any other sanitary authority or person, whether such offence is committed within or without the district of the first-named sanitary authority.

Stat. 2. The present arrangement of the drainage system of the burgh of Coatbridge has been in existence for more than thirty years, and was in operation prior to the passing of the Rivers Pollution Act 1876, and was taken over by the defenders on their constitution as a burgh in 1885. The burns and streams mentioned in pursuers' condescendence have been covered over, channelled, and bottomed for a long period, and within the burgh boundaries have been regularly used as public sewers. They are not burns and streams within the meaning of the Rivers Pollution Act, but from time immemorial have always been channels mainly used for sewage, and the waters therein have been unfit for the primary purposes. The owners of lands and heritages within defenders' burgh have prescriptive rights of permitting liquid or solid sewage matter to fall or flow into said sewers and all streams with which they combine, and are beyond the control of the defenders. In so far as the defenders have acquired the sewers and drains of the burgh under the Burgh Police Act 1892, they also acquired, on behalf of the burgh, prescriptive rights of use of said channels and watercourses for the purpose of permitting liquid and solid sewage matter to fall or flow into them and all streams with which they join. From time immemorial the upper waters of said burns and streams have received sewage

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and industrial refuse and effluent water, and where they pass through the burgh of Airdrie have been used as public sewers for the prescriptive period, and have been unfit for the primary purposes, and the defenders have no control over the burgh of Airdrie and the upper heritors to prevent such use. The Middle Ward District Committee of the pursuers also pass sewage into said upper waters. The lower waters of the said burns and streams are not polluted by the defenders. Any sewage therein is harmless and innocuous. From time immemorial they have received sewage from the upper waters under the prescriptive rights foresaid, and have been unfit for the primary purposes.

Stat. 3. The burns and streams mentioned in the pursuers' condescendence receive between their source and their outfall in the river Clyde chemical and other discharges from public works of a great variety of kinds on their banks or in their immediate vicinity, which discharges act as re-agents, and purify and render innocuous any solid or liquid sewage matter which falls or flows or is carried into them. The introduction into such burns or streams of such chemical or other re-agents renders all sewage matter discharged into them innocuous, and, moreover, is the best practicable and available means of rendering harmless any sewage matter falling or flowing or carried into such streams.

Stat. 4. By the entry into said burns and streams of such solid or liquid discharges, no interference with the due flow of such burns and streams within the pursuers' district takes place, nor is there any pollution within the pursuers' district of any such burns or streams for which the defenders are responsible, and no nuisance or injury to the public health or inconvenience to the public is caused by all or any of such burns or streams. The discharges into said streams at present complained of are no greater or worse now than they have been over a long period of years, and the petitioners or their predecessors have not heretofore made any complaint with regard to them.

They pleaded :—

1. The action being irrelevant and incompetent, and the Sheriff having no jurisdiction, ought to be dismissed, with expenses.

2. The pursuers having no title to sue, the action ought to be dismissed, with expenses.

3. No statutory offence being caused or permitted by the defenders, the defenders ought to be assoilzied, with expenses.

4. The burns and streams libelled not being streams within the meaning of the Rivers Pollution Act, the defenders ought to be assoilzied, with expenses.

5. Any sewage entering the said burns and streams, for which the defenders are responsible, being harmless and innocuous, and in any event the defenders having adopted the best practicable and available means of rendering their sewage harmless, the defenders are entitled to absolvitor.

6. The defenders having a prescriptive right to use, and having statutory authority for using, the said burns and streams as public sewers, and having also a prescriptive right to permit liquid and solid sewage matter to fall or flow into all streams with which they join, are entitled to absolvitor.

7. The whole allegations of the pursuers being unfounded in fact and incapable of proof, the defenders are entitled to absolvitor, with expenses.

8. The owners of lands and heritages within the defenders' burgh having prescriptive rights to allow liquid and solid sewage matter to fall or flow into such streams and all streams with which they combine, the defenders are entitled to absolvitor.

9. There being other proceedings pending for the offence of polluting said streams, the present petition is incompetent, or at least ought to be sisted.

After sundry procedure the Sheriff (Guthrie) on 10th April 1906 pronounced the following interlocutor :—

"Having heard parties' procurators and considered the cause, Finds that the defenders admit that they are permitting sewage matter to fall or flow or be carried into the streams condescended on in the petition; finds that they are thus committing an offence against sect. 3 of the Rivers Pollution Prevention Act 1876; repels the first, second, third, fourth, sixth, seventh, eighth, and ninth pleas for the defenders; reserves meantime their fifth plea in law, in so far as it coincides with the eighth plea for the defenders in the action by the County Council against the burgh of Airdrie; *quoad ultra*, repels said fifth plea; before making a remit as directed by sect. 10 of the said Act, appoints parties to be heard as to the terms of the remit. . . ."

[The eighth plea for the defenders in the action against the burgh of Airdrie was in these terms: "There being no means practicable and available by which the defenders can render the sewage less harmful, the defenders should be assoilzied."]

The Sheriff added the following note to his interlocutor :—

The defenders do not deny that they discharge sewage into the burns and rivers mentioned in the petition and condescendence. But they have stated a number of pleas as to competency and relevancy, and supported them with much apparent earnestness. On examination it is difficult to discover in them any real answer to the pursuers' case. But out of respect to the important communities represented by the defenders and the able procurators who addressed me, I shall try to enumerate the principal points discussed, and state my opinion in regard to each.

1. Title to sue. I can only look upon the 55th section of the Local Government Act as adding the County Council as an authority entitled to take proceedings against all offenders against the provisions of the Rivers Pollution Act passed thirteen years previously. Probably it was thought that that Act was not duly enforced, and that the newly instituted County Council should be invested with powers in addition to other sanitary authorities, whether created by the Act or previously existing. And it is to be observed that the section not only invests the County Council with "powers," but imposes on it "duties." This disposes, I think, of the point, which was more than once put forward, that the County Council has no "interest" to prosecute. I apprehend that an interest is not required when Parliament imposes a duty. But even if it were not so, has not the county an interest in the purity of its rivers?

2. It is said that the burns and rivers are not streams in the sense of the statute, but are watercourses which, at the passing of the Act, "were mainly used as sewers and emptying directly into a tidal river" (sect. 20). I do not think this can be seriously maintained. None of the streams empty into the sea, and there can be no pretence for saying that any but the North Calder water empties into a tidal

river. That river flows into the Clyde, but at a point where, as common knowledge, which the Court is bound to use, informs us, the Clyde is not a tidal river. The tide cannot come beyond Carmyle Weir, which is lower down than the entry of North Calder water. In the *Portobello* case, where the definition clause of the Rivers Pollution Prevention Act was discussed, the Figgate Burn emptied into the sea, and the tide probably ascended as far as the junction of the Pow and Braid Burns—the other streams whose pollution was complained of (10 R. 130).

3. It is said nuisance is not averred. The Rivers Pollution Prevention Act says nothing about nuisance. It assumes that sewage should not be discharged into rivers, and seeks to prevent that from being done.

4. The defenders plead that as private persons in the burgh have a right by use and prescription to lead their drains into these streams within the burgh, they have no power to prevent sewage from reaching them. It is rather unusual in these days for municipal persons to depreciate or minimise their powers. But a perusal of the 219th, 222nd, and adjoining sections of the Burgh Police Act 1892, shews the real position of the defenders with regard to the drainage and sewers within the burgh, and negatives their pleas on this point.

I regret not to be able to deal at greater length with arguments which occupied a considerable time. But there are really, as it seems to me, no relevant defences to the petition, and no course is open but to find, as the defenders admit, that they are permitting sewage to flow into the streams condescended on, and to remit to an engineer to report as to the best practicable and available means of preventing sewage matter from flowing or falling into the said streams, or of rendering it harmless, and as to the nature and cost of the work and apparatus required. The defenders do not allege that they have used any means to render the sewage passing into the streams harmless. Thus there is no case falling within the second paragraph of sect. 3, and the remit required is simply one under sect. 10 for the information of the Court.

Perhaps I should notice two decisions referred to on both sides. The *Portobello* case, already cited, differs from this in respect that a proof was taken before the Sheriff as to the history of the streams and the extent of pollution. The judges did not comment on this, or hold it to be unnecessary; and as pollution was not admitted, perhaps it could not have been avoided. The proof seems, however, to have dealt with a good deal of matter which, in the light of subsequent cases, and on a true construction of the Act, was irrelevant.

The other case is in the *West Riding of Yorkshire Council* v. *Holmfirth Urban Sanitary Authority* [1894], 2 Q.B. 842, which shews that even where a sanitary authority does not increase the quantity of sewage matter entering a stream by ancient sewers within its district, it is within the third section of the Act.

The principle of this judgment is illustrated and confirmed by the *Midlothian County Council* v. *Oakbank Oil Co.*, 6 F. 387, a case under the fourth section of the Rivers Pollution Prevention Act.

Although the defenders' pleas as answers to the charge of committing an offence against the Act and to their being ordered to do their duty are repelled, it does not follow that the referee and the Court may not give effect to some of their contentions when the manner in which they are to do their duty comes to be determined. Thus, as one example, it may be shewn that the continued use of the channels or the streams within the burgh for drainage purposes may be expedient under conditions.

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The defenders appealed to the Court of Session by way of special case in which they contended:

". . . . that the Sheriff's interlocutor of 10th April 1906 is ill founded, and ought to be recalled. They maintain in their pleadings that they are not polluting the streams referred to, and that the petitioners have therefore no title to raise the present question with them. They aver in their statement of facts, and offer to prove, that the streams in respect of which complaint is made have for a space of at least fifty years been used as sewers by the inhabitants of Coatbridge and surrounding district; that they are dedicated to this purpose; and that the defenders have acquired a prescriptive right so to use said streams. They further maintain that any sewage which enters said streams is so largely mixed with chemicals as to be innocuous, and that no further means are required to render it harmless. The appellants therefore maintain that they are entitled to a proof of their averments as set forth in their statement of facts, and that the Sheriff was not justified in disposing of the case without inquiry."

The following Questions of Law were submitted to the judgment of the Court:—

1. Was the Sheriff right in finding that the defenders admit they are permitting sewage matter to flow into the said streams?
2. If so, were the defenders thereby committing an offence against the said sect. 3?
3. Ought the Sheriff to have repelled the first, second, third, fourth, sixth, seventh, eighth, and ninth pleas for the defenders, or any of them?
4. Was the Sheriff bound to allow the defenders a proof of their averments?

The provisions of the Rivers Pollution Acts in question in the case are quoted by the Lord President in his opinion.

Argued for the Appellants: The Sheriff was wrong in not allowing a proof. The offence charged was that of having "knowingly permitted sewage to fall or flow," under sect. 3 of the Act of 1876. The offence was denied, and it was averred that private parties had prescriptive rights in the matter over which the appellants had no control. The case of the *Midlothian County Council* v. *Oakbank Oil Co. Ltd.* (1904, 6 F. 387), relied upon by the respondents, had no bearing. That case dealt with parties "causing" pollution under sect. 4, and did not touch the question of "knowingly permitting" here raised. The Court would insist upon full enquiry, especially where it was sought to interfere with the actings of a public body, nor would it grant interdict to compel parties to do what they were unable to do (*Att.-Gen.* v. *Dorking Guardians*, 1881, 20 Chan. Div. 595; *Kirkheaton Local Board* v. *Ainley, Sons & Co.* [1892], 2 Q.B. 274; *Yorkshire W. Riding Council* v. *Holmfirth*

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San. Auth. [1894], 2 Q.B. 842, p. Lindley, L.J., at p. 849).

Argued for the Respondents: The Sheriff had decided rightly. The obligation of the burgh to purify all sewage entering streams within its jurisdiction was absolute (*Midlothian County Council* v. *Oakbank Oil Co.*, *sup. cit.*). This was the effect of sect. 1 of the Act of 1893 (*Midlothian County Council* v. *Oakbank Oil Co.*, *sup. cit.*). There was no relevant averment that the appellants were using any means of preventing pollution which would entitle them to the exemption given in par. 2 of sect. 3 of the Act of 1876. Nor was there any relevant averment that the streams were *de facto* free from pollution when they entered the district of the respondents. The burgh had compulsory powers under the Burgh Police Act 1892 of dealing with drainage and pollution, but had taken no action thereunder.

Leave was given to the appellants, after the hearing of the case, to amend their record by the addition of the following statement:—

"At the point where the said streams leave the jurisdiction of the appellants and enter the territorial jurisdiction of the respondents they are not polluted by any solid or liquid sewage matter."

The Court, in respect of the Minute of Amendment, *found* it unnecessary to answer the questions submitted in the case, *recalled in hoc statu* the interlocutor of the Sheriff dated 10th April 1906, and *allowed* the parties a proof of the averments contained in the said Minute.

The Lord President.—My Lords, these are two special cases which are brought under the provisions of the Rivers Pollution Prevention Act of 1876, submitting for review a finding of the Sheriff to whom the complaint was presented. The complaint in each case is at the instance of the County Council of the county of Lanark, and is directed against the Magistrates of Coatbridge and the Magistrates of Airdrie in their capacity as Public Health Authority; and what the complaint seeks is to have a declaration that these two public authorities are committing an offence under the third section of the Rivers Pollution Act, and should be restrained from so doing. The offence which they are alleged to have committed is that they have allowed sewage matter from their system of drains to go into a certain set of small streams which are mentioned in the petition. Now, my Lords, the defence that is made by the two local authorities is twofold. The defence of which we heard most at the time of the discussion was that these two local authorities—who admit that they are the drainage authorities and that they have a system of drains—took over their system of drains, to a great extent at least, at a time prior to the passing of the 1876 Act; that as a matter of fact the streams in question had long ago been turned into what are practically sewers; and that the inhabitants of the two respective burghs had long ago gained a prescriptive right to put their sewage into these streams. On that state of facts the appellants have argued that no offence could be committed, and that they are entitled to be free. There is a second line of defence, which I shall presently notice; but, my Lords, as regards the first I think it is necessary first of all to look carefully at what the statute has laid down upon the matter. The offence is determined by the third section of the Act of 1876, which is in these terms:—"Every person who causes to fall or flow, or knowingly permits to fall or flow, or to be carried into any stream, any solid or liquid sewage matter, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act." Now, the burghs deny that the streams mentioned in the petition are streams in the sense of the Act. The Sheriff has decided that against them, and I think that there can be little doubt that the Sheriff here was right. A stream does not cease to be a stream because as a matter of fact after a portion of its passage through land you cover it up and practically make a drain of it. It still retains its character as a stream which is not purely historic, and it emerges as a stream after you get outside the territory. I think this is made still more clear by the terms of the definition which is given in sect. 20, where "stream" is said to include—I am omitting other parts of the section—"rivers, streams, canals, lakes, and watercourses other than watercourses at the passing of this Act mainly used as sewers, and emptying directly into the sea or tidal waters. . . ." Now, the streams in question here are not streams which empty directly into the sea, and therefore I think that ends it.

Now, the next branch of their defence is that inasmuch as the sewage is being contributed by other persons who have, as they allege, a prescriptive right to put in the sewage, the appellants cannot be "causing to fall or flow, or knowingly permitting to fall or flow," that sewage. My Lords, I think that would have been a question of considerable difficulty if the matter had rested upon the Act that I have quoted alone, but then it does not, because there is the explaining Act of 1893, and that Act, which is headed "An Act to Explain the Rivers Pollution Prevention Act 1876," provides by the first section, "Where any sewage matter falls or flows or is carried into any stream after passing through or along a channel which is vested in a sanitary authority, the sanitary authority shall, for the purposes of sect. 3 of the Rivers Pollution Prevention Act 1876, be deemed to knowingly permit the sewage matter so to fall, flow, or be carried." My Lords, I entirely agree with the remark of the learned Dean of Faculty that that section was passed for the

very purpose of avoiding these difficult questions, and in my judgment that section concludes the matter. We are here, on these facts, directly under the words of the section, and therefore I think it is out of the question to say that these local authorities here do not permit to fall, or flow, or be carried into any stream, any solid or liquid sewage matter, provided that solid or liquid sewage matter goes in.

Now, another point was incidentally raised. The third section which I have quoted goes on thus: "Where any sewage matter falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this Act for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow or to be carried, shall not be deemed to have committed an offence against this Act, if he shews to the satisfaction of the Court having cognisance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the stream." Now, the local authorities here have put in an averment to this effect. They say that besides the sewage which is in these streams or sewers there are also a great many chemical discharges and other discharges from works, and that these chemical discharges act as re-agents, with the result that the whole liquid is purified; and, accordingly, counsel argued to us that there could not be an offence here, because they had really come under the terms of this second bit of the third section. My Lords, I think here again the Sheriff has taken the right view, that we are not within the scope of that provision at all, because I think the second part of the third section clearly points to a person who allows the sewage to go in, doing something to prevent the contaminating nature of that sewage when it gets there, whereas the point of the averment here is that they do nothing. I think, therefore, that there is no averment which brings them under that second part of the third section. That, however, does not conclude the whole matter against them, as I shall presently shew when I come to the other sections. My Lords, the result, as far as I have gone at present, therefore, seems to me this, that the learned Sheriff is perfectly right in holding that upon the face of the proceedings there had here been an offence committed, and that the local authorities of these two burghs could not take any help either first, from the fact that the sewage was put in by persons who, they allege, to a great extent had a prescriptive right to put it in, or, second, from the fact that they further said that other things went in which rendered the sewage innocuous.

But then, my Lords, there is another matter which I think perhaps a little escaped notice, through the form of the pleadings, and chiefly through the fact that the brunt of the contest in the Court below was upon the topics which I have just handled, and that is this: the complaining authority here have only got a title, they not being in the district themselves, under the eighth section of the Act. Now, the eighth section of the Act says this: "Every sanitary authority shall, subject to the restrictions in this Act contained, have power to enforce the provisions of this Act in relation to any stream being within or passing through or by any part of their district, and for that purpose to institute proceedings in respect of any offence against this Act which causes interference with the due flow within their district of any such stream, or the pollution within their district of any such stream, against any other sanitary authority or person, whether such offence is committed within or without the district of the first-named sanitary authority." Now, here it is quite clear that the offence is committed outside the district of the complaining sanitary authority, and therefore the complaining sanitary authority can only have a title if there is caused pollution within their district of any such stream. Now, I have already mentioned these averments to the effect of there being chemical matters put in which acted as re-agents and purified the sewage. The averments are put in with reference to the point which I have already dealt with, but of course if they were true in fact it would lead to the conclusion that when the general liquid went out of the district of the first sanitary authority into the second, it emerged as a pure liquid. Something very near an averment to that effect is put in the pleadings, because speaking of what they call the lower waters, they do say in Statement 2 of the Statement of Facts for the defenders, "The lower waters of the said burns and streams are not polluted by the defenders." My Lords, your Lordships thought that that was not a very satisfactory state of averment, and the averment has now been cleared up by the defenders having put in a Minute in these terms:—"They crave leave to amend the record by inserting 'At the point where said burns or streams leave the territorial jurisdiction of the defenders and enter that of the pursuers, they are not polluted by solid or liquid sewage matter.'" Now, my Lords, that seems to me a perfectly straight and satisfactory averment, and if that averment is true, then I think it is quite clear that the title of the complaining authority disappears, because they do not bring this within the words of section 8 which alone gives them a title; and therefore I think with regard to that averment, which I think they are of course entitled to make, that the finding of the Sheriff, who, without proof, has decided that an offence has been at this moment committed, cannot stand. I do not think that it is at all the Sheriff's fault, because I think, as

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I say, that the brunt of the discussion turned upon the other topics before him, and this particular topic was rather lost sight of and not sufficiently accentuated in the pleadings of the defenders; but I think the defenders are clearly entitled to have an opportunity of proving that, and if they prove it satisfactorily, then I think the pursuers would have no title to ask for a finding that an offence has been committed. Accordingly, I think what your Lordships ought to do is to send back the case to the Sheriff with the intimation that is contained in our opinions that he should allow this amendment of the record and allow a proof upon that specific point, and upon that specific point alone. But I think we can do nothing else, because if I may assume for the moment that the defenders—I am merely assuming by way of hypothesis—if I assume for the moment that the defenders fail upon that, then I think the Sheriff's finding that an offence has been committed was quite right, that is to say, that I do not think there was any good case upon the second portion of section 3—anything which hung up the question of an offence having been committed. What I think did then ensue was an enquiry under section 10, and *that* the Sheriff was prepared to make, because he had made a remit under section 10. Section 10 does not compel the Court to pronounce interdict at once, for it provides that the Court may insert such conditions as to time or mode of action as it may think just, and really puts the Court in complete possession of the matter. Moreover, it also provides: "Previous to granting such order the Court may, if it thinks fit, remit to skilled parties to report on the best practicable and available means." The matter is somewhat complicated, but I hope I have made it sufficiently clear that I think the Sheriff's judgment was completely right, with the exception that there was this question of fact which is disputed, and which underlies the whole matter of title. If that is cleared out of the way I think the Sheriff's judgment is right. Under these circumstances I do not think it is necessary to answer the specific questions, but simply to remit the case *simpliciter* to the Sheriff, with this indication, that we think he ought to allow the amendment of the record and proof upon that single point.

Lord Kinnear.—My Lord, I concur.

Lord Dundas.—I agree with the course your Lordship proposes, for the reasons which you have stated.—*5th July* 1907.

Counsel for the County Council of Lanark, Dean of Faculty (Campbell, K.C.), Murray; Agents, Ross Smith & Dykes, S.S.C.—Counsel for the Burgh of Coatbridge, Hunter, K.C., Horne; Agents, Laing & Motherwell, W.S.—Counsel for the Burgh of Airdrie, Scott Dickson, K.C., Morrison, K.C., Horne; Agents, Drummond & Reid, W.S. W. A. R.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

124. Howard's Trustees *v.* Howard and Others.

Fee and Liferent—Company—Bonus Paid out of Reserve Fund—Simultaneous Creation of New Capital—Capital or Dividend—Held That Bonus Dividend Did Not Go to Liferentrix.

Special Case.

This was a special case presented for the opinion and judgment of the Court as to whether a liferenter or fiars under a trust disposition and settlement were entitled to payment of a bonus on certain shares held by the trustees under the settlement. By trust disposition and settlement dated 18th May 1891 James Brown Howard gave to his widow, the second party to this case, the liferent of his whole estate. The third parties were the residuary legatees under the trust disposition and settlement. James Brown Howard died on 16th May 1895. Shortly before his death the business of theatrical proprietors, of which the truster was a partner, was acquired by a company known as Howard & Wyndham Ltd., and by article 9 of the articles of association the company was empowered from time to time to increase its share capital. The truster, and afterwards the first parties to this case as trustees under the trust disposition and settlement, held, among others, certain ordinary shares in the company, and by agreement entered into with the company the truster was bound not to sell any of the ordinary shares for a period of seven years from the term of Whitsunday 1895. The trustees held the truster's ordinary shares until after the seven years had expired; and having thereafter disposed of part of their holding, they held, as at 19th April 1904, 620 ordinary shares of the company.

On 29th February 1904 the directors of the company issued a circular letter intimating to the shareholders that, as the result of the year's working, the reserve fund of the company would be increased to £35,000 and that as a sum larger than the amount of the reserve had been expended in connection with a new theatre in Glasgow, the directors recommended that the capital of the company should be increased, and the reserve fund of £35,000 should be applied by the shareholders in payment of 7000 additional ordinary shares of £5 each to be allotted to existing ordinary shareholders, and on this being done, that a special dividend or bonus of £5 on each ordinary share should be declared.

On 19th April 1904 the directors issued another circular letter to the shareholders intimat-

ing that the above proposals had been carried into effect, and enclosing a letter of allotment with warrant for the amount of the bonus attached to the allotment letter, and requesting the ordinary shareholders, if they desired to take up the allotment, to sign and return the allotment letter, and stating that the annexed warrant could be made available for paying up the amount due on the shares allotted. The first parties, as trustees, signed and returned the allotment letter for 620 new ordinary shares allotted in respect of their holding, and also signed the bonus warrant and returned it to the company, the bonus being applied in payment of the shares allotted. The 620 new ordinary shares allotted to the trustees were afterwards sold at £6 per share.

The question arose between the parties to this case as to whether the said special dividend or bonus declared by the company and paid by them to the trustees in respect of the shares held by them, or the price obtained for the shares purchased by the trustees with the said bonus, fell to be paid over to the second party absolutely, or whether the amount of the bonus, or the proceeds of the new shares of the company purchased by the first parties with the special dividend or bonus, should continue to be held by the first parties for the liferent use only of the second party, and for the third parties in fee.

The following questions of law were submitted for the opinion and judgment of the Court:—

1. Was the second party entitled to the said special dividend or bonus declared and paid by the said Company on the ordinary shares held by the first parties for her in liferent?

2. If the first question be answered in the affirmative, is the second party now entitled to payment of (1) the proceeds of the said shares which were purchased with the said special dividend or bonus? or (2) the original amount of the said special dividend or bonus?

The first and third parties *maintained* and *argued* that the amount of the special dividend or bonus formed part of the capital of the trust estate, and that the same, or the proceeds of the shares allotted to the first parties in consideration thereof, must be held by the first parties for the liferent use only of the second party, and for behoof of the third parties in fee.

The second party *maintained* and *argued* that the special dividend formed part of the income or revenue of the trust estate, and that the proceeds of the shares allotted to the first parties in consideration thereof, or, in any event, the amount of the special dividend or bonus, must be paid over to her absolutely.

Reference was made to the following cases:—*Bouch* v. *Sproule*, L.R. 12 A.C. 385; *Gunnis' Trs.* v. *Gunnis*, 1903, 6 F. 104; *Cunliff's Trs.* v. *Cunliff*, 1901, 3 F. 202; *Blyth's Trs.* v. *Milne*, 1905, 7 F. 799; *In re Malam* [1894], 3 Ch. 578.

The Court *answered* the first question in the negative, holding that the bonus dividend did not go to the liferentrix.

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The Lord President.—My Lords, the question here is whether the liferenter or the fiars should get a certain payment of a bonus of £5 on each of 620 ordinary shares of the company of Howard & Wyndham, which were held by the trustees in the settlement of Mr James Brown Howard. Your Lordships had occasion very recently in the case of *Blyth*, 7 F. 799, to examine the law on this matter, and I think it would be useless to repeat what was there said, because I understand all your Lordships agree that the law as laid down there was correct. But the difficulty always comes in the application of that law to the precise facts of each case; and I think I had occasion in *Blyth's* case to point out that no one case could be held to rule another, though of course cases might be cited as types of the different class of facts to which the law became applicable, taking them as types and nothing more. The whole question here is whether this case falls within the type of *Blyth's* case, where we held the dividend was properly dividend and was therefore given to the liferenter, or whether it falls within the type of *Gunnis's* case, 6 F. 104, where the Second Division held that it was not dividend but fell to the fiars

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I think Lord Herschell made the remark in the case of *Bouch*, L.R. 12 A.C. 385, that it was necessary to look both to the form and substance. I try, therefore, to look at both, and I find that the matter begins thus. The directors of the Company sent out a letter to the shareholders in which they say that the sum at the credit of reserve is now increased to £35,000. And then they go on to say: "As the Company has expended in connection with the new King's Theatre in Glasgow (which is practically completed) a sum larger than the amount of the reserve, the directors are of opinion, and recommend, that the reserve should now take the more permanent form of additional capital." Now that is as plain as words can put it, that here what the directors meant by the phrase "dividend" is a distribution of capital and not of revenue, and for this very good reason, that really they had not the money to distribute as dividend. They had got £35,000 at the credit of reserve, but at the same time had spent more than £35,000 in erecting a new theatre, and they said, "We want to keep this as capital, and propose that our reserve fund should assume the form of capital." More than that, I do not think myself that at that moment the directors could have divided the £35,000 as dividend, because in the condition that the Articles of Association stood in at that moment the reserve fund was controlled by Article 115, which was this:—"Subject to the provisions of these presents, the directors may, before recommending any dividend, set aside,

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out of the profits of the Company, such sum as they may think proper as a reserve fund to meet contingencies or for equalising dividends." I think that, standing that article without any alteration on it, they could not have divided the whole of the reserve fund as bonus, because you could not call it an equalising dividend, and it is not to meet contingencies, and the directors must have felt that in doing what they next proceeded to do. They altered that article by special resolution by adding the following words, "or for paying special dividends or bonuses." What they did after that first letter was, that they then proceeded to create new capital and to offer that new capital to the shareholders, and also to declare a special dividend bonus in terms of that addition to Article 115, and to declare it at such an amount that each shareholder by getting the dividend bonus would have exactly enough money to pay for the new share. It is perfectly true that that was done in such a way that, if a shareholder had taken up his dividend warrant, he might have got money for it without applying it to the purchase of the new shares, and he might have transferred his letter of allotment to somebody else. But the substance of the transaction was, I think, clear, and that was that the distribution was not as dividend but as division of capital, though the precise way in which it was done was by dividend warrant. I therefore think that the design was on the same lines as in *Gunnis's* case, that the distribution was of part of the capital, and so the question of law falls to be answered by saying that the second party is not entitled to the special dividend or bonus. That supersedes the second question.

Lord Kinnear.—I am of the same opinion. Of the cases cited, that of *Gunnis* comes nearest to the present, although the rule we are to follow is laid down with the highest authority in the case of *Blyth*. I agree that the so-called bonus dividend in question must be treated as capital, for the reasons your Lordship has stated. It was not any part of the intention of the directors, or of the shareholders who assented to the scheme proposed by the directors, to distribute the reserve fund as money available for the payment of dividend or bonus, and it was quite impossible that anything of the kind could have been done, both because the Articles of the Company as they stood would not have allowed it, and also because the money no longer existed so as to be divisible in that form. The money had been spent in acquiring a new theatre in Glasgow, and the whole purpose of the operations proposed by the directors and assented to by the Company appears to me to have been simply this—to state the accounts so as to record in the most convenient form operations that had been already carried out, and to define the interests of the shareholders in the result. The good faith of the transaction between the Company and the shareholders appears to me to have been that the shareholders on obtaining these dividend warrants were to apply for allotment of the new shares. It is quite true that any individual shareholder might, if he thought fit, have done otherwise and turned his dividend warrant into money. But, in the first place, that was not the true intent of the transaction as between the shareholders and the Company; and, in the second place, it is apparent on the face of the circular letter issued by the directors that they had throughout a well-justified confidence in the action of the directors, because it was for their "interest to take up the allotment." The trustees accordingly did take up the allotment, and I think nobody disputes that in doing so they were acting prudently in the administration of their trust. I quite agree that they were dealing with the capital of the trust estate, and that the new shares form part of the capital and no part of the income.

Lord Dundas concurred.—18*th July* 1907.

Counsel for First and Third Parties, D. Anderson; Agents, Lockhart Thomson & Stevenson, W.S.—Counsel for the Second Party, W. T. Watson; Agent, Robert Stewart, S.S.C.

For W. A. R., J. W. M.

FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

125. Mitchell *v.* Whitton.

WORKMEN'S COMPENSATION ACT 1897, SECTS. 1, 2 (C)—"SERIOUS AND WILFUL MISCONDUCT"—DRIVING CART WITHOUT HOLDING REINS—BREACH OF ROAD REGULATION—ROADS AND BRIDGES (SCOTLAND) ACT 1878 (41 AND 42 VICT. C. 51), SCHEDULE C, SECT. XCVII.—DRIVING WITHOUT HOLDING REINS NOT "SERIOUS AND WILFUL MISCONDUCT."

Stated Case under Workmen's Compensation Act 1897.

This was an appeal by way of Stated Case from a decision of the Sheriff-Substitute (Campbell Smith) in an arbitration under the Workmen's Compensation Act 1897, in the Sheriff Court of Forfarshire at Dundee, between Mrs Mary Lyall or Mitchell and others, widow and children of the late William Mitchell, farm servant, Waterybutts, Barry, and James Whitton, farmer there.

The facts as stated by the Sheriff-Substitute are summarised as follows:—The deceased William Mitchell was employed as a farm-servant on the farm of Waterybutts, of which James Whitton

was the tenant. On 14th January the deceased was in charge of a horse and cart belonging to Whitton, and was killed by the cart being overturned and falling upon him. At the time when the accident occurred the deceased was driving the cart along a public road, and was not holding the reins in his hand, but had tied them within reach to the left upper ring of the breeching. The accident was caused by the horse suddenly bolting off the road through an open gate into a field. The left wheel of the cart passed over a heap of road scrapings and ran into the left hand pillar of the gate, with the result that the cart was overturned and the deceased killed.

In these circumstances the Sheriff-Substitute found in fact that the death of the workman was not attributable to any serious and wilful misconduct on his part.

The question of law for the opinion of the Court was:—

Was the accident to the deceased attributable to his own serious and wilful misconduct within the meaning of sect. 1, sub-sect. 2 (*c*), of the Workmen's Compensation Act 1897?

Schedule C, sect. xcvii., of the Roads and Bridges Act 1878 provides that—

"if the driver of any cart, ... on any turnpike road shall ride on the shafts, or in or on any other part of such carriage, without having and holding reins attached to each side of the bridle of each beast of draught drawing such cart . . . . or shall at any time leave the same travelling on any such road without having some person to guide the beast . . . . such driver shall for every such offence forfeit and pay a sum not exceeding five pounds, over and above the damages occasioned thereby."

James Whitton *appealed* and *argued*: (1) The accident was due to the deceased's serious and wilful misconduct in not holding the reins in his hand, and thus keeping control of the horse. (2) The case was analogous to that of *Dobson* v. *United Collieries Ltd.*, 1905, 8 F. 241. In that case it was held that disobedience to a duly published special rule in force in a mine was serious and wilful misconduct. In this case the deceased was in breach of a statutory regulation in driving the cart without having the reins in his hand (Roads and Bridges (Scotland) Act 1897, Schedule C, sect. xcvii.).

Counsel for respondents were not called on.

The Court *answered* the question of law in the negative.

The Lord President.—I think this is a pure question of fact, and that the Sheriff-Substitute's statement of the circumstances discloses nothing that can give rise to a question of law. I therefore think it is not a case for review. In such cases there may be a question raised which is one of mixed fact and law and so capable of review, but I do not think the question here is of that nature. But even if I could have reviewed the decision I should have come to the same conclusion, for I think there is nothing disclosed here which amounts to serious and wilful misconduct, as that has been interpreted in various well-known decisions in the House of Lords. I think, therefore, the question must be answered in the negative.

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Lords M'Laren, Kinnear and *Pearson* concurred.—18*th July* 1907.

Counsel for Appellant, T. B. Morison, K.C., J. Macdonald; Agents, Gordon, Falconer & Fairweather, W.S.—Counsel for Respondents, G. Watt, K.C., Macmillan; Agents, Gardiner & Macfie, S.S.C. A. M.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

126. J. A. Mactaggart & Co. *v.* Roemmele and Another.

Property—Building Restrictions—Right of One Vassal to Enforce Restrictions Against Another—Acquiescence—Restriction Against Building Tenements Within a Certain Area—Held that Acquiescence in the Building of Tenements in Parts of Area Did Not Bar a Feuar from Enforcing Restriction Against a Co-Feuar Proposing to Build Tenement Next Door.

Appeal from Dean of Guild Court of Glasgow.

This was an appeal from a decision of the Dean of Guild of the City of Glasgow (Mason) in a petition for lining at the instance of J. A. Mactaggart & Company, builders, Glasgow. The petition was objected to, *inter alios*, by Mrs E. E. Roemmele and William Baird.

The petitioners pleaded, *inter alia*:—"2. The respondents' objections should be repelled, and decree of lining granted as craved, in respect . . . (*d*) the respondents are barred by their acting and acquiescence from insisting on them."

The Dean of Guild *granted* the decree of lining, and the respondents *appealed*.

The facts of the case appear from the Lord President's opinion.

The accompanying map is a copy of the plan referred to in the titles, with these exceptions:—the red line in the plan is a black line on the map; the sites of the tenements in existence at the date of this petition are hatched at the edges, and the site of the proposed tenements is hatched all over.

The following authorities were referred to:—For the Appellants: *Liddell* v. *Duncan*, 1898, 25 R. 1119. For the Respondents: *Johnston* v. *The Walker Trs.*, 1897, 24 R. 1061; *Stewart* v. *Bunten*, 1878, 5 R. 1108; *Gould* v. *M'Corquodale*, 1869, 8 M. 165.

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J. A. Mactaggart & Co. v. Roemmele and Another.

The Lord President.

The Court *recalled* the interlocutor of the Dean of Guild, and *refused* the decree of lining.

The Lord President.—This is an appeal from a decree of lining granted by the Dean of Guild of Glasgow. The petitioners propose to erect tenements upon a piece of land situated between Cambridge Drive and Kelvinside Gardens. This was objected to by several of the petitioners' neighbours as being in contravention of the restriction contained in the petitioners' title. The Dean of Guild repelled the title of all but two neighbours, namely, Mrs Roemmele and Mr Baird, and the other objectors acquiesced in his judgment. As regards Mrs Roemmele and Mr Baird, the Dean of Guild sustained their title, and further, held that the erection of the tenements in question was in violation of the restriction contained in the petitioners' titles; but, in respect that the petitioners pled—plea 2 (*d*),—that the respondents were barred by their acting and acquiescence from insisting in the objections, he allowed the petitioners a proof of their averments supporting that plea. The averments, so far as relating to the two objectors, are stated in answer 15 of the petitioners to the objectors' statement of facts as follows:—"Denied. Explained that tenements of four storeys in height have already been erected in Kelvinside Gardens, partly opposite the ground on which the petitioners propose to erect tenements, and also almost wholly opposite the ground owned by the objector Mrs Emilia Elizabeth Bost or Roemmele. . . . Explained further, that in the immediate neighbourhood, on part of said lands on the east of Kelvinside, four-storey tenements have also been erected."

Upon the result of that proof the Dean of Guild sustained the plea and granted the decree of lining. Against that interlocutor the present appeal is brought. The objectors, in the original pleadings, stated some objections to the petitioners' title, but before your Lordships they have not argued these questions, and have restricted their argument to the question of whether the Dean of Guild was right in sustaining the plea of "bar." In the same way, the respondents before your Lordships have abandoned all other pleas than that sustained, and in particular they conceded that the objectors, the respondents to the appeal, had, apart from "bar," a good title as co-feuars to insist on the restriction in the petitioners' titles, and that the operations proposed were in violation of these restrictions.

The question thus raised is an important one, and not directly, I think, covered by decision. It is important, therefore, first to see exactly how the facts stand as to the actings or acquiescence of the objectors, which have, according to the judgment, barred them from insisting on what otherwise would be their right. The community of feuars who are, by the Dean's judgment, agreed to in so far by both parties, *in titulo* to mutually enforce restrictions against each other, are the feuars whose feus are situated within a red line delineated on a plan referred to in the titles. It may be described thus:—The red line begins at the place called Queen Margaret's Drive. It then goes along Cambridge Drive, and then cuts to the southward at a point which I cannot indicate otherwise than by saying that it goes down past the letter "D" on the plan in process in the word "Drive" of Cambridge Drive, and through the letter "A" of "Kelvinside Gardens." It then comes south to Doune Terrace, and then goes along Kelvinside Terrace North, and finally meets at Queen Margaret's Drive, where it started. It thus includes an area which consists of stances or lines of building ground facing Queen Margaret's Drive, part of Cambridge Drive, part of Kelvinside Gardens, and Kelvinside Terrace North. Now, what has happened in the past is this: at the north-west of the ground tenemental erections have been made, that is to say, some have been constructed upon that portion of the ground facing Queen Margaret's Drive and the western portion of Cambridge Drive. Nothing of a tenemental character has been put upon the north side of Kelvinside Gardens or upon that portion of Kelvinside Terrace North which is found between the end of Kelvinside Gardens and the beginning of Queen Margaret's Drive. A short piece of tenemental building has been erected on the south side of Kelvinside Gardens opposite Mrs Roemmele's villa and a portion of the ground for which a lining is here sought. There are also pieces of tenemental building facing southwards, and situated in the south-east corner of the area enclosed within the red line.

The whole matter may be summarised thus. As far as Mrs Roemmele is concerned, she has got tenemental buildings on the opposite side of the street opposite her, but she has got none as her next-door neighbour. As far as Mr Baird is concerned, he has not got any opposite or behind him, and he has got none as next-door neighbour, but, of course, there are on various portions, as I have already described, of this area within the red line, undoubtedly tenemental buildings. The proposal of the petitioners is to erect tenemental buildings which will be next door both to Mrs Roemmele and Mr Baird, and which will for the first time invade that peninsula of land formed by Cambridge Drive and Kelvinside Gardens coming together, and which at present is entirely dedicated to the original villa buildings which were erected.

I now propose to examine the authority as to this branch of the law. I do not think it necessary to go through the long series of cases which gradually established the proposition that there might be created by the original act of the superior a right in each of a set of vassals to enforce restrictions in the titles of another vassal

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with whom they had no direct privity of contract and no direct relation of tenure, because the whole law on the subject may be said to be summed up in two leading cases in the House of Lords, namely, *Hislop* v. *MacRitchie's Trs.*, 1881, 8 R. (H.L.) 95, and the *Earl of Zetland*, 1882, 9 R. (H.L.) 40. These two cases seem to me to lay down with great precision the position of the superior and of the feuar. Thus Lord Watson says of the superior (*Lord Zetland's* case, at p. 47)—"I agree with the Lord Ordinary in thinking that the case of the *Tailors of Aberdeen* v. *Coutts* does determine that wherever a feu-right contains a restriction on property, the superior, or the party in whose favour it is conceived, cannot enforce it unless he has some legitimate interest. But that case does not lay down the doctrine that an action at the superior's instance, which merely sets forth the condition of his feu-right and its violation by his vassal, must be dismissed as irrelevant because the pursuer has failed to allege interest. *Prima facie*, the vassal, in consenting to be bound by the restriction, concedes the interest of the superior; and, therefore, it appears to me that the onus is upon the vassal who is pleading a release from his contract to allege and prove that, owing to some change of circumstances, any legitimate interest which the superior may originally have had in maintaining the restriction has ceased to exist. The law was so stated, and, in my opinion, correctly stated, by Lord Neaves in the case of *Campbell* v. *Clydesdale Banking Company*."

On the other hand, in regard to the feuar, the same noble and learned lord says (8 Rettie, H.L., p. 102):—"It is necessary to keep in view that when the feuar has a *jus quæsitum*, his title and that of the superior to enforce common feuing conditions are independent and substantially different rights. The title of the superior rests upon contract, a contract running with the estate of superiority, and burdening the subaltern estate of the vassal. The right of the feuar, though arising *ex contractu*, is of the nature of a proper servitude, his feu being the dominant tenement; consequently he cannot enforce it against other feuars, except in so far as he can qualify an interest to do so. Again, the superior's consent to discharge the condition cannot affect the right of the feuar, and as little can the feuar's renunciation of his servitude impair the superior's right to enforce the condition."

This difference in the right which exists in the superior and in the co-feuar seems to me necessarily to affect the character of the acts or omissions which will constitute a bar against them seeking to enforce their rights. It is clear that the actings of the superior cannot bind the co-feuar, and *vice versa*. But the matter goes deeper than that. Observe, for instance, the position which arises in the case of what I may call the first offender, that is, the case of the first feuar contravening the restrictions. The superior may object here at once, for, as Lord Watson says, his interest is *prima facie* conceded, and I am supposing there has been nothing extraneous to destroy the interest which the superior originally had. The superior, therefore, is clearly entitled to stop him. But with the co-feuar it is otherwise. He cannot stop him unless he can show a proper interest to do so. Accordingly, if the superior allows the act of the first offender to pass, he must either have willingly allowed it, or he must have conceded that all the legitimate interest to stop such acts was gone, whereas the only inference to be drawn from the *non renitentia* of the co-feuar is, that he did not consider that in that instance his interest was sufficient to warrant his interfering.

I am, therefore, not surprised to find that, so far as the decided cases were concerned, there was not produced to us any instance of a decision in which the co-feuar has been held barred from objecting to the contravention by A because he did not formerly object to the contravention by B, the quality of his interest to object to the operations of A and of B not being the same. On the contrary, the decisions of *Stewart* v. *Bunten*, and especially of *Gould* v. *M'Corquodale*, go quite the other way. In the case of the superior, there were the well-known decisions of *Browns* v. *Burns*, 1823, 2 S. 298, and *Campbell* v. *Clydesdale Bank*, 1868, 6 M. 943. But, as I have already pointed out, the superior is in a very different position. In other words, it is much more difficult to affirm that the quality of the superior's interest differs as regards each instance than it is to do so in the case of the co-feuar.

I do not think it necessary to go so far as to say there cannot be an instance where the failure of the co-feuar to assert his right in the case of other co-feuars may not be such as to allow the inference to be drawn that he has totally abandoned the right to enforce. Such an inference could strictly be drawn from the fact of his having himself contravened, and the undoubted acquiescence of his author in the dominant tenement may in this matter be reckoned as his own (*Muirhead* v. *Glasgow Highland Society*, 2 M. 420). But once it is settled that the right is a proper servitude on each of the separate feus, it is, to say the least of it, not easy to infer that because A does not stop B, he intends to free also C and D.

Applying these views to the facts of the present case, I come to the conclusion that the objectors are not barred from insisting in their admitted right to stop the proposed contravention of the petitioners. The Dean of Guild seems to me to have erred in limiting interest to one consideration only, namely, the uniformity of building in the whole neighbourhood. I do not doubt that that may represent an interest, but it is not the whole interest. A man may, it seems to me, well say: "I do not object to tenements in the

neighbourhood; I do object to them next door." I think also that, within reasonable limits, a man may be allowed to be the best judge of his own interest. Whether the objector Baird could have stopped the erection of the more distant tenements may be doubtful. But, even assuming that he could, I do not think that, if he did not, he thereby forfeited his right to stop them next door. *Tua res agitur paries cum proximus ardet* is, I think, good law as well as common sense.

The position of Mrs Roemmele is more difficult. But I come to the same result. An opposite neighbour is not the same as a next-door one; and after all there is, I think, a legitimate interest in conserving the oasis of ground between Cambridge Drive and Kelvinside Gardens, which is as yet unspoiled by tenemental buildings. In the words of Lord Kinloch in *M'Gibbon* v. *Rankin*, 9 M., at p. 432, "The locality must doubtless in its own time follow the fate of most city localities, and do so with that unanimous consent which will get the better of special restrictions. Carlton Place of Glasgow, once well known as the residence of her foremost citizens, must descend to a lower rank and to baser uses, but the time is not to be heedlessly and injuriously precipitated."

For these reasons I am of opinion that the judgment of the Dean of Guild is wrong, and ought to be reversed.

Lord M'Laren.—The present case is, by the party maintaining the Dean of Guild's judgment, sought to be assimilated to the case of *Campbell* v. *The Clydesdale Banking Co.*, 6 M. 943, which was decided on the principle that there had been a general abandonment of the original conditions of feu on the part of the community of feuars. I need hardly say that the case referred to is a very important authority, and for a period extending to nearly forty years it has been understood to regulate the rights of a member of a community of feuars who by tacit consent have relaxed the conditions imposed on them by the superior, and have used their property in a way which they conceived to be advantageous to themselves.

But in that case the action was at the instance of the superior, who was not successful in persuading the Court that he had any interest in the matter other than his interest to maintain his security for his feu-duties. I observe that Lord Cowan, who delivered the leading opinion in the case, states that the whole body of feuars were at one in holding it to be for their interest to depart from the building restriction, in repudiating it, as neither conducing to their utility nor to the ornament of their several possessions. His Lordship proceeded to observe that the superior's objections on this head had been disproved, and the judgment proceeded on the want of interest on the part of the superior to enforce the building restriction.

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Now I am far from saying that in a question of this nature the consent, express or implied, of every individual feuar is a necessary step to the assertion of the right of one of them to vary to some extent the conditions by which he and his predecessors in title were originally bound. In the case of *Johnstone* v. *The Walker Trs.*, 24 R. 1061, which came before this Division of the Court, it was assumed that a general departure from a building condition would amount to acquiescence on the part of the community of feuars. But this principle, founded as it is on equitable considerations, is subject to a very important qualification, viz. that the inference of general consent or acquiescence is not to be extended to alterations of a different character from those which have been permitted. On this point Lord Adam observes that the consent to the abandonment of certain building restrictions, implied from acquiescence, does not imply consent to the abandonment of all building restrictions which may be imposed upon the feuars. And in my own opinion the principle is stated to be, that where alterations or variations of the conditions of the feu-right have been permitted, the presumption is not for abandonment, but only for relaxation of the conditions of feu, according to the nature of the variations to which the feuars have presumably consented.

When we consider the facts of the present case, I think it may be taken that the appellants were tolerant of deviations from the conditions of feu which did not interfere with their personal comfort or convenience. They were not made parties to the Guild Court proceedings under which power was given to put up tenement or flatted houses within the area of the superiority, and apparently they did not consider that they had such an interest as would justify their intervention. Now I think it would be a very inconvenient, not to say inequitable, rule that a feuar who becomes aware of some infraction of building conditions by a feuar from the same superior, but at such a distance from himself that the infraction causes no inconvenience to him, must either apply for an interdict or be taken to have waived his right to enforce the condition in a question with conterminous feuars or disponees. I am putting an extreme case, in order to test the argument; because if in the case supposed the feuar does not lose his right to object by reason of tolerance or acquiescence where his comfort is not affected, then it is a question of degree, or rather a question of fact, in each case, whether his tacit assent or *non-repugnantia* in one or more cases of deviation from the conditions amounts to an abandonment to all intents of his rights in a question with the community.

In the present case I am not of opinion the abstention from legal proceedings on the part of the appellants, in cases where they did not conceive that their interests were affected, amounts

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to an abandonment of their rights to enforce the building conditions. I gather from the proof that Mr Baird's interest to enforce the conditions against the respondents is stronger than Mrs Roemmele's interest. But as I am not satisfied that in the case of either of the appellants there has been an abandonment of their contract rights, I think they are *in pari casu* in resisting the present application, and that their appeal should be allowed.

I may add, that I have heard the opinion of your Lordship in the chair, and desire to concur.

Lord Kinnear.—I agree with the opinion given by your Lordship, and have nothing to add.

Lord Pearson.—I also agree.—17*th July* 1907.

Counsel for Appellants, Hunter, K.C., Hon. W. Watson; Agents, Millar, Robson & M'Lean, W.S.—Counsel for Respondents, Cullen, K.C., Macmillan; Agents, J. & J. Ross, W.S.

A. M.

HIGH COURT OF JUSTICIARY.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Ardwall.*)

127. Christie *v.* Stevenson.

Justiciary Cases—Statutory Offences—Motor Car Act 1903 (3 Edw. VII. cap. 36), sect. 9—Charge of Driving at Excessive Speed Between Two Specified Points—Proof by Prosecutor Limited to a Portion Only of Distance Specified in the Complaint.

Bill of Suspension.

William Garnet Christie, timber importer, West Point, Saltcoats, was charged in the Sheriff Court at Kilmarnock on a summary complaint at the instance of the Procurator-Fiscal, setting forth:—

That the accused "has contravened The Motor Car Act 1903, sect. 9, as continued under Expiring Laws Continuation Act 1906, in so far as on 7th April 1907 he did drive a motor car at a speed of eighteen miles an hour, or otherwise at a speed exceeding ten miles an hour, on the public highway in the village of Seamill, parish of West Kilbride, and County of Ayr, being a place on the main road passing through said village, and at a part thereof between a point fifty yards before the first house, and a point fifty yards beyond the last house in said village, and being within the limits or being a place referred to or specified in the Motor Cars Regulation (County of Ayr) (No. 2) Order 1905, dated 5th April 1905, which Order was made by the Secretary for Scotland in pursuance of the powers vested in him by sects. 9 and 18 of said Act, and such offence is a second offence whereby," etc.

The accused pleaded not guilty, but after evidence had been led the Sheriff-Substitute (Mackenzie) convicted him "of the contravention charged" and imposed a penalty of £7, with the alternative of twenty-one days' imprisonment.

Christie presented a bill of suspension in which he stated:—

"Stat. 3. In the said complaint the place where the said William Garnet Christie had driven at an excessive rate of speed was libelled as a part of the main road passing through the village of Seamill 'between a point fifty yards before the first house and a point fifty yards beyond the last house in said village.' The said distance so libelled is three-quarters of a mile in length. No proof, however, was led with regard to the rate at which the complainer had driven between the said two points, but proof was led only with regard to a distance extending to a quarter of a mile within said limits, where the police had laid a trap. Upon the said proof the Sheriff-Substitute, as already stated, wrongously and unjustly found the complainer guilty of the contravention charged in the complaint. . . .

"Stat. 4. The complainer's agent took exception to evidence directed to establish only the rate at which the present complainer had covered said quarter of a mile, on the ground (1) that the offence charged was not that he had driven at an excessive speed for said quarter of a mile, and (2) that he had no notice of such a limitation in the proof, although the prosecutor must have been well aware when the complaint was brought of the limitation to which he now proposed to confine it. His objection, however, was disregarded."

The Complainer *pleaded*: "The said conviction should be quashed, in respect that—

"1. It was incompetent.

"2. No proof was led of the contravention which was charged; and,

"3. The complainer had no proper notice in the complaint of the particular contravention with regard to which proof was led against him."

The Court *refused* the bill.

The Lord Justice-Clerk.—I think we may hold here that the accused suffered no injustice by what has been done. But the question arises whether he is entitled to have this conviction quashed on account of want of specification of the *locus* in the complaint. I do not think he is.

I must say, however, that it would be fairer, in cases of this kind, if the prosecutor stated in the complaint the precise points between which he proposed to prove that the accused had exceeded the limit of speed laid down in the Order. But I cannot hold here that the complaint is irrelevant for want of specification, or that the accused had not in the complaint due notice of the charge he had to meet. On the whole matter, therefore, this suspension cannot be sustained.

Lord Ardwall.—I concur. It was quite necessary that the limits specified in the complaint, viz., fifty yards before the first house and fifty yards beyond the last house in the village, should be so specified, because otherwise the complaint would not have been in conformity

with the order of which it charges a contravention. The question, however, whether the prosecutor should in such cases also insert in the complaint a further limit within which he was prepared to prove that the offence was actually committed depends on the extent of the limits specified in the Order and the complaint. It would, of course, be unfair and absurd to charge a person with having driven at an excessive speed between, say, Edinburgh and Glasgow, when the proof offered in support of the charge referred to a short distance, say, of a quarter of a mile as in the present case. On the other hand, where the limits given in the complaint are those of a small village, three-quarters of a mile long, the fact that the prosecutor does not further limit or specify the *locus* of the offence, although it was in his power to do so, does not seem to me to inflict any hardship on the accused. It certainly does not affect in the remotest degree the relevancy of complaint. The only question which can arise in this or similar cases is whether the prosecutor has given to the accused a reasonable amount of specification in describing the place where the offence was committed, and I have no doubt in holding that he has done so in the complaint at present under consideration.

Lord Stormonth-Darling concurred.—18*th July* 1907.

Counsel for the Complainer, R. S. Horne; Agents, Simpson & Marwick, W.S.—Counsel for the Respondent, Orr, K.C., A. D. Adam, A.-D.; Agent, W. S. Haldane, W.S., Crown Agent.

F. A. U.

OUTER HOUSE.

(*Lord Mackenzie.*)

128. MacLean *v.* MacLean.

Succession—Legacy—Special Legacy—Ademption—Held that a Bequest of a Sum in the Hands of the Legatee at the Date of Executing the Settlement, and Which Was Subsequently Repaid to the Testator, Was Not a Special Legacy, and Could Not Therefore be Adeemed.

Alexander MacLean, the pursuer in this case, was the son, and Flora MacLean, the defender, was the daughter, of Mrs Flora M'Leod or MacLean, who died on 31st July 1901, leaving a general disposition and settlement dated 13th June 1898, by which she appointed the defender to be her sole executrix, and disposed to her her "whole means and estate, heritable and moveable, with the exception of £300 sterling of mine which my son Alick [the pursuer] has invested for me, and which I do hereby leave and bequeath to himself."

In this action the pursuer concluded (1) for an account of the defender's intromissions as executrix foresaid and as an individual . . . . with the whole means and estate of the said Mrs Flora M'Leod or M'Lean, and for payment of the sum of £1000, and for payment of the sum of £300. He averred that the defender had ingathered the said estate and that she was bound to make up proper accounts that he might ascertain the amount of his legal rights, but that she had refused to do so. He also averred that he was entitled to the said legacy of £300. The defender denied that she had refused to make up accounts. She averred that at the date of the said settlement in 1898 there was in the hands of the pursuer a sum of £300 belonging to the said Mrs M'Lean; that in the spring of 1901 the pursuer, being aware of the terms of the said settlement, wrote the defender a letter containing the following statement: "If mother is strong enough Flo tell her that I don't want to have this £300 as I am not in need of it and don't want people to think that I am in debt to you or mother and to oblige me tell Mr MacCallum to alter the will and allow me to return this £300, and since you are to be the trustee Flo, I wish to be straight—I won't take one cent;" that thereafter on 7th March 1901 the pursuer returned the said sum of £300 to his mother, and that it had been immixed with her other estate.

The defender pleaded, *inter alia*:—

"5. Said legacy of £300 having been adeemed, the defender is entitled to absolvitor from the conclusion for payment thereof."

In the Procedure Roll the defender's counsel cited *Pagan* v. *Pagan*, 1838, 16 S. 383; *Chalmers* v. *Chalmers*, 1851, 14 D. 57; *Anderson* v. *Thomson*, 1877, 4 R. 1101; *Jack* v. *Lauder*, 1742, M. 11357; *Davidson's Trs.* v. *Davidson*, 1901, 4 F. 107; *Douglas' Exrs.*, 1869, 7 M. 504; *Re Budle*, 1879, 4 C.P.D. 336; Williams on Executors, 10th ed., 1061. The pursuer's counsel cited *Mitchell's Trs.* v. *Fergus*, 1889, 16 R. 902.

The Lord Ordinary repelled, *inter alia*, plea 5 for the defender; *ordained* the defender to lodge an account; and *found* that the legacy of £300 had not been adeemed.

Lord Mackenzie.—The pursuer of this action is the brother of the defender, and, so far as regards the conclusions for accounting, his demand is now limited to the second account asked for, and that only so far as regards the defender's intromissions as executrix of their deceased mother.

This obviates the necessity for determining certain of the questions which were argued.

The pursuer is, in my opinion, entitled to get such an account, because, as he maintains, he ought to be put in possession of the necessary information to enable him to make up his mind whether he is to claim legitim or not.

By his mother's will, dated 13th June 1898,

OUTER HOUSE. *Lord Mackenzie.* MacLean v. MacLean.

the pursuer was left a legacy of £300. The defender maintains that this is a special legacy, and that it has been adeemed. By her will the deceased Mrs MacLean appointed the defender to be her sole executrix, and gave and disponed to her "my whole means and estate, heritable and moveable, with the exception of £300 sterling of mine which my son Alick" (the pursuer) "has invested for me, and which I do hereby leave and bequeath to himself." At the date of the will there was in the pursuer's hands a sum of £300 belonging to Mrs MacLean. In the spring of 1901 the pursuer wrote the letter quoted in Statement 4, and on 7th March 1901 returned the £300 to his mother. Parties have renounced probation as regards all matters bearing on the defender's fifth plea in law—the plea that the legacy has been adeemed.

The first question is whether the legacy of £300 was a special legacy. Unless it is held to be a special legacy the question of ademption does not arise. In my opinion the expression of the bequest points rather to the amount of the fund than to the designation of it as a specific *corpus*. In such a case the legacy is general, to be made good out of the general fund, though the money should have been uplifted (Bell's Prin., sect. 1886). None of the cases cited by the counsel for the defender were like the present. In all of them there was either a specific subject, or, in the case of money, a particular bond, bill, deposit receipt, or insurance policy. Here the bequest is of money which at the time happened to be in the pursuer's hands, but which he subsequently handed back. That, I think, is different from the case of a specific investment. I am accordingly of opinion that the defender's fifth plea in law should be repelled, and that there should be a finding that the legacy has not been adeemed.—*6th July* 1907.

Counsel for Pursuer, MacRobert; Agents, Young & Falconer, W.S.—Counsel for Defender, Chree; Agent, Alexander Ross, S.S.C.

A. M. H.

OUTER HOUSE.

(*Lord Guthrie.*)

129. Matthew *v.* Matthew's Trustee.

BANKRUPTCY—SEQUESTRATION—RANKING OF CLAIMS—WIFE'S CLAIM FOR ALIMENT AGAINST HUSBAND JUDICIALLY SEPARATED—SEQUESTRATION OF HUSBAND'S ESTATES—HELD THAT CLAIMANT WAS NOT ENTITLED TO HAVE HER ALIMENTARY DEBT VALUED AS DEPENDING ON A CONTINGENCY — BANKRUPTCY (SCOTLAND) ACT 1856 (19 AND 20 VICT. CAP. 79), SECTS. 53 AND 54.

In November 1896 Mrs Frances Ranken Hogg or Matthew obtained in an action of separation and aliment at her instance against her husband Duncan Matthew decree for payment of aliment to her at the rate of £50 per annum during the joint lives of her husband and herself. On 30th June 1897 the husband's estates were sequestrated, and Charles John Munro, C.A., was appointed trustee thereon. Mrs Matthew claimed in the sequestration for arrears of aliment and expenses of process in the action of separation, with interest, and she was ranked in full for £163, 7s. 6d., the amount of said claim. She subsequently lodged an amended affidavit and claim, claiming, in addition to the £163, 7s. 6d. for which she had obtained a ranking, a sum of £838, 12s. 9d. as the estimated value of the alimentary debt due under the said decree, and calling upon the trustee to put a value on said alimentary debt under sects. 53 and 54 of the Bankruptcy (Scotland) Act 1856, which are in these terms:—

LIII. *Valuation of Claim depending on a Contingency.*—When the claim of a creditor depends upon a contingency which is unascertained at the date of lodging his claim, he shall not be entitled to vote nor to draw a dividend in respect of such contingent debt, but he may apply to the Sheriff, if the trustee has not been elected, or, if elected, to the trustee, to put a value on such debt, and the Sheriff or trustee (as the case may be) shall put a value thereon as at the date of such valuation; and on such value being fixed such creditor shall be entitled to vote and draw dividends in respect of such value, and no more: Provided that if such contingency have taken place before the debt has been valued, such creditor may vote and draw dividends in respect of the amount of the debt, but the same shall not disturb any former dividends allotted to other creditors; and when such application is made to the Sheriff or trustee, notice thereof shall be given to the bankrupt and petitioning or concurring creditor; and the judgment of the Sheriff or trustee shall be subject to review, and any creditor who has claimed on the estate may appeal, or appear and be heard on any appeal.

LIV. *Valuation of Claim on Annuity.*—No creditor in respect of an annuity granted by the bankrupt shall be entitled to vote and draw a dividend until such annuity shall be valued, but he may, if the trustee has not been elected, apply to the Sheriff, or, if elected, to the trustee, to put a value on such annuity; and the Sheriff or trustee, as the case may be, shall put a value on the annuity, regard being had to the original price given for the annuity, deducting therefrom such diminution in the value of the annuity as shall have been caused by the lapse of time since the grant thereof to the date of the sequestration; and such creditor shall be entitled to vote and draw dividends in respect of such value, and no more: Provided always, that when such application is made to the Sheriff, notice thereof shall be given to the bankrupt and the petitioning or concurring creditor; and the judgment of the Sheriff or trustee shall be subject to review, and any creditor who has claimed on the estate may appeal, or appear and be heard on any appeal.

On 17th June 1907 the trustee rejected this supplementary claim.

Against this deliverance Mrs Matthew appealed, and *argued* that she was entitled to have

her alimentary debt valued either in terms of sect. 53 or sect. 54 of the Act.

The Lord Ordinary *sustained* the trustee's deliverance, and *dismissed* the appeal.

Lord Guthrie.—In 1897, in an action of separation the appellant obtained decree against her husband for aliment at the rate of £50 a year. In this sequestration of her husband's estates she has been ranked for certain arrears of aliment, and she appeals against the trustee's refusal to rank her for a capital sum which she says represents the actuarial capital value of the decree for aliment in her favour.

The appellant admits (1) that she cannot claim on the footing of an ordinary annuitant, as the decree itself bears that the payment to her is to be during the joint lives of herself and her husband; and (2) that a deduction must be made (*a*) for the chance of the aliment being withdrawn or diminished, and (*b*) for the chance of the parties coming together. The first admission introduces no difficulty, but the second admission, which the appellant could not avoid making, is, in my opinion, fatal to her claim. The question has not been made matter of express decision in Scotland, and it is stated in Bell's Commentaries (I. 688) as open. But in England it arose in 1885 in the case of *Linton*, 15 Q.B.D. 239, and the wife's claim was negatived. One ground of decision, as explained by the Master of the Rolls and Lords Justices Baggallay and Bowen, was the obvious one that the claim could not be ranked because it could not be valued, involving as it did elements, particularly the chance of the wife returning at any time to cohabitation (possibly the day after the ranking), which could not be ignored, and which were incapable of valuation. I think this view is sound, and accordingly refuse the appeal. —20*th July* 1907.

Counsel for Appellant, W. J. Robertson; Agents, Cuthbert & Marchbank, S.S.C.—Counsel for Respondent, D. Anderson; Agent, A. C. D. Vert, S.S.C.

C. H. B.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

130. Farrell *v.* Boyd.

Slander — Privilege — Public Duty — Police Official — Statement by Police Surgeon Regarding Illness of Member of the Force — Malice — Want of Probable Cause—Relevancy.

(*Reported ante, Vol. XIV. p.* 334.)

Reclaiming Note against an Interlocutor of Lord Salvesen.

The pursuer *reclaimed.* At the hearing, argument was given upon the question of relevancy only.

The Court, without calling upon the respondent's counsel, *adhered* to the interlocutor reclaimed against.

1st Div.

Farrell v. Boyd.

The Lord President.

The Lord President.—The case for the reclaimer here has been exceedingly well stated by Mr Macdonald, and that only confirms me in the view that the Lord Ordinary's interlocutor is right. The Lord Ordinary has admirably summarised the ground of his decision where he says:—"The mere fact that a medical man makes a wrong diagnosis on an insufficient examination, and adheres to it when it is brought to his knowledge that other medical men take a different view, does not necessarily imply" malice. Now the thing we are in search of here is malice, for this was a report made by an official which in the course of his duty he had to make. It is therefore privileged, and no action of slander can lie without proof of malice either from something extrinsic to the report or from the exaggerated terms in which his opinion was given. I can find no averments on record here from which malice could be inferred on either of these grounds, and am therefore of opinion that the Lord Ordinary's interlocutor should be adhered to.

Lord Kinnear and *Lord Dundas* concurred.—11*th July* 1907.

Counsel for the Reclaimer, Macdonald; Agents, M'Gregor & Purves, W.S.—Counsel for the Respondent, Dean of Faculty (Campbell, K.C.), Munro; Agents, Patrick & James, S.S.C.

W. A. R.

HIGH COURT OF JUSTICIARY.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Low.*)

131. Duke of Sutherland *v.* Douglas.

Justiciary Cases—Summary Procedure—Private Prosecutor—Law Agent of Prosecutor—Where One Law Agent Had Signed Complaint on Behalf of Prosecutor, Held that Another Law Agent Was Entitled to Conduct the Prosecution at the Trial—Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. cap. 33), sect. 9 (1)—Finlayson v. Bunbury (1898, 5 S.L.T. 301, 2 Adam 478) Followed.

Stated Case.

This was a case for appeal stated by the Sheriff-Substitute (Mackenzie) at Dornoch. The case set forth:—

"This case, as now ordered by the Lords of Justiciary to be stated, relates to the competency of proceeding with a complaint *brought in name* of the Duke of Sutherland, but *signed* by his recognised

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Duke of Sutherland v. Douglas.

local law agent (A. N. Macaulay) under authority of sub-sect. 1 of sect. 9 of the Summary Jurisdiction (Scotland) Act 1881, and is *directed* against the respondent Douglas for an alleged contravention of the Act 2 and 3 Will. IV., sect. 1.

"At the diet of compearance on 8th January last, the respondent was present, but the complainer and his said law agent who had signed the complaint failed to appear, and in consequence, the case was not then proceeded with, but was adjourned for a week.

"At the adjourned diet on the 15th January, the respondent was present with his agent, but both the complainer and his agent (Macaulay) were again absent. The latter's clerk, however, who is a law agent and represents his employer in his business before the Sheriff Court, claimed to appear in this case against the respondent, but the Sheriff-Substitute, being of opinion that the right of conducting the prosecution referred to in the statute could not devolve upon him and be exercised while neither the complainer nor his law agent (Macaulay) was personally present, declined to recognise such appearance, and sustained the objection by the respondent's procurator that no competent prosecutor was present, and therefore dismissed the complaint.

"The question of law submitted for the opinion of the Court is, *Whether in the absence of the complainer and the law agent* who under statutory authority had signed the complaint, the further right conferred on '*such law agent*' of conducting the prosecution '*on behalf of*' the complainer and acting as a competent prosecutor, could in his absence be exercised by another person not specially authorised under the statute."

The Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. cap. 33), sect. 9, sub-sect. (1), is quoted in the opinion of the Lord Justice-Clerk.

Argued for the Appellant: The question here was as to the meaning of the words "such law agent" in sect. 9, sub-sect. (1), of the Summary Jurisdiction (Scotland) Act 1881. Although the word "such" might sometimes be used as equivalent to "the said," that was an inaccurate use of the word. Its proper meaning was "of the kind already described." "Such law agent" therefore meant "law agent of the kind already described," that was to say, "a duly qualified law agent." The case was ruled by *Finlayson* v. *Bunbury* (3rd February 1898, 5 S.L.T. 301, 2 Adam 478). It was there contended, as it was here contended by the respondent, that "such law agent" meant the individual law agent who had signed the complaint, the result of the argument there being that the prosecutor was not entitled to be represented at the trial by any law agent, since, according to the argument, there was no "such law agent," the prosecutor having signed the complaint himself. The Court rejected the argument, holding that the words "such law agent" meant any duly qualified law agent.

Argued for the Respondent: The words here were "such law agent," not "such a law agent," thus plainly pointing to an individual, namely, the individual law agent who had signed the complaint. The statute contemplated two persons and two persons only, one or other of whom was entitled to conduct the prosecution—the prosecutor himself and the law agent who had signed the complaint. All that *Finlayson* v. *Bunbury* decided was that a private prosecutor who had signed the complaint himself did not thereby lose the privilege of being represented at the trial by his law agent.

The Court *found* that the complainer was entitled to be represented at the trial by any law agent duly qualified, to whom he might give a mandate to appear, and that in a case where the complaint had been signed by a certain law agent the prosecutor was not excluded from having the prosecution conducted by another law agent whom he might appoint; and *remitted* the case to the Sheriff to proceed.

The Lord Justice-Clerk.—The decision of this case depends on the interpretation to be put upon sub-sect. (1) of sect. 9 of the Summary Jurisdiction Act 1881. That sub-section says: "Every complaint at the instance of a private prosecutor or complainer under the Summary Jurisdiction Acts may be signed by such private prosecutor or complainer, or by a duly qualified law agent on his behalf, and such law agent may, in the absence of the private prosecutor or complainer, appear in Court and conduct the prosecution on his behalf."

In this particular case what happened was this. The complaint was signed by a law agent on behalf of the prosecutor, under the first branch of sub-sect. (1), but at the trial that individual law agent did not appear, and another law agent, who is not said to have had no mandate to appear, did appear to conduct the prosecution. The Sheriff-Substitute held that this was not permissible, because he read the words "such law agent" as meaning this, that where a law agent had signed a complaint on behalf of a private prosecutor, that law agent was the only law agent entitled to conduct the prosecution following upon the complaint. That is not the interpretation that I should have put upon the words "such law agent," even if the question had now come up for the first time. I think that the reasonable reading of these words—which certainly are not very satisfactory words—is that when a law agent, duly qualified as such, appears to conduct the prosecution, he is "such law agent" as being a duly qualified law agent. I do not think that the man who signed the complaint must necessarily be the man to conduct the prosecution. I think on general grounds that he need not be the same, because a law agent is not as a general rule the permanent official of a particular person. A man's law agent is the person whom at the time he employs to conduct his law business, and if he is entitled to be represented by a law agent in any particular business, he is entitled to be represented by the law agent

whom he employs at the time for the particular business; and if he has dismissed a law agent whom he formerly employed, or that agent is unable or unwilling to act, he is entitled to be represented by another law agent.

That is the conclusion to which I should have come even apart from authority, but I think that any doubt as to the meaning of the sub-section is removed by the case of *Bunbury*. That was a case in which the private prosecutor himself signed the complaint, and it was contended that, having signed the complaint, he was thereby debarred from being represented by a law agent in the conduct of the prosecution at the trial. The Court unanimously held that that was not a sound contention. I gave the leading opinion in that case, and my two brethren agreed with me as regards this part of the case. It was held that the words "such law agent" in sub-section (1) of section 9 of the Act meant an agent with such qualifications as had been previously described—that is to say, a duly qualified law agent. Now if that was a sound interpretation of the words "such law agent" with reference to the question which there arose, it must be a sound interpretation for all questions that may arise on the words, because the words can have only one meaning and must be read in the same way in every case which occurs regarding them, although the actual question may be a different one on the facts.

Upon the whole matter I come without difficulty to the conclusion that the Sheriff-Substitute erred here in dismissing the complaint because the agent who had signed it did not appear to conduct the prosecution.

I do not think that it would be satisfactory to answer the question put in the case. I think that we ought to pronounce such a finding as will make the matter clear, and remit the case to the Sheriff to proceed.

Lord Stormonth-Darling.—I agree. The statute of 1881 confers a privilege upon private prosecutors. The privilege is a double one. In the first place, a private prosecutor may have a complaint signed either by himself or by a duly qualified law agent acting on his behalf; and secondly, he may have the prosecution conducted on his behalf by "such law agent."

Now the words "duly qualified" do not refer at all to the authority given by the private prosecutor to the law agent to act on his behalf. These words refer solely to the legal qualification of the law agent to act as a law agent. The statute does not contain anything as to the law agent's authority to represent the prosecutor beyond using the words "on his behalf." Of course there must be authority, otherwise the law agent would not be entitled to represent the prosecutor; but it is not the words "duly qualified" that bring in the idea of authority; it is the words "on his behalf." The words "duly qualified" import no more than this—that the person who signs the complaint or who appears to conduct the prosecution must have acquired a legal qualification which entitles him to sign writs and to appear in court as a law agent.

In the present case the Sheriff-Substitute has held that the law agent who signed the complaint must necessarily be the law agent to conduct the prosecution in court. I do not think that that is a reasonable reading of the statute. Mr Armit contended that the statute referred to two persons and to two only—the private prosecutor and his law agent; and that to bring in a third person—another law agent—was to go beyond the statute. That, to my mind, is not a reasonable reading of the words "such law agent may in the absence of the private prosecutor or complainer appear in court and conduct the prosecution on his behalf." I think that the words "such law agent" plainly mean "a duly qualified law agent." Of course, as in the case of signing the complaint, the law agent who appears in court must have the prosecutor's authority, but here again it is the words "on his behalf" which are repeated, and not the words "such law agent," that connote the idea of authority—either general authority or authority for the particular occasion. Therefore, apart altogether from decision, I should be of opinion that the Sheriff-Substitute took too strict a view of this statute, and that he ought to have allowed this gentleman, whose authority is not denied, to appear and conduct the prosecution, he being a duly qualified law agent.

With regard to decision, I think that the case of *Bunbury* arose in somewhat different circumstances from those that we have here, and I should not like to say that it expressly rules the present case. But I entirely agree with the decision there, and therefore I think that both on the words of the statute and on decision the law is clear.

Lord Low.—I am of the same opinion. I confess that my impression is that this case is directly ruled by that of *Bunbury*, because, as I understand it, in order to reach a decision in that case it was necessary to construe the very words of this section which are here in dispute. But even if that were not the case, I confess that I should have no hesitation in coming to the conclusion that the words in the section "such law agent" mean "a duly qualified law agent," and are not confined to the particular law agent who happened to sign the complaint. I therefore agree with the course proposed by your Lordships.—19*th July* 1907.

Counsel for the Appellant, Hunter, K.C., Black; Agents, Macpherson & Mackay, S.S.C. —Counsel for the Respondent, Sandeman, Armit; Agent, W. B. Rainnie, S.S.C. F. A. U.

18 and 19

1ST DIV.

Robertson v. Brandes, Schönwald & Co.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

132. Robertson *v.* Brandes, Schönwald & Co.

EXPENSES—ACTION OF DAMAGES FOR BREACH OF CONTRACT — ARBITRATION — DEFENCE THAT ACTION EXCLUDED BY ARBITRATION CLAUSE—ACTION SISTED AND QUESTION SENT TO ARBITRATION — DEFENDERS NOT SUCCESSFUL IN ARBITRATION—NO EXPENSES GIVEN IN ACTION TO EITHER PARTY.

(*Reported ante, Vol. XIV. pp.* 32 *and* 90.)

On 9th July 1907 the pursuers presented a Note to the Court in which they set forth that as the result of the arbitration proceedings an award had been made against the defenders for £110, 10s. and an award of seventy-nine guineas of expenses, to be borne in the proportion of twenty-five guineas by the pursuers and fifty-four guineas by the defenders, and that the defenders had paid these sums. They accordingly craved the Court to recal the sist of 23rd May 1906, to assoilzie the defenders from the conclusions of the action, and to find the defenders liable to the pursuers in the expenses of the action down to the date of the closing of the record.

The defenders *opposed* the crave of the note as regards expenses, and maintained that they were entitled to their expenses up to the date of the Procedure Roll discussion. They had been entirely successful in the action. Their defence, to the effect that the action should never have been brought into Court at all, had been sustained.

In any case, the defenders were not liable to the pursuers in any of the expenses of the action (*Levy & Co.* v. *Thomsons*, 1883, 10 R. 1134).

The Court *recalled* the sist of 23rd May 1906, *assoilzied* the defenders from the conclusions of the action, and *found* no expenses due to or by either party.

The Lord President.—The point to be decided here is a question of expenses. The pursuer is a merchant in this country who had bought a certain quantity of slag from the defenders, who are a foreign firm, and the action is an action for damages for faulty delivery of the slag. The action having been raised, the defenders pleaded an arbitration clause. There was a decision by the Lord Ordinary on that point, which was affirmed by your Lordships, with the result that the dispute had to go to arbitration. The arbitration then proceeded, and in it the pursuer got an award of a sum of money as damages, and also an award of expenses. The defenders have paid these sums; so there is now no question that the action must be taken out of Court, and that, in consequence of the payments I have referred to, the defenders are entitled to be assoilzied.

There only remains the question of expenses. Now the expenses of the cause have to a great extent been already dealt with. An amendment of the record was allowed, and the expenses of the amendment have been disposed of. So also have the expenses of the reclaiming note to this Court, and the only expenses now remaining to be dealt with are the expenses of the raising of the action, and of the discussion in the Procedure Roll. Now I am not aware that this is a point which has yet been settled by decision, at any rate no trace of it is to be found in the case of *Levy & Co.* v. *Thomsons*, 10th July 1883, 10 R. 1134. In that case there is nothing in the books to shew what happened in the preliminary stages. Here, however, we have some correspondence, from which it is quite clear that the defenders were all along willing to arbitrate. There may be cases where a pursuer is entitled to bring the defender into Court—where, for instance, the defender refuses either to pay or to arbitrate,—and in such cases, if the defender subsequently pleads arbitration, the pursuer would naturally be entitled to recover the expenses of raising the action. But I think that, following on what was said in *Levy*, where, as here, the defender is all along willing to arbitrate, the pursuer cannot recover the expenses of raising the action.

On the other hand, I do not think the defenders here are entitled to an award of their expenses, for they have been to a certain extent in the wrong, since they disputed their liability for any payment at all. We shall therefore pronounce a decree of absolvitor, and find no expenses due to or by either party.

Lords Kinnear and *Dundas* concurred.—12*th July* 1907.

Counsel for the Pursuers, Morison, K.C., T. G. Robertson; Agents, J. & J. Galletly, S.S.C.—Counsel for the Defenders, Hunter, K.C., Boyd; Agents, Boyd, Jameson & Young, W.S.

W. A. R.

FIRST DIVISION.

(*Lords M'Laren, Kinnear and Pearson.*)

133. Low and Another *v.* Low's Trustees.

I. EVIDENCE—COMMISSION — EVIDENCE ACT 1852 (15 AND 16 VICT. CAP. 27), SECT. 3—EVIDENCE OF AGED WITNESS TAKEN ON COMMISSION—REPORT OF COMMISSION TO LIE IN RETENTIS—WITNESS SUBSEQUENTLY EXAMINED IN COURT—REPORT OF COMMISSION NOT ALLOWED TO BE READ TO PROVE THAT WITNESS MADE

Statement Therein Different From Evidence Given in Court.

II. Writ—Execution—Reduction—Irregularity of Execution—Act 1681, cap. 5—Will Ex Facie Probative—Averment that Signature of Granter Was Not Acknowledged to One of Subscribing Witnesses—Onus of Proof on Party Attacking Will—Conveyancing Act 1874 (37 and 38 Vict. cap. 94), sect. 39, Held Not to Apply.

III. Process — Reduction — Will — Undue Influence—Will Drawn by Private Party Acting as Agent for Testator — Party Drawing Will Appointed Residuary Legatee—Onus on Agent of Supporting Will Drawn in his Own Favour—Circumstances in Which it Was Held That Will Was Not Obtained by Undue Influence of Drawer.

(*Reported ante, Vol. XIV. p.* 38.)

Reclaiming Note against an Interlocutor of Lord Johnston.

The defenders reclaimed against the Lord Ordinary's interlocutor granting decree of reduction as craved.

The provisions of the statutes referred to in argument, so far as affecting the questions involved, are as follows.

The Evidence Act 1852 by sect. 3 provides—

"It shall be competent to examine any witness who may be adduced in any action or proceeding as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified."

The Act 1681, cap. 5, provides—

No witness shall subscribe as witness to any party's subscription unless he then knew that party and saw him subscribe . . . . or that the party did at the time of the witness's subscribing acknowledge his subscription. . . .

The Conveyancing Act 1874 by sect. 39 provides—

"No deed, instrument or writing subscribed by the granter or maker thereof and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution; but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof and by the witnesses by whom such deed, instrument or writing bears to be attested, shall lie upon the party using or upholding the same."

In the course of procedure in the Outer House the Lord Ordinary granted a commission to take the evidence of certain aged witnesses, the report of the Commission to lie *in retentis*. The said witnesses were subsequently examined in Court. The report of the Commission was not put in evidence, but was opened by the parties of consent. During the discussion in the Inner House counsel for the appellants moved for leave to read the report of the Commission with a view to shewing that witnesses had made statements when examined on commission different from the evidence given by them in Court, and referred to the Evidence Act 1857, sect. 3; *Emslie* v. *Alexander*, 1862, 1 M. 209.

1st Div.

Low and Another v. Low's Trustees.

The respondents argued that it was incompetent to use depositions taken on commission if the witnesses were subsequently examined in Court (Act of Sederunt, 16th February 1841, sect. 17).

The motion was *refused*.

Lord M'Laren.—I am not of opinion that this motion can be granted. Under the Evidence Act of 1852, of the working of which we have now had a long experience, it is made competent by sect. 3 to examine a witness "as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding." Now I do not doubt that the questions put to this witness as to the evidence which she gave when she was examined on commission were within the latitude allowed by the Evidence Act. But the point we have now to consider arises under the second part of that section, which provides that "it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified." Now, the report of the Commissioner may, in certain events and for certain purposes, become evidence, but it is not now evidence, and it is impossible that it ever can be made evidence *in causâ*, for the witness herself has been examined in Court with regard to the same matter. I am unable to see how the report of the Commissioner can be admitted as evidence that the witness has made a different statement on a previous occasion. How far it might be possible to cite the Commissioner, or to prove by the parole evidence of bystanders that the witness made a different statement when she was under examination before the Commissioner, it is not necessary to consider. The proof has been closed, and no case has been made for opening up the proof and allowing further evidence. We are not even told that, if we did so, there are witnesses who could be brought to prove that the witness had varied in her statements. What we are asked to do is to allow the report of the Commission to be read, and then to see whether it supports the contention that the witness had

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made a different statement on the former occasion. Now, there is no authority for such a proceeding; the nearest case being that of *Emslie* v. *Alexander*, Dec. 20, 1862, 1 Macph. 209, where the Court allowed a deposition to be recovered that it might be collated with the evidence that the witness might give in Court. But that is no authority for the proposition that the mere production of a deposition would be sufficient for the purpose for which it is proposed to use it. Great inconvenience might result from allowing depositions which the law says are to be superseded if the witness eventually gives his testimony in Court, to be kept alive for the purpose of contradicting what that witness may say in Court. Also, in the long period that has elapsed since the passing of the Evidence Act, there is no record of any such proceeding having been permitted. I do not, therefore, consider that what we are asked to allow falls within the purpose or the terms of the Act to which we were referred.

Lord Kinnear.—I am of the same opinion. The motion made to us really amounts to this: that a deposition which was provisionally taken to lie *in retentis* should now be put in evidence with the view of contradicting the testimony which the witness subsequently gave in Court. The deposition itself cannot be used as evidence; and, if it cannot, the report of the Commission is not evidence at all. The case of *Emslie* v. *Alexander*, 1 M. 209, which was cited to us, appears to me to have no bearing on the point, for the question in that case did not relate to a provisional deposition taken to lie *in retentis*, but to a deposition by a bankrupt in the course of his statutory examination. That such a deposition may be used is perfectly clear, for it is the authentic statutory record of an examination to which the Act of Parliament requires that the bankrupt shall submit. I cannot see any analogy between that case and this, which is a claim to read a deposition taken provisionally to lie *in retentis*, and not to be used at all if the witness subsequently appears and gives evidence in Court.

Lord Pearson.—I am of the same opinion. I think your Lordship's decision is entirely in accordance with practice.

The argument upon the main question appears from the opinion of Lord Kinnear *infra*. The following authorities were referred to in addition to those quoted therein:—

For the Appellants: On the question of execution, Bell, Pr., sect. 2229; *Frank* v. *Frank*, 1809, 5 Pat. App. 278; *Sibbald* v. *Sibbald*, 1776, M. 16,906; *Morrison* v. *Maclean's Trs.*, 1862, 24 D. 625, per L.J.C. Inglis at p. 629; *Cleland* v. *Cleland*, 1838, 1 D. 254, per Lord Corehouse at p. 262; *Cumming* v. *Skeoch's Trs.*, 1879, 6 R. 963.

For the Respondents: On the question of execution: *Tener's Trs.* v. *Tener's Trs.*, 1879, 6 R. 1111; *Duff* v. *Fife*, 1826, 2 W.S. 166 and 209 and 211. On the question of undue influence; *Fulton* v. *Andrew*, 1875, L.R. 7 H.L. 448; *Logan's Trs.* v. *Reid*, 1885, 12 R. 1094.

The Court *recalled* the interlocutor reclaimed against, *assoilzied* the defenders from the reductive conclusions of the summons, and *remitted* to the Lord Ordinary to dispose of the conclusions for legitim.

Lord Kinnear.—This is an action at the instance of two of the sons of a person called William Low, who died at Brechin in 1893, for reduction of his will.

The Lord Ordinary has found that the pursuers are two of the lawful children of the testator, the late William Low, and accordingly has repelled a plea to title, which is founded, as I understand, upon a denial of that fact. We must take it now, therefore, that the pursuers have a perfectly good title to sue, and the only question for us is whether they have made good their alleged grounds of reduction. The will under reduction is a perfectly simple one. It appears that the testator had a sum of money on deposit receipt, and that he had a house in Brechin of the value, I think, of about £250 or £280. The will leaves his whole estate, heritable and moveable, to James Guthrie and David Spence, whom he appoints executors and residuary legatees, subject to the payment of certain legacies, which do not amount altogether to a very large sum. The whole estate was a small one, and the legacies do not exhaust it. But it appears that in addition to these legacies the testator had set apart certain sums of money to be given to persons whom he desired to favour, but without naming them as legatees in his will, and that the defender Guthrie was entrusted with the duty of carrying out this intention. These are the facts to be kept in view in considering the grounds of reduction.

The action of reduction is based on two grounds. In the first place, it is said that the will was not duly executed, because the testator's signature was not witnessed nor acknowledged in the presence of one of the testamentary witnesses; and, in the second place, the will is said to be reducible because it was obtained by the fraud of the executor and residuary legatee, Mr Guthrie.

As to the first point—the due execution of the will—I agree with the Lord Ordinary that this question depends entirely on the Act of 1681, cap. 5, and the law and practice following on that Act prior to the passing of the Conveyancing Act of 1874, and that it is not affected in any way by the 39th section of the Conveyancing Act. It was decided in the case of *Smyth* v. *Smyth*, 1876, 3 R. 573, that that enactment does not dispense with the presence of witnesses as a solemnity of the execution of deeds, and that it

does not repeal the Act 1681, cap. 5, which requires the signature of the granter of a deed to be adhibited or acknowledged in the presence of the witnesses. The judgment rested on the perfectly plain and obvious ground, which I think was suggested by one of your Lordships in the course of the argument, though the decision itself was not brought before us, that when the Conveyancing Act speaks of "witnesses" it means persons who had in fact witnessed the things which they are supposed to attest. I think that decision is conclusive of the question that was raised on this first point, and I am therefore relieved of the difficulty which the Lord Ordinary appears to have experienced from an opinion ascribed to Lord Young in the case of *Geddes* v. *Reid*, 1891, 18 R. 1186. I am not satisfied that the rubric in that case, in so far as it ascribes to Lord Young the opinion to which the Lord Ordinary refers, is really borne out by the terms of his Lordship's judgment; but if that is the true import of what Lord Young says, it is at the utmost *obiter dictum*, and cannot stand against the formal and direct decision of the Court in *Smyth* v. *Smyth*.

But then the question is, whether the allegation that one of the witnesses did not see the testator's subscription or receive from him any acknowledgment of his subscription, has been made out; and on that point I cannot agree with the Lord Ordinary. The Lord Ordinary thinks the pursuers' contention proved because Mrs Lyall, the witness, says when examined in the box that she did not hear the testator say that the signature witnessed was his; and while she is perfectly certain as to this, she proves nothing else that is material to the question of due execution, except the fact that she signed her own name. Now I think upon the former law, as it stands upon a long series of decisions, it is quite certain that this evidence, even if it had been competent, would have been held to be perfectly insufficient to set aside a deed *ex facie* probative. I do not think we can accept all the former decisions as still binding, because the views that now prevail, both as to the competency and the effect of parole testimony, are widely different from those which governed the decisions in question; but I think the law still remains that when a deed is *ex facie* perfectly regular and duly tested, it cannot be set aside on the sole and unsupported statement of one of the witnesses that she did not really attest what her signature bears that she did attest. It can only be set aside on the clearest possible evidence; and I think the evidence of Mrs Lyall in this case is by no means sufficient. It is true that she is positive in assertion, but I cannot assent to the view that the case must be determined on her statement alone. It must be determined on a comparison of her statement and the contrary testimony of other witnesses, especially of Mr Guthrie, the defender; and these conflicting statements must be weighed with reference to the circumstances and the probabilities of the case. The witness herself is an old woman. She is examined as to this incident thirteen years after the date when it took place. It appears plainly enough on her own evidence that her memory is not perfect, and her statement that the deed was not acknowledged in her presence is contradicted by the direct and perfectly clear evidence of Mr Guthrie. And in so far as the question depends on probabilities, it appears to me in the highest degree improbable that Mrs Lyall's account of the matter should be accurate, because the undoubted facts are, that Mr Guthrie, having obtained the signature of the testator to the will, in presence of one witness, sent for this other witness, who lived in a house on the same flat, that she might be brought into the room and witness the testator's signature. The evidence is that she was brought for that purpose, and Mr Guthrie says he certainly did call on the testator to acknowledge in her presence that the signature which he was asked to attest was his signature, and that he did so. Now it does appear to me in the highest degree improbable that if Mr Guthrie had intended to be content with the subscription of one witness only, he should have sent for another and have her brought into the testator's presence for the very purpose of attesting the deed, and then that he should have been satisfied to take her signature without enabling her to attest it.

On the whole matter I think we must take the evidence of Mr Guthrie, supported as it is to a certain extent by the evidence of the other instrumentary witness and by the undoubted facts of the case, and hold that the pursuers have failed to prove their allegations that the will was not duly executed. It must be remembered that on this point the burden is entirely on the pursuers, and if the matter were left in doubt by reason of a conflict of testimony, it must be held that the pursuers have not proved their case.

Now if the will be duly executed, the next and most important question is, whether it has been proved that it was not the true deed of the testator, but was obtained by undue influence or fraud. Now upon that question the Lord Ordinary has repelled the plea that the will should be reduced in respect that "at the time of the making of said will the said William Low was weak and facile, and the defender obtained the said will by fraud and circumvention, and by taking advantage of the said weakness and facility of the said William Low to his prejudice"; and in his note his Lordship expresses the clear opinion—first, that although Mr Low was suffering from painful and mortal disease, it is proved that he retained his faculties till the end; and second, that while Mr Guthrie acted indiscreetly in preparing the will which was partly in his own

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favour, there is no doubt that he acted with perfect honesty; and his Lordship adds: "I should be the last to throw any imputation on Mr Guthrie's honesty, and sympathise heartily with him in the unfortunate position into which his interference with matters much better left to the lawyers has brought him." The determining facts being thus found in the defenders' favour, I should have thought it followed that they must be assoilzied, because if the testator was of disposing mind, and his instructions were honestly carried out by the person who made his will, there seems to be no reason why the will should not stand. The Lord Ordinary, however, has taken a different view. He does not repel the fourth plea in law for the pursuers, which is "that the will having been executed by the deceased while under error induced by the defender Guthrie as to its import and effect, is void and null, and ought to be reduced"; but he does not sustain it. I must say I should have thought that plea failed as a necessary consequence of the judgment to the effect that the second plea must be repelled, read along with the opinion which I have just cited from his Lordship's note. While he has given no formal judgment in support of any other ground of reduction than that based on the Act of 1681, he has, however, expressed an opinion that the residuary bequest to Mr Guthrie himself cannot stand, and that "the will *quoad* that part, had it been otherwise valid, must be reduced *quoad* the residue clause." If this opinion had been on distrust of Mr Guthrie's honesty, I should have had great hesitation in setting my own opinion on such a point against that of the judge who had seen the witness in the box; but, as I have already pointed out, Mr Guthrie has the benefit of the Lord Ordinary's opinion in his favour; and if he was, as his Lordship thinks, perfectly honest, and if the testator understood what he was doing, there seems to be no reason why he should not retain any benefit that the testator meant him to take. It was maintained that the question must be governed by the rule said to be laid down in the case of *Huguenin* v. *Baseley*, 1807, 14 Ves. 273 at 289, that voluntary donations obtained by persons in a fiduciary relation to the donor, such as that of guardian to a ward, or law agent to a client, cannot be retained, and it was urged that though Mr Guthrie was not a law agent, he had placed himself in exactly the same position by undertaking the duty of preparing the testator's will, and was therefore under the same disabilities as a law agent would have been when he—even in obedience to the testator's instructions—consented to his own name being inserted in the will as a residuary legatee. But assuming Mr Guthrie's position to be the same as an ordinary legal adviser of the testator, it has been decided both in England and in Scotland that there is a very material difference in this respect between a gift to an agent *inter vivos* and a benefit under a will. The law is so stated by L.J. Knight Bruce in *Hindson* v. *Weatherill*, 1854, 5 De G. M. & G. 301, and by Lord Barcaple in *Grieve* v. *Cunningham*, 1869, 8 M. 317, and it rests on a very obvious distinction, because the rule in question is that a person is not allowed to obtain an advantage over another whose interests, by reason of the fiduciary position he holds towards him, he is bound to protect. But in the case of a will there is no such conflict of interest and duty as there is in the case of a bargain, because there is no kind of bargain between the testator and the legatee; and accordingly Lord Cranworth, in the case of *Boyse* v. *Rossborough*, 1856, 6 Clark H.L. Cas. 2, decided that a person who stood in such a fiduciary position towards the testator that he could not bargain with him during his life, might yet be instituted in his will as a legatee.

The Lord Ordinary goes, I think, on a safer ground, which he finds laid down by Lord Barcaple, and also by the Lord President in the case of *Grieve* v. *Cunningham*. It is laid down by these learned judges, and I do not imagine that any of your Lordships doubt it, that when a law agent makes a will in his own favour the *onus* of supporting it lies on him, and he is not in the same position as any beneficiary who has not been concerned in the execution of the will, and who is therefore entitled to say that the deed was duly executed by a person of sufficient understanding, and that it is for those who are disputing it to prove that there is ground for setting it aside. I am not satisfied that Mr Guthrie, even in this respect, stands exactly in the same position as an ordinary legal adviser, because there is the high authority of Lord Brougham in the case of *Hunter* v. *Atkins*, 1834, 3 Myl. & K. 113, to the contrary. In that case, Lord Brougham states the rule thus: "There are certain relations known to the law as attorney, guardian, trustee: if a person standing in these relations to the client, ward, or *cestui que trust* takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew . . . . but where the relation in which the parties stand to each other is of a sort less known and definite, the jealousy is diminished." The confidential adviser employed specially to perform a particular business or write a particular instrument does not, in this view, lie under the same suspicion with an attorney, or one having a general management. I do not propose to your Lordships that we should rest our judgment upon that distinction, but I refer to Lord Brougham's opinion for the purpose of shewing that what we have to consider in a case of this kind is not a

fixed and rigid rule of law, but a presumption of fact the force of which must vary with the circumstances of the case.

The question therefore comes to be—Is there, on the whole evidence before us, sufficient ground for holding that the will was obtained from the testator by undue influence exercised by Mr Guthrie? Now, although there is an *onus* on the law agent in these circumstances, that does not imply that he may be required to prove a negative or to exclude indefinite possibilities for which no foundation has been laid in evidence. If he gives a clear and consistent account of his conduct which satisfies the judge before whom he is examined of his perfect honesty, and if his own evidence, being credible in itself, is supported by the other evidence in the case, and if he is able to displace any inference of fact which may be *prima facie* unfavourable, I see no good ground for holding that he must nevertheless be found to have failed in discharging the *onus* incumbent upon him.

The meaning of obtaining a will by undue influence has been the subject of decision, and in two of the most important cases on the subject in the House of Lords it has been laid down with authority that a will said to have been obtained by undue influence must be proved to have been obtained by fraud, because, in the case to which I have already referred of *Boyse* v. *Rossborough*, Lord Cranworth, after examining the grounds upon which undue influence may be sustained to set aside a will, goes on to lay down the general ground in this way. He said: "In order, therefore, to have something to guide us in our inquiries on this difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud," and Lord Halsbury, in the recent cases of *Weir* v. *Grace*, 1899, 2 F. H.L. 30, cites *Boyse* v. *Rossborough*, and quotes Lord Cranworth's opinion as a sound exposition of the law on the subject; and therefore we have to consider whether there is any evidence, taking the whole circumstances of the case before us into consideration, to suggest that Mr Low was under any misapprehension in making the will which he is said to have made, and, if he was, whether that was due to the undue influence, or, in other words, the fraud of Mr Guthrie. Now, upon the whole evidence in the case, I must say I am unable to see any shadow of evidence for charging Mr Guthrie with undue influence, or, in other words, with fraud.

A question of this kind must, of course, be considered with reference to the particular character of the will, and there are only two points to which the Lord Ordinary adverts to which it is necessary to refer. In the first place, the will disinherits the children of the testator, and the question is whether that supplies any ground for disputing that it expresses the unbiassed intention of the testator himself. There are cases in which a disinheritance of that kind would raise an unfavourable presumption, because the mere fact that a will disappoints just expectations is in itself a note of suspicion. But in this case it appears to me to be clear on the evidence that what the testator did in disinheriting his children was exactly what he might have been expected to do. It appears that he and his wife were living together in Brechin in 1851, and in that year she deserted him. She emigrated to America with another man, taking the three children with her, and she lived there thereafter with that other man as his wife, and the testator's children were brought up in America as his children. From that time till the date of his death, Mr Low, the testator, heard nothing from them. He considered that he owed them no duty of support, and the evidence shows that the last thing he desired was that his estate should go to his children, who, with their mother, had deserted him under circumstances which certainly were sufficient to estrange his affections from them altogether. Therefore, I do not think his disinheriting them a circumstance which tells against the will. The other circumstance to which the Lord Ordinary refers is of a very different kind, and does not appear to me to have any direct bearing on the question whether the will was the true will of the deceased man or not. It appears from the evidence that he desired to make certain gifts in view of his death to persons who were not his relations, but did not desire that their names should appear as legatees in the will. I do not think it at all material to consider his reasons for transacting the business in this way; but what he did was, he drew a certain amount of the money he had on deposit receipt and put sums into envelopes on which he marked the names of certain donees, and these sums were put into the hands of Mr Guthrie, the executor and residuary legatee, in order that he might hand them to the donees. There appears to have been some doubt in the mind of the executor as to whether Mr Low had made complete and effective gifts during his lifetime by having set them aside in the way I have described. I agree with the Lord Ordinary that these were not gifts completely carried out so as to divest the testator, and that in a question between the persons whom they were intended to benefit and executors or residuary legatees, who knew nothing of the testator's intention, they would not be good and effective gifts at all. But then, on the other hand, they were perfectly good against Mr Guthrie, for the money was put into his hands, as he says, for the purpose of his making it over to the donees; and he could not, I think, have set up his right as the residuary legatee against their claims, not

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merely because, as the Lord Ordinary suggests, it would have been a duty on his conscience to carry out what he knew to be the testator's intentions, but because the donees would have good claims against him which they could establish by reference to his oath.

But all that does not tend to throw any doubt on the will, so far as I can see. On the contrary, it appears to me to be in favour of and not contrary to the opinion of Mr Guthrie's truthfulness which the Lord Ordinary entertains, and in which, so far as I can judge from the printed evidence, I agree with him. There is no suggestion, so far as I can find, in any of the circumstances of the case, that Mr Guthrie made any kind of misrepresentation to the testator which could mislead him, or that he used any influence which could have coerced the testator into acting as an instrument of Mr Guthrie instead of as a free agent making his own will. So far as it goes, the evidence as to Mr Guthrie's influence is all to the contrary, because the pursuers brought a good many witnesses to show that the testator had spoken of him with considerable disrespect, and indicated by his manner that he was not a person under whose influence he was likely to have acted. Accordingly I am of the opinion, on the whole matter, that this ground of reduction completely fails.

The benefit of the will to Mr Guthrie is, however, a material fact to be taken into account in coming to a conclusion, and I think it is right to observe that, at the best, the benefit he could procure under the will would be extremely small. I do not desire to go into exact figures on these questions, because there has as yet been no accounting, and we have no sufficient evidence to enable us to determine the precise amount Mr Guthrie would have to account for if he were ordered to account under this action; but so far as it goes, the evidence seems to indicate that after paying the legacies, and after making good the *mortis causa* gifts—if one may so describe them—which he had been entrusted to give, and deducting certain expenses, which from his evidence may have been considerable, he would have derived but small benefit from the residuary bequest in his favour. But then I am afraid that even that small benefit must be very greatly reduced, because the pursuers have brought this action to enforce as an alternative claim, failing their right to obtain an accounting for the whole estate, their right to legitim, and I do not find on record any plea against the validity of that claim. Accordingly it does appear to me very doubtful whether, if the defender has to account for the portion of the estate which goes in legitim to the children, there will be any material residue left for him. That, however, is a question with which we are not concerned at present.

I think on the whole matter the defenders must be assoilzied from the reductive conclusions, and that the case must be remitted to the Lord Ordinary to proceed as shall be just to dispose of the conclusions for legitim. I think I need hardly say that in the observations I have made on these conclusions I am not expressing any opinion on the question, which has not been argued to us, whether the claim for legitim can be made good or not; but there is no plea on record against the claim, and if there is any doubt about it, the parties will have an opportunity for discussing it before the Lord Ordinary when the case goes back to him for further procedure.

Lord Pearson.—I concur in the opinion just delivered.

Lord M'Laren.—I also concur in the opinion of Lord Kinnear.—16*th July* 1907.

Counsel for Reclaimers, Hunter, K.C., Hamilton; Agents, Sharp & Young, W.S.—Counsel for Respondents, Wilson, K.C., Mitchell; Agents, John C. Brodie & Sons, W.S.

W. A. R.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

134. M'Fadzean *v.* M'Alpine & Sons.

CONTRACT—PROOF—INNOMINATE CONTRACT—AGREEMENT BY INJURED WORKMAN IN RECEIPT OF WEEKLY PAYMENT UNDER WORKMEN'S COMPENSATION ACT TO ACCEPT SUM OF MONEY IN SETTLEMENT OF ALL CLAIMS AGAINST EMPLOYER—DEATH OF WORKMAN BEFORE AGREEMENT IMPLEMENTED—NATURE OF AGREEMENT — PROOF BY WRIT ALLOWED — WORKMEN'S COMPENSATION ACT 1897 (60 AND 61 VICT. CAP. 37), SCHED. II., SECT. 8—DOWNIE V. BLACK (13 R. 271) COMMENTED ON.

Appeal from the Sheriff Court of Lanarkshire at Glasgow.

In this action Thomas M'Fadzean, the brother and executor-dative of the late Malcolm M'Fadzean, labourer, sued Messrs Robert M'Alpine & Sons, the employers of the deceased, for the sum of £40 alleged to be due to the deceased under a contract entered into between him and the defenders in relation to a claim for compensation for injuries suffered by the deceased in the employment of the defenders.

The material averments on record were as follows:—

COND. 2. On or about the 31st day of July 1902, while the said now deceased Malcolm M'Fadzean was engaged in the service of the defenders at Provanmill Gas Works, Germinston, Glasgow, he received injuries at a brickmaking machine at which he was working which resulted in the amputation of his right arm

near the elbow. Consequent upon said accident it was agreed that the defenders should pay to the said deceased as compensation for said injuries the sum of 9s. 1½d. per week, which was latterly reduced to 3s. 1½d. per week. Said reduced sum was paid down to 13th December 1905.

Ans. 2. Admitted, subject to the explanation that the payments referred to were made in terms of the Workmen's Compensation Act, and under decree of the Sheriff of Lanarkshire, recorded in the Sheriff Court books.

Cond. 3. On or about 16th December 1905, after sundry negotiations, the said deceased, through his law agent, offered to accept £40 in full settlement of all his claims, whether under the statutes or at common law, against the defenders, and on or about 29th December 1905 the defenders, through their law agent, accepted said offer. A binding contract was thereby completed between the parties for payment to the deceased by the defenders of the sum of £40.

Cond. 4. On or about the 6th January 1906, the said Malcolm M'Fadzean died suddenly before the above-mentioned sums had been paid to him. The receipt sent for his signature will be produced in process at the calling hereof and founded on. Defenders' statements in answer are denied. Explained that defenders, through their law agents, accepted the offer of £40 on or about 29th December 1905, and arranged to send the receipt for the deceased Malcolm M'Fadzean's signature by the middle of the following week, but failed to do so.

Ans. 3 *and* 4. Admitted that on or about 16th December 1905 the deceased's law agent offered to accept £40 in redemption of the payments due in terms of the said decree. *Quoad ultra* denied. Explained that on or about 29th December 1905 the law agent of the deceased Malcolm M'Fadzean met with the law agents of the defenders, when they informed him they had not yet obtained their client's instructions to accept of said offer, but that they hoped to get definite instructions shortly. It was then arranged that the defenders' law agents should enquire what procedure was necessary to have the decree terminated in the event of a settlement being come to. On 9th January 1906 the defenders' law agents received instructions to complete the arrangement, and on 10th January they wrote the agent of deceased with a memorandum of agreement for his client's signature, which after being signed by him and defenders required to be registered with the Sheriff-Clerk in order to terminate the decree. The pursuer is called upon to produce said agreement. A receipt in general terms for signature by the deceased was also sent. On 12th January, the pursuer's agent replied stating his client had died suddenly on Saturday, 6th January 1906. The pursuer's statements in answer are denied.

The pursuer pleaded :—

1. The said deceased Malcolm M'Fadzean having offered to accept said sum of £40 in full settlement of all his claims against them, and defenders having accepted said offer, an agreement was thereby concluded between them which defenders are bound to implement.

2. The pursuer now being in right of said agreement as executor-dative foresaid, is entitled to decree against the defenders for said sum of £40 first sued for.

3. The defenders having been due and resting owing the said deceased Malcolm M'Fadzean the sums sued for, and the pursuer, as executor-dative as aforesaid, now being in right of same, is entitled to decree against the defenders therefor, with expenses as concluded for.

The defenders pleaded :—

1. No title to sue.

2. The action is incompetent.

3. There having been no completed agreement between the deceased and the defenders, the defenders are entitled to absolvitor, with expenses.

4. *Separatim*, if a completed agreement had been come to, it was for the redemption of compensation due in terms of a decree under the Workmen's Compensation Act, and was personal to the deceased and does not transmit to his representatives.

The receipt and memorandum referred to in Ans. 3 and 4 for the defenders were in the following terms :—

Discharge (unsigned) by Malcolm M'Fadzean in favour of Robert M'Alpine & Sons.

I, Malcolm M'Fadzean, labourer, residing at 7 Forge Street, Springburn, Glasgow, do hereby acknowledge to have received from Robert M'Alpine & Sons, contractors, 188 St Vincent Street, Glasgow, per the hands of Howarth & Stewart, writers, Glasgow, the sum of £40 sterling, together with weekly payments made to me under and in virtue of (*First*) Memorandum of Agreement recorded in the Sheriff Court books of Lanarkshire, at Glasgow, on 25th January 1904; and (*Second*) Interlocutor of Mr Sheriff Boyd, dated 29th March 1904, in the Petition for Review of the former weekly payments in full payment and satisfaction of all claims and expenses present and future competent to me for injuries sustained by me on 31st July 1902 while in the employment of the said Robert M'Alpine & Sons at the erection of the Provan Gas Works, Glasgow, in respect of which accident I received such injuries to my left arm as necessitated its partial amputation: And I discharge all claims competent to me at common law under the Employers' Liability Act 1880, and the Workmen's Compensation Act 1897: In witness whereof.

Memorandum of Agreement between Malcolm M'Fadzean and Robert M'Alpine & Sons.

In the Sheriff Court of Lanarkshire at Glasgow.

In the matter of an agreement under the Workmen's Compensation Act 1897, between Malcolm M'Fadzean, labourer, residing at 7 Forge Street, Springburn, Glasgow, First Party, and Robert M'Alpine & Sons, contractors, 188 St Vincent Street, Glasgow, Second Parties, Take notice that on the day of January 1906 the First Party received from the Second Parties the sum of £40 sterling, which sum, together with weekly payments already received by him, he accepted in full satisfaction and discharge of all claims competent to him under and in virtue of (*First*) An agreement with the Second Parties and Memorandum thereof recorded 25th January 1904 in the Sheriff Court books of Lanark-

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shire, at Glasgow, in terms of order of Mr Sheriff Boyd, of date 8th January 1904; and (*Second*) Interlocutor by the said Mr Sheriff Boyd, dated 29th March 1904, in the Petition for Review of payments settled under above-mentioned Memorandum of Agreement.

You are requested to record this Memorandum pursuant to paragraph 8 of the second schedule of the above-mentioned Act, dated the 10th day of January 1906.

To the Sheriff-Clerk of Lanarkshire,
at Glasgow.

On 23rd October 1906 the Sheriff-Substitute (Fyfe) sustained the defenders' second plea in law, and dismissed the action.

The pursuer appealed.

Argued for the Pursuer: 1. The action was competent. It was not an action under the Workmen's Compensation Act. 2. The averments on record disclosed a contract such as the appellant was entitled to prove *prout de jure* (*Downie* v. *Black*, 1885, 13 R. 271). The contract was not of an unusual or anomalous nature; it was analogous to an agreement for the payment of a sum of money in settlement of an action, and proof should not be restricted to writ or oath (*Forbes* v. *Caird*, 1877, 4 R. 1141; *Reid* v. *Reid Bros.*, 1887, 14 R. 789). In any case the appellants were entitled to a proof by writ.

Argued for the Respondents: 1. The action was incompetent. The appellant's remedy was to apply to the Sheriff for registration of a memorandum of agreement under the Workmen's Compensation Act (*Cochrane* v. *Traill*, 1900, 2 F. 794; *Binning* v. *Easton & Sons*, 1906, 8 F. 407). 2. Assuming the action to be competent, the contract was one which could only be proved by writ (*Cochrane* v. *Traill*, *supra*, per Lord Young at p. 798, and *Binning* v. *Easton*, *supra*, per Lord Kyllachy at p. 415). Proof by oath was excluded, as the alleged contract was entered into through an agent (*Sawers*, 1902, 19 R. 1090).

The Court *sustained* the appeal, *recalled* the Sheriff-Substitute's interlocutor of 23rd October 1906, and *remitted* to him to allow the pursuer a proof by writ of the averments contained in Cond. 3, and to the defenders a conjunct probation.

The Lord President. — The pursuer here, Thomas M'Fadzean, is the executor of Malcolm M'Fadzean, a labourer who was engaged in the service of the defenders at Provanmill Gas Works, Glasgow. While engaged in such service he met with an injury, and he made a claim under the Workmen's Compensation Act. The parties seem to have come to an agreement without resorting to arbitration, and compensation was paid—first at the rate of 9s. 1½d. per week, and latterly at 3s. 1½d. per week—and a memorandum of agreement as to compensation was recorded in the Sheriff Court books under the terms of the Workmen's Compensation Act. Matters so standing, in the month of December 1905 the parties seem to have begun negotiations as to whether they might not come to some sort of a settlement which would, by a payment of a lump sum, get rid of the weekly payments which had still to be made under the Workmen's Compensation Act. The pursuer's averment in this matter is contained in Cond. 3, and it is this: "On or about 16th December 1905, after sundry negotiations, the said deceased, through his law agent, offered to accept £40 in full settlement of all his claims, whether under the statutes or at common law, against the defenders, and on or about 29th December 1905 the defenders, through their law agent, accepted said offer. A binding contract was thereby completed between the parties for payment to the deceased by the defenders of the sum of £40." The answer to that is. [His Lordship read Ans. 3 and 4.]

Now that is the averment and the answer, and the pursuer, of course, asked a proof of his averment. The case was dismissed by the learned Sheriff-Substitute, who sustained the second plea in law for the defenders, which second plea in law is that the action is incompetent. There are other pleas, that there was no completed agreement, and that the agreement was personal and did not transmit to the representatives of the deceased. But the plea sustained is that the action is "incompetent." I have not been able to see exactly on what ground that plea can be sustained, and I am bound to say the learned Sheriff-Substitute's note, which he has appended to his interlocutor, does not help me, for it seems to be, not a criticism of competency, but of relevancy—which is a different thing. After stating the facts, he says:—"But before this arrangement had been formally concluded, M'Fadzean died. I do not think there is any room for pursuer's plea that a new and binding contract had been completed. M'Fadzean might have changed his mind, as workmen so often do. So might the employers. Till the Court had reviewed the 3s. 1½d. award it stood, and that payment would only have been ended upon the £40 having been actually paid over. The situation amounted to no more than this—that the law agents had arrived at a basis upon which they would advise their clients to concur in ending the weekly payments. But this was not a new contract." Now all that does not seem to me to go to the competency at all, but only to the relevancy of the agreement as averred, and therefore I cannot see my way to sustain the judgment on the grounds on which it at present stands.

But that opens the question of what ought to be done with the case. Now I am bound to say that I do not think the averment of the pursuer is very satisfactory, because it does not bring out clearly what he alleges the contract really was.

But the contract must have been one of two things. The contract may have been a contract that, in respect of a payment of £40, the deceased man would take such steps as would free the employers from the obligations under which they at that time stood in virtue of the recording of the memorandum, and also relieve them from any claim in the future whether at common law or under the statutes. Well, if that was the contract, it is quite obvious that the action cannot stand, because it was a contract with mutual prestations, and M'Fadzean, by dying, has put it out of his power to fulfil his part of the bargain, and consequently the defenders are free of the contract. I think that is the view the learned Sheriff has taken of the contract, but his disposal of the case on that view is based really on irrelevancy and not on incompetency, in respect that the pursuer has not set forth the possibility of carrying out M'Fadzean's part of the contract.

But then that is not the contract that I take it the pursuer wishes to make out, and though, as I say, I do not think his averment is very clear on the point, it was perfectly clear in the mouth of his counsel. He wants to infer the second of the two views of the contract that I have referred to, viz., that a concluded bargain was come to under which one person said, "I will pay you £40," and the other person said, "You have promised to pay me £40. I therefore cry quits for any other claims I may have against you in respect of this accident," and that there and then a concluded bargain having been come to, the £40 was immediately exigible, and so was *in bonis* of the deceased. That is the only theory on which the executor can maintain the claim he makes in this action.

Now in that view of the contract the question of what is to be done with the case is a delicate one, but I have come to the conclusion that a contract of that peculiar description—for it is peculiar; it is not likely that a person would bind himself to make a payment of £40 down under these conditions; it is much more likely that he would not—a contract of that description can only be proved by writ or oath; and accordingly I propose that we recal the interlocutor of the Sheriff-Substitute and remit to him to allow a proof by writ of the averments in Cond. 3. The law upon the question of what can be proved by parole is perhaps not in a very clear state, and if this case had been a case of a larger character I should not have been unwilling that the whole matter should be carefully considered by a larger Court, especially having regard to the decision in *Downie* v. *Black*, 13 R. 271, which, so far as I am concerned, I should like to have an opportunity of reconsidering. But I may say that I know of no case which is authority for the view that an obligation to pay money, not incidental to one of the well-known ordinary consensual contracts, is provable in the law of Scotland otherwise than by writ or oath; and the learned counsel who pleaded this case was unable to point to any such decision. I cannot say that I find that the law has ever been exactly laid down in that formula, but I do say that I know of no case in which an obligation to pay money has been allowed to be proved otherwise than by writ or oath, except where the payment is an essential part of one of those contracts which can be proved by parole. I am fortified in the view I take of this case by the opinion delivered by Lord Young in *Cochrane* v. *Traill*, 2 F. 794, and by the opinion indicated by some remarks of Lord Kyllachy in the case of *Binning* v. *Easton & Sons*, 8 F. 407.

Lord Kinnear.—I have had considerable difficulty in dealing with this case. I have some doubt whether there is any relevant averment of contract at all, in this respect, that the averment seems to me to be so wanting in specification that it may reasonably be considered as meaning either of two different agreements; and I have some doubt whether the framer of this condescendence had any distinct idea in his own mind what contract he meant to aver. But it has been said to us with perfect distinctness at the bar that what the pursuer now wishes to prove is an agreement to the effect your Lordship has stated, and therefore, as I am not disposed to criticise the averments too strictly in cases of this kind, I assent to your Lordship's proposal that this case be sent to proof.

I agree also that the law in regard to cases in which proof ought to be limited to writ or oath is so unsettled that, if the amount of money involved in this case was sufficient, it might be very proper that the recent decisions should be reconsidered by a Court of Seven Judges. But it would manifestly be altogether improper to subject a litigant in the circumstances of this pursuer to such expense as would be involved in that proceeding. I therefore think we must do the best we can on the law as it now stands; and, though not without considerable hesitation, I agree that we should follow the opinion expressed by Lord Young in the case to which your Lordship referred.

Lord Dundas concurred.—17*th July* 1907.

Counsel for the Appellant, Crabb Watt, K.C., A. M. Anderson; Agent, C. Strang Watson, S.S.C.—Counsel for the Respondents, W. Thomson; Agents, Connell & Campbell, S.S.C.

W. A. R.

OUTER HOUSE.

(*Lord Guthrie.*)

135. **Stocks** *v.* **Holstein.**

Process—Proof or Jury Trial—Question Involving Construction of Statute—Death of Pursuer's Son After Partaking of Fish Dinner Supplied by Defender—Action Laid

OUTER HOUSE. *Lord Guthrie.* — Stocks v. Holstein.

ON FAULT AT COMMON LAW AND BREACH OF WARRANTY UNDER STATUTE—RELEVANCY—THE SALE OF GOODS ACT 1893 (56 AND 57 VICT.), SECT. 14, SUB-SECT. 1.

William Stocks, the pursuer in this case, sued the defender, Francis Louis Holstein, carrying on business at the Peacock Hotel, Newhaven, for damages and *solatium* for the death of his son, on the ground that his death was caused by his partaking, along with others, of a fish dinner or supper supplied by the defender at his hotel on 2nd February 1907. The pursuer made, *inter alia*, the following averments:—

The members of the staff in the office of the Superintendent of the Line of the North British Railway Company have been in the habit for some years of having an annual gathering and "fish dinner" at the defender's hotel, and this year it was arranged between them and the defender that the function should be held on Saturday, 2nd February 1907. Accordingly on that date the said staff, with one or two guests—the party numbering altogether about 30—met at the defender's said hotel, and partook of a fish dinner or supper provided for them by the defender. Among those present was the pursuer's son, Laurence Stocks, of the office staff of the District Goods Manager of the North British Railway.

Within an hour or thereby of leaving the hotel, pursuer's said son began to feel ill, and next morning (Sunday, 3rd February 1907), between 3 and 4 o'clock, he became seriously ill, being seized with vomiting and purging. His illnesss continued, his stomach being seriously affected, and although he received the best attention and medical advice he did not recover his health. No alarming symptoms developed at first, but about three weeks after 2nd February 1907, viz. 24th February 1907, the pursuer's son's illness assumed a much more serious aspect, and on or about 1st March 1907 it was pronounced to be typhoid or enteric fever. The interval of time which usually elapses before such a fever can be diagnosed is about three weeks. On 2nd March 1907 the pursuer's said son was, by his own medical attendant's orders, removed to the City Hospital, where he was treated with the best medical skill, but, nevertheless, he died there on 16th March 1907. The cause of death was certified to be enteric fever. Of the party to which pursuer's said son belonged, and who partook of the same fish dinner with him, at least twelve others also became seriously ill as a result of having so partaken.

The death of the pursuer's said son was caused through the fault or negligence of the defender. It resulted from his having, at said fish dinner in defender's said hotel, on 2nd February 1907, partaken of food, supplied by the defender, which was contaminated, or was otherwise unfit for human consumption. In particular, some of the fish supplied at said dinner was served with mussel sauce which, it has been discovered and is now averred, had been made from mussels that were tainted with sewage, and so not only unfit for human consumption, but very dangerous to the health and life of anyone partaking of it. All the mussels used by the defender for the purposes of his business were gathered from an area within the estuary of the Firth of Forth, situated between Leith pier and Craigentinny Meadows, which is polluted with the sewage of adjoining towns. It was known to the defender when he supplied the mussels in question that they had been taken from said area. It was also known to him that the waters in said area were polluted with sewage which affected shellfish, such as mussels, and made them unfit and highly dangerous for people to eat. He had also previously been warned several times by the medical officer of health for Leith, and by his inspectors, that the eating of mussels gathered in said estuary had been causing serious illness to people who had partaken of them, because of the pollution of the waters from which they were taken, and of the great danger of using the same for human consumption, and that therefore he should cease to use them in connection with his business. The defender also knew that there were printed or painted sign boards erected along the shore warning the public generally against eating mussels taken from these waters. Notwithstanding his said knowledge and the above repeated warnings, the defender continued to use, for the purposes of his said business, mussels which he knew were gathered on the south shore of the said estuary and within the said polluted area. The mussels from which the sauce supplied at said dinner on 2nd February 1907 was made were gathered from said polluted area, and the illness from which pursuer's son died was brought on by his having innocently partaken of said sauce supplied by the defender at said fish dinner on 2nd February 1907. It was gross negligence on the part of the defender to supply sauce made with the said mussels to the pursuer's son, and the death of the latter was the natural and probable result of his negligence.

By thus persisting in using mussels gathered from an area known to be polluted, and serving them to the members of the said party, including pursuer's son, the defender was guilty of gross negligence, and is liable for all the evil consequences caused by his having done so. Further, apart from defender's fault as aforesaid, he is liable in damages to the pursuer under the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sect. 14 (1), in respect of his implied warranty of the fitness for human consumption of the food supplied by him to the pursuer's said son at the said dinner. The defender knew the purpose for which the said fish dinner was required and supplied, viz. for human consumption. The various articles of food supplied were of such a description as it is in the course of the defender's business to supply, and he knew, as was the fact, that the individual members of said party relied on the defender's skill and judgment that the food supplied by him on said evening would be fit to be safely partaken of.

Sect. 14, sub-sect. 1, of the Sale of Goods Act is in the following terms:—

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

The pursuer proposed the following issues for the trial of the cause :—

1. Whether the illness which resulted in the death of the pursuer's son Laurence Stocks on or about 16th March 1907 was caused through the fault of the defender, to the loss, injury, and damage of the pursuer?
2. Whether, on or about the 2nd February 1907, the defender, in the course of his business, supplied a fish dinner to a company which included the pursuer's said son; whether the same or part thereof was not reasonably fit for human consumption; and whether pursuer's said son, relying on defender's skill as a purveyor, partook of said dinner and was in consequence thereof seized with illness which caused his death, to the loss, injury, and damage of the pursuer?

The pursuer moved for approval of issues.

The defender opposed this, and *argued* (1) that the pursuer's averments relating to the first issue were irrelevant; and that in any event the defender would be prejudiced if the case were sent to a jury.

The Lord Ordinary, on account of the questions involved in the second issue, *found* that the case was more suitable to be disposed of by way of proof, *disallowed* the issues, and *allowed* a proof before answer.

Lord Guthrie.—I reject the defender's argument that the pursuer's averments relative to the first issue, that of fault, are irrelevant. Nor do I see any grounds for his contention, in relation both to fault and breach of contract, that the case ought not to go to a jury, because of possible prejudice.

I have allowed a proof and refused the pursuer's motion for a jury trial, on account of the nature of the questions involved in the second issue, that of breach of contract under sect. 14, sub-sect. 1, of the Sale of Goods Act 1893; and I proceed to consider the question of jury trial or proof, as if the only case made by the pursuer was under the Act. The *onus* under the Act is probably lighter than in a case of fault, and he has therefore a reasonable ground for insisting in his second issue.

The question under the second issue is not so simple as the pursuer's counsel represented it. His issue, as framed, does not exhaust the elements necessary for the jury's consideration under the Act. The second issue asks the jury to find, *first*, that the food in question was supplied by the defender in the course of his business; *second*, that it was not reasonably fit for human consumption; and *third*, that the deceased relied on the defender's skill. But the Act further requires that, expressly or by implication, the buyer must have made known to the seller the particular purpose for which the goods were required. The purpose may be obvious in a case like the present, but still this is an element to be expressly considered by the jury. It illustrates the difficulty of the question of breach of contract that the pursuer's skilled advisers first proposed an issue which, if affirmed, would not have entitled them to a verdict, and then, at the end of the discussion, suggested that the case might be tried by a jury, on the record, without an issue.

As to practice, I consider only the practice of the Scotch Courts. In England the custom of putting questions to juries and obtaining special verdicts may diminish the risk of miscarriage in a case of this sort. The course followed by Lord Kyllachy in the cases of *Macfadyen*, 1897, 4 S.L.T. 321, and *Sutherland*, 1898, 5 S.L.T. 55, seems to me in accordance with precedent, and to be based on sound considerations of expediency.

I therefore send the whole case to proof.—*25th July* 1907.

Counsel for Pursuer, Kemp; Agent, Francis S. Cownie, S.S.C.—Counsel for Defender, Munro; Agents, Garden & Robertson, S.S.C. C. H. B.

FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

136. Boord & Son *v.* Thom & Cameron Limited.

I. Trade Mark—Registered Trade Mark—Trade Mark Registered as Old Mark in 1879 as Having Been in Use For Twenty-one Years Prior to 13th August 1875—Application for Rectification of Register on Grounds (a) That Mark was Common to the Trade When it Was Registered; (b) That Persons Seeking Rectification Had Used Mark Prior to Registration and Were Entitled to Continue to Do So—Held That the Question at Issue was, In Whom was the Property in the Mark at the Date of Registration?—Where a Mark Had Been Long Used and Largely Advertised Prior to Registration by the Person Registering it and His Goods Had Become Identified by the Mark, Held That He Had Property in the Mark and That Evidence of Small and Sporadic Use of the Mark by Other Parties Prior to Registration but Not of Any Real Trade in Their Goods Associated With the Mark Was Not Sufficient to Displace the Registered Owners From the Register—Held Also That Where Mark Had Been on Register for Long Number of Years Without Challenge, the Onus of Proof Was on

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THE PERSON ALLEGING THAT TRADE MARK WAS COMMON TO THE TRADE AT DATE OF REGISTRATION.

II. TRADE MARK—REGISTERED TRADE MARK—RECTIFICATION OF REGISTER—PATENTS, DESIGNS, AND TRADE MARKS ACT 1883 (46 AND 47 VICT. CAP. 57), SECTS. 76 AND 90—PROCESS — INTERDICT — INFRINGEMENT — DEFENCE — PLEA THAT TRADE MARK IN COMMON USE AT DATE OF REGISTRATION CAN BE PLEADED ONLY IN ACTION CONCLUDING FOR RECTIFICATION OF REGISTER AND NOT BY WAY OF DEFENCE TO ACTION FOR INFRINGEMENT.

III. TRADE MARK—REGISTERED TRADE MARK—RECTIFICATION OF REGISTER—RIGHT OF CONCURRENT USER PLEADED BY ALLEGED INFRINGER — RELEVANCY — PLEA THAT ALLEGED INFRINGER NOT ON THE REGISTER HAS RIGHT TO USE REGISTERED TRADE MARK CONCURRENTLY WITH REGISTERED OWNER CANNOT BE PLEADED BY WAY OF DEFENCE TO ACTION OF INFRINGEMENT, BUT ONLY IN ACTION CONCLUDING FOR RECTIFICATION OF REGISTER EITHER BY PLACING THE ALLEGED INFRINGER ON THE REGISTER AS OWNER OF TRADE MARK OR BY REMOVING THE REGISTERED MARK—OBSERVATIONS ON "THREE MARK RULE."

IV. TRADE MARK—REGISTERED TRADE MARK—INFRINGEMENT — SIMILARITY — MARK THE ESSENTIAL ELEMENT IN WHICH WAS A DESIGN OF A CAT AND BARREL—GOODS OF REGISTERED OWNER KNOWN IN MARKET AS "CAT AND BARREL BRAND"—OTHER DESIGNS WHICH, THOUGH DIFFERING TO SOME EXTENT FROM THE REGISTERED MARK, WERE HELD, IN VIEW OF EVIDENCE ASSOCIATING THE REGISTERED OWNERS' GOODS WITH CAT AND BARREL, TO BE PRACTICAL INFRINGEMENTS OF THE TRADE MARK.

Reclaiming Notes against Interlocutors of Lord Salvesen.

In July 1904 Boord & Son, distillers and spirit merchants, London, brought an action against Thom & Cameron Ltd., whisky merchants, Cheapside, Glasgow. The conclusions of the summons were—

(*First*) for declarator that the pursuers were the sole and exclusive proprietors of the registered trade marks Nos. 20,505, 257,763, 257,764, and 263,113; and (*Second*), "the defenders and their agents, or others acting for them, or for whom they are responsible, Ought and Should, by decree of the Lords of our Council and Session, be interdicted, prohibited and discharged from in any way infringing the pursuers' said trade marks, and from infringing the pursuers' sole and exclusive right to use the same, and from trading on and obtaining the benefit of the pursuers' established trade reputation; and, without prejudice to the foregoing generality, the defenders Ought and Should be interdicted, prohibited and discharged, by decree foresaid, from issuing, selling or using, as labels or as advertisements or otherwise, designs which infringe the pursuers' said registered trade marks or which are colourable imitations of the same, or which trade on and obtain the benefit of the pursuers' established trade reputation, and in particular from issuing, selling or using in labels, advertisements or otherwise the designs referred to in Article 6 of the Condescendence hereunto annexed, or any similar design which infringes the pursuers' said trade marks, or which trade on and obtain the benefit of the pursuers' established trade reputation or is in colourable imitation of the same; and (*Third*) the defenders Ought and Should be interdicted, prohibited and discharged, by decree foresaid, from selling, offering for sale, passing off, or attempting to pass off, or enabling others to pass off, Old Tom gin, unsweetened gin, or any spirits, wines, cordials, bitters, liqueurs, or other articles of a similar nature not of the pursuers' merchandise or manufacture, as and for the goods and merchandise of the pursuers in any way whatsoever, and in particular by using the words 'Cat and Barrel' in connection with the representation of a cat and barrel or otherwise, or by using the representation of a cat and barrel, or any words or a word, signs or a sign, figures or a figure, devices or a device, which are calculated to enable the defenders' gins or other fermented liquors or liqueurs, or goods of the defenders, to be passed off as or for the goods of the pursuers."

There was also a conclusion for delivery of all labels, etc., belonging to the defenders, and infringing, or calculated to assist in the infringement of, the pursuers' trade marks.

The labels, of which illustrations are given, are, first, No. 91 of process, which represents one of Messrs Boord's labels (No. 20,505 on the Register), and second, the four labels of Messrs Thom & Cameron referred to in Condescendence 6 and in the opinion of the Lord President, Nos. 21, 18, 39, and 33, and against which interdict was granted. Messrs Boord's other marks were similar in design to No. 20,505 except No. 263,113, which was a capsule mark containing only a representation of a cat on a barrel with "Boord & Son, London," printed round it.

The pursuers averred:

COND. 3. The pursuers and all their predecessors in business have for a great number of years manufactured, sold and advertised for sale, gin and liqueurs, as well as other fermented liquors and spirits, and have acquired a great reputation for the same respectively. Since at least the year 1854 they have so manufactured, sold and advertised said gin, liquors and spirits, under and in connection with a certain label or trade mark, whereof the important and essential feature is the representation thereon of a cat and of a barrel. Since at least the year 1854 the pursuers' goods have been well known and identified in the market under and by means of said label or trade mark. The pursuers are, moreover, the registered proprietors of said label or trade mark, which was registered as a trade mark in class 43 for fermented liquors and spirits on 8th April 1879 as having been used for twenty-five years before that date. Said trade mark was then registered by

Thomas William Boord, carrying on business under the name of Swaine, Boord & Company. On 17th June 1892 the pursuers were entered in the Register of Trade Marks as proprietors of said trade mark. The registration of said trade mark was renewed on 8th April 1893, and will remain in force for fourteen years from that date. The pursuers are also the registered proprietors of the trade marks Nos. 257,763 and 257,764 and No. 263,113. The said trade mark No. 257,763, which is used for dry gin, was registered on 7th June 1904 as having been used by the pursuers and their predecessors in business continuously since upwards of twelve years before the 13th August 1875. The said trade mark No. 257,764, used for cordial Old Tom, was also registered on 7th June 1904 as having been used by the pursuers and their predecessors in business continuously since upwards of twenty-five years before the 13th August 1875. The said trade mark No. 263,113, which is a capsule mark and is used for bottled cordials (alcoholic), Old Tom and dry gin, juniper cordial (alcoholic), orange bitters (alcoholic), ginger brandy and whisky, was registered on the 14th July 1905 as on an application dated 29th April 1904, as having been used by the pursuers and their predecessors in business since at least one year previous to 13th August 1875. The pursuers' trade mark is also registered in most of the British Colonies, in the United States, and in many other foreign countries. The pursuers have always applied for and obtained injunctions against any infringements of their said trade marks as soon as said infringements have come to their notice.

No. 91 of Process.
No. 20,505 on the Register.

COND. 4. The fermented liquors, spirits and liqueurs, including gin, sloe gin, and other goods of the pursuers' manufacture and sale, have for about fifty years been known to purchasers and intending purchasers as the "Cat and Barrel" brand of fermented liquors, spirits and liqueurs, including gin and sloe gin, and any such goods or merchandise advertised or sold under or in connection with the said trade mark or label, or as or of the "Cat and Barrel" brand, have been known to, and have been and are identified by traders and the public as goods of the pursuers' manufacture or merchandise. The words "Cat and Barrel" brand are commonly used to indicate the pursuers' goods, and in the market the pursuers goods only are known by that name. The pursuers have carried on their trade in connection with their said trade mark in England, Scotland and Ireland, and in the Colonies and abroad.

COND. 6. . . . . The pursuers [in the course of the action after referred to, *Boord & Son* v. *Huddart*] ascertained that the defenders were, and are, using a variety of labels in connection with their business which infringe the pursuers' said label and trade marks. Amongst these labels are the following: (1) A label with a barrel lying on its side, with a cat sitting on it, and having printed thereon Superior Old Tom Gin, manufactured by Thom & Cameron, Glasgow [No. 21 of process]; (2) a label with a barrel in an upright position, and the cat on the top thereof, with a bottle and a glass, and having printed thereon Thom & Cameron, Cream Old Tom Gin, Thom & Cameron, Limited, Glasgow and London [No. 33 of process]; (3) a label with a barrel also in an upright position, and the cat sitting on the top thereof, and having printed thereon Superior Old Tom Gin, Old Tom, Thom & Cameron, Glasgow [No. 39 of process]; and (4) a label with two barrels close together, laid on their side, and a third barrel on its side put on the top of them, with a cat on the top of it [No. 18 of process].

The said labels, which are colourable imitations of the pursuers' trade mark, registered as aforesaid, have, as the pursuers have now ascertained, and aver, been largely used by the defenders in connection with their export trade for a number of years. The said labels are an infringement of the pursuers' trade mark. Said labels, containing representations of a cat and a barrel similar to the pursuers' registered

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trade mark, have been, and are still being, largely used by the defenders in connection with the sale of gin and other spirits and liqueurs in Scotland, and for their foreign and colonial trade. . . . The defenders' labels referred to in the present action are not registered.

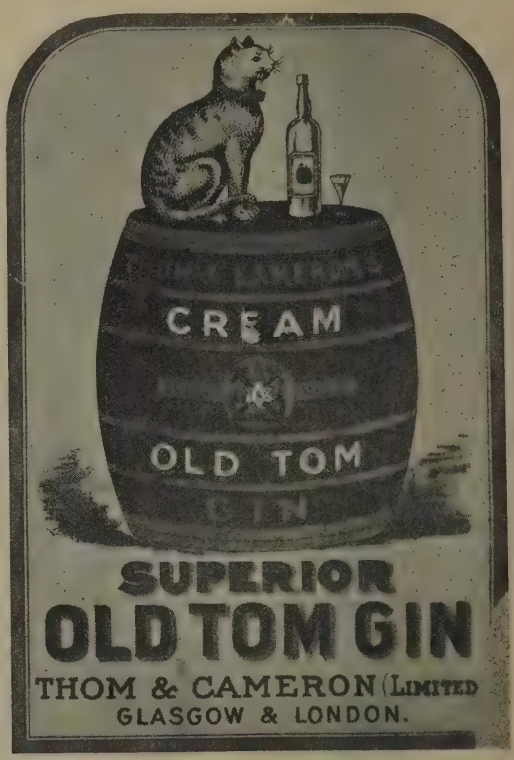
The Pursuers pleaded:—

"1. The pursuers, being proprietors of the said trade marks and having an established trade reputation for their goods under the term 'Cat and Barrel Brand,' are entitled to the sole and exclusive use of the same, and to prevent any other person, firm or company selling their goods upon such established trade reputation.

"2. The defenders having infringed the pursuers' said trade mark and exclusive right to use the same, the pursuers are entitled to interdict as concluded for."

The defenders averred in answer:

Explained that the defenders and their predecessors have since at least 1850 used in connection with their business, and particularly in selling gin, labels which bore as a distinctive feature the representation of a cat and a barrel, and that in consequence thereof the gin sold by them has for many years been known in the market as the "Cat Brand" and the "Cat and Barrel Brand" of gin. The defenders and their predecessors were not aware until about eighteen months ago that the pursuers used labels in connection with their business upon which there was a representation of a cat and a barrel. The said



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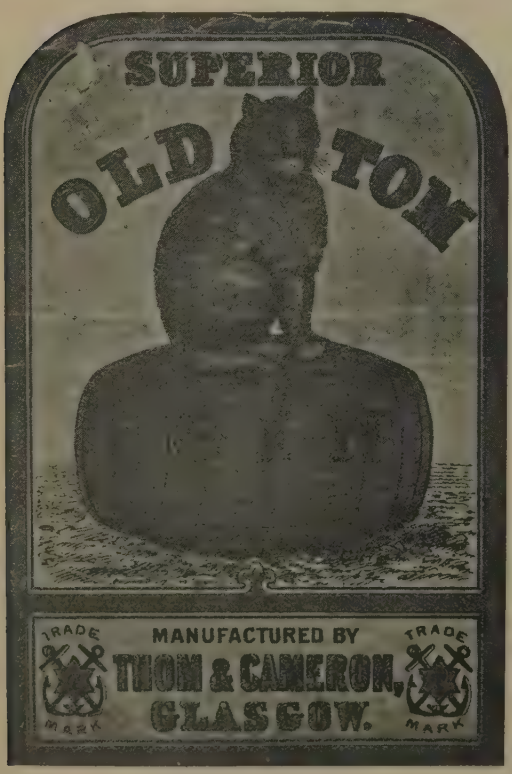

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representations upon the labels of the pursuers and defenders respectively are not similar in appearance, and would not in any event constitute an infringement of trade mark upon the part either of pursuers or of defenders.

The Defenders pleaded:—

"2. The pursuers not having an exclusive right to the 'Cat and Barrel' brand, decree of absolvitor should be pronounced.

"3. In respect that the defenders have not infringed the pursuers' trade marks, they should be assoilzied."

On 7th July 1905 Thom & Cameron Ltd. brought a cross action against Boord & Son. The conclusions of the summons were as follows:—

"(*Primo*), it Ought and Should be found and declared, by decree of the Lords of our Council and Session, that the entries of the four trade marks after mentioned in the register of trade marks kept under and in terms of the Patents, Designs, and Trade Marks Act eighteen hundred and eighty-three, as amended by the Patents, Designs, and Trade Marks Act eighteen hundred and eighty-eight, viz. [The summons then set forth Boord & Son's trade marks], were made in said register without sufficient cause, and that the same ought to be expunged therefrom accordingly. Or otherwise (*Secundo*), it Ought and Should be found and declared, by decree foresaid, that the said alleged trade marks were incapable of registration, and that the alleged entry thereof in the aforesaid register is invalid and illegal, and contrary

No. 39 of Process.

to the provisions of the aforesaid statutes and relative official notices issued by the Comptroller-General of Patents, Designs, and Trade Marks in pursuance thereof, and that the said alleged entries ought to be expunged from the said register accordingly: Or otherwise (*Tertio*), it Ought and Should be found and declared, by decree foresaid, that the defenders have no exclusive right to use the sign, figure, or device of a cat, or of a cat and barrel, on labels, advertisements, or otherwise, in connection with the sale of Old Tom gin, unsweetened gin, or spirits, wines, cordials, bitters, liqueurs, or other articles of a similar nature, and that the pursuers are entitled to use the said sign, figure, or device on labels, advertisements, or otherwise, in connection with the sale of Old Tom gin or any of the liquors before mentioned which is not made or manufactured by or on behalf of the defenders, and to sell, offer for sale, and advertise Old Tom gin, or any of the liquors before mentioned, made or manufactured by or on behalf of the pursuers under the said sign, figure, or device, by label, advertisement, or otherwise."

The pursuers set forth the entries on the register relating to the defender's trade marks, and further averred:—

An essential and important feature of the whole of said trade marks is the representation of a cat, or of a cat and a barrel. The whole of said trade marks were incapable of registration . . . . in respect that the device of a cat, or otherwise of a cat and a barrel, were in common use prior to the respective dates of registration, and were common to the trade, and were not disclaimed in the respective applications for registration. In particular [the pursuers made specific averments as to the use of the device of a cat and barrel by other traders].

The pursuers were not aware until recently of the registration of the said trade marks, or any of them. The defenders claim that they are exclusively entitled to use the representation or device of a cat, or a cat and barrel, in connection with the sale of gin and other liquors, or to the exclusive use of a label or trade mark for gin of any devices whereof an essential feature is the representation of a cat or a cat and barrel.

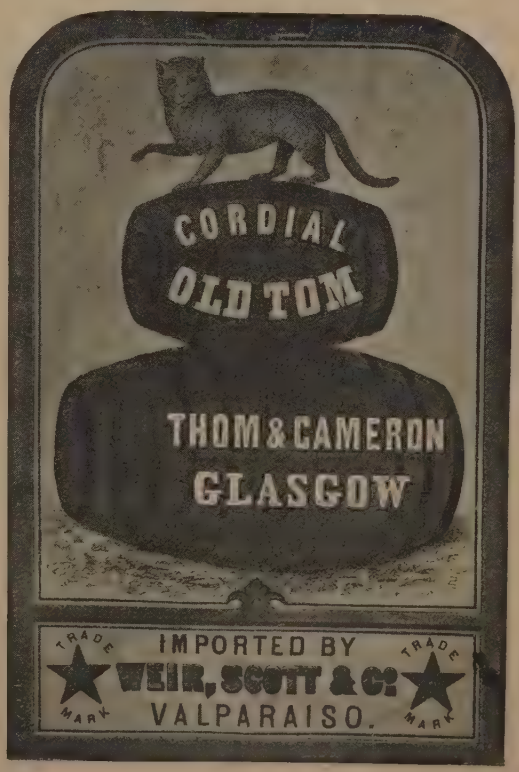
The Pursuers pleaded:—

"1. The said trade marks having been entered in the register of trade marks without sufficient cause, and the pursuers having been aggrieved thereby, they are entitled to decree in terms of the first declaratory conclusion of the summons.

"2. The said trade marks having been incapable of registration, and the entry thereof in the register of trade marks having been illegal and contrary to the provisions of the statutes and the notices issued in pursuance thereof, the pursuers are entitled to decree in terms of the second declaratory conclusion of the summons, and to decree of reduction, as concluded for, with expenses.

"3. The defenders having no exclusive right to the use of the figure or device of a cat, or cat and barrel, in connection with the sale of gin or other liquors, the pursuers are entitled to decree of declarator to this effect, and to decree of reduction, as concluded for."

Proof was allowed and led. The import of the evidence sufficiently appears from the opinion of the Lord Ordinary. The statutory enactments referred to are sufficiently set forth in the opinion of the Lord President.



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On 27th March 1906 the Lord Ordinary in the action at the instance of Boord & Son against Thom & Cameron Ltd. *assoilzied* the defenders. In the action at the instance of Thom & Cameron Ltd. against Boord & Son, his Lordship pronounced the following interlocutor:—

"Finds and declares that the defenders have no exclusive right to use the sign, figure or device of a 'Cat,' or of a 'Cat and Barrel,' on labels, advertisements or otherwise in connection with the sale of 'Old Tom' gin, but that the pursuers are entitled to use the said sign, figure or device on labels, advertisements or otherwise in connection with the sale of 'Old Tom' gin which is not made or manufactured by or on behalf of the defenders, and to sell, offer for sale, and advertise 'Old Tom' gin made or manufactured by or on behalf of the pursuers under the said sign, figure or device by label, advertisement or otherwise; finds it unnecessary to deal with the other conclusions of the action, and dismisses the same."

Lord Salvesen.—On 1st July 1904 Messrs Boord & Son raised an action against Thom & Cameron Ltd., in which they sought declarator that they were the sole proprietors of certain trade marks, and interdict against infringement of same. There was also a conclusion to the effect that Thom & Cameron should be interdicted from using the words "Cat and Barrel," or the representation of a Cat and Barrel, in connection with the sale of gin and other liquors. About a year later Thom & Cameron replied by an action of declarator and reduction, in which they sought to have Boord & Son's trade marks removed from the register, or otherwise a decree that the latter have no exclusive right to use the device of a Cat, or of a Cat and Barrel, on labels or advertisements in connection with the sale of "Old Tom" gin and other liquors. Both cases were ultimately sent to trial together, and I thought it right that Thom & Cameron should lead in the proof, on the ground that the registration of the trade marks threw the *onus* of proof on those who attacked their validity. In what follows I shall accordingly refer to Thom & Cameron Ltd. throughout as the pursuers, and Boord & Son as the defenders.

The defenders are an old-established firm of distillers and wine and spirit merchants. For some time prior to 1848 they had done a considerable trade in gin. The liquor then in vogue was a sweetened gin, and it had long previously acquired the name of "Old Tom." How that name originated is mere matter of conjecture, and it is of no materiality in the present case, as it is admitted that it was a name in common use. Prior to 1848 the defenders' business was entirely confined to the home trade; but after that year, owing to an Act having been passed which allowed a drawback on exported spirits, it became possible for British distillers to compete in foreign and colonial markets with the Dutch distillers of gin; and the defenders appear to have prosecuted the export trade with vigour and success from that time onwards. About 1849, or possibly a couple of years later, the defenders adopted a device upon their labels which consisted of a circular disc, on which was placed a Barrel on its bilge, which again carried a Cat in a standing position, with one paw uplifted and the back somewhat curved. This device they have consistently used on the labels of bottles in which their gin was bottled for export as well as for the home market—on showcards which they distributed to their customers, on caution notices which they issued from time to time with a view to preventing imitations, and on the other usual literature which is employed in connection with such a business. In 1879 the defenders applied for and obtained registration of the device as their trade mark, on the representation that they had used the same for twenty-five years prior to the date of their application. This was a true representation so far as gin was concerned, but it was not accurate so far as it applied to whiskies and other liquors. The defenders have uninterruptedly used the device in question as their registered trade mark ever since, and until now their right has never been judicially challenged. During the whole period from about 1850 onwards they have done a large trade in England and a large export business to various parts of the world, including India, Australia, Africa and America. To some extent also they have, during the whole period, carried on a business in gin with Scotland and Ireland, although—so far as their Scotch business is concerned—it has throughout been relatively small, and has diminished rather than increased.

From the first the defenders appear to have attached considerable importance to the device of the Cat and Barrel, which—so far as they knew—they were the first to adopt in connection with the sale of gin and other spirits. From time to time the device was fraudulently copied, and whenever a case of this kind came to their knowledge the defenders took prompt means to have it punished or stopped. So early as 1856 they found it necessary, for their protection, to issue printed notices to their customers and others, warning them against the unauthorised use of their label, and similar notices were periodically issued both before and after the device had been registered as the defenders' trade mark. In 1903 they raised an action in the High Court of Justice against a Mr Huddart, who was selling gin manufactured by Melrose, Drover & Co. Ltd., of Leith, on the ground that the label under which the gin was sold contained the representation of a Cat's head and paws protruding from the upper part of a barrel, a device which the defenders maintained was an infringement of their trade mark. The case went to trial; and after a large number of witnesses had been examined on both sides, the defenders obtained an injunction against Huddart from Mr Justice Swinfen Eady. This judgment was allowed to become final; and the defenders thereupon, having had their attention called to the use by other distillers and merchants of the device of a Cat and Barrel in connection with the sale of "Old Tom" gin, threatened these firms with proceedings unless they agreed to discontinue its use. In every such case they had hitherto been successful, and they have now taken action against the pursuers, one of whose directors was a witness for the defenders in the *Huddart* case.

The above facts, which are practically undisputed, present a formidable *prima facie* case in favour of the defenders' claim to the sole and exclusive use of the device which they have so long displayed on their labels—apart altogether from the statutory privileges which the registration of the device confers upon them. The pursuers, however, now assert that the defenders' trade marks were incapable of registration "in respect that the device of a Cat, or otherwise of

a Cat and a Barrel, were in common use prior to the respective dates of registration, and were common to the trade, and were not disclaimed in the respective applications for registration." They gave a list of twelve firms, including their own, who they say used labels in connection with the sale of gin whereon the figures of a Cat and a Barrel appear. This defence was not properly raised in the *Huddart* case, and at all events was not elaborated in evidence as it has been here.

The labels used by the pursuers and by those other traders have been conveniently collected on sheets, so as to make comparison with the defenders' registered device easy. Except that all the labels bear the device of a Cat and Barrel in whole or in part, there is, with perhaps four exceptions, in my opinion, no resemblance between these labels and those used by the defenders. In all of them the manufacturers' name is printed in large and legible type; and I do not think it possible that those who were familiar with the defenders' labels could for a moment imagine when they saw any of the alleged infringing labels that the contents of the bottles to which they were affixed were the defenders' manufacture. The possible exceptions are (1) labels 18 and 34, which were used on gin of the pursuers' manufacture imported by Weir, Scott & Co. to Valparaiso. There is a pretty close resemblance between these two labels and the defenders' trade mark, all the more striking that the word "Cordial," which the defenders from the first applied to "Old Tom," is also used in the same connection on them. It is suggested accordingly by the defenders that the person who designed labels Nos. 18 and 34 must have seen and copied their labels, and I confess that a very small amount of evidence might have induced me to draw this inference. The history of the labels, however, has been explained by Mr Steven, the lithographer by whom they were designed, at the request of Mr Scott, and the general import of his evidence is to the effect that they were not copies of the defenders' labels, of which he was ignorant, and that the resemblance is entirely accidental. No partner of the firm of Weir, Scott & Co. was examined on either side; but the proved fact that these labels have been used in the Valparaiso business since 1873, a place where the defenders say they have all along been doing business, and that there seems never to have been a complaint of the similarity between the two labels, or of any injury done to the defenders' business there, are *prima facie* evidence that no confusion did in fact arise. In view of this, and the entire absence of contrary evidence, I am unable to hold it proved that these two labels were conscious imitations of the defenders'; and even if they had been, the name of the manufacturers, which was printed in large letters, was sufficient to prevent any person who could read from drawing the inference that the gin sold under these labels was the manufacture of the defenders. (2) The labels Nos. 200, 201, and 35 of process are all plainly taken from the same design, and also bear a strong resemblance to the defenders'. The original label No. 200 is spoken to as having been used by James Mackenzie, Son & Co. at least as far back as 1859 or 1865, and up till two years ago. It is obviously impossible to expect evidence after a lapse of more than forty years as to the history of such a label, and everything, therefore, is to be presumed in its favour. The resemblance is by no means so close as to suggest that the one design was copied from the other; and I think, therefore, I must assume that the label No. 200 was independently designed in ignorance of the defenders' label, and, for all I know, at an earlier date.

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The defenders, however, have led a large body of evidence to the effect that in consequence of the long-continued and extensive use of their trade mark their make of gin has become favourably known as "Cat and Barrel brand," and that any representation of a Cat and Barrel on bottles of gin is liable to be injurious to their business. It was largely on this ground that Mr Justice Swinfen Eady decided that the head of a Cat protruding from the end of a Barrel, which was the device used by Melrose, Drover & Co., was an infringement of the defenders' trade mark, although the device is perhaps more unlike the defenders' trade mark than any of those on which the pursuers rely. The only part of the evidence on this head which impressed me was that which related to the trade with India, Burmah, and other countries, where English characters are not understood, and where the picture upon the bottle is the recognised mode of identifying the goods of a particular manufacturer. All that the evidence, however, comes to is, that the native dealer or middleman would be enabled, if Cat and Barrel labels of any kind were used on gin, to pass off, as the goods of the defenders, gin which was of an inferior quality, and thus succeed in defrauding the unwary purchaser to whom the words "Cat and Barrel brand," as applied to the defenders' gin, had become known. If the adoption of a Cat and Barrel on labels had been of recent use, and in the knowledge or presumed knowledge of the defenders' trade mark, it would have required very little actual evidence of deception to have predisposed me in the defenders' favour; but when I find that for half a century goods bearing some of the labels complained of have been exported to markets where the defenders' gin has been regularly sold, and that not a single instance can be adduced of a purchaser having been deceived, I am unable to draw the inference that the defenders desire. It is noticeable that in their price lists and advertisements the defenders did not, until very recent years, ever offer their gin for sale under the name of "Cat and Barrel brand." In this respect the case is in marked contrast with the case of the "C. B." corsets, which had been widely advertised under that description, and in such a way that the public generally were not aware that the letters "C. B." were the initials of the manufacturer's name; and although the defenders produced 155 written orders as evidence that their gin has become known in the trade as "Cat and Barrel brand," only 34 of these support their contention. In 104 instances "Old Tom" gin was ordered under the designation "Cat brand," and the defenders do not seek in this action to interdict the use of the device of a Cat by itself on any label applied to gin. This is noteworthy, as the defenders seem to me to have quite as much—if not more—to say for their gin being known as the "Cat brand" as for it being known as the "Cat and Barrel brand."

I do not doubt that, amongst customers of the defenders and others who had become familiar with their trade mark, their gin would be not unfrequently spoken of as the "Cat brand" or the "Cat and Barrel brand." But the defenders themselves at no time seem to have made any effort to get their goods recognised under this name; and, in the great majority of cases, I am satisfied that their gin was ordered under the name of the manufacturer. The evidence as to Scotland is extremely meagre on this head, and relates to very recent years. Even, therefore, if the only question in the case had been one of infringement

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of the defenders' trade mark, or of the resemblance between the pursuers' and the defenders' labels being such as was calculated to deceive, I should have great difficulty in granting interdict. The case appears to me to present many features similar to those which were the subject of discussion in the case of *Cowie* v. *Herbert*, 24 R. 353, where the alleged gullibility of Orientals was also emphasised.

Before dealing with this part of the case, I may notice in passing that there are formal averments as to the pursuers having attempted to pass off their goods as the goods of the defenders. No attempt has been made to prove these averments—even assuming that they were relevant—and I am satisfied that they are without the smallest foundation.

But the pursuers, in the action at their instance, challenge directly the validity of the defenders' trade mark, and it is necessary that I should now deal with the evidence bearing on this challenge. The evidence is voluminous, and I shall content myself with summarising the conclusions at which I have arrived as to the alleged common use of a Cat and Barrel device.

(1) The pursuers' business was founded by Mr Robert Thom in 1848. In 1865 he assumed Mr Cameron as a partner, and the business was carried on as a private concern until 1888, when it was converted into a limited liability company. From the commencement a moderate business in gin was done, at first in the home trade, afterwards in both the home trade and the export trade, and since 1869 in the export trade only. From 1853 onwards the pursuers and their predecessors have used a label as applied to "Old Tom" gin, on which the conspicuous feature was a Cat sitting on a Barrel. I incline to think that No. 39 of process was the first, that afterwards No. 21 was used for a considerable time, and that, concurrently with this, No. 32 of process was used as a flask label. Since 1869 the label regularly used on quart bottles of "Old Tom" has been No. 33 of process, although in the case of one or two customers the stock label No. 35 has been purchased and affixed to the pursuers' gin. Not unnaturally the earliest use of the label depends on the evidence of Mr and Mrs Thom. One other witness speaks to the year 1859, and from at least the year 1863 the continuous use of labels with the "Cat and Barrel" design is, I think, amply established. Since 1873 the business has been practically stationary so far as the turnover of gin was concerned, and has amounted on the average to something between 1000 and 2000 cases per annum. Prior to that period it seems to have been of a very fluctuating nature, reaching the lowest point in 1869, so far as the information now available goes, when only 190 cases are recorded as having been sold, and rising at times, according to Mr Thom's evidence, to considerable proportions.

(2) A firm of James Mackenzie, Sons & Co., who carried on business in Glasgow, used the device of a Cat and two Barrels, shown on label No. 200 of process, from some time prior to 1859. Their successors in business—Messrs Peter M'Donald & Co. —used the same label until 1904, when, at the request of the defenders, they agreed to discontinue it, on the ground that their trade in gin had ceased to be of any importance. The use of this label No. 200 depends on the evidence of Peter M'Donald corroborated by J. T. Stewart, who speaks to seeing the label in 1859. Apart from this corroboration I saw no reason to doubt Mr M'Donald's evidence. He has no motive to serve by giving false evidence, and no conceivable interest in the result of the present action.

(3) Stewart Pott & Co., another firm of wine merchants in Glasgow, have since 1859 used a label for "Old Tom" gin which had the device of a Cat sitting on a Barrel. At first the Cat was represented as sitting on the side or bilge of the Barrel, but afterwards the label No. 85 of process was adopted, which closely resembles that of Thom & Cameron for flasks, except that the Cat is facing in the opposite direction. It is peculiar to their case that they have apparently used this label since 1876, mainly on gin supplied by the defenders, but without arrangement with them.

(4) Messrs Wright & Greig Ltd., another large firm of distillers and spirit merchants in Glasgow, used a Cat and Barrel label for their gin between 1875 and 1885, after which they discontinued the use of that label, and utilised one with the figure of a Cat alone in the centre. Their business in gin was a small one, not exceeding a hundred cases per annum, but it was almost entirely in Glasgow and the surrounding districts.

(5) Messrs R. H. Thomson & Co. of Leith seem to have used the label No. 201 of process between 1873 and 1901. Apparently they also used at the same time a label with an anchor upon it, with no representation of a Cat and Barrel, and this became the one commonly applied shortly after 1886. The trade in gin did not exceed 500 dozen-cases per annum.

(6) The use by Messrs Bernard & Co. of Leith of a label having the device of a Cat and Barrel upon it was somewhat more extensive; and, in addition, Messrs Bernard caused to be printed and distributed 2000 showcards similar to No. 203 of process. They also registered their trade mark, containing the representation of the Cat and Barrel, for "Old Tom" in May 1876, it being stated in their application that they had used it for sixteen months before. They continued to use the label until after *Huddart's* case, when, at the request of the defenders, they discontinued its use and cancelled their registration.

(7 and 8) For the Valparaiso market two labels were printed for Rodger & Co., and Rodger, Symington & Co., who got the labels designed expressly with a view to a sale of the pursuers' gin. There is evidence that from 1873 large shipments of gin with these labels were made by the pursuers to Valparaiso. The other labels for Weir, Scott & Co. have already been referred to. They were also got up for that firm's use in the sale of gin at Valparaiso.

(9) The evidence of Mr Henry Hughes is to the effect that the stock label No. 253 of process was used by Mr Blake, a wine merchant in Dublin, in October 1868, and has been in use since then.

In addition to deponing to their own use of what may be called for shortness Cat and Barrel labels, many of the witnesses say that they understood that the device was common to the trade, and that they had seen it from time to time on the labels of other persons. Most of them were entirely unaware that the defenders used a similar device on their labels, or that they had registered it as their trade mark. The existence of a stock label, which could be purchased both in Dublin and in Glasgow, with the device of a Cat and Barrel upon it, is a peculiar feature of this case, when regard is had to the long period over which its use is proved to have extended. Taken as a whole, the evidence, I think, amply establishes that prior to 1879 the device of a Cat and Barrel, as applied to "Old Tom" gin, was commonly used in the trade, and the explanation given by a good many of the witnesses of this circumstance is that the name

"Old Tom" suggested the picture of a Tom Cat sitting or standing on or near a barrel of spirits, as an appropriate symbol of the commodity itself.

The defenders have no means of meeting this large body of evidence, or even of seriously criticising it. They say, and I think truly, that they were unaware of the use, which seems to have been so prevalent in Scotland, of the Cat and Barrel label in connection with "Old Tom," and they might well be so, looking to the small trade which they themselves did in Scotland. They say further, and I think with justice, that such use, in order to invalidate their trade mark, must not merely be common use, but must have been substantial and lawful. But the facts already stated are sufficient to shew that the use was substantial, although probably all the traders whom I have enumerated did not together do as large a business in gin as the defenders. As regards the lawfulness of the use, if the defenders had been in a position to prove that prior to (say) 1860 their gin had become known in the market as "Cat and Barrel" gin, it may be that they would have had a case for interdicting all others from *thereafter* adopting a Cat and Barrel device on labels used on gin bottles. As might be expected, however, the evidence to this effect is meagre in the extreme, and a very strong case indeed would have to be made out in order to shew that a practice that has continued for more than forty years was all the time unlawful. Even where they did discover—as in the case of James Mellor & Sons—that a Cat and Barrel label had been adopted subsequent to their own registration, and were informed by the user that he considered himself entitled to continue its use, they took no steps for a period of nearly twenty years to follow up their challenge. The truth appears to be that the importance of the Cat and Barrel label to the defenders has grown with their increasing business, and that it is only in comparatively recent times that they have ventured to assert their right to a monopoly of these pictorial emblems in connection with the sale of gin. It is worth noticing, as corroborating the account which the witnesses gave of the numerous forms of Cat and Barrel labels, that no attempt seems to have been made to imitate the labels or trade marks of other well-known distillers of London gin; and it would be extremely odd that the defenders—who did a comparatively small business in Scotland, and cannot, therefore, have acquired any wide reputation for their gin—should be the only victims of this supposed imitation of their trade mark.

On the grounds above stated, I should have been prepared to hold that the device of "Cat and Barrel" was common in the trade long prior to the registration by the defenders of their trade mark. But Mr Dickson urged that even on this assumption certain decisions in the English Courts, by which the so-called "three mark" rule has been established, were not binding in Scotland, and ought to be reconsidered, as being contrary to the trade mark statutes. It is unnecessary that I should consider this argument, as the pursuers' counsel stated that he did not press for any rectification of the register provided he obtained decree in terms of his third conclusion—this being the only conclusion in which the pursuers have a direct interest. Moreover, the defenders' registration in respect of all liquors except "Old Tom" gin has not been attacked. Even as regards dry gin, there seem to be no cases (apart from Melrose, Drover & Co. Ltd., who are now out of the field) of persons using a "Cat and Barrel" label in connection with that ommodity except the defenders.

It follows that the pursuers are, in my opinion, entitled to a declarator that the defenders have no exclusive right to the "Cat and Barrel" device in connection with the sale of "Old Tom" gin, and that the pursuers are equally entitled to employ the same. I think that we have here an honest concurrent user of a similar device in different parts of the kingdom by traders who never saw each other's labels, or, if they saw them, had not their notice specially directed to their similarity. It cannot be contended that the fact that the one business has throughout been a large, prosperous, and increasing one in this commodity is to prevent a smaller rival from continuing a use which has extended over an almost equally long period. Nor do I think the element upon which Mr Dickson waxed eloquent—that the defenders' trade mark is considered by them to be of enormous value, while the pursuers do not estimate the value of their "Cat and Barrel" labels in connection with the sale of gin at a £5 note—is of the least materiality in this question of legal right. It might have been an excellent reason for the defenders settling with the pursuers upon generous terms, but is no reason at all for depriving the pursuers of their established rights.

Argued for Reclaimers: On the evidence led at the proof, it was established that reclaimers invented the Cat and Barrel mark; used it exclusively and advertised largely, and stopped infringements whenever brought to their notice. The mark was by the trade identified exclusively with Boords' goods in the early fifties. They did an immense trade, and the Cat and Barrel design of their trade mark had become vocalised—traders and customers ordering their gin as Cat and Barrel gin. Owing to this vocalisation any design with a Cat and Barrel was an infringement of the trade mark. Boords' use was so extensive that attempted infringements had begun and a caution notice was issued to the trade as early as 1856, and since then Boords had stopped all infringements that came under their notice. They registered in 1879. They did not know of the defenders' Cat and Barrel labels until some of these were produced against them at the trial of the action of *Boord* v. *Huddart*. They thereupon brought their actoin against the defenders for infringement. The defenders defended the action, and brought a counter-action craving rectification of the register by removing Boords' mark. Their pleadings in the two actions were contradictory. In the infringement action they stated that "Cat and Barrel" was their mark and that their gin was known as "Cat and Barrel gin." In the declarator they said that the Cat and Barrel mark was common to the trade and should therefore be expunged from the register—or alternatively, that they had a concurrent right with Messrs Boord to use the mark. They did not crave to be put on the register, and their declarator of right to concurrent use was incompetent, and not contemplated in the statutes. Further, their averments were not

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relevant to sustain a claim that they should be put on the register. On the facts, they had failed to prove either that the mark was common or that it was their own mark. No one but Boords had proved a right to use arising from original and independent invention or adoption. The user required to make a mark common must be (*a*) lawful, (*b*) substantial, and (*c*) within the knowledge of the owner of the mark. The users founded on by the Lord Ordinary had none of these qualities. They were all infringements, had all with two exceptions been stopped, and the use of the infringing labels had been insignificant in comparison with the volume of reclaimers' trade. In regard to the respondents' user it was not proved that they used a Cat and Barrel label from 1851, nor did they say that they then invented the mark. They said they adopted a common mark, but they had really seen Boords' and copied it. The probable first date on which they used such a label was 1869, but it must be admitted that for export trade only and to a small extent they had used Cat and Barrel labels for some years prior to reclaimers' registration in 1879. The right in a trade mark is one of property, and apart from registration the evidence shewed that under the old law Boords had by their reputation a property in this mark dating, say, from the early fifties. That would have entitled them to be registered in 1879, even had Thom & Cameron then opposed and pleaded their own and the other users referred to in this action. None of these users except Boords were of right. They were all wrongful, and therefore not lawful. They were merely adoptions or colourable imitations of Boords' mark. These users would not then have been considered sufficient to prevent Boords' being registered, and they were not now sufficient as a defence to Boords' present action, or as a ground for rectification of the register.

In dealing with a mark which had been so long on the register every presumption must be made in its favour; and the *onus* was on those attacking it. Documentary evidence of user was of great value in such a case. Boords had ample documentary evidence. The evidence of the respondents as to early years was entirely parole. Most of the labels founded on by the respondents had been used only in export trade, and user outside the United Kingdom would not make a mark common.

The reclaimers were entitled to interdict against all the Cat and Barrel labels which the respondents were using. Some of these (*e.g.* the Valparaiso labels) were manifestly copies of Boords' label. Others did not so closely resemble Boords' label, but they were all more like it than the label which had been stopped in *Boord* v. *Huddart*.

No argument was offered against the competency of the declaratory conclusions as to rectification of register in the Scottish Courts. The reclaimers did not dispute the decision in *Dewar's* case, 2 F. 249.

The following authorities and statutes were cited and referred by the reclaimers:—*Millington* v. *Fox*, 1838, 3 My. and Cr. 338; *In re Meeus' Application*, L.R. [1891], 1 Ch. 41, 8 R.P.C. 25; *Boord & Son* v. *Huddart*, 1903, 21 R.P.C. 149; *Edelsten* v. *Edelsten*, 1863, 1 De G., J. and S. 185; *Hall* v. *Barrows*, 1863, 4 De G., J and S. 150; *Leather Cloth Co. Ltd.* v. *American Leather Cloth Co. Ltd.*, 1865, 11 H.L.C. 523; *Ransome* v. *Grahame*, 1882, 51 L.J., Ch. 897; *M'Andrew* v. *Bassett*, 1864, 4 De G., J. and S. 380, 33 L.J., Ch. 561; *Seixo* v. *Provezende*, 1865, L.R., 1 Ch. 192; *Johnston & Co.* v. *Orr Ewing & Co.*, 1882, L.R., 7 A.C. 219; *In re Christiansen's Trade Mark*, 1886, 3 R.P.C. 54; *Trade Mark of la Société Anonyme des Verreries de l'Étoile*, 1893, 10 R.P.C. 436; *Bourne* v. *Swan & Edgar Ltd.*, L.R. [1903], 1 Ch. 211, per Farwell, J., at p. 224, 20 R.P.C. 105; Sebastian on Trade Marks, pp. 16, 46, 205, 346; *Ripley* v. *Bandey*, 1897, 14 R.P.C. 591, per Kekewich, J., at p. 594; *Kinahan* v. *Bolton*, 1863, 15 Ir. Ch. 75; *Paine & Co.* v. *Daniells & Sons' Breweries*, L.R. [1893], 2 Ch. 567, 10 R.P.C. 217; *Ford* v. *Foster*, 1872, L.R. 7 Ch. 611; *Barlow & Jones* v. *Johnston & Co.*, 1890, 7 R.P.C. 395; *In re Münch's Application*, 1883, 50 L.T.N.S. 12; *In re Trade Marks of Bass, Ratcliffe & Gretton*, 1902, 19 R.P.C. 529; *Jackson & Co.* v. *Napper*, 1886, L.R. 35 Ch. D. 162, 4 R.P.C. 45; *In re Chesebrough's Trade Mark "Vaseline"* [1902], 2 Ch. 1, 19 R.P.C. 342; *Wellcome* v. *Thompson & Capper* [1904], 1 Ch. 736, 21 R.P.C. 217; *Cowie Bros. & Co.* v. *Herbert*, 1897, 24 R. 353, 14 R.P.C. 436; *Dewar* v. *John Dewar & Sons Ltd.*, 1899, 2 F. 249; *Re Hudson*, 1886, 32 Ch. D. 311, per Cotton, L.J., at pp. 322 and 323, 3 R.P.C. 155; *Re Barker's Trade Mark*, 1885, 53 L.T. 23. Merchandise Marks Act 1862 (25 and 26 Vict. cap. 88); Trade Marks Registration Act 1875 (38 and 39 Vict. cap. 91); Trade Marks Registration Amendment Act 1876 (39 and 40 Vict. cap. 33); Patents, Designs, and Trade Marks Act 1883 (46 and 47 Vict. cap. 57), sects. 62, 71, 74, 75, 76, 77, 90; Patents, Designs, and Trade Marks Act 1888 (51 and 52 Vict. cap. 50), sects. 8, 16, 17, 23; Trade Marks Act 1905 (5 Edw. VII. cap. 15), sects. 6, 9, 19, 21, 32, 35, 39, 40, 41, 45; Kerly on Trade Marks, pp. 4, 33, 34, 192, 365, 392.

Argued for Respondents: The Lord Ordinary's judgment was well founded. The case is different from any in the Books. Admitting that Boords have used their mark for many years, the respondents had used their labels for the same if not a longer time. Thom & Cameron's was a concurrent, independent, and honest user probably since 1851 (which was earlier than Boords' use had been proved), but at any rate for many

years before Boords' registration, and Boords' registration did not deprive the respondents of any right they had in their labels. There was no case in which a mark which had been honestly and continuously used (as one or other of the Cat and Barrel labels of the respondents had been used) for a period of nearly fifty years being challenged or stopped after that interval. Every presumption must be made in favour of a mark which had been honestly used for so long. Boords had not the reputation as Cat and Barrel people that their witnesses spoke to, at least not in Scotland. In Scotland at any rate the mark was common to the trade long before Boords registered. The Lord Ordinary was right in holding on the evidence that the mark was common.

The labels Nos. 21, 33 and 39 are Thom & Cameron's labels, and are not infringements or in any way calculated to deceive. They are materially different from Boords' labels. No. 18 was not Thom & Cameron's label, but was Weir Scott's. In all probability it had been copied from one of the stock labels produced, not from Boords' label. There was no date given when the alleged vocalisation of Boords' Cat and Barrel mark took place. Their reputation, if any, was only connected with their own mark, and that gave them no right to stop other Cat and Barrel marks. There was no case of any one being deceived mentioned in the evidence, and if Boords' Scotch trade was as extensive as they said, and there was any confusion between their labels and the other Scotch labels in use, they would have been able to prove cases of mistakes. Boords were guilty of a want of vigilance in regard to the other Cat and Barrel marks which were in daily use, which amounted to acquiescence, and barred them now getting interdict. Boords had no exclusive reputation in the Cat and Barrel, and therefore the honest concurrent user of Thom & Cameron should not be stopped. The respondents do not insist on the conclusion for the removal of Boords' mark from the register, but they maintain that Boords have no exclusive right, that there has been no infringement, and should be no interdict. In any event the interdict should be limited to certain markets where deception might take place. There should be no interdict in the United Kingdom, especially in Glasgow, where the labels had been so long used by the respondents.

The following authorities were cited for the Respondents: *Orr-Ewing* v. *Registrar of Trade Marks*, 1879, L.R. 4 A.C. 479; *Jackson & Co.* v. *Napper, cit.*; *Mouson & Co.* v. *Boehm*, 1884, 26 Ch. D. 398; *Goodfellow* v. *Prince*, 1886, 35 Ch. D. 9; *Baker* v. *Rawson*, 1890, 45 Ch. D. 519, 8 R.P.C. 89; *Orr-Ewing & Co.* v. *Johnston & Co.*, 1880, 13 Ch. D. 434, per Cotton, L.J.; *Barber* v. *Manico*, 1893, 10 R.P.C. 93; *Cowie* v. *Herbert, cit.*; *Singer Manufacturing Co.* v. *Kimball & Morton*, 1873, 11 M. 267; *Singer Machine Manufacturers* v. *Wilson*, 1877, L.R. 3 A.C. 376; *Singer Manufacturing Co.* v. *Loog*, 1882, L.R. 8 A.C. 15, per Lord Watson, at p. 39.

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In the action at the instance of Boord & Son the Court pronounced the following interlocutor:

". . . . *Recal* said Interlocutor, *Find* and *Declare* and *Interdict, Prohibit*, and *Discharge* in terms of the First and Second conclusions of the Summons; *quoad ultra*, *Dismiss* the action, and Decern."

In the action at the instance of Thom & Cameron the Court *recalled* the interlocutor of the Lord Ordinary, and *assoilzied* the defenders.

The Lord President.—My Lords, the firm of Boord & Son in 1904 raised an action against Thom & Cameron Ltd., in which they had declaratory conclusions that they were proprietors of certain trade marks, and also sought interdict against the defenders for infringing the same. The action did not proceed with any great expedition, and within a year Thom & Cameron raised a counter-action against Boord & Son, and the conclusions of that counter-action were for declarator (first) that certain entries in the trade mark register, which were specified and all of which were the property of Boord & Son, were made on the register without sufficient cause, and that the same ought to be expunged therefrom accordingly. There was also a second conclusion that the said trade marks were incapable of registration and illegal, and a third alternative conclusion that it ought to be found and declared that the defenders had no exclusive right to use the same in connection with the sale of "Old Tom" gin and unsweetened gin, and a long list of other spirits. Now these two actions depended before the Lord Ordinary and they were not conjoined, but the actions were taken together, and what the Lord Ordinary has done is this. In the second action—I mean second in point of time, that is, the action by Thom & Cameron against Boord & Son—the Lord Ordinary finds and declares that the defenders have no exclusive right to use the sign, figure or device of a "Cat" or of a "Cat and Barrel," on labels, advertisements, or otherwise. In other words, the Lord Ordinary grants declarator in terms of the third alternative conclusion; and then his Lordship proceeds, "finds it unnecessary to deal with the other conclusions of the action, and dismisses the same." And having come to that conclusion in that action, he naturally in the other action, at the instance of Boord & Son against Thom & Cameron, assoilzies the defenders from the conclusions of the action in so far as they relate to "Old Tom" gin. It is from these interlocutors that the present reclaiming notes are taken.

His Lordship has gone very carefully into the

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matter, and his opinion is embodied in one long note. He has written only one note in the two actions, and has written it in the action which he has made the leading action of the two, namely, the action of *Thom & Cameron* v. *Boord & Son*. Now, my Lords, I am bound to say, first of all, that I am not quite satisfied with the technical way in which the matter has been disposed of, and that not merely by way of technical criticism, for I think it goes somewhat deeply into the questions which are raised in these cases. I will make my meaning clear, I think, by first of all trying to consider what are the defences available to persons who, like Thom & Cameron, have been attacked. (I explain first that the Lord Ordinary, having taken the action of *Thom & Cameron* v. *Boord* as the leading action, calls Thom & Cameron the pursuers, and Boord & Son the defenders. I prefer, however, to deal with it the other way, because the matter is begun by Boord & Son, who are the undoubted proprietors of certain trade marks, objecting to infringement; and therefore in my judgment I shall use the term pursuers as applied to Boord & Son, and defenders as applied to Thom & Cameron.) I proceed therefore to ask myself—when the pursuer, who is the registered proprietor of a trade mark comes into Court and complains that his trade-mark is being infringed by someone else, what are the defences that are competent to a person so attacked? Of course there is an obvious defence that he does not infringe, because he does not use a trade mark resembling in any way the trade mark of the pursuers. I need not pause for a moment on that one, because it is perfectly simple on the statement of it. But there are other defences competent, and in order to see what they are one must first of all see what is the right a person has as the registered owner of a trade mark.

I need scarcely remind your Lordships that the law of trade mark is, in one sense, partly common law and partly statutory, but is, in another sense, purely statutory. That is to say, that the rights which follow from registration are purely statutory. Previous to the Trade Mark Acts altogether there was a right in a trade mark—a right which originally depended entirely upon the proposition, or on the view, that no man was entitled to pass his goods off as another man's, and that, accordingly, if one man had sold his goods in association with a certain mark for such a time as to make the public when they saw the mark think the goods were his goods, another person might be interdicted or prevented from using the same mark because that had a tendency to deceive. I need scarcely remind your Lordships that what in the initial stages depended solely on this view, and the idea of a *mala mens* that you associate with this view, came in the development of the law, especially after the well-known case of *Millington* v. *Fox* (1838, 3 My. and Cr. 338), decided by Lord Cottenham, to depend on a real right of property in the trade mark. All that was, I will not say altogether altered, but to a great extent altered by the Trade Mark Acts, and when the Trade Mark Acts were passed several new consequences happened. In the first place, the property in the trade mark was absolutely recognised by these Acts. In the second place, you could get property in a trade mark without use by the mere registration of a mark which had not been registered before, but subject of course to certain statutory restrictions as to the class of thing that could or could not be registered as a trade mark. Into all the particulars of that I need not enter, but one point must be alluded to. The original Act, I need scarcely remind your Lordships, has been amended more than once, and as recently as 1905 an Act was passed which alters what is the law, and, on the subject I am going to speak of, very much alters it; but I need not go into that matter, because the present case before us has to be decided on the law as it then stood, and the law as it then stood was the 1883 Act as amended by the 1888 Act. Now in the 1883 Act there is a division of the Act which is headed "Effect of Registration," and section 76 of that Act is in these terms: "The registration of a person as proprietor of a trade mark shall be *prima facie* evidence of his right to the exclusive use of the trade mark, and shall, after the expiration of five years from the date of the registration, be conclusive evidence of his right to the exclusive use of the trade mark, subject to the provisions of this Act." Now, if it had not been for the words, "subject to the provisions of this Act," it would have been possible to argue, though I do not say it could have been successfully argued, that the terms of the section are absolute, and that the terms are such that, if a person found himself left upon the register as owner of a trade mark for five years, he would then have an exclusive right to that trade mark and could prevent anybody else from using it, no matter what, so to speak, the past history of it might have been. But then there were those words, "subject to the provisions of this Act." Now there are provisions in the Act, not only for making the register, but also for altering the register, and the section of the Act that deals with that is section 90, which is this: "The Court may, on the application of any person aggrieved by the omission, without sufficient cause, of the name of any person from any register kept under this Act, or by an entry made without sufficient cause in any such register, make such order for making, expunging, or varying the entry, as the Court thinks fit"; and in any proceeding under this section they may decide any question which it may be expedient to decide for the rectification of the register.

Now, it was very early decided, and decided very authoritatively, by a well-known leading

case — the case of *The Apollinaris Company* L.R. [1891], 2 Ch. 186, — that a person who was said to be an alleged infringer was in the sense of the statute aggrieved, that is, if he choose to say so; in other words, it was settled, and I think it is absolutely settled law, that a person who is proceeded against for infringement is entitled to say "Apart from infringement, I say your trade mark ought never to have been on the register, and I will have the register amended and take it off." Its presence on the register is the condition precedent for raising an action for infringement, and it follows that if the complainer's trade mark ought never to have been on the register, then there is an end of an action for interdict or infringement. All that was held in the *Apollinaris* case. The next step was, that it was held that being five years on the register was no bar to removal. Your Lordships observe there was no limitation of time in section 90 for expunging entries from the register. It is simply "the Court may, on the application of any person aggrieved." Accordingly, it was held that though there was limitation of time in section 76 to the effect that entry in the register should be conclusive evidence, at the end of five years, of the right to the trade mark, yet the words "subject to the provisions of this Act," let in section 90, and so might control, if it was in operation, section 76. In other words, therefore, the defence open to an alleged infringer of saying that the trade mark ought never to have been on the register was open after five years.

Now, there is a whole set of cases dealing with this which I need not quote. They vary, because the reasons why the trade mark ought not to have been on the register may vary; but we can take one as an example. A trade mark ought not to be there, for instance, if it is not a registrable mark. It ought not to be there also if no one can appropriate it, and therefore I take that illustration to see what we are coming to in this case. The case of *La Minerva Habana* (*In re Lloyd & Sons' Trade Mark*, *Lloyd* v. *Bottomley*, 27 Ch. D. 646) was a case where a mark was removed after five years at the instance of a person who was being attacked, and the ground for removal of the mark was that it ought never to have been on the register, because it was common property, and that no one could appropriate it. It may be as well to digress and explain what common property means. When this register was first introduced it was obvious that among people who would apply to be registered would be not only those who, for the first time, had invented what was apparently a new trade mark, and therefore proposed to get the priority of others by its registration, but also persons who sought to put on the register what they had already been using. There were, of course, many instances where more than one person had been using the same trade mark, and accordingly that question very early came up. The Act evidently contemplated something of the sort, for in the section dealing with applications for registration it expresses itself thus—I am reading from section 71: "Where each of several persons claims to be registered as proprietor of the same trade mark, the Comptroller may refuse to register any of them until their rights have been determined according to law, and the Comptroller may himself submit, or require the claimants to submit, their rights to the Court." Now, the meaning of that section is, I think, clear in itself. Of course, if one person wanted to register a trade mark who had been using it, and another person came and said, "I want to register it as well, but I have not been using it," that would be a clear case—it would show that there was a right in the one and not in the other. But in the case which I have mentioned, where more than one had in the past been using a trade mark, there were rules settled by decisions to this effect, that up to the number of three there would be registration of persons who had *bona fide* used the same mark, but if more than three applied and said they had used the mark, then the mark was really such common property in the trade that it was not registrable at all. The import of all this is, I think, that the true meaning of a trade mark is the association of the mark with one person's goods. If you show that a large number of people have all been using the same mark, then it becomes a practical impossibility to say that the mark was associated with any one person's goods. And, accordingly, I think the matter is well settled that the registration of a mark, an old mark, may be given to persons not exceeding the number of three, but that if more than three are shown to have used it, it is common property, and cannot be registered at all.

I have now got so far that that is one defence that an alleged infringer may make. He may say, "Notwithstanding that five years have passed, I propose to show that the mark ought never to have been on the register at all." But there is another defence which he may make. Without saying that a mark is common property, and that therefore the complainers ought not to have been registered as the owners of it, he may say, "I, myself, would have been entitled to be put on the register; it is quite true I have not applied, but I make the application now, and, of course, if I am entitled to be on the register for the mark, there is no infringement, for I am not using any mark but my own." That distinction was early taken, and I think it entered into the law of the decision of several cases, but I will refer merely to the admirable decision, if I may say so, of Mr Justice Stirling in *Jackson* v. *Napper*, 1886, L.R. 35 Ch. D. 162.

Now, your Lordships will see that these two

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defences, although in one sense different, are yet technically the same. They both rest on this, that the register as it is, is wrong, and that it ought to be corrected. In one case the correction is by striking out the complainer's registration, and in the other case the correction is by putting on a mark as belonging to the alleged infringer. Accordingly, in England I think it is perfectly well settled that, if the infringer is gone against by the registered proprietor of a trade mark who has had his trade mark on the register for more than five years, the infringer cannot be heard to say anything on these matters unless he makes an application to rectify the register, and he cannot make that by way of defence to an action. That has been settled a good many times, but particularly in the case of *Pinto* v. *Badman*, 8 R.P.C. 181. I take it further that, if the defence which is made here had been made in England, it would not have been listened to, unless Thom & Cameron had at the same time made an application either to rectify the register by striking out Boord & Son, or to rectify it by inserting Thom & Cameron as proprietors of the same trade mark. Now, technically speaking, I do not think that that is exactly the same in Scotland, because there is a decision of this Division which is binding, and I do not intend to suggest for a moment that I have any wish to go back on it at all. I refer to the case of *Dewar* v. *Dewar*, 2 F. 249. That was an action raised by one Dewar against another Dewar, they both being in the whisky trade, concluding for declarator (1) that the defender's trade mark "Dewar's Whisky" had been entered on the register without sufficient cause and should be expunged; (2) that it was incapable of registration; and (3) that the defenders had no right to the exclusive use of the words "Dewar's Whisky" as a trade mark, and for reduction of the entry in the register of trade marks. The defender pleaded "No jurisdiction." Well, I do not think that that phrase is very correctly used there. They did not plead "No jurisdiction" in the ordinary sense of the word, because they were a Scottish limited company. There was no question about their being subject to the jurisdiction of the Scottish Courts. I think their true plea there was not "No jurisdiction"—as stated in the rubric—but "incompetency." What they argued was that the Court could not give the declarator that was asked for because the application was in substance for a rectification of the register, and the condition of the law in England was pointed to, and it was said that the only person who could alter the register was the person who had charge of the register, in other words, the registrar in England, who was subject to the English Court; and therefore if they wanted to get rid of this erroneous entry—as they said it was—they must go to England and present a petition and get it done there. They said that that could not be done in Scotland. That plea was repelled, and I think rightly repelled; and at any rate the judgment is binding. It was held there that the rights of the Scottish Court were defined by section 111 of the Act, and section 111 is in these terms: "The provisions of this Act conferring a special jurisdiction on the Court"—and the Court as defined by the Act was of course the English Court—"shall not, except so far as the jurisdiction extends, affect the jurisdiction of any Court in Scotland or Ireland in any proceedings relating to patents or to designs or to trade marks." And then it defines what it means by the Court in Scotland, which is the Court of Session; and then it goes on: "If any rectification of a register under this Act is required in pursuance of any proceeding in a Court in Scotland or Ireland, a copy of the order, decree, or other authority for the rectification shall be served on the Comptroller, and he shall rectify the register accordingly." And accordingly this Court held that, inasmuch as this was a question of right in a trade mark, they were perfectly entitled to pronounce a declaratory finding on that matter; and that if they did so, and if the result of their finding was such that the trade mark ought never to have entered the register, then the second subsection of section 111 would come into play, and the Comptroller would be bound to alter the register in accordance with the decree that was made by the Scottish Court.

Now that, I take it, is good law, and was rightly decided, and that of course disposed of the plea that had been raised. It was not raised in this case, but it was in the one referred to—that, technically speaking, these matters could not be raised in the Scottish Court at all. But it seems to me quite clear that it leaves the underlying ratio of the matter precisely as it is in England. That is to say, it does not seem to me that you can raise this defence here, any more than you can in England, unless you make rectification the positive crave. In *Dewar's* case it was made the positive crave, because an order was asked from this Court in one of the conclusions of the summons that the mark ought to be expunged. That also is done here in the action of Thom & Cameron against Boord, and I am quite clear that the matter is perfectly properly raised, in so far as declarator is asked that the mark should be expunged on the ground that it ought never to have been on the register because it was common property. But I am bound to say that I do not think the other defence is properly raised—a defence which your Lordships will observe is *per se* inconsistent with the first defence—namely, that the trade mark is not common property, but that Thom & Cameron have as good a right to it as Boord & Son. The two defences are inconsistent. I do not mean that inconsistent defences cannot ever be pleaded, because there are cases in which defenders can plead inconsistent defences. But

these defences are inconsistent in the underlying substratum of fact, because, of course, it is perfectly clear that if such and such a mark was such common property that it could not be registered by B, that is equally destructive of its capacity to be registered by C. Therefore the main defence that the pursuers ought never to have put it on the register because it was common property, is one defence. But that Thom & Cameron were themselves entitled to put it on the register is quite another defence. I find record for the one, but not for the other, and I do not see how you can contend, without a record to support your contention, that you are entitled to be put on the register as proprietor of a trade mark.

Now I come, after this somewhat long preamble, to the criticism which, as I think, runs rather deep into the Lord Ordinary's judgment. The Lord Ordinary has not given declarator on the conclusion which I think perfectly well raised against Boord & Son, namely, the conclusion that Boords' mark ought to be expunged from the register, but has given declarator in these words, that Boord & Son have no exclusive right to use the sign of a "Cat" or of a "Cat and Barrel" in labels, advertisements, or otherwise in connection with the sale of "Old Tom" gin. Now I point out at once that the finding that Boord have no exclusive right to the "Cat and Barrel" or the "Cat" may rest on one or other of two propositions. It may rest on the proposition that Boord's mark ought never to have been on the register, and so, not being his property, he cannot go against anybody else for using it; or it may rest on the view that, although his mark is there, he cannot say he has exclusive right to it, because Thom & Cameron have right equally with him. Therefore my first observation on the Lord Ordinary's judgment is that it does not shew which one of these pleadings in the inconsistent defence is given effect to. I apprehend that, inasmuch as there is record for one and not for the other, he has given effect to the first, and I would have concluded that that was perfectly clear had it not been for the way in which his Lordship, after reviewing the evidence, brings in his argument. I am not going through the long note; but summarising it very briefly, the skeleton of the Lord Ordinary's note is this—Boord & Son have led abundant evidence to establish their long use of this mark, and that their goods have gained a reputation which is associated with the "Cat and Barrel" mark. Indeed the Lord Ordinary says that the *prima facie* case in favour of Boord's claim is formidable. I only pause to say that though no doubt it was necessary for Boord to lead this evidence so far as being on the question of infringement, yet so far as title is concerned I do not think it is necessary to look beyond anything but the fact that they have been on the register for five years. The Lord Ordinary goes on to say that there was sufficient evidence to establish a substantial use of this mark by other people in the trade than Boord & Son. Then he proceeds on page 9 to say (and it is this that makes me doubtful what he really founds on): "On the grounds above stated, I should have been prepared to hold that the device of 'Cat and Barrel' was common in the trade long prior to the registration by the defenders of their trademark." Then he refers to the argument about the "three-mark" rule, which does not matter, and then he says—"It is unnecessary that I should consider this argument, as the pursuers' counsel stated that he did not press for any rectification of the register provided he obtained decree in terms of his third conclusion—this being the only conclusion in which the pursuers have a direct interest. . . . It follows that the pursuers are, in my opinion, entitled to a declarator that the defenders have no exclusive right to the 'Cat and Barrel' device in connection with the sale of 'Old Tom' gin, and that the pursuers are equally entitled to employ the same." Now, with great deference to his Lordship, I do think that that phrase is a non-sequitur. If he had said—I am prepared to hold that the device of "Cat and Barrel" was common in the trade long prior to the registration by Boord & Son of their trade mark, and had gone on to find that it ought to be expunged from the register, that would be a good conclusion, namely, that the trade mark ought never to have been registered because it was common in the trade. But when his Lordship says—"I do not consider it necessary to affirm one way or the other whether the 'Cat and Barrel' was common in the trade," and goes on to say, "In my opinion, he has no exclusive right to the device," that would, strictly taken, be an affirmation of the other defence, for which, as I have said, there is no record, and with which in his note on the evidence the Lord Ordinary has not dealt. Accordingly, on the terms of his judgment, I come to the conclusion that the Lord Ordinary has left me in doubt as to whether he really proceeds on the device being not registrable as being common in the trade, or whether he proceeds on the fact that he thinks that Thom & Cameron had also a right to that device.

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The Lord President.

But assuming, as I am rather inclined to do, that it is on the first that he has proceeded, I think the declarator he has given is not the proper declarator in the circumstances. I should not have made so much of this if it had been a mere technical criticism on the Lord Ordinary's judgment, but I think it goes very deep into the matter, for in my opinion the only question properly raised in these pleadings is the first, and not the second. I think that there is evidence enough to dispose of the second adversely to Thom & Cameron as well as of the first, but still

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there is no pleading that entitles Thom & Cameron to a defence on the second. Of course the best test to take is to examine the pleas. Now, in Boords' action, that is to say where the attack comes in, what are the pleas in law for the defenders? They first of all say in their averments that the "Cat and Barrel" has been used by a great many people; and then in their pleas, after the usual plea of irrelevancy, they simply put as plea 2—"The pursuers not having an exclusive right to the 'Cat and Barrel' brand, decree of absolvitor should be pronounced"; and as plea 3—"In respect that the defenders have not infringed the pursuers' trade marks, they should be assoilzied." That, I think, can only be taken with what they say before—that these marks were well known in many other places, and in particular must be taken with this—that nowhere is there intimation that they propose to have themselves put on the register. In short, I do not see how they can have a relevant defence founded on the fact that they have a right to these marks when they say they have been used as well by all these other persons. In regard to the Thom & Cameron action against Boord, the pleas there necessarily cannot touch that point, for none of the conclusions touch it. The conclusions are only pleadable to taking a party off the register; and though there is one that Boord & Son have no exclusive right, yet there is no explanation of it in that case either by any intimation that Thom & Cameron themselves want to go on the register.

The leading and therefore the proper question in this case is—Ought the pursuers' label to be expunged from the register as being common property? Now I think the determination to which you would come in such a matter must vastly depend on what criticism you apply to the evidence. My Lords, I think it is very necessary to keep this firmly in view—that what we are doing in this case is something very different from what one does in examining the evidence in a case, say, as to anticipation of a patent. If the right to a trade mark was constituted by the fact that it was, so to speak, an invention, then it is quite clear that as soon as it was proved that the trade mark had been used by anybody, however little the use was, but still had been used at a period prior to that when it was first possible to register it, that would be sufficient to put out of the way the claim to exclusive right of a person who had got registered for it. But that is not the nature of the right to a registered trade mark. I again remind your Lordships that the idea of right to a mark by putting it on the register—that is to say, right by registration itself, and nothing more—was an entirely new idea under the Acts; and there never could be any question as to competition in that matter, unless you suppose such a state of things as two people coming up at the same time and presenting themselves hand-in-hand with applications for registration of the same mark. But you can put out of view that fantastic case. Now, what we find here is Boord coming forward and entering the "Cat and Barrel," but nobody else coming forward. Then, if it were a new mark, there could have been no question. But it was not a new mark—it was an old one; and therefore you have to consider the question of whether the mark was common property, and in doing so you must consider what you mean by property in a mark in the state of facts antecedent to the registration.

Now, property in a mark does not mean a few isolated sales under that mark, but it means, as I take it, that you had sold so much goods under it that the mark had come, in a certain market, to be associated with your goods. And it is just because I think the Lord Ordinary has, to my mind, not taken that sufficiently into view, that I come, on the whole matter, to a conclusion different from him. I do not think the evidence led in this case is evidence such as to enable us to affirm as a proposition that the mark was common property, and so ought not to have been registered. And I must say this, that though mere lapse of time, as I before said, is not in itself a bar, yet if a mark is allowed to be on the register all the time that this has been, it is not too much to say that the *onus* is on the other person to shew that it never ought to have been there. The Lord Ordinary has gone through the evidence in his note as to the cases which he thinks shew general use of the mark. Passing over for the moment the evidence as to Thom & Cameron themselves, he first deals with James Mackenzie. Well, James Mackenzie's firm has abandoned the use of the mark as of right. One of the partners describes their trade in gin as being infinitesimal. The label was only made in 1883, and the older trade was nearly all export, and very little in Scotland. The next case is Stewart, Pott & Co. In later years, at any rate, all the gin they got was Boords' gin. Wright & Greig say their trade was only a small trade. Thomsons of Leith was in the same position—very small in amount. Messrs Bernard gave up the label as soon as they were appealed to, and would not fight the matter at law, and disclaimed it. The Valparaiso case, I am bound to say, left on my mind the opinion that that was a definite attempt by a firm in Valparaiso to try to mimic Boords' label in order to pass of other gin as Boords'. And Hughes' was a very small trade. Now, as far as the use by Thom & Cameron themselves is concerned, there is a great deal of difficulty, I think, about the date. It is very variously stated, and there is almost no evidence of any home trade at all. My Lords, I do not go into these matters in detail, because it would only be reading evidence for hours. I will just say that, taking the matter

as a jury would, it seems to me that none of these people have really proved anything more than a very sporadic use of the labels with a Cat and Barrel on them, and that by none of them is there really any trade proved that would associate their goods with a Cat and Barrel. It is not unworthy of remark that, in their defences as originally stated in answer 3, the defenders proposed to prove that they had for many years sold gin with labels which bore as a distinctive feature a representation of a Cat and Barrel; and that in consequence thereof the gin sold by them had for many years been known in the market as the "Cat" brand, or the "Cat and Barrel" brand. They have not even attempted to prove that, and of course it is dead in the teeth of what one of the defenders himself says, that there is really not a £5 note in the worth of the labels as far as he is concerned. On the whole matter I think the evidence falls far short of what would be necessary to displace Boord & Son from the register as owners of the "Cat and Barrel" mark which has been associated for so long with their gin, and accordingly I have come to a different conclusion from the Lord Ordinary.

The question still remains as to what is to be done. Of course in the action *Thom & Cameron* v. *Boord* it is simple enough; in that action there will be absolvitor. But as regards the other, Boords' action, various things are asked. The first is declarator in general terms, which is nothing, because that is merely saying that they are proprietors of their own trade mark. Then, second, there is an interdict—that Thom & Cameron be interdicted against using the designs said to infringe the pursuers' trade marks. Now in article 6 of the Condescendence there are four labels specified as infringing, and these four labels are numbered 21, 18, 39, 33 on their card. 21 is very obviously like. Next to it is 18, and that also is like. 39 is not quite so obvious: that is the "Cat" sitting on the top of the barrel; not on the flat end, but on the round. 33 also is a "Cat" on the top of a barrel, with a glass and a bottle. Now these two labels are certainly not so obviously like. But, my Lords, it seems to me that it is there that you get the benefit of the evidence which has been led by Boord & Son, and I think that the evidence is strong enough as shewing such association in the trade of the "Cat and Barrel" with Boords' gin that one must not be too nice about this matter, and I think these are practical infringements of the trade mark. I come to that conclusion all the easier, for I am fortified in my opinion with regard to these labels by the result at which Mr Justice Swinfen Eady came in the action tried before him. The labels which were held to be infringements in that action are not nearly so near to Boords' label as either of these two with which I am now dealing. Accordingly, I think that Messrs Boord are entitled to interdict in terms of that conclusion. Then there is the third conclusion for interdict against selling or passing off or attempting to pass off their manufactures as Boords' manufactures. I do not think there is any proof of that. That would be a fraudulent proceeding on the part of Thom & Cameron, which I do not think they have been guilty of, and it would not be right to stigmatise them by an interdict against a proceeding which they have never contemplated. Therefore I do not think decree ought to be granted on that conclusion. In regard to the conclusion for delivering up papers, I think that is not one the pursuers insisted upon.

My opinion, therefore, is that the Lord Ordinary's interlocutor should be recalled, and that in the one case there should be decree of absolvitor, and in the other case there should be decree in the terms of the first and second conclusions.

Lord M'Laren.—I am entirely of the same opinion, and have nothing to add.

Lord Kinnear.—I also agree with your Lordships on all the points.

Lord Pearson.—I am of the same opinion.—18*th July* 1907.

Counsel for Reclaimers, Dickson, K.C., Johnston, K.C., Grainger Stewart; Agents, T. & W. A. M'Laren, S.S.C.—Counsel for Respondents, Solicitor-General (Ure, K.C.), Murray; Agents, Cumming & Duff, S.S.C. J. S. M.

OUTER HOUSE.

(*Lord Guthrie.*)

137. Caithness Flagstone Company *v.* Threipland.

Diligence—Poinding—Poinding by Landlord for Rent—Receipt of Cheque for Rent Due Before Goods Inventoried—Effect on Diligence — Suspension and Interdict—Expenses.

This was an action of suspension and interdict by the Caithness Flagstone Co. Ltd. against Captain William Murray Threipland of Fingask and Toftingall, by which it was sought to interdict the respondent from following up a poinding of the complainers' goods commenced by him in respect of the half year's rent due at Martinmas 1906 by the complainers as tenants, to the respondent as landlord, for certain quarries on his lands.

The material facts, arguments and authorities,

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are all set forth in the Lord Ordinary's opinion, from which it appears that the question was one of expenses, depending on whether or not the receipt of a cheque for the rent suspended the respondent's right to proceed with the diligence he had commenced.

The Lord Ordinary *found* the complainers liable to the respondent in expenses.

Lord Guthrie.—This suspension was brought to stop the further progress of a poinding, in which the goods poinded had already been inventoried. Parties are agreed that it is now unnecessary that I should pronounce any order on the prayer of the note, and they have asked me to decide the question of expenses on the pleadings and correspondence.

In considering what the true question between the parties is, the following dates must be kept in view:—

1906. 11th November. Rent of quarries in Caithness due under lease by the complainers to the respondent.

1907. 30th April. Charge given by respondent for payment of said rent.

,, 6th May, Monday. Officer started from Edinburgh at 4 a.m. to inventory goods at quarry next day.

,, 6th May. Cheque on the Bank of Scotland, Thurso, for said rent handed to respondent's Edinburgh agents at mid-day, and receipt granted.

,, 6th May. Charge expired at midnight.

,, 7th May. Poinding executed and inventory taken in morning.

,, 9th May. Suspension raised. Order for answers within eight days, and interim interdict granted.

,, 13th May. Respondent's Edinburgh agents informed that cheque met.

In these circumstances, the complainers say that the rent was paid before the expiry of the charge, which did not expire till midnight of the same day; that the respondent was not entitled to execute the poinding by inventorying on the 7th May; and that they were justified in bringing the suspension on 9th May. The respondent answers that his receipt of the complainers' Thurso cheque on 6th May did not operate as payment to interfere with his following out his diligence by inventorying at the quarries on 7th May, and that, even if the receipt of the cheque would have prevented his proceeding to sell, he did nothing thereafter, by threatening to sell or otherwise, to warrant the complainers' application to the Court on 9th May.

In the complainers' 4th statement it is said, "By the respondent's acceptance of said payment of the rent charged for and interest, the said charge fell." The complainers' counsel admitted that the charge did not fall; he maintained that its operation was suspended till it was seen whether the complainers' cheque was honoured by the bank, and that, until that appeared, the respondent was not entitled even to inventory under his diligence.

There is no dispute about the effect of the cheque given by the complainers. It was an order on the bank at Thurso to pay the respondent when the cheque was presented, which order was necessarily contingent on the complainers having either sufficient free cash in the bank, or sufficient credit with the bank to cover the amount. It was therefore a conditional payment, involving a certain amount of delay before the condition could be purified. The payment was conditional as truly, although the condition was not so serious, as if the course of post had been weeks instead of days, or as if the document had not been a cheque payable at sight but a promissory note, or a bill, payable at a certain time after date or sight.

The true question, therefore, is, Was the respondent not entitled at least to take such steps in the way of inventorying as might be necessary to make his diligence immediately effectual in the event of the cheque not being met, and an order for sale becoming necessary? It is admitted that, before the receipt of the cheque, at mid-day, on Monday, 6th May, the respondent was entitled to dispatch the officer early that morning to inventory at the quarries next day. I am of opinion that the receipt of the cheque did not lay on the respondent any obligation either to stop the officer by telegram in the course of his journey to Thurso, or to wire or write him not to proceed with taking the inventory.

I heard an elaborate argument, with a full citation of English authorities, on two questions —*first*, whether, in the ordinary case, the receipt of a cheque or promissory note or bill suspends diligence till the document has been duly presented and refused; and, *second*, whether, supposing that to be the ordinary rule, there is not an exception in such a case as the present, namely, a claim for rent, to which a higher right of recovery attaches than in an ordinary debt. The first rule is stated in Byles on Bills (16th edition) 24, 316; and Chitty on Contracts (14th edition) 628; and the leading cases are *Pearce* v. *Davis*, 1834, 1 Moody and Robinson 365; *Carmarthen Railway Co.*, 1873, L.R. 8 C.P. 685; *Cohen* v. *Hale*, 1878, 3 Q.B.D. 371, per Cockburn 373; *In re Palmer*, 1881, 19 Ch. D. 409, per Brett 417. In none of these cases was the point made matter of express decision, and the proposition, as stated in some of the *obiter dicta*, would seem to require extensive qualification. The second point is dealt with in Byles on Bills at page 374, Leake on Contracts 634, Addison on Contracts 712, and Chalmers on Bills 311; and the leading cases are *Davis* v. *Gyde*, 1835, 2 A.

& E. 623; and *Belshaw* v. *Bush*, 1851, 11 C.B. 191, per Maule, J., 206.

The Scotch Courts have not had occasion to consider either the alleged general rule or the alleged qualification. It is, of course, clear that a debt cannot be extinguished and that a diligence cannot fall by a conditional payment. It may yet require to be determined whether a conditional payment suspends diligence to any extent. Meantime, the question before me does not relate to a threat of ultimate diligence, but only to a complaint of a step which it was important for the creditor to take at the time, in view of the possibility of the condition not being purified. I decide that question in the respondent's favour, and therefore hold him entitled to expenses. The complainers ask for suspension against the sale of their goods on the ground that, the respondent having proceeded illegally to inventory, they presume that he means to go on to sell. I hold that his inventorying was not illegal, and I see no evidence of his meaning to go on to sell before ascertaining whether the cheque would be honoured.—6*th August* 1907.

Counsel for Complainers, Constable; Agents, Purves & Simpson, W.S.—Counsel for Respondent, Munro; Agents, Mackenzie, Innes & Logan, W.S. C. H. B.

HIGH COURT OF JUSTICIARY.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Ardwall.*)

138. Findlay *v.* Walker.

Justiciary Cases — Complaint — Specification—Penalty—Common Law Offence—Necessity for Specification of Penalty for Common Law Offences Under General Police Act—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sect. 490.

Bill of Suspension.

David Findlay, potato merchant, 3 Hamilton Street, Paisley, was charged in the Police Court at Paisley on a summary complaint at the instance of the Burgh Prosecutor. The complaint, which was headed "Under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887," set forth—

That the accused, time and place libelled, "*did* assault William Keter, farmer, residing at Bogside Farm, Moorpark, Renfrew, by striking him a severe blow on the face with his fist, whereby his left lower eyelid was severely cut to the effusion of blood, and to the hurt and injury of his person: And the said David Findlay has been previously convicted of the crime of assault in your Honours' Court at Paisley on 4th October 1904.

"May it therefore please your Honours to grant warrant to cite the said David Findlay to appear before you to answer to this complaint, and thereafter to convict him of the said crime, and to adjudge him to suffer the pains of law." High Court of Justiciary — Findlay v. Walker.

Findlay pleaded not guilty, but after evidence had been led, he was convicted. The conviction and sentence was in the following terms:—

"At Paisley, the 2nd day of April 1907.—The Magistrate, in respect of the evidence adduced, finds the said David Findlay guilty of the crime charged, aggravated as charged, and therefore fines and amerciates him in the sum of £10, payable to the Clerk of Court; and in default of immediate payment thereof, decerns and adjudges the said David Findlay to be imprisoned for the space of thirty days, unless the said sum shall be sooner paid; further, ordains the said David Findlay to find sufficient caution acted in the books of Court for good behaviour for the period of six months from and after the date of payment of said fine, or of the expiration of said period of imprisonment, under a penalty of £20, and in default of said caution being found, sentences and adjudges the said David Findlay to be imprisoned for the further space of thirty days from the date of the payment of said fine or the expiration of the term of imprisonment for non-payment thereof, and thereafter to be set at liberty; and for that purpose grants warrant to officers of law to convey the said David Findlay to the prison of Glasgow, thereafter to be dealt with in due course of law."

Findlay presented a Bill of Suspension, in which he stated:—

"4. The said complaint was brought under only the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, and not under the Burgh Police (Scotland) Act 1892. Under the said Summary Jurisdiction and Criminal Procedure Acts, and at common law, the said sentence was excessive, and *ultra vires*. The presiding magistrate was not entitled to fine the complainer in a greater sum than £5, nor was he entitled to ordain the complainer to find caution for his good behaviour, as above mentioned. The said conviction and sentence is accordingly irregular, incompetent, and invalid. The complainer had no notice of nor was he aware of the terms of section 490 of the Burgh Police (Scotland) Act 1892.

"5. Further, and in any event, the complainer is innocent of the crime charged, and the blow struck by him was justifiable, and was struck in self-defence. In convicting and sentencing the complainer as aforesaid, the presiding magistrate disregarded the evidence and acted nimiously, oppressively, and illegally."

The Complainer pleaded—

"The said conviction and sentence being nimious and oppressive, and being incompetent and illegal, ought to be suspended, with expenses, in respect—

"(1) That there was absolutely no evidence justifying the conviction;

"(2) That the sentence was unwarranted both at common law and under the Summary

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Jurisdiction Acts libelled, and that no notice was given of sect. 490 of the said Burgh Police Act; and

"(3) That the penalty imposed was in excess of that authorised by the statutes under the provisions of which the complaint proceeded."

The Burgh Prosecutor lodged answers in which he stated:—

"4. The statutes mentioned are referred to. Explained that the Court was constituted, and the presiding Magistrate acted under the powers conferred by the Burgh Police (Scotland) Act 1892. Although the complainer had been previously convicted of assault, and the offence of which he was found guilty was an aggravated one, the presiding Magistrate did not wish to send the complainer to prison, but he expressed the opinion that an exemplary sentence was, in the circumstances, necessary. The said Burgh Police (Scotland) Act 1892, and in particular sect. 490 thereof, under which said Magistrate acted, authorises the penalties imposed. *Quoad ultra* denied.

"5. Denied."

The Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), enacts:—

"Sect. 29. Where by any Act of Parliament a power is or shall be given to any sheriff, justices or justice or magistrate in the exercise of jurisdiction as a judge of police to take cognisance of offences punishable by fine or imprisonment, without any declaration being expressed or implied by the powers of such judge of police in relation to the punishment of such offences, it shall be lawful for such sheriff, justices or justice or magistrate, convicting for an offence of which he or they may lawfully take cognisance, to sentence the person convicted to pay a penalty not exceeding five pounds, or, in the discretion of the judge, to sentence him to be imprisoned for any period not exceeding sixty days from the date of imprisonment, and also to adjudge him to find caution to keep the peace for six months under a further penalty of ten pounds; and in default of such caution being found, to be imprisoned for a further period not exceeding thirty days."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55) enacts:—

Sect. 490. "The magistrate may either sentence the accused on conviction for common law crimes or offences to imprisonment with or without hard labour for any period not exceeding two months, or he may impose a fine not exceeding ten pounds, and failing payment thereof award imprisonment not exceeding the respective periods after specified; and in lieu of or in addition to either of these modes of punishment, he may order the accused to find security for good behaviour for any period not exceeding six months and under a penalty not exceeding twenty pounds; and failing the finding of such security he may award imprisonment or additional imprisonment not exceeding the respective periods after specified, but in no case shall the total imprisonment exceed sixty days except as hereinafter provided."

Sect. 516. "If it should be found convenient in any prosecution under this Act or any special statute, any of the provisions or forms of the Summary Jurisdiction Acts or the provisions or forms of the Criminal Procedure (Scotland) Act 1887 may be used."

Argued for the Complainer: The prosecutor here had elected, as he competently might—(Burgh Police (Scotland) Act 1892, sect. 516)—to proceed under the Summary Jurisdiction Acts 1864 and 1881, and the Criminal Procedure Act 1887, and not under the Burgh Police Act 1892. The Burgh Police Act 1892 was not mentioned in the complaint; consequently it was incompetent for the magistrate to impose a penalty of £10, although such a penalty would have been competent had the complaint been a complaint under the Act of 1892. As it was, the sentence was *ultra vires*, £5 being the maximum penalty competent under sect. 29 of the Summary Jurisdiction Act of 1864 (*Reid* v. *Miller*, 13th July 1889, 7 S.L.T. 120, 3 Adam 29).

Argued for the Respondent: The offence here charged was a common law offence. That being so, it was unnecessary that the complaint should specify the penalties. Nor was it necessary that the Burgh Police Act of 1892 should be specified in the complaint, for that was the general Police Act upon which the whole jurisdiction of the magistrate depended. *Reid* v. *Miller* was a case of a statutory offence.

The Court *refused* the bill.

Lord Stormonth-Darling.—This suspension is brought (1) on a ground which this Court cannot possibly entertain, viz., that the evidence was insufficient to warrant a conviction. But (2) it is brought on the ground that the sentence was not warranted by the Summary Jurisdiction Acts on which the complaint bore to proceed. It is not denied by the accused that the sentence actually imposed—a fine of £10, followed by an order to find security for good behaviour for a period of six months—was fully warranted by sect. 490 of the Burgh Police Act in the case of a conviction, as this was, for a crime at common law. But it is said that the Burgh Police Act was not mentioned in the complaint, and that the only statutes which *were* mentioned in the heading of the complaint were the Summary Jurisdiction Acts 1864 and 1881 and the Criminal Procedure Act 1887. Moreover, it is said that the accused had no notice, nor was he aware, of the terms of sect. 490 of the Act of 1892. I think it did not matter whether he had notice of it or not, and that he was bound to know the law as to the punishment which could be inflicted, although, of course, that could never apply to any section that creates a statutory offence, as to which distinct notice must always be given in the body of the complaint so that an accused person may know what he is being charged with. But a mere enlargement of the magistrate's powers with regard to sentence for a common-law crime seems to me to be attended with no such consequences, and therefore I am of opinion that this suspension should be refused.

Lord Ardwall.—I am of opinion that this suspension ought to be refused.

The principal, and indeed practically the only, ground on which the conviction under review is attacked is, that while the complaint on which it proceeds bears to be brought under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, the sentence pronounced exceeds the maximum sentence of thirty days' imprisonment or £5 of a fine which under the 29th section of the Act of 1864 police judges have power to pronounce. But it is answered that, by the Burgh Police (Scotland) Act 1892, sect. 490, the powers of police judges in this matter were enlarged to the effect of enabling them to pronounce a sentence of imprisonment not exceeding two months or a fine not exceeding ten pounds.

The matter simply stands thus, that the provisions in sect. 29 of the Summary Jurisdiction Act of 1864 are altered as regards police magistrates by sect. 490 of the Burgh Police Act of 1862, and of course the provisions of the later statute must prevail. Then by sect. 516 of the Burgh Police Act 1892, it is provided as follows: "If it should be found convenient in any prosecution under this Act or any special statute, any of the provisions or forms of the Summary Jurisdiction Acts, or of the provisions or forms of the Criminal Procedure (Scotland) Act 1887, may be used."

I think that the fact that the prosecutor has taken advantage of this section and made use of the forms and provisions of the Summary Jurisdiction Acts in the present complaint cannot reasonably be held to re-impose upon the police magistrate disposing of the complaint in the burgh police court the limitations in the matter of sentences which was imposed by sect. 29 of the Act of 1864, but removed by sect. 490 of the Burgh Police Act of 1892. There is, in my opinion, no obligation on a prosecutor in the case of a common law offence to libel the Act or Acts of Parliament under which the judge is authorised to pronounce any particular sentence.

I am therefore of opinion that the police magistrate in the present case was competent to pronounce the sentence he did, and that the suspension ought to be refused.

The Lord Justice-Clerk concurred.—19*th July* 1907.

Counsel for Complainer, MacRobert; Agent, Walt. M. Murray, S.S.C.—Counsel for Respondent, M. P. Fraser; Agents, Campbell & Smith, S.S.C. F. A. U.

HOUSE OF LORDS.

(*The Lord Chancellor* (*Lord Loreburn*), *Lords Ashbourne, Macnaghten, Robertson, Atkinson and Collins.*)

139. Hope Vere *v.* Hope Vere.

Marriage Contract—Construction—Two Antenuptial Contracts, One in Scots, One in French Form—Divorce of Husband—Obligation to Pay Annuity to Wife on Death—Whether Obligation Prestable.

Appeal against an Interlocutor of the Second Division (*The Lord Justice-Clerk, Lords Stormonth-Darling and Low*), *adhering in effect to an Interlocutor of Lord Salvesen.*

(*Reported ante, Vol. XIII. p.* 774; *Vol. XIV. p.* 772.)

The facts of the case appear from the previous reports. The defender *appealed* to the House of Lords. The pursuer presented a cross appeal.

The House *dismissed* the defender's appeal with costs, and *dismissed* the cross appeal without costs, and without prejudice to the effect of the Scots marriage settlement.

The Lord Chancellor.—There is no decision in the Second Division as to the extent to which these lands are bound by the Scotch marriage settlement. Accordingly your Lordships have not been troubled with argument upon that subject, and the point so far as this House is concerned is open.

The question in this case is as to whether or not there was a personal obligation to pay the £1500 a year referred to in the marriage settlements. It was a marriage between a Scotsman and a French lady, and there were marriage settlements. One of them was in Scots form although executed in Paris, and the other was in French form. Both of them are admittedly binding. If they conflicted the one with the other in the sense of either contradicting the other it would be necessary for your Lordships to consider a different question. They do not conflict, and both of them apply.

The Scots contract gives a certain property in land, which in a conventional way may be described as a security, whatever the particular legal character of it may be. The French document does create a personal obligation to pay this sum of £1500 a year. There is really no dispute that it is so; but in effect two points when they are analysed are raised by the Dean of Faculty—one of them is that it was not so designed by the parties. I cannot pass behind the words used in order to penetrate to some imaginary design which may lurk beneath them. I think myself that it was designed, because the object of the French contract was in my view

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to create a duty which should be enforceable in France, whereas the Scots contract relating to landed property in Scotland would not be so easily handled by a French Court.

The second point which was in substance argued was this—that in some way the effect of the French contract must be controlled by reference to the Scots deed. I do not think that is so. Both of them being consistent must be read according to their natural meaning. In my opinion, without entering upon a criticism of the language used, the words in the preamble of the French contract do not affect this question, and I think this appeal ought to be dismissed with costs.

Lord Ashbourne.—I concur.

Lord Macnaghten.—I agree.

Lord Robertson.—It is not surprising that difficulties should arise when two contracts relating to the same marriage are executed, the one according to Scots law and the other according to French law. But, as my noble and learned friend on the Woolsack has said, even supposing there were a contradiction between the two deeds, it would be the duty of the Court which has to give effect to the rights of the parties, to find a solution of that difficulty. I am happy, however, to think in the present case that question does not arise.

I will take first of all (for reasons which I shall presently mention) the French contract, and I am bound to say, as the net result of the argument, I think it is perfectly clear that the French contract imposes a personal obligation upon the bridegroom. But it does more; and this I think has received scarcely sufficient enforcement in the argument. It not only imposes a personal obligation, but it also relegates the infeftment to the position of a security, because it uses that very term in describing it; and the theory of the French deed (to put it in a word) is that there is a personal obligation for this annuity, and a security granted by virtue of the Scots marriage contract.

Then when we turn to the Scots deed I must own that I was at first gravely impressed by the difficulty which arises from this fact, that the Scots contract is a complete settlement, or purports to be a complete settlement, of the rights of the parties. It has all the usual words of style, which are not immaterial, but on the contrary serve to exhaust, as it were, the rights of the two parties who are to be joined in marriage. I thought that presented a very serious difficulty, but the pressure of that is to my mind very greatly relieved by the introduction of these words: "In contemplation of which marriage, and in consideration also of the provisions made in a marriage settlement in the French form which has been or is about to be entered into between the parties hereto." Now that seems to me to let in the French provisions in their full and ample effect; and accordingly it remains to be seen whether there is anything in the remainder of the Scots deed which sets up an antinomy, as it were, between the two schemes of the settlement. I think that the solution is to be found here. The Dean of Faculty has most properly pointed out that the infeftment is a real right to secure so much of the rent of the property. It is not expressed as a security, but then the question is not what is the expression of the right, but what it serves for in relation to the other contract, the French marriage contract, which the Scots marriage contract recognises and founds upon. The solution of the case seems, therefore, to me to be this, that while in form and in technical accuracy of language the infeftment is not given as a security, yet it operates as a security when we are dealing with the rights which are settled by the combined action of the French and Scots marriage contracts.

Lord Atkinson.—I concur.

Lord Collins.—I also concur.

The Lord Chancellor.—There is the question of the cross appeal, and before your Lordships come to a decision I think it would be well to suggest that the cross appeal should be dismissed without costs, but with a statement that it be without prejudice to the effect of the Scots marriage settlement.—24*th July* 1907.

Counsel for Pursuer, Clyde, K.C., Hon. W. Watson; Agents, Tods, Murray, & Jamieson, W.S., Edinburgh; Rawle, Johnstone & Co., London.—Counsel for Defender, Dean of Faculty (Campbell, K.C.), Cripps, K.C., Macphail; Agents, Melville & Lindesay, W.S., Edinburgh; John Kennedy, W.S., Westminster.

HOUSE OF LORDS.

(The Lord Chancellor (Lord Loreburn), Lords James of Hereford, Robertson and Collins.)

140. Dunlop Pneumatic Tyre Company Limited *v.* Dunlop Motor Company Limited.

Trade Name — Infringement — Personal Name—Action to Restrain Use of Name "Dunlop"—No Fraud and No Deception Arising from the Use of Name—Interdict Refused.

Appeal against an Interlocutor of the Second Division (The Lord Justice-Clerk, Lords Kyllachy, Stormonth-Darling and Low), reversing an Interlocutor of Lord Dundas.

(*Reported ante, Vol. XIII. p.* 401; *Vol. XIV. p.* 284, and 8 F. 1147.)

The facts of the case appear from the previous reports.

The Complainers the Dunlop Pneumatic Tyre Co. Ltd. *appealed* to the House of Lords.

The House *dismissed* the appeal.

The Lord Chancellor.—The question here is—Ought the respondents to be restrained in substance from using the style and name of the "Dunlop Motor Company Limited" on the ground that it is misleading and enables them to acquire part of the goodwill of the appellants?

I think the pursuers in this case fail upon the facts. It is not necessary to enter into the evidence in detail. In each case it nearly always is a question of fact as it is here. The real complaint in this case was as to the use of the name "Dunlop." That name is the true name of the two brothers who got up the respondent company. I can see very little proof that anyone was misled by its use, and I can see no proof that any article was bought by anyone from the respondents in the belief that they were a branch of the appellant company. The two companies do not to any considerable extent in fact deal in the same articles, and I see no ground for thinking that the little repairing business in Kilmarnock does or can do any unlawful harm to the appellant company.

I am therefore of opinion that this appeal ought to be dismissed.

Lord James of Hereford.—The complainers in this case, the appellants, have by themselves or their predecessors in title carried on business using the name of Dunlop to designate the goods manufactured and sold by them, and such name was stamped on most of the goods so manufactured.

These goods were principally tyres—and the name of the appellants' company, the Dunlop Pneumatic Tyre Company, so represents. Other goods, accessories used in relation to and on and about motor cars and bicycles, were also manufactured and sold by the appellants.

Previously to the year 1904 two brothers, Robert and John Fisher Dunlop, had carried on a small business at Kilmarnock under the style of R. & J. F. Dunlop. The principal business of this firm was that of selling and repairing bicycles and tricycles.

In 1904 a small company with very limited capital was formed under the name of the Dunlop Motor Company for the purpose of selling (on commission) and repairing motors and motor cycles and parts thereof.

The business carried on by this—the respondents'—company was a small local trade in Kilmarnock, and consisted principally in the repairs of motor cars and the sale of petrol.

The complainers, the appellants, seek to prevent the respondents' company from carrying on its business under the name of the Dunlop Motor Company, on the ground that the use of such name is calculated to deceive the public into purchasing the respondents' goods in the belief that such goods are those of the appellants.

In my judgment the appellants have failed in making out this contention. They do not allege that they sell motors or any other vehicles, but they do deal in parts or accessories of such vehicles, viz., tyres, pumps, and other adjuncts, and they allege that a confusion may be caused and a belief created that the respondents' company were selling these same portions as being those of the appellants.

Now, in what does the deception consist, and who were the persons deceived?

The complainers have no claim to the exclusive use of the name Dunlop. It is a common name in Scotland. The respondents had traded as R. & J. F. Dunlop. The appellants have chosen to announce themselves as the Pneumatic Tyre Company preceded by the name Dunlop, and their case seems to be that having done so they can shut out persons named Dunlop from employing that name in connection with a company at all similar in object to the tyre company. I agree that the objects of the two companies need not be absolutely identical in order to entitle the complainers to relief, but there must be great similarity. In this case I do not think that the measure of similarity established is sufficient either in the name employed or in the nature of the trade sought to be carried on.

The complainers say we are a pneumatic tyre company. The respondents represent themselves to be a motor company. Then, as I have said, the tyre company does not sell motors. The motor company appears to do so, or at least seeks to do so. If in respect of some minor articles there might be a common production, yet the main objects of the two businesses are different.

As to these minor articles I agree with the view expressed by Lord Kyllachy, that the complainers have not proved that they have any exclusive right in connection with the sale of those articles to the use of the name Dunlop, nor have they proved that the name in question has any special reputation or value in connection with such minor articles.

Then, secondly, who are they who will be deceived by the name used by the respondents? It appears to be admitted that an ordinary business person would not be misled, but it is alleged that the unwary would. Well of course there are unwary people in this world, but I think that a man who employs his own name in carrying on his business has the right to regard the people whom he may attract as being capable of exercising and being in the habit of exercising thought; and I cannot differ from the judgment of Lord Low, in which he says:—"Anyone who took the trouble to think about the matter would see that the respondents'

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company was a motor company and the complainers a tyre company. I do not think that the respondents are liable to have their business practically stopped unless they change their name simply because a thoughtless person might unwarrantably jump to the conclusion that they were connected with the complainers."

Under the circumstances of the case before your Lordships I do not think that the average citizen of Kilmarnock would be deceived, and I cannot speculate upon the degree of unwariness that would induce the confusion necessary to support the appellants' claim.

It is not without full consideration of the very lucid judgment of the Lord Ordinary that I have come to the conclusion that the decision appealed from is correct, and that therefore this appeal should be dismissed.

Lord Robertson—I agree in the judgment of the Lord Chancellor.

Lord Collins—I am of the same opinion.—24*th July* 1907.

Counsel for the Appellants, Sir Robert Finlay, K.C., Clyde, K.C.; Agents, Deas & Co., W.S., Edinburgh; John B. & F. Purchase, London.—Counsel for the Respondents, Upjohn, K.C., Hon. W. Watson; Agents, Campbell & Smith, S.S.C., Edinburgh; John Bartlett, London.

HOUSE OF LORDS.

(*The Lord Chancellor* (*Lord Loreburn*), *Lords Macnaghten, Robertson and Atkinson.*)

141. Macknezie's Trustees *v.* Mackenzie and Others.

Succession — Trust Disposition — Construction — Destination — Residue—"Heir Entitled to Succeed Under" Deed of Entail —Disentail Before Term of Payment of Residue—Held That Residue Did Not Fall Into Intestacy.

Appeal against an Interlocutor of the Second Division (*The Lord Justice-Clerk, Lords Kyllachy, Stormonth-Darling and Low*), *adhering to an Interlocutor of Lord Johnston.*

(*Reported ante, Vol. XIV. p.* 498, *and* 1907 *S.C.* 139.)

The facts of the case appear from the previous report.

The Baroness Wesselenyi, administratrix of C. L. Mackenzie, *appealed* to the House of Lords.

The House, without calling on counsel for the respondents, *dismissed* the appeal with costs.

The Lord Chancellor.—The point in this case is a very short point, and it is this—There is a direction in the fourth codicil of this deceased gentleman to the following effect:—"I direct my trustees, after paying all debts, legacies, annuities, and life interests affecting my personal estate, to make payment to the heir for the time being entitled to succeed under the said deed of entail" of certain sums of money. The question is whether those words mean the heir who shall in fact have title by virtue of the deed, or the heir whom the deed designates as the person entitled to succeed. I agree with the decision of the Second Division that under this language you have to ask who is the person whom the deed declares to be the heir. It is a question of what the deed says, not what the deed does; and so, although it is no longer operative, it can still indicate the heir pointed to in the codicil.

In regard to the question of costs I do not perceive at your Lordships' bar any appearance on behalf of Sir Victor Mackenzie. Therefore I move your Lordships that this appeal be dismissed with costs in the ordinary way.

Lord Macnaghten.—I agree.

Lord Robertson.—The respondent, Sir Victor Mackenzie, is unquestionably the person entitled to this residue if the entail of Kintail still subsisted.

The proposition maintained by the appellant is really this, that the testator's intention to give this residue to Sir Victor, his lineal descendant, was subordinate to his intention to give it to an heir of entail, and that as the entailed title has gone by the board the testator has expressed no intention applicable to the situation. It seems to me that this is to erect out of words of style a structure of intention wholly non-existent. The testator was dealing with what he was making an entailed estate, and he therefore calls the persons whom he is benefiting heirs of entail. But the substance of a bequest of residue is the choice of persons; and Sir Victor is the designated person in the present case.

On the question of costs I have only to say that I can see no ground at all for granting the appellant costs out of an estate which we hold to be determined by this will as the effective instrument, his whole argument being that the will has no application to the case in hand. As to the position of Sir Victor, I entirely concur with what my noble and learned friend on the Woolsack has said.

Lord Atkinson.—I concur.—25*th July* 1907.

Counsel for the Appellant, Clyde, K.C., Chree; Agents, Mackenzie, Innes & Logan, W.S., Edinburgh; Busk, Mellor & Norris, London.—Counsel for the Respondents (*Mackenzie's Trustees*), *Dean of Faculty* (*Campbell, K.C.*), *Hon. W. Watson; Agents, Tods, Murray & Jamieson, W.S., Edinburgh; Norton, Rose, Barrington & Co., London.*

OUTER HOUSE

(*Lord Salvesen.*)

142. Sillars *v.* M'Alpine and Others.

Succession — Will — Deposit Receipt — Destination in Deposit Receipt—Passing Property—Connell's Trustees v. Connell's Trustees, 1886, 13 R. 1175, Followed.

The question in this action related to a sum of £400 contained in a deposit receipt dated 9th January 1905 with the Bank of Scotland, Lamlash, Arran, in name of the defender Alexander M'Alpine, for behoof of his two daughters.

Said deposit receipt had been exchanged for one dated 5th August 1902 in name of the pursuer's brother, Angus Sillars, herself, and her sister Mrs M'Alpine. Angus Sillars died in December 1902.

The pursuer, who was a sister-in-law of the defender, concluded for declarator that the sum of £400 contained in said deposit receipt was her property, and to have the defender ordained to endorse and deliver it to her. The defender's two daughters were called for any interest they might have; as were also the pursuer's two sisters and the pursuer herself as executrix of her deceased brother Angus Sillars. Defences were lodged for Alexander M'Alpine and his two daughters.

The opinion of the Lord Ordinary further sufficiently reports the case.

After a proof the Lord Ordinary, on the ground that the pursuer's right of property in the deposit receipt had not been established, *dismissed* the action, and found neither party entitled to expenses.

Lord Salvesen.—In this action the pursuer seeks a declarator that the sum of £400 contained in a deposit receipt dated 9th January 1905 in name of the defenders for behoof of his two daughters is her property; and her leading conclusion is that the defender should be decerned to endorse the said deposit receipt and deliver it to the pursuer. The only defence formulated in the pleas in law is that the sum contained in a deposit receipt dated 5th August 1902, for which the deposit receipt described in the summons was exchanged, was validly donated to the defender's two children. There is, however, no admission of the pursuer's statements in Cond. 1, which relate to her right of property in the deposit receipt in question; and as there could be no valid donation unless the pursuer was the owner of the property donated, it appears to me that the question of property is incidentally raised.

On record the pursuer's statement in Cond. 1 is that on 5th August 1902 she deposited the sum of £400 on deposit receipt in name of her brother Angus Sillars, herself, and her sister Mrs M'Alpine, and the survivor or any of them; that this sum was the sole property of the pursuer, and that the receipt was taken in the terms stated to provide for the contingency of the pursuer's death. This averment, which is the foundation of her case, is contradicted by the pursuer herself. The money was not deposited by her but by her brother Angus Sillars, with whom she was then residing, and she did not prescribe the terms in which it was taken. At the time when it was deposited the pursuer—as I read her evidence—does not affirm that the property in the money belonged to her, or that Angus Sillars might not have uplifted the money and redeposited it in any names which he chose. She endeavours now to make a case either of *inter vivos* or *mortis causa* donation; and although she was very voluble in her evidence I confess I am still quite in doubt which theory she prefers. In considering whether a transference of property took place by donation it is fair to consider the circumstances in which the claim arises; and I shall accordingly now do so.

The pursuer's father was the tenant of a small farm called Benlicken, near Pirnmill, in Arran. He died a great many years ago, but his widow and children continued to reside on the farm. There were two sons, Peter and Angus, and three daughters — the pursuer, Mrs M'Millan, and Mrs M'Alpine. The lease of the farm appears to have been taken in the name of the eldest son, Peter, and on his death in 1898 to have passed to Angus. Mrs M'Millan married about forty years and Mrs M'Alpine some twenty years ago. The pursuer remained unmarried, and continued to reside with her mother and brothers and latterly with her last surviving brother Angus, and to take an active and no doubt an efficient part in the management of the farm. On Peter's death a sum of £50 each was paid to Mrs M'Millan and Mrs M'Alpine, but the pursuer got no definite sum, although it was understood that she was to receive £100, as she had contributed more than her sisters to the money earned in the conduct of the farm.

When Angus died on 19th December 1902 there were four deposit receipts which had been taken out by him lying in his repositories. Of these, one was for £305, 4s. 1d., which was deposited with a bank in Campbeltown in his own name; two for £260 and £60 respectively were deposited in the name of Angus Sillars and the pursuer and the survivor; and the fourth, for £400, was deposited with the Bank of Scotland in the names of Angus Sillars, the pursuer, and Mrs M'Alpine and the survivor. The pursuer was appointed executrix of her brother Angus, and she gave up an inventory of his estate, in which she included only the one deposit receipt which stood in the name of Angus Sillars alone. She took possession of the deposit receipts for £260 and £60, and uplifted the contents on the

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footing that they were her own property; and one or two days after the death of her brother Angus (it is quite immaterial which) she handed the deposit receipt for £400 to the defender in presence of his wife. Both the pursuer and the defender agreed that the sum was not to enter the inventory of the deceased's effects; and each now claims the full property in it, the pursuer for herself and the defender on behalf of his minor daughters.

On the admitted facts of the case it is obvious enough that the pursuer had a moral claim to a larger share than her sisters in the accumulations from the profits of the farm, which may be taken to be represented by the various sums on deposit at Angus's death. But a court of law cannot make a will for a deceased man who has not himself taken the trouble to do so; and his estate must be divided according to the rules of intestate succession quite irrespective of considerations of equity.

The pursuer herself seems to have thought that the terms of the deposit receipt were equivalent to a will in her favour. In this she was wrong, as was decided in the case of *Connell's Trs.*, 13 R. 1175. This case does not stand alone, but followed on a series of decisions which were all to the effect that a deposit receipt can have no testamentary operation or effect. Unfortunately the misconception which appears from these cases to have been at one time common in Scotland as to the effect of a deposit receipt in name of two or more persons and the survivor seems still to linger in Arran, where deposit receipts, according to the evidence in this case, appear to be utilised, not merely as conclusive evidence of testamentary intention, but as convenient documents for transferring property, and incidentally of evading Government duties.

It follows from the decision in *Connell's* case that the money contained in the deposit receipt of 5th August 1902 must be presumed to have been the property of Angus Sillars the depositor, and at his death to have formed part of his executry. Of course it would still be open to the pursuer to prove that the money in the deposit receipt was donated to her; but I cannot hold that she has established this by her own evidence alone, especially in view of its vagueness and want of precision. In my opinion, therefore, the leading conclusion of the summons must be negatived.

It was strenuously urged by the pursuer's counsel that I was not entitled to reach this conclusion because the question of property was not distinctly raised between the pursuer and the only compearing defender, and that I was therefore bound to accept the pursuer's statement that the money contained in the deposit receipt was in fact her property. He directed my attention to the fact that all the next of kin of the deceased Angus Sillars are cited as defenders, and that the pursuer has even called herself as executrix of her brother. I should have been more impressed with this argument if the executry estate had been under the administration of some third person. If an independent executor having investigated the circumstances did not think fit to contest the pursuer's right of property the Court would scarcely intervene; but this question can only properly be tried between the pursuer and some one representing the executry estate, and it would be an odd result that the mouths of all parties interested should be closed because the pursuer as an individual had obtained a decree in absence against herself in her capacity of executrix. No doubt in the special circumstances a defence by the M'Millans might have been entertained; but I am at a loss to see upon what facts they could have proceeded, as all information was withheld from them by the pursuer. The deposit receipt in question was secretly transferred to the defender within a couple of days after the death of Angus Sillars; and I am satisfied that this was done so that its very existence might be concealed from the M'Millans. Moreover, the pursuer's statement on record was quite misleading and, as I believe, was intended by the pursuer to be so. There was no improbability that she might have deposited the £400 contained in the deposit receipt in question, and if so she would have been *prima facie* entitled to the ownership. The fact is that she did not do so, Angus Sillars having transacted all the banking business while he was alive. As, however, the proper defender on this question of property is not here to contest the claim, I do not desire to say anything further to prejudice the pursuer's rights, as it is conceivable she may have some corroborative testimony on the subject of the alleged *mortis causa* donation, or may otherwise establish her claim to the contents of the deposit receipt.

If I am right so far, the money contained in the deposit receipt of 1902 cannot have been validly donated to the defender. But in case a different view may be taken elsewhere I think it right to express my opinion as to the effect of the proof on the subject of donation.

[The Lord Ordinary then dealt with the evidence and expressed the opinion that assuming the property of the deposit receipt was in the pursuer, it was sufficiently proved that the pursuer made a gift of it to her nieces.]—*5th June* 1907.

Counsel for Pursuer, Macmillan; Agents, Patrick & James, S.S.C.—Counsel for Defenders, M. P. Fraser; Agent, L. M'Intosh, S.S.C.

J. W. F.

OUTER HOUSE.

(*Lord Salvesen.*)

143. Hallet *v.* Ryrie and Others.

I. Evidence — Contract — Innominate — Agreement to Leave Person a Sum of Money by Will—Proof of Writ or Oath—Observations on Proof of Innominate Contracts.

II. Evidence — Testamentary Writing — Obligation to Leave Money by Testamentary Writing—Proof of Obligation—Proof Prout de Jure Held Incompetent and Proof Habili Modo Allowed.

The opinion of the Lord Ordinary sufficiently reports this case.

Lord Salvesen.—The pursuer in this case avers that in July 1901 the late Alexander Ryrie proposed marriage to her, and was accepted. The marriage was arranged for the first week in October; but the intending husband became ill, and ultimately desired to be relieved of his engagement. As compensation for his breach of promise he agreed with the pursuer in the beginning of 1902 to make a settlement upon her during his lifetime of £25 a year, payable in quarterly instalments, and to leave her £1000 at his death in the event of his predeceasing her. Mr Ryrie died in November 1905, after having—according to the pursuer's averments—duly implemented that part of his obligation which referred to payment of the annuity, and she now sues his executrices for payment of the sum of £1000 which Mr Ryrie bound himself to leave her by will.

The defenders are administering the estate under a general settlement of the deceased's affairs, which contains no provision in the pursuer's favour. They admit that they are also in possession of a testamentary writing (of a later date) which bears to contain a direction by Mr Ryrie to his executors to pay the pursuer a sum of £1000 sterling, free of legacy duty; but they say that this document was never signed by the deceased; or, at all events, that it was never duly executed. The pursuer admits that she cannot found her claim upon this document; although she proposes to use it as an adminicle of evidence in proof of the contract which, she says, was entered into between her and the deceased.

The defenders plead in their first plea in law that the action is irrelevant; but this plea was not strongly pressed. In the case of *Paterson*, 1893, 20 R. 484, it was held that an onerous agreement between a mother and her son that the mother should execute an irrevocable settlement of her property in his favour was binding, and that the obligation undertaken by the mother was not the less to be enforced that, in its nature, it could only be implemented after her death. Accordingly, the main argument was directed to the fifth plea in law, that the pursuer's averments can only be proved by the writ of the deceased. For the pursuer it was, on the other hand, contended that the agreement alleged was entered into by way of compromise of a legal claim, and was therefore proveable *prout de jure*.

The pursuer cited the cases of *Forbes* v. *Caird*, 1877, 4 R. 1141, and *Downie* v. *Black*, 1885, 13 R. 271. These cases establish that there is no such rule as that innominate contracts cannot be proved except by writ; and there are other cases not cited which conclusively settle that a compromise of an action may be proved *prout de jure*. In *Downie's* case Lord Shand reaffirmed, what had been previously repeatedly laid down in the older decisions, that if the contract is of a very unusual kind, the proof must be by writ or oath of the parties. For my own part, I think that doctrine requires reconsideration. I can scarcely imagine that there is to be first an inquiry whether a particular kind of contract is unusual before the mode of proof is determined. If not, it will rest with the tribunal in each case to say whether an agreement is unusual—which is a matter of fact that can only be safely determined after evidence. No tribunal can be familiar with the customs of every class of the people in every particular industry or business; and it may well be that a particular contract, of which the judge before whom the case is tried has never heard, may yet be quite familiar to a section of the general public. The observations of Lord Deas, in the case of *Forbes* v. *Caird*, form an excellent illustration of this. In that case—commenting on the decision in *Taylor* v. *Forbes*, 1853, 24 D. 19, where it was held that an agreement by which a law agent undertook business gratuitously, reserving his right to recover costs from the opposite party in the event of success, was held to be only proveable by the writ or oath of the agent—Lord Deas remarked: "It is so unusual, and out of the ordinary course of business, for a law agent to work for nothing, that a contract to do so will only be allowed to be proved by his writ or oath" Yet it is common knowledge that litigations for persons in humble circumstances, but not on the Poor's Roll, are daily conducted in the Court of Session on this footing; and the decision in *Taylor* v. *Forbes* has since, I was told, been overruled. I am, therefore, not disposed to restrict the proof in this case, on the ground that the contract alleged was an innominate one containing unusual stipulations.

There is, however, another ground by which the same result may be reached. According to our law, a testamentary writing, to have effect,

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must be either holograph of the deceased or probative. This law, which is most salutary in its application, would be practically abrogated if it were possible to prove *prout de jure* that the deceased had come under an obligation (whether onerous or gratuitous I do not think matters) to leave his whole estate, or part of it, in favour of a particular person. In the case of *Johnstone* v. *Goodlet*, 1868, 6 M. 1067, the Lord Justice-Clerk (Patton) said: "If an agreement to leave all one's property to a particular individual were proveable *prout de jure*, the law as to the execution of testaments would be superseded. Writing in such a matter is requisite to express the fixed and settled determination of mind, because the lubricity of parole testimony would make it very difficult to distinguish between words of mere intention and those of engagement or obligation. They might easily be confused." I think this affords a much safer ground of judgment in favour of the defenders' contention than the doctrine as to innominate and unusual contracts; and it is obvious that it applies in terms to the contract libelled in the present case.

The defenders moved that in the event of my sustaining their fifth plea I should appoint the pursuer to lodge in process the writings upon which she founds, and then consider *ab ante* whether they are sufficient to allow parole proof in explanation. That is, no doubt, a competent course which has been occasionally adopted. I think, however, in this matter it is safer to follow the form of interlocutor adopted in the case of *Paterson*, 1897, 25 R. 144, where similar questions were raised. It will be quite competent at the proof for the defenders to object to any parole testimony being led, and if no writing has been produced which imports an obligation of the kind averred by the pursuer, the objection will be sustained.

The following interlocutor was pronounced:—"The Lord Ordinary having considered the cause, repels the first plea in law for the defenders; finds that the pursuer's averments can only be proved by writ or oath, and that such writ need not be holograph or tested; allows the pursuer a proof of her averments *habili modo*, and to the defenders a conjunct probation."—13*th July* 1907.

Counsel for Pursuer, A. M. Anderson; Agent, M. G. Yooll, S.S.C.—Counsel for Defenders, Constable, Macmillan; Agents, Cowan & Stewart, W.S. J. W. F.

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144. Giersten and Others (Owners of S.S. "Bauta") *v.* Turnbull & Co. *et e contra.*

I. Ship—Charter-party—Hire — Hire to Cease when Ship Inefficient Through Breakdown of Machinery, etc.—Meaning of "Breakdown of Machinery"—Liability of Charterer for Coals and Other Expenses Though Hire Ceased from Inefficiency of Ship.

II. Ship — Charter-party—Hire — Payment —Loss of Time—Detention by Breakdown of Machinery—Computation of Time—Held that Hire Payable to be Calculated by Hours, Not by Days or Parts of Days.

In these actions the material facts and the contentions of the parties sufficiently appear from the two Opinions of the Lord Ordinary.

Lord Salvesen.—These actions all arise out of a charter-party which was entered into between the owners of the "Bauta" and a firm of shipping agents in Leith. The charter-party is dated 26th July 1905, and was for a period of six calendar months commencing on 23rd September of that year. The sums sued for by the owners represent certain deductions which the charterers made when settling for the hire of the vessel during the time that she was actually employed. The charterers, on the other hand, maintain that they were entitled to make larger deductions than they have actually done, and in the counter-action at their instance they sue for repetition of sums paid amounting *in cumulo* to about £200. Some of the deductions which are in dispute represent comparatively small amounts, and these the parties have arranged extra-judicially. The controversy has accordingly been substantially narrowed to this—For what periods were the charterers exempt from payment of hire during the currency of the charter-party, in respect of certain breakdowns of machinery which occurred on three separate occasions and which for the time being prevented the working of the vessel? The clause in the charter-party which regulates this matter is Art. 12, and is expressed in the following terms: "That in the event of loss of time from a deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease from the time the breakdown, etc., occurs until she be again in an efficient state to resume her service." On the construction of this clause as applicable to the facts in the case the controversy turns.

The evidence with regard to the first break-

down is as follows. On the 14th of November, while the "Bauta" was on a voyage to Jaffa in ballast to load a cargo of oranges there, the master, who was on deck, heard a peculiar sound which is entered by the first mate in the log-book as a violent shock in the engine-room. The captain now explains that this language does not accurately express what actually took place, and that the noise, in fact, was such that it did not attract the attention of any of the other persons who were on deck. It was, however, an unusual sound; and although the captain does not now profess to know what caused it, he at one time attributed it to the propeller having struck some wreckage, although the evidence now led for the ship suggests that it may have been one of the knocking sounds which are a common result of some temporary derangement in the machinery. The experts examined were agreed that such noises are attributable to a variety of causes: such as the slackening of bolts or the presence of water in the cylinders, or the like. As the steamer, however, was able thereafter to maintain her ordinary speed the captain did not attach so much importance to the occurrence as he was inclined to do at the time. The entries in the log shew that on the 14th, 15th, 16th, and 17th of November the steamer was able to make on an average about 8 knots an hour; and indeed occasionally the speed rose to 8½ and even to 9 knots under favourable conditions. At 10.40 p.m. on the 17th the vessel arrived at Jaffa, and next day she commenced to take in her cargo of oranges. In the mate's log there is no further reference to the noises in the engine-room, or to anything which could give rise to any uneasiness.

In the engineer's log, which was kept by the first engineer—the witness Henriksen—the entry with regard to the same matter is in the following terms: "At 8 p.m. a strange noise was heard in the engine-room—the steam pressure was then 140 lbs. As the fires were being cleaned at the time, the place whence the sound came could not be located. As the steam pressure rose rapidly the sound disappeared and the engines were kept working under full steam pressure." There are no remarks with reference to the 15th, 16th, or 17th of November; but on the 18th of November the engineer notes: "On arrival at Jaffa, the strange sound aforenamed was again heard, but during the manœuvring nothing was heard." The engineer, however, deponed that when the pressure got low he had heard a knocking sound, the cause of which he was unable to explain, from time to time during the period between the 14th of November and the arrival of the ship at Jaffa.

At Jaffa the engineer made as thorough an examination of the engines as was possible under the circumstances. Jaffa is an open roadstead, and accordingly steam required to be kept up on the boilers during the whole period of loading, and I think it is proved that it would have been unsafe to have tilted the vessel so as to have made a thorough examination of the propeller and propeller-shaft possible. The engineer, however, rowed round the vessel in a boat, and he also took hold of the propeller with his hand to ascertain whether it was loose. The captain also made an inspection of the ship from a boat, but did not handle the propeller or shaft. Nothing was found to be wrong with the machinery except that two bolts at the couplings, which support the propeller shaft, were found to be out of order, the one being broken and the other slack. These were put right, and it was hoped that thereby a recurrence of the knocking sound would be prevented. Up to that point I think the master and engineer did all that was reasonable; and I reject the view that they ought to have called a survey by engineers of other vessels, or to have gone to Port Said. The defect, whatever it was, was quite obscure; and there was no reason to apprehend at that time that it would interfere with the working of the vessel.

The "Bauta" left Jaffa at 7 p.m. on 20th November on a voyage to Valencia. About an hour after departure (as the engineer notes in his log) "the strange sound was again heard, somewhat more pronounced when steam went down a little, but on the steam pressure going up the sound disappeared." On the 21st the sound was again heard all through the twenty-four hours, every time the pressure went below 150 lbs., and was observed to grow worse; and the same remark is made with regard to the 22nd. On the 23rd, at 1.30 a.m., the engines were stopped to examine the pumps, to ascertain if the sound might originate there. A coupling bolt was then found to be out of order and a new one was put in. At 8.40 a.m. the engines were again started, but without any improvement. On the 24th the strange sound from the engines became more observable, but no special flaw could be detected. On the 25th, as the sound became worse, it was decided to take out the piston-rods, and at 8.30 a.m. the engines were stopped and all the three piston-rods were examined, but were found to be in order. On the 26th the vessel apparently proceeded under full speed and steady high pressure. On the 27th the thumping noise became more pronounced and sharper, and there was great vibration in the engines when the shocks occurred, and, for the first time, the engineer seems to have thought that the propeller must be loose on the shaft and that this was the cause of the persistent noise. At 8.30 on the morning of the 28th the engines were stopped in order that a new bolt might be put in the crank-shaft; and, while the ship was stopped, an examination was made of the propeller, of a similar kind to that made at Jaffa, with the result that the engineer reached the conclusion that the propeller was loose on the shaft. The engineer then apprised the master of his discovery, and it was

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resolved to make for the nearest port, which happened to be Bona, under slow speed, so as not to make the damage worse. This was accordingly done; and by midnight on the 30th the vessel was moored in Bona harbour. It was there ascertained that the shafting had got out of line, and that the white-metal stern-bush had been worn down to a dangerous extent. According to the experts, the gradual wearing away of the bush was sufficient to account for the knocking sound which had continued at intervals since the 14th of November. The vessel had to lie at Bona until her machinery was again in an efficient condition; and in the meantime the cargo of oranges had to be tran-shipped and forwarded by another vessel.

The owners of the "Bauta" contend that it is only from the time that the vessel arrived at Bona until she was again efficient that no hire is due. The charterers, on the other hand, maintain that the breakdown must be held to have commenced on 14th November, and that from that time the hire ceased to be payable. In their action, however, they do not insist upon this extreme contention; and, indeed, there was no evidence whatever that the defect—assuming it to have commenced on the 14th—caused any loss of time until much later. Accordingly their main contention was that, as from the time that the vessel left Jaffa, she was not, by reason of the defects which afterwards developed so as to cause a breakdown, in full working order; and that as this caused a loss of time exceeding twenty-four running hours, the hire must be held to cease from the time the breakdown occurred.

In my opinion this construction of the clause is unsound. The words "a breakdown of machinery" must be construed in a popular and reasonable sense; and I do not think that the ordinary commercial man would say that the machinery had broken down because there was a defect in the machinery which did not interfere with the ordinary working of the ship, although an ultimate breakdown was attributable to that defect. In many cases it would be impossible—*e.g.*, where breakdowns arise through parts of the machinery gradually wearing out—to say when the defect commenced; and it would be most unsettling to business if a construction of a common clause in a commercial contract were to be adopted which would necessarily raise endless controversies. The vessel here was able to steam at her full speed for seven days after the alleged breakdown, because I think the small progress that she made on the 24th, 25th and 26th November is sufficiently accounted for (apart from the occasional stoppage of the engines for purposes of examination), by the strong head winds and high seas which she encountered. Even on the 27th November she was able to cover practically her ordinary day's journey, and it was only after 8.30 a.m. on the 28th that the speed was greatly reduced in consequence of the discovery which was then made. If she had, in the meantime, reached Valencia I presume the charterers' argument would have been just the same; although, in point of fact, there would never have been a day during which a reasonable amount of work in their service was not done. It is not to be left out of view that the charterers themselves at first were prepared to pay, and in fact did pay, the hire up to the 25th of November, notwithstanding that they had at that time before them both of the ship's logs which contained all the evidence upon which they now rely. I also reject the shipowners' construction of the clause in question. They contended that the breakdown did not take place until the vessel arrived at Bona, and that, up to that time, it could not be said that a breakdown had occurred "preventing the working of the vessel," as she in fact proceeded to Bona under her own steam. In my opinion, in a commercial sense, the vessel broke down whenever the defect was discovered which rendered it necessary in the opinion of a prudent navigator that she should proceed to a harbour for repairs. She was not the less broken down that she was able to proceed, under her own steam at half speed, than if she had employed a tug, or had managed to reach port under sail. This view appears to be in accordance with the decision in the case of *Hogarth* v. *Millar, Brother & Co.*, 1890, 18 R. (H.L.) 10, where the breakdown was held to date from the time that the high-pressure engines broke down, although the vessel was able to reach a port under her low-pressure engines. I accordingly reach the conclusion that the owners are entitled to about three days' hire, in addition to what the charterers have paid; and, of course, that involves that they are not liable to have deducted the value of the coals consumed during that period.

The next matter in controversy is the amount to be deducted for the breakdown that occurred on the 5th of February 1906, while the "Bauta" was on a voyage from Grangemouth to Cullera. The main facts are contained in Art. 7 of the joint minute of admissions for the parties. This breakdown was due to a fracture in the main steam pipe, which is admitted to be a very serious matter. This fracture was first observed at 10 a.m. on 5th February; but although the crack was 1½ inches long, the engineer seems to have at first thought that the vessel might proceed after the speed was reduced. This was accordingly done, and the pressure on the steam pipe correspondingly diminished. The crack, notwithstanding, rapidly increased, and by 10 p.m. it was found to be 5 inches in length, and the master then determined to go into Vigo to repair. The charterers propose to deduct hire, and to charge the coal consumed as from 10 a.m. until the vessel was again rendered efficient by the repair of the main steam pipe

in Vigo, and I think they are right in so doing. If the crack had been a very slight one, such as a prudent engineer might reasonably anticipate would not seriously interfere with the vessel's progress until she reached her port of destination, I should not have thought that the breakdown was necessarily coincident with the first appearance of the crack. But here the crack was so serious that speed had to be at once materially reduced, and I think it was the duty of a prudent master to have at once made for Vigo, instead of continuing for twelve hours under reduced steam with consequent loss of time. The opposite view would involve that the charterers were to be responsible for delay caused by fruitless and imprudent attempts to repair the main steam pipe. The fact that the moment this defect was discovered it was recognised as so serious that the speed had to be at once reduced, differentiates it from the case with which I first dealt.

The third breakdown is connected with another crack in the steam pipe, which was observed at 12.30 a.m. of 23rd May 1906, while the "Bauta" was on a voyage from Newcastle to Almeria. The engineer, according to his log, at once started clamping the pipe, "in order to put patent metal round the pipe to stop the leakage. When this had been done, proceeded under reduced speed until midnight." As the leakage did not increase, it was decided to proceed on the voyage. It does not appear that this crack was nearly so serious as the crack which was noticed on 5th February; and so little did it interfere with the speed of the vessel that on the 24th she was able to make her ordinary speed of eight knots during several of the watches. By twelve noon, however, the engineer found that the leakage had increased, so that he had to "shut off further on the main steam valve to the main boiler until $\frac{1}{4}$ turn. Proceeded with this speed until midnight." Now I think at that point it ought to have been realised that the injury to the main steam pipe was one that required repair before the vessel could continue on her voyage; and in accordance with my previous decision I think this is the point of time from which the breakdown must be reckoned to commence. No doubt the ship made from five to six knots an hour for some twenty hours longer, with the leakage from the pipes always increasing; but the very fact that speed had to be materially reduced, shews that those in charge of her realised that she was not in the efficient condition in which it was the owners' duty to maintain her. It may be said that during this period the charterers actually derived some benefit from the distance which the vessel travelled; but, on the other hand, their liability for hire recommenced when she was rendered efficient again at Cadiz; although it involved a certain amount of steaming before she could reach the position at which she would have passed that port had a deviation not been rendered necessary by the breakdown.

I was informed that, if I made findings with regard to the three periods during which no hire falls to be paid, the parties would be able to adjust not merely the sums to be deducted in respect of these periods, but the value of the coals consumed by the ship while off hire. I shall accordingly only meantime make such findings, and leave the parties to adjust the figures.—20*th March* 1907.

The interlocutor contained findings as follows:

"Finds that the pursuers are not entitled to hire in respect of the following periods, namely, (1) from 8.30 a.m. on the 28th of November 1905 till 9 a.m. on the 1st of January 1906; (2) from 10 a.m. on 5th February 1906 till 6 p.m. on 7th February; and (3) from 12 noon on 24th May 1906 until 9.20 p.m. on 26th May 1906: And, with these findings, appoints the cause to be enrolled for further procedure."

After further debate the Lord Ordinary disposed of the remaining questions at issue as follows:—

Lord Salvesen.—Two questions remain to be decided. The first is whether during the periods when according to my previous judgment payment of hire ceased the coals consumed on board the "Bauta" fall to be charged against the shipowners or the charterers. The latter contended that it was inequitable that during the time when they were deriving no benefit from the ship they should nevertheless be liable for the cost of the coal used to enable the vessel to steam to a port of safety from the spot where the actual breakdown took place. In my opinion the decision of this question depends not on general considerations of equity but on the terms of the charter-party. By Art. 2 the defenders were taken bound to provide and pay for all the coals, fuel, etc., used during its currency. But for the stipulation contained in Art. 12 they would also have been liable to pay the hire, for the misfortunes of a ship under a time charter primarily affect the charterer. It does not, however, follow that because they have stipulated that the hire shall cease from the time a breakdown occurs, that the other expenses for which they are liable shall also cease to run, and the implication from the stipulation in Art. 12 points in the contrary direction. There is no express decision on this matter; but the *dictum* of Mr Justice Phillimore in *Vogemann*, 1901, 6 Com. Cas. 253, accords with my own opinion. I hold that the general obligation on the charterer to provide and pay for coals is not subject to any implied limitation during the time that the vessel is broken down.

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The second question relates to the method of counting periods of time shorter than a day. One of the periods during which I held that the hire ceased to be payable extended over two days and eight hours; and the shipowners maintain that the succeeding period of sixteen hours must be treated as a full day. The contention is based on cases like *Angier*, 1884, 1. C. & E. 357, and *Hough*, 1879, 6 R. 961. The former case referred to a time charter which had expired, and it was held that there was no smaller unit for estimating the hire payable than a day. The latter was a case of demurrage, in which again the day was taken as the unit. So far as I am concerned the question is no longer open, because I have already found that the pursuers are not entitled to hire in respect of certain specified periods of time during which the vessel was through breakdowns inefficient for her service. Apart from this, I would reject the argument as contrary to the charter-party, the terms of which are quite explicit. The vessel must be more than twenty-four hours disabled before suspension of hire takes place, but it would be a strange thing to construe this provision as meaning in effect that only one day's hire shall be deducted whether the vessel was disabled for twenty-four hours or for forty-seven hours. Nowadays demurrage is generally calculated by hours to avoid the inconvenience of the rule established by the Courts, and I see no difficulty, except one of elementary arithmetic, in giving full effect to the literal language of the charter-party. I accordingly hold that the hire payable falls to be calculated by hours or half hours up to the point of time when each breakdown occurred and commences to run again from the moment when the vessel was efficient for her service.—13*th July* 1907.

Counsel for Giersten and Others, Horne, W. T. Watson; Agents, Beveridge, Sutherland & Smith, S.S.C.—Counsel for Geo. V. Turnbull & Co., Dickson, K.C., C. D. Murray; Agents, Alex. Morison & Co., W.S. J. W. F.

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(*Lord Johnston.*)

(Exchequer Cause.)

145. Lord Advocate *v.* Caledonian Railway Company.

REVENUE — STAMP DUTY — FINANCE ACT 1895 (58 & 59 VICT. CAP. 16), SECT. 12—RAILWAY COMPANY—STAMP DUTY UPON CONVEYANCE OF PROPERTY COMPULSORILY ACQUIRED—INTERPRETATION OF SECTION—OBLIGATION TO PRODUCE DEED DULY STAMPED IMPLEMENTED BY PRESENTATION OF DEED FOR STAMPING.

This was an action at the instance of the Lord Advocate on behalf of the Commissioners of Inland Revenue against the Caledonian Railway Company. The summons concluded (1) for declarator "that, under and in respect of sect. 12 of the Finance Act 1895 (58 & 59 Vict. cap. 16), the defenders, when authorised by virtue of any Act to purchase property, are bound to produce to the Commissioners of Inland Revenue, within three months after completion of the purchase, an instrument of conveyance of the property, duly stamped with the *ad valorem* duty payable upon a conveyance on sale of the property"; (2) that the defenders should be decerned and ordained "to produce to the Commissioners of Inland Revenue the instrument of conveyance or disposition granted in favour of the defenders by Sir John Cheyne, Procurator of the Church of Scotland, and others, as trustees of the Gaelic Church of St Columba in Glasgow, dated 24th, 25th, 27th and 29th May and 3rd June 1901, whereby the said trustees conveyed and disponed to the defenders" certain subjects in Hope Street, Glasgow, which were purchased by the defenders under the powers of the Caledonian Railway (General Powers) Act 1899 (62 & 63 Vict. cap. ccxv.), "the said instrument of conveyance or disposition being duly stamped with the *ad valorem* duty payable upon a conveyance on sale of said subjects"; (3) in the event of the defenders failing to produce said instrument, conveyance or disposition, that they should be decerned and ordained "to make payment to the pursuer of the sum of £223, 10s. sterling," or such other sum as should be found to be the amount of the said *ad valorem* duty, with interest at 5 per cent. from 3rd June 1901 till payment.

The facts of this case and the contentions of parties sufficiently appear from the Lord Ordinary's Note.

The Lord Ordinary *assoilzied* the defenders.

Lord Johnston.—This case is brought to test the duty of railway and other public companies and bodies, under the 12th section of the Finance Act 1895 (58 Vict. cap. 16), or perhaps more properly stated, to determine what the Inland Revenue may insist on as the due compliance by such companies, etc., with that enactment.

To lead up to a consideration of the Act of 1895 it is desirable to examine the state of matters which preceded it. The object of the 12th section of that Act being ostensibly to secure the revenue in the duties, expressing it generally, upon the transfer of property authorised to be purchased by railway companies, etc., by way of a general enactment of universal application, it is understood the same object had previously been in use to be attained by special clauses, inserted at the instance of some public department, probably the Board of Trade, in all private Acts, where the necessity for such arose.

At my request the defenders, who are the

Caledonian Railway Co., have lodged in process specimens of such clauses.

Their Act of 1889 (52 & 53 Vict. cap. xii.), while it gives them compulsory power (sect. 4) to acquire lands in usual terms, expressly sanctions (sect. 33) four agreements for the acquisition of lands, "provided always that within three months from the date of completion of each of the purchases contemplated by the agreements comprised in schedules C, E, and F to this Act, the Companies shall produce to the Commissioners of Inland Revenue a duly stamped deed of conveyance in respect of such purchase; and if the Company shall not produce such deed as aforesaid, the *ad valorem* stamp duty, with interest thereon at the rate of five pounds per centum per annum from the date of such completion to the date of payment, shall be recoverable from the Company, with full costs of suit, and all costs and charges attending the same."

Their Act of 1891 (54 & 55 Vict. cap. exciii.) (sect. 4), gives them compulsory power to acquire lands in usual terms. But sect. 39 also empowers the Company, in conjunction with the Glasgow and South-Western Railway Company, to purchase by agreement *a certain* private railway and to maintain, improve and work the same, "Provided that any such purchase shall be evidenced by a duly stamped conveyance, which shall within three months from the date of vesting" of the said private railway in their Companies be produced to the Commissioners of Inland Revenue, *mutatis mutandis* as in the before-recited Act.

Then their Act of 1894 (57 & 58 Vict. cap. cxlvi.) (sects. 40 and 41) authorises them to acquire the undertaking of the Forfar and Brechin Railway Company, on terms fixed by the Act, and sect. 42, on payment, transfers to and vests that undertaking in the Caledonian Company, as from the date of the passing of the Act, "Provided that within three months after payment of the consideration of the transfer, the Company shall produce to the Commissioners of Inland Revenue" a Queen's Printer's copy of the Act, duly stamped as if it were a deed of conveyance, all as provided *mutatis mutandis* in the first recited Act.

Now it is here to be noted in passing, that though two of these Acts at least provide for the compulsory acquisition of lands in general terms, their enactments regarding the production of a duly stamped conveyance or copy of the Act apply only to the cases of statutory vesting, or statutory confirmation and sanction of provisional agreements for purchase. And it is patent that some such provision was necessary for the protection of the revenue, because otherwise, in the case of a statutory vesting, no conveyance or transfer was necessary, and therefore nothing came into existence naturally requiring to be stamped; and in the case of lands acquired by provisional agreement scheduled to an Act, and expressly confirmed and sanctioned by it, there was always the risk that the Company would, at any rate for a period of years, if not altogether, rest content with possession on such an agreement with statutory confirmation and sanction, and take no feudal conveyance requiring to be stamped. It does not therefore appear to have been considered necessary, prior to 1895, to require production, under the same condition or penalty of conveyances of lands taken in the ordinary way by compulsory purchase, where a feudal title by conveyance would follow, as in similar voluntary transactions.

Subsequent to the passing of the Finance Act 1895 these particular clauses in protection of the revenue were dropped out of the defenders' private Acts, and I presume out of all other similar Acts. As, for instance, in the defenders' Act of 1902 (2 Ed. VII. cap. cxlvi.) where (sect. 16) compulsory powers in ordinary form are given; (sect. 17) certain prior agreements for the purchase of lands are confirmed and sanctioned; and (sect. 34) certain subordinate independent undertakings are statutorily vested in the Company, and no provision in protection of the revenue follows. Examples might be multiplied, but this example is a complete and comprehensive one.

Now the section of the General Finance Act 1895 which I have to interpret and apply (sect. 12) is as follows:—

"Where after the passing of this Act, in virtue of any Act whether passed before or after this Act, either—

(*a*) any property is vested by way of sale in any person; or

(*b*) any person is authorised to purchase property, such person shall within three months

(*a*) after the passing of this Act, or the date of vesting, whichever is later, or

(*b*) after the completion of the purchase,

as the case may be, produce to the Commissioners of Inland Revenue

(*a*) a copy of the Act printed by the Queen's Printer of Acts of Parliament, or some instrument relating to the vesting in the first case, and

(*b*) an instrument of conveyance of the property in the other case,

duly stamped with the *ad valorem* duty upon a conveyance on sale of the property;

and in default of such production, the duty with interest thereon at the rate of five *per centum per annum*

(*a*) from the passing of the Act, date of vesting, or

(*b*) completion of the purchase,

as the case may be, shall be a debt to Her Majesty from such person."

I have quoted the *ipsissima verba* of the Act, though the spacing and lettering is mine, to assist in its consideration.

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What is meant by (*a*), a statutory vesting by way of sale, and how the want of a formal conveyance on sale in such a case is to be supplied, is quite clear and needs no comment.

But a question of some difficulty is raised on the interpretation of the alternative expression (*b*), "authorised to purchase property." The Department maintains that it covers every case of purchase by a railway or other company, etc., by virtue of statutory powers, whether by agreement receiving statutory confirmation and sanction, or by exercise of compulsory powers statutorily conferred. The defenders, on the other hand, maintain that it applies only to the case of statutory confirmation and sanction of an agreement to purchase.

The defenders maintained with great force that the general provision was only the crystallising of the particular clauses in use to be inserted in private Acts, that the necessity was the same, and is the measure of the general, as it had been of the particular provisions. I did not receive any explanation from the Department of a more extended necessity or purpose, leading to a more extended interpretation. The terms of this part of the provision are no more happily chosen than are those of another part to be immediately noticed, and I feel the full force of Mr Clyde's argument. If I found it necessary for the disposal of the case to determine this question I should feel much hesitation, notwithstanding that the general expression, "authorised to purchase in virtue of any Act," is capable of covering more than merely confirmations and sanctions of provisional agreements, and might perfectly well cover acquisitions by the exercise of statutory compulsory powers. My hesitation is not diminished by the impression that the extended construction is not necessary for the protection of the revenue. There was a time in which instances occurred, and I remember of more than one in my own practice, where the railway companies in Scotland were in the earlier days of railway enterprise dilatory in taking, or the landowners in granting, conveyances of land compulsorily acquired, and both rested on possession, following on the exercise of compulsory powers and a settlement of the price. But I think that these days are past, and that railway companies and proprietors now treat compulsory purchases just like ordinary transactions, and that conveyances are taken and recorded in ordinary course.

Nor is my hesitation diminished by the difficulty of interpreting the expression "completion of the purchase." This expression is vague, and the Crown have not assisted to elucidate it. They have evidently felt the difficulty, for they have not attempted distinctly to interpret it, but have in their summons somewhat vaguely assumed that at latest it must be the date of execution of a disposition of the lands acquired. Now, according to the generally accepted doctrine, the Act which confers compulsory powers is the equivalent of an offer of the property, and the Company's notice to treat is the acceptance, and on offer and acceptance, even when the consideration has to be fixed by arbitration, a purchase is completed, past resiling on either side. But as arbitration, failing agreement to fix the consideration, must follow in compulsory purchase, and often takes months, even years, to carry to an award, before which an execution of a conveyance on sale is not possible, it is evident that the statute cannot mean to fix the date of the notice to treat as the date within three months of which an instrument of conveyance of the property duly stamped must be produced to the Commissioners of Inland Revenue. It is not, however, easy to say what other date is intended. It must either be the arbiter's award, as I think the Crown were inclined to argue, or the execution of the conveyance. Now, once the notice to treat is given, either party can, under the Lands Clauses Act, compel arbitration proceedings resulting in the fixing of a price. And the landowner, after the award, may compel the Company to take a title (see *in re* Carvy Elwes Contract, L.R. (1906) 2 Ch. 143). But the Inland Revenue cannot interfere to hasten the parties. It is difficult, therefore, to see, if this is the meaning and intention of the phrase, how in such cases the assumed object of the statute is attained, if that object is the mere speedy collection of the revenue.

But assume the extended interpretation contended for by the Department, and that the completion of the purchase is, in the sense of the statute, the execution, and I think it must be added the delivery, of the conveyance, it falls now to be considered what it is that the Department demand. It is this, that conveyances on compulsory sale shall, in the matter of stamping, go through forms and ceremonies not required in the case of any other conveyances on sale.

To test the question the Department have fixed on a certain conveyance to the Caledonian Railway Co. by the trustees of the Church of Scotland, of St Columba's Gaelic Church, Glasgow, which followed on a compulsory taking and arbitration proceedings. The duty has been paid and the document has been stamped in ordinary course. But the Department says to the defenders, you must produce the conveyance again, in order that it may be examined, and entered on a register we have instituted, and be marked with a certificate we have adopted; and as a *compulsitor* on the Company to bring the document back to the Department, they sue for the duty already paid, with five per cent. interest from the date three months after its execution, which took place six years ago.

I thought the demand unreasonable on my own knowledge of the practice of the Department. But as I do not trust to that, I thought it proper to remit to the Depute-Keeper of the Signet to

report. His report has confirmed me in thinking that whatever view may be taken of the matters I have already referred to, the Department are not justified in their demand.

If all conveyances were in use to be written on paper already stamped, then on their interpretation of the statute the Department would be entitled and bound to demand production of such documents, and I do not think the defenders would oppose the demand. But the practice is otherwise. For manifest good reasons the practice has long prevailed, for which the internal arrangements of the Department provide, of writing conveyances and all more important documents on plain paper, and then handing them in to be stamped with the proper stamp, and so giving opportunity to the party tendering the document to be stamped and the Department to come to a *prima facie* agreement as to the stamp to be impressed. I refer to Mr Paul's report, the details of which I need not repeat. For my purpose the gist of it is this:—A deed which it is desired to have stamped, is handed to the "deeds marker." The enquirer pencils on the left-hand top corner the amount of duty which he proposes to pay. The deeds marker examines the deed sufficiently to satisfy himself whether he can pass it for the amount so proposed. If he can do so, he initials it, and passes it on to be stamped. If he cannot, and cannot agree with the enquirer on an altered duty, he passes the deed on to the solicitor's office for consideration—not for formal adjudication, unless that is desired and an extra fee paid—but that the superior officer of the Department may consider the matter of the stamp. Whether the deed goes direct to the "stamper" or through the "check clerk" is immaterial for the present purpose. What is material is this:—In Scotland the Controller of Stamps and Taxes represents the Commissioners of Inland Revenue, the "deeds marker" is an official in the Controller's department. The Commissioners cannot act personally in the matter, nor can the Controller. If the conveyance is produced to the "deeds marker" or (if he is not satisfied and submits the "deed" to the solicitor for his opinion) to the solicitor, and if the deed remains in the hands of the Inland Revenue authorities until it is stamped *prima facie* to their satisfaction, it appears to me that the obligation to produce it duly stamped to the Inland Revenue is reasonably complied with, for the emphasis is not on the word "duly" but on the word "produce."

Where one finds an enactment with a practical object drawn with some indefiniteness, and not altogether contemplating the customary practice alongside of which it has to be applied, I think that a reasonable application consistent with the object should be sought.

Now there is nothing in the matter of duty to differentiate conveyances to railway companies from any other conveyances. And the object of the enactment is not, I am persuaded, to enforce a compulsory adjudication of the stamp duty, as if the essence of the enactment was contained in the word "duly." For one reason, that however often the document is produced to the Commissioners, unless the stamp is formally "adjudicated" and the adjudication fee paid, the mouth of the Inland Revenue is not closed. But nevertheless the document has been as "*duly* stamped" as any other document which has passed through the mill of the stamp office, and the inquirer has done his *duty* on that behalf. The object of the enactment is to secure that the revenue from stamps is promptly collected, and if they choose, the Inland Revenue officials can secure all that in my opinion the Act intends, when the document is in their hands for stamping; and before it is given out again duly stamped, if it has not been timeously stamped they can exact interest on the duty. If they cannot trust their "deeds marker" to see to this, they have only to instruct him to pass on all such documents *per aversionem* to the solicitor, or to some special official, as I presume they would be passed on if the Department were warranted in insisting on the system they seek to initiate.

I have all sympathy for a public department which is in any way thwarted by members of the public in the execution of a statutory duty. But I cannot myself see, and, though I have asked for it, I have not received from the Department any satisfactory reason for their insistence in the present demand. It appears to me that in the present case, by bringing, according to recorded practice, their conveyances to the Department for stamping, and as I humbly think for "due stamping" in the sense of the statute, the defenders are putting the Department in a position to perform all their functions under the statute in a reasonable way, and that the Department is not justified in saying to them, you must take your deeds away out of this door, and you must bring them back again by that door, in order that we may keep certain registers and write certain certificates, which have no statutory warrant, and so far as I can see no statutory or other effect.

I am confirmed in this view when I consider the particular circumstances of the case and the conclusions of the summons.

Notice to treat was served on 25th November 1899. The owners intimated their claim on 8th December 1899. The oversman pronounced his award on 22nd March 1901. A conveyance was executed by the owners on 3rd June 1901. The conveyance was handed in, the duty paid, and the stamp impressed in ordinary course on 7th June 1901. The conveyance was recorded on 8th June 1901, while the action was not raised till 6th December 1906. The duty was thus paid four days after the execution of the deed, and the action not raised till five and a half years after the duty was paid.

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Now the logic of their position obliges the Department to say, there has been default, the duty and interest is due in consequence, and for that we sue. But they cannot face up to this, for they know that the duty has been paid and accepted nearly six years ago, and that they cannot recover it twice over, and have no statutory warrant for suing for interest, owing to delay in producing only, so they frame a conclusion which, however reasonable from their point of view, is not in accordance with the situation which the enactment contemplated.

I think I must therefore find that the instrument of conveyance or disposition referred to in the summons has already been produced to the Commissioners of Inland Revenue in the sense of the Finance Act 1895 (sect. 12), and therefore assoilzie the defenders from the conclusions of the summons, with expenses.—10*th July* 1907.

Counsel for Pursuers, Solicitor-General (Ure, K.C.), A. J. Young; Agent, Philip J. Hamilton Grierson, Solicitor of Inland Revenue.—Counsel for Defenders, Clyde, K.C., King; Agents, Hope, Todd & Kirk, W. S. R. S. B.

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146. Kerr *v.* Hood and Others.

I. EDUCATION—SCHOOL BOARD—ELECTION—NOMINATION — RETURNING OFFICER — REJECTION BY RETURNING OFFICER OF NOMINATION PAPERS—ACTION TO REDUCE DECISION OF RETURNING OFFICER.

II. EDUCATION—SCHOOL BOARD—ELECTION—ELECTORAL ROLL — EDUCATION (SCOTLAND) ACT 1872 (35 & 36 VICT. CAP. 62), SECT. 12, SCHED. B., SECTS. 2 AND 4—EDUCATION (SCOTLAND) ACT 1878 (41 & 42 VICT. CAP. 78), SECT. 27—REGULATIONS AND ORDERS OF EDUCATION DEPARTMENT OF 2ND OCTOBER 1905—ELECTORS MUST BE UPON VALUATION ROLL OF PARISH OR BURGH—OMISSION OF BURGH IN DESIGNATION OF NOMINATOR INSUFFICIENT TO VITIATE NOMINATION—CANDIDATE NEED NOT BE ELECTOR OR RESIDE IN AREA—OMISSION OF HIS FULL ADDRESS IN NOMINATION PAPER VITIATES NOMINATION — NAME OF NOMINATOR MUST APPEAR ON NOMINATION PAPER AS IN VALUATION ROLL.

(*Reported ante, Vol. XIV. p.* 823; *supra, p.* 14.)

The facts of this case and the contentions of parties sufficiently appear from the previous reports and from the Lord Ordinary's note.

The Lord Ordinary *assoilized* the defenders and *found* no expenses due to or by either party.

Lord Johnston.—I refer in this case to my judgment of date 28th February 1907, and to that of the Second Division of the Inner House, reported 15 S.L.T. 14. When the case was formerly before me, various preliminary pleas were disposed of. But the defenders' plea to the relevancy was reserved to be discussed on the merits, and in my former judgment I intimated that the proof which appeared necessary must be a proof before answer. This, I think, was approved by the Division. When the formal interlocutor of 24th May 1907 allowing a proof was pronounced, the words "before answer" were omitted *per incuriam*. But both parties understood the nature of the proof and that the defenders' plea to the relevancy was reserved.

It is this plea to the relevancy which occasions me most difficulty in the case.

Taking the case of Mr Kerr's own nomination paper by itself first, Mr Hood has now been obliged to condescend upon his objections to it, and farther, to select those which, after proof led, he still maintains, and these are limited to two.

First, that the place of abode of nominator and candidate, as inserted in the nomination paper, is wanting in specification, not having "Port-Glasgow" as part of it.

Second, that in the case of one of the nominators, Peter S. Beatton, the place of abode given, viz., "Craigard," is an incorrect address.

The pursuer maintains that neither of these are good objections. But I find it necessary to consider the farther question, Suppose either or both of them are, in my opinion, bad objections, am I entitled, in the exercise of that jurisdiction, which has been sustained, to quash the election, because my opinion differs from that of the returning officer? Am I entitled, that is, to review him on the merits? That is equivalent to saying, Are these objections relevant grounds of reduction? This question is made a difficult one, chiefly by reason of the chaotic, if I may respectfully so characterise it, condition of school board election law. I confess that I do not much wonder that returning officers have difficulty in administering it, or that a court should find difficulty in reviewing their action. In order to ascertain how a school board election is regulated, one has to piece together the following: The Education Act 1872, its Schedule B; the Education Act 1878; and the Regulations and Orders of the Education Department.

The Education Act of 1872 provides (sect. 12) for the first election of school boards after the passing of the Act. The Act itself makes no provision for further elections, and does not even incorporate or give any statutory sanction to Schedule B appended to it and headed "General Rules respecting Election of Members of School Board subsequent to the first Election." It was left to the Education Act 1878, sect. 27, to remedy that omission.

The first serious difficulty is what is to be the

electoral roll. Schedule B of the Act of 1872 provides (sect. 2): "The electors shall consist of all persons being of lawful age and not subject to any legal incapacity, whose names are entered on the latest valuation roll applicable to the parish or burgh, for which the Board is to be elected . . . . as owners or occupiers of lands or heritages of the annual value of not less than £4 situated within such parish or burgh, and the valuation roll or a certified copy thereof shall be conclusive evidence that the persons therein named had and continue to have the qualifications annexed to their names respectively in the said roll." Now it is apparent that the valuation roll is not the roll of voters, but only a roll out of which a roll of voters might be extracted and made up. For, first, the valuation roll is primarily a roll of heritable subjects in order of locality, and it would be practically impossible to use it as an electoral roll. In the next place, it is not confined to subjects of four pound value. And in the last place, while it contains a column for proprietor, another for tenant, and a third for occupier, and so affords the material from which a list of proprietors and occupiers, the tenant not being necessarily the occupier, could be made up, there is this serious objection to it, that no one is entered as occupier on his own return, or has any call or opportunity for having the roll corrected, so far as he is concerned, at the time of its being made up, and yet, notwithstanding that the valuation roll is not a register of voters, and is an unsatisfactory document from which to extract one, the schedule makes no provision for making up an electoral roll. But Schedule B of the Act of 1872, sect. 4, as altered by the Act of 1878, sect. 26, provides that "the triennial election of a school board for any parish or burgh shall be held at such time and in such manner and in accordance with such regulations as the Scotch Education Department may from time to time by order prescribe; and the Scotch Education Department may by order appoint or direct the appointment and make regulations as to the duties, remunerations, and expenses of any officers requisite for the purpose of such election, and make regulations respecting all other necessary things, preliminary or incidental to such election." Accordingly, such regulations have from time to time been made by the Department. But there is nothing that I can find in the current regulations of 2nd October 1905, issued by virtue of these powers, touching the making up of a roll of electors. The only reference to it is in Schedule B appended to these regulations, where with reference to parishes, though not to burghs, the returning officer is directed to provide, *inter alia*, a copy of the valuation roll in so far as applicable to the parish or school district. It is only in a covering circular letter to school board clerks that the Secretary to the Department informs them that under certain circumstances a separate alphabetical roll of electors *may* be made up, and informs them that "where a separate roll of electors has been prepared . . . . it must be deposited by the returning officer for not less than six clear days before the day of election in some convenient place or places, of which due notice shall be given, and to which any ratepayer may have reasonable access for the purposes of inspection, and in order to ascertain whether his name appears in such roll." There is not, however, the slightest provision for the rectification of the roll if objected to, though the roll itself is one which it would be by no means easy to make up correctly.

Such being the method provided for ascertaining who is an elector, the regulations of 2nd October 1905 provide (sect. 8) that, after publication of the notice of election, "but not less than fourteen clear days before the day fixed for the election, any five electors may nominate as a candidate any person being of lawful age and not subject to any legal incapacity, by sending to or delivering at the appointed place a nomination paper subscribed by such five electors as aforesaid and stating the Christian name and surname, with the place of abode and designation of each subscriber and of the candidate nominated, and the returning officer shall send forthwith notice of such nomination to each candidate."

Now by sect. 9 of the same regulations the duty of deciding as to the validity of the nomination paper is put upon the returning officer, thus: "No nomination paper shall be received after 8 p.m. of the last day upon which such paper may be received, except so far as hereinafter ordered, and no person shall be a candidate unless he has been nominated within the time and in the manner aforesaid. The returning officer shall decide whether any nomination is valid, and the returning officer's decision shall be final."

It is true that it is now settled that it was incompetent for the Department to make his decision final, yet his duty of decision as to the validity remains untouched.

The first point which I have to decide is whether after the nomination paper is lodged, if any detail is wanting or any point occurs in which it does not satisfy the returning officer (*e.g.*, the want of the word "Port Glasgow" in the places of abode of the nominators and candidate), the returning officer would be entitled or bound to point these out in order to their being supplied or corrected. I think that the nomination paper must stand or fall as it is lodged. The nomination has to be made at, or prior to, 8 p.m. of the last nomination day. If at that point of time the nomination is invalid the candidate has not been nominated within the appointed time. An alteration of the ballot paper subsequent to its being lodged in order to cure a defect makes it a different nomination paper. Further, if the returning officer should in any way meddle in the nomination of candi-

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dates, there would be, I think, grave risk of miscarriage. He could not do so without virtually revising all papers, if he revised any. And I do not think he could well reject any after making himself party to the preparation of any or all. I should say this equally whether his intervention occurred after or before the last date for nomination. The present is a very good example of what would occur. For the intervention of the depute clerk to the school board, though he is not depute returning officer, has created a situation with which I shall have to deal in the sequel.

The next point is, On what footing is the returning officer to apply his mind to the nomination papers? The defender maintains that he is not entitled to apply his personal or local knowledge, and that as the nomination paper has to be capable of affording exact information to any one interested, it must be capable of being read with the assistance of nothing but the valuation roll. Here I think he is wrong. So far as the nominations go, primarily I think the information contained in the paper is for the returning officer, in order that he may determine who have been nominated and publish the list of candidates. Now the Departmental regulations do not admit of the details being verified by the valuation roll merely. The nominator must be an elector, and the valuation roll affords the means of ascertaining whether the nominators are electors, but it gives no assistance to determine whether their places of abode or designation are accurately stated. A man may occupy half a dozen tenements in the electoral area, and yet none of them be his place of abode. Designations are not given at all in the valuation roll, except incidentally in some cases. The returning officer must thus either apply his personal knowledge or obtain information. So far as the candidate is concerned it is different, in that he need not be an elector and that there is no restriction on his selection, except that he must be of full age and not subject to any legal incapacity. To judge on these points and also as to his proper address and designation the returning officer must draw on his own knowledge or enquire.

What amount of accuracy, then, is required? It appears to me that as there is no definite rule which can be referred to as supplying all that is necessary to be stated, it is sufficient *dummodo constat de persona*, and in the case of the nominator, that the *persona* is an elector.

This, then, leads to the question, Were the defender's objections well founded? That those he has departed from were not I am satisfied. But as to the two that remain—

First, the absence of the word "Port Glasgow" as part of the specification of the "place of abode."

In the case of the nomination I think that this was unnecessary. The information, as I have said, was primarily, if not entirely (for I am not aware that anybody else sees the nomination papers) for the returning officer. Now I think that the descriptions of these gentlemen must be read *coram subjectam materiam*. They were nominating for election to the School Board of Port Glasgow. The nomination paper which they signed is officially headed "Burgh of Port Glasgow," and I think that it is a reasonable inference which the returning officer was entitled and bound to draw, unless he knew to the contrary, that the place of abode, which was stated as Church Steeet, Craigard, etc., was in Port Glasgow.

But in the case of the candidate it is different. The nomination paper is for the purpose of enabling the returning officer to frame and publish the list of candidates, for the general information of the electors. I do not think that in so doing he can supplement the information of the nomination paper. Now, Mr Kerr is designed as of "Hawarden, writer." The objection to Hawarden instead of Hawarden Cottage is, I think, frivolous. But the absence of Port Glasgow is serious. Candidates may be drawn from any locality and need no local qualification. I must regard this as matter of principle. I discard, on the one hand, the fact that Mr Kerr, writer, Hawarden, was perfectly well known to the returning officer, and probably to all concerned in the election, and on the other, that there is a place, peculiarly well known to the public generally, called Hawarden elsewhere. But inasmuch as candidates may be drawn from any locality, in order that they may be identifiable, as matter of principle, the locality of their residence, as well as the name of their residence, must, in my opinion, be given adequately to specify their "place of abode."

Second, that the description of Mr Beatton's place of abode as Craigard was inaccurate. As matter of fact I think this objection was not well founded. I am satisfied on the evidence that the name "Craigard," which was first given to the tenement abutting on Barr's Brae, was extended first of all by the builder to the additional house which he built in line with it, and was afterwards publicly and generally accepted as descriptive, not of the tenement, but of this limited locality, just as much as Lilybank and many of the other names with which the returning officer was concerned, and that notwithstanding that Mr Beatton's and others of the houses subsequently received distinctive names of their own. The meaning of the name Craigard, the nature of the locality, the fact that access to the whole was got by the same flight of steps, and that the name "Craigard" was painted up in such a position as to indicate to the public that it described the whole house to which the steps gave access and not the tenement merely, all lead to this, and it is confirmed by evidence of general understanding. I think

that, if the defender had been as astute to find objection to the other candidates' papers as to Mr Kerr, he might have found quite as good reason as this for rejecting most of them.

But before leaving Mr Kerr's case, it is, I think, right to consider how far I am entitled in the exercise of my jurisdiction to consider these objections on the merits. This is matter of great difficulty, from the want of any distinct election code. The Elections (Corrupt and Illegal Practices) Act 1890, sect. 30, *ex hypothesi* gives no assistance, and I find it very difficult to formulate any rule satisfactory to my mind for the delimitation in application of the Court's jurisdiction in such cases. I think that there can be no doubt that, when an objection raises a matter of principle, as in the case of the necessity of a full address to define the nominators or the candidate, such an objection is one which the Court ought to entertain, even though their judgment may go to invalidate a whole election (cf. *Sheldon* v. *Fletcher*, 1847, L.J. 17 C.P. 34). Even so where the question touches the electoral qualification of an individual nominator. But where the issue depends on some small detail in fact and opinion, as whether an address is accurate or sufficient, I confess that I at least doubt the propriety of the Court, assuming that there was no improper bias on the part of the returning officer, entertaining such question when the result might be the overturning a popular election.

So far as regards Mr Kerr's paper. With reference to Mr Blair's, the "Port-Glasgow" objection, I need not again refer to it. The other objection is that James A. Mackenzie, clerk, Springhill, one of Mr Blair's nominators, is not to be found on the valuation roll. It appears that James Allan Mackenzie, whose abode is 8 Springhill, and who was a cashier, and is now a clerk, is entered in the valuation roll as James Mackenzie, cashier, occupant of 8 Springhill. The mistake has arisen, probably, from his signing James Mackenzie in his business and James A. Mackenzie in his private capacity. There is no doubt as to the identity of the James Mackenzie on the valuation roll and the James A. Mackenzie who signs the nomination paper. But inasmuch as the valuation roll is the only fixed point afforded in the case of a school board election, and that Mr James A. Mackenzie does not appear on that roll, I should be prepared to uphold his rejection by the returning officer as a nominator (*Moorehouse*, 1885, L.R. 15 Q.B.D. 273). This also is a point which I think the Court would be justified in entertaining, in review of the returning officer's decision, as it depends on the general question whether, in the matter of the name of the elector and nominator, the valuation roll is conclusive.

There remains to consider the question whether, even if there has not been corruption, there has been the same even-handed justice meted out to Messrs Kerr and Blair in this matter as to other candidates, and, if there has not, what is the effect. I set aside at once any idea of corruption, and yet I do not think that Messrs Kerr and Blair have been treated in the same way as the other candidates or some of them. I cannot help feeling that there was no desire on the part of the defender to see them on the Board, and every desire to avoid the necessity of an election. The defender who, *pro hac vice*, was the returning officer, is really the clerk to the School Board. He quite properly left the reception of the nomination papers to his subordinate, the depute clerk, who was not really, though many persons supposed him to be in consequence, the depute returning officer. The business of the returning officer, or of his subordinate, was to receive the nomination papers—to give access to all who demanded it to the valuation roll. But I do not think that either was justified in criticising papers, and suggesting or making corrections. It is clear to me that if Mr Hood had not had a pretty good idea that there was no particular wish to see Messrs Kerr and Blair oust any of the sitting Board, these gentlemen, when they lodged their papers, would have received a hint, as others had done, that if they wanted to satisfy one of the pronounced views of the returning officer they must add "Port-Glasgow." Justified as he was in leaving certain matters to the depute clerk, the returning officer must be responsible for his action. And though I cannot find enough in that action to upset the election, there is, I think, enough to affect the question of expenses, and I think I do justice if I give expenses to neither side.

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I shall therefore assoilzie the defenders and find no expenses due.—18*th July* 1907.

Counsel for Pursuer, G. Watt, K.C., Spens; Agents, Bryson & Grant, S.S.C.—Counsel for Defenders, Dean of Faculty (Campbell, K.C.), Chree; Agents, Morton, Smart, Macdonald & Prosser, W.S. R. S. B.

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(Exchequer Cause.)

147. Eadie and Others *v.* Magistrates of Glasgow.

Burgh — Accounts — Common Good — Application of Common Good to Certain Purposes — Challenge by Burgesses — Timeousness of Challenge—Town Councils Act 1900 (63 & 64 Vict. cap. 49), sects. 94, 95, 96, 109—Sir William Rae's Act, 1822 (3 Geo. IV. cap. 91), sects. 1 to 4 and 9 and 10 — Burgh Reform Act 1833 (2 & 3 William IV. cap. 76), sect. 32—Glasgow

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Eadie and Others v. Magistrates of Glasgow.

MUNICIPAL ACT, 1879 (42 & 43 VICT. CAP. CXXIII.), SECT. 10.

This was a petition and complaint at the instance of certain burgesses of the city of Glasgow challenging the application by the Corporation of Glasgow of any part of the common good of the burgh towards payment of expenses incurred by the Corporation in promoting legislation for the taxation of land values. The preliminary plea was taken by the compearing respondents that the objection was not timeously taken.

The Lord Ordinary *repelled* the preliminary plea as to the timeousness of the objection, and *ordained* the respondents to produce in process a detailed account, with relative vouchers, of the item of expenditure in dispute.

Lord Johnston. — George Eadie and others, burgesses of Glasgow, in this petition presented to the Court of Exchequer in Scotland, challenge the application by the Corporation of Glasgow of any part of the common good of the burgh towards payment of expenses incurred by the Corporation in promoting legislation for the taxation of land values. The particular entry in the Abstract Statement of the Revenue and Expenditure of the Common Good of the Corporation of the City of Glasgow for the year ending 31st May 1906, No. 23 of process, to which objection is taken, is to be found on page 16 of the Abstract, and is this:

Taxation of Land Values (Suspense Account), including £1142 9s. 6d. spent during the year £2457 2 11

This entry appears under a heading of open accounts on the credit side of the abstract.

The Corporation, or rather those members who appear to defend, for a large number have disclaimed the defence, state the preliminary plea that the objection was not timeously taken, and that it is now, by virtue of sect. 10 of Sir William Rae's Act of 1822, incompetent to complain to the Court in regard to any entry in the account for the year ending 31st May 1906.

I have heard an exhaustive argument on this preliminary point, but am prepared without further delay to dispose of it against the contention of the Corporation. I think that the objection was timeously stated, and that there is nothing to prevent my entertaining the complaint on the merits.

As the contention was seriously maintained, and as the Corporation intimated that they desired an authoritative construction of the statutes bearing upon this point, which is doubtless of importance to the finance department of the city, it is right that I should explain at some length my reasons for coming to the above conclusion.

There was passed in 1900 the Act 63 & 64 Vict. cap. 49 for Consolidating and Amending the Law relating to the Election and Proceedings of Town Councils in Scotland. That Act, which was intended to be of general application, repealed a great number of previous statutes connected with these matters with a view to the codification as well as the supplementing of their provisions, and in particular it repealed the following Acts bearing upon the particular point here in question, viz.—the Act of 1822 (3 Geo. IV. cap. 91), for Regulating the Mode of Accounting for the Common Good and Revenues of the Royal Burghs of Scotland, commonly known as Sir William Rae's Act; and the Act of 1833 (2 & 3 Wm. IV. cap. 76), for Altering and Amending the Laws for the Election of Magistrates and Councils of the Royal Burghs in Scotland, commonly called the Burgh Reform Act. Having repealed these statutes, the Act of 1900, in sects. 91–99, enacted a code for regulating the accounting for the corporate property of burghs, including not only property heritable and moveable vested in the Council, but also all rates or assessments levied, and all money received and expended by or on account of the Council. One of its most important provisions (sects. 94 and 95) related to the audit of the burgh accounts and the securing the appointment of independent auditors by placing the appointment in the hands of the Secretary for Scotland. Another (sect. 96) related to the Council's approval and publication of their annual accounts with a view to their inspection by ratepayers or electors interested, and an appeal to the Sheriff of the county by any such ratepayer or elector dissatisfied with the account or any item therein was provided. But, unfortunately, the influence of the five larger burghs in Scotland interfered with the generality of its application, and enabled them to obtain in sect. 109 a virtual exemption from the general Act. That section provided that, notwithstanding anything in the Act contained, it should be in the power of the town council of any of these five larger burghs, including Glasgow, by resolution passed within twelve months of the date of the Act, to declare that any sections or subsections of the Act relating, *inter alia*, to "accounts and corporate property specified in such resolution, shall not be applicable to such burgh, and that in lieu thereof the corresponding sections or subsections, if any, of an Act or Acts applying to such burgh, repealed by this Act, which sections or subsections shall be specified in the resolution, shall notwithstanding such repeal remain in force or revive within the burgh."

Now two of the statutes applying to the burgh of Glasgow (as they were general statutes) repealed by the Act were the above-mentioned Sir William Rae's Act of 1822 and the Burgh Reform Act of 1833, and they contained corresponding sections relating to accounts and corporate property. Accordingly, within the statutory period, the Corporation of Glasgow

resolved that *inter alia* sects. 91 to 97 of the Act of 1900 should not be applicable to Glasgow, and that in lieu thereof the following corresponding sections should remain in force or revive, viz., sects. 1 to 4 and 9 and 10 of Sir William Rae's Act of 1822, and sect. 32 of the Burgh Reform Act of 1833.

Accordingly, the statutory provisions with regard to the accounts of the city of Glasgow are to be found in these sections, subject to certain qualifications by the city's local Acts.

It must be borne in mind that when Sir William Rae's Act passed in 1822 the councils of Scottish Royal Burghs were close corporations, perpetuated by the system of co-option, and that, disregarding charitable mortification vested in the Corporation, the revenue was substantially derived from the common good; and further, that, although the Burgh Reform Act of 1833 restored or created the system of free election, the revenue of burghs still continued at that date to be similarly derived. But Sir William Rae's Act contemplated that there might be revenues derived from other sources, as from cess or any local tax or imposition, and provided accordingly. So also did the Burgh Reform Act of 1833, for it calls for an account, not merely of property but of revenues generally, and thus the Act of 1900 amplified to "rates or assessments levied and money received or expended by or on account of the Council." All these statutes, therefore, contemplated that the accounts they respectively required should be comprehensive. But in Glasgow separate accounts for separate funds are required by local statutes (see the Glasgow Police Act 1866, sects. 23 *et seq.*, and the Glasgow Corporation Act 1884, sect. 44). Hence it has come to pass that the accounts of the common good of Glasgow are in use to be kept separate. And it will be found that the accounts with which we are here concerned are confined to the common good of the burgh.

That being premised, I would now draw attention to the enactments of Sir William Rae's Act of 1822. It proceeded on the preamble that it was expedient that regular accounts should be annually stated and exhibited of the Common Good of the Royal Burghs of Scotland, shewing the property and funds as well as the incumbrances affecting the same and the receipts and disbursements in every year, and that provision should be made for preventing and redressing any error or wrong that may be committed in the administration of the common good, and therefore enacted (sect. 1) that "a particular account of the common good and revenues of every royal burgh in Scotland made up to the day preceding the general annual election of magistrates in each burgh shall be annually stated and deposited in the manner directed by this Act." This account was to be certified by the provost in terms of a statutory certificate.

It was then enacted (sect. 3) that "every such annual account shall be deposited in the office of the town clerk of the burgh to which it appertains within three months after the annual election of the magistrates thereof, and such account shall remain there for thirty days after the expiration of the said three months, open to the inspection of the burgesses, who may state objections thereto in writing either during that time or within two months after the expiration of the said thirty days, and be entitled to call in writing for the production of any particular vouchers." And it was then further enacted that if the objector or objectors were not satisfied "it shall and may be lawful for any three or more burgesses of such burgh within three calendar months after the expiration of said thirty days to make complaint in writing to the Barons of the Court of Exchequer in Scotland."

I must here note that the annual election of the magistrates is not a loose expression intending to refer to the election of the Council. The Act in several passages carefully distinguishes between the Council as a whole and the magistrates, and when it refers to the annual election of magistrates it means, in my opinion, the election of magistrates properly so called, by the Council. Under this statute, therefore, the maximum period for the lodging objections to the burgh accounts was three calendar months plus thirty days plus two calendar months, and for complaining to the Court of Exchequer one calendar month more. And it is admitted that the petitioners' letter of objections of 7th May 1907 and their subsequent complaint to this Court, were timeous, if the limitation of time imposed is to be found in this statute. I should have said that the Act (sect. 10) further enacted "that in the event of no complaint being made to any annual account within the time here limited, it shall not be competent thereafter to complain to such Court in regard to such account."

But these matters do not rest on this statute alone. The Burgh Reform Act of 1833 provided by sect. 32, which, as above mentioned, notwithstanding its repeal, remains in force or is revived *quoad* Glasgow, "that the existing magistrates and councils in all royal burghs shall on or before the 15th day of October in the present and in all future years make up a distinct state of their affairs . . . . . containing an account of all the funds, properties, and revenues in their administration, and of all their transactions in relation to such funds, properties, and revenues, since they came into office, which account shall be brought down as nearly as may be to the 15th day of October and shall be kept in the town clerk's or treasurer's office for the inspection of any of the registered electors from the said 15th day of October down to the time of election, and a full and distinct abstract of the

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said account, with a balance sheet containing all necessary particulars, shall be printed and published by the said magistrates on or before the 20th day of the said month of October."

This is the whole provision contained in the Act of 1833 regarding corporate property and accounts, and it is quite clear that its provisions had a totally different purpose from and did not supersede those of Sir William Rae's Act of eleven years previous. The object of that Act was to secure honest and accurate accounting, the exposure of the burgh accounts to the inspection of the burgesses, and their correction, if necessary, by the Court of Exchequer. But the object of the Burgh Reform Act of 1833 was electoral merely. In contemplation of the annual election in the month of November, it provided for the inspection of the burgh accounts, not by burgesses with a view to correction, but by registered electors, clearly because the disclosures of the burgh accounts for the past year had or might have a material bearing on the question of the election and re-election of candidates. And consequently the Act of 1833 contained no provision for objection or complaint to the Court of Exchequer or any other authority. Hence I am clearly of opinion that, though there may have been an awkward overlapping of dates, involving the statutory deposit of the same accounts on two different dates, for two different purposes, and with entirely different consequences, that is no possible reason why the important and salutary provisions of the former statute of 1822 should be held as virtually abrogated by those of the later statute of 1833.

Nor do I think that this virtual appeal is affected by the qualification introduced into the Act of 1833 by the local Glasgow Municipal Act of 1879 (42 & 43 Vict. cap. cxxiii.). This Act (sect. 10) provides that the Council may cause the state of affairs which they are required to make up annually on or before 15th October by sect. 32 of the Act of 1833, "to be made up as at the 31st day of May in each year, with the annual accounts or statements of the various other trusts under their administration, and the said 31st day of May shall be substituted for the said 15th day of October." Pausing there and reading sect. 10 of the local Act of 1879 into sect. 32 of the General Act of 1833, it only amounts to this, that the Council shall on or before 31st May in each year make up a state of their affairs brought down as near as possible to that date, which account shall be kept in the town clerk or treasurer's office from the said 31st May down to the time of the election, and an abstract shall be printed and published on or before 20th October. The result is merely to anticipate the date of closing the burgh's accounts for the year, and to subject them to the inspection of the registered electors for a very much longer period. But as in my opinion the provisions of sect. 32 of the Act of 1833, in their original form, in no way abrogated the provisions of Sir William Rae's Act of 1822, neither do they do so where qualified by sect. 10 of the local Act of 1879.

But then the last mentioned section concludes: "And no other annual state of affairs or account than that hereby authorised shall be required to be made up by them." The only result, so far as I can see, of this latter provision is to remove any doubts as to whether two different accounts, one under the Act of 1822, and the other under the Act of 1833 as modified by that of 1879, were required. If before there was any doubt on this subject, for the future one account only was required to satisfy the provisions of both sets of enactments. But this does not result in the provisions for its exhibition to the registered electors, for the purposes of the Burgh Reform Act of 1833, superseding the necessity of its exhibition to the burgesses for the purposes and under the conditions of Sir William Rae's Act of 1822. I am here concerned with the purposes of the last-mentioned Act only, and for these purposes the calendar or series of dates specified in that Act still regulates procedure. And as on that hypothesis it is admitted that the objections and complaint now before me are timeous, I must repel the preliminary objections stated for the Corporation, and I think that the best step which I could take at this period of the session to advance the process is to ordain the Corporation at or prior to the first box-day in vacation to produce in process a detailed account, with relative vouchers, of the item on page 16 of their Abstract of Accounts, No. 23 of process, which is the subject of the objection and complaint.—19*th July* 1907.

Counsel for Petitioners and Complainers, C. S. Dickson, K.C., Hon. W. Watson; Agents, Macrae, Flett & Rennie, W.S.—Counsel for Respondents, Hunter, K.C., Macmillan; Agents, Campbell & Smith, S.S.C. R. S. B.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

148. Johnstone's Trustees *v.* Johnstone's Trustees.

Succession—Will—Mutual Settlement by Husband and Wife—Revocability—Gifts by Each Spouse of Liferent to Survivor and of Residue to Children of Marriage—Questions of Difficulty Whether Certain Subjects Belonged to Husband or Wife—Mutual Settlement Held Irrevocable Except by Joint Act of Spouses.

Special Case.

On 17th April 1879 George Johnstone, tailor, Dalbeattie, and Mrs Margaret Bell or Johnstone

his wife, executed a mutual settlement the material clauses of which were as follows :—

I, the said George Johnstone, do hereby give, grant, assign, and dispone to and in favour of my said wife, Margaret Bell or Johnstone, in case she shall survive me, in liferent for her liferent use allenarly, All and Sundry lands and heritages, long leasehold subjects, goods and gear, debts, and sums of money, household furniture and others, and in general my whole estate, heritable and moveable, real and personal of what kind or nature soever, or wheresoever situated, which shall belong and be addebted to me at the time of my decease. . . . And in like manner, I, the said Margaret Bell or Johnstone, do hereby give, grant, assign, and dispone to and in favour of the said George Johnstone, in case he shall survive me, in liferent for his liferent use allenarly, All and Sundry lands and heritages, and in general my whole estste, heritable and moveable, real and personal, of what kind or nature soever or wheresoever situated which shall belong and be addebted to me at my decease. . . . And on the death of the longest liver of us the said George Johnstone and Margaret Bell or Johnstone, we hereby each agree and declare that the whole remainder of our estates, heritable and moveable, or such part thereof as may not have been sold and used by the survivor of us in virtue of the powers hereinbefore conferred upon us, shall be disposed of as follows . . . . the free residue shall be realised, and the free proceeds thereof shall be equally divided as soon as practicable among our children . . . . and the survivors and survivor of them, declaring always that the lawful issue of such of our said children who may predecease shall be entitled to their parent's share. . . . And we revoke and recal all settlements and deeds *mortis causa* heretofore executed by us or either of us, and we declare the same null and void, and we hereby reserve to ourselves full power to alter or revoke these presents during our joint lives.

Mr Johnstone died on 31st December 1902. Mrs Johnstone died on 24th August 1905, leaving a trust disposition and settlement dated 11th June 1900, which bore to revoke all previous *mortis causa* deeds executed by the testator, but to which Mr Johnstone was not a party. Mrs Johnstone also left a codicil dated 3rd July 1903.

The trustees under the mutual settlement were the first parties to this special case. The trustees under Mrs Johnstone's trust disposition and settlement were the second parties.

The estate of the spouses included a deposit receipt for £500 with the Union Bank of Scotland in name of Mrs Margaret Bell, and also certain leasehold subjects in Dalbeattie which were let on long lease to the spouses in conjunct fee and liferent.

The first and second queries in the special case (which the Court found it unnecessary to answer) raised the questions whether (1) the leasehold subjects and (2) the deposit receipt belonged to Mr or to Mrs Johnstone.

The third question as amended was as follows :—

3. Was the said mutual disposition, assignation, and settlement validly revoked by the said Mrs Margaret Johnstone's trust disposition and settlement?

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The first parties maintained that the mutual settlement could not be revoked except by the joint act of the spouses. They cited: *Kidd* v. *Kidds*, 1863, 2 M. 227; *Mudie* v. *Clough*, 1896, 23 R. 1074; *Craich's Trs.* v. *Mackie*, 1870, 8 M. 898; *Croll's Trs.* v. *Alexander*, 1895, 22 R. 677; *Robertson's Trs.* v. *Bond's Trs.*, 1900, 2 F. 1097.

The second parties maintained that the mutual settlement, apart from the liferent given to Mr Johnstone, was revocable by Mrs Johnstone, and had been revoked by the trust disposition and settlement. They cited *Traquair* v. *Martin*, 1872, 11 M. 22.

The Court *answered* the third question as amended in the negative, and found it unnecessary to answer the first and second questions.

Lord Low.—My Lords, the first and second questions which are put in this special case raise points of considerable difficulty, on which I should not be prepared to express an opinion without further consideration. But the third question appears to me to raise a sufficiently clear issue, and, in the view I take of it, the answer to that question will be sufficient to dispose of the special case.

The point raised by the third question is, whether the mutual disposition, assignation and settlement of 17th April 1879 was validly revoked by a settlement which Mrs Johnstone subsequently made?

Looking to the circumstances under which the mutual settlement was executed, to the facts that no antenuptial marriage contract had been entered into between the spouses, and that the whole funds possessed by them were in a position which might well have given rise to questions after their death, it was very natural that they should have come to an agreement as to the disposal of their joint estate. That, in my opinion, is what they actually did. Each spouse agreed to give the liferent of his or her estate to the other in the event of survivance. It is not disputed that that was a remuneratory arrangement which amounted to a contract. Then the spouses agreed and declared that on the death of the survivor the whole residue of their estates should be divided equally among their ten children. It was argued that that provision was purely testamentary and could be revoked by either spouse *quoad* his or her estate. If the gift of the residue had been to strangers it might very well have been regarded as being only testamentary, but it is different when the object of the gift was to provide for the children of the marriage. That is a matter upon which it is natural and customary that spouses should come to an agreement, and I regard the whole settlement as being a family arrangement which neither of the spouses could revoke without the

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consent of the other. It is further not without significance that the words of the settlement are that the parties "agree and declare" that the residue shall be divided among the whole children. Accordingly I think that we should answer the third question in the negative.

Lord Ardwall.—I agree. The point raised by the third question is whether the mutual settlement executed by Mr and Mrs Johnstone on 17th April 1879 was contractual or merely testamentary. I have no doubt that it was contractual and could not be revoked except by the joint act of the spouses during their lifetime. No such joint revocation was made. The position of the heritable and moveable estates in question at the said date was that the heritable subjects were held under a 999-year lease, and, though I do not wish to express an opinion on the matter, would appear to have been vested in the husband, while the sum to which the wife succeeded as the share of the estate of her father, fell under her husband's *jus mariti*, subject to his making reasonable provision for her maintenance if a claim therefor were made on her behalf, as provided for by The Conjugal Rights Amendment Act 1861, sect. 16. Now, reasonable provision was made by the mutual settlement by which, in short, the spouses settled their whole affairs *inter se*, each conferring some benefit on the other and both departing from their strict legal rights. That being so, it is, I think, vain to contend that the settlement could be revoked by the survivor. I therefore agree that the third question should be answered in the negative, but I think the words "*quoad* her property" at the end of the question should be omitted. In this view of the case it becomes unnecessary to answer the first and second questions.

The Lord Justice-Clerk concurred.—*15th October* 1907.

Counsel for the First Parties, Chree, W. T. Watson; Agents, Cameron & Orr, S.S.C.—Counsel for the Second Parties, J. A. T. Robertson; Agent, Gilbert Tweedie, W.S. J. S. M.

SHERIFF COURT.

(Sheriff-Substitute Davidson and Sheriff Guthrie at Glasgow.)

149. Harrison *v.* The School Board of Glasgow.

REPARATION — NEGLIGENCE — LIABILITY OF SCHOOL BOARD FOR INJURY CAUSED TO SCHOLAR BY TEACHER—EDUCATION—DUNCAN V. FINDLATER, 1839, M'L. AND ROB. 911, DISCUSSED.

In this case a father, as tutor for his child, raised an action against the Glasgow School Board for damages, averring that his child, who was a pupil in one of their schools, had been injured through the negligence of one of the teachers in that school. The defenders pleaded, *inter alia*, that the action was incompetent against them. The Sheriff-Substitute (Davidson) issued the following interlocutor and note:—

Glasgow, 23rd July 1907.—Having heard parties' procurators on the closed record and considered the cause, Sustains the first plea in law for the defenders; dismisses the action and decerns; etc.

Note.—This is an action in which the pursuer sues for injury done to his child through the throwing down of a pen by one of the teachers in a school under the jurisdiction of the School Board of Glasgow, and he calls the School Board as defenders. The relevancy of the averments depends on the responsibility attachable to such a body as the defenders for the negligence of a teacher appointed by them. If they were private proprietors of a school, I can have no doubt that an action would lie against them in similar circumstances; and if the injury complained of had been done to an outside party I think it would be difficult to affirm that no action could lie against them. But this is not a private school, nor is the person, injury to whom is alleged, an outside party. The School Board are a local authority set up by Parliament for carrying out the intentions of the Education Act. They are under the authority of the Board of Education, to whom they are responsible for the efficient administration of the Act. In pursuance of their statutory duty they erect schools, appoint teachers, and make provision for the education of children. After a careful perusal of the opinions expressed by the learned judges in *Tozeland* v. *West Ham Union* [1907], 1 K.B. 920, I am unable to distinguish between that case and this. Every point which was made for the defendants in *Tozeland's* case, and which influenced the Court in non-suiting the plaintiff, is present here. The School Board are acting purely in their ministerial capacity in the appointment of teachers and in educating scholars. They do these things under statute, but they are not supposed to insure against injury the children who come to their school, just as the guardians do not insure the paupers to whom they administer relief from injury. I take it that the decision in *Tozeland's* case is conclusive in regard to such an action as this; and therefore I have sustained the first plea in law for the defenders.

The pursuer having appealed, the Sheriff (Guthrie) adhered to the Sheriff-Substitute's interlocutor and added the following note:—

Note.—The case is difficult, and I have anxiously considered it in connection with the

case cited by Sheriff Davidson and various cases relating to the responsibility of public authorities, public officers, and statutory trustees. The cases following on *Duncan* v. *Findlater*, 1839, M'L. and Rob. 911, and altering the law supposed to have been laid down there, such as *Mersey Docks Trs.* v. *Gibbs*, 1866, 1 H.L. 93, are full of difficulty notwithstanding the explanation of Lord President Inglis in *Virtue* v. *Alloa Police Commissioners*, 1873, 1 R. 285, owing to the varying and somewhat confusing grounds of judgment expressed by the different judges. But I think that in the present question there is a satisfactory reason for adhering to Sheriff Davidson's interlocutor in the principle that a public servant is not responsible for the negligence of those who are in the same employment as himself. This rule is recognised in Mr Justice Blackburn's exhaustive opinion in the *Mersey Docks* case, followed by the House of Lords. The public school teacher is not a servant of the School Board, though paid and liable to be dismissed by it, but both are servants of the community. This it is which accounts for the immunity of police authorities and other public officials from actions on account of the delicts or negligence of their subordinates. It is often difficult to distinguish the cases in which there is and is not liability, but this is similar to the case of a claim for fault or negligence by a police constable or a postman in the performance of his duty, where, even apart from special statutes, action lies only against him and not against his superior officer or the police authority. The rule is well expressed by Guthrie Smith on Damages (2nd ed.), p. 305, although the authorities in his note are insufficient; see also *Young* v. *Magistrates of Glasgow*, 1891, 18 R. 825, and Muirhead on Municipal and Police Government (2nd ed.), p. 261; Glegg on Reparation (2nd ed.), pp. 528 *et seq.*—*9th October* 1907.

Agent for Pursuer, G. Gunn.—Agents for Defenders, Montgomerie & Flemings.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

150. Ranken's Trustees *v.* Ranken.

2nd Div. — Ranken's Trustees v. Ranken.

I. Fee and Liferent—Trust—Direction to Trustees to Divide Clear Annual Income Among Beneficiaries—Mines and Minerals — Produce of Mines Unopened During Lifetime of Testator —Minerals Let by Trustees—Fixed Rent Payable While Mines Unworked by Tenants—Held Fixed Rent Formed Part of Corpus of Estate and Did Not Fall Under Income Payable to Liferenters.

II. Succession — Trust — Accumulations — Thellusson Act (39 & 40 Geo. III. cap. 98), sect. 1—Mines and Minerals — Mineral Rents Forming Part of Corpus of Estate—Held Thellusson Act Applies Only to Accumulations of Income and Does Not Prohibit the Addition to Capital of Yearly Returns which Form Part of Corpus of Estate.

Special Case.

The late James Ranken of Glenlogan and Whitehill, in the county of Ayr, died in 1848, leaving a trust disposition and settlement, whereby he conveyed his whole estate to trustees.

The material clauses of the settlement were as follows:—

My said trustees . . . . shall divide the clear annual income of my whole estate before conveyed into ten equal shares, and that half-yearly as the same shall be realised . . . . (here followed directions for the disposal of the income) . . . . and on the failure by death of all the parties to whom I have directed a share or shares of the income of my property to be paid, I direct my trustees to convey and pay over the fee of my whole property, heritable and moveable, to the person who shall on that event taking place be heir-male of George Ranken of Whitehill, my father, and to his heirs and assignees whomsoever.

The case stated:—

1. The first parties are the trustees now acting under said trust disposition and settlement.

3. The party of the second part is at present heir male of the said George Ranken of Whitehill. He is also heir at law of the testator. He is also the eldest son of the testator's nephew, George Ranken, mentioned in his trust disposition and settlement and now deceased, and as such is at present in receipt of certain shares of the income of the testator's estate. The parties of the third part are the persons by whom the liferents of the remaining shares of income are at present enjoyed.

4. The trust estate under the management of the first parties consists of two landed properties—Glenlogan and Whitehill — which are situated about fifteen miles apart. Both of these estates contain coal of considerable value. At the date of the testator's death the coal in the estate of Glenlogan was being worked, and it has continued to be worked ever since. The coal in the estate of Whitehill had not been worked or let before the testator's death. It was recently let by the first parties for a fixed rent of £200 or royalties, and the said fixed rent is now being paid to the first parties. The said coal has not yet been worked by the tenants. They are also tenants of an adjoining property, upon which they have a pit, through which they propose to work the coal in Whitehill. It is not expected, however, that they will begin to work said coal for a considerable time to come.

5. In these circumstances a question has arisen as to the disposal of the mineral rents and lordships of Whitehill. The parties of the first and second part

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maintain that as the minerals of Whitehill had never been worked prior to the death of the testator, and as his trust disposition and settlement contains no direction to work them, the rents and lordships payable therefor do not fall to be paid over to the parties entitled to the income. The parties of the first part maintain further that said rents and lordships being the proceeds of the *corpus* of the estate are in their nature capital, and fall to be retained by them with a view to being paid over to the person ultimately entitled to conveyance of the estate. The party of the second part further maintains that said shares of income derived from the rents and lordships payable in respect of the minerals of Whitehill are not disposed of by the testator in the circumstances which have occurred, and have fallen into intestacy, and that he, as heir at law of the testator, for the time being, is meantime entitled thereto. The parties of the third part maintain that said mineral rents and lordships are income of the estate, and fall to be divided and paid over to them and the second party accordingly. *Separatim*, they contend that so long as the coal in Whitehill remains unworked they are entitled to the fixed rent paid by the tenants in respect of the tenancy of said minerals.

The following Questions of Law, *inter alia*, were submitted:—

3. Do said mineral rents and lordships form part of the *corpus* of the estate, and do they accordingly fall to be retained by the first parties for the purpose of being ultimately paid over to the person entitled to a conveyance of the estate?
4. Is the accumulation of said rents and lordships struck at by the Thellusson Act, and do they accordingly fall to be paid over in the meantime to the second party as possessing for the time the character of heir at law of the testator, and heir of George Ranken, entitled to conveyance of the estate?

The Thellusson Act (39 & 40 Geo. III. cap. 98), sect. 1, provides:

No person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated .... [for any longer term than the terms set forth in the section].

By the Entail Amendment Act 1848 (11 & 12 Vict. cap. 36), sect. 41, this provision was made applicable to heritable property in Scotland.

Argued for the First Parties: (1) Minerals were *partes soli* and mineral rents were truly part of the *corpus* of the estate (*Campbell* v. *Campbell's Trs.*, 1883, 10 R. H.L. 65, affd. 9 R. 725; *Gowans* v. *Christie*, 1873, 11 M. H.L. 1, per Lord Cairns at p. 12). No doubt there was an exception in the case of minerals which had been worked during the lifetime of the testator. But there was no case of that kind here. There was no difference between a fixed rent and lordships. It was immaterial that no part of the minerals had been taken away. (2) The rents being capital, not income, there was no accumulation of income which could be struck at by the Thellusson Act (39 & 40 Geo. III. cap. 98, sect. 1, made applicable to heritable property in Scotland by 11 & 12 Vict. cap. 36, sect. 41).

Argued for the Second Party: The second party adopted the argument of the first parties to the effect that the rents were capital. But there was no power to work minerals in the settlement. Accordingly the rents were undisposed of, and went to the second party as heir at law (*In re Scarth*, 1879, L.R. 10 Ch. D. 499). (2) No coal having been taken away, there was no diminution of the capital value of the land. Accordingly, this was an accumulation struck at by the Thellusson Act, and the rents fell to be paid to the second party as the party who would have been entitled to the beneficial enjoyment of the estate if accumulation had not been directed.

Argued for the Third Parties: No coal having been taken away, it followed that the fixed rent was a return from heritable property, which did not diminish the capital value of that property. It was therefore income and not capital, and fell to be paid to the third parties (*Ross's Trs.* v. *Nicol*, 1902, 5 F. 146).

The Court *answered* the third question in the affirmative and the fourth question in the negative.

Lord Low.—I think this case is ruled by the decision in the case of *Campbell* v. *Campbell's Trs.* in the House of Lords. That case established the rule that where a testator leaves the income or liferent of his estate to certain persons, the income to which the beneficiaries are entitled includes the produce of any minerals which were worked during the lifetime of the testator, but does not include the produce of mines which were opened after his death. No doubt there may be a modification of this rule, if the special terms of the trust deed require it, and shew that it was the intention of the testator to include minerals that might be worked in future. But here the trust deed simply directs the trustees to divide the income among certain beneficiaries. Therefore I have no doubt that the rule laid down in *Campbell's* case applies, and that the rents in question do not fall within the income directed to be divided among the beneficiaries. I accordingly suggest that the third question in the case should be answered in the affirmative.

The only other question which requires an answer is the fourth, and that is whether the accumulations of the said rents and lordships is struck at by the Thellusson Act. Now I think the answer to the one question solves the other, because if we answer the third question in the affirmative, on the ground that these rents are capital and not income, it follows that they cannot be struck at by the Thellusson Act, which refers to income only. Therefore, I think that

the Thellusson Act has no possible application to this case, and that the fourth question ought to be answered in the negative.

Lord Ardwall.—I concur with my brother Lord Low and have little to add. It has been argued that the rents in question do not fall under the rule laid down in the case of *Campbell* because the minerals are not being worked and are still in the ground, and that although the rents were to be handed over to the liferenters, the capital value of the estate would remain undiminished, as no coal has been removed. With regard to this argument I have to observe that in entering on a mineral lease the parties take into consideration the time when the working of the minerals is likely to be begun, the propinquity of such minerals to pits already opened, and so on, and the parties having these matters before them, adjust the rents and lordships and the periods when they shall become payable accordingly. But that does not alter the fact that the only consideration for which the rents are paid is coal under the soil and forming *pars soli*, whatever the arrangement as to the time or manner of the rents being paid or the minerals being worked. Accordingly I think that the argument to which I have adverted is ill founded, and that it should be rejected. I hold that the rents are part of the consideration given for the coal in the estate, whether it is worked immediately after the lease is signed or after the lapse of a period of years, and that therefore these rents, whenever paid, fall under the rule laid down in the case of *Campbell*, and must be kept in the hands of the trustees as forming part of the fee of the landed estate, and not paid over to the liferenters.

The Lord Justice-Clerk concurred. — *17th October* 1907.

Counsel for the First Parties, Chree; Agents, Elder & Aikman, W.S.—Counsel for the Second Party, Lyon Mackenzie; Agents, Elder & Aikman, W.S.—Counsel for the Third Parties, Cochran Patrick; Agents, White & Nicholson, S.S.C. J. S. M.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

151. Francesco *v.* De Meo.

Revenue — Stamp — Conveyance on Sale —Agreement for Sale—Offer and Acceptance—Stamp Act 1891 (54 & 55 Vict. cap. 39), sect. 59, sub-sect. 1, and sect. 14, sub-sects. 1 and 4 — Question of Difficulty Whether Document Should Bear Agreement Stamp or Ad Valorem Stamp as Conveyance on Sale — Plea That Document Could Not be Considered, as Being Insufficiently Stamped, Not Sustained.

2nd Div.

Francesco v. de Meo.

Appeal from the Sheriff Court of the Lothians and Peebles at Peebles.

This was an action brought by Francesco Don Francesco, confectioner and ice-cream merchant, Peebles, against Onofrio de Meo, confectioner and ice-cream merchant there, to obtain (1) interdict against the defender carrying on business as a confectioner or ice-cream merchant in Peebles, and (2) decree for the sum of £150.

The pursuer averred:—

Cond. 3. On 13th June 1904 a verbal agreement was come to between the parties whereby the defender agreed to sell, and the pursuer agreed to purchase, the stock-in-trade, fittings, and goodwill of the [defender's] business at the price of £150 (the stock-in-trade and fittings being valued at £50, and the goodwill at £100) . . . . and in respect of said price the defender undertook not to compete with the pursuer in business in Peebles under a penalty of £150.

Cond. 4. Said verbal agreement was repeated in the presence of witnesses at a meeting between the parties in Edinburgh on 26th August 1904, and was reduced to writing and signed by the parties on that date before said witnesses. Both pursuer and defender are Italians, and the document was executed in the Italian language, and is herewith produced.

The defender averred:—

Ans. 4. Admitted that the pursuer and defender are both Italians, and that on 26th August 1904 they reduced the terms of the sale and purchase of said business to writing in their own language as after explained. *Quoad ultra* denied. Explained that the agreement between the parties was contained in two documents each signed by them, one containing an offer or agreement by defender to sell said business to pursuer for £150 on certain conditions as regards payment of the purchase price, which was delivered to pursuer, and the other containing an acknowledgment by pursuer that he had bought said business (the signing by him of the first mentioned document being held by the parties as an acceptance by him of said offer), and agreeing to fulfil the defender's conditions under certain penalties therein expressed, if incurred, which was delivered to the defender, said two documents together forming the contract of sale between the parties and shewing exactly its terms. A copy of said last mentioned document with English translation thereof interlined in red is herewith produced and referred to. Further explained and averred that said first mentioned document did not contain the last paragraph appearing in the writing, No. 3 of process, lodged by pursuer, the accurate translation of which into English is:—"I, Onofrio De Meo, bind myself not to serve in any other ice-cream shop in Peebles, and if I do so the party is entitled to all the money paid. This space remains for anything to be put afterwards." Further also explained and averred that said

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writing, No. 3 of process, founded on by pursuer, is . . . . insufficiently impressed with stamp duty as a conveyance on sale of property according to the Stamp Act of 1891 (54 & 55 Vict. cap. 39, sect. 54).

The pursuer lodged the following translations of the documents referred to on record:—

Translation by Pursuer of Document No. 3 of Process.

Edinburgh, 26th August 1904.

I, the undersigned, Onofrio De Meo, do agree to sell my shop to Francesco Don Francesco for £150, which is situated at 25 Northgate, Peebles, such sum must be paid by instalments as follows:—That in two years' time Francesco Benigno will pay to Onofrio De Meo two pounds each week during the summer season and one pound or so each week during the winter season, according to the income of business. The said shop was handed over to Francesco Don Francesco on 13th June 1904, the vendor to receive full payment in two years' time from that date.

I, Onofrio De Meo, bind myself not to serve in any other ice-cream shop in Peebles, and should I do so, Francesco Don Francesco is entitled to all the money he paid to me for said property. We leave the following space for anything to be added to the above contract.

Onofrio De Meo.
Francesco Don Francesco.
Stamp 6d. Bordone Achille, *testimone.*
Pasqualo Marandola.
Alphonso Vetraino.

Translation by Pursuer of Document No. 6 of Process.

Edinburgh, the day 26 August 1904.

I here undersigned Francesco Donfrancesco myself declare of being debtor with Mr Onofrio Demeo for the Sum of £ Sterling 150. Say One hundred and fifty paid £ Sterling 42 say pounds for having bought one of his shop situated at No. 25 Northgate, Peebles.

I Francesco Donfrancesco have the full responsibility of paying the said Onofrio Demeo the said sum of £ Sterling 2 say two in the summer months from 15 May to 15 November 1905 in the winter at one pounds per week or what I am able to. I Donfrancesco myself guarantee to pay all the sum for £50 Sterling from 13 June 1904 to 13 June 1906 say June nineteen six and every time I pay the said Onofrio above the sum of two pounds he is obliged to put on a stamp.

Refusing to pay the said sum the way written the said Onofrio he can retake the present shop and satisfy me with what the law will allow.

If the Donfrancesco does not pay the witness have no responsibility or interest in the consequence.

Francesco Donfrancesco di Demenico.
Accetto Onofrio Demeo.
Stamp 6d. Bordone Achille, *testimone.*
Pasqualo Marandola.
Alphonso Vetraino.
Testimone.

The defender pleaded, *inter alia*:—

"1. Said writing, forming No. 3 of process, being insufficiently stamped in terms of law, pursuer ought to be called upon to implement the provision contained in the Stamp Act of 1891 (54 & 55 Vict. cap. 39, sect. 14) anent the production of insufficiently stamped deeds in judicial proceedings; and failing such implement the action should be dismissed with expenses."

The Stamp Act 1891 (54 & 55 Vict. cap. 39), sect. 59, sub-sect. 1, provides:—

"Any contract or agreement . . . . made in Scotland, with or without any clause of registration . . . . for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

Sect. 14 provides:—

"(1.) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon; and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the Court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of £1, be received in evidence, saving all just exceptions on other grounds.

"(4.) Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

On 27th December 1906 the Sheriff-Substitute (Orphoot) granted decree against the defender for the sum of £150.

The defender appealed to the Sheriff (Maconochie), who on 18th January 1907 dismissed the appeal and of new granted decree against the defender for the sum of £150.

The defender appealed and *argued*: The contract of sale was contained in the documents Nos. 3 and 6 of process. The subjects sold included the goodwill of the business—a subject which was separable from the lease of the shop. The documents ought therefore to have been impressed with an *ad valorem* stamp as a conveyance on sale in terms of sect. 59 (1) of the Stamp Act 1891 (*Potter* v. *Inland Revenue*

Commissioners, 1854, 10 Ex. 147; *Benjamin Brooke & Co. Ltd.* v. *Inland Revenue Commissioners*, L.R. [1896], 2 Q.B. 556; *West London Syndicate Ltd.* v. *Inland Revenue Commissioners*, L.R. [1898], 2 Q.B. 507). It was the duty of the Court to take judicial notice of the fact that the documents were insufficiently stamped (Stamp Act 1891, sect. 14 (1) and (4)).

Argued for Pursuer:—The document No 3 was an offer, and the proper place for the stamp was the acceptance No. 6. But it was not necessary to look at No. 6, because the defender admitted on record that his offer had been accepted. In any event an *ad valorem* stamp was not necessary, because the only subject sold was the lease of the shop. The English cases cited were distinguishable, because there the goodwill was specifically conveyed, and that was not so here.

The Court *dismissed* the appeal.

Lord Ardwall.—This action arises out of the sale of an ice-cream business by the defender to the pursuer, and the pursuer asks that the defender should be ordained to pay a sum of £150 sterling, being the penalty agreed to be paid in case of the defender breaking his agreement not to carry on business in any other ice-cream shop in Peebles.

The defender states as a preliminary objection to the document founded on by the pursuer that it is not properly stamped, inasmuch as it is stamped only with a sixpenny agreement stamp and not with an *ad valorem* stamp as provided for by sect. 59 (1) of the Stamp Act 1891, and the section of the Stamp Act founded on as excluding the document from the cognisance of the Court is sect. 14, sub-sect. 1, of the said Stamp Act, which provides that notice shall be taken by judges "of any omission or insufficiency of the stamp" on any instrument produced as evidence. Now this is not a provision compelling judges to raise test cases or try doubtful questions regarding the stamping of instruments. I think that they are only bound to intervene to protect the revenue where there is an undoubted case of insufficient stamping or an attempted evasion of the Stamp Act. Now in my opinion there is no such case here. The document in question was stamped with a sixpenny stamp which is the proper and appropriate stamp for any ordinary agreement; but it is pleaded for the defender that this document was not only an agreement, but was an agreement for the conveyance and sale of the stock and fittings and goodwill of the shop mentioned in the document. In my opinion this is far from being clear, for the document itself sets forth, and it is matter of common ground on the record, that the agreement for the sale of the business was, as set forth in Cond. 3 and answer thereto, a verbal agreement, and was concluded on 13th June 1904, and on the same date the shop was handed over to the pursuer, the price of the business being then also fixed at £150. This being so, it appears to me that so far as the sale of the business was concerned No. 3 of process was not the instrument under which that sale took place, although it refers to and recites the sale, but was merely an agreement (1) as to the mode of payment of the price, and (2) as to the obligation on the defender not to carry on another similar business in Peebles under penalty of paying back all the money paid for the business; and it falls to be observed that it is only as evidence of the second point that the document is now produced, and for that purpose undoubtedly it is sufficiently stamped.

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I accordingly think that this is not a case in which there is any duty on the Court to order this document to be stamped with an *ad valorem* stamp either *proprio motu* or on the motion of one of the parties. [His Lordship then dealt with other questions as to which the case is not reported.]

The Lord Justice-Clerk and *Lord Low* concurred.—18*th October* 1907.

Counsel for Pursuer, Scott Brown; Agent, S. F. Sutherland, S.S.C.—Counsel for Defender, Carmont; Agent, W. R. Mackersy, W.S.

J. S. M.

OUTER HOUSE.

(*Lord Johnston.*)

152. Ainslie Brown *v.* Livingstone-Learmonth's Trustees. Ainslie Brown *v.* Carron Co. Ainslie Brown *v.* Forbes.

Servitude — Thirlage — Multures — Barony Mill—Astriction of Omnia Grana Crescentia—Express Grant in Titles—Dismemberment of Barony—Liberation From Astriction—Non-User for Forty Years—Prescription—No Mention of Astriction in Leases of Mill for More Than Forty Years—No Mill Services Exacted—Obligation on Mill Tenant to Repair—Restoration of Mill Without Claim on Suckeners — Resorting to Mill Voluntarily and for Convenience Insufficient to Preserve Right—Evidence on Which Plea of Prescription Sustained.

(*Reported ante, Vol. XIV. p.* 142.)

The facts of these cases, two of which on grounds similar to the first were instituted after the date of Lord Ardwall's judgment (reported *ante*, Vol. XIV. p. 142), with the contentions of parties, sufficiently appear from the Lord Ordinary's Note and the previous report.

The Lord Ordinary (assuming, but not decid-

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ing that on the titles the defenders' lands had been thirled to the pursuer's mill) *held* that the right of thirlage had been extinguished by the negative prescription, and *assoilzied* the defenders.

Lord Johnston.—At the close of the proof in these cases, it appeared to me that the state of the title raised questions of extreme difficulty and perplexity, the solution of which, if indeed they were soluble, must still involve great expense to the parties. The pursuer has devoted much time and research to the investigation of title, and his legal experience and acumen have produced results which creates the impression in one's mind that he is the proprietor of an old barony mill, viz. that of Manuel, to which most at any rate, if not the whole of the defenders' lands were at least at one time astricted. But to carry this impression the length of judicial conclusion, it would involve an even more laborious investigation of the titles which have been produced, and expensive excerpts from these titles. It occurred to me, therefore, to suggest to the parties that it would be to their mutual interest to take the exceptional course of reversing the usual order of things, and to direct attention first to the question whether, assuming that the pursuer had a good title to a thirlage mill, and that the defenders' lands were originally embraced in the thirl, the right of thirlage still subsisted, and had not been lost by the negative prescription. To this suggestion the parties, after consideration, acceded, and accordingly a print of that part of the evidence only which bears on the question of prescription has been laid before me, and for this print I have to express my indebtedness. The present judgment will therefore be confined entirely to this subject.

But before dealing with the question of possession, it is desirable to state shortly how, as I understand the case, the question arises.

In the early history of the properties involved there are two families, more or less allied, concerned, viz. the families of Livingstone and of Crawford. But an initial difficulty arises from the fact that there were what I may term overlapping baronies, each embracing the properties involved, or some of them. There was a barony of Manuel, of which traces are found in titles of the fifteenth and sixteenth centuries, but neither the date of erection nor the extent is known. There was a barony of Haining erected and, so far as appears for the first time in 1612, which included the lands of Manuel. Yet the foundation of the pursuer's title of date 1609 treats the barony of Haining as already existing, for it astricts the lands and barony of Haining to the Mill of Manuel, while at a later date there appears to have been a barony of Manuel-Foulis more or less carved out of the earlier baronies, one or both. For my present purpose I do not think it necessary to follow out the history of this latter barony.

I have formed the impression that Manuel was the original name of the nucleus of the estate, which formed the subject of consecutive erections, as the barony received additions and suffered deductions; that the place of strength which undoubtedly existed was called the Haining; and that the name Haining supplanted the name Manuel as the commonly received name of the barony; and further, that the crown charter of resignation of 1612, though apparently the first, was not actually the first erection of a barony of Haining but only its extended erection in the person of John Livingstone of Baldorane (probably the modern Bedlormie).

Now this crown charter of resignation of 1612 can only have embraced the *dominium directum* of Manuel Mill and mill lands. For in 1603 Alexander Livingstone obtained a charter of confirmation of *inter alia* the lands of Manuel (*i.e.* Haining, together with the mill of Manuel), and in 1609 he and his wife disponed to Henry Crawford and his wife "All and Whole that our mill of Manuel, commonly called Manuel-mill with the astricted multures of all and sundry our lands and barony of Haining and other multures and sequels pertaining to the said mill used and wont, with the mill lands also belonging to the said mill." And therefore when in 1612 John Livingstone of Baldorane obtained his crown charter of erection of the barony of Haining, on the resignation among others of the same Alexander Livingstone and spouse, the mill with the astricted multures of the existing barony of Haining and the mill lands had already been alienated to the Crawfords. Consistently with this the title to the Mill of Manuel was held base of the Livingstone family, afterwards Earls of Calender and Linlithgow until the '15, when the Earl being forfeited, an entry was obtained direct from the crown under the Clan Act. I do not think that it is disputed that the pursuer by a valid progress represents the alienee of Alexander Livingstone in the before-mentioned deed of 1609.

A question, however, arises whether the barony of Haining, which that deed treats as astricted, was the same in its component parts as the barony of that name erected in 1612, and, I may add, of new erected with important additions in 1646. Though I do not find it necessary to determine this question, there is a deed in the progress which would probably resolve it in favour of the pursuer, viz., the feu-contract of 1703, between the then Earl of Linlithgow and Thomas Crawford, then proprietor of the mill and mill lands, which is really of the nature of a confirmation and redisposition, and which may be read as astricting the Earl's then lands and barony of Haining to Manuel Mill.

For the present purpose, therefore, it may

be assumed that the pursuer is proprietor of the mill and mill lands of Manuel, and that by his title there are astricted to the said mill the lands and barony of Haining in the widest sense which that description can assume, reserving, if it be necessary, to consider farther whether that assumption can be judicially accepted.

In the next place, to the Livingstone or Earl of Linlithgow's Barony of Haining, the defender Forbes of Calender is the direct successor in title, through the York Building Company. But the acquisition was under important exceptions, as much of the property had been conveyed or feued out by the Livingstone family between 1603 and the acquisition of the forfeited estates of the family by the York Building Company. Of these exceptions I think it may be surmised, and accepted for the present purpose, that a considerable portion has found its way into the hands of the other two defenders the Carron Company and the Livingstone-Learmonth family. But it must be added that only in a very few isolated cases does any notice of astriction appear in the titles of the lands assumed to have composed parts of the barony and so to be astricted.

The identity of the various parcels of lands now held by the different defenders with those to be found in the enumerations in the old barony and subordinate titles is of course open to question, but having regard to the tenacity of old place-names in country districts I think there is at least a very good *prima facie* case in the pursuer's favour.

In approaching the proof of prescription the question therefore presents itself thus: The pursuer is the proprietor of a barony mill having on the face of his title a clause astricting, or at least acknowledging the astriction, of the lands of the barony to it, under the hand of the disponer of the mill, who was at the time infeft in the barony. The defenders may be taken as *ex facie* at least the holders by progress of the barony lands, or some of them, from the proprietor of the barony who disponed the mill and created or acknowledged the astriction, but there are only in exceptional cases any reference to astriction in the titles.

If these be the circumstances, then I think it follows that the thirlage was of *omnia grana crescentia*, and not merely of grindable corn, as the thirlage of lands implies the thirlage of the crops growing on the lands (*Waughton*, 1635, M. 11230; *Yeaman*, 1759, M. 16044). But thirlage has so far at any rate the quality of a prædial servitude, that the obligation to bring the crop of the lands to the mill may be discharged by the negative prescription. Yet in considering the proof of possession or usage it must be kept in view, *first*, that when there are several parcels of one tenement the obligation may be kept in force by the usage of submitting to the thirl by the occupants of one or more parcels, though the occupants of the remainder evade it. The nature of the right is anomalous. The constitution is, so to speak, prædial, the current obligation is personal and prestable from the occupant, not the owner of the *prædium*. *Second*, that usage to pay part only of the stipulated multures will presume the right to exact the whole (*Waughton, supra*).

But though these be general principles, the general circumstances proved must determine whether *de facto* anything has been exacted and paid as multure by virtue of astriction.

Now I have examined the proof with some care, and the first thing that I am struck with is, that as far back as local history can take us, neither the proprietors of the mill nor the tenants of the mill, nor the proprietors of the lands in the alleged sucken nor the tenants of those lands, ever heard of astriction or of intown multures, or of any right or claim of thirlage. This is the more remarkable that for a very considerable time, beyond the prescriptive period, the property of the mill was in the hands of Isaac and George Bayley in succession, two very experienced conveyancers. That the leases of the mill should contain no reference to thirlage is not conclusive, as the lease of the mill of a thirl would imply an assignation of the rights of the owner. But that the leases in earlier times should include the words "with the astricted multures" or equivalent terms, and that the introduction of these words should cease with the advent of the nineteenth century, is a much more pregnant circumstance, and indicates that the right of thirlage, which was then falling into desuetude, was with full knowledge and intent abandoned. While dealing with the leases there is a further matter of some importance to be noticed. It is a necessary consequence of thirlage that the suckeners are liable in mill services. The maintenance of the thirl by exaction and payment of intown multures involves the perpetuation of the obligation to these services, even though not exacted. But it throws light, I think, on the interpretation to be put on the acts of frequenting the mill, to be afterwards noticed, that no one has ever heard even a tradition of mill services being tendered, and that more than forty years ago Mr Isaac Bayley, in letting the mill to a new tenant, Peter Roberts, took him bound to maintain both the mill and its adjuncts of dam and lead in repair; and further, that when it was burnt down his son, George Bayley, rebuilt it, without calling on the suckeners for cartages or other services.

With this in view it would, I think, require a stronger proof of resorting to the mill than we have here to resist the implication that the claim of thirlage has long since been abandoned. For what does the proof come to at best? Thirlage over *grana crescentia* has never been exacted or

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suggested, within the memory of man. So long as such memory goes, all grain, not required for use on the farms, has been sold off in open market, with the knowledge and acquiescence of those in right of the thirlage mill, and no dry multures have ever been heard of. This fact is not conclusive by any means on the authority of *Waughton's* case, *supra*. But it cannot be ignored in considering the weight and complexion of what is found regarding grindable corn. Now, there has been a use of going from some farms to Manuel Mill, particularly with oats—in fact, I think the proof is almost confined to oats. But there have been three processes in use at the mill—oatmeal grinding, hashing, and bruising. Now hashing is grinding the whole or unhusked grain for cattle feeding, and so, though a grinding process, would be an exception from the suckeners' obligation. Bruising, again, is not a grinding operation at all, and, moreover, is applied to horse corn, and so is doubly excepted. There remains, therefore, the small amount of oats brought to be ground for domestic consumption on the farms. If the thirlage of *omnia grana crescentia* has been, so far as memory goes, reduced to this, and if this has been accomplished by the other circumstances to which I have alluded when dealing with the leases, I should require to be satisfied that even the bringing "grindable corn" to the mill has been a matter of obligation and not a matter of convenience. And this I am not. Convenience of neighbourhood, satisfaction with the work performed, friendship with the miller, counter transaction of selling grain to him—these have all been the influences in determining such parcels of grain to the mill. There has been no suspicion of obligation on either side, and in particular there has been no discriminating charge within the thirl, distinguishing intown grain from outtown grain. Nobody has heard of intown multures.

It is true that oats for meal have always been multured and not paid for in cash, but though this may be a legacy from the old days of astriction, having regard to the generality of the custom, I do not think that it is enough to preserve the flavour of astriction over the parcels of oats which have been brought to the mill to be ground into meal, so that by this one act the whole right of the thirlage over *grana crescentia*, for it must be brought up to that, can be held to have been preserved.

I therefore propose to sustain the defenders' plea on prescription, and to assoilzie them with expenses.—30*th September* 1907.

Counsel for Pursuer, Solicitor-General (Ure, K.C.), Craigie, K.C., Welsh; Agent, R. Ainslie Brown, S.S.C.—Counsel for Defenders, Dean of Faculty (Campbell, K.C.), Macfarlane, K.C., Chree; Agents, A. Sholto Douglas, W.S.; Graham, Johnston & Fleming, W.S.; John C. Brodie & Sons, W.S. R. S. B.

OUTER HOUSE.

(*Lord Mackenzie.*)

153. M'Caw *v.* M'Caw.

Expenses—Taxation—Husband and Wife—Divorce for Adultery of Husband—Finding of Expenses in Usual Form—Taxation of Expenses on Consistorial Scale.

In an action at the instance of Mrs Margaret Robertson or M'Caw against her husband, Daniel M'Caw, for divorce on the ground of adultery, the Lord Ordinary (Dundas) pronounced decree on 20th July 1907, finding the defender guilty of adultery and divorcing him from the pursuer. The interlocutor concluded: "Finds the pursuer entitled to expenses; allows an account thereof to be lodged, and remits the same to the Auditor to tax and report."

The Auditor having taxed the pursuer's account, the defender objected to the report "on the ground that the Auditor has taxed the account contrary to the finding of the Lord Ordinary, in respect that he has taxed it as between agent and client, and has allowed the following items" [here followed items amounting in all to £37, 0s. 8d.]. These items consisted mainly of the outlays and fees of the Edinburgh agents of the pursuer for communication with the agents of the pursuer in Glasgow, and also of the outlays and fees of the Glasgow agents for communication with the agents in Edinburgh and with English solicitors.

The defender *argued* that, as the interlocutor of 20th July 1907 merely found the pursuer entitled to expenses and did not direct that these expenses were given as between agent and client, the Auditor was not entitled to tax the account except as between party and party; and cited *Reid* v. *Hope*, 1825, 4 S. 198; *King* v. *Patrick*, 1845, 7 D. 536; and *Mackellar* v. *Mackellar*, 1898, 25 R. 883.

The pursuer *argued* that it was only where expenses were to be given on a scale which was not appropriate in ordinary cases of the same kind, that it was necessary that provision should be made, in the interlocutor awarding expenses, as to the scale on which taxation was to proceed; and cited *Earl of Stair* v. *Countess of Stair*, 1905, 13 S.L.T. 446; and *Grant* v. *Grant*, 1905, 13 S.L.T. 516. He also referred to the Conjugal Rights (Scotland) Amendment Act 1861, sect. 7.

The Lord Ordinary *approved* of the Auditor's report; *repelled* the objections; and *found* the pursuer entitled to the expenses of the discussion on the objections; and modified the same to two guineas.

Lord Mackenzie.—In this case the interlocutor disposing of the merits of the case awards expenses to the pursuer in the usual form. Since the discussion before me on the defender's note

of objections to the Auditor's report, I have taken the opportunity of consulting the Auditor, and as I find that in taxing the pursuer's account he has followed the usual rule in consistorial cases, I do not see my way to give effect to the objections. I shall therefore repel the defender's objections, and as the Act of Sederunt of 6th February 1806 makes an award of the expenses of the discussion of the Auditor's report imperative, I shall find the pursuer entitled to these expenses, and modify them to two guineas.—16*th October* 1907.

Counsel for the Pursuer, J. R. Christie; Agents, Cumming & Duff, S.S.C.—Counsel for the Defender, C. D. Murray; Agents, M. J. Brown & Co., S.S.C. R. C. H.

OUTER HOUSE.

(*Lord Salvesen.*)

154. The Screw Collier Company Limited and Others (Owners of S.S. "Prudhoe Castle") *v.* Weir (Owner of S.S. "Ruby"), *et e contra.*

I. Ship—Collision—Total Loss—Method of Estimating Value of Ship—Vessel Under Charter—Freight—Measure of Damage.

II. Ship—Collision—Reparation—Negligence of Both Ships—Damages for Loss of Life—Liability of Owners of One Ship to Crew of the Other Ship—Contribution Between Wrongdoers—Admiralty Rule of Division of Loss.

(*Reported ante, Vol. XIV. p.* 465.)

These actions arose out of a collision in the Firth of Forth between the s s. "Prudhoe Castle" and the s.s. "Ruby." As the result of the collision the "Ruby" sank and six of her crew were drowned. The Lord Ordinary *held* that both vessels were to blame, and to this judgment the Second Division adhered. The case was remitted back to the Lord Ordinary for further procedure, and his judgment sufficiently reports the questions remaining to be decided.

Lord Salvesen.—The liability for the collision out of which this action has arisen has already been finally determined on the footing of both vessels being to blame. Parties have, so far, adjusted the damage claims; but they have been unable to agree as to the value of the "Ruby," and as to some other matters which really raise questions of law, and which will be afterwards specifically referred to.

The owners of the "Ruby" claim that, at the time she was lost, she was of a value of £7500. The leading expert witness examined on the other side puts her value at £5500. In order to arrive at the proper figure it is therefore necessary to consider the facts on which the valuations proceed.

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The Screw Collier Co. Ltd. and Others (Owners of S.S. "Prudhoe Castle") v. Weir (Owner of S.S. "Ruby"), *et e contra.*

The "Ruby" was an iron screw steamer of 560 tons carrying capacity. She was built in 1888, and had triple expansion engines which were situated aft. In 1898 she was purchased for a sum of £6900. In order to fit her for the trade in which she was to be employed some £400 was spent in repairs and improvements, so that she actually cost about £7300 before she was put in commission. Considerable sums of money were annually disbursed to meet ordinary upkeep. Further, in 1903 a new boiler was supplied at a cost of £1183; and the extra supply of steam which she obtained from this boiler had the effect of improving her speed to about twelve knots an hour. In 1903 she got one new winch and in 1905 a second; and, in the latter year, a sum of £306 was spent in connection with the special survey which she then passed. The vessel was well suited for the coasting trade in which she was engaged, her relatively high speed giving her an advantage as compared with most other vessels used for similar purposes. Her employment in this trade yielded a fair profit to her owner.

The method adopted by the owner himself in valuing the "Ruby" was to allow depreciation at 4 per cent. on the value at which she stood in his books, and then to add the cost of repairs executed during the year. The result of applying this method to the "Ruby" is that, although she was gradually getting older, she was all the time appreciating in value, and stood in the books as worth £8602, 13s. 8d. as at December 1905. Adopting the same method, but allowing 5 per cent. instead of 4 per cent. for depreciation, the figure works out at £8129, 13s. 9d. In my opinion this is an entirely erroneous method of arriving at the value of the ship. The cost of necessary repairs is part of the expense of running the vessel; and, except in so far as the repairs consist of renewals of important parts, does not add to the value of the ship. As the ship is gradually wearing out through age, it is obvious that some allowance for depreciation must be made even on the assumption that she is well kept up; and the witnesses for the "Prudhoe Castle" stated that the recognised allowance on this head in the case of an iron ship is 5 per cent. That allowance has the merit of being recognised by the Income Tax Commissioners; but, in the case of an old vessel, I think it may be too high. An iron vessel may well be serviceable for thirty or even forty years; but if 5 per cent. is annually written off for depreciation on the diminishing value, after twenty years she will stand in the owner's books at a break-up value although she may be trading for twenty years more. While the allowance of 5 per cent. may, therefore, overhead be fair enough, it cannot be rigidly applied to the case of every individual ship.

The valuations of the experts for the "Prudhoe Castle" must also, I think, be modified as being

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based entirely on selling value, and not on the value to the owners. A ship is not like a bale of goods, the exact counterpart of which can be bought in the market. Hence the market price cannot be ascertained with precision; and the prices of similar vessels, while they may be useful as shewing the state of the market, are by no means conclusive. Much also depends on the exact condition of the ship which is brought to sale, her previous history, and the circumstances under which she is sold. The two cases relied on by Mr Pinkney of the "Test," which was sold in January 1906 for £3750, and the "St Kebin," which was sold about the same time for £6000, illustrate this. The "Test" was two years younger than the "Ruby," and resembled her in speed, yet she fetched only £3750; while the "St Kebin," which was considerably slower and much older, fetched £6000. The difference may be partly explained by the "Test's" boiler being twelve years old and therefore nearly worn out, but this would account only for about £1200, leaving as much more to be accounted for in other ways that are not explained.

I propose, accordingly, to arrive at an estimate of the value of the "Ruby" for myself, with such assistance as the evidence on both sides affords. I start with the figure of £7300, which I think represents the actual cost in the open market to the owners—this sum including the amount that required to be spent in making the vessel fit for her service. The vessel being then ten years old, I think it sufficient to write off depreciation at 4 per cent. on the diminishing value; but as extensive renewals were made in the last two years to the extent of some £1400 in the shape of a new boiler, new winches, new propeller and new funnel, I think the cost of these must be taken into account as increasing her value as at the time of collision. On this sum I allow depreciation for two years overhead at 7½ per cent., as the parts renewed wear out much more quickly than the hull. The result is that the figure works out at roughly £6670.

In reaching this result I have fully in view that Mr Pinkney and Mr Cormack did not think that the cost of the new boiler added materially to the value of the ship. This may be so for purposes of sale, but is certainly not so to an owner who does not desire to sell.

At the time when the ship was lost and she was laden with a cargo the freight of which amounted to £50, 3s. 1d., she was within sight of her port of destination; and an expenditure of something less than £15 would have enabled her to earn this freight. It was argued for the "Prudhoe Castle" that, if interest was allowed from the date of the loss on the value of the ship, no other claims could be entertained. In my opinion that does not apply to the freight of the voyage in which she was engaged. This was expressly decided in the case of the "Amalia," 1864, 34 L.J. (Ad.) 21; and the principle was extended in the cases of the "Kate," 1899, P. 165, and the "Racine," 1906, P. 273, to the freight which might have been earned under other charter-parties which had been concluded for the vessel's subsequent employment. Here no such engagements had been made; and, therefore, I think the claim on this head must be limited to the sum of £35, 13s. 6d., being the net freight which would have been received at Grangemouth.

The owners of the "Ruby" also claim £332, 15s. as the profit which the "Ruby" would have made in the seven months following the loss, based on an average of three years' trading, on the footing that it would have taken at least seven months to build a similar steamer. I disallow this claim; but, instead of it, I allow interest at 5 per cent. from the date of the loss as part of the damages. I do so on the principle—which I think has been uniformly recognised, both in Admiralty and at common law—that 5 per cent. per annum represents the legal compensation for being wrongfully deprived of the use of money. Whatever may be said of the rate of interest otherwise, 5 per cent. is still the recognised commercial rate; and commercial men cannot borrow at less for the purposes of their business. The other sums set forth in the statement of claim (No. 162 of process) have been adjusted.

The remaining questions relate to two sums of £1155 and £166. The former represents the cumulated amount of damages paid by the owners of the "Prudhoe Castle" as compensation to the representatives of the members of the crew who lost their lives on board the "Ruby." None of the crew settled with were personally connected with the navigation of the "Ruby." The owners of the "Prudhoe Castle" claim to deduct one-half of this amount from the sum which they are otherwise liable to pay.

The question thus raised is a novel one, so far as Scotland is concerned; and the argument on which it was founded was ingenious. It was said that the sum claimed represents part of the damage which the "Prudhoe Castle" sustained in consequence of the collision, and that, under the Admiralty rule, the "Ruby" is liable for one-half of such damage. The former proposition is undoubtedly true. But for the collision—to which both ships contributed—the claims in question could not have been made; and the "Prudhoe Castle," being admittedly a joint delinquent, had no answer to the actions of the seamen's representatives. It does not follow, however, that they are entitled to relief to the extent of one-half of the cost of settling these claims. Had the owners of the "Ruby" been liable equally with those of the "Prudhoe Castle" for the loss of life, I should have had little difficulty in applying the doctrine of contribution between wrongdoers, which was outlined in the case of the *Wick and Pulteneytown*, 1894,

S.S. Company, 21 R. H.L. 39. If, for instance, one of the claims had been by a passenger who was injured in the collision, and the full amount of his claim had been paid by the owners of the "Prudhoe Castle," it would have been only equitable that they should be relieved of one-half by the owners of the "Ruby." The mere fact that the injured person selects one of two joint delinquents, and recovers against him, is no reason why the ultimate liability should not be made to rest equally upon both. But the owners of the "Ruby" were not liable, either at common law or in Admiralty, for any fault committed by a member of the crew through which other members lost their lives. If, then, they could not be made directly responsible to the representatives of the deceased men, I fail to see how they can be made to share the responsibility at the instance of the co-delinquent. That would, in effect, be imposing upon them a liability which the law does not countenance. The same view has been taken in England, where it has been held that the Admiralty rule of equal division of loss, where two vessels are both to blame, does not apply to claims for loss of life (*The "Bernina,"* 1888, 13 A.C. 1; *The "Circe,"* 1906, P. 1). It was argued that these decisions proceeded upon the limited nature of the jurisdiction of the Admiralty Court, and that they were inapplicable to Scotland. That may be so, but it is from England that we have derived the Admiralty rule with regard to the apportionment of damages; and it appears to me that we must take it with all its limitations. At common law the claim would be equally untenable; because, under this rule, the plea of contributory negligence results in neither of two parties who have been injured by the fault of both being entitled to recover against the other.

I may add that I think it would be unfortunate if any other result were reached, because the liability of a shipowner would vary according as the action was raised in Scotland or England, it being generally in the power of the pursuer to select either forum. There is, besides, high authority for saying that the maritime law of Scotland is the same as that of England, although Lord Watson's *dictum* to that effect is probably too absolutely stated (*Currie* v. *M'Knight*, 1896, 24 R. (H.L.) 1). I accordingly reject the claim on this head.

The other claim of £166, the adjusted value of the seamen's effects, seems to me to be ruled by the same considerations. The loss of these effects grounded a claim at the instance of the seamen, or their representatives, against the owners of the "Prudhoe Castle"; but, just as the owner of the "Ruby" was not liable for loss of life or injury to his own crew, so I cannot see how he can be liable for the loss of their belongings. Such effects are not analogous to cargo shipped by third parties for the loss of which by the negligence of the crew they are—in the absence of express contract—entitled to be indemnified by the ship-owners.

OUTER HOUSE. *Lord Salvesen.*

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The following interlocutor was pronounced:—"The Lord Ordinary, having considered the cause in the action at the instance of the owners of the 'Prudhoe Castle,' finds that the loss sustained by the pursuers amounts to the sum of £300; in the action at the instance of the owners of the 'Ruby' finds (1) that the market value of the 'Ruby' at the date of her loss on 10th October 1905 was £6670; (2) that the owner of the 'Ruby' is entitled to charge in his statement of claim interest at 5 per cent. from said date to the date of payment; (3) that the amount of the freight to which the owner of the 'Ruby' is entitled is the sum of £35, 13s. 6d.; (4) that the value of the stores on board the 'Ruby' at the date of her loss was £20, making in all £6725, 13s. 6d., from which there falls to be deducted the sum of £72, 19s. 7d., being the price, less charges, at which the wreck was sold, thus leaving the sum of £6652, 13s. 11d. as the loss sustained by the owner of the 'Ruby'; disallows the counter-claim for £1155, being the sum paid by the owners of the 'Prudhoe Castle' in respect of loss of life, and also the other counter-claim for £166, being the sum paid in respect of seamen's effects lost on board the 'Ruby'; finds that the total loss sustained by the owners of both vessels amounts to the sum of £6952, 13s. 11d. Therefore, in the action at the instance of the owner of the 'Ruby,' finds that the pursuer is entitled to the sum of £3476, 6s. 11d., but that, in an accounting between the pursuer and defenders, the latter are entitled to credit for the sum of £300 in lieu of a decree therefor in the separate action at their instance, and that, on said sum being credited and deducted, there remains due by the defenders to the pursuer a sum of £3176, 6s. 11d.: Therefore, in the separate action at the instance of Andrew Weir against the Screw Collier Company Limited, decerns against the defenders for payment to the pursuer of the said sum of £3176, 6s. 11d., with interest on the said sum at the rate of 5 per centum from the 10th day of October 1905 till payment; and in the separate action at the instance of the said Screw Collier Company Limited against Andrew Weir, in respect that the sum therein sued for has hereinbefore been placed to the credit of the pursuers as in an accounting between them and the defender, finds it unnecessary to dispose of the conclusions of the summons: Dismisses the action, and decerns: Finds no expenses in the cause due to or by either party."—18*th July* 1907.

Counsel for Owners of "Prudhoe Castle," C. D. Murray, Spens; Agents, Boyd, Jameson & Young, W.S.—Counsel for Owners of "Ruby," Clyde, K.C., Horne; Agents, Beveridge, Sutherland & Smith, S.S.C.

J. W. F.

Outer House. *Lord Mackenzie.*

Williams and Others v. Philip.

OUTER HOUSE.

(*Lord Mackenzie.*)

155. Williams and Others *v.* Philip.

I. Lunacy—Insanity—Testing Capacity—Relevancy of Averments.

II. Fraud — Will — Reduction — Issue of Facility and Circumvention—Relevancy of Averments.

III. Process — Proof or Jury Trial?—Reduction of Will.

This was an action by Edward Taunton Williams, as sole trustee and executor nominated under a trust disposition and settlement of the late Joseph Wilberforce Williams, dated 3rd September 1904, and others, the heirs *in mobilibus* of the said J. W. Williams, against Andrew Philip and others, in which the pursuers sought to reduce a trust disposition and settlement of the said J. W. Williams executed in favour of the said Andrew Philip and dated 23rd August 1905.

By this will of 1905 the testator (who died on 2nd September 1906) appointed the defender Philip sole executor, and conveyed to him the testator's whole estate, heritable and moveable, subject to two legacies to two charitable institutions. These institutions were called as defenders, but did not lodge defences.

The pursuers averred that in May 1905 the testator went to live in Lenzie and that some time thereafter he was introduced to Philip, who also resided there; that Philip "assiduously cultivated" the testator's acquaintance; that Philip on one occasion dissuaded the testator from taking a holiday along with the parties with whom he lived; and that Philip took him about to Glasgow and other places. It was also averred that Philip "wrote instructions to a writer in Glasgow selected by himself for the preparation of a will by the deceased in his own (Philip's) favour. The writer prepared and sent to Philip the will now under reduction, and it was laid by Philip before and signed by the deceased in Philip's house, in Philip's presence, and at Philip's instigation. The deed bears the names of two instrumentary witnesses, who were workmen engaged in Philip's house at the time, and signed their names at Philip's request before the deceased adhibited his signature. All these proceedings were carefully concealed from Mr Williams' family, and the will was kept secret by Philip and his agent till five months after Mr Williams' death."

In addition to the averments noticed in the Lord Ordinary's opinion the pursuers further averred:—

"Cond. 4. The said pretended deed did not express the true testamentary wishes of the deceased, and is reducible either on the ground that when the deceased executed it he was incapable of understanding and did not understand what it contained, or otherwise on the ground that he was weak and facile and easily imposed on, and that the defender Andrew Philip, having obtained an influence over him, fraudulently took advantage of that influence and of the weakness and facility of the deceased to impetrate the said deed in his own favour."

"Cond. 6. . . . . During this latter period of his life his mental weakness and derangement continued, though it did not assume a violent form. He was solitary in his habits. He rarely spoke to strangers, and never made friends outside the circle of his relatives and landladies. He was eccentric, changeable and suspicious, and prone to sudden outbursts of passion at the merest trifles. He was childish in his tastes and fancies. He also exhibited the symptom, common to persons in his condition, of being extremely open to flattery, and it was easy to get him to do anything by humouring him. . . . ."

"Cond. 9. The deceased was incapable of understanding, or at any rate he did not understand, the purport and effect of the deed which he was then induced to sign. . . ."

"Cond. 10. In any event, the deceased did not sign the deed of his own free will. He was, as already explained, weak and facile, and was absolutely under the influence of Philip, by whom the whole arrangements connected with the making and signing of the deed were carried out, and who used the influence which he had acquired over the deceased to inspire him with suspicion and dislike of his relatives, and to dictate or suggest to him how his property should be left, and by these means to impetrate the deed from him. The deceased subsequently, both verbally and in writing, evinced a strong dislike to Philip, whom he accused of deceiving him. In particular, on 29th November 1905 he wrote to his brother Henry:—'As for the man Philips, I try to avoid him as much as possible, as I find he is a deceitful person.'"

Issues having been ordered, the pursuers lodged two issues for the trial [which are given in the Lord Ordinary's opinion]. The defender argued that the case was not suited for jury trial but should be sent to proof, and that, in any case, the averments were not relevant to support the proposed issues.

The Lord Ordinary *approved* of the issues.

Lord Mackenzie.—Counsel for the defender in this case did not oppose inquiry by way of proof, but maintained, if trial by jury were insisted on, that the summons was not relevant.

Taking the latter point first I am of opinion that there is sufficient upon record to warrant both the issues proposed. The first issue is, "Whether the will bearing to be dated 23rd August 1905 is not the deed of the late Joseph Wilberforce Williams?" Now it is averred that

from his early years the testator had shown manifest weakness of intellect, and had never been fit for work of any kind; that he was certified to be insane and went to an asylum for two years in 1870; that he thereafter remained in the custody of one or other of the members of his family, and especially of the pursuer, the Reverend Henry John Williams, until 1898; that during the latter period of his life (he died in 1906) his mental weakness and derangement continued, and that the agents of a certain trust refused to pay over to him income to which he was entitled, on the ground that he was incapable of granting a discharge. The will sought to be reduced was made on 23rd August 1905, and it is averred in Cond. 4 that when the deceased executed it he was incapable of understanding and did not understand what it contained. The defender's counsel pointed out that in Cond. 9 the averment ran thus:—"The deceased was incapable of understanding, or at any rate he did not understand, the purport and effect of the deed which he was then induced to sign." It was argued that the relevancy of the record must depend on the weaker alternative, and that it was not relevant to say that the testator did not understand the will. I think the averments, however, must be taken as a whole, and that there is a plain case made on record that the testator was not of sound disposing mind.

The second issue is, "Whether, on or about 23rd August 1905, the late Joseph Wilberforce Williams was weak and facile in mind and easily imposed upon, and whether the defender Andrew Philip, taking advantage of his said weakness and facility, did by fraud or circumvention obtain or procure from the said Joseph Wilberforce Williams the will bearing the said date, to the lesion of the said Joseph Wilberforce Williams?" An attempt was made to contend that the case on record was one of undue influence, and not of facility and fraud or circumvention. It is impossible, in my opinion, after the cases of *M'Callum* v. *Graham* (1894, 21 R. 824), *Rooney* v. *Cormack* (1895, 22 R. 761), and the Lord Chancellor's opinion in *Weir* v. *Grace* (1899, 2 F. (H.L.) 30), to maintain this successfully. The case of *M'Kechnie* v. *White and Others* (1906, 14 S.L.T. 140) seems to have been a special one. Upon the question whether there are sufficient averments to support the second issue, I am of opinion that there are. The averments in regard to facility appear to me to be strong. As regards fraud and circumvention the pursuers aver that the defender, after an acquaintance of three months only with the deceased, acted as the sole intermediary in the preparation of a will largely in his own favour, excluding the family of the deceased. The pursuers then go on to say that the deceased was absolutely under the defender's influence, and that he used this influence to inspire him with suspicion and dislike of his relatives, and to dictate or suggest to him how his property should be left. These averments are, I think, enough to entitle the pursuer to the second issue.

As regards the question whether there is any special cause why this case should not go to a jury, the points founded on were that the case was one of doubtful relevancy, that a jury was unsuited to try the questions of the amount of influence brought to bear by the defender on the testator, and that the averment about the defender's imprisonment was apt to prejudice his case in the eyes of a jury. I am unable to hold that there is any sufficient cause for not sending the case to a jury. The cases of *Weir* v. *Grace* (1898, 25 R. 739) and *Fearn* v. *Cowper* (1899, 1 F. 751) were of a different nature. Nor do I consider the case of *M'Kechnie* (*supra cit.*) an authority for ordering a proof in the present case.

I therefore approve of the issues proposed.—19*th October* 1907.

Counsel for Pursuers, Constable; Agents, Constable & Sym, W.S.—Counsel for Defender, A. M. Anderson; Agents, Paterson & Salmon, Solicitors. R. C. H.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

156. M'Gregor *v.* Ballachulish Slate Quarries Limited.

I. Expenses — Company — Liquidation — Petition for Compulsory Winding Up —Subsequent Petition by Voluntary Liquidator for Supervision Order— Petition for Compulsory Winding Up Dismissed with Expenses Out of Estate to Petitioner and Liquidator— Held that Expenses Should be Taxed as Between Agent and Client.

II. Expenses — Company — Liquidation — Decree Awarding Expenses in Ordinary Form in Favour of Petitioner for Compulsory Winding Up of Company Where His Petition Has Been Dismissed and Voluntary Liquidation Continued Under Supervision—Held Auditor Entitled to Tax Such Expenses as Between Agent and Client.

Objections to Auditor's Report.

The whole circumstances of this decision appear sufficiently from the Opinion of the Lord President.

The case was heard in the Single Bills, when the Lord President intimated that the Court would communicate with the Auditor. The case was subsequently advised.

The Lord President.—My Lords, this is a case in which a petition was presented for the compulsory winding up of the Ballachulish Slate Quarries

1st Div. M'Gregor v. Ballachulish Slate Quarries Ltd. — *The Lord President.*

Company Limited. Upon the same day as that petition was presented, a meeting was held at which an extraordinary resolution was passed by which the Company was wound up voluntarily, and a liquidator appointed, and the liquidator was directed to present a petition for the continuation of the voluntary winding up under the supervision of the Court. These two petitions, with cross answers which were lodged, came to depend before Lord Kinnear, the Lord Ordinary on the Bills in Vacation, and his Lordship, after hearing parties, dismissed the compulsory winding up petition and pronounced an order in the other petition for the continuation of the voluntary winding up subject to the supervision of the Court. He also pronounced an interlocutor finding the petitioner in the petition for the compulsory winding up and the liquidator entitled to expenses out of the estate.

My Lords, that is a perfectly ordinary proceeding and the usual interlocutor, and the reason of it is of course plain enough, that even although the Court in its discretion may hold that the better form of winding up is not a compulsory winding up but a winding up under the supervision of the Court, the Court is still entitled, indeed bound in proper cases, to give the petitioner who comes into Court with a petition for compulsory winding up, his expenses, as having brought the matter into Court, the view being that the whole parties concerned have the benefit of his initial proceedings in the liquidation which is then instituted.

Now the expenses were taxed, and they were taxed by the Auditor upon the scale of agent and client, and the present question has arisen upon the objection taken by the liquidator that, inasmuch as the interlocutor does not in terms mention agent and client, the expenses ought to be taxed as between party and party. As to the general rule in ordinary actions upon this matter there can be no doubt. "Expenses," without any more being said, means taxation upon the scale of party against party, and anyone who wishes taxation on another scale must take care that it is mentioned in the interlocutor. As to that there is no doubt. But upon inquiry there seems to be as little doubt as to the rule in the present case. The finding of expenses here really means taxation as between agent and client, because there is, in the proper sense of the word, no question of party against party. The petitioner here was not found entitled to expenses because he had been in any sense successful against his only opponent the liquidator. As a matter of fact, so far from being successful he was really unsuccessful, because while he contended that the order should be for compulsory winding up, the liquidator contended, and with success, that it should be a supervision order. He was not found entitled to expenses as having been the victor in a litigation against another party. He was found entitled to expenses because it was his petition that initiated the whole matter and really formed the true basis of the liquidation, although technically it was found in this particular instance convenient to write on the other petition.

Now in this case the truth is there is no question of party against party to whom the rule is to apply. Accordingly I think the Auditor here has done according to the ordinary practice, and according to the right practice, in allowing this petitioner the expenses he has incurred so far as reasonable—that is, his expenses taxed as between agent and client.

Lords M'Laren, Kinnear and *Pearson* concurred.—15*th October* 1907.

Counsel for Petitioner, A. A. Fraser; Agent, William Calder, Solicitor.—Counsel for Liquidator, J. A. T. Robertson; Agents, Inglis, Orr & Bruce, W.S. W. A. R.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Low.*)

157. Patullo *v.* Caithness Flagstone Company.

Expenses — Company—Liquidation—Competing Petitions for Winding Up Order and for Supervision Order—Petition for Supervision Order Granted—Held Expense of Presenting Unsuccessful Petition for Winding Up Order But Not of Subsequent Proceedings Therein Should Form Part of Expenses of Liquidation.

Petitions for Winding Up Order and for Supervision Order.

On 29th July 1907 James Adam Pattullo, S.S.C., Edinburgh (hereinafter called "the petitioner"), presented a petition to have the Caithness Flagstone Company Limited (hereinafter called "the respondents"), wound up by the Court.

On 30th July 1907 an extraordinary general meeting of the shareholders of the Caithness Flagstone Company passed an extraordinary resolution that the Company should be wound up voluntarily. Mr Thomas Dingwall, C.A., Edinburgh, was appointed liquidator. On 12th August 1907 the company and the liquidator presented a petition to have the voluntary liquidation placed under the supervision of the Court.

Answers were lodged to both petitions.

At the hearing it was stated that the parties were agreed that the voluntary liquidation should be continued under the supervision of the Court, but the petitioner moved that Mr Dingwall should be superseded by a liquidator to be appointed by the Court.

The Court having held that Mr Dingwall

should not be superseded, counsel for the petitioner moved that the expenses of the petition for a winding up order should form part of the expenses of the liquidation. He cited *Pattisons Ltd.* v. *Kinnear*, 1898, 1 F. 551; *Drysdale & Gilmour* v. *Robertson*, 1890, 18 R. 98; *Ballachulish Slate Quarries Co. Ltd.*, *supra*, p. 397; *Elsmie*, 1906, 8 F. 434.

Counsel for the respondents opposed the motion.

The Court found the petitioner entitled to expenses up to 12th August, and found that these formed expenses in the winding up, and remitted the same to the Auditor to tax and to report.

The Lord Justice-Clerk.—We allow the expenses of initiating the petition for a judicial winding up, but not of any after proceedings.—22*nd October* 1907.

Counsel for the Petitioner, Murray, Lyon Mackenzie; Agents, M'Neill & Sime, S.S.C.—Counsel for the Respondents, Hunter, K.C., D. Anderson; Agents, John C. Brodie & Sons, W.S.

J. S. M.

OUTER HOUSE

(*Lord Dundas.*)

158. **M'Ewan** *v.* **M'Ewan,** *et e contra.*

I. Husband and Wife—Divorce—Desertion—Act 1573, cap. 55—"Reasonable Cause"—Opinion per Lord Dundas that No Defence is Good as an Answer to an Action of Divorce for Desertion which Falls Short of What Would Suffice to Support an Action of Judicial Separation.

II. Husband and Wife—Divorce—Desertion—Act 1573, cap. 55—Inclusion in Four Years of Period During which Wife was Prosecuting Bona Fide Action of Judicial Separation on Ground of Cruelty.

III. Husband and Wife—Divorce—Desertion—Act 1573, cap. 55—Negotiations Between Parties During Four Years with View to Resumption of Cohabitation—Offer by Wife to Resume Cohabitation—Negotiations Broken off—Held that Running of Four Years Not Interrupted.

IV. Husband and Wife—Divorce—Desertion—Act 1573, cap. 55—Privy Admonitions—Repeated Requests at Beginning of Four Years by Husband to Wife to Resume Cohabitation—Subsequent Agreement Between Parties Declaring Husband's Desire to Resume Cohabitation—No Subsequent Communication between Parties—Held that Husband had Sufficiently Performed his Duty of Expressing to Wife his Desire to Adhere.

(*Reported ante, Vol. XIV. p.* 927.)

The circumstances of the cases sufficiently appear from the previous report and the Lord Ordinary's Opinion.

The Lord Ordinary granted decree of divorce in the action at Mr M'Ewan's instance, and absolved Mr M'Ewan from the conclusions of the action against him at Mrs M'Ewan's instance.

Lord Dundas (husband's action).—This is an action by a husband against his wife for divorce upon the ground of desertion. The parties were married on 19th December 1900; the defender left her husband's house on 28th September 1901; and they have never since lived together. The action was raised on 18th July 1906. It is thus an admitted fact that the parties have lived apart for more than four years prior to the action. The main question is whether or not the defender had reasonable cause for remaining away from her husband during that period. The case is one of the utmost importance to the parties. I have heard a long and exhaustive proof, and able arguments by counsel; some, though not, I think, all of the points of fact and law involved present considerable difficulty. I have therefore studied the case with great care and anxiety. I have come to the conclusion that the pursuer is entitled to the decree which he seeks.

When the case was in the Procedure Roll, a question of law was raised as to which, on 20th March 1907, I reserved my opinion for reasons then expressed. On 13th December 1902, Mrs M'Ewan brought an action of separation and aliment against her husband, in which the Lord Ordinary (Low) on 8th December 1903 assoilzied the latter. A reclaiming note was presented, but the case went no further, in consequence of an agreement between the parties to which I shall have to refer later. The question as to which I reserved my opinion was whether or not a valid defence to this statutory action for divorce for desertion may be based upon grounds insufficient to afford the defender success in her action for separation and aliment. In the view which I hold of the present case, it is not necessary for me to decide that question, because I am of opinion, for reasons which I shall explain, that even if it be answered in the affirmative the defender has not made out any sufficient case of "reasonable cause" for absenting herself from her husband. But as the question is interesting and important, and as this case may go further, it is right that I should state my opinion upon the legal point. No defence, in my judgment, will be good as an answer to a statutory action like the present, or to an action of adherence at common law, which falls short of what would be sufficient to support an action of judicial separation by the absenting spouse against the other. This question was fully canvassed, though not decided, in the well-known case of *Mackenzie*,

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1893, 20 R. 636, affd. 1895, 22 R. H.L. 32. In the Court of Session a majority of the judges seem to have thought that what is "reasonable cause" within the meaning of the Act 1573, cap. 55, is a jury question for the judge or judges in each case as it arises; and that it may consist in something less than would be sufficient as a defence to an action of adherence. The latter view was, as I gather, distinctly negatived in the House of Lords, at all events by Lord Watson (22 R. at pp. 40, 41). But his Lordship seems (at p. 42) to have treated as an open question for future decision whether or not, in an action of adherence, a wife can successfully defend herself upon any other grounds than would be required in order to sustain an action at her instance for separation and aliment. I am content to express my entire concurrence in the opinion of Lord Rutherfurd Clark in *Mackenzie's* case, the reasoning of which appears to me to be irresistibly sound. There is not much authority upon the point. Lord Rutherfurd Clark refers to the weighty *dictum* of Lord President Inglis in *Chalmers*, 1868, 6 M. 547, and to the direct decision in *A. B.* v. *C. D.*, 1853, 16 D. 111 (the word "resist" in Lord Rutherfurd Clark's quotation from the interlocutor in *A. B.* v. *C. D.* is a misprint for "insist on"). To these one might add Fraser on the Personal and Domestic Relations (1846), p. 448 and p. 684. On the other hand, it must be noted that Lord Fraser in his later book (Husband and Wife, Vol. II. p. 873) seems to have altered his opinion; and that Lord Watson (22 R. H.L. p. 42) was "unable . . . . to regard the case of *A. B.* v. *C. D.* as an authority of weight."

[His Lordship here proceeded to examine the evidence as to the conduct of parties up to 28th September 1901, when the defender left her husband's house and never returned.]

If my views upon the evidence are, up to this point, correct, it follows, in my judgment, that the defender had not, when she left her husband's house, reasonable cause for permanently absenting herself from him contrary to his desire. The evidence, in my opinion, falls far short of anything which has been hitherto held in our law to amount to legal cruelty or *saevitia*. . . . If again (contrary to my opinion), something short of *saevitia* may do as a defence to an action like the present, it appears to me that what is here proved ought not to be held sufficient. . . .

I now come to consider the events which have happened since 28th September 1901, and I do so in the light of what, according to my view, had occurred previously. On 4th November 1901 Messrs Drummond & Reid wrote to the pursuer the letter to which I have already referred, alleging "a long and systematic course of cruelty carried on" by him towards his wife and asking him to agree to a voluntary separation. The pursuer handed this letter to his agent, who replied to it on the 8th, stating that he was making enquiries into the matter. Mr Robson's enquiry was careful and methodical, and occupied a considerable time. On 4th March 1902 he replied to Drummond & Reid, denying absolutely the charges of cruelty, or that any ground for separation existed, and stating that the pursuer desired that, as soon as the defender was sufficiently recovered from her recent confinement, she should return to her home, along with the child. On 7th March Messrs Drummond & Reid wrote that "Mrs M'Ewan remains of the same mind as when she instructed us to write the letter of 4th November last to Mr M'Ewan, and . . . . cannot agree to the proposal you make that she should return to live with Mr M'Ewan." This is a very clear declinature to adhere, and the pursuer dates the commencement of his wife's desertion of him from this time, though he pleads alternatively a day in July 1902. I do not think that the effect of the letter in this aspect is materially diminished by the fact that Mrs M'Ewan was admittedly too weak and ill on 7th March to have been able to rejoin her husband. That was not the "proposal" which had been made, in which her return was made expressly conditioned upon her being sufficiently recovered to allow of her being removed with safety; and Messrs Drummond & Reid's rejection of the "proposal" is absolute, and not based upon the state of her health at the time. The child, it appears, was born at Dalmeny on 27th February 1902. . . . On 21st June an important letter was written by the pursuer's agents to Messrs Drummond & Reid, in which he expressed the pursuer's continued desire that his wife should return and live with him, and his willingness—immediately on learning that Mrs M'Ewan agreed to come back—to make a home for her as soon as possible, and meanwhile to arrange for their living together in suitable apartments. Prior to this, on 11th June, the pursuer had written to his wife in affectionate terms, the sincerity of which I do not in the least doubt. The reply he got was from Mr Jones, the defender's father, on 16th June, written in the third person, and briefly informing him that his wife had gone to Glasgow to consult a specialist, and would probably be there for some time. This announcement produced a letter from Mr Robson to Mr Jones of 21st June, which speaks for itself. On 8th July Messrs Drummond & Reid wrote to Mr Robson asking for "a definite reply to the matters referred to in our letters. (1) A voluntary separation; (2) custody of the child; and (3) aliment for Mrs M'Ewan and her child." This letter was crossed in the post by a letter from Mr Robson to the defender's agents repeating his client's desire that his wife should return, and adding "as he has not only offered, but has urged this, and is willing thus to maintain and

provide for her, he declines to furnish her with separate aliment." The pursuer takes 8th July 1902 as the date at which, at the latest, the defender's desertion must be held to have commenced. On 12th August the pursuer and his wife had a personal meeting, and on the 16th he wrote her an affectionate letter. Again, on 7th October, a meeting took place at the defender's request, at which, as appears from a letter by the pursuer's agents dated on the 8th, "Mrs M'Ewan stated that she was prepared, as soon as she was stronger and sufficiently recovered, to return to live with her husband and try to be happy together." On 3rd November the defender called upon Mr Robson, who gives a distinct account of the interview. On the 6th Mr Robson wrote to the defender, informing her that the pursuer had taken a house in Warrender Park Crescent, which she had recently seen with him, and would have it put in order and furnished without delay, so that she might return to and resume living with him; and asking her to meet the pursuer on an early day in order to select papers and colours for the rooms. The letter concludes: "I am also instructed to say that, as you have already been informed, he wishes that neither your sister nor any member of your family should visit at or come to the house." It was the fact that the pursuer had expressed this wish, which I do not think was, in the circumstances, unwise or unreasonable, at all events as regarded the immediate future. The defender's reply, written on 7th November, is a very important letter, as bearing upon a legal point argued by her counsel, to be afterwards referred to. She says: "I agree to the taking of the flat in Warrender Park Crescent. With regard to painting, furnishing, etc., will Mr M'Ewan be good enough to please himself, as, in the circumstances, it is a matter in which I have no interest. I have made up my mind that however Mr M'Ewan acts, or whatever he says, I will try living with him for the sake of my helpless little boy. I wish another meeting, which Messrs Drummond & Reid will arrange for me." The meeting desired by the defender was arranged for, and took place on the 19th. But, before that event, a most regrettable change of circumstances had arisen. A sharp disagreement had occurred between the defender and her sister on the one part and the nurse, whose duty it was to bring the baby daily to their lodgings, on the other part. The ladies allege that Nurse Archibald had been intolerably rude to them, and had even slapped Miss Jones's face. The meeting on 19th November, from which the pursuer, under his agents' advice, absented himself, and at which Mr and Miss Jones were present, was wholly taken up with this dispute. Mr Robson's letter of 21st November describes the situation, and announces that the pursuer declined, "in the interests of the child," to comply with the defender's request that Nurse Archibald should be dismissed; and on 24th November Messrs Drummond & Reid wrote that the defender "cannot go to the house in Warrender Park Crescent if the present nurse is to be retained. She is quite decided as to this." On the 27th Mr Robson wrote, adhering to the position which the pursuer, under his advice, had taken up upon this matter of the nurse. The negotiations between the parties for a permanent reconciliation broke down; and in December the wife's action for separation was raised. It cannot, I think, be denied that this rupture was a most unfortunate occurrence. The circumstances attending it have given me much anxiety. I confess that in my judgment the pursuer would have acted with more propriety if he had yielded to his wife's wishes, and got a new nurse for the child. It is not, to my mind, clear upon which side lay the justice of the dispute as to the conduct of Nurse Archibald. The evidence is conflicting. But in any case I think it is matter for regret that the pursuer did not yield upon the point. It is, however, a very different affair to conclude that, in not so yielding, he was guilty either of cruelty in the legal sense, or of such conduct as could justify his wife in refusing to come back to him. I cannot adopt that conclusion. A number of reliable witnesses speak to the nurse's excellent treatment of the child; it is, to my mind, doubtful whether she had been guilty of insolence towards the defender and her sister; the matter was *prima facie* one upon which the pursuer was entitled to judge; and I am convinced that his resolution —mistaken as I conceive it to have been—was arrived at conscientiously upon the advice of his agent, who was also his uncle, upon whom he relied implicitly, and not from any intention of wounding his wife, or being cruel to her. The judgment of Lord Low was pronounced on 8th December 1903. The agreement which has been referred to was signed on 9th and 11th January 1904. Since that time the parties have neither written nor spoken to one another. This action was raised on 18th July 1906.

The defender's counsel argued that, even if his client must be held to have been in "malicious and obstinate defection" in April or in July 1902, the pursuer's action fails, (*a*) because the defender had not been in such "defection" for a full space of four years prior to 18th July 1906; and (*b*) because the pursuer had not, during that period, sufficiently complied with the duty incumbent upon him of endeavouring to persuade her to return. The former of these arguments included two quite separate branches. It was argued, in the first place, that the defender cannot be held to have been in desertion during the dependence of her action for separation, which, although not successful, was raised and fought out in *bona fide*; and that the period—about a year—over which the litigation ex-

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tended, must be cut out and disregarded; the result being that the necessary space of four years has not elapsed. I know of no authority for this contention, and I think it is unsound. It seems to me to derive no support from the case of *Young*, 1882, 10 R. 184, which was cited, where a wife's action was thrown out as irrelevant, because it appeared that, during the last two years of the period of alleged desertion, her husband had been, and still was, in prison. As Lord Adam justly observed: "If during a part of that period the absence has been compulsory, it cannot, in my opinion, be affirmed to have been wilful." Nor does the recent English decision in *Craxton*, 8th May 1907, 23 Times L.R. 527, appear to me to aid the defender's argument at all. I remain of the opinion upon this point which I expressed on 20th March last. It was urged by the defender's counsel that, if this view is sound, in a case where a separation action had been so prolonged as to extend over four years, a wife might, at the end of it, be then and there divorced for desertion. I do not think this result could follow. She would always have a *locus pœnitentiae* to declare her willingness to adhere. On the other hand, if the defender's contention is sound, the result might, in the case figured, be that the husband would have to wait, not four but eight years for his decree.

The second branch of the defender's argument as regards the period of four years deserves, I think, more consideration, and raises what appears to me to be a delicate point, and one not covered by authority. Her counsel urged that the running of the statutory period was effectually interrupted because, during October and the beginning of November 1902, the parties were on friendly terms with one another, and on 7th November the defender wrote the letter to Mr Robson which I quoted some time ago at length. It was urged that the parties had thus "practically come together"; and that at all events on 7th November it could not be said that the wife was "remaining in malicious obstinacy." The point has caused me more anxiety than any other in the case; but upon the whole, I think that it is not sound. It has, I am aware, been often laid down that the remedy of divorce for desertion is a very peculiar and a purely statutory one; and that care must be taken not to unduly extend its application. But I think one must regard the general mental attitude of the defender during the period as a whole, and not pay undue heed to temporary signs of softening, unfortunately abandoned, and never ripening into actual adherence. I think the defender's expression of willingness to adhere, for the sake of her child, was always under some reservation as to an improvement in her own health and strength; and even the letter of 7th November expressly conditions that a further meeting should be arranged. Most regrettably, as I have explained, the scene had materially altered before that meeting took place, and the overtures of 7th November came to nothing. If I am right in holding that the defender was in wilful non-adherence otherwise during the period in question, I cannot hold that anything that took place during this temporary brightening of the horizon was sufficient to bar the currency of the statutory period.

The defender's remaining argument was based on the pursuer's alleged failure to fulfil his duty in the way of persuading his wife to return to him. During the earlier part of the time in question no such charge could, I think, possibly be maintained against Mr M'Ewan. I have alluded to his letters and his conduct. I think he was sincerely anxious to get his wife back, and made it abundantly clear to her that he was so. But after the separation case was over, an agreement, as I have already explained, was entered into, to which Mr and Mrs M'Ewan and Mr Jones were parties. The first article of this document recorded, as matter of declaration and agreement by all parties, Mr M'Ewan's adherence to his former position as regarded his wife, and a repetition of his request and desire that she should return to him. It is true that after the agreement was signed he never again wrote to his wife. It may perhaps be regretted that he did not; and if he had been left to his own impulse, I think he probably would have done so. But he was advised by Mr Robson, and the advice was, in my judgment, legally correct, that the clause to which I have referred was a standing offer to his wife to return, and needed no further repetition. In my opinion the pursuer was not, in the circumstances which I have detailed, bound to continue requests and entreaties which it seems clear enough must, if answered at all, have been answered in the negative. The limits of a deserted husband's duty in this regard were fully canvassed in the Whole Court case of *Watson*, 1890, 17 R. 736, where some difference of opinion arose. I think the question must be held to be largely one of circumstances. I assent to the view of Lord Kinnear in *Willey's* case, 11 R. 815, which was quoted with approval by the Lord President in the case of *Watson*, to the effect that in order to his success it is necessary that "the deserted spouse is desirous to adhere, and takes some intelligible method of expressing that desire to the offender." I cannot doubt that the pursuer here was throughout sincerely desirous to adhere, and that the defender thoroughly understood that he was so.

For the reasons which I have now stated I am of opinion that the pursuer is entitled to decree. . . .—19*th October* 1907.

Counsel for Husband, Cooper, K.C., Macphail; Agents, Millar, Robson & M'Lean, W.S.—Counsel for Wife, Dickson, K.C., Murray, Umpherston; Agents, Drummond & Reid, W.S. A. M.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Low and Ardwall.)

159. Home Drummond and Others *v.* M'Lachlan.

Process—Interdict—Interim Interdict—Subsistence of Interim Interdict—Held That Interim Interdict Once Granted Subsists Until it is Recalled by the Court and Does Not Fall by Implication on the Lodging of Answers in the Bill Chamber or of Notice of Appearance or Defences in the Sheriff Court—Dictum of L.J.C. Inglis in Hamilton v. Allan, 1861, 23 D. 589, Explained.

Appeal from the Sheriff Court of Clackmannan at Alloa.

This was a petition and complaint for breach of interdict brought by Lieutenant-Colonel Home Drummond of Blair Drummond and others, proprietors of salmon fishings in the river Forth, against Henry M'Lachlan, fisherman, Alloa.

It appeared that the petition for interdict had been presented on 18th August 1902, and that interim interdict had been granted on that date. Answers were lodged. The record was closed on 3rd October 1902. The interdict was made perpetual on 21st October 1903. In the meantime the cause had fallen asleep, no step having been taken therein between 3rd October 1902 and 7th October 1903. Accordingly the interlocutor of 21st October 1903 was inept.

On 28th November 1906 the Sheriff-Substitute (Dean Leslie) pronounced an interlocutor, whereby he, *inter alia*, found that the respondent had broken the interim interdict granted on 18th August 1902.

The respondent appealed to the Sheriff (Lees), who on 9th February 1907 recalled the Sheriff-Substitute's interlocutor, and found that the respondent had broken the interdict granted on 21st October 1903.

The Respondent appealed and *argued*: The interim interdict fell at the time when answers were lodged (*Hamilton* v. *Allan*, 1861, 23 D. 589, per L.J.C. Inglis at p. 591). There was therefore no subsisting interdict at the time of the alleged breach.

Argued for the Petitioners: If the interlocutor of 21st October 1903 were invalid, the interim interdict was still in force. An interim interdict subsisted until it was recalled by the Court (*Clippens Oil Co. Ltd.* v. *Edinburgh and District Water Trs.*, 1906, 8 F. 731). The *dictum* of L.J.C. Inglis in *Hamilton* v. *Allan* (*cit.*) was *obiter*, and was inconsistent with the practice of the Bill Chamber. It was every-day practice for the Lord Ordinary, on passing the note, to "recal" or "continue" the interim interdict. These interlocutors would be inappropriate if the interdict fell when answers were lodged.

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The Court *recalled* the interlocutors appealed against, and *found* that the defender had broken the interim interdict granted on 18th August 1902.

The Lord Justice-Clerk.—This case stands in somewhat a peculiar position, but as regards the merits I have no doubt. In using a drift net or a net as a drift net, the defender was plainly acting contrary to the interdict, whether interim or perpetual.

There remains, however, the question whether the judgment can stand notwithstanding the fact that the interlocutor which declared the interdict perpetual was pronounced in a process which had fallen asleep. At the time at which the Sheriff disposed of the case, I think he was probably right, and could not have considered the regularity of the former decree, but we are in a different position, for we have the former process before us and can see that it had gone to sleep. That being so, it is, I think, safer to revert to the judgment of the Sheriff-Substitute. But it was strongly pleaded, and with a considerable force, that there was no interim interdict any longer standing, because that had been brought to an end by the fact that the respondent had lodged answers; and in support of this the opinion of Lord President Inglis, then Lord Justice-Clerk, in *Hamilton* v. *Allan*, 23 D. 589, was referred to. Now if that case had been a clear decision to that effect, it would have had to be given effect to. But to read the opinion of Lord President Inglis in that way is to make it inconsistent with itself, and it must, moreover, be considered as having some relation to practice. There is no practice which suggests that the lodging of answers can take away the effect of a judgment of a competent Court. On the contrary, the practice is that, when interim interdict has been granted *de plano*, the Lord Ordinary, after answers have been lodged and parties heard, either passes the note to try the question and continues the interim interdict, or refuses the note and recals the interdict. Now, either to continue or to recal an interdict that has previously come to an end is impossible.

I see that the late Mr Antonio, who had, of course, great experience in such matters, gives in his book the procedure as "Intimation ordered and interim interdict granted. Answers lodged and parties heard. Note passed and interdict continued." The practice without doubt being so, and commending itself to common sense, it is inconceivable that an interdict can be set aside merely because answers are lodged. Accordingly I am of opinion that the interim interdict was standing at the time of the fishing in question.

I think we should recal the interlocutor of the Sheriff and revert to that of the Sheriff-

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Substitute, both as to his findings in fact and in law.

Lord Low.—I am of the same opinion. As regards the merits, the evidence appears to me to be perfectly clear, and to justify the interlocutor of the learned Sheriffs. The only matter of any difficulty in the case arises in consequence of certain *dicta* of the late Lord Justice-Clerk Inglis in the case of *Hamilton* v. *Allan*. I cannot help thinking that the report incorrectly sets forth what the learned Lord Justice-Clerk really said. The main question in that case was as to whether an interim interdict granted in the Bill Chamber upon presentation of the note and before answers were lodged, continued in force notwithstanding that the action had been allowed to go to sleep, and it seems to have been argued on behalf of the respondent that it would be a great hardship to him to have an interim interdict hanging over his head for an altogether indefinite period; and what the Lord Justice-Clerk pointed out was, that there was really no hardship, because the position of matters was due to the fact that the respondent had not lodged answers.

His Lordship is reported as having said that the interim interdict would have been brought to an end by the lodging of answers. I think that what was meant was, that if the case was one in which it was not just that interdict should be granted, the respondent might have asked for and obtained immediate recal if he had lodged answers. I think that that must have been what was meant, because I know of no rule of law or practice whereby the lodging of answers in itself operates the recal of an interim interdict previously granted, and I am confirmed in that view by the careful explanation of the effect of interim interdicts granted in the Bill Chamber, given by the present Lord President in the case of the *Clippens Oil Company*. I therefore think that the interim interdict here did not fall, and I agree that the safer course will be to revert to the judgment of the Sheriff-Substitute.

Lord Ardwall.—I agree with both your Lordships. The question as to the subsistence of the interim interdict would be important if there were any doubt about the practice. But so far as my experience, both as counsel and as judge, not only in this Court but in the Sheriff Court, extends, I never heard it doubted that where an interim interdict had once been granted it subsisted until it was recalled, and that it was not recalled by implication, in consequence of answers being lodged in the Bill Chamber, or by defences, or notice of appearance being lodged in process in the Sheriff Court. I have always understood that the true doctrine was that laid down by Lord Justice-Clerk Inglis in the first portion of his opinion in the case of *Hamilton* v. *Allan*, 23 D. p. 591. His Lordship quotes an interlocutor, which was in the ordinary form of the first deliverance in the Bill Chamber, and proceeds: "The meaning of that interlocutor is perfectly well known to every professional man. From the time when that interlocutor was pronounced and until the application is disposed of, the party is under an interdict to the extent and effect craved in the bill of suspension, and it 'lies with him to remove that interdict by lodging answers as ordered by the interlocutor." So far there is little difficulty as to the meaning of his Lordship's words, but further on in the opinion he is reported to have spoken as follows: "It is in vain to say that this is any hardship on the respondent in an application for interdict; he has it in his power to bring the interim interdict to an end whenever he chooses, by lodging answers. The interdict is then at an end, and requires to be renewed, and unless it is then renewed by another deliverance, the respondent is no longer under interdict." Now it is plain that, if the latter part of this *dictum* has the meaning contended for by the appellant, there is a contradiction between the two portions of the opinion. I think we must reconcile them in some reasonable way, and that the true explanation is that the Lord Justice-Clerk lays down the general rule in the first part of his opinion, and that in the latter part he points out that if the party wishes to get rid of the interim interdict, lodging answers is the proceeding which gives him a *locus standi* to discuss the question and to get rid of the interim interdict.

I am unable to doubt that that is what the Lord Justice-Clerk meant, and I am confirmed in this opinion by what fell from the present Lord President in the *Clippens Oil Company* case. He points out that the practice in the Bill Chamber as to the subsistence of interim interdicts was always the same as we now understand it, although procedure by note has been substituted for procedure by bill. Further, in an excellent work by the late Mr Antonio, Clerk of the Bills, on the practice of the Bill Chamber, it is set forth as the usual procedure that, on the note being passed, the interim interdict is continued. That implies that, at the time when the note is passed, there is a subsisting interdict, because it would be absurd and futile to issue an interlocutor continuing an interdict if the interdict had fallen the moment answers were lodged, for in that case there would be no existing interdict capable of being continued. Accordingly I have no doubt that, when interim interdict has once been granted, it subsists until it is recalled by a competent Court or judge.—19*th October* 1907.

Counsel for Petitioners, Blackburn, K.C., Lord Kinross; Agents, Dundas & Wilson, C.S.—Counsel for Respondent, W. Thomson, J. Macdonald; Agents, Lindsay Cook & Dickson, Solicitors.

J. S. M.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

160. Millar and Another *v.* Millar's Trustees and Others.

Succession—Liferent and Fee—Will—Construction — Repugnancy — Direction to Trustees to Divide Residue into Shares for Children Nominatim — Subsequent Direction to Invest Shares of Two Children and Pay Beneficiaries Alimentary Liferent Only—Circumstances in which Held that Trustees Bound to Hold Shares for Liferent only of Beneficiaries, and Beneficiaries Not Entitled to Immediate Payment of Shares.

The object of this Special Case was to obtain an interpretation of certain provisions in the testamentary settlement of the late George Winton Millar. The testator died on 31st March 1895, survived by a widow and by nine children. By trust disposition and settlement, dated 28th February 1891, the deceased conveyed his whole means and estate to trustees for various purposes. The fourth purpose contained the provisions in question, which are in the following terms:—

On the death of the survivor of me and my said wife, I direct my trustees to divide the whole residue and remainder of my means and estate into nine equal shares, being one share for each of my following children, *videlicet*—Helen Millar or Somerville, wife of David Somerville, Scotland Street, Edinburgh; Jessie Millar, Jane Millar, Marion Winton Millar, John Millar, George Millar, William Millar, Thomson Millar, and Thomas Millar; and my trustees shall invest in their own names the shares of my said daughters, and shall pay to them during their respective lives the free annual interest or produce thereof for their liferent alimentary use, and the fee of said shares shall, on the death of my said daughters, respectively be paid or made over to their respective children, equally among them if more than one, and that on each child attaining twenty-one years of age, or, in the case of daughters, on being married, whichever event shall first happen. . . . With regard to the shares of my sons the said John Millar and George Millar, my trustees shall invest the same in their own names, and shall pay to my said two sons, or expend for their behoof, in such way, by such instalments, and at such times as my trustees in their discretion shall think best, the free annual interest or produce thereof for their liferent alimentary use respectively: But notwithstanding the foresaid provisions for the shares of my said daughters, and of my said sons John and George, being liferented by them, my trustees shall have power in their discretion to pay to each of them out of the capital of their shares a sum not exceeding four hundred pounds, if my trustees consider that such payment may be for the benefit and advancement in life (my trustees being the sole judges on this point) of my said daughters and my said two sons, or any of them. . . . And it is hereby declared that the foresaid provisions in favour of my children and their issue shall not vest in them or any of them until the death of my said wife in the event of her surviving me, and that if any child shall die either before or after me, leaving lawful issue, and without having acquired a vested interest in such provision, such issue shall be entitled to the share or shares, original and accruing, which their parent would have taken by survivance, and the share of any child dying without leaving lawful issue shall be divided among the surviving children, and the lawful issue of such children as may have died leaving such issue, in equal shares, *per stirpes*; but any sum which may accrue to my daughters and said sons John and George, under this provision, shall be held by my trustees for their liferent use only, as above provided, with reference to their original shares.

The testator's widow died on 8th June 1906. The parties to this case were the said George Millar and the *curator bonis* of the said John Millar of the first and second parts respectively; and the testamentary trustees and the remaining seven children of the deceased of the third and fourth parts respectively. The first and second parties contended that the intention of the testator and the effect of the said deed was to make an absolute gift to the first party and to John Millar of a right of fee of one-ninth share of the residue of the trust estate respectively, and that the provisions of the deed were ineffectual to limit their respective interests to a right of liferent merely. They further contended that the trustees were bound to make an immediate division of the estate amongst the testator's children, and to pay over to the first parties their respective one-ninth shares. The third parties contended that they were neither bound nor entitled to pay to the first and second parties respectively more than the liferent of one-ninth share of the fee of the trust estate. The fourth parties adopted the contention of the third parties.

The following questions were submitted to the judgment of the Court:—

1. Did the first party and the said John Millar, on the death of their mother, each acquire a vested right to the extent of one-ninth share of the fee of the residue of the testator's estate, or are their respective rights limited to a liferent of one-ninth share of said fee?
2. If the first branch of the first question is answered in the affirmative, are the first party, and the second party, as *curator bonis* of the said John Millar, each entitled to immediate payment of one-ninth share of the fee of said residue?
3. If the first branch of the first question is answered in the negative, to whom does the fee of said shares of residue belong?

Argued for First and Second Parties.—The direction to divide was equivalent to a direction to divide and pay, and in the absence of a disposal of the fee otherwise it must be held that there was a gift of an absolute fee (*Jamieson* v. *Lesslie's Trs.*, 1889, 16 R. 807; *Hargrave's Trs.* v. *Schofield*, 1900, 3 F. 14). This being so, the

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Millar and Another v. Millar's Trustees and Others.

clause restricting the interest to one of liferent is ineffectual (*Wilkie's Trs.* v. *Wight's Trs.*, 1893, 21 R. 199, following *Miller's Trs.*, 1890, 18 R. 301).

Argued for Second and Third Parties.—There was no gift of fee in terms, and it was clear from the subsequent provisions of the deed that the testator's intention was to give a liferent only. The rule of *Miller* only applied where the gift of fee was held to be absolute (*Tweedale's Trs.*, 1905, 8 F. 264; *Forest's Trs.*, 1904, 7 F. 142; *Anderson's Trs.*, 1904, 7 F. 224).

The Court *found* that the trustees were bound to hold the shares in question for the liferent alimentary use of the first and second parties with the discretion as to payment of capital expressed in the fourth purpose of the testator's settlement, and that the first and second parties were not entitled to an immediate conveyance of said shares, and declined to answer the further questions put.

The Lord President.—Mr John Millar left a family of nine children. By his trust disposition and settlement he directed his trustees "to divide the whole residue and remainder of my means and estate into nine equal shares, being one share for each of my following children, *videlicet*—Helen, Jessie, Jane, Marion, John, George, William, Thomson and Thomas." He then directed the daughters' shares to be invested for their liferent alimentary use, with the fee to their children. The will continues:—"With regard to the shares of my sons the said John Millar and George Millar, my trustees shall invest the same in their own names and shall pay to my said two sons, or expend for their behoof, in such way, by such instalments and at such times as my trustees in their discretion shall think best, the free annual interest or produce thereof for their liferent alimentary use respectively: But notwithstanding the foresaid provisions for the shares of my said daughters and of my said sons John and George being liferented by them, my trustees shall have power in their discretion to pay to each of them out of the capital of their shares a sum not exceeding £400 if my trustees consider that such payment may be for the benefit and advancement in life (my trustees being the sole judges on this point) of my said daughters and my said two sons or any of them." There is then a clause providing that no share shall vest in any child until the death of the survivor of the spouses, but that the share of any child predeceasing the period of vesting leaving issue shall go to such issue, or, if there be no issue, to his surviving brothers and sisters. This clause concludes: "But any sum which may accrue to my daughters and said sons John and George under this provision shall be held by my trustees for their liferent use only, as above provided with reference to their original shares." The truster's son George and the curator of his son John are the first and second parties to this case, and they ask the trustees to denude themselves of the portions of the trust estate held on their behalf, and to pay the same to them now. This is resisted by the trustees, on account of the direction to hold these shares for these sons in liferent only. This is one of the class of case of which there are many examples in the Books and regarding which it has been said that one case cannot be taken as an authority for another. But from these decisions I think one or two general rules may be gathered which will be of assistance in determining the present case. In the first place, it is quite settled that if a testator begins by conferring an undoubted and unrestricted fee, any subsequent expressions in the deed seeming to limit the fee will be disregarded on the ground of repugnancy. Of course a testator may change his mind either in a later deed or in a later part of the same deed, but where the gift and the limitations fall to be read together, the rule of construction will be as I have indicated. There is also another rule that where an undoubted fee has been conferred on a beneficiary, trust management will not be kept up where it is unnecessary. But neither of these rules, in my opinion, applies in the present case, for here there is no direct gift of fee to these beneficiaries, nor do I think that any such gift can even be inferred from the terms of the will. I do not doubt that, if there were nothing more, the direction to divide the estate into shares, "being one share for each of my following children," might be construed into a gift of fee. But here there is something more. The direction to divide merely concerns the number of parts into which the estate is to be apportioned, and the truster then proceeds to say what is to be done with each share. He first deals with the daughters' shares, and then directs his trustees to hold the shares of his sons John and George for their liferent use only. So I do not think that this case falls under the decision in *Wilkie's Trs.*, 21 R. 199. The matter becomes still clearer if we look at the clause dealing with lapsed shares, the reference in which to the directions regarding original shares shows that the truster did not intend these sons to have immediate payment of their portion of his estate.

I do not think that the questions of law can be answered as stated either in the affirmative or the negative, as that would involve a decision as to the fee of these shares which we are not able to come to at present, seeing that all the parties who might have an interest in the matter are not before us. I therefore think that a finding should be pronounced in accordance with the opinion which I have expressed.

Lord M'Laren.—We are only concerned in this case with two out of the nine shares into which the testator directed that his estate should

be divided. As to these shares the question arises whether the interest given to the testator's sons John and George is limited to an alimentary liferent or whether it extends to the capital or fee. Now, where there is a gift of an unqualified liferent and also an unqualified gift of fee to the same beneficiary, I suppose it is not doubtful that the right of the donee is the right of a fiar, because the lesser interest expands and is merged in the fee. Again, if the gift of fee is qualified only by some contingency, and that contingency is purified, the result is the same. This is the principle of the decision in *Miller's* case and in the other cases consequent upon it. The principle was enunciated by the Lord President in that case where he says "that where by the operation of a testamentary instrument the fee of an estate or parts of an estate has vested in a beneficiary, the Court will always, if possible, relieve him of any trust management which is cumbrous, unnecessary or expensive." But his Lordship is careful to add: "Where there are trust purposes to be served which cannot be served without the retention of the vested estate or interest of the beneficiary in the hands of the trustees the rule cannot be applied, and the right of the beneficiary must be subordinate to the will of the testator." It has never been held that in the case of the gift of an alimentary life interest in an estate with a gift of the fee which subsequently comes to the same beneficiary, the principle of *Miller* will apply to the effect of excluding the operation of trust purposes intended for the beneficiary's protection.

For the purposes of this case I think it is enough to say that in quite plain terms there is a direction to the trustees to invest the shares of his sons John and George in their own names, and to pay to the two sons, or expend for their behoof, in such way, by such instalments and at such times as the trustees in their discretion should think best, the income thereof for their liferent alimentary use. I am of opinion that, whether these sons have the fee or whether the fee is in the next of kin, the trustees must meanwhile pay over the income of these shares under the testamentary directions.

I agree with your Lordship that we cannot at present say whether the fee will go to the heirs of John and George or to the testator's heirs in intestacy, for there is not an eventual gift of fee to these sons except in so far as an inference to that effect may be drawn from the subsequent provision to the effect that in certain circumstances the sons may have advances out of capital.

Lord Kinnear.—I agree with your Lordship that the questions in the case are not put in such a form that a direct answer in the affirmative or negative would correctly determine the rights of parties, but the decision which your Lordship proposes entirely satisfies the difficulty which had occurred to me in that respect. The first question is not properly stated any more than the third. The true question in the case is raised by the contentions of the parties as set forth in Cond. 7. "The first party and the second party contend that the intention of the truster was to confer on the first party and on the said John Millar the sole right and title to and beneficial interest in the fee of one-ninth part or share of the residue of his whole means and estate in each of them; that the provisions of the trust disposition and settlement make an absolute gift to the first party and to the said John Millar of a right to the fee of one-ninth part or share of said residue, and are ineffectual to limit their respective interests to a right of liferent merely"; and as a consequence of that contention they maintain further that the trustees "are bound immediately to divide the estate among the testator's children and to pay or convey to the first party, and to the second party as *curator bonis* of the said John Millar, their respective one-ninth shares."

Now, for the reasons your Lordship has stated, I am of the opinion that the first and second parties are not entitled to immediate payment of their shares. The truster has clearly directed his trustees to pay to these two sons the income of their shares for their alimentary use, and there is no direction to pay the capital. The inference to be drawn is clear enough in itself, and is strengthened when we consider the different way in which the truster directs his trustees to deal with the shares of his other sons, viz. that they are to be paid over at once. But not only is there no direction to pay over the whole shares in question here, but there is a direction to pay over, in the discretion of the trustees, a sum not exceeding £400 to each of the beneficiaries, if the trustees think fit. Now that appears to me equivalent to an express direction not to pay over more than £400, and, subject to the discretionary power to advance that amount, to hold the capital in their own hands, paying the income only to the two sons in question during their lives. For these reasons I concur with your Lordship.

Lord Pearson concurred.—16*th October* 1907.

Counsel for First and Second Parties, Welsh; Agents, Welsh & Forbes, W.S.—Counsel for the Third and Fourth Parties, Craigie, K.C., D. P. Fleming; Agents, R. H. Miller & Co., S.S.C.

W. A. R.

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A. B. v. C. D.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

161. A. B. *v.* C. D.

Administration of Justice—Law Agent—Duty of Law Agent who has Ceased to Act for a Party to a Cause.

Reclaiming Note against an Interlocutor of Lord Ardwall.

When this case, which was on the Short Roll of the First Division, was called in Court on 23rd October, counsel for the respondent alone appeared. He stated that the agents for the respondent had received intimation from the agents for the reclaimers that they had ceased to act for the reclaimers, but that they had intimated to their former clients that the case had been put out for hearing. Counsel also stated that the agents for the respondent had applied to these agents for the reclaimers' address, but that that had been refused, and the agents for the respondent had therefore been unable to give any intimation to the reclaimers personally.

The Court continued the case for two days and directed the Clerk of Court to write to the former agents of the reclaimers and require them to appear at the Bar on that date to explain their refusal to communicate the reclaimers' address.

At the next calling the agents appeared. The Lord President informed counsel who appeared for them that the Court was satisfied with an explanation which had been sent by letter to the Clerk of Court.

The Lord President added that he wished it to be clearly understood by agents practising in the Court that in every case in which they ceased to act for a party to a cause it was their duty to furnish the agents for the opposing party with the address of their former clients, if it was known to them, in order that intimation might be made by the opposite party, so as to enable that party to move the Court to proceed if further attendance was not made. His Lordship stated that the Court would not deal with the case on the footing that the reclaimers were before them, because they were told that intimation had been given by their former agents; that the intimation must be given by the opposing party.

The Court continued the case to 30th October, and ordered the respondent to make intimation to the reclaimers that the case would be called on that date, and of the motion which they would make to the Court in the event of no appearance being made by or on behalf of the reclaimers.

When the case was again called in Court on 30th October no appearance was made for the reclaimers. Counsel appeared for the respondent and stated that intimation had been given as ordered by the Court.

The Court *refused* the reclaiming note, with expenses.—30*th October* 1907.

Counsel for Respondent, D. M. Wilson; Agents, Fraser & Davidson, W.S. F. A. U.

FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

162. North British Railway Company and Glasgow and South-Western Railway Company *v.* Caledonian Railway Company.

Railway — Running Powers — Siding — Powers to Run Over Sidings Constructed at Commencement of Amalgamation Act or Renewals Thereof — Siding Constructed Prior to Act in Terms of Stipulation with Feuar of Steading of Ground from Railway —Siding Removed and Laid with Alterations to Premises of Subsequent Disponee of Subjects—Siding Held to be Renewal—Caledonian and General Terminus Act 1865 (28 & 29 Vict. c. clxvii.), sect. 15.

(*Reported ante, Vol. XIV. p.* 367.)

Reclaiming Note against an Interlocutor of Lord Ardwall.

The Defenders *reclaimed*, and *argued*: The Lord Ordinary's decision was based upon the similarity of purpose of the present and the original sidings. In no case should this consideration be the basis of decision. The question did not depend upon similarity of purpose, or indeed upon physical identity, but on the nature and incidence of the obligation under which it was constructed. The original siding was constructed under a personal agreement with Sim and came to an end in every sense upon the death of Sim. The present siding was constructed upon an application made by Messrs Slater, Rodger & Co. in the ordinary course as traders. The siding was also physically different.

Argued for the Defenders: There had been no discontinuity of user, and the running powers in 1865 were independent of the party to whom the crossing was primarily granted.

The Court *adhered.*

The Lord President. — My Lords, by the Caledonian and General Terminus Railways Amalgamation Act 1865 the Caledonian Railway Company took over the system called the General Terminus Railway; and as is usual in such amalgamations, various other railway companies

were given rights by some of the sections of the Amalgamation Act. In particular, by sect. 15, four railway companies, who, I may say, are represented by the present pursuers, were given running powers in these terms: that they might "run over and use all or any of the stations, sidings, or branches of the last-mentioned railways constructed at the time of the commencement of this Act, or any renewals thereof." The "last mentioned railways" there referred to include, *inter alia*, the General Terminus Railway. The plain meaning of that seems to be that what I may call the system of the General Terminus Railway, which was handed over to the Caledonian Railway Company by the Amalgamation Act, was subjected to running powers in favour of those other railway companies. They were to be allowed to run over that system, and it was provided that if the system at any time was renewed, they were still to have the same running powers over the renewed portion. It is obvious that it would have been no concession at all if at any moment when the rails got worn out in any portion of the system, and were replaced by new rails by the Caledonian Railway Company, the running powers ceased and determined. On the other hand, the running powers, of course, were limited to the General Terminus system, and did not extend to any new creations that the Caledonian Railway Company might afterwards make.

Now, the dispute in question has arisen over a certain siding, and the history of that siding seems to be this. Originally there was a long siding going to a place called Vermont Street, and from that there was a branch siding which went to serve some works, that at that time—I am now speaking of the time which ended in 1865, the date of the Amalgamation Act—belonged to a gentleman of the name of Sim. Subsequently Vermont Street really went out of existence, being superseded by a large depôt known as the Kinning Park Depôt; and accordingly part of the siding that went to Vermont Street was entirely abandoned, and the portion that went into Sim's works was still continued, although the actual direction of the rails was a little altered. In particular, instead of being only one branch it was bifurcated and made into two branches, and these two branches were prolonged into the works themselves, Sim having been succeeded by the Birkenshaw Coal Company. That was the state of affairs in 1895. In 1901 the Birkenshaw Company left the ground, and they were eventually succeeded by Messrs Slater, Rodger, & Co., who seem to have taken possession in 1903, and who are the present possessors of the ground. During the period after the Birkenshaw people left and Slater, Rodger & Co. came in, the siding was so far altered. The Birkenshaw Company took away the rails in so far as they were within their own ground, and the siding therefore became a sort of bifurcated end which approached the ground without actually entering into it. There seemed to be a little dispute between the parties as to whether this bifurcated end was actually used for the purpose of taking goods which went into the ground, or taking anything away from the ground; but in the view I take of it it really does not make any difference.

My Lords, I think the whole question is whether there really is identity of subject. I think it is perfectly clear that the question of who the private person was who used the siding, is neither here nor there. All sorts of people would use the sidings on the General Terminus system, and the running powers were not given merely so long as these sidings were used by the same people; they were given so long as there was identity of subject. My Lords, I come to the conclusion without any difficulty that here there is in the fair meaning of the words identity of subject. I do not think that the fact, if it be a fact, that for a short period the siding was, so to speak, disused, really alters the question. The siding now is what it originally was—namely, a siding for the use of those particular works connecting with the Caledonian Railway system at that point. I do not think it has lost its proper identity at all, and accordingly I think the conclusion the Lord Ordinary has come to is right.

Lord M'Laren.—I am of the same opinion, and have nothing to add.

Lord Kinnear.—I quite agree. I agree with the final sentence of the Lord Ordinary's opinion in which he says that the siding in question is, in his judgment, a renewal of the siding which existed at the same place and substantially in the same position in 1865.

Lord Pearson.—I am of the same opinion.—18*th October* 1907.

Counsel for Pursuers, Hunter, K.C., Macmillan; Agent, James Watson, S.S.C. — Counsel for Defenders, Clyde, K.C., Hon. W. Watson; Agents, Hope, Todd & Kirk, W.S. W. A. R.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Low.*)

163. Anderson's Trustees *v.* James Donaldson & Company Limited.

Company—Liquidation — Companies Act 1862 (25 & 26 Vict. cap. 89), sects. 87 and 163 —Leave to Proceed With Action Against Company in Liquidation — Diligence — Superior's Hypothec — Sequestration for Feu-Duty — Proceeding for Purpose of Making Available Security in Existence

2ND DIV. Anderson's Trustees v. James Donaldson & Co. Ltd.

AT DATE OF LIQUIDATION AS DISTINGUISHED FROM PROCEEDING FOR PURPOSE OF ACQUIRING NEW SECURITY — HELD SEQUESTRATION FOR FEU-DUTY NOT STRUCK AT BY SECTION 163 OF THE COMPANIES ACT 1862, AND LEAVE TO PROCEED GRANTED — ATHOLE HYDROPATHIC CO. LTD. v. SCOTTISH PROVINCIAL ASSURANCE CO., 1886, 13 R. 818, FOLLOWED—ALLAN v. COWAN, 1892, 20 R. 36, DISTINGUISHED.

Reclaiming Note against Interlocutor of Lord Ordinary on the Bills (Lord Mackenzie).

This was a Note presented by Peter Begg and others, the trustees of the late James Anderson, manufacturing chemist, Edinburgh, under sect. 87 of the Companies Act 1862, in which they prayed the Court to grant leave to proceed with an action of sequestration for feu-duty, which they had raised against James Donaldson & Co. Ltd., 157 Great Junction Street Leith.

The compearers averred:—

Upon 1st June 1907 an order was pronounced by the Court for winding up [the said] James Donaldson and Company, Limited. . . .

Upon 4th June 1907 the compearers raised an action of sequestration in the Sheriff Court at Edinburgh against, *inter alios*, the said James Donaldson and Co. Ltd. in liquidation, praying for sequestration of the whole moveables on All and Whole that area or piece of ground . . . . (here followed a description of the subjects), and the Sheriff having on 4th June 1907 granted warrant to cite and sequestrated, the petition and deliverance thereon were duly served on 5th June 1907, and the moveables were of that date inventoried by the sheriff officer.

The compearers are the superiors of the area of ground referred to, and as the liquidator declines to pay the half-year's feu-duty of £107, 10s. due at Whitsunday last, and to give security for the current year's feu-duty of £215, it is necessary, in order to give effect to the superiors' hypothec upon the moveables on the ground, to proceed with the said sequestration. . . .

The Companies Act 1862 (25 & 26 Vict. cap. 89) provides:

Sect. 87. "When an Order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the Company except with the leave of the Court, and subject to such terms as the Court may impose."

Sect. 163. "Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the Company after the commencement of the winding up shall be void to all intents."

On 25th July 1907 the Lord Ordinary on the Bills (Mackenzie) refused the prayer of the note.

The Compearers *reclaimed* and *argued*: No doubt proceedings taken for the purpose of acquiring a preference were void under sect. 163 of the Act of 1862, but that section did not bar proceedings which were taken for the purpose of making available a preference which was already in existence at the date of the liquidation (*Athole Hydropathic Co. Ltd.* v. *Scottish Provincial Assurance Co.*, 1886, 13 R. 818; *Holmes Oil Co.*, 1901, 8 S.L.T. 360; *In re Wanzer Ltd.* [1891], 1 Ch. 305). The superior's hypothec was constituted by his infeftment (2 Bell's Com., M'Laren's edition, pp. 26, 27; *Yuille* v. *Lawrie*, 1823, 2 S. 155, N.E. 140), and was thus in existence at the date of the liquidation. *Athole Hydropathic Co. Ltd.* v. *Scottish Provincial Assurance Co.* (*cit.*) was in point. *Allan* v. *Cowan*, 1892, 20 R. 36, was distinguishable, because the creditor in that case had only a preference in the ranking as distinguished from a preference by way of security. The superior had a security only with a higher right than the ordinary security-holder. Further sequestration for feu-duty did not fall under the word sequestration in the section (Bell's Dictionary, p. 976; Bankruptcy Acts, 1856 (19 & 20 Vict. cap. 79), sects. 3, 7, 107). The difference between the provisions of the Bankruptcy Act and those of the Companies Act was explained by the fact that there was no vesting of the Company's property in the liquidator. The fact that the action had been brought subsequent to the date of liquidation was not a good reason for refusing leave to proceed (*Stevenson & Co.* v. *Radford & Bright Ltd.*, 1902, 10 S.L.T. 82).

Argued for the Respondents: The superior's hypothec did not depend wholly on infeftment, because it was not made real without sequestration (Ersk., II. 6, 56 and 62). It was therefore not in existence at the date of liquidation, and the action, being an attempt to acquire a new security, was struck at by sect. 163 of the Companies Act 1862. *Athole Hydropathic Co. Ltd.* v. *Scottish Provincial Assurance Co.* (*cit.*) was distinguishable, because it was a case of poinding of the ground. The distinction between a preferential debt and a security was unsound; *Athole Hydropathic Co.* v. *Scottish Provincial Assurance Co.* (*cit.*) was therefore inconsistent with *Allan* v. *Cowan* (*cit.*), and was wrongly decided. This conclusion was supported by the fact that whereas the Bankruptcy Act 1856, sects. 102, 118, saved the remedies of superiors and heritable creditors, there was no similar provision in the Companies Acts. It was immaterial whether sequestration for feu-duty was a "sequestration" in the sense of sect. 163, because that section struck at all diligence (*In re Wanzer Ltd.* (*cit.*), *Radford & Bright Ltd.* v. *Stevenson & Co.*, 1904, 6 F. 429). In any view the action should not be allowed to proceed, because it had been commenced subsequent to the date of liquidation, in violation of sect. 87 of the 1862 Act.

The Court *recalled* the interlocutor of the

Lord Ordinary, *found* the sequestration at the instance of the reclaimers competent and authorised them to proceed therewith.

Lord Low.—I am of opinion that the interlocutor of the Lord Ordinary on the Bills must be recalled. I think the only question is whether the present case is ruled by the judgment in the *Athole Hydropathic* case, or that in the case of *Allan*. I think it is conceded that there is no substantial difference between the position of the creditor here and the creditor in the *Athole Hydropathic* case. There the creditor was an heritable creditor infeft in the lands, who was seeking, by the diligence of poinding, to make good the security which he had over the moveables upon the land. In this case the creditor is the superior, who is seeking to make good, by the diligence of sequestration, the security which he has of the moveables upon the land for arrears of feu-duty. It seems to me that for the purposes of this question the position of these two creditors was identical, because both of them had a right of security in regard to certain moveables, and in both cases what they were attempting to do was to make that right of security effectual by attaching the moveables. In the *Athole Hydropathic* case it was found that such a proceeding did not fall within the meaning of the 163rd section of the Companies Act of 1862. I recognise that the question raised in that case was one of very considerable difficulty, upon which different views might very well be held. But the case was fully argued in the First Division, and the judgment that was given was a considered judgment of Lord President Inglis, of Lord Shand, and of Lord Adam—a tribunal of unquestionably high authority—and the view which they took has been held to rule the law ever since its date some twenty years ago.

It is said, however, that the more recent decision of the same Division, in the case of *Allan*, really is not consistent with the view which was taken in the *Athole Hydropathic* case. As it happened, I was the Lord Ordinary in the case of *Allan*, and it seemed to me that it was ruled by the case of the *Athole Hydropathic*. But a different view was taken, and, I am now satisfied, was rightly taken, by the First Division, because the creditor in the case of *Allan* was the Collector of the County Assessments, and he founded upon a statutory provision to the effect that the debt for the assessments should be a preferable debt. I think that I was perhaps misled, to some extent, by the way the case had been put in the *Athole Hydropathic* case when it was said that the creditor was only seeking to make effectual a preference which he already had. But, as I have indicated, when that case is examined, the ground of judgment was that he was seeking to make effectual, not a preference in the sense of having a preferable debt, but a preference in the sense of having a security for his debt. Now in the case of *Allan* the creditor had no security for his debt whatever. He had merely a statutory declaration that, in the event of bankruptcy, his debt should be dealt with as a preferable debt. I am therefore satisfied that the First Division were quite right in holding that the case of *Allan* was not ruled by the previous case of the *Athole Hydropathic*.

I therefore think that the interlocutor reclaimed against should be recalled, and leave granted to the superior to proceed with the sequestration notwithstanding the liquidation of the debtors.

Lord Stormonth-Darling.—I entirely agree. I think that this case is precisely ruled by the judgment twenty years ago of the First Division in the *Athole Hydropathic* case.

The Lord Justice-Clerk.—I am of the same opinion. I must say that no two cases could be nearer to one another than the *Athole* case and this case. I think the one is practically the same as the other. And as regards the case of *Allan*, it distinguishes very clearly between such a case as we have at present and the case with which the Court were then dealing. It does so absolutely, and the decision in *Allan's* case in no way affects the decision of the First Division in the case of the *Athole Hydropathic*.

Mr Constable stated a very ingenious argument to the effect that if the decision to be given in this case was to be in accordance with the case of the *Athole Hydropathic*, certain logical consequences would follow in other cases. I do not know whether that is so or not, nor do I think it necessarily follows. But if it be true that certain logical consequences would follow, that is a matter for the legislature to deal with, and not for this Court. Therefore, although the argument of Mr Constable was very ingenious, we cannot go behind the case of the *Athole Hydropathic*.—26*th October* 1907.

Counsel for Compearers, G. Watt, K.C., C. H. Brown; Agents, W. & T. P. Manuel, W.S.—Counsel for Respondents, Constable; Agents, Davidson & Syme, W.S. J. S. M.

OUTER HOUSE

(*Lord Mackenzie.*)

164. Lafferty *v.* The Caledonian Railway Company.

I. Process—Act of Sederunt, 20th March 1907—Retrospective Operation—Held that Act of Sederunt Came Into Operation at Its Date Though Subject for a Period of 36 Days to Alteration by Parliament—Opinion that Act Would Apply to Action Raised Before Its Date.

Outer House. *Lord Mackenzie.* Lafferty v. The Caledonian Railway Co.

II. Expenses—Act of Sederunt, 20th March 1907—Appeal under Judicature Act 1825 (6 Geo. IV. cap. 120), sect. 40—Expenses in Sheriff Court—Pursuer Found Entitled to Half Only of his Expenses in Both Courts — Judge's Certificate.

The circumstances of this case are given in the Lord Ordinary's Opinion.

Lord Mackenzie.—This action was brought in the Sheriff Court at Glasgow, and was appealed under the 40th section of the Judicature Act to the Court of Session for jury trial. It is an action of damages for personal injuries, in which the pursuer recovered by the verdict of the jury a sum of £40. A motion was made on the pursuer's behalf to apply the verdict and find him entitled to full expenses. This was opposed by the defenders, on the ground that sect. 8 of the Act of Sederunt of 20th March 1907 applies, and that the pursuer is only entitled to one-half of the taxed amount, unless a larger proportion, not exceeding two-thirds, is certified for.

Counsel for the pursuer argued that the Act of Sederunt did not apply, as it did not come into operation until after the action was raised. This is plainly a bad objection. The action was brought on 20th April, and the date of the Act of Sederunt is 20th March 1907. No doubt the Act had thereafter to be laid before both Houses of Parliament, but it was only if either House resolved "that the whole or any part of such Act of Sederunt ought not to continue in force" that the whole or such part was to cease to be binding, from the date of the resolution. If there was no such resolution (which was the case here), then the Act continued in force from its date.

I should have been of opinion, even if the action had been brought before 20th March 1907, that the Act of Sederunt, dealing as it does with procedure, is retrospective in its effect.

It was further maintained that the Act of Sederunt did not apply to the expenses in the Sheriff Court. Sect. 8 provides: "Where the pursuer in any action of damages in the Court of Session, not being an action for defamation or for libel, or an action which is competent only in the Court of Session, recovers by the verdict of a jury £5, or any sum above £5 but less than £50, he shall not be entitled to charge more than one-half of the taxed amount of his expenses" unless the judge certifies for a larger proportion not exceeding two-thirds.

I am of opinion that this applies to the whole expenses in the cause, and is not limited to the expenses in the Court of Session. It has been decided that when a cause has been appealed under the 40th section of the Judicature Act for trial by jury, the Court may deal with it in the same manner as if it had originated in the Court of Session (*Cochrane* v. *Ewing*, 1883, 10 R. 1279). It then is an action of damages in the Court of Session, and in the absence of any qualifications of the general expression "the taxed amount of his expenses" in sect. 8, I am of opinion that it means the whole expenses in the cause.

It was contended that this was a case in which a certificate should be granted for the larger amount, viz. two-thirds. I have considered this and referred to the notes taken at the trial. I am clearly of opinion that this is not a case in which a certificate should be granted.

Accordingly the verdict will be applied, decree given in favour of the pursuer for £40, and a finding pronounced entitling pursuer to one-half of his expenses and remitting to the Auditor.—*26th October* 1907.

Counsel for Pursuer, A. M. Anderson, W. T. Watson; Agents, Oliphant & Murray, W.S.—Counsel for Defenders, King; Agents, Hope, Todd & Kirk, W.S. R. C. H.

OUTER HOUSE.

(*Lord Guthrie.*)

165. **Walter** *v.* **Campbell.**

Jurisdiction — Residence — Citation — Domiciled Scotsman Cited at Last Place of Residence in Scotland Within Forty Days of Leaving Scotland for Foreign Service — Judicature Act 1825 (6 Geo. IV. cap. 120), sect. 53.

This was an action of damages for breach of promise of marriage, in which the defender, *inter alia*, took the following pleas:—

"1. The defender, not being resident within Scotland, is not subject to the jurisdiction of the Court of Session.

"2. *Separatim*, the defender, being neither domiciled in Scotland nor resident there, is not subject to the jurisdiction of the said Court."

The admitted facts relative to this question are set forth in the Lord Ordinary's Opinion.

The defender *argued* that domicile did not of itself create jurisdiction in a petitory action, and at the time when the citation was made he was not *de facto* resident in Scotland. The pursuer had therefore no ground on which jurisdiction could be based, domicile not creating jurisdiction, and residence being absent. The pursuer thus relied solely upon sect. 53 of the Judicature Act 1825 (the purport of which is given in the Lord Ordinary's opinion) as creating jurisdiction; but that section related purely to citation and nothing else, and could only apply where jurisdiction had been established already.

In addition to the authorities mentioned in the Lord Ordinary's opinion the following were cited at the discussion:—*Tasker* v. *Grieve*, 1905,

8 F. 45; *Clarke* v. *Newmarsh*, 1836, 14 S. 488; *Brown* v. *M'Callum*, 1845, 7 D. 423; *Sinclair* v. *Smith*, 1860, 22 D. 1475; *Macdoual* v. *Dalhousie*, 1837, 16 S. 6; *Udny* v. *Udny*, 1869, 7 M. (H.L.) 89; and *Bell* v. *Kennedy*, 1868, 6 M. (H.L.) 69.

The Lord Ordinary *repelled* the pleas to the jurisdiction.

Lord Guthrie.—The defender Campbell was born in Scotland, son of a domiciled Scot. On 12th January 1907 he enlisted for seven years in the Royal Scots, subject to the ordinary obligations as to service with the regiment, wherever, at home or abroad, it might be ordered. Up to the morning of 14th January he resided with his parents at Hawthorn Cottage, Penicuik. On that morning he left Hawthorn Cottage for Shorncliffe, where he arrived in the afternoon of the 15th, and where he has since resided, in the course of his duty as a soldier. On the evening of the 15th a copy of the summons in the present case was left for him at Hawthorn Cottage. On that date the defender remained, as he had always been, a domiciled Scot.

In these circumstances the defender, whose only defence on the merits goes to amount of damages, pleads that he is not subject to the jurisdiction of the Court of Session.

The pursuer's case is founded on domicile, coupled with citation, at the defender's ordinary place of residence in Scotland, within forty days after he had left for England. The question would have been the same had the summons been left at Hawthorn Cottage thirty-nine days, instead of one day, after the defender left for Shorncliffe.

The defender does not dispute that, provided the Court had jurisdiction over him on 15th January, the citation left at a house in which he had resided within the previous forty days was good (*Joel* v. *Gill*, 1859, 21 D. 929, p. L.J.C. Inglis, 939, middle). He denies that he was subject to the jurisdiction of the Scotch Court on 15th January.

In *Buchan* v. *Grimaldi*, 1905, 7 F. 917, Lord Kyllachy said at page 922:—"Apart from the ownership of heritage or arrestment *jurisdictionis fundandæ causa*, residence and not domicile is what in ordinary actions determines the jurisdiction. Domicile—that is to say, domicile of succession—may be important in judging of the character of a residence or in questions of continuity. But while that is so it would not, I apprehend, be possible to sue, say, for debt, in the Scotch Courts, and to cite edictally a Scotsman who had resided abroad for many years, supporting the jurisdiction upon the ground merely that having been born in Scotland he had not yet lost his domicile of origin."

These observations must be taken subject to the rule which I think is implied in sect. 53 of the Judicature Act of 1825 (6 Geo. IV. cap. 120), namely, that a domiciled Scotsman who has left Scotland retaining his Scotch domicile, can be subjected to the jurisdiction of the Scotch Courts by citing him at his last known residence in Scotland within forty days of his leaving Scotland, provided he retains his Scots domicile at the time of citation. The rule was thus expressed by Lord M'Laren in *Corstorphine* v. *Kasten*, 1898, 1 F. 287 at page 297:—"If a domiciled Scotsman goes abroad for a short time for business or recreation, it is reasonable to assume that letters and papers left at his last known residence will be forwarded to him. Accordingly this would be a proper case for leaving the citation there. The difficulty is to find a period during which this address should continue, and that is solved by the Act of Parliament, which establishes a limited period of forty days." It does not affect the views thus expressed that the same case, correcting the decision of Lord Stormonth-Darling in the case of *International Exhibition* v. *Bapty*, 1891, 18 R. 843, shews that the rule has no application in the case of a foreigner.

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I therefore repel the defender's pleas 1 and 2. —26*th October* 1907.

Counsel for Pursuer, Mercer; Agents, Cunningham & Lawson, Solicitors.—Counsel for Defender, A. R. Brown; Agent, Robert Stewart, Solicitor.

C. H. B.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

166. James Kirkwood & Sons *v.* Clydesdale Bank and Another.

Banking—Cheque—Death of Drawer Before Presentment—Cheque Operating as Assignment of Funds Available for Payment Thereof—Credit Balance in Favour of Drawer on Account Current But Other Accounts Overdrawn, Though Guaranteed and Secured, to Amount Exceeding Credit Balance—Held No Funds Available—Bills of Exchange Act 1882 (19 & 20 Vict. cap. 60), sects. 53, 73, 75.

Appeal from the Sheriff Court of Lanarkshire at Glasgow.

This action was raised in the Sheriff Court of Lanarkshire at Glasgow on 22nd September 1905. On 4th January 1906 the Sheriff-Substitute (Balfour) assoilzied the defenders, the Clydesdale Bank. The facts of the case appear from the note to this interlocutor, which is in the following terms:—

Note.—This is an action at the instance of a firm of stockbrokers against the Clydesdale Bank for pay-

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ment of a cheque, dated 15th December 1904, for £1588, 8s. 7d., drawn by J. & G. Moffatt in favour of pursuers upon the Clydesdale Bank. On said date (15th December 1904) the cheque was handed by the pursuers to their bankers, the Bank of Scotland, for collection, and it was presented by the Bank of Scotland to the Clydesdale Bank on the morning of 16th December 1904, but payment was refused on the ground that Mr George Moffatt, the sole partner of J. & G. Moffatt, had died that morning. The pursuers aver that when the cheque was presented there was standing at the credit of Messrs Moffatt's ordinary working account with the defenders the sum of £3105, 10s. 6d., and there can be no doubt that, in terms of sub-sect. 2 of the 53rd section of the Bills of Exchange Act, the cheque in question operated as an assignation of the sum for which it was drawn.

The defenders, however, aver that on 16th December 1904 Messrs Moffatt were owing them the sum of £26,706, but with reference to this averment the pursuers deny that Messrs Moffatt were owing the defenders that amount, and in any case it is averred by the pursuers that, although that was so, the defenders held securities for the amount, and had placed said indebtedness to the debit of accounts in their books other than said account, at which there was the credit of £3105, 10s. 6d. By this averment I understand the pursuers to mean that there was standing at the credit of Messrs Moffat's ordinary working account, on which the said cheque is said to have been drawn (although it does not bear to be drawn on any special account), the sum of £3105, 10s. 6d., and the defenders placed the indebtedness for £26,706 to the debit of accounts in their books other than the said ordinary working account. I therefore apprehend that the pursuers base their claim upon the cheque in question being a cheque upon Messrs Moffat's ordinary working account, on which there was a credit balance of £3105, 10s. 6d., and that the defenders have no right to take into consideration the debt of £26,706 in a question with the pursuers, in respect that the defenders had placed said indebtedness to the debit of accounts in their books other than said ordinary working account.

I, however, know of no authority for holding that a bank is not entitled to take into consideration the total amount due by a customer to the bank when a cheque of that customers' is presented to them for payment. In other words, the Messrs Moffatt may have had an ordinary working account with the defenders, and they may have had other accounts in the defenders' books, and I am of opinion that the bank is entitled, when Messrs Moffatt's cheque is presented, to take into consideration the whole amount standing against Messrs Moffatt in their books. The bank would certainly have no right to mix up a personal with a trust account, but they would be entitled to take into consideration the whole accounts standing in their books against the customer, and retain the total amount against his cheques. It will not do to say that the cheque referred to in this case is on the Moffatts' ordinary working account, because, as I have already said, the cheque is not ear-marked at all, and it operates as a simple assignment of the drawer's funds in the defenders' hands, and the defenders aver that they have no free funds because Messrs Moffatt were owing them £26,706, and the mere fact of the defenders holding securities for that amount and placing the £26,706 to the debit of accounts in their books other than the working account is not a relevant consideration in this case. A customer might have several accounts with a bank, all in his own personal name, irrespective of any trust, and if that customer passed a general cheque upon his account, the bank would be entitled to hold the whole monies at his credit with the bank against the cheque. This view is well expressed in Wallace and M'Neil's book on Banking Law, at page 7: "Where several accounts are opened by one person under various headings, with the object that the sums paid into the respective accounts may be kept separate, the various accounts may be treated by the bank, so far as the relation of debtor and creditor between it and its customer is concerned, as being one to the effect that a debit balance in the one may be compensated by a credit balance in the other."

Another question arises as to the countermand of the cheque. By the 2nd sub-section of the 75th section, a cheque is countermanded by notice of the customer's death, not by the death itself, but by the notice of it. This case stands in a peculiar position on this branch of it. I cannot ascertain from the record if the defenders received special or formal notice of Moffatt's death, but I do not think that any such special notice is required. The pursuers say that payment was refused on 16th December 1904, on the ground that Moffatt had died that morning, and the defenders also say that payment was refused on the ground of Moffatt's death. Neither of them say if special notice was given to the defenders of the death, nor when it was given, but it is not disputed that Moffatt died that morning, and that the reason for the bank refusing to honour the cheque was that he had died, and for the purposes of this case it is sufficient that the defenders refused payment of the cheque on the ground that Moffatt was dead, and they must have known the fact before stating it. It is too narrow to contend that notice, formal or otherwise, was not given to the bank of the death—it was sufficient that Moffatt was dead, that this was known to the bank, and that the bank's authority was revoked.

The cases referred to were *Pedder* v. *Mayor of Preston*, 31 L.J., C.P. 291; *Garnett* v. *M'Kewan*, L.R. 8 Exchq., p. 10. The authorities were Hart on the Law of Banking, p. 194, and Wallace and M'Neil, already referred to.

By the Bills of Exchange Act it is provided as follows:—

Sect. 53. *Funds in hands of drawee* . . . . (2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder from the time when the bill is presented to the drawee.

Sect. 73. *Cheque defined.*—A cheque is a bill of exchange drawn on a banker payable on demand.

Sect. 75. *Revocation of banker's authority.*—The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by . . . . (2) notice of customer's death.

The pursuers *appealed* to the First Division of the Court of Session.

On the 7th December 1906 the Court appointed the pursuers to make intimation of the dependence of the action to the judicial factor on the estate of the late George Moffatt, and the record was subsequently opened and answers

lodged for the judicial factor. Certain additional averments were made on record, and the Court allowed a proof, to proceed before Lord Pearson. The import of the proof, so far as material, appears from the opinion of the Lord President.

Argued for the Pursuer: The bank was bound to make payment of the cheque out of the funds available on the current account, upon which account the cheque was drawn. When in the course of dealing the bank has been in the custom of honouring cheques drawn on a current account as long as there are funds available there, despite the fact that other accounts of the same customer are overdrawn, the bank is not entitled to refuse to honour cheques so drawn without notice, and third parties were entitled to rely on this rule (*Cumming* v. *Shand*, 1860; 5 Hurlstone & Norman 95; *Buckingham* v. *London & Midland Bank*, 1895, 12 T.L.R. 70). When a party holds a cheque in circle he is entitled to receive payment from the funds in bank to meet it. The authority of the banker to pay the cheque is determined by notice of the customer's death (Bills of Exchange Act, sect. 55); but when the banker had in his hands funds available for the payment thereof, it remained alive as an assignment of the sum for which it was drawn (sects. 73, 53 (2), and *Carruthers* v. *British Linen Bank*, 1883, 10 R. 923; *Bryce* v. *Young's Trs.*, 1866, 4 M. 312). In this case there were such funds available in the current account. Assuming that the bank was entitled to mass the accounts there were even so funds available. The banker was not entitled to plead no funds available unless he could shew the drawer to be his debtor on an accounting and realisation of the securities.

Argued for the Judicial Factor: The cases cited in the course of dealing, referred to the case of a living customer. The rule had not been applied to the case of a customer who died before presentment (*Thomas* v. *Howell*, 1874, L.R. 18 Eq. Ca. 198). The assignment could only be held to be to funds in bank generally, and on his account generally the drawer was debtor to the bank. The existence of security or guarantee was immaterial to the drawer's relation with the bank *qua* debtor and creditor.

Counsel for the Clydesdale Bank adopted the argument for the judicial factor.

The Court *affirmed* the interlocutor appealed against.

The Lord President.—The pursuers in this action are stockbrokers in Glasgow. In order to oblige a certain Mr Moffatt, now deceased—who wished a sum of money in London, and who had not himself got a bank account there—they gave Mr Moffatt a cheque upon a bank in London, and by that means put in Mr Moffatt's hands a document by which he could get the money in London. They were paid for that by taking from Mr Moffatt a cheque upon his Scottish bank, the Clydesdale Bank, with its office in Glasgow.

The pursuers, unfortunately, did not present that cheque at the moment, and before they did present the cheque Mr Moffatt had died, his death being sudden. The result of that was that naturally enough the Clydesdale Bank refused to pay the cheque when presented; and the present action is directed by the Messrs Kirkwood against the Clydesdale Bank for payment of the cheque. Now the pursuers cannot deny that, so far as the ordinary operation of the cheque was concerned, the Clydesdale Bank were perfectly within their rights, and it was according to their duty, to refuse payment of the cheque, because sect. 75 of the Bills of Exchange Act 1882 says perfectly clearly that "the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (1) countermand of payment, and (2) notice of the customer's death." It is not denied that at the time the cheque was presented the Clydesdale Bank had notice of the customer's death.

But the pursuers rely upon the second subsection of the 53rd section, which says:—"In Scotland where the drawee of a bill has in his hands funds available for the payment thereof the bill operates as an assignment of the sum for which it was drawn from the time when the bill is presented to the drawee." The pursuers say that the Clydesdale Bank had funds in their hands belonging to Mr Moffatt, and that accordingly this cheque being an intimated assignation of these funds, they are bound to make the same forthcoming. This statement of having funds in their hands belonging to Mr Moffatt the Clydesdale Bank deny; but the state of the facts as elucidated by the proof is this. Mr Moffatt, in accordance with a common practice, kept several accounts, and, using the nomenclature that is common in Scottish banking, these accounts may be described as Current Account, Loan Account, and various Cash Accounts. Now the Current Account is, as its name indicates, an account on which the ordinary transactions from day to day are made; and there is no question that this cheque was intended to be drawn upon that Current Account. In point of fact it was drawn, not by Mr Moffatt himself, but by a gentleman connected with his firm who had right to draw upon this account, and upon no other. The state of affairs as at the death of Mr Moffatt was that in the bank's books there was on that Current Account a credit balance in favour of the customer. But there were other accounts—namely, the Loan Account and various Cash Accounts; and in all of these, as was natural, there was a debit balance against the customer. There is no question whatever that the sum of these debit balances against the customer amounted to a sum much greater than the credit balance upon the Current Account.

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The Lord President.

It is quite true that against these debit balances upon the Loan and Cash Accounts the bank held various securities, partly consisting of stock and shares belonging to the debtor himself, and partly consisting of guarantees by various third parties, which guarantees for the purposes of the argument may be assumed to be good guarantees—that is to say, guarantees given by persons who if called upon are equal to meet the amounts. Now the argument therefore really has come to this—In the circumstances, is the bank's answer that it has no funds of Mr Moffatt a true one or not?

My Lords, I am of opinion that it is a true one. It seems to me that the state of affairs between a banker and his customer as at any given time must be taken to be the state of affairs upon all accounts, and the state of affairs on all accounts shews perfectly clearly that the bank did not owe the customer, but the customer owed the bank money. I do not think that fact is disturbed by either of the two considerations which have been pressed upon us by the counsel for the pursuers. One consideration is the question of what security the bank holds. That is a matter of very great moment for the bank, but none the less it does not seem to me to alter the relation of debtor and creditor as between the bank and its customer. That becomes very clear if you look at the security such as is given by an outsider—by a cautioner or by a guarantor. What is caution? It is not to pay money that you owe yourself, but it is to pay money that is owed by somebody else. In other words, the very hypothesis of a cautioner being called upon is that the customer is truly in the relation to the bank of a debtor and not a creditor. As little, I think, is the fact I have mentioned affected by the rule in support of which reference was made to the English cases of *Buckingham* and of *Cumming* v. *Shand*. That is the rule which lays down that a banker who is in the habit of honouring his customer's cheques to the extent to which he has funds at that customer's credit upon a current account is not entitled, without notice, at any moment, to turn round and refuse to honour these cheques because, as a matter of fact, there are other loan and cash accounts, and because, as a matter of fact, if all the accounts were massed the customer would be found to be a debtor and not a creditor. That seems to be common sense; and really it is a rule without which the ordinary banking practice with customers would be impossible. Cash accounts generally and loan accounts always have from their birth a debit balance against the customer, and a customer who happened to have a loan account or a cash account as well as a current account would never be in security to work on a current account at all, because he might never know at any moment when a cheque might be dishonoured upon presentment. But that does not affect this question. The question here as upon a question of honouring a cheque is gone, because the cheque as a cheque was countermanded by death; and the whole question is what is the right which is given by the section of the statute which says that a cheque shall operate as an assignation. It seems to me quite clear that the expression, "Where the drawee of a bill has in his hands funds available for the payment thereof," must mean funds as upon a true state of the accounts between the two parties concerned. As I have already pointed out, upon a true accounting between the parties concerned there were no funds in the hands of the Clydesdale Bank belonging to this gentleman at this time; and I am accordingly of opinion that the result which the Sheriff has come to is right, and his judgment ought to be affirmed.

Lords M'Laren, Kinnear and *Pearson* concurred. —15*th October* 1907.

Counsel for Pursuers, Hunter, K.C., Sandeman; Agent, J. Mullo Weir, S.S.C.—Counsel for the Judicial Factor, Dean of Faculty (Campbell, K.C.), Macmillan; Agents, Ronald & Ritchie, S.S.C.—Counsel for Clydesdale Bank, Solicitor-General (Ure, K.C.), W. J. King; Agents, Campbell & Smith, S.S.C. W. A. R.

OUTER HOUSE.

(*Lord Johnston.*)

167. **Mackay** *v.* **Rosie.**

I. WORKMEN'S COMPENSATION—WORKMAN'S OPTION—WORKMEN'S COMPENSATION ACT 1897 (60 & 61 VICT. CAP. 37), SECT. 1, SUB-SECT. 2 (B)—PARTIES DEALING ON EQUAL TERMS—ACCEPTANCE OF PAYMENTS EQUAL IN AMOUNT TO WHAT WORKMEN'S COMPENSATION ACT WOULD HAVE ALLOWED — CIRCUMSTANCES IN WHICH HELD WORKMAN HAD ELECTED TO TAKE RIGHTS UNDER ACT.

II. STATUTE—PRESUMPTION THAT INTELLIGENT WORKMAN KNOWS PROVISIONS OF STATUTE CONCEIVED IN HIS FAVOUR—IGNORANTIA JURIS NEMINEM EXCUSAT—WORKMEN'S COMPENSATION ACT 1897 (60 & 61 VICT. CAP. 37).

In this case the pursuer, who was a working mason in the defender's employment, sued his master for damages in respect of injuries sustained by him on 20th November 1906, during the demolition of a tenement which was being carried out by the defender. On 8th December 1906 the pursuer was paid 18s. by defender's son, who at the same time pointed out to him that nothing was due him for the first two weeks. The sum then paid was one-half of the pursuer's full-time wage. Thereafter the sum of 18s. was

paid to pursuer weekly, but no receipts were granted. On 11th May 1907 a receipt was tendered to the pursuer for signature in the following terms:—

Received by me Alexander Mackay, from George Rosie, 52 East Crosscauseway, Edinburgh, per..... .....the sum of twenty pounds sixteen shillings and.....pence sterling, being thirty-two weeks' compensation to 13th July 1907 at the rate of thirteen shillings per week, in terms of the Workmen's Compensation Act 1897 or 1900, under which Act I elect to take compensation in respect of injuries arising from an accident which occurred to me while in the course of my employment with the said George Rosie on or about the 20th day of November 1906.

The pursuer refused to sign, and raised the present action.

The defender pleaded—

"(2) The pursuer having elected to accept, and having accepted, compensation under the Workmen's Compensation Act, is barred from raising the present action."

Proof was allowed. The facts, in addition to those stated above and the contentions of parties, sufficiently appear from the Lord Ordinary's Note.

The Lord Ordinary *sustained* the defender's second plea in law, and *dismissed* the action.

Lord Johnston.—I do not think that it is necessary to delay giving judgment in this case. The pursuer is not a foreigner; he is not even what I may call an illiterate workman. He is a Scotsman; he is a member of one of the skilled trades of this country, and from his appearance I am justified in saying that he is one of the best representatives of that trade. On the other hand, the defender is a man really of much the same station as the pursuer. He is now an employer, but he began as a workman—so much so, that the present pursuer actually worked under him when he was merely a foreman in the employment of others. I regard them in point of education and in point of intelligence, and I say so not merely as a matter of inference, but from their appearance in the witness-box I must regard them, though one is workman and the other employer, very much as equals.

Now, the pursuer's counsel's contention practically comes to this, that there is a duty imposed upon the employer to take charge of the interests of his workmen. I cannot conceive a case in which such a rule would operate greater injustice than the present, where I find that the employer and the workman are men of similar origin, similar upbringing, similar education and, as far as I can judge, of similar capacity, only that the one, being about eighteen years older than the other, has developed into a small employer, which there is no reason the other should not also do in his turn. But there is no such rule. The employer must not take advantage of the position of his workman, must not take advantage of his ignorance and want of education, must not take advantage of the physical condition to which a serious accident has for the time reduced him. But when they meet on equal terms and at arm's length, I hold that there is no more obligation on the employer to take charge of the interests of his workmen in the matter of compensation for accident, than there is on any other contracting party to charge himself with the interests of the party with whom he is contracting.

What, then, are the circumstances here? The pursuer meets with, I assume, a serious accident. His employer acts with perfect consideration to him. I cannot conceive of any more appropriate or more considerate action on the part of an employer. He sends his son at once to see him, and, at the of the week in which the accident occurs, sends him again to make payment of, not the precise amount of wages which were due, but of a liberal allowance in lieu of the balance of wages. The actual sum paid is a matter with which I have no concern; but I have a concern with this, that, on the day on which it was paid, the defender's son said to him: "That is to cover anything that is due to you at present; you will get nothing for the next two weeks, and after that you will get half wages." Now, I am prepared to hold it as proved by irresistible implication that both parties were perfectly aware what the meaning of this was. I am not going to take it off the pursuer's hands that a Scottish workman of his position and his capacity at this time of day knows nothing about the Workmen's Compensation Act. If there be an idea abroad among workmen that they may pose as in ignorance of the statutes which have been passed to provide for their protection, it is high time that that idea was dissipated. I am prepared to hold that a British workman is bound not merely to know something about his rights, but to take proper steps to ascertain what his rights are, and that, as I have already said, when he deals with his employer on even terms and at arm's length, there is no more obligation upon the employer to take charge of his interests than there is on any other contracting party to take charge of the interests of the party with whom he is contracting.

Now, it is clear that the pursuer knew perfectly well that, in the first place, he was entitled by a statute, even if he did not know by what precise statute, to nothing for the first fortnight, and to half wages during the subsequent time of his disablement. He knew perfectly well that his employer was under obligation, imposed upon him by a statute, to make that payment; and, for the space of nearly six months he accepted and allowed his employer to continue paying him half wages, or what was understood to be half wages, although it turned out, on an accurate calculation, to be somewhat more. For a period of nearly six months half wages were paid as matter of obligation and of

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statutory obligation and accepted as matter of right and of statutory right, and there being no question of advantage taken, I think it is impossible to do otherwise than infer an agreement to make and accept compensation in this statutory form. I cannot accept the pursuer's contention that he is now entitled to come here and say, "I knew it was under some statute, but I did not know under what statute it was that this payment was being made; moreover, I did not take the trouble to ascertain what was the statutory condition of my accepting this payment." He is not a child, he is not a foreigner, he is not an illiterate; he is an educated workman. He was not, during those six months, on a bed of sickness or otherwise incapacitated. He was not in any sense in a position in which it could be said that the parties were not meeting on equal terms and were not acting at arm's length. To sustain the pursuer's contention would be to write out of the law of Scotland the principle that *ignorantia juris neminem excusat* in favour of the workman, but of the workman only, where he transacts with his employer in the matter of compensation for personal injury.

In the case of *Valenti*, 1907, S.C. 695, referred to, the parties were not on equal terms. There you have the employer, a large company, acting through its officials; and the workman, an Italian, knowing little or nothing of English. Even under these circumstances, had there been anything like the facts which you have got here, an agreement would, I think, have been implied. But there was only one interview and two receipts which, *ex hypothesi*, the man could not read, which he only authenticated by his mark, and about which no practical explanation was given to him. Again, in the case of *Fowler*, 1903, 5 F. 394, also referred to, you have the parties also not on equal terms, through another cause. The workman there met with an injury which so much affected one of his eyes that it ultimately had to be removed. While he was lying suffering acutely from the inflammation in the eye, before the operation, he was asked to sign one single receipt. Quite unable to read, and in a bodily condition in which it is not to be presumed that he was capable of applying his mind to what he was doing, he signed the receipt, at a place which was pointed out to him, and without explanation. In neither of those cases were the two parties dealing on equal terms, and their circumstances were quite different from those of the present case. But I think there is another point which differentiates them. In *Fowler's* case there was one receipt, and one receipt only. In *Valenti's* case there were two. But here there were about five and twenty payments spread weekly over a period of nearly six months made and accepted. It is quite true that the master through his son came to the workman and openly told him what he was bound to pay and the workman entitled to receive. The master did, in a certain sense, volunteer the payments at the start and continued to forward them for a month or six weeks; but for the next three or four months the pursuer, quite content with the situation, regularly went and applied for the payment. Mr Anderson contended that he made no claim. It seems to me that there is quite ample claim to satisfy the statute. If a man comes to the office to ask and receive the payment which had been made to him for a month or six weeks at his own house and continues to do so from about the beginning of January until May, it seems to me that that distinguishes the case from *Fowler's* and *Valenti's* cases, and brings it very much more nearly on all fours with the case of *Little*, 1900, 2 F. 387, where receipts were signed for six months.

I venture to say that there is no distinction in the principle here to be deduced from the fact that no receipts were actually signed. If the pursuer is justified in his contention here, I do not think he would have been foreclosed even had he signed receipts. He is paid and he receives half his wages admittedly as a matter of statutory right and obligation. Would it have made it any stronger if he had signed a receipt in which it was stated "I accept the sum which you are paying me as statutory compensation or even as compensation under the Workmen's Compensation Act"? I think not, because, in the knowledge of both parties, the sum was paid and was received under statute, if not specifically under the Workmen's Compensation Act. If that is so, can it be admitted that a man should come and claim and accept a payment which is due to him under statute and not be held to take it with all the statutory conditions? Is the master, because the transaction happens to be between a master and a servant—is the master bound to say, "Oh, I cannot pay you this, until I am quite sure that you know what the statute is under which we are transacting, and that you know everything that is in the statute; not merely that you are entitled to this payment—not merely that you are receiving this payment under the statute, but that you know all the conditions which will follow your receipt?" I know no law which makes such a difference between contracts, between employers and workmen, and contracts between other people. If the one party does not choose to know his rights, I am prepared to say that the same law must be meted out to him, though he is a workman, as would be meted out to anybody else were the contract other than a contract between master and workman.

What concludes the matter to my mind is this: if one party is bound, both parties are. It seems to me it would have been futile for the master in the circumstances of this case to have turned round and said, "No, I am not going to continue these payments." If the master is bound so must the employee be.

I shall therefore sustain the second plea in law for the defender and dismiss the action. But in respect that both parties fell into error in May 1907, after the payments had been going on for nearly six months, the one proposing to go back on the basis of wages, on which the agreement had been made, at his own hand and not by application under the statute to have the amount of compensation varied, and the other repudiating the agreement altogether, and are therefore mutually responsible for the litigation which has ensued, I shall find no expenses due to or by either party.—18*th October* 1907.

Counsel for Pursuer, A. M. Anderson, Hendry; Agent, John S. Morton, W.S.—Counsel for Defender, Constable; Agents, Simpson & Marwick, W.S. R. S. B.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Low.*)

168. M'Kechnie *v.* M'Kechnie's Trustees.

I. Succession—Will—Reduction—Undue Influence—Paramour—Held that Undue Influence Per Se Is a Ground for Reduction of Will Only Where There Exists a Fiduciary Relation Between Person Exercising Influence and Testator, and that There Is No Such Relation Between Testator and His Paramour.

II. Succession—Will—Reduction—Fraud—Facility and Circumvention—Evidence on a Consideration of which Held that Testator Was Not Facile.

III. Process—Reduction—Interest to Sue—Action for Reduction of Will and Codicil—Codicil Revoking Bequest in Will in Favour of Party Other than Pursuer—No Pecuniary Interest in Pursuer—Opinion Per Lord Low that Pursuer Not Entitled to Insist on Reduction of Codicil Standing the Will.

(*Reported ante, Vol. XIV. p.* 140.)

Reclaiming Note against Interlocutor of Lord Ardwall.

This was an action brought by George Turnbull M'Kechnie, 59 Comiston Road, Edinburgh, against (1) the trustees of his deceased father, John M'Kechnie, warehouseman, 99 Princes Street, Edinburgh, and (2) Miss Jemima White, Ardgowan, Pollokshields, Glasgow, for reduction of the trust disposition and settlement of the said John M'Kechnie, dated 11th January 1904, and of a codicil thereto, dated 16th September 1904.

By the said trust disposition and settlement the testator left the bulk of his estate to the defender Miss White, and to his illegitimate son by her—C. J. D. M'Kechnie. The testator left a provision of about £2 per week to his legitimate daughter Mrs Jane M'Kechnie or M'Lelland. *Quoad ultra*, the provisions in favour of the testator's wife and of his legitimate family consisted of the residue of the estate, which was estimated to produce a sum of about £900. The testator's estate at the date of the settlement amounted to about £12,000, but, mainly in consequence of *inter vivos* gifts in favour of Miss White, the amount of the estate passing under the will was only £8500. By the said trust disposition and settlement the testator left a house, 13 Annandale Street, Edinburgh, to his brother Alexander. By the codicil of 16th September 1904 he revoked this bequest and left the house to his illegitimate son C. J. D. M'Kechnie.

The facts of the case are sufficiently set forth in the judgment of the Lord Ordinary.

On 2nd February 1907 the Lord Ordinary (Ardwall) *reduced* the codicil of 16th September 1904, and, *quoad ultra*, *assoilzied* the defenders.

He issued the following Opinion.

Lord Ardwall.—In this action George Turnbull M'Kechnie, who is the youngest son of the late John M'Kechnie, seeks to reduce his father's trust disposition and settlement, dated 11th January 1904, and a codicil thereto, dated 16th September 1904.

At the conclusion of the proof, counsel for the pursuer stated that it was not now maintained that Mr M'Kechnie was not of sound disposing mind at the date of the deeds, but that reduction was sought either on the ground of facility and fraud or circumvention, or of facility and undue influence.

The deceased John M'Kechnie was born in 1848, and accordingly was fifty-seven years old at the time of his death on 16th October 1905. In 1873 he married Mrs Elizabeth Turnbull or M'Kechnie, who is still alive and an inmate of the Crichton Institution for the Insane, Dumfries. Four children were born of the marriage: (1) John Dickson M'Kechnie, born in 1874; (2) Jane Templeton M'Kechnie, who is now Mrs M'Lelland, born in 1877; (3) David M'Kechnie, born in 1879, and who died unmarried in 1899; and (4) the pursuer, born in 1882, and who is now twenty-four years of age.

The testator, whom I shall designate Mr M'Kechnie, began business life in Glasgow, apparently as a salesman, in Copland & Lye's warehouse. In 1878 he and his wife removed to Edinburgh, and in 1881 Mr M'Kechnie entered into partnership with a Mr Wight in a ladies' dressmaking and drapery business. In April of 1882 the defender, Miss White, entered M'Kechnie & Wight's employment as a dressmaker. In 1884 Mr and Mrs M'Kechnie, who had previously been living apart for about a year, entered into a contract of separation, which is dated 19th August and 3rd September of that year. An attempt has been made to shew that the estrangement and separation were due to Mr M'Kechnie having at that time begun to pay attentions to Miss White, but I do not think that this is proved, and it is really no part of the case to determine who was to blame for the separation, although I think there is more evidence

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to the effect that Mrs M'Kechnie was a difficult person to get on with than Mr M'Kechnie was, but possibly there were faults on both sides. Mrs M'Kechnie was probably all along a person of a more or less neurotic and excitable temperament, which culminated in insanity in 1895, when she was removed to Morningside Asylum. In 1888 Mr M'Kechnie opened a shop at 99 Princes Street, Edinburgh, and dissolved partnership with Mr Wight. Miss White, who had continued head of the dressmaking department with Mr M'Kechnie, subsequently applied for and obtained the situation as manageress of the shop in Princes Street, and the subsequent prosperity of that business seems to have been largely due to her.

On 31st January 1889 a will was prepared by Mr Coutts and signed by Mr M'Kechnie. In 1891 or 1892 Mr M'Kechnie opened two new shops, one in Waverley Bridge, Edinburgh, and the other in Argyle Street, Glasgow. After Mrs M'Kechnie was removed to Morningside Asylum in 1895, Jane and George M'Kechnie resided with their father at 26 Pitt Street, Edinburgh, but in 1896 Mr M'Kechnie, who for some time previously must have been carrying on an illicit intimacy with Miss White, took up house with her at 18 Westminster Terrace, Glasgow, where they lived as husband and wife, and on 10th January 1897 C. J. D. M'Kechnie, who is often referred to throughout the evidence as "C. J.," was born at 18 Westminster Terrace, Glasgow, and for some time after that old Mrs M'Kechnie, Mr M'Kechnie's mother, resided with her son at 18 Westminster Terrace, Glasgow, and looked after the child, Miss White apparently having gone to England for some time.

In March 1898 John and George M'Kechnie, who had been living for some time in Birmingham, came to reside in Edinburgh, in compliance with their father's request, as appears from the letter No. 109 of process, addressed by Mr M'Kechnie to his son John. It appears that, following on that letter, Mr M'Kechnie took John to the Princes Street shop and introduced him there as his son and future partner, but he had only been there two days when his father wired him to come through to Glasgow, and he then told him that he had written him on the understanding that Miss White was not coming back to manage the business, but that this was a mistake, and that she had gone to 99 Princes Street, Edinburgh, that day, but offered him an equal position in the business with Miss White; but he refused that, and shortly after left, his father promising him £200 as compensation to him for having thrown up his situation in England. This incident, which undoubtedly is proved, is founded on very strongly as shewing the great influence Miss White had over Mr M'Kechnie. On the other hand, it is not to be forgotten that Mr M'Kechnie had previously, if Miss White is speaking the truth, offered her a partnership in the Princes Street business, that that business had not been doing so well during the eighteen months she was away from it, and that Mr M'Kechnie, in his own interests, was more than willing that Miss White should resume her old position in the shop, even although he did not like sending John away again after having asked him to come.

In April 1898 Mr M'Kechnie's four children all commenced to live together in Manchester with John, and Alexander M'Kechnie, Mr M'Kechnie's brother, entered his employment in the shop at 18 Argyle Street, Glasgow. In August 1900 Mr M'Kechnie purchased a house called "Craigton" at Girvan, where he and Miss White generally went for the summer after that, and in 1901 he purchased a villa—"Shawfield"—in the Pollokshields district, and he and Miss White removed to it from their Westminster Terrace house. On 9th September 1901 George M'Kechnie left Manchester and went to Peter Robinson's in London, and John M'Kechnie left Manchester and entered the shop at 18 Argyle Street, Glasgow.

In 1902 Mr M'Kechnie opened another shop at 60 St George's Road, Glasgow, and John went to manage it. In March of 1902 George entered his father's employment for the first time at 18 Argyle Street, Glasgow, and in that same month John and he visited their father at Shawfield for the first time since he had taken up house with Miss White, and at Christmas of the same year Mr M'Kechnie opened another shop at 184 Sauchiehall Street, Glasgow. On 6th March 1903 Mr M'Kechnie executed a trust disposition and settlement, which would come into operation if the deeds under reduction were set aside. On 10th May 1903 Mr M'Kechnie had a serious illness, which I shall afterwards have to refer to. On 26th August 1903 Mr M'Kechnie handed over to his son John the business at 60 St George's Road, Glasgow. On 29th August a codicil to the will of 1903 was signed, and on 28th November of 1903 Mr M'Kechnie made over the whole of the furniture in all his houses to Miss White by letter. On 11th January 1904 the trust disposition and settlement under reduction was executed, and on 29th April George M'Kechnie, who had been latterly at 18 Argyle Street, Glasgow, had high words with his father, and left his employment for the last time. On 3rd August Mr M'Kechnie executed a contract of copartnery with Miss White, giving her over as a free gift the half of the capital in the businesses as from 1st March 1904. On 16th September the codicil under reduction was executed under the circumstances which I shall afterwards have to refer to. On 20th September 1904 the pursuer went to London and got a situation with a Mr Poppy, and during his absence in London he regularly corresponded with his father. In May 1905 a villa, called "Ardgowan," was bought by Miss White, and Mr M'Kechnie and Miss White removed there from Shawfield. In September Mr M'Kechnie and his son George met several times in London. After his return from London, Mr M'Kechnie, in the beginning of October, made preparations for having a new trust disposition and settlement made out, and by Friday the 13th of October he had these pretty well completed, but he died on Monday the 16th of October. These jottings for a new will are Nos. 51 and 52 of process, and, as explained by Miss Peter, the cashier of the Edinburgh business, whom he got to assist him in making out the jottings, he had No. 52, which is all in his own handwriting, with him when he first dictated to her detailed jottings made from it. The first edition of these, so to speak, was not satisfactory to him, and he had two more copies made out before he got them adjusted to his mind. Miss Peter gave a very clear explanation of the meaning of these jottings, which I have no hesitation in accepting as correct.

These being the main events connected with this case, I shall now proceed to state shortly what I consider the result of the very voluminous proof which was led by the parties.

One or two matters may be disposed of at once. There was an attempt made to show that Mr M'Kechnie was of intemperate habits. This entirely broke down. It was proved, indeed, that he was

what might be called a free drinker when he got home after business hours, but that he never took alcohol in any shape during the day, and, considering the enormous amount of physical and mental work he went through each day before his illness, I cannot say the amount of drink he took was excessive, though probably he would have been better with less. After his illness in May 1903 his medical adviser recommended him to cease from the use of alcohol altogether, and this he did, so the drink question does not seem to enter into the present case.

Then, again, it is suggested that Miss White endeavoured to keep away the members of his family from Mr M'Kechnie, and to prejudice him against them. I think this is without foundation. I am of opinion that, considering the difficult position she was in, she behaved very well to the members of Mr M'Kechnie's family, inviting them to come and see their father both at Shawfield and at Girvan, especially when he was ill. The daughter, Jane M'Kechnie, frequently stayed with them; George and John frequently visited them, so also did Alexander M'Kechnie, the deceased's brother, who was a constant visitor on Sundays.

The next point to be considered is the state of Mr M'Kechnie's health after his illness in May 1903. His illness began with a seizure one morning before he got up. He was able, however, to ring the bell and send for Miss White, who discovered that he was complaining of a severe pain in his head and a difficulty in seeing properly with one eye. This pain in his head lasted for a considerable time, and his medical man seems to have no doubt that it was caused by a slight effusion of blood upon the brain, caused by the bursting of some small blood-vessel, and that it was the pressure of this on the optic nerve that affected his eyesight. This, however, according to the doctor's opinion, was not so serious a matter as what he discovered on examination regarding the state of Mr M'Kechnie's heart, for he found that he was suffering from serious derangement of the heart's action. Possibly that may have been connected in some way with the effusion of blood on the brain; at all events, the two attacks seem to have been simultaneous, and it was the state of his heart, more than anything else apparently, that led to the doctor cautioning him against continuing to work in the way he had been doing, and ordering him to take life much more easily, as well as prohibiting the use of stimulants. It may be noticed here that the life that Mr M'Kechnie had been leading, accompanied throughout by Miss White, was one of the most exhausting description. They daily started early in the morning, either from Girvan or from Pollokshields, for Glasgow, inspecting the Argyle Street shop, and sometimes the others, went through to Edinburgh by train, were occupied there at the central business in Princes Street, with occasional visits to the other business, the whole day, returned to Glasgow at night, and thence to Pollokshields or Girvan, as the case might be. It is, I think, pretty clear that after his illness there was a great apparent loss of physical energy on the part of Mr M'Kechnie, partly due, no doubt, to the change wrought in him by his illness, but still more due to the fact that having been seriously alarmed as to the state of his heart, he took much greater care of himself, and this was, of course, accentuated by the defect in his eyesight, which seems to have troubled him more or less for a considerable time. His weakened physical condition undoubtedly would affect his disposition more or less, and might make him more amenable to pressure on the part of others, and especially of Miss White, who was constantly with him, and whose presence and assistance were invaluable to him in his impaired state of strength.

As to his mental capacity, I do not think it has been proved that that was impaired in the sense that he was less capable of understanding business of any kind, although it is possible that he may have been unable to seize ideas as rapidly as he had done before, or to carry them out as promptly and energetically. But the evidence of his architect, Mr Shearer, of his man of business, Mr Geddes, of Mr Nightingale, and of Mr Macpherson, the accountant, and other less important witnesses, I think proves that he was perfectly intelligent, and able to attend to business matters to the end of his life. But the strongest evidence upon this I consider to be the evidence of Miss Peter, which is completely borne out by the documents Nos. 51 and 52 of process, and which shews how capable he was up to within a few days of his death of making a settlement of his affairs, to meet certain main ideas which he had himself jotted down in his own hand, and wished to carry out. The conclusion I arrive at, therefore, as to his mental condition is that possibly owing to failing bodily strength and the condition of his heart he may have been less able to resist any pressure brought to bear on him by others than he was before his illness, yet I cannot say that it is proved that generally he was weak and facile in mind, although it is possible that he might be more or less facile in the hands of a person who had very strong influence over him.

This leads me to the consideration of the question as to alleged undue influence of Miss White over the testator.

Miss White, as the whole of her history in this case shews, is an exceedingly capable, clever, and managing woman, and I have little doubt that Mr M'Kechnie spoke the truth when he said, as he repeatedly did, that he owed his success in business very much to her. His business was one in which a great many young women were employed, both in the dressmaking department and in the shop, and the principal customers were ladies. In a business of that kind, accordingly, it was all-important to have a capable managing lady both to look after the employees and to interview customers. Miss White was, owing to her ability, experience, and tact, in a position of commanding influence in relation to Mr M'Kechnie as regarded his business. But besides that, she was really in the position not merely of a mistress but of a wife, and possessed the influence attached to both these positions, because while she managed his household, looked after himself, and was his companion at bed and board, just as a wife would have been, she was, as being only his mistress, in the position of being able to leave him whenever she liked, being under no legal obligation whatever to remain with him longer than she chose. I think that she only spoke the truth when she signified to two or three of the employees who speak to the matter that she could twirl Mr M'Kechnie round her little finger, and from various things that she is reported, I think truly, to have said at different times, it is apparent that she was quite conscious of the influence she had with Mr M'Kechnie, either to prevent him doing what she did not want done or to do what she did want. I attach no importance to her denials of what these witnesses say, for while she struck me as a very clever witness, I observed that when a crucial question was put to her, she several times either pretended

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that she did not hear it or did not understand it, while she was thinking hard all the time what answer it would be best for her case to give. In short, she conveyed to my mind the impression that she was a very clever witness, but not a very reliable one.

But however strong an influence one person may possess over another, especially when holding such close personal relationship as Miss White did to Mr M'Kechnie, that will not suffice to reduce a will unless it is proved that that influence was exercised unduly in order to impetrate the will from the testator, or failing such evidence of connection between the person possessed of such influence and the preparation or execution of the deed complained of, it would require to be shewn that the will was so outrageously against the presumed intentions or clear moral duty of the testator as to make it incredible to suppose that it could have been executed except under the pressure of undue influence on the part of those who were taking the principal interest under it. Now there is not a particle of evidence to show that Miss White had anything whatever to do with the giving of the instructions for the preparation of the deed under reduction or the execution of it. The will under reduction was prepared by Mr Geddes, solicitor, Edinburgh, who is a witness in the case. It seems the will under reduction began first to be discussed about the beginning of August 1903, when the testator told Mr Geddes that he was proposing making codicils to his will, and gave him directions. Mr Geddes advised him that a new will should be drafted, as the codicils would not fit in very well. Mr Geddes seems to have thought throughout that Mr M'Kechnie was giving too much to Miss White and her child, and warned him that there might be trouble about it; but Mr M'Kechnie, who seems to have had a strong will of his own, determined to have his own way, and gave Mr Geddes the reasons for his settlement. The jottings he left with Mr Geddes were in his own handwriting, and he instructed him perfectly intelligently, and told him to send him a statement in black and white setting forth the legal rights of his widow and children, which Mr Geddes did, and it forms No. 37 of process. The draft accordingly was made out as he had instructed, and he was so anxious that it should be his settlement, that when he brought it back for engrossment he had the draft executed as a will, so that it would serve as a will till the engrossment was made out and duly signed. All this was done in Edinburgh, and outwith the presence of Miss White. The draft is No. 48 of process, and it bears out what Mr Geddes says to the effect that Mr M'Kechnie thoroughly understood the terms both of the draft and of the will, and I have no doubt he did. It was signed at Edinburgh on 11th January 1904, before Miss Peter and a dressmaker in the shop. Mr Geddes says that Miss White had nothing whatever to do with any of the deceased's testamentary writings, and certainly it is not proved that she had.

It is always of importance in a case of this sort to consider the terms of the deed itself, and if, as I have already said, the terms of such deed are in conflict either with the known or presumed intentions of the testator, or are so entirely contrary to ordinary moral obligations as to make it incredible that it should have been executed by him voluntarily, that may have the effect of opening the door for the plea of undue influence.

The first thing that is noticeable about the will under reduction is that, so far as Miss White is concerned, it does not materially differ in its provisions from the will of 1903, nor yet as regards the provisions in favour of the pursuer, although in two ways the effect of these provisions has been much altered, in the first place, because the 1904 will disposes of some heritable properties which, under the 1903 will, were left to fall into residue, and, in the next place, by the conveyance of one-half of the partnership assets after the will of 1904 was executed, by which, of course, the residue of Mr M'Kechnie's estate was largely reduced in amount.

Coming to the provisions of the will itself, undoubtedly Miss White and her child take the lion's share of the estate, but from some points of view this was not extraordinary. If we are to believe Mr Geddes and other witnesses, Mr M'Kechnie strongly insisted on the service Miss White had been to him to make the money he had made. Then undoubtedly he had been the means of placing her and her child in a disadvantageous social position, for after his death it would emerge that she had been his mistress and not his wife, as their friends and neighbours at Pollokshields and Girvan had supposed, and that the child was illegitimate. Then the child was of tender age, being only seven years old in 1904, and apparently he was much attached to it. It is therefore not extraordinary that he should leave the bulk of his estate to Miss White and their child. But his obligations to the others of his family were not forgotten. His wife was left sufficient for her support in Dumfries Asylum, considering that she was besides entitled to her terce, as he knew from Mr Geddes' note; then his son John had been left a share of the residue, and had been set up in business; besides, Mr M'Kechnie had been very much displeased and disappointed about his marriage. George was certainly not very well left, but it is to be observed with regard to him that his father did not seem to have much confidence in him, and probably thought he was not to be trusted with much money, but would do better without it. He had very foolishly, and after using some very unbecoming language to his father, left the shop in Argyle Street, where he had been placed. His own account of it given in his evidence shews that he spoke in a foolish manner, owing partly undoubtedly to his resenting the position Miss White had been put into when his mother was still alive, but still not at all justified by anything that Miss White had ever done to him. His father seems to have been considerably dissatisfied by his conduct in the shop in Edinburgh and Glasgow, by his being too severe with the shop girls at one time and too familiar at another, while his correspondence with his father from London was of the most ridiculous character, and his father seems to have resented it more or less as silly and unbecoming in a man of business, besides being not always respectful to himself as his father. Mr M'Kechnie, however, shewed no ill-will to George; on the contrary, he appears to have been kindly disposed towards him notwithstanding his faults. Then with regard to his daughter Jane, he makes a provision for her which will give her £2 a week for life, as he considered that she was not likely to be able to earn her own living for herself. He also made a provision for his brother Alexander, his sister Mary, and his other sister Mrs Johnston; and on the whole I cannot say that the will is either an irrational or absurd one, or one the terms of which, looking to the history of the family, was not consistent with what may be presumed to have been the wishes and intentions of the testator; nor is it a will which ignores

his obligations to his lawful wife and family, and even his collateral relations. I need hardly say that, granting all this, I consider that it was, when taken along with the contract of copartnery and other deeds, a most unfair disposition of his property as regarded his lawful children.

While, therefore, I think there is no evidence to justify me in reducing the will on the ground that it was impetrated by undue influence on the part of Miss White, I think the matter is different with regard to the codicil under reduction. That codicil deprives Alexander M'Kechnie, the testator's brother, of the fee of the property, 13 Annandale Street, and gives it to C. J. M'Kechnie. I regard this codicil as being directly the work of Jemima White and her alone. The incident out of which the matter arose was a sufficiently absurd one. Miss White, on her way to Edinburgh one morning, had requested Alexander M'Kechnie to get a cap for her boy, and to send it by the porter to the Pollokshields train along with other parcels in the afternoon. In the bustle of business Alexander M'Kechnie forgot this commission till the porter had started with the parcels for the train. On recollecting this, he rushed out and bought a cap, and sent one of the shop girls down to the train with it, telling her to give it to Miss White. I must here notice that Miss White was known by that name in all the shops, but at Westminster Terrace and at Shawfield she was known as Mrs M'Kechnie, and was visited by a number of people, including the Free Church minister and his wife, who supposed her to be Mr M'Kechnie's wife. When the girl got to the station Mr M'Kechnie and Miss White were seated in a carriage for Pollokshields, and in the same carriage was a gentleman from Pollokshields who lived right opposite them, and who had known and visited them as Mr and Mrs M'Kechnie. The girl, when she saw them, rushed forward with the parcel, and said quite loudly, "Here's a parcel for Miss White," to whom accordingly it was handed. Mr M'Kechnie and Miss White, but I expect especially the latter, were much disconcerted, it is said, by this occurrence. Miss White says that Mr M'Kechnie was very angry at Alexander, and on getting home resolved to dismiss him from the shop, and sent her in to tell him so; that she, after getting her tea, went back to Glasgow to the shop and did not dismiss Alexander from the shop as she had been told to do, but talked a lot to him and told him how angry his brother was. Alexander says about Miss White when she came into the shop: "She told me that I had a lot of consideration for her, and she would have as much consideration for me, and would pay me back and make me suffer for it." Miss White denies this, but I believe Alexander M'Kechnie, who appeared to me to be an exceptionally candid and honest witness, and I do not believe Miss White's denial, and I further believe that it was entirely due to her influence that Mr M'Kechnie, on the 16th September 1904, made the codicil he did. I do not believe Miss White's story. I have the gravest doubts whether Mr M'Kechnie told her to dismiss Alexander, but, if he did, I think that, with her usual acuteness in business matters, she thought Alexander was very useful where he was in the Argyle Street shop, and where, I may observe, he still remains under Miss White's management, and that she thought a better way of punishing him would be to get him taken out of the will and her own son substituted. I do not think Mr M'Kechnie would have done this himself. It was much more like a woman's trick, and not what Mr M'Kechnie would have done of his own free will when he heard how innocent his brother Alexander had been in the matter, which was a pure accident so far as he was concerned. I am confirmed in this view by the fact that in the jottings which represent Mr M'Kechnie's last intentions he again makes a bequest to Alexander, though not of the same nature as formerly. It is also noticeable that Miss White knew what had been done by Mr M'Kechnie, for she told Alexander the moment he went out to the house after Mr M'Kechnie's death that he had been cut out of the codicil in consequence of the incident above referred to. On the facts, therefore, I am of opinion that Miss White, being very much enraged with Alexander M'Kechnie, though with no good reason, exercised the strong influence she had with Mr M'Kechnie in order to carry out her threat to pay Alexander back and "make him suffer for it." We have here the position which is familiar in criminal law of an evil threatened and an evil perpetrated, the person who made the threat having it in her power to accomplish the perpetration by the hand of another person. I am of opinion that in such circumstances a judge or jury is entitled to infer that the person who made the threat was the person who truly carried it out.

I accordingly propose to grant decree of reduction of the codicil, on the ground that it was impetrated by undue influence on the part of Miss White, Mr M'Kechnie being at the time facile in mind in relation to her, in consequence of the commanding influence she had obtained over him and his entire dependence upon her.

With regard to expenses, the pursuer has been successful in reducing the codicil, and although that is merely part of the directions as to the succession of the deceased, yet it could not have been obtained without evidence bearing on the whole history of the deceased and his relations to Miss White. Accordingly, I think the pursuer is entitled to some expenses, but as he has failed in reducing the deceased's will, I think these may be modified to the extent of one-half. The trustees will be entitled to take out of the trust estate the amounts strictly expended by them in defending the will, but they must not take out of the trust estate any part of Miss White's expenses, which she herself must meet out of the very ample provisions she has secured out of the deceased's estate.

The defenders *reclaimed* and *argued*: Standing the will, the pursuer was not entitled to insist in a reduction of the codicil, because he had no interest to sue (*Swanson* v. *Manson*, 1907, S.C. 426; *Gilchrist* v. *Morrison*, 1891, 18 R. 599; *Duncan* v. *Duncan*, 1892, 20 R. 200). On the merits the pursuer's case failed, both as to the will and as to the codicil. Undue influence was a good ground of reduction only where the party alleged to have impetrated the will stood in a fiduciary relation (as, for instance, that of legal or spiritual adviser) to the testator (*Munro* v. *Strain*, 1874, 1 R. 522; *Harris* v. *Robertson*, 1864, 2 M. 664; *M'Callum* v. *Graham*, 1894, 21 R. 824; *Weir* v. *Grace*, 1898, 1 F. 253). There was no such relation here (*Hargreave* v. *Everard*, 1856, 6 Ch. (Ir.), 278). There was no proof that undue influence had been exercised. As to the ground of facility and circumvention, the testator was not facile, and there was no proof of circumvention.

Argued for the Pursuer: Undue influence might be a good ground of reduction, although

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the person who impetrated the will did not stand in an official relation to the testator. The necessary elements were (1) that there should be in fact a relation of trust and confidence, and (2) that that trust should have been betrayed (Bell's Prin., sect. 14B.; *Gray* v. *Binny*, 1879, 7 R. 332; *Harris* v. *Robertson* (*cit.*); *Fearn* v. *Cowpar*, 1898, 1 F. 751; *Morley* v. *Loughnan*, [1893], 1 Ch. 736). Both elements were present here. As to the ground of facility and circumvention, it was not necessary that the testator should be generally of facile mind It was enough that he should be peculiarly susceptible to the influence of the person who impetrated the will (*Clunie* v. *Stirling*, 1854, 17 D. 15; *Munro* v. *Strain*, 1874, 1 R. 1039, per Lord Justice-Clerk Moncreiff at p. 1043). Facility in that sense, and also circumvention, were proved. As to the pursuer's interest, there was no plea on record impugning his title or interest to sue.

The Court *recalled* the interlocutor of the Lord Ordinary and assoilzied the defenders.

The Lord Justice-Clerk.—My Lords, we have had a very full and elaborate debate in this case. There are two questions involved. The first question is with regard to the will, and the second question is with regard to the codicil. As regards the will the Lord Ordinary has held that the pursuer has no case for reducing it, and in that opinion I entirely concur. I do not think it is necessary, because it is very much a matter of verdict, to enter into the matter at length. All I say is this, that the pursuer has failed to prove any case entitling him to a verdict upon the facts. That being so, I am for affirming the Lord Ordinary's interlocutor as regards that part of the case.

As regards the codicil, I confess I do not quite appreciate what the Lord Ordinary has done, or the reasons he has given for doing it. We have had an argument upon the law as applicable to such a case. I am not of opinion that the cases which are founded upon by the pursuer—the cases of *Strain*, and other cases of a similar class—have any bearing upon this case whatever. These are cases of persons who having, from an official position towards another person, some capacity for influence over him, misuse that position for the purpose of inducing him to do or abstain from doing something that he has right to do or abstain from doing in the exercise of his rights as regards his own property. The essence of the matter is that the persons in that official position, such as clergyman or doctor or lawyer, are people who have not only a duty but a right to advise and urge those with whom they have to deal, in certain directions; and it is natural and right that a person who is so dealt with should give effect to, or at least be greatly influenced by, the advice of those persons, and what is urged upon him by those persons. Therefore the person who has that influence, and ought to have it in dealing with a person who ought to be influenced by it, must take the greatest possible care that he does not outstep the bounds of his official position, and endeavour to get other things done, under that influence which he has, with which he has no right whatever to interfere. The clergyman and the doctor may have cause to strongly advise a person with whom they have to deal officially, but their advice must not be tainted by any motive not within their own province. As regards the lawyer, in a question of property the position is somewhat different from the position of a clergyman or the position of a doctor, because it may be his duty to advise his client, and even sometimes to urge his client, in a particular direction, when the client desires to make a disposal of his affairs; and if in doing so he urges anything in his own favour, or urges anything in favour of a particular individual, who gets him to do it, then of course he is in a corrupt position, in which anything that is done under his influence cannot receive effect. These cases are clear enough. Most of these cases do not turn either upon the question whether a person has capacity to make his will or not, or upon the question whether he is weak and facile. Of course, if there is anything of the nature of weakness or facility in such cases, the weakness or facility will make it much more easy to hold that a person acted under undue influence. But as regards the relatives of a man, and particularly as regards the people who are living in close relationship, practically of husband and wife, such rules do not apply. Such persons are entitled to use influence to induce the man to do what he may be expected to do himself—namely, to make provision for those whom he has placed in the position of being dependent upon him, and particularly in the case of a person who is placed in the position of being the mother of his child. In such circumstances there may be grounds for setting aside a will made by a person if, being on the face of it an absolutely unjust and wrong will, it can be proved that he had not the mind to make a will, or if it can be proved that his mind had got into a weak and facile condition, so that he was a person who could be easily imposed upon, and the person accused, taking advantage of his weakness and facility, did impose upon him and impetrated from him the deed which is complained of.

Now, that matter again is a question of fact. Two questions of fact are involved. First, was the late Mr M'Kechnie weak and facile, and easily imposed upon? If that question be answered in the affirmative, then we must consider the second question, whether advantage was taken of his condition, and whether he was imposed upon. Now, as regards the first question, giving the best consideration to the evidence which has been put before us and to the argument upon it, I am unable to say, on the jury question, that I

can find that he was weak and facile, and easily imposed upon. I find no evidence of that. There is no doubt that after he had a certain illness he was weaker than he was before. His body had suffered, and to a certain extent his sight had suffered. But I think the evidence, read fairly, leads to the conclusion that he was quite as capable of making up his mind about his own affairs as he ever had been in his life. I come without any difficulty to the conclusion that he was not a man who was weak and facile, or easily imposed upon. That being so, it is unnecessary to go any further, because the first answer to that part of the issue applicable to such a case must be in the negative. But I shall assume that influence was used for the purpose of obtaining this deed. I confess I agree with the view that was taken by the solicitor, that what he was doing was going too far in the direction of providing for this woman with whom he was living, and to whom he had been attached for many years, and for the child whom she had borne to him. On the other hand, I think it was a case in which he himself was of opinion, and I assume rightly of opinion, because it is not said that later in life he had ceased to have the opinion which he had held for so long, that to a very great extent his success in life, and the fortune he had accumulated, was due to the energy and the exertion of this defender, with whom he lived. I assume also that when he was spoken to about it by the solicitor, the solicitor did impress upon him the importance of what he was doing in the way of dealing with his property. He seems to have made up his mind distinctly to do what he had expressed his desire to do before his agent urged him in the opposite direction, and he carried that out. I think in doing so he carried out his own will. It is not to be left out of view that he was not a man who rushed into these matters wildly; but that he was giving consideration to them from time to time. That is, I think, conclusively proved by the pencil jotting we have in the large print of the proof. We have ascertained from an unimpeachable witness—namely, Miss Peter—that that was a pencil jotting made to his dictation, in which he shewed a perfect knowledge of his own affairs, and was jotting down his own views as to what he meant to do. Death prevented his doing anything to complete his intentions as indicated in these jottings.

As regards the codicil, I have no doubt that that codicil was granted at a time when he was in an irritated state, perhaps not wisely, for people get very irritated sometimes about small matters. This was in itself a small matter, but most certainly very trying to the parties concerned, namely, that owing to the blunder of Alexander this mistake had been made in exposing Miss White and him at the railway station. He acted upon that, but he was evidently considering the matter later in a calmer state of mind, as is shewn by the pencil jotting, and it was because of the unfortunate circumstance that he died before giving effect to that jotting that matters are in their present state. On the whole matter I find myself unable to say that I am satisfied with the grounds of the Lord Ordinary's judgment. I think he has drawn inferences which were not justified, and that therefore his interlocutor must be recalled in so far as it reduces the codicil. The only remaining question is the question of expenses, and I think the trustees should be found entitled to their expenses, but only to one set of expenses for both defenders.

Lord Stormonth-Darling.—I agree with your Lordship. This case has been very fully and carefully argued. There can be no doubt, I think, that the pursuer of the action, who was the youngest son of the testator, has, as indeed all the family had, good reason to complain of the deeds which he here challenges, because the provision which the testator made as between his legitimate family and his paramour and the child which she bore him was most disproportionate and unfair. But that, I need hardly say, is no reason for reducing a settlement. That can only follow if, in the first place, it is a case of testamentary incapacity, which is not here alleged, or if it can be brought under the category of facility and circumvention, coupled with impetration by some person who takes advantage of that facility. This case is brought alternatively on that latter head, and on the further head, which I rather think is the real ground of action, of undue influence exercised towards the testator by the person who impetrates the will. I admit that that is a third ground of reduction which has in some cases been held sufficient to warrant reduction, though I rather think no instance exists of such an issue being sent to a jury. But I agree with your Lordship that that principle has only been hitherto applied to cases either of transaction, of which *Gray* v. *Binny*, 7 R. 332, is an example, or in the much rarer case of wills where a position of trust and confidence is held by the person who impetrates the will towards the testator, and where that position of trust and confidence has been abused. The only illustrations which Mr Mair, in his exhaustive examination of the evidence and authorities, was able to give us, were cases of the well-known categories of such trust and confidence being reposed in law agents or doctors or clergymen, or some person in a position of being trusted by the testator himself—that is to say, trusted that they would not ask him to do anything inconsistent with his duty, or anything wrong in itself. I need hardly say that is not the case here. Mr Mair, with all his ingenuity, was not able to adduce a single instance of undue influence exercised by a paramour towards the man with whom she was living, and for the very

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good reason, I think, that she is not in the position of owing any duty towards him or, so far as I can see, towards anybody but her own child. I quite agree with the Lord Ordinary where he says that Miss White did possess very considerable influence over this testator; but then, I thoroughly agree with the Lord Ordinary when he goes on to say—"However strong an influence one person may possess over another, especially when holding such close personal relationship as Miss White did to Mr M'Kechnie, that will not suffice to reduce a will unless it is proved that that influence was exercised unduly, in order to impetrate the will from the testator; or failing such evidence of connection between the person possessed of such influence and the preparation or execution of the deed complained of, it would require to be shewn that the will was so outrageously against the presumed intentions or clear moral duty of the testator as to make it incredible to suppose that it could have been executed except under the pressure of undue influence on the part of those who are taking the principal interest under it. Now there is not a particle of evidence to shew that Miss White had anything whatever to do with the giving of the instructions for the preparation of the deed under reduction or the execution of it." I quite agree with that passage. There is not a particle of evidence, literally not a particle of direct evidence, to shew that Miss White took any part in the preparation or execution of this will; and the whole evidence of the pursuer consists of inferences, which he asks us to draw from the relationship of the parties towards each other. I find myself wholly unable to draw that inference without a great deal more than there is in this proof. The influence was undoubted, but it fails altogether in the necessary requisite of being undue; that is to say, it was just what might be expected, and what the testator was bound to expect, from the relationship of the parties. It was a very strong interest, no doubt; but interest by itself is not enough in a case of undue influence, because there is no cause where it could be said that confidence has been betrayed. The actual facts being as they are, I agree with your Lordship that there is nothing to justify us in drawing the inferences which we are asked to make. I further think, differing from the Lord Ordinary, that there is no reason for making a distinction between the will and the codicil, and I do so for the reasons which your Lordship has given. I also agree with your Lordship's proposal as regards the expenses of the case.

Lord Low.—I have felt this case not to be altogether free from difficulty, and I have listened most anxiously to the able argument which we heard on both sides. I am not surprised that the settlement in this case was challenged, because it is evidently a most unfair disposition of the testator's property, so far as the claims of his legitimate children were concerned; indeed so unfair as to suggest, from its very terms, either that Mr M'Kechnie, whom we know had been a shrewd man of business, and who seems to have been an affectionate parent, was not in a condition in which he was able to make his will when he executed the settlement in question, or that some outside influence had induced him, when suffering from the effects of serious illness, to do that which he would not have done if left to the guidance of his own sense of what was right and just. Therefore there was a pretty good foundation for an action such as we have here. It seems to me, however, that the only possible issue in this case is whether the will was executed when he was in a facile condition, and easily imposed upon by circumvention on the part of Miss White. I say I think that is the issue, because the question that was raised in the record, as originally framed, whether the deed was the deed of the testator or not, has not been pressed.

It was, however, argued that the pursuer did not require to go so far as to shew that the testator was facile and easily imposed upon, and that Miss White impetrated the will from him by fraud or circumvention when he was in that condition, because it was sufficient to shew that she had strong influence over him which she unduly exercised. I am of opinion that this case does not fall within that category of the law at all. I think that the doctrine of what is called undue influence is confined to cases where the relationship between the two persons is such that the natural and legitimate consequence is influence upon the one side and trust and confidence upon the other. It is quite clear that the relationship which exists between a woman and a man with whom she has lived in concubinage is not of that kind; and therefore the issue here is the issue of facility and fraud or circumvention.

No doubt after his illness Mr M'Kechnie was not the man which he had formerly been, but the evidence, read as a whole, shews very clearly that down to the last he was fully capable of taking the management of his own affairs, and of understanding matters of business, even of a complicated nature. I am quite satisfied that there was no facility in this case. If that be so, then, as your Lordship in the chair has pointed out, there is an end of the case, because if there is no facility, one part of the issue on which the case depends has not been established. Upon the whole question, I have in the end come to the conclusion, I confess without much difficulty latterly, that the pursuer has not made out his case.

In regard to the codicil I cannot think that the evidence is really different from the evidence in regard to the settlement itself, because the circumstances as regards the testator's condition are the same, and if there was no facility in the

one case, there was no facility in the other. But then, if I had agreed with the Lord Ordinary that there were grounds for setting aside the codicil, which did not apply in the case of the will, I should not have thought that that entitled the pursuer to decree. When the pursuer brought his reduction of the settlement, it was, of course, quite right that he should also bring a reduction of the codicil. The two together constituted the will of the deceased. If the pursuer had been found entitled to reduce the settlement, the codicil also would necessarily have fallen, because the codicil could not stand without the settlement. If, however, it is once established that the will is not reducible, I think it is very clear that the pursuer has no interest to insist upon reduction of the codicil. If he had brought an action for the reduction of the codicil alone, I think it would have fallen to be thrown out, upon the ground that he had no interest, because he had nothing whatever to gain by setting aside the codicil. For this same reason, if the will is not to be reduced I think that the pursuer cannot insist upon reducing the codicil. On the whole matter, therefore, I agree with your Lordships.—30*th October* 1907.

Counsel for Pursuer, Morison, K.C., Munro, Mair; Agent, J. Farquharson Macdonald, Solicitor. — Counsel for Defenders John M'Kechnie's Trustees, G. Watt, K.C., Macmillan; Agent, William Geddes, Solicitor.—Counsel for Defender Miss Jemima White, G. Watt, K.C., Macmillan; Agents, Davidson & Syme, W.S.

J. S. M.

OUTER HOUSE.

(*Lord Guthrie.*)

169. Donald *v.* Baird and R. O. & A. B. Mackay.

Process—Proof—Onus—Arrestments to Found Jurisdiction—Arrestment of Ship in Course of Construction — Pursuer Ordered to Lead in Proof on Jurisdiction.

This was an action of damages for personal injury by a seaman against the captain of the steamer "Dundee," on which he was injured, and R. O. & A. B. Mackay, the alleged owners of said steamer at the time. The pursuer averred that said alleged owners had their principal place of business in Hamilton, Ontario, but that they had been made subject to the jurisdiction of the Supreme Court of Scotland by virtue of arrestment of their goods and effects, and particularly a ship, machinery, and appurtenances, in course of construction in the premises of Archibald M'Millan & Son Ltd., shipbuilders, Dumbarton, on 6th June 1907, conform to letters of arrestment executed on that day. The defenders R. O. & A. B. Mackay averred in answer, *inter alia*, that at the date in question (in or about November 1906) the said ship was jointly owned by Robert Osborne Mackay, Adam Brown Mackay, and William Southam, all of Hamilton, Ontario. They also averred that the arrestment referred to did not arrest any property of any of those who were the owners of the "Dundee" at the time of the accident to the pursuer, *i.e.* 8th November 1906.

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The said defenders having, *inter alia*, pleaded that they were not subject to the jurisdiction of the Scotch Courts, the pursuer *moved* that said defenders should be ordained to lead in the proof in the question of jurisdiction. The following cases were cited:—(1) for pursuer, *Napier* v. *Shanks & Bell*, 1892, 19 R. 412; and (2) for defenders, *Heron*, 1894, 22 R. 182, and *Young*, 1890, 18 R. 163.

The Lord Ordinary *held* that, the defenders having on record made out a *prima facie* case of no jurisdiction, the pursuer must lead in the proof.—1*st November* 1907.

Counsel for Pursuer, Gunn; Agents, Mackay & Young, W.S.—Counsel for Defenders R. O. & A. B. Mackay, J. S. Mackay; Agents, Boyd, Jameson & Young, W.S.

C. H. B.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

170. Allgemeine Deutsche Credit Anstalt and Others *v.* Scottish Amicable Life Assurance Society and Others.

Process — Declarator — Declarator ab ante—Competency—Action by Assignees of Life Insurance Policy—Declarator That Insurance Company Were Bound to Pay to Pursuers—Policy Neither Matured nor Surrendered—Action Held Incompetent—Policies of Assurance Act 1867 (30 & 31 Vict. cap. 144), sect. 1.

(*Reported ante, Vol. XIV. p.* 775.)

Reclaiming Note against an Interlocutor of Lord Ardwall.

The pursuers reclaimed against the interlocutor of the Lord Ordinary dismissing the action.

The conclusions of the action were for declarator (1) that the pursuers had good and undoubted right and title to a certain policy; and (2) "that the defenders the said Scottish Amicable Life Assurance Society are bound, on the sums contained in the said policy becoming due and payable, to make payment thereof to the pursuers, or to any person or persons who may have derived right from them, in and to the said certificate or policy, contents and proceeds thereof."

Argued for the Reclaimers: As long as there

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was a present right in the policy vested in the pursuers, the action was competent. It fell under the class of cases of which examples were to be found in *Chaplin's Trs.* v. *Hoile*, 1890, 18 R. 27; *Harveys* v. *Harveys' Trs.*, 1860, 22 D. 1310, per L.J.C. Inglis at 1326; *M'Kenzie's Trs.* v. *M'Kenzie's Tutors*, 1846, 8 D. 964, per L.O. at 967. All persons were called in the action who were entitled to contradict. The benefit of a declarator as a form of action was that a right could be declared although no question had yet arisen in regard to its enforcement (*Mansfield* v. *Stewart*, 1846, 5 Bell's Ap. 139, per Lord Brougham at 160; *Cairns' Trs.* v. *Cairns*, 1907, S.C. 117). Counsel also referred to the Policies of Assurance Act 1867, sect. 1.

Counsel for the respondents was not called on.

The Court *adhered*.

The Lord President.—In this case I think the judgment of the Lord Ordinary is clearly right. The matter arises in this way. A policy of insurance was taken out with the Scottish Amicable Life Assurance Society in favour of a certain gentleman called Oscar Philipp. The pursuers, who are bankers in Germany, raised an action in which they called certain persons who have at different times, according to them, been in right of the policy; and they also called the Scottish Amicable Life Assurance Society. They asked for declarator that the pursuers have good and undoubted right and title to the extent of one-half each—for there are two pursuers—in the policy; and they put in the conclusion that the defenders, the Scottish Amicable Life Assurance Society, are bound, on the sums contained in the said policy becoming due and payable, to make payment thereof to the pursuers, or to any person or persons who may have derived right from them. They base that demand upon a statement in which they set forth a large number of transferences to different people, with a certain amount of bankruptcy proceedings as part of the story, and they say they are now the persons in right of the policy.

Now the only contradictors the pursuers can get are either the original persons to whom the policy belonged, or some of the people in the chain of transmissions which is set forth. The insurance company, of course, have no interest in the matter as to whom the policy belongs. Their interest is this, that if the policy matures and becomes a claim, then they will have to pay the proper person. If the pursuers had left out the conclusion which is directed against the Scottish Amicable Life Assurance Society, then, of course, the Scottish Amicable Life Assurance Society would not, I take it, have entered appearance in the action, because no decree that would have been pronounced could possibly have bound them, there being no reference to them in the only conclusion which would then have remained. Whether the action would have gone on or not would have depended upon whether any of those who are called would have come forward, for if they did not, there would have been decree in absence against them; if they did, it would have been upon such grounds of defence as they set forth. But the insurance company would not have been here. When the pursuers put in their claim against the insurance company, they put in something which in my judgment they were not entitled to ask, because no one can tell whether the Scottish Amicable Life Assurance Society will ever be bound to make payment to the pursuers. No one knows who will be the claimants when the time comes for the policy to mature, or when it has been turned into a claim by means of a surrender. Therefore to entertain a declarator *ab ante* against the insurance company seems out of the question. A very good test of the competency is this—Could the insurance company have raised an action of multiplepoinding at this time upon such a question? Clearly they could not.

Counsel for the pursuers here have said that they would be quite content if decree was not given in terms of that conclusion. But that simply turns out their action upon another ground, because then it is perfectly clear that the Scottish Amicable Life Assurance Society ought not to be here at all, and they are entitled to have the action dismissed as against them.

To these observations I only add that I am perfectly satisfied with the manner in which the Lord Ordinary has expressed his opinion. I have never known, and counsel have been unable to produce to us, any action of declarator where the Court gave a declarator as to a right without there being a proper contradictor present. It seems to me that the whole argument we have listened to this morning was vitiated by an assumption as to who the contradictor in this case is. The insurance company is not the contradictor as in the question of whom the insurance policy belongs to. The contradictor must be found among the ranks of the parties to whom at various times the policy belonged, and depends upon the question of whether these various steps or links of the chain of title are or are not correct. The insurance company have no interest whatever, except simply to pay the policy, when it becomes a proper claim. Therefore, it seems to me that the whole of the cases where declarators have been obtained have really no application to the case before us. I propose to your Lordships that we adhere.

Lord Kinnear.—I am of the same opinion, and I only add, that my reasons are stated very clearly by the Lord Ordinary in the last paragraph of his opinion, and I agree in all that his Lordship has said.

Lord Dundas.—I agree with the Lord Ordinary, and with your Lordships. I confess that I think the case a very clear one. There is no proper contradictor here, and no actual *lis.* As your Lordship has pointed out, it is clear that a multiplepoinding cannot at this time be competently raised, and that, I think, is a conclusive test of the situation.—26*th October* 1907.

Counsel for Pursuers, T. B. Morison, K.C., Jameson; Agent, F. J. Martin, W.S.—Counsel for Defenders, Dean of Faculty (Campbell, K.C.), Spens; Agents, Thomson, Dickson & Shaw, W.S.

F. A. U.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

171. Denholm's Trustees *v.* Denholm and Others.

Succession — Testament — Legacy — Construction — Bequest of Horses and Carriages—Circumstances in which Bequest Held to Include Motor Cars.

Special Case.

This was a Special Case presented for the opinion of the Court on a question arising on the construction of the trust disposition and settlement of the late John Denholm, The Mains, Eastwood, Renfrewshire. The parties to the special case were John Denholm's trustees, of the first part; his widow, Mrs Catherine Denholm, of the second part; and his residuary legatees, of the third part.

The facts were set forth in the special case as follows:—

1. The said John Denholm died without issue at The Mains aforesaid on 3rd January 1907, leaving a trust disposition and settlement, dated the 22nd day of October 1890, and recorded in the Books of Council and Session 9th January 1907. By his trust-disposition and settlement he assigned and disponed to the first parties, for the purposes therein mentioned, his whole estate, heritable and moveable.

2. The trust purposes were (*First*) payment of the testator's debts and sickbed and funeral expenses; (*Secondly*) payment to the said James Ferguson of a legacy of £250 free of legacy-duty; (*Thirdly*) the trustees were directed to deliver to the testator's brother Thomas Denholm the testator's gold watch, breechloading gun, and all his body clothing, together with all articles of every description belonging to him that might be at Greenhill aforesaid at the time of his decease; (*Fourthly*) the trustees were directed to make over to the second party, the said Catherine Gillies or Denholm, the testator's whole other furniture and plenishing, including books, plate, pictures, jewellery, ornaments, and bed and table linen, and also his horses and carriages, live stock, plants, and garden and stable implements; (*Fifthly*) the trustees were directed to make over to the second party, the said Catherine Denholm, the testator's lands and estate of Eastwoodmains, burdened with certain debts, which, however, were paid off by the testator in his lifetime; and (*Lastly*) with regard to the residue of his means and estate, the testator directed his trustees to divide the same into two equal portions, and to pay or convey [it to a number of legatees].

3. Mr Denholm resided at The Mains, a small residential estate near Giffnock, about five miles south of Glasgow on the Kilmarnock road. That estate adjoins and is surrounded on three sides by his estate of Eastwoodmains. He left estate amounting to about £53,000. For many years Mr Denholm kept a brougham and a wagonette and one carriage horse, and occasionally a riding horse; but about four years ago he bought a 10-h.p. Argyle open motor car, and got his coachman trained to drive it. Shortly thereafter he sold his wagonette and horses but retained his brougham, for which he occasionally got a horse on hire. About a year before his death he bought another motor car,—a 16-h.p. Argyle brougham motor-car,—and he then sold his brougham. These motor-cars were in his possession at his death, and they are valued for Government duty purposes at £75 and £450 respectively. Deceased's furniture and plenishing, live stock, plants, and garden and stable implements, other than the effects bequeathed to Thomas Denholm, are valued at £474. A question has arisen as to whether the bequest in favour of the second party contained in the above recited fourth purpose of the said trust disposition and settlement carries the motor cars to the second party or not, and it has therefore been agreed by all the parties to state this question for the opinion of the Court.

4. The second party contends that, on a just construction of the testator's settlement, the motor cars in question are bequeathed to her. On the other hand, the third parties contend that the said motor cars form part of the residue of the trust estate.

The Questions of Law put to the Court were:—

(1) Is the second party entitled to the said motor cars in virtue of the bequest in her favour contained in the said fourth purpose of the said trust disposition and settlement? Or

(2) Do the said motor cars fall to be included in the residue of the testator's estate under the last purpose of the said trust disposition and settlement?

Counsel cited *In re Platt*, reported in "The Times," 20th April 1907; White and Tudor's Leading Cases in Equity, 7th edit. pp. 808, 812; *In re Gibson*, 1866, L.R. 2 Eq. 669.

The Court *answered* the first question in the affirmative, and the second question in the negative.

The Lord President.—My Lords, the parties in this special case are, on the one hand, the trustees and the residuary legatees of the late Mr John Denholm, and on the other the truster's widow; and the question arises on the interpretation of a clause in his trust disposition and settlement. That trust disposition and settlement was dated in 1890, but Mr Denholm did not die until 1907. He thereby made over all his property, heritable and moveable, to trustees, and then he proceeded to state the trust purposes.

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The Lord President.

The first direction to his trustees was to pay a legacy to a certain gentleman, and the second was to deliver to his brother Thomas certain specific articles, which may be described as articles particularly appropriate to a man. Then he proceeded in the fourth purpose to direct his trustees "to make over to my said wife my whole other furniture and plenishing, including books, plate, pictures, jewellery, ornaments, bed and table linen, and also my horses and carriages, live stock, plants, and garden and stable implements." He next bequeathed to his wife the lands and estate of Eastwoodmains, and finally gave directions as to his residue.

Now, the point is whether under the bequest in this fourth purpose the wife has, or has not, right to two motor cars which were in the premises of the deceased at the time of his death. At the time of the execution of the will in 1890, the testator was not in possession of any motor cars. That was not much to be wondered at, because, although motor cars had as a matter of fact been invented in 1890, there were very few indeed of them in the United Kingdom at that time. But as time went on motor cars became common, and the deceased Mr Denholm first bought one motor car, and relinquished part of his stable establishment, and afterwards got a second motor car and gave up keeping horses altogether, so that at the time of his death he did not have any means of locomotion except motor cars, one being an open car, and the other a brougham or landaulet. The whole point is whether these motor cars fall within the expression which I have read.

Of course, this is a matter of intention, and the first observation I have to make is that one cannot read the testator's settlement without seeing that he wanted, speaking generally, his wife to have the whole moveable property that was connected with the enjoyment of his house, all except those special articles which would not have been appropriate to a lady, namely, the breechloading gun and body clothing, which he gave to his brother Thomas. That being the testator's intention, the only question which remains is whether the words he used were sufficient to give effect to that intention, and that depends upon whether the word "carriage" can be held to include motor cars. I think one is entitled to construe the word "carriages" in the will of the testator in the light of what the testator himself had done, and I think that the testator when alive showed that he had come to consider these motor cars as his carriages. The word "carriage" itself is certainly wide enough to cover any form of vehicle in which you are carried, though it has secondary significations which vary according to the context. It may be admitted that the ordinary sense of the word "carriage" is a carriage drawn by horses, but to show how its meaning varies, I may take this illustration. I do not suppose that anyone would doubt that a dog-cart would fall under the designation of "carriages," and yet there is as little doubt that if a person who kept a dog-cart and a landau or barouche sent round to his stable and said, "I want the carriage," that would be regarded as equivalent to an order to send the barouche or landau, and not the dog-cart. I accordingly think that the word "carriage" is a term sufficiently elastic to include motor cars, and that when this gentleman allowed his will to remain unaltered, knowing that he had actually replaced his horse carriages by motor carriages, he intended the bequest of his carriages to include his motor cars. I am therefore for answering the first question in the affirmative and the second in the negative.

Lord Kinnear.—I am of the same opinion. The first point that was taken by the residuary legatee was that the testator had no motor cars in his possession at the time of making his will, and that what he meant by the word "carriages" must be ascertained by reference to his actual possession at that date. If that were sound, it would, as a logical consequence, prevent the widow from receiving any of the other articles which were left to her in the same sentence, except on condition of shewing that they belonged to the testator at the time of making the will. But the contention appears to me to be entirely without foundation. I do not come to that conclusion upon any rule of law as to the date at which a will should be held to speak, but as mere matter of construction of the plain meaning of the words used in this particular will. We cannot construe a particular clause in a will disjoined from the rest, but we must take in the whole deed in order to see what the testator really means; and the first thing that strikes one in this settlement is that the testator clearly intends to dispose, not of the property which he had at the time, because he might have changed it considerably before his death, but of the whole real and personal property of every kind and description which should belong to him at the time of his death. That is the description, at the outset, of the property he means to dispose of. When he comes to deal with the particular kind of property with which we are concerned now, he begins, in the first place, by leaving certain things to his brother Thomas, and he says that the trustees are to deliver to his brother Thomas "my gold watch, breechloading gun, and all my body clothing, together with all articles of every description belonging to me that are at Greenhill at the time of my decease." I understand that Greenhill was the house where his brother lived. Well, then, he was to have all the articles that are at Greenhill "at the time of my decease." Then he goes on to make the provision in question for his wife. He says that she is to have all the other furniture and plenishing, including certain specified things. Now, it

seems to me plain on the collocation of these two sentences that the time he had in view in both was the same time. My brother is to get all the things at the time of my death that are in Greenhill, but as for the other things my wife is to have them. What other things? The other things at the time of my death besides the articles and furniture and so on which are at Greenhill and which go to my brother. Therefore it seems to me that the only question that really requires consideration is whether the words in which he bequeaths to his widow his "carriages" are wide enough to cover the only kind of carriage which he had at the time of his death, that is, motor cars. I have no hesitation in agreeing with your Lordship that, according to the ordinary use of language, a "motor car" is a "carriage," because a "carriage" is, as your Lordship said, simply a vehicle for carrying persons.

It is perfectly true, and I entirely agree with the observation of your Lordship, that in ordinary language people very often do use the term "carriage" to describe a particular kind of vehicle, in order to distinguish it from some other kind, which nevertheless also falls within the general signification of the word "carriage," as, in the instance your Lordship stated, it is perfectly common and natural that a man should describe a barouche or a landau as a carriage in order to distinguish it from a waggonette or a dog-cart. But when he uses the term, not for the purpose of distinguishing between particular articles which may fall within the meaning of the general word, but for describing all the articles which might possibly be described by it, then it must receive its most comprehensive meaning. I have no doubt at all that it ought to receive its comprehensive meaning in this case, both because I think that is the plain meaning of the words used, and also because when you read the will, as it is right we should read the will, with reference to the statement before us as to the things possessed by the testator at the time of his death, we find that the carriage that he himself was using at the time, and the only carriage, was a motor car. That the intention of the testator was to put his widow in the same kind of enjoyment of his house and furniture and means of locomotion as he himself had enjoyed during his life, seems to me to be plain upon a fair construction of the will. I therefore agree with your Lordship's proposal as to the way in which the questions should be answered.

Lord Dundas.—I am of the same opinion. It seems clear that the testator, when he subscribed his settlement in 1890, intended to bequeath to his widow the whole accessories, both indoors and out of doors, requisite to her comfortable enjoyment of the landed estate she was to possess. In the latter category were included "my horses and carriages." Mr Denholm owned at that time a horse or horses, and also a brougham and a wagonette. But when he died in January 1907 he had parted with his horses, his brougham, and his wagonette, and had acquired in their stead two motor cars. It is, to my mind, impossible to suppose that Mr Denholm, though he altered his style of private locomotion in accordance with the march of modern times, intended to alter, and indeed to delete, the bequest to his wife of a comfortable, though not absolutely necessary, item of her enjoyment of the estate which he bequeathed to her. Nor do I think that, looking to the admitted circumstances of his establishment as regards the modes of vehicular conveyance successively employed by him, we shall in the slightest degree strain the language of his settlement if we decide, as your Lordships propose to do, that the motor cars fall within the expression of his bequest of "carriages." It seems to me, therefore, that the first question put to us should be answered in the affirmative, and the second in the negative.—29*th October* 1907.

Counsel for the First and Second Parties, C. H. Brown; Agents, Smith & Watt, W.S.—Counsel for the Third Parties, Valentine; Agent, Henry Smith, W.S. F. A. U.

OUTER HOUSE.

(*Lord Guthrie.*)

172. Black and Others *v.* The North British Railway Company.

Process—Issue—Form of Issue—Action of Damages for Death of Husband and Father—Negligence Admitted by Defenders—Quantum of Negligence Held to be a Relevant Matter for Jury's Consideration—Issue in Ordinary Form Allowed—Morton (Cooley's Factor) v. Edinburgh and Glasgow Railway Company, 1845, 8 D. 288, and Dobie v. Aberdeen Railway Company, 1856, 18 D. 862, Followed.

This was an action of damages by a widow and children for the death of her husband and their father in a railway accident, claiming £5000 for the widow and £4000 for each of the four children. The defenders, the North British Railway Company, admitted liability for the death, but pleaded that the damages claimed were grossly excessive.

The pursuers proposed the following issue :—

"Whether, on or about the 28th day of December 1906, and at or near Elliot Junction, a station on the Dundee and Arbroath Joint Railway, the late Alexander William Black, Writer to the Signet, Member of Parliament, husband of the pursuer Mrs Ellinor Wilson or Black and father of the other pursuers, received

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injuries to his person from which he subsequently died, through the fault of the defenders, to the loss, injury, and damage of the pursuers?

Damages laid—

To Mrs Ellinor Wilson or Black at . £5000
To Miss Ellinor Isabella Black at . 4000
To Thomas Wilson Black at . . 4000
To James Alexander Black at . . 4000
To Mrs Ellinor Wilson or Black as tutrix and administratrix-in-law of John Sutherland Black at . . 4000"

The defenders *argued* that the *quantum* of defenders' admitted negligence was not a relevant consideration for the jury in assessing the damages, and proposed the following form of issue:—

"It being admitted that on or about the 28th December 1906 the late Alexander William Black, Writer to the Signet, Member of Parliament, husband of the pursuer Mrs Ellinor Wilson or Black, and father of the other pursuers, received injuries to his person at or near the railway station known as Elliot Junction near Arbroath, from which he subsequently died, through the fault of the defenders.

"What is the amount of the loss, injury, and damage sustained by the pursuers?"

Damages laid [as in pursuers' issue].

The Lord Ordinary adjusted and *approved* of the issue in the form proposed by the pursuers.

Lord Guthrie.—I approve the form of issue proposed by the pursuers in this case, as against the form of issue proposed by the defenders.

In the case of *Morton* (*Cooley's Factor*) v. *Edinburgh and Glasgow Railway Company*, 13th December 1845, 8 D. 288, Lord Moncreiff stated that, prior to the date of that case, issues in both forms had been allowed by the Court, although it does not appear whether the question between the two forms of issues had ever been debated. But the point was carefully considered in *Cooley's* case, by a Court composed of the judges of the First and Second Divisions; and by a majority of five (Lord President Boyle, Lord Justice-Clerk Hope, and Lords Fullerton, Jeffrey, and Moncreiff) to three (Lords Mackenzie, Medwyn, and Cockburn), the form of issue proposed by the pursuers in this case was preferred. In considering the case of *Cooley*, it must be kept in view, *first*, that the action involved the element of assythment, which the present case does not at least bear to do; and *second*, that, whereas in this case the defenders merely admit "negligence," the defenders in *Cooley's* case admitted "culpable" negligence.

After *Cooley's* case the issue there approved seems to have been followed for ten years, without question, in cases of admitted liability. In 1856 the same point was again brought before the Court in *Dobie* v. *Aberdeen Railway Company*, 18 D. 862. None of the judges of the First Division before whom *Dobie's* case came (Lord President M'Neill, and Lords Ivory, Curriehill, and Deas) sat on *Cooley's* case. They took the case to avizandum, and the Lord President delivered this opinion: "We have looked into the case of *Morton* to see whether there was any distinction between it and the present case, and whether it disposed of the question on its merits and on principle, and we find that in no feature is it distinguishable from the present case on the point now before us, which was very fully considered there. We cannot disturb that judgment, and therefore we approve of the issue for the pursuer."

Since *Dobie's* case, the *Cooley* issue has been followed (see *Cunningham* v. *Duncan & Jamieson*, 1889, 16 R., per Lord Shand, p. 389, compared with Lord Adam, p. 390). I am informed that the point was again brought under the notice of the First Division in the recent case of *M'Bride* v. *Loudon & Inglis* (although the question was not fully debated), and an issue was approved in the same form. In these circumstances it is obviously my duty, whatever my view on the merits, to approve the pursuers' issue.

But as I heard an argument on the merits, and as the question is one of general importance (see Glegg on "Reparation" (1905), page 118, where a view favourable to the defenders is stated), it is right that I should express my opinion. During the discussion, my impression was with the defenders. I have now arrived at an opposite conclusion, and think that the decision of the majority in *Cooley's* case was right in principle.

The real question underlying the point now at issue between the parties, is whether the *quantum* of the defenders' negligence is relevant for the jury to consider in estimating damages. Had the defenders admitted *simpliciter* the whole averments of the pursuers as to negligence, and had the case gone to trial on the defenders' issue, the same point would have arisen for the judge's decision at the trial, when the pursuers' counsel proposed to read and found upon the defenders' admissions. In this case the defenders make a bald admission of "negligence," and deny all the pursuers' averments relating to negligence, with the result that the case might be one of a merely technical fault. Now, it must be observed that in *Cooley's* case the minority differed from the majority only on the question of whether the jury should be asked, in the issue, to consider and decide what was really not matter of dispute between the parties. None of the three judges, Lords Mackenzie, Medwyn, and Cockburn, denied the relevancy of the *quantum* of negligence (*culpable* negligence admittedly in that case) as an element to be considered by the jury. Lord Medwyn expressly affirmed it: "I am inclined to think that, since the defenders admit their liability, theirs is the proper form of issue. But, as I could not exclude the whole circumstances

from being gone into, my opinion practically comes to the same result as if the pursuers' issue were adopted. The wealth of a defender is an element always taken into consideration. I think that the degree and amount of culpability stands in the same situation."

The defenders point out that it is inaccurate to say that the whole circumstances in a case can be relevantly laid before the jury, and they dispute Lord Medwyn's proposition and analogy —"the wealth of a defender is an element always taken into consideration. I think that the degree and amount of culpability stands in the same situation." I agree with them in this. If the defenders' wealth can be considered, then it would form proper matter for averment and enquiry, which, so far as I know, has never been allowed, and, if this view were sound, I suppose a certain great Scotch railway company would have escaped cheaper at the historic period when some of its engines were poinded, than it would do now. I equally doubt the view suggested by Lord Fullerton's question—"Could it be maintained that the *solatium* should be the same in an action at the instance of a son of a proprietor of £20,000 per annum and that of a person in humble life?" I should have supposed that no distinction could be drawn between the *solatium* in the two cases, arising from grief for the loss of a father, but that the elements referred to by Lord Fullerton would be relevant, because the patrimonial loss, arising from injured prospects of superior education and advancement in life, would be different in the two cases.

But Lord Medwyn's and Lord Fullerton's conclusions may be sound on the question of the *quantum* of culpability, although their analogies are false.

The relevancy, in a question of damages from personal injury, of the *quantum* of negligence, may be justified on either or both of two grounds, *first*, because gross negligence may aggravate the injury to the feelings of the injured person, or, in the case of death, to the representatives; or, *second*, because gross negligence may warrant damages which, although payable to the injured person or his representative, are partly penal in character, as being imposed in the public interest, to deter the defenders and others from similar disregard of public safety. The first only of these grounds is founded on in *Cooley's* case. It is, I imagine, a fact in human nature that grief may be aggravated and loss embittered by the knowledge that the slightest care on the part of those causing the injury would have prevented the accident. On the other hand, if the case is only by a technicality outside the category of inevitable accident, the situation is accepted with greater resignation and the mind sooner recovers calmness.

For the second ground above stated, there is authority in the law of England (see Beven on "Negligence," Vol. I. pp. 49–50). In Scotland, so far as the cases go, the element seems to have been expressly admitted only in cases where the element of malice was involved. These cases are noted in Glegg on "Reparation" (1905), p. 119. I should not suppose the Court would be inclined to extend the principle to cases where there is legal liability, without personal fault.—*23rd October* 1907.

Outer House. *Lord Guthrie.*

Black and Others v. The North British Railway Co.

Counsel for Pursuers, Scott Dickson, K.C., Constable; Agents, Cadell, Wilson & Morton, W.S.—Counsel for Defenders, Cooper, K.C., Grierson; Agent, James Watson, S.S.C. C. H. B.

OUTER HOUSE.

(*Lord Johnston.*)

173. Hillcoat *v.* The Glasgow and South-Western Railway Company.

Process—Issue—Form of Issue—Action of Damages for Personal Injury—Negligence Admitted by Defenders—Opinion per Lord Johnston that Quantum of Negligence was Not a Relevant Matter for Jury's Consideration, and that Issue in Ordinary Form Should Not be Allowed.

In this action the Lord Ordinary, having heard counsel as to the adjustment of an issue for the trial of the cause, reported the case to the First Division under reference to the subjoined Note.

Lord Johnston. — This action is raised by Mrs Hillcoat against the Glasgow and South-Western Railway Company to recover compensation for the injury occasioned to her by an accident which occurred to one of their trains in which she was travelling, at Saltcoats Station, on 18th August 1906. The circumstances were that the train in which the pursuer was travelling was standing at Saltcoats Station when another train of the defenders' company ran into it from behind, causing a collision, in which the pursuer was injured. I do not touch upon the allegations of fault which led to, or caused, the collision, because the defenders admit the occurrence of the collision and the pursuer's consequent injury, and accept liability for the accident which caused it. They cannot accept liability without, for the purposes of the action, impliedly admitting fault for which they are responsible.

The nature of the injuries alleged are serious internal injuries, occasioned by the twisting of the pursuer's body in the collision, and shock to her nervous system.

I am called upon to adjust issues for the trial of the case. The pursuer has proposed the ordinary issue in cases of personal injury, viz.:

"Whether, on or about Saturday, 18th August 1906, at or near Saltcoats Railway Station, the pursuer, while a passenger in a train of the

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defenders, was injured in her person, through the fault of the defenders, to her loss, injury and damage?"

While, on the authorities as they at present stand, the pursuer is entitled to demand this form of issue, the propriety of granting it has been much canvassed in the profession, and the question has been brought into prominence by the recent serious accident to a North British Railway train at Elliot Junction, in the county of Forfar. There have been several actions arising out of that accident, in one of which I myself, and in another one of my brethren in the Outer House, had determined to report the point to the Inner House. But these and other actions arising out of the same accident have been settled, with the exception of that at the instance of *Black and Others* v. *North British Railway* [*supra*, p. 431], in which Lord Guthrie has, after mature consideration, granted the ordinary issue. That case, however, has been taken to the Inner House, and will afford an opportunity of reconsidering the question should that Court think it proper to do so.

In these circumstances I hesitate to adjust an issue, as I may well adopt one of which the Inner House may be found to disapprove by their judgment in *Black's* case, and at the same time I think it doubtful whether I have any right to delay adjusting an issue. I therefore report the case to the Inner House, that they may have it before them along with that of *Black*. I do so the more readily as *Black's* case is one in which the death of a father occurred, giving rise to an action at the instance of his widow and dependants, while in the present case there was nothing but a personal injury, not resulting in death, and the action is directly at the instance of the injured party. The Court will therefore have the matter before them from both points of view.

I must add that had *Black's* case not occurred I should have taken the course of reporting this question, because I could not take upon me to disregard a practice founded, as aftermentioned, on an Inner House decision, however much I might think that it ought to be altered. Where a matter of practice is a matter upon which parties in their dealings have come to rely and pecuniary interests are affected, though the practice may be a bad one, every Court would hesitate to disturb it. But where, as here, the practice is not one upon which any person has relied to the affection of patrimonial interest, if the practice is now seen to be wrong, I conceive that the Court will not hesitate to reconsider it, and it is in that view that I should have ventured respectfully to submit it for the reconsideration of the Inner House. I should have done so because I think the practice to be founded on unsound principle and to be liable to be unfair and dangerous in result. The question was first considered in 1845 in the case of *Cooley* v. *Edinburgh and Glasgow Railway Company*, 1845, 8 D. 288, where, in a consulted judgment of the two Divisions, it was determined in an action of assythment and damages by the children of a party killed in a railway accident, that though the defenders admitted the death and that it was caused by fault, negligence, or want of skill on the part of their employees and for whom they were responsible, and that there was consequent loss, injury, and damage to the pursuers, the Court found that the pursuers were entitled to put all these matters in issue, just as if there had been no admission.

The matter came again before the Court in the case of *Dobie* v. *Aberdeen Railway Company*, 1856, 18 D. 862, when the First Division had come to be entirely differently constituted, and the Court found that they could not distinguish *Cooley's* case from the one before them, and refused to disturb that judgment. There is therefore no indication of whether they approved it in principle or not.

These two cases have regulated the practice in adjusting such issues down to the present day. But although the form of issue has remained the same I have very grave doubts whether the principle upon which the majority of the Inner House in *Cooley's* case determined it has been allowed, at any rate for a considerable time, to influence the presiding judge in admitting evidence and directing the jury. If I am right in this it is manifest that a false issue has been in use to be presented to juries, the continuance of which ought not to be perpetuated.

For the principle on which the issue was adopted and must now be defended there is no support but the case of *Cooley* already referred to. If the opinions in that case be examined it will be found that while there was manifest doubt in the minds of some of the judges, those who were clearly in favour of the issue as allowed, based their judgment entirely upon the principle that in arriving at the measure of damages the degree of negligence is a material matter for the consideration of the jury. With very great respect for the learned judges who held this opinion, I conceive that principle to be unsound when applied to cases of personal injury. It would justify the same verdict for the loss of a finger under circumstance of gross negligence, and for the loss of a hand under circumstances of very slight negligence. I think that the error in adopting it arose from allowing the somewhat scholastic distinction between *culpa lata* and *culpa levis* to intrude itself into the consideration of a class of cases to which it is inapposite. It is true that there are cases arising out of contract in which the degree of negligence affects the liability, but that is no justification for maintaining that in these or any other class of cases the degree of negligence is to affect, not the liability, but the measure of damages. In the case of injury from negligence

where no question of contract is concerned, liability depends upon negligence, and where negligence is established liability follows independently of the degree of negligence, and it is not the negligence but the liability to compensate which determines the damages. In such cases Lord Cranworth's *dictum* in *Wilson* v. *Brett*, 1843, 11 M. and W. 113, that "gross negligence is ordinary negligence with a vituperative epithet," holds good, and the *dictum* of Mr Justice Willes in *Lord* v. *Midland Railway Company*, 1867, L.R. 2 C.P. 339, that "any negligence is gross in one who undertakes a duty and fails to perform it" is equally applicable.

I think that the judgment in *Cooley's* case is also open to this criticism that it is inconsistent with itself. It accepts the position that the jury may not give vindictive damages, and that it is the duty of the presiding judge so to direct. If by vindictive is meant the satisfaction of the legal analogue of the natural vendetta, the statement may be justified in relation to the principle adopted. But if, as I think it must be, the expression means punitive or exemplary, I do not see how it is possible to avoid giving such damages if the jury are entitled, and if entitled, bound to take into consideration the degree of negligence.

When I say above that I think the issue has become a false issue because presiding judges, or many of them, do not subscribe and give effect to the principle which underlies it, I have the support of Lord Shand and Lord Adam in the case of *Cunningham* v. *Duncan & Jamieson*, 1889, 16 R. 383, where Lord Shand says at p. 389: "I do not for myself say that I should recommend a jury to make the nature or extent of the Company's fault an element in determining the amount of the damages to be awarded"; and Lord Adam adds, p. 391: "No doubt the question of fault is laid before the jury, but in my experience a jury is never asked to enlarge or diminsh the amount of damages on the ground of the extent of fault on the part of the defender. That has not been, in my experience, the nature of the inquiry in actions of damages for fault or negligence."

If Lord Adam is right the customary issue is a false issue. It is liable to hamper the judge and to mislead the jury.

The issue which I should, but for the practice following on *Cooley's* case, have approved, is:—

"It being admitted that on or about 18th August 1906, and at or near Saltcoats Railway Station, on the line of the defenders, the pursuer, while travelling in a train belonging to the defenders, was injured in her person, through the fault of the defenders or those for whom they are responsible, to her loss, injury and damage.

"What is the amount of compensation to which the pursuer is entitled in respect thereof?

"Damages laid at £1500."

If the pleas in law are examined it is found, as might be expected, that it is compensation for injury which is the subject of the action, and that what the parties have joined issue about is whether the compensation sued for is reasonable or excessive. That the degree of the defenders' negligence or fault has any legitimate bearing on that question, I am unable to see. But I can see that it may be used to have a very unfair and disastrous effect upon the verdict.

These pleas are consistent with the right and the liability that arise out of the circumstances, and I am not apprehensive that the form of issue which I would adopt would exclude any relevant matter from proof. There are (1) circumstances relating to the position of the individual party injured, as, for instance, occupation and prospects in life; (2) circumstances surrounding the accident to the individual injured. Where shock and pain suffered must always be factors in the consideration it is essential to know the circumstances surrounding the occasion of the injury to him or her; (3) circumstances surrounding the cause of the occurrence which occasions the injury. To establish liability proof on the last heads is relevant and necessary. But where liability is admitted, proof on the first two is all that is required. And it would be admissible though fault is not formally put in issue. Whereas if it is formally put in issue, I do not see how the presiding judge can either exclude or restrict proof on the last head.—29*th October* 1907.

Counsel for Pursuer, Munro; Agents, St Clair Swanson & Manson, W.S.—Counsel for Defenders, Spens; Agents, John C. Brodie & Sons, W.S. R. S. B.

[On 1*st November* 1907 the First Division interponed authority to a joint-minute settling this case.]

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

174. **Selkirk** *v.* **Ferguson.**

Contract—Reduction—Essential Error—Alteration Made on Deed Before Signing—Materiality of Alteration—Opportunity to Party to Read Before Signing—Party Signing Without Reading on Being Told Alteration Not Material—Held no Ground for Reduction on the Head of Essential Error.

(*Reported ante, Vol. XIV. p.* 550.)

Reclaiming Note against an Interlocutor of Lord Johnston.

The pursuer *reclaimed* against the interlocutor of the Lord Ordinary assoilzieing the defender

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from the conclusions of the summons. The facts of the case sufficiently appear from the previous report and the opinion of the Lord President.

Argued for Pursuer: There was no evidence of inducing; and error was only a ground of reduction if it was induced by the representations or misrepresentations of the other party to the contract (Bell's Pr., sect. 11; *Stewart* v. *Kennedy*, 1890, 17 R. H.L. 25). The deed signed was the same deed as in draft, with an alteration. The defender's carelessness was not equivalent to being induced by the pursuer. The case fell under *Young* v. *Clydesdale Bank Ltd.*, 1889, 17 R. 231.

Argued for Defender: The Lord Ordinary was right. The alteration made on the draft was of so material a character that it ceased to be the same deed as it was in draft.

The Court *recalled* the interlocutor of the Lord Ordinary, and gave *decree* for damages, which were assessed at £250.

The Lord President.—This is an action at the instance of an advertising contractor called Selkirk against Alexander Ferguson. Ferguson had come into possession of certain patents in regard to an advertising apparatus, to which was given the soubriquet of "animated posters." Ferguson conceived that the invention was one out of which money could be made, but he was not in a position to work it. He had not a connection which would enable him to secure advertisements, and he was not in a position to get up a company with the necessary capital to provide the machines and the expenses. He knew a man Slight, who was an agent of Selkirk, and through Slight he entered into negotiations with a view to seeing whether Selkirk would take up the matter. Selkirk professed himself willing to do so, so far as the advertising part was concerned, but he was not in a position to provide the money or to raise a company for the manufacture of the machines Ferguson then proceeded to approach Cohen with a view to getting up a company, but in order to shew Cohen that there would be advertisements for them, he thought it better to enter into an agreement with Selkirk dealing with the provision of advertisements. Accordingly, Selkirk and Ferguson entered into the agreement which is the basis of this claim.

Under this agreement Ferguson bound himself to pay the costs of providing the machines, and to pay a salary to Selkirk; on the other hand, Selkirk bound himself to manage the business and to use his best endeavours to procure sites for the machines and provide advertisements at a minimum price. This agreement was duly signed. I need not go further into the negotiations between Cohen and Ferguson than to say that they were eventually broken off, Cohen electing not to go on and forfeiting a sum of £100. As a matter of fact, no company has been formed, but Selkirk, alleging himself to have been all along ready and willing to do his part, sues Ferguson on the contract for damages in respect of his breach. Ferguson admits that he is not willing to go on with the contract, but he puts in a defence which is an avoidance of the contract on grounds which would infer its reduction. This is to the effect that there was a material alteration in the contract as signed from what was in the draft; that he signed it under error; that it was essential error; and I think that he is bound to say that the error was induced by the representations of the other party to the contract. He puts his ground of defence quite clearly in his fourth plea in law, where he says:—"The defender should be assoilzied, with expenses, in respect that (1) the said agreement was entered into by defender under essential error induced by pursuer; (2) said essential error was induced by fraudulent misrepresentations and concealment on the part of the pursuer; and (3) said agreement is not binding on defender, but is null and void."

As regards the law on this point I do not think there can be any doubt. The law of this class of cases was most distinctly laid down by the House of Lords in *Stewart* v. *Kennedy*, 17 R. H.L. 25, and if I may take a single sentence from Lord Watson's opinion, I should quote this passage (p. 29): "Without venturing to affirm that there can be no exceptions to the rule, I think it may be safely said that, in the case of onerous contracts reduced to writing, the erroneous belief of one of the contracting parties in regard to the nature of the obligations which he has undertaken will not be sufficient to give him the right, unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract."

That, I think, disposes of the third branch of the plea in defence here, but leaves untouched the first two branches I have read. I have laid greater stress on this because I have found difficulty in the ground of judgment of the Lord Ordinary. The alteration which the defender here says was a material alteration, as to which he was in essential error, provided for Ferguson's continued liability although his interests were assigned to a company with a capital of £10,000 fully paid up. The parties had had a long meeting at which the draft was gone over, and each took away a copy to consider it. As the draft stood, Ferguson, on assigning to such a company, was to be no longer bound. Selkirk had his draft revised by his solicitor, who made the alteration. He made it in order to provide for the possible event of the company to which the interests were assigned being a bogus company. The parties had a meeting to adjust the agreement, which was of a somewhat hurried character. And there was a final meeting at which it was signed. In the view I take I do not think the discrepancies about what took place at the meet-

ing are of any moment. The Lord Ordinary has disposed of the case, not upon the ground that any false representations were made by the other party to the contract, but on the ground that the defender signed one deed thinking he was signing another. I think his Lordship there is applying a doctrine of law in a way in which it has never been applied before. The understanding which I think has always obtained as to what is error *in essentialibus* in this branch of law is that it applies where a man has signed a document of some sort thinking it is another sort of document. Mr Bell in his Principles (sect. 11) gives in so many words an illustration —"as, for example, if one sign a conveyance believing it to be a bond or security or a testamentary deed"; and there is a very well-known leading case in England where a person signed a deed, being told it was a release of rents, whereas it was a release of all claims. There there was a mistake as to the document, not so here. If the matter can be treated as the Lord Ordinary has done, in every case where there has been an alteration of any materiality, it could be said that it is not the document. It is the same document with an alteration upon it. I think the Lord Ordinary has imported into his judgment something which has to do with a different class of cases from this.

I should like to say also that I cannot agree with what the Lord Ordinary says, that there cannot be two opinions as to the materiality of the alteration. I think there is room for a difference on the matter, and that it was perfectly possible for one to form an opinion that it was not material. On paper it was a decided alteration. But practically it probably was not. It was not a term of the contract which would necessarily come into operation, for the company might never be formed. And if it was formed, the security of the company with £10,000 paid up was practically ample to protect Ferguson for a liability for a salary of £10 a week for three years.

I do not think the Lord Ordinary's judgment can stand. But that leaves the case, which is quite well set forth in the defences, that the error in which the defender was as to the actual difference in the documents was induced by the misrepresentations of the other party to the contract. The pursuer cannot object to his own account of what passed being taken, and that account seems to me to negative any idea that there was any representation by the other party which led the pursuer to sign. By that account he referred the question to Slark, and he was content to abide by Slark's opinion. He knew that there were alterations. He chose to be guided by Slark's view that these were not material—a view which, as I have already pointed out, might, I think, be quite an honest one. And then, though having the opportunity of reading for himself, he did not do so. In such circumstances I think there are no grounds for reduction.

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Lord Kinnear.—I entirely concur, and I have the less hesitation in concurring because I think that on the question of fact the Lord Ordinary has not arrived at any different conclusion from that which we have formed, and that if he had held that the true issue was whether the defender had been induced to enter into the contract which he signed by the representations of the pursuer, he would have given the same verdict as your Lordship has proposed. The view which he takes of the defender's conduct is even more unfavourable than that which your Lordship has expressed, for, after examining the whole proceedings at the meeting, he says, "It is impossible to account for or excuse the folly and neglect of Ferguson." In a later passage he refers to his "inexcusable conduct at the signing of the agreement," and on that account refuses to award him expenses in spite of his success in the action. The Lord Ordinary cannot have meant to decide that the defender's signature was obtained by the pursuer's representations, since he finds that his conduct in signing was inexcusable, and due entirely to his own folly.

Lord Kinnear.

The judgment of the Lord Ordinary, therefore, comes to rest upon the opinion in law which he expresses when he says: "However one must condemn Ferguson's conduct at this stage, it is impossible to come to any other conclusion than that he signed a document in terms materially differing from those of the document which he believed he was signing. It is no question of the misunderstanding of the import and effect of the document, it was error as to the document itself; and I cannot therefore hold Ferguson to be bound by his signature." I understand this to mean that the contract actually signed by Ferguson was not his deed, because he believed he was signing an instrument of a different character. Now there is authority to the effect that when a man signs one document thinking it to be another and different document, he is not bound by his signature. The early English case to which the Lord President referred—*Thoroughgood's* case (1552, 2 Co. Rep. 9 b.)—is an excellent illustration. There may be an element of fraud in such cases, but in the more recent decision of *Foster* v. *Mackinnon* (1869, L.R. 4 C.P. 704) the law is expounded in a sense which seems to coincide with the Lord Ordinary's view, for it is said that an instrument executed in the belief that it is one thing while in fact it is another is invalid, not only on the ground of fraud but on the ground that the mind of the signer does not accompany the signature; or, in other words, that he never intended to sign, and in contemplation of law never did sign, the contract to which his name is appended. But this is quite a different case.

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The defender knew the contract that he was signing. He knew that alterations had been made on the draft, and that the document which he was asked to sign was the deed so altered He did not know what the alterations were, but he asked if they were material, and on being told by Mr Slark that they were not, he thereupon signed the deed. In these circumstances to say that he signed a totally different deed from the one which he thought he was signing, appears to me to be out of the question. The deed he signed was exactly the deed which he thought he was signing—to wit, a contract in the terms of the draft he had seen but with alterations the nature and importance of which he did not know, but which he was content to accept in reliance on the opinion of Mr Slark. The true issue is whether the error under which he signed was induced by the other party to the contract, and on that issue the judgment of the Court must be for the pursuer.

Lord Dundas concurred.—*24th October* 1907.

Counsel for Pursuer, Crabb Watt, K.C., R. S. Brown; Agent, John Robertson, Solicitor.—Counsel for Defender, M'Kechnie, A. J. L. Laing; Agent, David Philip, S.S.C.

F. A. U.

EXTRA DIVISION.

(*Lords M'Laren, Pearson and Ardwall.*)

175. M'Douall *v.* Irvine.

I. Game—Common Informer—Title to Prosecute—Partridges Act 1799 (39 Geo. III. cap. 34), sect. 3—Taking of Partridge in Close Time—Held that a Private Prosecutor has No Title to Sue Under the Partridges Act 1799.

II. Process — Summary Procedure — Complaint—Instance — Private Prosecutor—Partridges Act 1799 (39 Geo. III. cap. 34)—Instance Held Bad.

Stated Case.

This was an appeal by way of stated case under the Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. cap. 62), against a decision of the Sheriff-Substitute (Watson) in the Sheriff Court of Dumfries and Galloway at Stranraer, in a cause at the instance of Andrew Kenneth M'Douall of Logan, appellant, with concurrence of the procurator-fiscal, against Archibald Irvine, labourer, Drumore, respondent.

The case as stated by the Sheriff-Substitute was as follows:—

This is a cause brought in this Court on the 27th day of June 1907 under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, at the instance of the appellant, with concurrence of John Marquis Rankin, solicitor, Stranraer, procurator-fiscal of court at Stranraer, for the public interest, against the respondent, the complaint in which sets forth that the respondent did on 22nd May 1907, on the public road leading from Stranraer to Drummore, and at a part thereof in the parish of Kirkmaiden, distant about 90 yards in a northerly direction from the dwelling-house in Shore Street, Drummore, occupied by Helen Stevenson, spinster, and on the seashore *ex adverso* of said part of said road, kill and take a partridge in close time, *that is to say* between 1st February and 1st September, both in the year 1907, contrary to the Partridges Act 1799, sect. 3, whereby the respondent is liable to a penalty not exceeding £5.

When the complaint had been read the agent for the respondent stated the following objections, viz.—

1. No jurisdiction.
2. No title or interest on the part of the complainer, Andrew Kenneth M'Douall, to sue.
3. The complaint is incompetent, irrelevant, and wanting in specification.

The Sheriff-Substitute sustained the second objection stated for the respondent, and dismissed the complaint.

The question of law for the opinion of the Court was:—Has the appellant, with concurrence of the procurator-fiscal, sufficient title to prosecute the present complaint?

Sect. 3 of the Partridges Act 1799 provides for a close time for partridges between 1st February and 1st September, and for a penalty for infringing the close time to be imposed "in the same manner, and under such and the same rules, regulations and restrictions" as in 2 Geo. III. cap. 19.

Sect. 4 of 2 Geo. III. cap. 19 provides as follows:—"If any person or persons transgress this Act in any of the aforesaid cases, and shall be lawfully convicted thereof . . . . every such person shall, for every partridge . . . . taken . . . . in his possession, . . . pay the sum of five pounds to the person or persons who shall inform or sue for the same: and it shall and may be lawful to and for any person or persons to sue and prosecute for, and recover, the said penalty of five pounds, . . . in any of his Majesty's Courts of Record at Westminster."

The Act 2 Geo. III. cap. 19 does not apply to Scotland.

Sect. 1 of 1 and 2 Will. IV. cap. 32 repeals 2 Geo. III. cap. 19.

The following authority was cited at the hearing:—*Duke of Bedford* v. *Kerr*, 1893, 20 R. J.C. 65.

The Court *answered* the question of law in the negative.

Lord M'Laren.—In this case my opinion may be stated in a few words. The complaint charges the defender with taking partridges in close time contrary to the Partridges Act 1799, sect. 3, and claims for a penalty not exceeding £5. Now, on referring to this statute we find

that it prohibits the taking of partridges within a close time there defined, and prescribes that the penalty may be recovered under the powers of an earlier statute, 2 Geo. III. cap. 19.

The Partridges Act 1799 applies to Scotland, but the Act of 2 Geo. III. cap. 19 makes no provision for the recovery of penalties in the Courts of Scotland, but only provides for the recovery of penalties in the King's Courts at Westminster. The reference to 2 Geo. III. cap. 19 is therefore ineffective, so far as Scotland is concerned; at all events while the penalty is sued for by a private prosecutor; and in my opinion the Sheriff-Substitute has rightly dismissed the complaint.

The ground of judgment is want of title to sue, and in the stated case this is the only point brought under review. If the Sheriff-Substitute had found that he had no jurisdiction, I should have been disposed to affirm the judgment. But I think the preferable ground of decision is want of title; because it may be that without any special statutory title the Lord Advocate or the procurator-fiscal has a title to prosecute wherever an illegal act is penalised and no provision is made for recovery of the penalty. By sustaining the plea of want of title on the part of a private prosecutor we keep this question open. I of course give no opinion as to whether taking partridges in close time may be the subject of a prosecution or complaint under any statute other than the Partridges Act 1799.

Lord Pearson.—I agree that this prosecution must fail, and I desire to explain very briefly the grounds of my opinion. The complainer is in the position of a common informer who has obtained the concurrence of the procurator-fiscal. The complaint is laid upon what is now styled the Partridges Act 1799 (39 Geo. III. cap. 34). That Act had for its main purpose to introduce a uniform close time for partridges in Great Britain, namely, from 1st February to 1st September. Unfortunately, in the matter of imposing and recovering the penalty, the Act referred to a statute of 1761 (2 Geo. III. cap. 19), which was a purely English statute providing for the recovery of the penalty "in any of His Majesty's Courts of Record at Westminster," by any person who might inform or sue for the same. That procedure, or whatever its modern equivalent may be, would obviously be futile at the instance of a common informer complaining of a contravention of the Act within Scotland; and I have not heard any suggestion as to the source from which a private informer in Scotland can derive a title to prosecute in any Scotch Court without express statutory authority. It is otherwise with the public prosecutor, who, as a general rule, can prosecute before the Sheriff Court for penalties which a statute has imposed without expressly enacting how the penalty is to be recovered.

I would not, however, be held as expressing any opinion as to whether a prosecution in the present case under the Act 1799 would have been competent in the Sheriff Court at the instance of the procurator-fiscal himself. It may be that the express reference back to the Act of 1761 in the matter of imposing and recovering the fine excludes any implied authority to the procurator-fiscal to take proceedings under the Act of 1799 in a Scottish Court. In determining that question, which is not now before us, it would be pertinent to consider whether there is any other remedy open, and, in particular, whether the Act of 1773 (13 Geo. III. cap. 54) does not apply, notwithstanding its partial repeal in 1796 by an Act which was itself repealed without any saving clause in 1799 (36 Geo. III. cap. 54; 39 Geo. III. cap. 34).

Lord Ardwall.—I agree with both your Lordships. The complaint which initiated the proceedings appealed against in the present case is founded solely upon the Partridges Act 1799 (39 Geo. III. cap. 34), sect. 3. *Inter alia*, the objection was taken that the complainer had no title or interest to sue, and this objection has been sustained by the Sheriff-Substitute, and he dismissed the complaint.

I am of opinion that the Sheriff-Substitute's decision is right.

The leading Scotch Act relating to close time for game is 13 Geo. III. cap. 54, and under this statute the close time for partridges was fixed to be from 1st February till 1st September. Under that Act (sect. 8) it was provided that all offences under it might be tried before two or more Justices of the Peace or the Sheriff or Sheriff-Substitute of the county, and that the prosecutions might proceed either at the instance of the fiscal of the Court at which the prosecution might be brought, or by any other person who should inform or complain.

With respect to partridges, the period of close time formerly regulated by the above statute was altered by 36 Geo. III. cap. 54, which made it unlawful to kill partridges between the 1st day of February and the 14th day of September in any year, and it provided that any person doing so in Scotland should incur the same penalties and forfeitures as by the Act of 13 Geo. III. cap. 54, and under the same rules.

Matters remained in this situation until the year 1799, when the Act 36 Geo. III. cap. 54 was repealed by the Act 39 Geo. III. cap. 34. The commencement of the season for killing partridges was then altered from the 14th to the 1st day of September, and this was declared to apply to the whole of the kingdom of Great Britain, and then the third section of the Partridges Act 1799 proceeds to say that any person transgressing the Act should be liable to the same penalty and to be recovered in the same way as is provided by the Act of 2 Geo. III. cap. 19.

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Referring now to the Act of 2 Geo. III. cap. 19, it does not appear that the penalty there prescribed is recoverable in any of the Courts in Scotland, but only in any of the Courts of Record at Westminster. This view derives support from the observations of Mr Hutchison in his work upon Justices of the Peace, Vol. II. p. 550, note *c*; and a case was tried in the Sheriff Court of Dumfriesshire, referred to in a treatise on the Game Laws, by John William Ness, 1813, p. 123, in which it was held that the statutory penalty of £5 could not be recovered in the Sheriff Court. It will be noticed that by the Act 2 Geo. III. cap. 19 it is declared that "nothing therein contained shall be construed to extend to that part of Great Britain called Scotland." I think it follows from these provisions of 2 Geo. III. cap. 19 that the provision to the effect that an informer may prosecute for a penalty under the Act cannot be held to apply to Scotland, because such informer is only authorised to prosecute for a penalty in the Courts at Westminster. Now without statutory authority a private informer is not in Scotland entitled to prosecute for penalties or fines; and if this is so, the concurrence of the procurator-fiscal cannot supply the defect in the instance of a complaint brought by a private informer (*Duke of Bedford*, 20 R. (Just.) 65).

In the present case the complainer prosecutes merely in the character of an informer, because it is not maintained that he had any other interest in the matter, the offence having been committed not on land belonging to the complainer but on the seashore.

I am accordingly of opinion that under the Act of 1799, which is the only Act we have to deal with in this case, the complainer had no title to prosecute the complaint in question, that the concurrence of the procurator-fiscal did not supply the defect in the instance, and that accordingly we should answer the question put in the stated case in the negative.—*2nd November* 1907.

Counsel for Appellant, Chree, W. T. Watson; Agents, E. A. & F. Hunter & Co., W.S.—Counsel for Respondent, Moncrieff; Agents, Simpson & Marwick, W.S. A. M.

OUTER HOUSE.

(*Lord Johnston.*)

176. Governors of George Watson's Hospital *v.* Parish Council of Edinburgh.

I. Assessment—Poor and School Rates—Exemption—Meaning of "State-aided" Day School in Education Acts—Endowed Secondary School Not Entitled to Exemption From Assessment Under Education (Scotland) Act 1897 (60 & 61 Vict. c. 62), sects. 2 and 3.

II. Education—School—Voluntary School "State-aided"—Schools Sharing in Technical and Secondary Education Grants But Not in Ordinary Parliamentary Grant Under Education (Scotland) Act 1872 (35 & 36 Vict. cap. 62), sect. 67, Are Not "State-aided" Within Meaning of Education (Scotland) Act 1897 (60 & 61 Vict. cap. 62), sects. 2 and 3—Education (Scotland) Act 1872 (cit. supra), sects. 1, 5, 12, and 67 — Educational Endowments (Scotland) Act 1882 (45 & 46 Vict. cap. 59), sects. 13, 19, 45 — Local Government (Scotland) Act 1889 (52 & 53 Vict. cap. 50) sects. 19, 22, 85—Local Taxation (Customs and Excise) Act 1820 (53 & 54 Vict. cap. 60), sect. 2—Education and Local Taxation Account (Scotland) Act 1892 (55 & 56 Vict. cap. 51), sects. 1, 2 (1)—Technical Instruction Amendment (Scotland) Act 1892 (55 & 56 Vict. cap. 63), sect. 1 (e)—Minutes of the Education Department Regulating Grant for Secondary Schools—Scottish Education Code for 1907.

In this suspension and interdict the governors of George Watson's Hospital sought to have the Parish Council of Edinburgh interdicted from assessing for poor and school rates their schools known as George Watson's College for Boys and George Watson's Ladies' College, upon the ground that they were voluntary schools within the meaning of the Education (Scotland) Act 1897, sects. 2 and 3, and therefore exempt from local taxation. The said schools are endowed schools in Edinburgh carried on under a scheme under the Educational Endowments (Scotland) Act 1882, approved by Her Majesty in Council on 17th November 1888. The said schools participate in grants for secondary education given under sect. 2 of the Education and Local Taxation Account (Scotland) Act 1892, and sect. 2 of the Local Taxation Account (Scotland) Act 1898, and also in an annual grant voted by Parliament for science and art. The Education (Scotland) Act 1897 relieves from assessment for local rates "voluntary" schools, and defines a voluntary school as a "state-aided day school not provided by a School Board."

The complainers maintained that their schools fall under this description. The respondents pleaded that throughout the Acts dealing with education in Scotland the term "state-aided" school meant a school sharing in the Parliamentary grant conferred by sect. 67 of the Education (Scotland) Act 1872, and that as the complainers' schools were not entitled to share in that grant, they were not "state-aided" within the meaning of the Education (Scotland) Act 1897.

The facts of the case, the contentions of parties, and the statutes cited, are sufficiently set forth in the Lord Ordinary's Note.

The Lord Ordinary *refused* the note, and *held* that the complainers' schools were not voluntary schools within the meaning of the Scottish Education Acts.

Lord Johnston.—The question raised under this suspension is whether the Governors of George Watson's Hospital are entitled under sect. 3 of the Education (Scotland) Act 1897 to relief from poor and school rates assessed on the subjects occupied by them as George Watson's College for Boys and George Watson's Ladies' College in Edinburgh. Though the question is raised with the Parish Council and therefore is confined to poor and school rates, the judgment will cover any other assessment or rate levied on the complainers.

In order to obtain the relief or exemption claimed the complainers must bring their schools under the definition of "voluntary schools" in the statute in question. For the provision of sect. 3 of the said Act of 1897 is this—no assessment under any general or local Act of Parliament for any county, burgh, parish or any other local purpose whatsoever, shall be assessed or levied on "any land or buildings used exclusively or mainly for the purposes of the schoolrooms, offices, or playground of a voluntary school." Now the statute has already in the preceding section stated that "the expression 'voluntary schools' means a state-aided day school not provided by a School Board." But nowhere in the statute, or indeed in any previous statute dealing with education in Scotland, has the expression "state-aided" as applied to a school been defined.

The present question resolves itself into this. Is the term "state-aided" to receive a natural or popular meaning and a liberal construction, or has it become in reference to legislation on educational matters a *vox signata*, with a stereotyped meaning, which does not require definition, that meaning being recipient of a Parliamentary grant as defined in the Education Act 1872.

For the determination of this question it is necessary to consider the history of legislation on the subject of education in Scotland from 1872 onwards. But before doing so it is proper to consider the Education Act of 1897 as a whole, and not merely sect. 3 above referred to.

Its object was twofold; first, to amend the provisions in the latter part of sect. 67 of the Education Act 1872, which were intended to assist a class of poor parishes. With this part of the Act I need not concern myself.

But, second, it aimed at the "aiding voluntary schools" by the payment out of monies provided by Parliament of "an aid grant equal to 3s. per child for the whole number of children in average attendance in those schools," to be distributed in accordance with conditions to be laid down by the Scottish Education Department. Now the term "voluntary schools," though well known in England, had not previously been used in Scotland, and it was therefore necessary to define it, and it was, at the end of sect. 3 (with which I am now dealing), defined as meaning "a state-aided day school not provided by a School Board." If, then, the complainers' schools are voluntary schools, they are entitled not merely to exemption from local rates under sect. 3 of the Act of 1897, but are entitled to the aid grant of 3s. per child in average attendance, provided the conditions laid down by the Department are fulfilled.

I think it is of some importance in determining what is meant by "state-aided" to note that the same class of schools as are to be exempted from local rates, are also at least contingently entitled to participate in the 3s. aid grant under the statute. For if it be made clear that a school of the class of those conducted by the complainers was not intended to participate in the 3s. aid grant it follows that it was not intended to be exempt from local rates. Now the complainers are governors of important secondary schools of the highest class, with large foundation endowments, and it is certainly not to be readily accepted that they were intended to participate in this trifling supplementary grant in aid of 3s. per scholar.

To turn, then, to the legislative history of the educational question in Scotland from 1872 onwards, it will be found that from the passing of the Act of 1872 to the present day state aid in the narrower sense was given once for all in 1872, and in the wider sense has been given from time to time since 1872 to the schools of Scotland in increasing amount but in very varied ways.

To begin with, the Act of 1872 provided for a Parliamentary grant, and so defines it (sect. 1) that the term "Parliamentary grant" has thenceforward a definite meaning. It is defined as a grant made in aid of a school out of monies provided by Parliament for the Civil Service, entitled "For Public Education in Great Britain." The term Parliamentary grant does not apply to the monies provided by Parliament, but to the grants made out of such monies by the Scottish Education Department (sect. 67) under the conditions contained in their Minutes in force for the time. And these grants may be made (1) to any school board in respect of the public schools under their management, that is, in popular language, to school board schools in parish or burgh; and (2) to the managers of any school which is, in the opinion of the Scottish Education Department, efficiently contributing to the secular education of the parish or burgh in which it is situated, that is, briefly, to a non-school board school, or what in England would be called a voluntary school.

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Unquestionably the reception of a Parliamentary grant would be the reception of state aid, and schools of the second category complying with the conditions of the department and so receiving Parliamentary grants would be "state-aided" and therefore "voluntary" in the sense of the definition of the Act of 1897. And there is nothing at first sight to confine such voluntary schools to schools of the elementary class or to exclude secondary schools from participating in the Parliamentary grants, if they comply with the Department's conditions.

At the time the Act of 1872 was passed, the term secondary in reference to education had not come into use, but the Act recognised (sects. 62–64) a distinction between higher class public schools and others of a more elementary character, though the term elementary is not found in the statute. The statute vested in the school boards of parish and burgh (sects. 23 and 24; see also sect. 38) not merely elementary schools, but all schools which were properly described as parish or burgh schools, as distinguished from schools having exceptional foundations and governing bodies, such as, for instance, the schools of the several Edinburgh hospitals. The Act itself scheduled (Schedule C) a certain number of schools as higher class public schools, and by sects. 62 and 63 committed it to the school boards, subject to the approval of the Department, to resolve that any other schools under their management should be deemed to be higher class public schools. But a higher class public school under these sections is not to be a burden on the school fund and therefore to share in the school rate, but is to be, so to speak, self-supporting. And though *ex facie* of sect. 67 such school might share the Parliamentary grant, I think that it would have been inconsistent with the terms of sects. 62–64 that it should have done so. If so, I cannot assume that the Legislature intended the endowed secondary school not under the school board to do so either. But whatever might have been contended under the Act of 1872 this matter was cleared up by the application to Scotland of the 20th section of the English Elementary Education Act 1876, which provided that in order to obtain a Parliamentary grant the income of the school shall be applied only for the purpose of public elementary education. Accordingly from 1876 onwards it was made quite clear that none but elementary schools, and therefore neither higher class public schools nor secondary schools not under the management of a school board, were to receive a Parliamentary grant.

Before passing from the Act of 1872 it is to be noted that in sect. 12 there is the first statutory use of the term "state-aided." In excluding teachers from eligibility as members of school boards, the teacher of a state-aided school is mentioned as in contradistinction to the teacher of a public school thus—"No teacher of a public school or state-aided school," etc. A "public school" is defined in sect. 1 as being a school board school, and, though a public school may be also a "state-aided" school, the use of the alternative "or state-aided school" must have been intended to bring in schools not under a school board but yet receiving a Parliamentary grant, for that was the only form in which state aid was under that Act and for some time afterwards given.

If, then, "state-aided" meant in the section above referred to, recipient of a Parliamentary grant, does it in subsequent legislation continue to have the same restricted meaning?

I find nothing to note in the Education Act 1878, except that with regard to the examination of higher class schools sect. 19 (though using the word "public," I think *per incuriam*) recognises that there may be schools not under school boards giving higher class and not merely elementary education, just as by sect. 20 it recognises that there may be school board schools doing the same.

The next Act to be considered is the Technical Schools Act 1887. This Act empowers school boards to provide technical schools, and, subject to applying the school fees to teachers' salaries, to charge any deficiency upon the school fund. But the statute contemplates that such school may claim a grant from the Department of Science and Art. Now I understand that from 1836 onwards Parliament has provided a grant administered, so far as Scotland was concerned, for a long time by the Department of Science and Art, and now by the Scottish Education Department, towards the support of schools and continuation classes of a technical character. In a sense, therefore, participation in this grant would be the receipt of state aid, and I understand that though this statute provides only for the establishment of public or school board technical schools, other higher class schools not under school boards have been in use to participate in this grant prior to 1887. I do not, however, think that this fact can be regarded as making them state-aided in the sense in which that term was used once at least in the 1872 Act, and is frequently used in the Acts to be now mentioned, and in the Act to be interpreted.

I come therefore to the history of the abolition of school fees in which is involved the grant towards secondary education in which the complainers' schools participate, and in respect of which participation they claim to come under the category of "voluntary schools" as defined in the Act of 1897.

Although prior to its passing, the Exchequer had been in use to make sundry contributions in relief of local taxation, the English Local Government Act 1888, for the first time, I think, created what is now known as "The Local Taxation Account," to the credit of which were to be carried, first, the proceeds of certain licences;

and, second, a share of the Probate Duties, and so far as England is concerned, provides for their distribution.

In the same year was passed the Probate Duties (Scotland and Ireland) Act 1888, which, *inter alia*, assigned to Scotland its proportionate share of the Probate Duty grant to be carried to "The Local Taxation (Scotland) Account," and made an interim provision for its application. Then the Local Government (Scotland) Act 1889, a share of the Probate Duty grant having been already directed to be carried (by the Act of 1888 last referred to) to the Local Taxation (Scotland) Account, provided, firstly, for the application of the share of the Probate Duty grant for the current year 1889–90. After allocating a sum of £50,000 to the relief of local taxation in the Highlands, and another sum towards the maintenance of highways, it declares (sect. 19 (3)) the balance shall be applied towards payment in relief of school fees "in the state-aided schools in Scotland," and distributed in such manner and in accordance with such conditions as may be set forth in a Minute by the Scottish Education Department. Then it provides for carrying to the Local Taxation (Scotland) Account the proceeds of certain scheduled licences from and after the close of the current financial year; and, secondly, for the application of the whole monies so in the future carried to the Local Taxation (Scotland) Account, that is, the share of the Probate Duty grant and the proceeds of the Local Taxation Licences grant, in a more permanent way, and here again it appropriates the balance towards the relief and payment of school fees in "the state-aided schools of Scotland." There is also a noticeable use of the same term in sect. 85 of the said Act of 1899. Now at that date the term "state-aided school," which Parliament uses as having a recognised or recognisable meaning, would only, I think, apply to schools which were recipients of the Parliamentary grant. For I cannot think that the Legislature had in contemplation schools participating in the comparatively unimportant grant for technical education, which was at that time administered outside the purview of the Education Acts, and by an authority other than the Education Department.

Next comes the Local Taxation and Excise Act 1890. This Act provided anew for the distribution of the sums carried to "Local Taxation Account" from the Probate Duty grant and the Customs and Excise Duties grant. In dealing with the Scotch share of these grants (sect. 2 (2)), a sum not exceeding £40,000 is to be applied in relief from the payment of school fees in "the state-aided schools" in Scotland of children in the compulsory standards of the Scotch code. Here again, therefore, "state-aided" school is used as though it had a definite if not a statutory meaning.

The limitation to children in the compulsory standards does, I admit, create some difficulty, as indicating that the "state-aided" school may be more than elementary, and if so, why not secondary? But I do not think that the contention can be pushed that length, as it is notorious that all the best Parliamentary grant schools aim at going beyond the compulsory standards though not claiming to be higher class or secondary schools. Again, by the Education and Local Taxation Account (Scotland) Act 1892 a further rearrangement was made, and the term "fee grant in Scotland" is adopted. Instead of the balance of monies carried to the credit of the Local Taxation account, there is to be paid out of monies provided by Parliament an annual grant towards relief from the payment of school fees in "state-aided" schools in Scotland of £265,000, or of such other amount as Parliament may determine, and here are the important words: "Having regard to the amount of the fee grant under the Elementary Education (England) Act 1891." If anything were wanted to indicate that "state-aided schools in Scotland" meant only elementary schools receiving a Parliamentary grant, it would be found here in reference to the English Elementary Education Act of 1891. This change liberated money formerly applied in relief of school fees, and accordingly for the first time Parliament applied £60,000 of the sum so liberated in aid of the cost of secondary education in Scotland. The distribution of this sum of £60,000 was to be made by the Department, and they were not restricted in their grants to higher class public schools, but might include either schools "under the same management as a state-aided school," or a school of the class which I may shortly define as endowed schools. It is clear that "a state-aided school" must in this provision mean a non-school-board elementary school receiving a Parliamentary grant, as distinguished from the class of schools supplying secondary education and intended to share in the secondary education grant in aid. I do not need to refer to the Local Taxation Account (Scotland) Act 1898, which can have no bearing on the interpretation of that of the previous year.

I return now to the Education Act 1897, where the term "voluntary school" is defined as being a state-aided day school not provided by a school board. There can, I think, be no doubt that when Parliament used the term state-aided, it used a term which it considered to have a definite meaning and one which did not need interpretation. Having regard to the history of educational legislation from 1872 onwards, the term had come in Parliamentary usage to have a definite and stereotyped meaning. That is the only meaning which it can reasonably receive in the clause providing the 3s. aid grant, in which the definition of voluntary school occurs; and if so, I can give it no other meaning

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in the subsequent clause which gives exemption from local taxation to voluntary schools.

As the schools of the complainers are not non-school-board elementary schools receiving a Parliamentary grant, but secondary or higher class endowed schools participating only in the secondary education grant in aid, they are not voluntary schools in the sense of the section which I am called upon to interpret.

This note of suspension will therefore fall to be refused, with expenses.—28*th October* 1907.

Counsel for Complainers, Dean of Faculty (Campbell, K.C.), W. J. Robertson; Agent, Alex. Heron, S.S.C.—Counsel for Respondents, Clyde, K.C., J. E. Graham; Agents, R. Addison Smith & Co., W.S. R. S. B.

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(*Lord Salvesen.*)

177. Kerr and Others *v.* The Screw Collier Company Limited (Owners of "Prudhoe Castle").

Process—Proof or Jury Trial—Reparation—Collision Between Vessels at Sea—Loss of Member of Crew of One Vessel—Action of Damages by Relatives of Deceased—Form of Inquiry—Nautical Assessor—Issue Disallowed.

The pursuers in this action were the widow and children of George Kerr, master of the s.s. "Ruby," which was sunk on 9th October 1905 as the result of a collision with the s.s. "Prudhoe Castle" in the Firth of Forth near the Forth Bridge. The master and six of the crew were drowned. The result of a litigation between the owners of the respective vessels was to find that both were to blame.

The averments of fault made by the pursuers against the defenders were as follows:—

Cond. 5. The death of the said George Kerr was caused through the fault of the defenders, or those for whom they are responsible, owing to their faulty navigation. In particular, the "Prudhoe Castle," in breach of the regulations for the prevention of collisions at sea, and especially Articles 25, 28, and 29 thereof, and of the rules of good seamanship, (1) failed to keep a proper look-out; (2) failed to signal her alteration of course to starboard; (3) failed to timeously stop and reverse her engines when approaching the "Ruby"; (4) when the vessels were on courses which, if maintained, would have taken them clear of each other, negligently directed her course to port; and (5) the Firth of Forth west of the Forth Bridge, and, in particular, at and near the place of said collision, being a narrow channel, failed to keep to that side of the fairway or midchannel which lay on her starboard side.

The pursuers proposed an issue in ordinary form for the trial of the action.

The defenders contended that the case was not suitable for jury trial and ought to be sent to proof. They referred to *M'Lean* v. *Johnstone*, 1906, 14 S.L.T. 63, 8 F. 836; Nautical Assessors (Scotland) Act, 1894 (57 & 58 Vict. cap. 40), sect. 2.

The Lord Ordinary *refused* an issue and *allowed* a proof.

Lord Salvesen.—I have very great sympathy with the pursuer, because, if my recollection serves me right, she is the only person of all those who suffered by this very disastrous collision who remains uncompensated, and I would have been very anxious if I could to have given her the benefit of having her case submitted to a jury. But if I did so, I think I should be establishing a bad precedent and also going contrary to the decisions of both Divisions of the Inner House. I think it must now be taken as settled law that in a maritime case where questions arise as to navigation, and with regard to which it might be right that the judge should be assisted by a nautical assessor, the case is not suited for jury trial but ought to be tried by the judge himself. I entirely agree with Lord Kyllachy's opinion as reported in *Maclean* v. *Johnston*, that where an action is raised to recover damages for loss of life at sea, if the issue involved is a simple issue of fact, the case may quite appropriately be tried by a jury. But when I look at the averments here I am afraid I cannot regard this case as falling within that category. There are five respects in which it is said that the defenders' vessel was improperly navigated, and the allegations of fault involve the construction, or the application, at all events, of the rules for preventing collisions at sea which constitute a very difficult code to interpret. In these circumstances I have no option but to refuse the issue. —24*th October* 1907.

Counsel for Pursuers, Sandeman, W. T. Watson; Agents, Beveridge, Sutherland & Smith, S.S.C.—Counsel for Defenders, Spens; Agents, Boyd, Jameson & Young, W.S. J. W. F.

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(*Lord Johnston.*)

178. Liddall *v.* Parish Council of Ballingry.

Expenses — Sheriff — Ministerial Act—Sheriff has No Power at Common Law to Award Expenses when Acting Ministerially—Burial Grounds (Scotland) Act 1855 (18 & 19 Vict. cap. 68), sects. 10, 13 and 26.

This was a suspension raised by Mr W. J. N. Liddall of Navitie, Kinross, of a charge at the instance of the Parish Council of Ballingry for £48, 4s. 3d., being the expenses awarded against him by the Sheriff-Substitute of Fife and Kinross at Kirkcaldy (Shennan) in a petition under the

Burial Grounds (Scotland) Act 1855, in which he had appeared as an objector.

The facts of the case and contentions of parties sufficiently appear from the Lord Ordinary's Note.

The Lord Ordinary *held* that under the said Act the Sheriff was acting ministerially and had no right to impose expenses, and *suspended* the charge.

Lord Johnston.—Mr Liddall of Navitie under this suspension complains that he has been charged at the instance of the Parish Council of Ballingry on an extract decree for expenses pronounced by the Sheriff-Substitute of Fife which the latter had no power to grant.

The circumstances are these:—The Parish Council of Ballingry, as coming in place of the old Parochial Board, in May 1906 presented a petition to the Sheriff of Fife by virtue of the Burial Grounds (Scotland) Act 1855, praying him to designate 4½ acres of the glebe lands of Ballingry for the purposes of a burial ground for the parish. The prayer of their petition concluded by craving the Sheriff to find any person offering objections to the petition liable in expenses. Mr Liddall competently appeared, and after the statutory enquiry the Sheriff-Substitute, in disposing of the petition, found him liable in expenses. I am of opinion that neither had the Parish Council a right to conclude for expenses nor had the Sheriff-Substitute power to award them under said petition. That he should have even done so on the merits had he the power is unintelligible, his whole reasoning leading to an opposite conclusion, and proving that Mr Liddall's opposition was not only necessary but advantageous in the public interest as well as in his own, and amply justified by the result. But the question before me does not depend on the merits, but on the competency of the Sheriff's award.

The Burial Grounds (Scotland) Act 1855 provides for the closing of burial grounds which have become dangerous to the public health or offensive to public decency, and for the provision of burial grounds, whether existing burial grounds have been so closed or not. In relation to this matter certain authority is given to the Sheriff, subject to an appeal to a Lord Ordinary of the Court of Session, but I think that the very subject-matter of the authority committed to the Sheriff raises the *prima facie* presumption that his action will be ministerial and not judicial. This is amply confirmed by the provisions of the statute when these are examined in detail.

The Sheriff is first called in by sect. 3, where it is proposed to put the statute into operation, when a parish is partly burghal and partly landward, to determine whether for the purposes of the Act such parish is to be deemed to be burghal or landward. And where application is made to him for that purpose he is to hear "any parties having interest."

In the next place, by sects. 4 to 8, the Sheriff may be applied to not merely by the Parochial Board, but by any ten persons assessed for relief of the poor, or any two householders residing within one hundred yards of an existing or proposed burial ground, to determine whether such burial ground is or would be dangerous to public health or offensive to public decency. The provisions for the procedure on such application require the Sheriff "to permit all parties whom he shall judge to have an interest to appear and be heard in such manner as he shall deem fitting." He is to make enquiry, and if satisfied of the truth of the allegations of the applicants, he is to pronounce an interlocutor to such effect and transmit a copy to the Home Secretary, whereupon an Order in Council is to be pronounced closing the existing or prohibiting the opening of the proposed burial ground. In this branch of the statute there is no provision for appeal, but there is a prohibition of the renewal of the application to the Sheriff, except with the concurrence of the procurator-fiscal, till after the lapse of five years. In both these provisions it is quite clear that the Sheriff is acting ministerially, and this is accentuated by the clause to which I have last referred, and to enable him to deal properly with such applications it is manifestly necessary, and to the public advantage, that all having interest should be heard.

Then there follow in sects. 9 to 14 enactments for the provision of burial grounds for parishes, and I think also of additional ground to be added to an existing burial ground, and that whether the burial ground of the parish has been ordered to be closed or not. So far as I am concerned the important sections are 10 and 13. Sect. 10 provides for the Parochial Board, any ten ratepayers, or any two members of the Board, applying by summary petition to the Sheriff to have a suitable portion of land designated. And after examining witnesses, of whose evidence he shall keep a note, and making enquiry, the Sheriff is to proceed to designate and set apart such portion as he may deem necessary "of any lands in such parish suitable for the purpose," provided that due intimation is first given to the owner of such lands that he may be heard for his interest before such designation is actually made. Then sect. 13 incorporates the Lands Clauses Act 1845, which in effect makes the Sheriff's designation of a parcel of land for the purpose of a burial ground the equivalent of a private Act and confers compulsory powers on the Parochial Board as promoters of the undertaking to acquire the lands designated by the Sheriff. It is somewhat strange that the 10th section should only provide expressly for the owner of such lands being heard for his interest, but I think that the Sheriff-Substitute, having regard to the

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provisions of the Lands Clauses Act, did right in giving a wide interpretation to the word "owner," and in holding it to include anyone who, as Mr Liddall, might be injuriously affected, in respect, for instance, that the land proposed to be taken marched with his estate and was separated therefrom by a burn, in the water of which he had the rights of a riparian proprietor, and which water was liable to be polluted by drainage from the proposed cemetery. I cannot understand the reasoning of the Sheriff-Substitute's note, in which he indicates that he was prepared to be satisfied of the suitability of the ground chiefly because it was the only ground possible, without satisfying himself that either there would be no injurious affection of the burn by pollution, or that proper precautions were to be taken to prevent it, and which led him to proceed to designate the land with a mere warning that, "having in view Mr Bennett's (that is, Mr Liddall's adviser's) cogent criticism of the tentative scheme, they (the Parochial Board) must see that an efficient scheme is provided." It is manifest that but for Mr Liddall's appearance, whether statutorily entitled or not, the drainage question would never have been considered and must have subsequently been raised between him and the Parochial Board in the form of an action for nuisance.

In this third class of applications to the Sheriff an appeal is given to a Lord Ordinary of the Court of Session, but notwithstanding I cannot hold the proceedings either before the Sheriff or before him to be anything but ministerial. Of this I think it is sufficiently conclusive that by sect. 13 to the Sheriff is committed the duty of a Parliamentary Committee on a private Bill.

As the statute makes no provision as to expenses except by saying (sect. 26) that the expenses incurred by the Parochial Board in carrying the Act into execution, so far as not covered by burial fees, are to be raised by assessment, the complainer here maintains that the Sheriff-Substitute in his final deliverance on the Board's application had no power to award expenses against him, while the respondents maintain that he was entitled to do so by virtue of his common law powers. I am of opinion that he had no such common law powers, and that having no statutory power he was acting *ultra vires* in awarding expenses against Mr Liddall.

That he was acting ministerially I think cannot be doubted, and I refer to *Binning* v. *Easton & Sons*, 1906, 8 F. 407, and to *Hughes* v. *Thistle Chemical Co.*, 1907, S.C. 607.

The Ecclesiastical Buildings and Glebes (Scotland) Act 1868 is an Act of somewhat similar character, though it provides for appeal to the Sheriff and ultimately to the Lord Ordinary in teind causes from proceedings in the Church Courts, and there is therefore rather more to be said for such an appeal being of a judicial character than under the statute in question. Yet by sect. 15 of the Ecclesiastical Buildings Act it was thought necessary to give express power to the Sheriff and Lord Ordinary to award expenses.

Two categories of cases were referred to as authorities on this subject. First, those in which summary complaints of a merely *quasi* criminal character were concerned, as in *Ledgerwood* v. *M'Kenna*, 1868, 7 M. 261, where opinions were expressed that justices without any express power might competently award expenses in a complaint under that Act, but I think it is sufficient to say of that case that the justices were assumed to be acting judicially. Then in the analogous case of *Nimmo* v. *Clark & Wilson*, 1872, 10 M. 477, being an appeal to the Court of Session from a conviction by the Sheriff for contravention of the Mines Regulation Act 1860, the question was raised whether the Court of Session, to whom the appeal was taken, could award even expenses in the appeal, there being no provision for an award of expenses in the original complaint. There was no suggestion that the Sheriff could have awarded expenses in the court below, and the Court held that on the analogy of the practice in the Justiciary Court in appeals from convictions of a criminal character they were entitled to award expenses in similar appeals from convictions of a civil character.

The other category of cases to which I was referred was those in which the Sheriff acts as referee, as in the Burgh Police Act 1892, in the matter of extension of burgh boundaries, definition of drainage and water areas, etc., and it was pointed out that in *County Council of Dumbarton* v. *Clydebank Burgh Commissioners*, 1901, 4 F. 111, the Court on a statutory appeal from a Sheriff had assumed the power of awarding expenses both before them and in the court below of a successful opposition to the magistrates' application, although the statute made no provision for expenses. I have some difficulty in understanding that decision, and looking to what Lord M'Laren says, I cannot regard it as a considered judgment upon the point, and can only explain it to my own mind by assuming that in the peculiar circumstances of the case, and to redress a manifest hardship, the Court used their *nobile officium* to do that which neither they nor the Sheriff had power under the statute or common law to do. But this does not infer that the Sheriff had any power at his own hand to do the same, and in support of my view I refer to *White* v. *Magistrates of Rutherglen*, 1897, 24 R. 446.

I therefore propose to suspend the charge, with expenses.—31*st October* 1907.

Counsel for Complainer, Macmillan; Agents, Somerville & Watson, S.S.C.—Counsel for Respondents, Constable, Mercer; Agents, Tait & Crichton, W.S. R. S. B.

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179. Pick *v.* Stewart, Galbraith & Company Limited.

International Law—Foreign Decree—Decree-conform—Enforcement of American Decree — Circumstances Where Jurisdiction of American Court Not Recognised.

The following statement of the circumstances under which this action was raised is taken from the Opinion of the Lord Ordinary:—

"This is an action by the assignees of an American citizen to enforce a judgment in absence, obtained in the State of New York, by the grant of a decree-conform. The facts, as appearing from the pleadings, or *ex facie* of the proceedings in the American Courts, are as follows:—

"On 21st November 1903 the defenders, who are distillers in Scotland, entered into an agency agreement with a certain Demeter Pick of New York for the sale of their whiskies in the United States and Canada. Disputes arose as to the carrying out of the mutual obligations of parties, and it appears to be common ground that very few orders which Mr Pick obtained were accepted by the defenders. In October 1905 Mr Duncan M'Callum, one of the defenders' directors, had occasion to be in New York on business, and on 30th October 1905 he was served with a summons in which Mr Pick claimed 10,000 dollars for breach of the agreement. The defenders explain that the alleged service took place on board a steamer by which Mr M'Callum was returning to this country, by handing him an envelope, the contents of which he did not ascertain until he opened it at sea some days later. They further say that he did not understand the nature of the document. Those explanations are denied, and I cannot, therefore, in any way proceed upon them at present. It is certain, however, that no appearance was made for the defenders, or any other person; and the proceedings shew that, after the formal evidence had been led, decree in absence was pronounced on 28th April 1906. Both the summons and the judgment were directed against 'Stewart, Galbraith & Co.' and not against 'Stewart, Galbraith & Co. Ltd.,' who are the present defenders. This judgment was assigned on 4th June 1906 by Mr Pick to Moses Weill, who appears to have been his attorney, and on 29th June 1906 Mr Weill assigned it to the present pursuer. Both assignations bear to be of a judgment for 10,000 dollars obtained against Stewart, Galbraith & Co.

"It seems to have been ascertained that this judgment could not be enforced against the defenders, and accordingly a motion was made for leave to amend the Judgment Roll by the insertion of the word 'Limited' after the words 'Stewart, Galbraith & Company' wherever appearing in the Roll. This motion, which was not intimated to the defenders, was granted; and it is upon the judgment as so amended that the pursuer now sues."

The defenders pleaded, *inter alia*:—

"(1) No title to sue.

"(2) The pursuer's averments being irrelevant and insufficient to support the conclusion of the summons, the action should be dismissed.

"(5) The said alleged judgment having been pronounced by a Court having no jurisdiction over the defenders, is not enforceable against them."

The Lord Ordinary *sustained* the first, second and fifth pleas in law for the defenders, and *assoilzied* them with expenses.

Lord Salvesen [after narrating the facts as set forth above].—These proceedings are sufficiently extraordinary to invite examination, notwithstanding that Mr Justice Betts, the same judge who had pronounced the decree in absence and granted leave to amend the Judgment Roll, refused an application to vacate the judgment, and held that the service of the summons was good. It is unnecessary, however, to consider these matters, as I have reached the opinion that the American Court had no jurisdiction such as the Courts of Scotland will recognise to entitle the pursuer to a decree-conform.

The defenders are described as a limited company, having their registered office in Scotland. They could not, therefore, be subjects of the United States, nor resident there at the time when the action began, neither is it alleged that they had contracted to submit themselves to the *forum* in which the judgment was obtained, nor that in the character of pursuers they had selected the *forum* in which they were sued, and they are not said to have had real estate within the State of New York. Now these are the only grounds of jurisdiction which will be recognised as properly subjecting a party to the jurisdiction of a foreign Court (*Rousillon* v. *Rousillon*, 1880, 14 Ch. Div. 351; approved *Sirdar Gurdyal Singh* [1894], A.C. 670). It may well be, nevertheless, that, according to the legislation of New York State, a foreign corporation may be properly cited there although none of these grounds of jurisdiction exist. We are familiar in Scotland with the process of founding jurisdiction by arrestment of moveables; but it is quite certain that a foreign court, and even an English Court, will not grant a decree-conform to a Scotch decree where this was the only ground of jurisdiction of the Scotch Court which pronounced it. It is therefore of no consequence whether according to the law of New York State the defenders were subject—whether on the ground of citation or otherwise—to the

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jurisdiction of the Courts there. In the Privy Council case to which I have already referred it was expressly decided that the mere fact that the cause of action arose within the jurisdiction of the Court in which the judgment was pronounced would not, in a personal action, give jurisdiction over a defendant who was personally resident elsewhere; and it was laid down in absolute terms that no territorial legislation can give jurisdiction which foreign Courts ought to recognise against foreigners who owe no allegiance or obedience to the Power which so legislates. Assuming, therefore, that the accidental presence and citation of a director of the defenders' company in New York was sufficient, according to the law there prevailing, to confer jurisdiction on Mr Justice Betts to pronounce the judgment in question, that has no relevancy in this action unless the ground of jurisdiction was one which the Scotch Courts ought to recognise. Accepting Mr Justice Fry's enumeration in *Rousillon's* case of the grounds of such jurisdiction as complete, it is obvious that the jurisdiction on the grounds claimed cannot be recognised here.

What I have said proceeds on the assumption that the defenders had been properly called and cited. I have already pointed out that they were not called, in the first instance, under their proper statutory designation; and that it was only after a judgment had been pronounced against defenders who, if they exist at all, are a different *persona* from the present defenders, that the judgment was amended without notice, so as in fact to substitute these defenders in place of another party against whom the judgment had been pronounced. Such a proceeding seems to be contrary to elementary rules of justice, and to indicate that the particular tribunal which sanctioned it was disposed to accede to any *ex parte* motion. When, in addition, it appears that the only judgment of which the pursuer is an assignee is a judgment against Stewart, Galbraith & Co., it is obvious how hopeless his present demand is. I shall accordingly sustain the first, second and fifth pleas for the defenders, and assoilzie them from the conclusions of the action.—*2nd November* 1907.

Counsel for Pursuer, Hunter, K.C., Findlay; Agents, Hossack & Hamilton, W.S.—Counsel for Defenders, Dean of Faculty (Campbell, K.C.), Macmillan; Agent, James Purves, S.S.C.

J. W. F.

OUTER HOUSE.

(*Lord Mackenzie.*)

180. Semple *v.* Macnair and Crawford.

I. Arbitration—Partnership—Dissolution—Clause in Contract of Co-partnership Referring Differences Between Partners as to Meaning of Contract—Dissolution of Firm—Exclusion of Action—Held that the Jurisdiction of the Court was Not Excluded by Arbitration Clause.

II. Partnership — Action for Dissolution of — Construction of Arbitration Clause in Contract of Co-partnery—Reference of Differences Between Partners as to Contract.

This was an action at the instance of David Smith Semple, writer, Paisley, against Thomas Dun Macnair and Gavin Crawford, also writers in Paisley, in which the pursuer sought to have it declared that the firm of D. S. Semple, Macnair & Crawford (of which the parties were the individual partners) was dissolved on or about 4th January 1907, and that at that date the defenders ceased to have any share or interest in the said firm, its property and assets, and that their share and interest vested, as at the said date, in the pursuer, subject to their right to receive from the pursuer their share and interest in the firm as the same should appear from a balance-sheet to be made at the said date; or otherwise, that a decree should be pronounced dissolving the said partnership as at the date of citation in this action, or at such other date as might be fixed; and that, upon said decree of dissolution being pronounced, the pursuer and defenders should be decerned and ordained to realise the assets of the co-partnery and, after repayment of the capital of each partner, to divide the same among the parties according to their interests.

The pursuer averred that in September 1901 he was carrying on business alone as a law agent and conveyancer in Paisley. At the said date he arranged to take the defenders into partnership with him, and a contract of co-partnership was entered into by the parties on 27th September 1901. This contract provided that the co-partnership should begin on 1st October 1901 and should endure till 28th May 1917, and that the pursuer should always be entitled to the position of senior partner.

The contract of co-partnership also provided :—

(2) "The business shall be carried on under the firm of 'D. S. Semple, Macnair & Crawford,' and the signature of the firm may be used by any of the partners, but for behoof of the partnership only. . . . In the event of any contravention of this provision the contravener . . . . in the option of the other partners, ceasing to be a member of the Company, without any legal process whatever, on payment of his share and interest as is hereinafter provided with regard to the share and interest of a partner becoming bankrupt or insolvent."

(5) "The second and third parties shall be bound to devote their whole time and attention to the partnership business, but the first party shall only be bound to devote such time and attention to the business as he pleases, and the partners shall consult each other on all matters of importance. It is

specially agreed that, with the assistance of the junior partners, the senior partner will, so long as he desires, conduct the secretary and law agency of the Paisley Heritable Property Investment Society and such trust estates as are presently under his charge, as he may desire, and the second and third parties shall conduct the court, conveyancing and general work of the office, and report at least once a week to the senior partner."

(7) "A proper set of business books shall be kept . . . . the books shall be balanced annually on 31st December in each year. When the books are balanced, a balance-sheet shall be made out shewing the profit or loss, the said balance-sheet shall be examined and docqueted by the partners within a period of two months after the balance is made. . . ."

(8) "At each balance whatever sum stands at the credit of each partner beyond his capital may be either withdrawn by the respective partners in whole or in part, or with consent of his co-partners allowed to remain in the business and bear interest at five per cent. per annum."

The pursuer's averments in Conds. 5 and 7 were that he had a large amount of work for clients who had employed him prior to the co-partnership, which he continued to conduct. He occasionally called in the assistance of his co-partners in this work, but they objected to aid him with it, and demanded that he should hand over the control of it to them. On the other hand, the defenders kept locked up the receptacles for papers which they brought to the partnership office and denied the pursuer access to them. From the autumn of 1903 onwards the defenders interfered with the pursuer's clients and with his conduct of their business, and, in defiance of his wishes, took the affairs of his clients out of his hands, and on different occasions entered into communication with them and usurped the entire management and control of various matters outwith the work allotted to them under the contract. Also, the defender Crawford, with the concurrence of the other defender, ignored the pursuer and sought the advice of other law agents regarding the affairs of the pursuer's clients.

In other condescendences (omitting Cond. 3, which the pursuer withdrew) the pursuer averred that the defenders had endeavoured to take the management of the whole affairs of the firm out of the pursuer's hands; that they had kept the firm's bank and cheque books and deposit receipts in their safe, and excluded the pursuer from access thereto; that since August 1903 they had ceased to report each week to him; that in 1905 they did not submit the balance-sheet of the firm to him; and that in 1906, having prepared a balance-sheet, they withdrew their shares (including a portion of their capital) before giving the pursuer an opportunity of checking the balance-sheet. Further, they abused the pursuer to the firm's clients, and on 25th July 1906 the defender Macnair wrote to one of the pursuer's clients blaming the pursuer for neglect of that client's interests. The defenders also amalgamated with the firm's business the trade of house-factoring, and persisted in signing the firm's name in connection with said business, in contravention of Article 2 of the Contract of Co-partnership. In consequence of the defenders' conduct the relations between the parties became strained, and the pursuer sought to have it declared that the defenders, in respect of their contraventions of the contract of co-partnership, had ceased to be members of the co-partnership.

The defenders founded, *inter alia*, on the last clause of the said contract providing for arbitration (which is quoted in the Lord Ordinary's opinion), and pleaded:—

"(5) In any event the action should be sisted until it has been decided by the arbiter whether or not the defenders have committed any breaches of the contract."

Lord Mackenzie.—The pursuer is the senior partner of the firm of D. S. Semple, Macnair & Crawford, who carry on business as law agents in Paisley, and the defenders are the two junior partners. Decree is sought that the firm was dissolved on or about 4th January 1907, or otherwise the Court is asked to pronounce a decree dissolving the partnership. There is also a conclusion applicable to the division of the assets on dissolution.

The defenders maintain that the matters founded upon by the pursuer in his condescendence fall within the reference clause in the contract of co-partnery, and their motion was that the action should be sisted in order that the arbiter nominated in that clause may consider and decide the differences which have arisen between the partners, and report whether the condition of affairs in the partnership is due to the fault of the pursuer or of the defenders; and, if there is fault on both sides, how far it is the fault of the pursuer and how far the fault of the defenders, and indicate whether, in his view, there should be dissolution, and in the event of his being of opinion that dissolution is advisable, to report the terms upon which, in his opinion, it should take place. These are the terms of the motion made by counsel for the defenders.

Now the reference clause is in the following terms:—"In the event of any difference arising between the partners, or between the representatives or creditors of a deceasing or bankrupt partner and the surviving or solvent partners, as to the true intent and meaning of these presents, or any alterations that may hereafter be made on the same, or to the implement or carrying out of these presents, or in any way concerning the same, such differences are hereby submitted and referred to the amicable decision, final sentence, and decreet-arbitral" of an arbiter named. It was not maintained on behalf of the defenders that under this clause the arbiter had power to decree dissolution. That, it was

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admitted, was matter for the Court. The argument was that as the averments of the pursuer in support of his demand for a dissolution related all, or nearly all, to breaches of the contract of co-partnery, these were differences falling within the reference clause to be determined by the arbiter; that consequently he must first of all pronounce his decision upon them, and that then his report should be submitted to the Court, and that the Court should say whether there is to be dissolution or not.

I think there is a fallacy in the argument of the defenders, and it is this: The difference between the partners here is whether there should be dissolution or not; that, it is admitted, is not a matter for the arbiter to decide, and therefore the jurisdiction of this Court to pronounce a decision upon the difference between the partners is not excluded by the reference clause. As bearing upon the question in issue it will be necessary to investigate matters in dispute between the parties. Each of these matters taken by itself might have fallen within the terms of the reference clause. Where, however, the question is what bearing they have upon the only question raised in this action, viz., whether there should be decree of dissolution or not, I am unable to see how the arbiter comes in place of the Court. What the defenders are really asking the Court to do is to form an opinion on and decide a question without hearing the evidence. The case seems to me entirely different from that of the *North British Railway Co.* v. *The Lanarkshire and Dumbarton Railway Co.*, 1895, 23 R. 76. There the difference was to be determined by the arbiter. Here it is not. There the question in dispute was within the reference clause, but it was argued that the defenders' actings were outwith their statutory power, and that the questions raised were questions of law. It was held that there was no reason why the engineer to whom the matter had been committed should not dispose of it. So, too, in *The Caledonian Railway Co.* v. *The Greenock and Wemyss Bay Railway Co.*, 1874, 1 R. (H.L.) 8, it was held that a difference between the parties in regard to the mode in which an agreement was to be carried into operation was within the arbitration clause, and that the action was excluded. If the question in this case, whether there should be dissolution, had been one for the arbiter, these cases would have applied. According to the argument submitted, they do not.

Reference was made on behalf of the defenders to the English cases of *Russell* v. *Russell*, 1880, 14 Ch. D. 471; *Walmsley* v. *White*, 1892, 40 W. R. 675; *Belfield* v. *Bourne* [1894], 1 Ch. 521; *Vawdrey* v. *Simpson* [1896], 1 Ch. 166. In these cases it was held, on a construction of the arbitration clause, that it was for the arbiter to say whether there should be dissolution of the partnership or not. The defenders here, however, did not carry their contention so far. I could understand the defenders founding on these cases if they were prepared to go the full length of them. According to the decisions in these cases, it was the person who heard the evidence who decided the matter. The proposal here, however, is for one tribunal to take the evidence and report, and for another to form an opinion and pronounce a decree. In my opinion that is out of the question. I may point out that there appears to be a difference between Scotch and English practice in such matters as this. In Scotland where the partners have agreed to refer the question to arbitration the jurisdiction of the Court is excluded. In England where a motion is made to stay proceedings by reason of an agreement to refer to arbitration, the Court has a discretion whether to grant the motion or not (Lindley on Partnership (7th ed.), p. 494).

I am of opinion that the defenders' fifth plea in law should be repelled; . . . . the case will be continued in order that the pursuer may deliver to the defenders particulars in regard to his averments in Conds. 5 and 7. The question of relevancy may be further discussed if so desired, after this has been done. The pursuer intimated that he did not insist in his averments in Cond. 3. —*5th November* 1907.

Counsel for Pursuer, Wilson, K.C., Horne; Agents, Simpson & Marwick, W.S. — Counsel for Defenders, Cooper, K.C., Deas; Agents, Mitchell & Baxter, W.S. R. C. H.

OUTER HOUSE.

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181. Baird & Company Limited *v.* M'Whinnie.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), Sched. I (*b*), 2, 12—Payment During Incapacity — Workman in Right of Registered Agreement Earning with Same Employers Lower Wages — Charge on Registered Agreement—Suspension of Charge—Offer to Pay Difference for Period of Lower Wages—Nimmo & Co. Ltd. v. Fisher, 1907, S.C. 890, Followed.

This was an action of suspension at the instance of William Baird & Co. Ltd., coal and iron masters, complainers, against John M'Whinnie, sometime miner, respondent, in which the complainers sought to suspend a charge by the respondent in virtue of an extract registered memorandum of agreement and warrant of the Sheriff of Stirling thereon, dated 24th April 1907. The facts are given in the Lord Ordinary's Opinion.

Lord Mackenzie.—The respondent is a miner

who met with an accident to his eye on 29th March 1906, while in the employment of the complainers. He claimed compensation under the Workmen's Compensation Act 1897 in respect of his total incapacity for work. On 12th April 1906 the parties agreed that the weekly amount of compensation in respect of the respondent's total incapacity was 14s. 5d. The respondent's average weekly earnings in the complainers' employment were 28s. 9⅗d. The sum of 14s. 5d. was the maximum rate under the statute for total incapacity.

The respondent was paid 14s. 5d. a week of compensation from 12th April to 29th May 1906. On 29th May he returned to work at a wage of 18s. 4d. a week, which he continued to earn till 12th July 1906. During this period he was paid 5s. 3d. a week as partial compensation. On 13th July 1906 he again became totally incapacitated, and his total incapacity continued till 13th September 1906. On 21st July 1906 an agreement was entered into between the parties under which the respondent was again paid compensation at the maximum rate of 14s. 5d. a week. A memorandum of the agreement of 21st July 1906 was recorded in terms of the Act. The agreement, which is produced, does not refer to the respondent's total incapacity, but in Answer 5 he admits that he received the payment of 14s. 5d. a week from 13th July to 13th September 1906 in respect of his total incapacity. On 13th September 1906 the respondent returned to work with the complainers. He continued to work from that date till 6th May 1907 at wages which averaged 23s. 2d. a week.

On 6th May 1907 the respondent charged the complainers on the memorandum of agreement of 21st July 1906 to pay to him £35, 5s. 6d., being forty-two weeks' compensation at 14s. 5d. a week from 21st July 1906 to 6th May 1907, under deduction of £6, 9s. 9d., being the amount received by him between 13th July and 13th September 1906. If the complainers pay the sum charged for, the respondent would receive, in respect of the period between 13th September 1906 and 6th May 1907, a sum considerably exceeding (the complainers say about 9s. a week) his average weekly earnings prior to the accident.

The complainers maintain that the respondent is only entitled to compensation, from 13th September 1906 to 6th May 1907, at the rate of the full difference between the average of his actual weekly earnings during that period and the average of his weekly earnings prior to the accident. This for the period between 13th September 1906 and 6th May 1907 amounts to £9, 10s. 3d., which complainers tender in the present suspension of the charge.

The complainers argued that the present case was ruled by the principles laid down in *Beath & Keay* v. *Ness*, 1903, 6 F. 168, followed in *Nimmo & Co. Ltd.* v. *Fisher*, 1907, S.C. 890, and I am of opinion that this argument is well founded. The respondent maintained that this was not so, because under the Workmen's Compensation Act, Sched. I, sect. (1) (*b*), compensation at the rate of 14s. 5d. a week might be awarded in respect not only of total, but also of partial incapacity. He accordingly maintained that an application must be made to have the agreement reviewed. I am unable, looking to what I consider to have been decided by these cases, to hold that the respondent can found upon the agreement of 21st July 1906, so as to enable him to recover a sum in excess of his average weekly earnings prior to the date of the accident. In the present case, either the respondent got wages on the implied agreement between him and the complainers that compensation at the rate of 14s. 5d. per week — the amount which had been fixed in respect of his total incapacity — was no longer due or claimable, because the total incapacity in respect of which this sum of compensation was due had ceased, and therefore the right to get, or obligation to pay, compensation at that rate had come to an end; or the payment of wages at the average rate of 23s. 2d. a week was in the first place to be held to the extent of 14s. 5d. of that sum as payment of the compensation, and the balance as the remuneration given for such service as the respondent in his partially disabled condition was able to render. In *Nimmo's* case the complainers tendered a sum which represented the full difference between the respondent's average earnings prior to the accident and his actual earnings for the period in question. The Court, in respect of his refusal to accept this offer, sustained the reasons of suspension, and suspended the charge *simpliciter*. Accordingly I am of opinion in the present case that there should be a finding that the compensation due to the respondent was payable only during his total incapacity; and further, in respect of his refusal to accept the complainers' offer of £9, 10s. 3d., that the reasons of suspension should be sustained and the charge suspended *simpliciter*—the complainers being found entitled to expenses. —*5th November* 1907.

Counsel for Complainers, Horne, Strain; Agents, W. & J. Burness, W.S.—Counsel for Respondent, Munro, A. M. Mackay; Agents, St Clair Swanson & Manson, W.S. R. C. H.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

182. Macfarlane *v.* Colam.

Reparation—Road—Motor Car—Motor Car Left Unattended at Roadside in Breach of Turnpike Act, But Not Causing Obstruction—Horses Shy at Car, Causing Damage—Held That Car Owner Not Liable

1ST DIV. Macfarlane v. Colam.

—ROADS AND BRIDGES (SCOTLAND) ACT, 1878 (41 & 42 VICT. CAP. 51), SECT. 123, AND TURNPIKE ROADS (SCOTLAND) ACT 1831 (1 & 2 WILLIAM IV. CAP. 43), SECT. 96.

Appeal from the Sheriff Court of Inverness.

In this action a horse-hirer sued the owner of a motor car for the sum of £38, as representing damage alleged to have been suffered by the pursuer through injury to a waggonette and pair of horses of his property owing to the fault of the defender. The immediate cause of the injuries complained of was the upsetting of the waggonette, the horses drawing it having taken fright at the defender's car, which had been left unattended at the roadside.

The Sheriff-Substitute (Grant) found the defender liable for the damage sustained.

The facts of the case and the grounds of judgment are fully detailed in the Note to the Sheriff-Substitute's interlocutor, which is in the following terms.

The motor car belonging to the defender in this case was left by his son upon the roadway of the public road between Kingussie and Newtonmore about 6 p.m. on the afternoon of 30th July 1906. No person was left in charge of the car, but Mr Colam, jun., had stopped the machinery and disconnected it, in this complying with the Motor Car Regulations on the point.

A waggonette and a pair of horses belonging to the pursuer came from the direction of Newtonmore, and the horses taking fright at the motor car, the waggonette was overturned and the horses and the waggonette damaged.

The driver of the waggonette was a careful and experienced man, and in no way by his fault contributed to the accident.

The available breadth of the roadway was a little more than 15 feet; of that the car occupied about one-third, leaving about 10 feet passage for the waggonette. There was a stone wall on the opposite side of the road to the car, so that there was no possibility of expanding the space by going on the verge.

There was thus no absolute obstruction of the highway: ten feet of an opening are enough for the passage of a waggonette and pair, assuming the driver was of ordinary skill and the horses perfectly quiet.

There was a grass verge to the road on the side on which the motor car lay, but it was not a place where Mr Colam could have placed his car, having reasonable regard to its care, nor could he prudently have placed it on either of the approaches of the house which he was visiting, an unfinished house his father was building.

There remains the one point on which *culpa* may be inferred on the part of young Mr Colam, whether he acted in breach of the Statutory Regulations under the Road Acts in leaving his car unattended on the highway. Sect. 96 of 1 & 2 William IV. cap. 43, as incorporated in the Roads and Bridges (Scotland) Act 1878, sect. 123, *inter alia*, enacts "If any person shall leave any . . . . carriage whatever upon such road or on the side or sides thereof without any proper person in the sole custody or care thereof, longer than may be necessary to load or unload the same, or shall not place such . . . . carriage during the time of loading or unloading the same or of taking refreshments as near to one side of the road as conveniently may be, either with or without any horse or beast of draught harnessed or yoked thereto, shall for each and every such offence forfeit and pay a sum not exceeding fifty shillings sterling over and above the damages occasioned thereby."

A motor car is a carriage in the sense of the Road Acts; *vide* Locomotives on Highways Act, 1896, sect. 1 (*b*).

Mr R. L. Colam did leave the car in question on the road without any proper person in the sole custody or care thereof. I cannot doubt that the fact of the car being there was the immediate cause of the accident. The horses were skilfully driven; they had passed motors in motion eight times that day without becoming unmanageable; and no other cause can be suggested for this accident than this stationary and unattended motor car placed where it ought not to be according to the Road Acts. There is thus, I consider, a direct relation between young Mr Colam's act and the damage that resulted.

There remains to be considered the exceptions to the section. During the time necessarily required for loading and unloading or for taking refreshments, a carriage may be left unattended if placed as near to one side of the road as conveniently may be, that is, on either side, not necessarily the proper side in passing. These particulars Mr Colam complied with. The car was practically close to the side on which his business lay. No allegation of "refreshment" was raised, and all that is left is the question whether his absence was no longer than was requisite in "unloading." The object of his journey was to take some vases—fragile articles—to the new house; if that had been done expeditiously and he had returned to the car without delay, it might have been soundly maintained that this was "unloading" in the sense of the Act; but the evidence shews, I think, that he stayed longer in the house than was absolutely requisite to deposit the vases. His return was occasioned by the accident itself: not actuated by the desire to return to his motor as soon as possible; and he admits having been ten minutes in the house, though the architect, Mr Cameron, puts it at a shorter period of time

I conclude, therefore, that the accident was occasioned by Mr R. L. Colam's breach of the statute, and that his father was responsible, as he was on his father's business. I think it is true, as some witnesses say, that horses are more ready to take fright on a country road than in a town street, where there are a variety of sounds and sights to distract their attention; but that does not enter into my reasons of judgment any more than what my private opinion may be as to the reasonableness of this section of the Act which I have to administer. I must hold that Mr R. L. Colam was in fault in leaving his car unattended, and the defender is liable for the direct consequences of his so doing.

The defender *appealed* to the Court of Session. His counsel was stopped by the Court.

Argued for the Pursuer: The defender was liable, as the cause of the accident lay in his wrongous use of the road (*Harris* v. *Mobbs*, 1878, L.R. 3 Ex. Div. 268; *Williams* v. *Day*, 1883, L.R. 12 Q.B.D. 110).

The Court *recalled* the interlocutor appealed against, and *assoilzied* the defender.

The Lord President.—In my view this is really a most preposterous case. The driver of a motor car, in order to go up to a house, leaves it on a road, and he leaves it in such a position that there is plenty of room for other vehicles to pass. He goes up to the house, leaving the car standing, and he is absent for about fifteen minutes. He had stopped the car and the machinery was not running, and it was therefore not an object of terror to anything else on the road by means of noise, and there it stood on the side of the road. Another man comes along driving a pair of horses, and when he gets beside the car the horses shy and he has not sufficient control of them to prevent them getting into the ditch. The carriage is injured and one of the horses is injured, and then he brings an action against the owner of the motor car. The only ground upon which the Sheriff-Substitute has allowed the case is that he finds that under a well-known section of the Turnpike Act no vehicle must be left unattended on the roadway, and there is a forty-shilling penalty, and then he says, "That being so, I do not doubt the car being there was the immediate cause of the accident." It was the immediate cause in the sense that it was the object at which the horses shied. But the car being unattended was, in the Sheriff's view, a contravention of the statute. All I can say is that if that were so there would be a great many convictions. I will assume, however, that there could have been a conviction under the statute. But the fact of the car being unattended did not make it something which became more terrifying than it otherwise would have been, for this good reason, that while it is quite true that the presence of a man, and especially if he use his voice, calms horses, the car might have been well attended with the man sitting behind the car and not visible. In the whole circumstances I think the case is quite irrelevant. It would have been a different thing if the car had been placed so as to cause an obstruction to the highway, but upon the facts, agreeing with the Sheriff, I do not think there was any obstruction. I advise your Lordships to recal the interlocutor, find in fact that the leaving of the car in the position described did not constitute an obstruction of the highway; find that the leaving of the car unattended had no relation to the accident, and that the same happened through the shying of the horses and the inability of the driver to control them; find in law that the defender is not liable to the pursuer in damages, and assoilzie him from the conclusions of the action.

Lord Kinnear.—I concur.

Lord Dundas.—I also concur. I observe that the Sheriff-Substitute makes no finding of fault on the part of the defender, but concludes that, as the accident was occasioned by Mr Colam, jun., leaving the car, the defender is liable in damages. I am unable to see that the breach of the statute, if there was a breach of the statute, had any relation to the accident which occurred.—1*st November* 1907.

1st Div. Macfarlane v. Colam. *Lord Dundas.*

Counsel for Pursuer, Hunter, K.C., Lyon Mackenzie; Agents, Fletcher & Baillie, W.S.—Counsel for Defender, Dean of Faculty (Campbell, K.C.), W. Thomson; Agent, Peter Macnaughton, S.S.C. W. A. R.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

183. Murdoch and Others *v.* The Caledonian Railway Company.

Ground Annual—Grassum or Duplication—Allocation — Ambiguous Clause — Construction—Contract of Ground Annual Provides for Payment of Grassum "Every Nineteenth Year From and After" Certain Date, "Commencing the First Term's Payment" at Said Date—Deed of Allocation Provides for Payment of Allocated Sums in Name of Grassum "Every Nineteenth Year From and After" Said Date, "All as Provided in Contract of Ground Annual"—Held That Payment of Grassum Due at Said Date.

Reclaiming Note against an Interlocutor of Lord Johnston.

(Reported ante, Vol. XIV. p. 527.)

The facts of the case sufficiently appear from the previous report.

The defenders *reclaimed.*

The Court, after hearing counsel for the reclaimers, and without calling upon the respondents, *adhered* to the interlocutor reclaimed against, the Lord President intimating that the Court agreed with the judgment of the Lord Ordinary and with the reasons on which it proceeded.—13*th November* 1907.

Counsel for the Reclaimers, Blackburn, K.C., R. C. Henderson; Agents, Hope, Todd & Kirk, W.S.—Counsel for the Respondents, Scott Dickson, K.C., W. Thomson; Agents, J. Douglas Gardner & Mill, S.S.C. W. A. R.

2nd Div.

Lang v. St Enoch Shipping Co. Ltd.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Low.*)

184. Lang v. St Enoch Shipping Company Limited.

Ship—Seaman—Contract of Service for Commercial Voyage—Carriage of Contraband—Refusal to Proceed to Belligerent Port—Discharge of Seaman—Wrongful Discharge—Wages—Merchant Shipping Act 1894 (57 & 58 Vict. cap. 60), sects. 134 and 186—Seaman Wrongfully Discharged on Account of Refusal to Proceed to Belligerent Port Held Entitled to Recover Wages from Date of Discharge to Date of Final Settlement in Terms of Merchant Shipping Act 1894, sect. 134, and also to Damages—Caine v. Palace Shipping Company Limited [1907], A.C. 386, Followed.

Appeal from the Sheriff Court of Lanarkshire at Glasgow.

Robert Lang, fireman, 44 Cheapside Street, Glasgow, brought an action in the Sheriff Court of Lanarkshire at Glasgow against the St Enoch Shipping Co. Ltd., 48 West Regent Street, Glasgow, to obtain decree for (1) the sum of £4 per month from 24th January 1905 until the date of settlement, less the sum of £4, 12s. 5d. paid to account, in name of wages due to the pursuer, and (2) the sum of £100 in name of damages.

Proof was allowed and led. The facts found proved were set forth in the interlocutor of the Second Division as follows:—

"Find in fact (1) that on 24th January 1905 the pursuer agreed to serve as a fireman on board the defenders' steamship 'St Helena,' under articles which are admitted on record; (2) that the said steamship loaded at Cardiff a cargo of Welsh coal, and on 16th April 1905 she arrived at Gap Rock, the signal station for Hong Kong; (3) that the master there received orders to take the vessel to Nagasaki in Japan; (4) that the master, in accordance with these orders, altered the ship's course for Nagasaki and communicated the change to the crew; (5) that at this time a state of war existed between Russia and Japan, while towards them Great Britain maintained an attitude of neutrality; (6) that some time previously Russia had notified as contraband of war every kind of fuel, including coal; (7) that the pursuer along with the majority of the crew refused to go to Nagasaki with this cargo, and was entitled under the articles so to refuse; (8) that it is not proved that the pursuer and the rest of the crew refused to work the ship from Gap Rock or the vicinity thereof to Hong Kong; (9) that the defenders thereafter wrongously charged the pursuer and the rest of the crew before the police magistrate at Hong Kong with refusal of duty, and that the said magistrate convicted each of them of the said offence and sentenced them to three weeks' imprisonment with hard labour; (10) that while they were still undergoing imprisonment the said ship was despatched from Hong Kong, and that, the defenders having made no provision for the passage home of the pursuer, in terms of the Merchant Shipping Act 1894, he was sent home as a distressed seaman."

The Merchant Shipping Act 1894 (57 & 58 Vict. cap. 60), provides:—

Sect. 134. In the case of foreign going ships . . . .

(*a*) The owner or master of the ship shall pay to each seaman on account, at the time when he lawfully leaves the ship at the end of his engagement, two pounds or one-fourth of the balance of wages due to him, whichever is least, and shall pay him the remainder of his wages within two clear days (exclusive of any Sunday, fast day in Scotland, or Bank holiday) after he so leaves the ship.

(*b*) If the seaman consents, the final settlement of his wages may be left to a superintendent under regulations of the Board of Trade. . . .

(*c*) In the event of the seaman's wages or any part thereof not being paid or settled as in this section mentioned, then, unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the wrongful act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof.

Sect. 186 (1). In the following cases . . . .

(*b*) Where the service of any seaman or apprentice belonging to any British ship terminates at any port out of Her Majesty's dominions,

the master shall give to that seaman or apprentice a certificate of discharge in a form approved by the Board of Trade. . . .

(2) The master shall, also besides paying the wages to which the seaman or apprentice is entitled, either—

(*a*) provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman; or

(*b*) furnish the means of sending him back to some such port; or

(*c*) provide him with a passage home; or

(*d*) deposit with the consular officer or merchants as aforesaid such a sum of money as is by the officer or merchants deemed sufficient to defray the expenses of his maintenance and passage home.

On 9th June 1906 the Sheriff-Substitute (Boyd) *assoilzied* the defenders.

The pursuer *appealed* to the Sheriff (Guthrie), who on 22nd November 1906 decerned against the defenders for the sum of £6, 8s. as the balance of wages due to the pursuer up to the date of his arrival in Hong Kong, and the sum of £40 in name of damages.

The Defenders *appealed* and *argued*: No doubt the crew were entitled to refuse to proceed to Nagasaki (*Caine* v. *Palace Steam Shipping*

Co. Ltd. [1907], A.C. 386). But it was proved that they had refused to obey the captain's order to come aft at the time when he wished to inform them that he had given up the voyage to Nagasaki. That was a case of refusal to obey lawful orders. The pursuer was therefore in breach of his contract, and was not entitled to bring an action thereon. *Caine* v. *Palace Steam Shipping Co. Ltd.* (*cit.*) was distinguishable. The pursuer there had not refused to obey lawful orders. Even if the pursuer were entitled to sue, he was only entitled to the wages actually earned, because there was a dispute as to liability which entitled the master to refuse to pay (Merchant Shipping Act 1894, sect. 134 (*c*)). Alternatively the running of the wages was stopped at the date of the judgment of the Sheriff, that being the date which corresponded to the date of the judgment of the Court of Appeal in *Caine* (*cit.*). It was immaterial that there had been no payment into Court, because payment into Court without admitting liability was unknown in Scotch practice. If the pursuer were entitled to continuing wages under sect. 134 (*c*), he was not entitled to damages in respect of failure to comply with sect. 186. Sect. 134 proceeded on the hypothesis that the contract remained in force, sect. 186 on the hypothesis that the contract had been terminated. In any view the sums which the pursuer had earned, or might have earned, since the date of discharge, should be taken into account in fixing the amount of damages.

Argued for the Pursuer: It was not proved that the pursuer had refused to obey any orders other than the order to proceed to Nagasaki. That was an unlawful order, which the pursuer might refuse to obey. He was not in breach of his contract, and was entitled to sue thereon (*Caine* v. *Palace Shipping Co. Ltd.*, *cit.*). The pursuer was entitled to wages up to the date of "final settlement" (Merchant Shipping Act 1894, sect. 134 (*c*)), *i.e.* up to the date when they were actually paid. In *Caine* (*cit.*) the running of wages was stopped at the date of the judgment of the Court of Appeal only because there was a payment into Court at that date. There was no such payment here. The pursuer was entitled to damages as well as wages (Merchant Shipping Act, sect. 186, *Caine*, *cit.*). As to wages earned by the pursuer, if the defenders wished to limit their liability, it was for them to establish the fact on which the limitation of liability depended. In the present case there was no evidence as to the amount of the pursuer's earnings.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff of Lanark dated 22nd November 1906, as also the interlocutor of the Sheriff-Substitute dated 9th June 1906; find in fact . . . . (*ut supra*). Find in law that in these circumstances the defenders are liable to the pursuer in damages; and also that under and by virtue of sect. 134 (*c*) of the said Merchant Shipping Act, the pursuer's wages continue to run, and are payable until the time of the final settlement thereof; therefore assess the damages at £40 (including maintenance); find the pursuer entitled to wages at the admitted rate of £4 per month from 24th January 1905 until the date hereof, under deduction of the sum of £4, 12s. 5d. received by him to account (£134, 9s., less said £4, 12s. 5d.), and accordingly decern against the defenders to make payment to the pursuer of the said sums of £40 and £129, 16s. 7d., being together the sum of £169, 16s. 7d., with interest thereon at the rate of 5 per centum per annum from the date hereof until payment; find . . . . (as to expenses)."

The Lord Justice-Clerk.—The pursuer seeks compensation under the following circumstances. He was a fireman,—one of the crew of a vessel called the "St Helena." The vessel being on the way to Hong Kong, which by her papers was her port of destination on the voyage she was making at the time, was signalled, when still at sea, from the signal station on the coast near Hong Kong, to proceed to Nagasaki, in Japan, and her course was altered accordingly. The war between Russia and Japan being in progress at the time, and the cargo, which was coal, having been declared contraband by both belligerents, the crew in a body refused to work the ship in the direction of Nagasaki. They had various interviews with the master, in which they consistently refused to serve the ship in a voyage to Nagasaki, and accordingly they remained on board idle. That being the position, the master, after consultation with his officers, who in the meantime were navigating the vessel, altered her course, and made for Hong Kong. He says that he summoned the men aft to inform them that he was going to Hong Kong, but that they refused to come aft. The crew say that the delay in coming aft was only a few minutes, while they cleared away their dinner things, and that when they came aft he waved them back, saying that he "wanted nothing more to do with them." Whoever is right as to what happened, the important point is that the master did not take proper steps to test whether the crew would assist in taking the vessel to Hong Kong, but navigated the vessel by the officers only for some time. No new order was issued. The crew were under the order to go to Nagasaki, or if that order was one that the master had no legal right to enforce, it was for him to cancel it and issue other orders. It therefore becomes the crucial point in the case, whether from the time when the order to set the course for Nagasaki was given until the time when the crew were landed at Hong Kong, any order was given by the master which the crew were bound to obey, and which they

2ND DIV. refused to obey. The occasion was an important and a serious one, the master having maintained that the crew were bound to give their services to go to Nagasaki, in which he was wrong. It lay with him to take proper measures to bring the working of the vessel into normal conditions, if he could do so. In testing this, one naturally looks to the log to see what was recorded at the time, that being the official statement made on the responsibility of the master, when the events were recent, and by which the position must be judged in any question with him. Now, the log records the abandonment of the voyage to Nagasaki, and gives the details of the duties undertaken by the officers plainly upon the footing that the master had not then informed the crew or called on them to return to duty. The day after this entry was made there appears an entry which is of great importance in the case. It is in these words:—"The foregoing entry had been read over to the members of the crew interested, who replied as follows, that they refused to go to Nagasaki as ordered, but they professed their willingness to take the ship into Hong Kong." That entry follows immediately on the entry mentioned above. It is very difficult to see how in the face of that entry it can be said that the crew ever refused to assist in navigating the vessel into Hong Kong. That being so, the sole question between pursuer and defender is narrowed down to this: Had the master the right to demand that the crew should work the ship on a course for Nagasaki? That is the question which was raised by the master before the magistrate in Hong Kong, and on which the master succeeded in having the men imprisoned. It is plain that the master proceeded throughout upon the footing that the crew were bound to obey his order to work the vessel to Nagasaki, and that they refusing to do so, he did not put them to the duty they were willing to undertake, viz. to navigate the vessel to Hong Kong. The conviction in Hong Kong was plainly wrong, and cannot be maintained. The risk of sailing into waters in which capture for carrying contraband of war was probable, was not a risk which the men in signing articles had undertaken. Therefore the men were in no default in refusing to go to Nagasaki, and it is plain that had that been accepted, they might have been able to do what they had undertaken to do, namely, to work the vessel on the course for Hong Kong.

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In these circumstances the pursuer sues for wages in so far as not paid down to the date of final settlement, and for damages. The damages found are not impugned, but the Sheriff has not given wages down to the date of settlement. In that I think the Sheriff has erred. I am clearly of opinion that sect. 134 (*c*) of the Merchant Shipping Act applies, and that the wages under that clause run to the date of final settlement, there being no ground for attributing the delay in the settlement to the pursuer, or any one else than the master or his owners.

The view I take in this case is strongly confirmed by the case of *Caine* v. *The Palace Shipping Company*, recently decided in the House of Lords.

Accordingly, my view is that the pursuer is entitled to the damages as found in the court below, and to his wages, as far as not already paid, down to the date of settlement.

Lord Stormonth-Darling.—In my opinion this case is indistinguishable in point of principle from the case of *Palace Shipping Co. Ltd.* v. *Caine and Others*, decided by the House of Lords on July 29th last. If so, we are bound to follow that case.

There, as here, the question arose out of the war between Russia and Japan, and out of a demand by the master that the crew (including in this case the pursuer, who was a fireman, and therefore a "seaman" in the sense of the Merchant Shipping Act 1894) should go with the cargo of coal, which had been declared contraband of war by both belligerents, to a port in Japan. The information as to the destination of the ship was communicated to the crew for the first time in this case when the ship reached Gap Rock, the signal station for Hong Kong: while in the House of Lords case the information was given at Hong Kong itself. But it is not contended that this trifling variation in the facts makes any distinction in principle. The only difference which the defenders represent as material is that the refusal of the pursuer and the rest of the crew to obey a lawful order applied, as they say, to an order to take the vessel to Hong Kong, and had nothing to do with the orders to go to Nagasaki in Japan. But this, though quite distinctly averred by the defenders on record (Ans. 10), is not borne out by the proof. The master nowhere says that he ever asked the pursuer and the others to take the vessel to Hong Kong. On the contrary, he says that after he had twice asked the men, first collectively and then individually, to "continue on the voyage," the course being at that time set for Nagasaki, in accordance with orders which had been received at the signal station, and they had twice refused, in the face of his remonstrances, he had a conference with the chief officer and the chief engineer as to the possibility of continuing the voyage, and it was then for the first time decided to go into Hong Kong, with the aid of the officers and engineers, the course being changed for Hong Kong in consequence of this decision. The Sheriff-Substitute discusses the precise sequence of events, and prefers the evidence of the officers examined to that of the men; but the Sheriff, on the other hand, accepts the evidence of the men, which is to the effect that they were in the act

of going forward, in response to the master's command delivered by the third officer, when he held up his hand on the bridge and "said he wanted nothing more to do with us." Though personally I am disposed to agree with the Sheriff, I do not think that it is necessary to decide absolutely between these two slightly different versions of what occurred, seeing that there is no attempt on the part of the defenders to prove that any order, or even suggestion, was ever made to the pursuer and the others that, whether they were willing to go to Nagasaki or not, they were at least bound to work the vessel into Hong Kong. The most that is attempted on the part of the defenders by way of suggestion is to say, that the men must have seen that the ship was turned towards Hong Kong, and might then have offered to do their duty. But if the men were right in their refusal to carry contraband of war to a port of one of the belligerents, their legal position could not be reversed or affected so long as this order was never withdrawn or a new order substituted. And that this was the truth of the case sufficiently appears, I think, from the log-book of the ship on the two critical days. After the entry about the refusal of the crew "to do any more work or continue the voyage" (*i.e.* to Nagasaki), there is an entry, "In consequence of the above refusal, we were compelled to abandon the voyage, and take the ship into Hong-Kong," and then there is a description of the several duties undertaken by the officers. That again is followed by an entry made next day, and signed not only by the master and the chief officer, but also by the chief engineer, in the following terms:—"The foregoing entry has been read over to the members of the crew interested, who replied as follows, that they refused to go to Nagasaki as ordered, but they professed their willingness to take the ship into Hong Kong." I regard this statement not only as a *de recenti* record made by the officers of the ship of the true position of the contending parties, but it squares with all that followed. Acting on his erroneous views of the crew's rights, the master had the men put on shore, tried before the police magistrate of Hong-Kong, and sentenced to three weeks' hard labour for refusal of duty. After three days of the sentence had elapsed, the governor of Hong Kong, in the exercise of his discretionary powers, released the men, because (as appeared from subsequent correspondence with the Colonial Office) there had been an opposite decision in Hong Kong on a similar charge. In that opposite decision it had been held that, in view of the proximity of belligerent ships, special risks, not covered by the crew's agreements, did exist. It is therefore plain that the whole question turned, not on any minor point connected with the few hours' steaming from Gap Rock to Hong Kong, but on whether the crew, having signed an agreement to serve on an ordinary commercial voyage, subject only to perils of the sea, were justified in refusing to serve after the agreement had been broken by the shipowner requiring them to serve on a voyage which, although within the geographical limits of the articles, was yet attended with risks not contemplated by the articles. The consequences, as regards the pursuer, were that, when he was released, the ship was gone, and that he had to accept a passage home as "a distressed seaman." He accordingly now sues the defenders (1) for wages at the rate of £4 per month from the date of the articles till the date of final settlement, in terms of sect. 134 of the Merchant Shipping Act 1894, less a small sum paid to account, and (2) for the sum of £100 of damages. The Sheriff deals with the claim for wages merely, by giving decree for the sum of £6, 8s., admitted in the defences as the amount of the pursuer's wages up to his arrival in Hong Kong. The damages he assesses at £40.

The pursuer is satisfied with this latter award, as covering maintenance and every other claim except money wages. But I am of opinion that we must follow the rule applied by the House of Lords with regard to wages; and to that extent we must recal the Sheriff's interlocutor. In other words, we must hold that the master acted wrongfully in procuring the imprisonment of the pursuer on an unlawful ground and in bringing his engagement to an end without making any provision for his passage home, in terms of sect. 186 of the Merchant Shipping Act 1894. In these circumstances it follows that the matter is regulated by sect. 134 (*c*) of that Act, which declares that the seaman's wages shall continue to run and be payable until the time of the final settlement thereof. There has been no final settlement thereof down to the present time, and the delay is not due to any cause other than the wrongful act or default of the owner or master. We must therefore give decree for the pursuer's wages at the admitted rate of £4 per month down to the date of our judgment hereon, under deduction of the sum of £4, 12s. 5d. admitted to have been received by him in Cond. 11, but without any reference to the sum of £6, 8s. alleged to have been paid by the defenders to the superintendent of shipping in Hong Kong as the balance of wages due to the pursuer; and *quoad ultra* we must affirm the Sheriff's award of damages (including maintenance), with which the pursuer declares he is satisfied.

This does not mean that we dissent from the main findings of the Sheriff. On the contrary, we agree with them; but it is necessary formally to recal his interlocutor and to vary his findings, in order to bring his judgment into harmony with a later decision of the House of Lords.

2ND DIV.
Lang v. St Enoch Shipping Co. Ltd.
Lord Low.

Lord Low concurred.—12*th November* 1907.

Counsel for Pursuer, Kennedy, K.C., M. P. Fraser; Agent, D. Hill Murray, S.S.C.—Counsel for Defenders, Hunter, K.C., Spens; Agent, Campbell Faill, S.S.C. J. S. M.

HIGH COURT OF JUSTICIARY.

(The Lord Justice-Clerk, Lords Stormonth-Darling and Low.)

185. Gold *v.* Neilson.

I. JUSTICIARY CASES — COMPLAINT — RELEVANCY—RESET—LATITUDE OF PLACE LIBELLED—"OR ELSEWHERE IN GLASGOW"—POSSIBILITY OF LOCUS PROVED BEING OUTWITH JURISDICTION OF MAGISTRATE.

II. JUSTICIARY CASES — CONVICTION — SPECIFICATION — RESET — CHARGE WITH ALTERNATIVES OF TIME AND PLACE AND ENUMERATION OF ARTICLES—NECESSITY OF SPECIFYING IN CONVICTION TIME AND PLACE AND ARTICLES IN REFERENCE TO WHICH THE CHARGE WAS FOUND TO BE PROVED — SUMMARY PROCEDURE (SCOTLAND) ACT 1864 (27 & 28 VICT. CAP. 53), SECT. 18, SCH. K, NO. 1.

III. JUSTICIARY CASES—SUMMARY PROCEDURE—RECORD OF WITNESSES—SUMMARY PROCEDURE (SCOTLAND) ACT 1864 (27 AND 28 VICT. CAP. 53), SECT. 16, SCH. I—ONE WITNESS MISNAMED IN RECORD—DESIGNATION AND ADDRESS CORRECTLY SET FORTH—SUSPENSION REFUSED.

Bill of Suspension and Liberation.

This was a Bill of Suspension and Liberation at the instance of David Gold, who was convicted in the Police Court at Glasgow on a complaint at the instance of the respondent.

The complaint charged:—

That David Gold, of 74 Parson Street, Glasgow, did, during the period between 19th July and 9th August 1907, in his licensed broker's shop at 75 Glebe Street, in his house at 74 Parson Street, in his store at 64 Parson Street, and in a close at 14 Albert Street, Townhead, all in Glasgow, or at one or other of said places, or elsewhere in Glasgow, the particular place or places being to the complainer unknown, on different occasions during said period, the particular occasions being to the complainer unknown, reset in all ten rubber cycle tubes, eight freewheel clutches, twenty-four cycle inflator connections, one cycle hub and one horn, the particular articles resetted on each occasion being to the complainer unknown, the said articles having been dishonestly appropriated by theft from the shop of Joseph Milliken at 6 George Street, Glasgow, by Arthur Hughes, now of West Thorn Reformatory, Parkhead, Glasgow, and Robert Ralston, of 300 Charles Street, Townhead, Glasgow, and the value of the property above libelled is under Ten pounds sterling; and the said accused has been previously convicted of reset of theft, conform to the conviction specified in the subjoined schedule, and to be put in evidence at the trial.

The conviction and sentence was as follows:—

The magistrate, in respect of the evidence adduced, finds said accused guilty of the crime charged, and the previous conviction libelled in the schedule having been proved against the said accused, the magistrate therefore sentences and adjudges said accused to be imprisoned for the space of thirty days from this date, and grants warrant to officers of law to apprehend and convey him to the prison of Glasgow, thereafter to be dealt with in due course of law.

The complainer presented this Bill of Suspension, and the respondent lodged answers thereto.

The reasons of suspension set forth and answers, were, *inter alia*, as follows, viz.:—

STAT. 5. David Cook [writer, Glasgow, the complainer's agent], before the accused was asked to plead to the charge, stated certain objections to the relevancy of the complaint, in respect that the latitude taken by the respondent as regards time and place was too great, and in consequence the complaint was irrelevant, and was vague, indefinite and ambiguous. He asked that said objections should be noted, and the record of the proceedings shews that that was done. The magistrate repelled the objections, held the complaint relevant, and allowed a proof.

Ans. 5. Admitted, under reference to the record of proceedings.

STAT. 6. The said conviction secured against the complainer is improper and inept, particularly in respect that it does not bear that he was convicted of any particular offence committed at any particular time or at any particular place, or in respect of any particular article or property. By the failure of the respondent, George Neilson, to give the complainer proper notice in said complaint of the particular offence or offences with which he was charged, with due specification of time, place and property, complainer was seriously prejudiced in preparing his defence. He is yet without knowledge of what particular offence it is that he has been convicted of, and the proceedings of the St Rollox Police Court . . . . fail to disclose the particular offence or offences with which he is charged and of which he has been convicted.

STAT. 7. For the prosecution there were several witnesses examined. From no witness except the said Robert Ralston was there elicited any information with regard to the time at which the offence or offences were committed, and he, on giving evidence on oath, deponed that the great bulk of the articles were sold to the complainer in the month of June 1907. In addition, it was proved that the said Robert Ralston and the said Arthur Hughes left the employment of Joseph Milliken referred to in the complaint on the 17th of July 1907, and that they could have no opportunity of selling articles subsequent to that date or in the month of August. They further stated that all articles stolen by them prior to leaving their employment had been disposed of by them prior to the first date mentioned in the complaint under which the complainer has been convicted. Both these witnesses further deponed as to the particular articles which they alleged were sold by them to the complainer, and stated which articles were sold in the shop and in the

house of the complainer, and in the close and store referred to. They further deponed that they had informed the police as to the exact number of articles sold to the complainer on each occasion, with a specification of the place where each transaction occurred.

Ans. 6 *and* 7. Denied. Explained that, as is frequently the case in charges of a similar nature, the present charge contained as specific an averment of *locus* as the knowledge of the prosecution at the time justified the prosecution in making. The evidence adduced at the trial disclosed, and the magistrate found it proved, that two boys [had stolen the articles mentioned in the complaint and sold them to the complainer]. The magistrate was perfectly satisfied that the transactions were from beginning to end dishonest, and that the complainer had been clearly proved guilty of the crime charged. Explained that the complainer did not ask for any adjournment, nor did he lead any evidence to explain his possession of the said articles. A previous conviction of reset was proved against the complainer.

Stat. 8. Further, the record bears that one Joseph Milligan was examined as a witness. There was no such witness examined. Further, one Milliken was examined as a witness and his name is omitted from the record. Accordingly the conviction is bad and inept in respect the statutory provisions have not been complied with.

Ans. 8. Admitted that in the record of proceedings the name of the witness Joseph Milliken is spelt as Joseph Milligan. His designation otherwise is correct.

The Complainer pleaded:—

1. The said conviction and sentence ought to be suspended *simpliciter*, and the complainer set at liberty in respect—(1) That the complaint against him is irrelevant on the grounds stated in the objections thereto and as herein founded on; (2) that on the facts proved in evidence the charge against the complainer was not proved; and (3) that the complainer, owing to the absence of specification in the pretended complaint brought against him, was seriously prejudiced, and had no opportunity of instructing a proper defence so as to prove his innocence.

2. *Separatim*, the said conviction and sentence ought to be suspended in respect that it does not disclose the particular acts of which the magistrate found the accused guilty, and that the magistrate in convicting the complainer of the crime as charged, should have specified the particular place or places, the articles and the dates, in respect of which the said conviction passed.

3. The said conviction and sentence should be set aside in respect that the names of the witnesses examined are not noted in the record of proceedings as required by statute.

Argued for the Complainer: (1) The words "or elsewhere in Glasgow" in the complaint were sufficiently wide to render the complaint irrelevant on the ground of possible want of jurisdiction on the part of the magistrate who tried the case. If the complaint had stopped before these words it would have been relevant, but these words made the latitude of place libelled excessive. (2) There was in the complaint a series of alternatives, and there was a large latitude in time. The conviction was a general conviction. When alternatives of place such as were here and a large number of articles were charged, the conviction ought to be a special one. The articles as to which reset was found proved ought to be specifically set forth, and also the place or places at which it was proved to have been committed. Particularly was this so where the places mentioned in the complaint were such as to include places which might be outwith the jurisdiction of the magistrate trying the case. There was really no difference between a case with alternatives such as were here and a long list of specified articles alleged to be resetted, followed by a general conviction, and a case of alternative charges with a general conviction. The schedule which gave the form of conviction (Sched. K, No. 1, of the Summary Procedure Act of 1864) used the words ("or state to what extent he is guilty"); and those words applied to such a case as this. (3) It was essential to a conviction standing that the record of proceedings should contain a list of the witnesses who were examined (Summary Procedure Act, 1864, sect. 16, Sched. I). The record here did not contain the name of a witness who was examined, viz. Milliken. And it contained the name of a man who was not examined, viz. Milligan. The conviction ought on this ground to be quashed.

Counsel for the respondent was not called on.

The Court *refused* the Bill.

The Lord Justice-Clerk.—I have no doubt or difficulty in holding that this bill of suspension must be refused.

To take the last objection first: one of the witnesses in the list of witnesses is slightly misnamed. The object of having the names of the witnesses recorded is that they may be ascertained. When a witness has been slightly misnamed in the list but his address and designation are correct, there can be no difficulty in ascertaining the person who is meant. I have therefore no difficulty in holding that the conviction cannot be set aside upon that ground. It would be absurd to hold otherwise. The total omission of the name of a witness from the list is quite a different matter. But a slight mistake in the name of a witness is not material, provided the person is sufficiently identified.

The complainer also objects to there being no finding by the magistrate specifying the particular places, times, and articles as to which he was found guilty. It is an entirely new idea to me that when alternatives as to time and place have been stated in a complaint, and these allegations as to time and place have been held relevant to be remitted to probation, it is necessary to have special findings in the conviction and sentence as to the particular times

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and places at and on which the crime has been committed. But it is said here that the prosecutor took too great a latitude. The place of the crime is stated as, *inter alia*, "or elsewhere in Glasgow to the prosecutor unknown." I should like to say that prosecutors ought always to avail themselves of the simpler forms of stating place and time which are authorised by the statute, which makes a great deal that is often found in complaints like this, such as this statement of "elsewhere to prosecutor unknown," quite superfluous. But as regards the latitude here taken, such latitude has been long ago decided to be legitimate in cases of reset. There are two cases in Bell's Notes which clearly shew this. In the first of these cases (*M'Intosh*, 4th January 1831, Bell's Notes to Hume on Crimes, p. 213) the place libelled was "within your house in King Street, Leith, or in some other part within the town or in the vicinity of Leith to the prosecutor unknown." In the second case (*Wilkinson*, 30th September 1835, Bell's Notes to Hume on Crimes, p. 213) the place libelled was "some place in the county of Perth to the prosecutor unknown." Such latitude is necessary in cases of reset. It is a continuing crime. The person accused may originally have got the goods honestly, but if he afterwards finds that he got them from a thief, the moment he knows this he is guilty of reset, unless he takes steps at once by informing the police to shew that he has no guilty intention with regard to the goods.

But it is said further that this is a general conviction of resetting a great number of different articles, and that the complainer has been put at a disadvantage because he did not know from the conviction which articles he has been found guilty of resetting. The magistrate was not bound to make any such finding. He pronounced a verdict of guilty as libelled. Now that means guilty of resetting all the articles or part thereof. It may sometimes be important to distinguish as to particular articles; for example, where the charge is resetting one article of great value and also other articles of comparatively small value. In such cases it might be right to limit the verdict to particular articles, and the matter should be attended to at the trial. But in the ordinary case, when there is a doubt regarding the guilt of the accused as to two or three of the articles libelled, there is no need to mention that in the conviction. A general conviction of guilty means guilty of all that is charged or of a substantial and material part thereof, and that is enough. I may add that reset is in many respects peculiar. For example, it is competent in a case of reset to prove previous convictions for the purpose of shewing guilty intention.

On the whole matter I think everything in this case was done regularly and properly, and that there is no ground for setting aside the conviction.

Lords Stormonth-Darling and *Low* concurred. —*7th November* 1907.

Counsel for Complainer, A. M. Anderson; Agents, Bryson & Grant, S.S.C.—Counsel for Respondent, Lord Advocate (Shaw, K.C.), M. P. Fraser, A. Crawford; Agents, Campbell & Smith, S.S.C. F. A. U.

OUTER HOUSE.

(*Lord Salvesen.*)

186. M'Lennan *v.* M'Lennan.

HUSBAND AND WIFE—CURATORIAL POWER OF HUSBAND—HUSBAND AND WIFE LIVING APART—SALE BY WIFE OF BUSINESS CARRIED ON BY HER—REFUSAL OF HUSBAND'S CONSENT — PETITION TO DISPENSE WITH CONSENT — MARRIED WOMEN'S PROPERTY (SCOTLAND) ACT 1881 (44 & 45 VICT. CAP 21), SECT. 5—CIRCUMSTANCES WHERE PROOF AS TO WIFE LIVING APART FROM HUSBAND WITH HIS CONSENT REQUIRED.

Sect. 5 of the Married Women's Property (Scotland) Act 1881 (44 & 45 Vict. cap. 21) enacts as follows:—

"Where a wife is deserted by her husband, or is living apart from him with his consent, a judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate."

This was a petition presented by Mrs Marion May Duncan or M'Donald or M'Lennan, Maybank, Sauchiehall Street, Glasgow, wife of Herbert Alexander M'Lennan, wine and spirit merchant, 1 Buckingham Street there. The petitioner lived apart from her husband. She proposed to sell a bill-posting business which she had carried on for a number of years, but her husband refused to give his consent so as to enable her to grant a valid conveyance to the purchaser. In this petition she craved the Court "to dispense with the consent of the said Herbert Alexander M'Lennan to such disposition, assignations, or other deeds of transfer as may be requisite to effectually convey to a purchaser the said bill-posting business carried on by the petitioner."

The husband lodged answers in which, *inter alia*, he denied that he had deserted the petitioner, or that she was living apart from him with his consent, and maintained that the said section of the said Act did not apply to the circumstances of the parties to this petition.

The Lord Ordinary *held* that the application could not be disposed of without inquiry, and allowed a proof.

Lord Salvesen.—The petitioner in this case is the wife of the respondent, from whom she is living apart. She proposes to sell a bill-posting

business, which she has been carrying on for a number of years; and she has asked her husband's consent, so as to enable her to grant a valid conveyance to the purchaser. This consent he refuses to give; and the prayer of the petition is that the Court should dispense with his consent, and so enable her to deal with her property in the same way as if she were unmarried.

The application is made in virtue of sect. 5 of The Married Women's Property (Scotland) Act, 1881, the terms of which are quoted on page 5 of the petition. It is a condition of the petitioner succeeding under this section that she should instruct either that she has been deserted by her husband or is living apart from him with his consent, and her counsel urged me, without enquiry, to come to the conclusion that it sufficiently appeared from the pleadings that the petitioner was living apart from the respondent with his consent; and, if so, that this was obviously a proper case for the Court exercising its power of superseding the respondent's curatorial rights. On the latter point I should not have much difficulty, because I do not think it is a good reason why the husband should refuse his consent to the sale of the separate business carried on by his wife that she may thereby be enabled more readily to defeat any legal rights of succession that he might have in her estate if she predeceased. *Prima facie* the curatorial power of the husband ought to be exercised with a view to the wife's benefit and the protection of her estate, and not in order to protect his rights of possible succession, or, as the petitioner suggests, with a view to coercing her to make payment to him of a substantial sum of money as the price of his consent. It is admitted here that the petitioner is a clever business woman; and as she has managed this bill-posting business without her husband's interference with much success, it would seem that she may well be trusted to dispose of it on advantageous terms.

The other question, however, is primarily one of fact, and I have to consider whether there are sufficient admissions by the respondent to justify me in holding that the petitioner is living apart from him with his consent. The Dean of Faculty, for the petitioner, maintained that it was sufficient for his purpose that there were no relevant averments in the answers that the petitioner had deserted her husband; and, if so, it followed that she must be living apart from him with his consent in the sense that he acquiesced, whether reluctantly or not, in her so doing. I confess that I would gladly have reached that conclusion, because the broad facts of the case appear to be best explained on this footing. The parties were married in 1895, and since the end of 1896 they have been both resident in Glasgow; and both have had ample means to enable them to take up house together. They have been, apparently, seeing each other from time to time, and communicating on friendly terms; and yet all the time the petitioner has been living under the name of her first husband in her own house, while the respondent has been residing with his mother. On carefully considering the respondent's answers, however, I am unable to take that *prima facie* view of the case. He says (page 5) that in November 1896 he "again offered to take up house with her and let the marriage be known. The respondent repeatedly urged her to adopt this course and end what he regarded as an intolerable position, but she always declined." Again (p. 7) the respondent denies that the petitioner has been deserted by him; and his answer proceeds as follows: "The petitioner and respondent have all along been constantly in one another's society. Denied that she is living apart from him with his consent. Explained that, on the contrary, the respondent has all along objected to the petitioner's refusal to reside with him as husband and wife (*sic*), and has persistently offered to make a home for her, and urged her to live openly with him as married persons." I was at first disposed to think that the absence of any allegation that the respondent had taken a house for his wife, to which he had invited her to come, might indicate that his alleged offer was not such as she was bound to accept; but, on the other hand, it may well be that the respondent was not bound to interrupt his present mode of life, or to go to the useless expense of taking and furnishing a house if he was assured that his wife would not join him there. I have therefore, with some reluctance, come to the conclusion that I cannot dispose of this application without enquiry; although I fully realise that it might be in the interests of both parties that many of the matters which are dealt with in the petition and answers should not be made public property. —*6th November* 1907.

Counsel for Petitioner, Dean of Faculty (Campbell, K.C.), Macmillan; Agents, Campbell & Smith, S.S.C.—Counsel for Respondent, M. P. Fraser; Agents, Patrick & James, S.S.C.

[*Note.*—This interlocutor was recalled by the First Division on 21st inst.].

J. W. F.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling and Low.)

187. Lord Polwarth *v.* North British Railway Company and Others.

I. Carriage—Railway—Goods—Route—Deviation—Contract for Carriage of Cattle from M to A via K—Alternative Routes from M to A via K—Contract for Return of Cattle from A to M by Same Route as on Outward Journey—Cattle Sent from A to M

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2ND DIV.

Lord Polwarth v. North British Railway Co. and Others.

VIA K BY ROUTE DIFFERENT FROM ROUTE OF OUTWARD JOURNEY—CIRCUMSTANCES WHERE HELD RAILWAY COMPANY HAD BROKEN THEIR CONTRACT.

II. CARRIAGE — RAILWAY — GOODS — SPECIAL CONTRACT—CONTRACT FOR CARRIAGE OF CATTLE AT OWNER'S RISK — CONTRACT FOR CARRIAGE OF CATTLE BY DEFINED ROUTE — CATTLE SENT BY DIFFERENT ROUTE—CATTLE DESTROYED WHILE IN RAILWAY COMPANY'S HANDS BUT NOT ON CONTRACT ROUTE—HELD RAILWAY COMPANY NOT PROTECTED BY OWNER'S RISK CLAUSE.

III. CARRIAGE—RAILWAY—GOODS—LIABILITY FOR LOSS OF GOODS—LIMITATION OF LIABITITY—RAILWAY AND CANAL TRAFFIC ACT 1854 (17 & 18 VICT. CAP. 31), SECT. 7—CONTRACT FOR CARRIAGE OF CATTLE BY DEFINED ROUTE—CATTLE SENT BY DIFFERENT ROUTE—CATTLE DESTROYED WHILE IN RAILWAY COMPANY'S HANDS BUT NOT ON CONTRACT ROUTE — HELD RAILWAY COMPANY'S LIABILITY FOR CATTLE LIMITED TO £15 PER HEAD, IN TERMS OF RAILWAY AND CANAL TRAFFIC ACT, SECT. 7.

Reclaiming Note against an Interlocutor of Lord Johnston.

The following narrative of the facts of the case is taken from the note of the Lord Ordinary (Johnston) appended to his interlocutor of 20th July 1905.

"This action is raised by Lord Polwarth to establish liability against the North British Railway Company and the North-Eastern Railway Company jointly, or jointly and severally, for the loss of three head of cattle destroyed at Tweedmouth Junction on their way back to Maxton, the station for Lord Polwarth's estate of Mertoun, from the Northumberland Agricultural Society's Show at Alnwick on 13th July 1904.

"The cattle were despatched from Maxton on the morning of 12th July, *via* Kelso, and travelled by the short route by Coldsteam and Wooler to Alnwick. They were returned on the afternoon of the 13th from Alnwick, *via* Alnmouth Junction, to Berwick, and thence back to Tweedmouth, with the intention of sending them from Tweedmouth, *via* Coldstream and Kelso, to Maxton. While standing at Tweedmouth Junction, the truck in which the cattle were caught fire, and they were destroyed.

"The cattle being prize animals, the sum of £800 is claimed as their value.

"The question raised, or intended to be raised, depends first upon the special contract made by Lord Polwarth, through his factor Mr Campbell, with the Company or Companies for the transit of the cattle; and second, upon the fact that the North-Eastern Company returned the cattle *via* Berwick and not *via* Wooler, and the effect thereof. . . .

"The admitted situation is that Maxton Station is on the North British Railway between St Boswells Junction and Kelso; that from Kelso to Sprouston is part of the North British line, but is worked by the North-Eastern, and the traffic between the two Companies is exchanged at Kelso, so that practically the North-Eastern line may be said to begin at Kelso; that from Kelso Alnwick can be reached by two routes of the North-Eastern—one, the shorter, *via* Coldstream and Wooler, the other, the longer, *via* Coldstream, Tweedmouth, and Alnmouth; that the route *via* Tweedmouth frequently involves the traffic being taken to Berwick and back to Tweedmouth; that besides the routes above mentioned, traffic between Maxton and Alnwick could be taken by a third, but a very roundabout route, *via* Duns and Reston, to Berwick, on the North British, and thence *via* Tweedmouth and Alnmouth, on the North-Eastern, to Alnwick.

"An arrangement exists, as was not denied, though the details of the arrangement and the precise relations of the Companies were not before me, between the North-Eastern and the North British Railway Companies (and I gather that the agreement is a general one among all railway companies in the kingdom) for the transit of cattle for *bona fide* show purposes to and from agricultural meetings at freight-and-a-half—*i.e.* freight for going and half freight for returning. But in order to obtain the benefit of such reduction of freight a somewhat elaborate system of documents requires to pass, the precise terms of which are essential to the contract between Lord Polwarth and the Railway Companies.

"In the first place, before the cattle start on the outward and return journeys respectively, declarations are required, Nos. 13 and 16 of process, to be handed to the station agents at the point of shipment for the outward and homeward journeys. These declarations are each of them headed North-Eastern Railway. What the precise relation between the North British and the North-Eastern Railway Companies in the matter is, as I have already said, not disclosed, but the terms preclude the North-Eastern from denying that the North British was at least their agent, except on the footing of denying authority and disclaiming the transaction altogether. But without detailed information there is practically no doubt, having regard to the known relations of the two lines, that, as between themselves, there exist arrangements for through traffic which cover the occasion in question.

"No. 13 of process commences with a certificate by the secretary to the Agricultural Society that the stock had been entered by Lord Polwarth for exhibition. The rest of the document is titled a certificate, but it is in reality one side of an agreement which, if stock are tendered and accepted for transit on the faith of it, becomes

mutual. In consideration of the North British receiving and forwarding the stock under the conditions applicable to agricultural show traffic, Lord Polwarth, through his factor, undertook to relieve the North British Company and all other Companies over whose lines the animals might pass, from all liability for loss, etc., except upon proof that such loss, etc., arose from wilful misconduct on the part of the servants of such Companies. Endorsed upon this document are 'General Conditions of Conveyance,' which I understand to be the conditions applicable to agricultural show traffic, as none others are referred to. Of these the important articles are that the stock is conveyed—

8. To the Show at ordinary rates.
9. From the Show, if sold, at ordinary rates.
10. From the show, if unsold, at half rates back to the station whence sent.
1. The live stock can only be conveyed at the owner's risk.
6. On returning, if the animals remain unsold, the exhibitors must produce a certificate of the fact, issued by the secretary of the society, and signed by the exhibitor, in order to be entitled to the privilege of having the stock charged at half rates.
7. In order to secure the return of the live stock at half rates if unsold, the exhibitors must in every case take care to consign them on the return journey by the same route as they were sent to the meeting, otherwise full rates will be charged.

"On delivery of this document to the station agent at Maxton, on 12th July 1904, the usual owner's risk consignment note was prepared by the agent and signed by W. Henderson, the man in charge of the cattle, whose authority from Lord Polwarth was not disputed. It bore simply that the cattle were consigned from Maxton to Alnwick, *via* Kelso, which left it in the Company's option to send them on from Kelso, *via* Wooler or *via* Tweedmouth, although it must, I think, be conceded that it was the understanding of both parties that the cattle would travel *via* Wooler, not only as the shorter and more convenient route, but also that which consisted with the hour at which the cattle were delivered, and the times of the trains running, and prior arrangement to this effect may, for aught that appears, be proved.

"What Henderson signed was a request that the cattle 'be carried at the special or reduced rate, in consideration whereof he agreed to relieve the North British Company and all other Companies over whose lines the stock might pass from all liability for loss, etc., except upon proof that such loss, etc., arose from wilful misconduct on the part of the Company's servants.'

"It was pleaded that the only contract made with the North British Company was a contract for the carriage of the stock from Maxton to Alnwick, as Lord Polwarth came under no obligation for a return journey. I do not think that this contention is tenable. I think that the North British Railway Company contracted on behalf of itself and the North-Eastern Company absolutely for the carriage of the stock to Alnwick and conditionally for the carriage of the stock from Alnwick back to Maxton, and that, on the condition being purified by the stock being tendered at Alnwick in the circumstances required by the general conditions of conveyance, the contract in both its heads became absolute, and I think that this composite contract, absolute and conditional, was binding on the North-Eastern, unless it could plead, which it does not do, want of authority on the part of the North British Company.

"On the return journey, the document No. 16 of process, also signed by Mr Campbell, Lord Polwarth's factor, was handed to the station agent at Alnwick, similar in terms with the document No. 13 of process, and having the same general conditions of conveyance endorsed, except that it bore the word 'returned' as part of the heading 'agricultural show traffic,' and 'from the Show' instead of 'to the Show,' and also bore a certificate by the Agricultural Society's secretary that the stock had been exhibited, instead of had been entered for exhibition, and was addressed, not to the North British, but to the North-Eastern and North British Companies. But then the document No. 16 of process was supplemented by the document No. 15, signed by Henderson, the man in charge, and, admittedly, representing Lord Polwarth. This bore a declaration, first of all, that the stock had been exhibited and had not been sold, and was still the *bona fide* property of the exhibitor; and, in the second place, a request which, on the stock being accepted for carriage, completed a mutual agreement in terms very similar to that which is embodied in the North British consignment note No. 12. In fact, No. 15, with the North-Eastern consignment note, No. 14, are the North-Eastern's counterpart of the North British consignment note, No. 12.

"But though the terms are very similar generally, and have the same object, viz., to relieve the railway companies from loss, except for wilful misconduct on the part of their servants, and the contract is to be deemed to be made separately with all Companies parties to any through rate under which the stock is carried, there is this important difference that the consignment is expressly for carriage *back* to the station "named" in the schedule endorsed, which station is Maxton, North British "(from which station such *animals or goods were consigned here for the above-mentioned Show*), *by the same route as on the journey here* at the reduced rate below your ordinary rate; and in considera-

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tion of your charging such reduced rate,' etc. The italics are the Company's. Neither in this nor in the consignment note No. 14 is any route otherwise mentioned, but merely the station of destination, viz. Maxton."

The defenders pleaded, *inter alia*:—

"1. The pursuer's averments are irrelevant and insufficient to support the conclusion of the summons.

"3. The defenders should be assoilzied from the conclusions of the action, in respect that the animals were at the time of the fire being carried under an owner's risk special contract.

"6. No declaration having been made by or on behalf of the pursuer in terms of the Railway and Canal Traffic Act 1854, sect. 7, the defenders are not in any event liable in excess of £15 for each animal."

The sections of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. cap. 31) are sufficiently set forth in the judgment of Lord Low.

On 20th July 1905 the Lord Ordinary continued the cause to allow the pursuer an opportunity of lodging a minute of amendment of his record.

He added the following note:—

Lord Johnston [after the narrative above quoted].—It is maintained in the first place for the defenders that their liability is, in any event, limited to £15 per animal, in respect that no declaration of an excess value was made on behalf of Lord Polwarth in terms of the Railway and Canal Traffic Act 1854, sect. 7; and in the second place, that the stock was, at the time of the fire, being carried under an owner's risk special contract, which exempted them from liability, in respect that no wilful misconduct on the part of their servants was alleged.

Lord Polwarth's answer is that, assuming that both or either of these defences might, under other circumstances, have been available to the defenders, they cannot in the actual circumstances be pleaded, in respect that the Companies had broken their contract with him by diverting the traffic round by Berwick and Tweedmouth, instead of sending it back by the route by which it came.

This answer requires, first, a consideration of the contract, and, second, of certain English authorities bearing upon the point.

I am of opinion, in the first place, that it is not open to the Railway Company to plead that the condition endorsed on the documents Nos. 13 and 16, to the effect that the traffic must be consigned on the return journey by the same route as that by which they were sent, is one entirely in their favour, and which may be waived by them if they find it convenient (*Bidoulac*, 1889, 17 R. 144). I do not need to determine, absolutely, whether this might or might not have been so on the documents Nos. 13 and 16 of process, for the matter does not rest on these documents alone; it rests also on the document No. 15 of process, which having been accepted and the cattle delivered for carriage on the faith of it, becomes a mutual contract for the return journey "*by the same route as on the journey here.*"

But the Railway Companies maintain further that the word "route" is elastic, and that they were not confined to transmitting the stock by the same line of rails by which it had come, but were entitled to return it by any combination of their lines, for though they did not put their argument precisely in these words, I cannot find any other which accurately defines it. I think they limit their contention to this, that so long as they send back by Kelso, it is open to them to send either by Wooler or Tweedmouth. But it appears to me that if their contention is good at all, it would warrant their returning the traffic by Reston and St Boswells, or by any other possible route on their combined systems—say Edinburgh and St Boswells. I cannot hold that the word "route" has this extended meaning, even with the limitation which the Company indicates. I think that "route," particularly in the phrase "the same route," as "on the journey here," imports a definite line within the system of a company, or within the combined system of two companies, and not merely the system or systems of one or both as a whole. I do not suggest that this view could be pressed to the extreme point, as for instance to involve a breach of contract if traffic which was taken through Carstairs station were returned by the Carstairs loop line without entering the station; but without pressing the argument to such an extreme, I cannot hold that the route from Alnwick, by Alnmouth and Tweedmouth or Berwick, was not an entirely different route from that by Wooler, and one to which pursuer might reasonably have objected had it been proposed to him as sufficient implement of the Company's contract.

I think it is not unfair to test this point by putting the converse proposition. Suppose at Alnwick the pursuer for his own advantage or convenience had booked his cattle back to Maxton *via* Tweedmouth or Berwick, could he have had any answer to the Company's demand for full freight on the return journey? In my opinion he would not.

But I am bound, in the second place, to consider the English authorities founded upon, as they appear to bear very closely on the question.

I do not think that the case of *Great Western Railway Company* v. *M'Carthey*, 1887, L.R. 12, App. C. 218, goes further than to determine that the clause in the owner's risk contract note of both the companies concerned imported quite a legal condition exempting from liability under the Railway and Canal Traffic Act 1854, sect. 7, provided a proper alternative was given, and in the present case no question is apparently raised on this score, but the three cases (*Morritt* v. *North-Eastern Railway Company* 1876, L.R., 1 Q.B.D. 302; *Mallett* v. *Great Eastern Railway Company*, [1899], 1 Q.B. 309; and *Foster* v. *Great Western Railway Company*, [1904], 2 K.B. 306) are more apposite, and the latter was founded upon as the ruling case and as deciding the present question in favour of the railway companies.

I pass over *Morritt's* case, as it may be referred to the same principle as *Foster's* case.

The real question is between *Mallet's* case and *Foster's* case, and whether *Mallett's* case is a sound judgment and applicable to the present, or is substantially overruled by *Foster's*. In *Mallet's* case the contract was to carry from Lowestoft to Jersey *via* London, the Great Western Railway, and Plymouth, whereas the receiving company transmitted goods from London *via* the London and South-Western Railway and Southampton. This was done by mistake of their servants, who misread the direc-

tion, which was not very distinctly written. There was delay in the transmission and consequent loss. It was held that the delay was delay in the performance of the contract and arose in consequence of the defenders doing something which was wholly at variance with the contract.

But in *Foster's* case the circumstances were different. The goods were being carried also to Jersey, and they ought to have been transmitted from Exeter *via* London and South-Western to Southampton. But they were accidentally carried past Exeter, and when the mistake was discovered, it was too late to send them back to Exeter to catch the Southampton boat, and the Railway Company did what was best in the circumstances by sending them *via* Weymouth, which was a totally different route from that by which they had undertaken to carry them. The decision was that the breach of their contract was at Exeter, but that it was occasioned by their servants' negligence but not wilful misconduct, and that they were therefore protected by the relieving clause in their contract, that after Exeter they were no longer obliged to have recourse to that clause, because they were no longer carrying under the contract, but as baillees of the goods were doing their best in the circumstances. And the case was carefully distinguished from that of *Mallet*. It is quite true that in the opinions of the judges who gave judgment in the case, and particularly of Lord Alverstone, there is an undercurrent of dissatisfaction with the case of *Mallet*, but it goes no further. It may be that it is justified, if it be held that in *Mallet's* case at London a similar mistake was made to that made in *Foster's* case at Exeter; but even if this be so, neither *Foster's* case nor *Mallet's* case, assuming it to be corrected by the judgment in *Foster's*, is like the present. Here there was no mistake in transit. There was a deliberate diversion of the route from the beginning, and I do not think that the doubts indicated in *Foster's* case strike at the grounds of judgment in *Mallet's* case, but merely their application in the circumstances. But whether these grounds of judgment properly applied in *Mallet's* case or not, they apply, in my opinion, here, and I cannot hold them displaced by *Foster's* case.

I speak of the above cases with the respect due to them as decisions pronounced by the English Courts in *pari materia* though not binding on me, but I should myself have adopted the ground of judgment in *Mallet's* case in the circumstances of the present.

On the documents, therefore, upon which the case must ultimately depend, and on which it was argued by the pursuer, I should be prepared to hold that he might have a good case to recover untrammelled by the owner's risk contract, embodied in the special agreement for carriage to and from the Show. But then the documents are not his record, but are only embodied in it and that insufficiently by reference. And while Mr Mackintosh presented a very able argument on the documents and authorities, he failed, to my mind, to connect them with his record. [His Lordship criticised the pursuer's record, coming to the conclusion that his averments were irrelevant.] —*20th July* 1905.

The pursuer having lodged a Minute of Amendment, the Lord Ordinary on 25th November 1905 repelled the first, third, and sixth pleas in law for the defenders and allowed the parties a proof of their averments as to, *inter alia*, the value of the cattle.

He added the following note:—

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Lord Johnston.—The record in this case has been amended in terms of my interlocutor of 27th October, and the defenders admitted at the bar that the pursuer had complied with the requirements of the opinion expressed by me on 19th July, and stated that they did not propose to raise further the question of relevancy. But they contended that, though it might be implied from the form of my opinion that the question raised in their sixth plea in law had been disposed of, that was not really the case. That plea in law, the sixth, is to the effect that "no declaration having been made by or on behalf of the pursuer in terms of the Railway and Canal Traffic Act, sect. 7, the defenders are not in any event liable in excess of £15 for each animal."

It is true that I did not expressly consider or dispose of that plea, though I stated that the point raised was the first point maintained for the defenders. My recollection is, however, that I thought it unnecessary to deal with it separately and considered it covered by the opinion which I expressed with reference to what was maintained in the second place in support of the defenders' third plea in law, which was that "the defenders should be assoilized from the conclusions of the action, in respect that the animals were at the time of the fire being carried under an 'owner's risk' special contract."

The defenders having asked to be re-heard on their sixth plea in law, I have now heard a full argument, and have reconsidered the question with the result that I shall now repel the plea.

Prior to the passing of the Carriers Act 1830 (11 George IV. and 1 William IV., cap. 68), common carriers were practically in the position of guaranteeing the safe delivery of goods which they accepted for carriage, and all goods which they accepted for carriage for one person they were bound to carry for all the lieges. The law, however, allowed them to relieve themselves, by notice published with the intent to limit such heavy responsibility. But in respect of the practice of persons tendering for carriage parcels the value of which was grossly disproportionate to the bulk, without notifying to the carrier the value and nature of the contents, and of the difficulty of fixing parties with knowledge of such limiting notices, the Legislature thought fit, by sect. 1 of the above Act of 1830, to enact that no common carrier by land for hire should "be liable for the loss of or injury to any article or articles or property of the descriptions following" (and there followed an emuneration of bullion, gold and silver plate, jewellery, bank notes, paintings, china, silks, furs, lace, and other articles of similar nature, of value disproportionate to bulk), contained in any parcel or package delivered for carriage "when the value of such article or articles or property aforesaid, contained in such parcel or package, shall exceed the sum of £10, unless at the time of the delivery thereof . . . . the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as herinafter mentioned, or an engagement to pay the same be accepted by the person receiving such parcel or package." By this provision, therefore, the carrier was entirely relieved for the loss of or injury to any such article, unless it was declared, and what was practically a premium of insurance paid.

But when railways and canals came practically to supersede the common carriers of 1830, while the Act of 1830 still continued to regulate the carrier's

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liability where it applied, a further limitation was found necessary, and was introduced by the Railway and Canal Traffic Act 1854, sect. 7, but the relief given was not absolute, but qualified and limited. That section provided that every Railway and Canal Company "shall be liable for the loss of or any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, and delivering thereof, occasioned by the fault or neglect of such Company, or its servants, notwithstanding any notice, condition, or declaration made and given by such Company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void," subject to the following provisos:—1st, "that nothing in the Act contained should be construed to prevent the Companies making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, etc., as should be adjudged by the Court to be just and reasonable"; and 2nd, "that no greater damages shall be recovered for the loss of or for any injury done to any of such animals beyond the sums hereinafter mentioned (that is to say) . . . . for any neat cattle, per head £15," unless the sender should at the time of delivery declare them to be of higher value, in which case it should be lawful for the Company to demand and receive a reasonable percentage upon the excess value to be paid in addition to the ordinary rate of freight.

It was maintained that this provision limited the defenders' liability for the loss of the pursuer's cattle to the sum of £15 per head, in respect that he had not declared them to be of higher value and paid the consequent increased freight. But I think that the grounds on which I have already disposed of the defenders' third plea in law apply to the plea founded upon this provision, and warrant my rejecting it. I think that it is an implied condition of the Railway Company taking benefit by the limitation of liability provided, that they shall carry on the contract on which the cattle were delivered.

I have again considered the English authorities to which I was referred at the first debate, and certain further authorities which were quoted, but I have not changed my view of their bearing.

The former authorities quoted were *Morrit* v. *North Eastern Railway*, 1876, L.R. 1 Q.B.D. 302; *Mallet* v. *Great Eastern Railway* [1899], 1 Q.B. 309; and *Foster* v. *Great Western Railway Company* [1904], 2 K.B. 306. I am prepared on further perusal to admit that *Mallet's* case was wrongly decided, and that it was in reality not distinguished, but disapproved by the Court of King's Bench in *Foster's* case. But that does not alter my view of the bearing of the two other cases. They determine that a mistake, even negligently made, by a railway company in the course of executing the contract of carriage, which resulted in goods being diverted from the route by which they were contracted to be carried, did not deprive the Companies in the one case of the benefit of the provision of sect. 1 of the Carriers Act 1830, and in the other case of the benefit of a special condition just and reasonable, and therefore permissible to be made, under sect. 7 of the Railway and Canal Traffic Act 1854. But they leave open the question what is to happen when the mistake or the neglect or the default occurs, not in course of executing the contract, but where the contract is never even commenced to be executed.

The distinction between these cases and certain others to which I will immediately refer was, I think, correctly noted by Lord Blackburn, then Mr Justice Blackburn, when he says in *Morritt's* case at 1 Q.B.D., page 304, "in each of these (that is, the latter cases) there was an intentional act on the part of the defendants in sending on or misdelivering the goods; here there was only negligence."

The new cases to which I have been referred are *Sleat* v. *Fagg*, 1822, 5 Barn. and Ald. 342 and 24 R.R. 407, and *Garnet* v. *Willan*, 1822, 5 Barn. and Ald. 53 and 24 R.R. 276, in both of which carriers were held responsible for loss notwithstanding notice equivalent to the provisions of the Carriers Act 1830, brought home to the knowledge of their customer, because they were not carrying under their contract but outwith their contract, and these decisions seem to me to support the view which I have already expressed. I was also referred to *Hearn* v. *L. & S.-W. Railway*, 1855, 24 L.J. Ex. 180; *Millen* v. *Brasch*, 1882, L.R., 10 Q.B.D. 142; and *Handon* v. *Caledonian Railway Company*, 1880, 7 R. 966. The first two are illustrative of the general question; the latter, like the cases of *Sleat* and *Garnet*, is more directly in line with the present.

In fact, I remain of the opinion which I formerly held that the question at issue in the case depends upon whether Lord Polwarth's cattle were returned "by the same route as on the journey" out. I have already expressed my reason for the opinion that they were not so returned. If so, they were not carried on the contract, but contrary to the contract of carriage . . . .—25*th November* 1905.

The parties having lodged a Minute of Admissions, whereby they, *inter alia*, admitted that the value of the cattle was £550, the Lord Ordinary, on 27th February 1907, decerned against the defenders for the agreed on sum of £550.

He added the following note:—

Lord Johnston [after discussing questions not now reported].—But the case has been taken throughout on the footing that the pursuer founded entirely on breach of contract, and though I think that their record might have deduced this more pointedly, I think that it is their real case on record. If so, then the contract was broken, the cattle were not carried on it, but in contravention of it. It was no mere negligence or fault of the defenders' employees diverting the cattle in transit. They never were carried on the contract at all, and this was done intentionally. Whether for the defenders' convenience, or whether it was assumed that the pursuer would thereby get better expedition, does not appear to me to affect the question. Under their contract the defenders, whether they were common carriers or carrying on a special contract, were bound to deliver the cattle at Maxton, and they could not do so. They cannot therefore plead any of the conditions of the contract to excuse their breach. Nor can they so plead the statutory limitation of liability, for the statute subsumes a contract of carriage, and that the carriage proceeds under that contract. I cannot distinguish from *Handon* v. *Caledonian Railway Company*, 1880, 7 R. 966, in Scotland, and from *Sleat* v. *Fagg*, 1822, 5 B. & A. 342; *Lilley* v. *Doubleday*, 1881, L.R. 7 Q.B.D. 510, and *Royal Exchange Shipping Company* v. *Dixon*, 1886, L.R. 12 A.C. 11, in England. The damage then is the value of the cattle. "The question is whether the defendant was responsible for

the goods, and if so the damage must be their value," per Lindley, J., in *Lilley* v. *Doubleday*, *supra* (and *cf. Ellis* v. *Turner*, 1800, 8 T.R. 531), unless indeed the damage was too remote. But this I cannot hold in face of the English cases of *Davis* v. *Garett*, 1830, 6 Bing. 716; *Scaramanga* v. *Stamp*, 1880, L.R. 5 C.P.D. 295, to which I was referred. I do not think that even a *damnum fatale* would have excused the defenders, but the defenders do not attempt to show that the accident was occasioned by the agency of nature, and could not reasonably have been avoided (*Nugent* v. *Smith*, 1876, L.R. 1 C.P.D. 423).

I shall therefore decern against the defenders for the agreed-on sum of £550 with expenses. I do not think that there should be any modification in respect of the amendment of record, for if the defenders did not add to their statement in defence, they brought forward for the first time the important plea last disposed of, and occasioned the third hearing.—22*nd February* 1907.

The Defenders *reclaimed* and *argued*: (1) No doubt the contract for the return of the cattle provided that they should be sent back by the route by which they had come to Alnwick. But in the original contract that route was defined as *via* Kelso. Here the cattle were being sent back *via* Kelso, and there was thus no breach of contract. Further, the stipulation as to the route was a stipulation wholly in favour of the defenders, on which the pursuer was not entitled to found (*Bidoulac* v. *Sinclair's Trs.*, 1889, 17 R. 144). (2) Apart from this, the cattle were carried at owner's risk, and there was no averment of misconduct on the part of the defenders' servants. This exemption would not avail the defenders if the cattle were in their hands *dehors* the contract. But here the defenders were engaged in sending the cattle back to Maxton, and were thus in course of executing the contract. They were therefore protected by the exemption clause (*Morrit* v. *North-Eastern Railway Co.*, 1876, L.R. 1 Q.B.D. 302; *Foster* v. *Great Western Railway Co.* [1904], 2 K.B. 306; *Scaramanga* v. *Stamp*, 1880, L.R. 5 C.P.D. 295). *Mallet* v. *Great Eastern Railway Co.* [1899], 1 Q.B. 309 was inconsistent with *Foster* (*cit.*) and was wrong. (3) In any event the defenders were only liable to the extent of £15 per head. The limitation in sect. 7 of the Railway and Canal Traffic Act applied to every case of goods being lost when in the Company's hands as carriers (*Morrit* v. *North-Eastern Railway Company*, *cit.*, *Foster* v. *Great Western Railway Company*, *cit.*), whether the loss was due to breach of contract or to tort (*Great Western Railway Company* v. *M'Carthy*, 1887, L.R. 12 A.C. 218; *Hodgman* v. *West Midland Railway Company*, 1865, 35 L.J. Q.B. 85; *Hill* v. *London and North-Western Railway Company*, 1880, 42 L.T. 513). This conclusion was supported by the cases on the analogous provisions of the Carriers Act 1830 (11 Geo. IV. and 1 Will. IV. cap. 68), sect. 1; *Hinton* v. *Dibdin*, 1842, 2 A. and E. Q.B. 646; *Baxendale* v. *Harp*, 1852, 21 L.J. Ex. 123; and of the Merchant Shipping Act 1854 (17 & 18 Vict. cap. 104), sect. 514; *London and South-Western Railway Company* v. *James*, 1872, L.R. 8 Ch. 241; *Wahlberg* v. *Young*, 1876, 4 Asp. Mar. Cas. 27). The cases relied on by the pursuer were distinguishable. *Sleat* v. *Fagg*, 1822, 5 B. and A. 342, and *Garnett* v. *Willan*, 1821, 5 B. and A. 53 were cases on the old law of carriers prior to the Carriers Act. *Hearn* v. *London and South-Western Railway Company*, 1855, 10 Ex. 793, was doubted in *Millen* v. *Brasch* (1882, L.R. 10 Q.B.D. 142).

Argued for the Pursuer: The contract provided that the cattle should be sent back by the route by which they had come. They had in fact been sent back by a different route. The defenders had never sent the cattle on the contract journey. Therefore they had dealt with the cattle *dehors* the contract and were bound to make good the loss (Justinian's Institutes, III. 14. 2; Ersk., III. 1, 22; Jones on Bailments, p. 68). The pursuer was entitled to found on this stipulation. It was important to him that the cattle should return by a route the risks of which he knew. *Bidoulac* v. *Sinclair's Trs.* (*cit.*) was not in point. It only decided that a defaulter could not found on his own default. Neither the owner's risk clause in the contract nor the limitation of liability contained in sect. 7 of the Railway and Canal Traffic Act would avail the defenders. These applied where mistakes had been made in the course of performing the contract (*Morrit* v. *North Eastern Railway Company*, *cit.*; *Foster* v. *Great Western Railway Company*, *cit.*; *Great Western Railway Company* v. *M'Carthy*, *cit.*; *Baxendale* v. *Harp*, *cit.*; *Hodgman* v. *West Midland Railway Company*, *cit.*; *London and South-Western Railway Company* v. *James*, *cit.*), and did not apply where goods had been dealt with *dehors* the contract (*Davis* v. *Garrett*, 1830, 6 Bing. 716; *Royal Exchange Shipping Company* v. *Dixon*, 1886, L.R. 12 A.C. 11; *Scaramanga* v. *Stamp*, *cit.*; *Ellis* v. *Turner*, 1800, 8 Term Rep. 531; *Garnett* v. *Willan*, *cit.*; *Sleat* v. *Fagg*, *cit.*; *Lilley* v. *Doubleday*, 1881, L.R. 7 Q.B.D. 510; *Handon* v. *Caledonian Railway Company*, 1880, 7 R. 966; *Mallet* v. *Great Eastern Railway Company*, *cit.*). In the present case the cattle had been intentionally sent on a journey which was not the contract journey, and had thus been dealt with *dehors* the contract. The case was substantially the same as if the defenders had retained the cattle in their hand in order to satisfy a debt due to them by the pursuer, and had sent them to the south of England for sale.

The Court *recalled* the interlocutor of the Lord Ordinary and decerned against the defenders for the sum of £45, with interest, from the date of citation.

Lord Low.—The instructions which the pur-

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suer gave to the defenders to convey his cattle from Maxton to the agricultural show at Alnwick were to convey them *via* Kelso. These instructions were indefinite to this extent that, beyond Kelso there were two routes, one by Wooler and the other by Tweedmouth, both upon the defenders' system, by either of which the cattle might have been sent to Alnwick, and between which there was little difference either as regarded distances or convenience. It was stated by the pursuer's counsel that the intention was that the cattle should be sent by the Wooler route, because it was arranged that the cattle truck should be taken from Maxton by a train which ran in connection with a Wooler train. If that had been admitted or proved, it might have been sufficient to show that "*via* Kelso" meant in this particular case *via* Kelso and Wooler, but there is neither admission nor evidence on the point. All that we know is that the cattle were consigned to Alnwick *via* Kelso, and if that was all that the defenders were requested and agreed to do, I am inclined to think (although in the view which I take of the case it is unnecessary to decide the point) that it was open to them to take the cattle *via* Tweedmouth.

The cattle were, in fact, conveyed by the Wooler route. They were safely delivered at Alnwick, and no question arises in regard to the journey thither.

At the close of the Show the cattle, not having been sold, required to be returned to Maxton. The defenders give special terms to persons sending live stock to agricultural shows upon certain conditions. They, *inter alia*, charge only half rates for the return journey of stock which is not sold, but only upon the condition that "the exhibitor must in every case take care to consign them on the return journey by the same route as they were sent to the meeting, otherwise full rates will be charged."

The pursuer was naturally desirous to have his cattle returned at half rates, and accordingly his servant, who had charge of the cattle, filled up and signed the form supplied by the defenders of a special contract for the return of unsold cattle from a show at half rates. The document runs thus:—"You are requested by the undersigned to receive the cattle in question for carriage back" to Maxton, "by the same route as on the journey here, at the reduced rate below your ordinary rate; and in consideration of your charging such reduced rate for the carriage thereof, the undersigned hereby undertakes to free and relieve you" of all liability for loss or damage unless caused by wilful misconduct on the part of the Company's servants.

Although these were the terms of the contract for the return journey, the defenders did not send the cattle *via* Wooler, but *via* Tweedmouth. During the journey the truck in which the cattle were being conveyed took fire, to the effects of which they all ultimately succumbed. The question to be determined in this case is whether the defenders are liable in damages to the pursuer for the loss which he has sustained, and, if so, what is the measure of their liability?

The defenders maintain: (1) that they are not liable to any extent in respect that by the contract the pursuer relieved them of all liability for loss, unless the loss was occasioned by the wilful misconduct of their servants, which is not alleged; and (2) that in any view they were not liable in a larger amount than £15 for each animal in terms of the seventh section of the Railway and Canals Traffic Act 1854.

In support of their contention that they are liable to no extent the defenders argued in the first place that the words in the contract "by the same route as on the journey here" meant the route by which the cattle were consigned when sent to the Show—namely, *via* Kelso, and that as they (the defenders) had the option of taking the cattle either by Wooler or Tweedmouth on the outward journey, they had the same option on the return journey. I am of opinion that that argument is not well founded. The words in the contract for the return journey which I have quoted seem to me, according to their natural and ordinary signification, to mean the route by which the journey to Alnwick was as matter of fact made, and I do not think that it is competent to read them as meaning something else, by reference to a prior and entirely separate contract.

The defenders further argued that the stipulation in regard to the route was inserted solely for their benefit, because they only agreed to carry the cattle at half rates on the return journey upon the condition that the pursuer should consent to the cattle being sent back by the same route as that by which they had come. The stipulation therefore (the defenders argued), although binding upon the pursuer, was not binding on them, and that, so long as they only charged half rates as for the Wooler route, they could send the cattle by another route, if they found it more convenient to do so.

Here, again, I am unable to accept the defenders' argument. If the argument be sound, the defenders were entitled to convey the cattle by any route they chose, and would not be bound to consider whether it was equally convenient and safe for the pursuer as the specified route. To say that the defenders had such power seems to me to be out of the question, seeing that the pursuer had agreed that the cattle should be conveyed at his risk. No doubt he took the risk in consideration of the reduced rate which was charged for the carriage, but he also took the risk for the route which was specified, and for no other.

I am therefore of opinion that the defenders were in breach of their contract in taking the

cattle by Tweedmouth, and that they cannot found upon the indemnity clause in the contract.

The question remains whether the defenders' liability is limited in amount by the Railway and Canals Traffic Act 1854? The Lord Ordinary has answered that question in the negative, holding that the Act applies only where a railway company is carrying cattle under a contract, and that in this case the route adopted by the defenders having from its commencement been a different route from that specified, they were altogether outside of their contract. Whether that view be sound or not appears to me to depend upon the construction of the statute.

By the first section it is enacted that every railway company shall "afford all reasonable facilities for the receiving and forwarding and delivering of traffic"; and traffic is defined as including animals. A railway company therefore is bound to carry cattle.

By the seventh section it is enacted that every railway company "shall be liable for the loss of or for any injury done to any horses, cattle, or other animals . . . . in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants. . . . Provided always that no greater damages shall be recovered for the loss of or for injury done to any of such animals beyond the sums hereinafter mentioned (that is to say) . . . . for any neat cattle per head fifteen pounds," unless the person sending the animals shall have declared them to be of a higher value, in which case the company is authorised to demand a reasonable percentage upon the excess of value so declared.

In this case the pursuer made no declaration of value, and, accordingly, if the statute applies, he cannot recover from the defenders more than £15 for each of the cattle.

What, therefore, the railway company is by the statute made liable for, is the loss of, or injury to, cattle, "in the receiving, forwarding, or delivering thereof." Now, unquestionably, the defenders received the cattle from the pursuer's servant for the purpose of forwarding them to Maxton, and they were, in fact, forwarding them to Maxton when the fire occurred. *Prima facie*, therefore, the Act applies. But it was said that the defenders cannot be regarded as having been acting as carriers for the pursuer at all, because they intentionally and deliberately adopted a route which was wholly different from that by which, alone, the pursuer had agreed that the cattle should be conveyed.

The force of that argument lies in the fact that the defenders *intentionally* adopted a different route from that stipulated, and that fact differentiates this case from those in which the contract has been departed from by mere mistake or carelessness, as, for example, when goods have been despatched upon the contract route, but have afterwards been negligently shunted on to the wrong line, or put into the wrong train at a junction, or where goods have been carried on beyond the station at which they ought to have been delivered. It seems to me, however, that the fact that there has been intentional departure from the contract route does not of itself solve the question. Suppose that cattle were being sent to an agricultural show, or to be sold at a market to be held on a particular day, and that after they had been carried a certain distance along the contract route it was found that the line ahead was blocked,—I cannot doubt that railway officials could send the cattle on by another route by which they could arrive at their destination in time for the show or market, without losing the benefit of the statute in the event of the cattle being killed or injured after they had been diverted from the contract route.

In this case we do not know the reasons which led the defenders to send the cattle *via* Tweedmouth, because there is neither admission nor evidence upon the point, and probation has been renounced. It is not averred, however, that there was anything of the nature of wilful misconduct, in the ordinary sense of these words, on the defenders' part, or that they took the cattle *via* Tweedmouth for any other purpose than to deliver them to the pursuer at Maxton. The Dean of Faculty gave an illustration, intended to enforce his argument, that the defenders, having intentionally departed from the contract, could not found upon the statute. The case which he supposed was that the pursuer had been in debt to the defenders, and that they had resolved to hold the cattle against the debt, and for that purpose had carried them off to York. I agree that, in that case, the statute would not have applied, because the defenders would not have been engaged as carriers in receiving, forwarding, or delivering the cattle. In the case which happened, however, they were acting as carriers and in no other capacity. When the accident occurred they were carrying the pursuer's cattle to the appointed destination, and there was nothing in the nature of appropriation of the cattle to their own use, or of handing them over to another carrier, or of sending them to the wrong destination, or the wrong person. It therefore appears to me that the defenders did not, by their breach of contract, put themselves outside of the statute, and I am confirmed in that view by the highly authoritative judgment which was given in regard to a similar question under the Carriers Act in *Morritt* v. *North-Eastern Railway Company*, 1876, L.R. 1 Q.B. Div. 302.

I am accordingly of opinion that the pursuer is not entitled to recover more than £45, being the statutory maximum amount allowed when no declaration of value is made.

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The Lord Justice-Clerk and *Lord Stormonth-Darling* concurred.—15*th November* 1907.

Counsel for Pursuer, Dean of Faculty (Campbell, K.C.), W. Æ. Mackintosh; Agents, Guild & Guild, W.S.—Counsel for Defenders, Solicitor-General (Ure, K.C.), Cooper, K.C., Grierson; Agent, James Watson, S.S.C. J. S. M.

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(Lords Stormonth-Darling, Low and Ardwall).

188. The Walker Steam Fishing Company Limited.

Company — Capital — Reduction — Confirmation by Court—Companies Act 1867 (30 & 31 Vict. cap. 131), sect. 9, and Companies Act 1877 (40 & 41 Vict. cap. 26), sect. 3—Alternative Resolutions for Reduction or Conversion of Capital—Terms of Resolution Not Confirmed by Court in Respect It Was Doubtful Whether Resolution Was Truly a Resolution to Reduce Capital—Resolution Providing for "Conversion" or "Re-allocation" of Capital—Terms of Alternative Resolution Confirmed by Court.

Petition for Confirmation of Reduction of Capital.

This was a petition for confirmation of a resolution to reduce capital presented by the Walker Steam Trawl Fishing Co. Ltd.

The petition stated:

The Company was established to purchase and acquire from Thomas Walker, trawl owner in Aberdeen, two steam trawlers known as "Star of Peace" and "Star of the East," together with their furnished appurtenances and apparelling, to adopt and carry into effect a provisional contract entered into between the said Thomas Walker and Andrew Walker, Commercial Road, Aberdeen, for behoof of the Company, providing for the Company taking over at the price of £5400 each (being the cost price), a contract for the building of these steam trawlers, and to carry on the business of fishing by trawl, lines, nets or otherwise from the port of Aberdeen, or any other port or ports as might be thought expedient.

Clause Fifth of the Memorandum of Association is in the following terms:—"The capital of the Company is £50,000, divided into 50,000 shares of £1 each, with power to increase or reduce the capital in conformity with the law in force at the time and with this Memorandum and Articles of Association of the Company, as originally framed or as duly and competently altered, and to attach to any additional capital such preferential, deferred or special rights, privileges, or conditions as the Company may determine."

By Clause 52 of the Articles of Association it is provided that "The Company may by a special resolution reduce its capital by reducing the number or the value or both the number and the value of the shares into which it is divided, and may consolidate or subdivide its shares, and may cancel any shares that have not been taken or agreed to be taken by any person in the manner and with all or any of the incidents prescribed by the statute"; and by Clause 148, that "If the Company shall be wound up, the surplus assets shall belong to the holders of the shares in proportion to the amount paid up or deemed to be paid up thereon, but this Article shall be without prejudice to the rights of the holders of any shares to be issued on special terms."

The whole of the original share capital was issued as ordinary shares, and 12s. 6d. has been paid up on each share. Since its incorporation the Company has been uniformly prosperous. For the first two years the dividends were at the rate of 7½ and 5 per cent. respectively on the subscribed capital, and during the last three years uniform dividends at the rate of 10 per cent. have been declared and paid, and that after ample allowance has been made for depreciation on the Company's property. The Company finds that the capital subscribed is as much as it can profitably make use of for many years to come, and its financial position is such that there is no necessity for retaining the liability of 7s. 6d. attaching to each share, which liability has the effect of unduly depressing the selling value of the Company's shares. The Company desires, however, to retain the denomination of its shares at £1 sterling each, which is the reason for resolutions numbers one and two, and for the first minute hereinafter specified.

Accordingly an extraordinary general meeting of the Company was held in Aberdeen on 27th April 1907, at which the following resolutions were unanimously passed:—

(1) That the capital of the Company be converted from 50,000 shares of the value of £1 each, whereof 12s. 6d. has been paid upon each share, a total of £31,250, into 50,000 shares also of the value of £1 each, upon 31,250 of which the full amount shall have been paid up, leaving 18,750 shares to be issued at the discretion of the directors for the time being, and that such conversion be effected by re-allocating the share capital among the shareholders, crediting to each shareholder one £1 share in respect of every pound sterling with which he or she is credited in the share capital account of the Company.

(2) That in order to carry out the re-allocation of the share capital among the shareholders, the directors of the Company be authorised to receive from Mr Andrew Walker, Commercial Road, Aberdeen, such amount as may be required to pay the shareholders any fraction of a pound sterling with which they may be credited in the share capital account of the Company, and that the said Andrew Walker receives the resultant remaining shares at par value equivalent to the amount so paid by him;

alternatively,

(3) That the capital of the Company be reduced from £50,000, divided into 50,000 shares of £1 each, on which 12s. 6d. each has been called and paid up, to £31,250, divided into 50,000 shares of 12s. 6d. each fully paid, and that such reduction be effected by extinguishing the liability in respect of uncalled capital on the said shares to the extent of 7s. 6d. per share.

. . . . . .

At an extraordinary general meeting held on 13th

May 1907, these resolutions were unanimously confirmed as special resolutions of the Company.

The Companies Act 1867 (30 & 31 Vict. cap. 131), sect. 9, provides:

Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital; but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the registrar of joint stock companies as is hereinafter mentioned.

The Companies Act 1877 (40 & 41 Vict. cap. 26), sect. 3, provides:

The word "capital," as used in the Companies Act 1867, shall include paid-up capital; and the power to reduce capital conferred by that Act shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company; and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Companies Act 1867.

On 19th July 1907 the Court remitted to Mr W. G. L. Winchester, W.S., to enquire and report whether the power prayed for should be granted.

The reporter reported, *inter alia*, as follows:

The conclusion I have formed is that the first resolution printed in this petition cannot be confirmed by the Court as "a reduction of capital" under either the Act of 1867 or that of 1877. The resolution in question purports to be "a conversion" or "re-allocation" of the share capital, and I do not think it can in any sense be held to be "a reduction of capital" within the meaning of the Acts founded on by the petitioners.

The second or alternative resolution clearly imports a reduction of capital, and is authorised by the regulations of the Company as originally framed, and is competent under sects. 9 to 19 of the Act of 1867. The petitioners ask for confirmation of one or other of the special resolutions, and I beg respectfully to suggest that, should your Lordships hold the first resolution to be incompetent, the second or alternative resolution may be confirmed.

Argued for the Petitioners: The first resolution was a resolution for the reduction of capital. It was therefore competent to the Court to confirm it, and it ought to be confirmed (Companies Act 1867, sect. 9; Companies Act 1877, sect. 3; *Phœbe Coal Co.* [1900], W.N. 182). In any event the alternative resolution ought to be confirmed.

The Court confirmed the reduction of capital resolved on by the alternative resolution.

Lord Stormonth-Darling.—In this case we have the benefit of a very careful report by Mr Winchester, and we have also had the advantage of a fair and candid statement by Mr Morton. He says that the shareholders would prefer to have the first alternative resolution confirmed. But the reporter is of opinion that we ought not to confirm the first alternative resolution and that we ought to confirm the second, which has this at least to be said for it, that it is literally and plainly a resolution for "reduction of capital." I agree with Mr Winchester. He does not say that any existing creditor will be prejudiced by the one proposal more than the other. But he says that a resolution to "convert" and "re-allocate capital" is not in terms or in reality a proposal to reduce capital. Therefore the first alternative resolution is not strictly within the words of the statute. Mr Morton says that he has searched for and has failed to find any case which would be a precedent for doing what he asks the Court to do here. In the absence of such a case, I think the safer course will be to walk by the strict words of the statute, and confirm the second alternative resolution.

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Lord Low.—I concur, but with considerable regret. I recognise, however, that the first of the alternative resolutions, although for practical purposes it amounts to very much the same thing as the second, does not in fact reduce the capital, which is the only matter which the statute empowers the Court to deal with.

Lord Ardwall.—I concur. I am of opinion that no reasons of expediency can justify the Court in departing by a hair's breadth from the provisions of the statutes under which alone they have jurisdiction to make alterations in the capital of a company that has been incorporated under the Companies Acts.—16*th November* 1907.

Counsel for Petitioners, Morton; Agent, John N. Rae, S.S.C. J. S. M.

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(*Lords M'Laren, Pearson and Ardwall.*)

189. Nairn and Others *v.* The University Court of the University of St Andrews and Others.

Election Law—Parliamentary Franchise—Women's Suffrage—University Representative—Claim of Women Graduates to Vote in Election of University Representative—Representation of the People (Scotland) Act 1868 (31 & 32 Vict. cap. 48), sect. 27—Universities (Scotland) Act 1889 (52 & 53 Vict. cap. 55), sect. 14, subsect. 6—Universities Elections Amendment (Scotland) Act 1881 (44 & 45 Vict. cap. 40), sect. 2, subsect. 3—Held (1) That Women Graduates Not Entitled to Vote in Election of

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UNIVERSITY REPRESENTATIVE, AND (2) THAT WOMEN GRADUATES NOT ENTITLED TO HAVE VOTING PAPERS SENT THEM BY THE REGISTRAR IN TERMS OF THE UNIVERSITIES ELECTIONS AMENDMENT (SCOTLAND) ACT 1881, SECT. 2, SUBSECT. 3.

(*Reported ante, Vol. XIV. p.* 176.)

Reclaiming Note against an Interlocutor of Lord Salvesen.

The circumstances of this case appear from the previous report.

The Pursuers *reclaimed* and *argued*: University representation was not a part of a general scheme of representation, but a special franchise created by the Act of 1868. It differed from the ordinary franchise (1) in being based on education and not property; and (2) in the nature of the constituency, which was unique in not being geographical. The University franchise was thus *sui generis*, and even though there were a presumption against the capacity of women to vote at common law, that could not apply to a franchise purely statutory and differing in essentials from other franchises. Sect. 27 of the Act of 1868 gave a vote to every member of the General Council "of full age and not subject to any legal idcapacity." The question was, Did this include women members of the General Council? (1) "Person" was equivalent to "man or woman" (*The Queen* v. *Crosthwaite*, 1864, 17 Ir. C.L. Rep. 157). There was thus a direct enfranchisement of women. The same words, "all persons, being of lawful age and not subject to legal incapacity," in the Education (Scotland) Act 1872, Sched. B. 2, included women. The Act of 1868 in dealing with any franchise but the University franchise, used the words "every man" (sects. 3, 4, 5 and 6). It was only in the case of the University franchise that a change was made to "every person." There was therefore a presumption that the phrase was expressly varied so as to include women. In sects. 2 and 7 of the Reform (Ireland) Act, 2 & 3 Will. IV., cap. 88, which conferred the franchise on persons outside the University, the words used were "male person"; and in sects. 60 and 61, dealing with the University franchise, "every person" is used. So the same thing was done both in Ireland and Scotland and could not be accidental. (2) If "every person" was equivalent "to every man or woman," then women could not be disqualified by the words "not subject to any legal incapacity." "Legal incapacity" referred to peers, lunatics, paupers and aliens, etc., and had no reference to sex. In the Reform (England) Act 1832, sects. 19 and 20, the words "every male person of full age and not subject to any legal incapacity" occur, shewing a legal incapacity has no reference to sex. The cases of *Chorlton* v. *Lings*, 1868, L.R. 4 C.P. 374, and *Brown* v. *Ingram*, 1868, 7 M. 281, referred to by the Lord Ordinary, were distinguished because in them the claimants were not on the register. In any event the registrar was bound to send voting papers to "each voter as entered on the Register of the General Councils" in terms of sect. 2, subsect. 3, of the Universities Elections Amendment (Scotland) Act 1881. The registrar was not a judge of who was entitled to receive voting papers. He was bound to send out the papers, and the Vice-Chancellor was the person to decide whether the vote was good if an objection was taken.

Argued for the Respondents: At common law the Parliamentary franchise was confined to men, and if women were to have the franchise bestowed on them by statute it was natural to expect it would be bestowed in unequivocal terms, and not by a doubtful implication. Thus the *onus* was on the pursuers to shew that the Acts had bestowed the franchise on them. The word "person" in the Act of 1868 did not include women. In itself it was an ambiguous word. It was not necessary in 1868 to use a distinctively masculine term, as there were at that time no women graduates. "Legal incapacity" included the incapacity of sex. A woman was *incapax quoad* a *manus publicum*. The mere fact that women were on the register did not entitle them to vote, as they were subject to a legal incapacity (*Stowe* v. *Jolliffe*, 1874 L.R., 9 C.P. 734; *Earl of Beauchamp* v. *Madrefield*, 1872, L.R. 8 C.P. 245; *Beresford-Hope* v. *Lady Sandhurst*, 1889, L.R. 23 Q.B.D. 79; *Wilson* v. *Town Clerk of Salford*, 1868, L.R. 4 C.P. 398; *Borough of Oldham*, 1869, 1 O'Malley and Hardcastle's Election Petitions, 151; *Marquis of Bristol* v. *Breck*, 1907, 23 Times L.R. 224. If women were not entitled to vote they were not entitled to have voting papers sent to them. The Universities Elections Amendment (Scotland) Act 1881, sect. 2, subsect. 3, ordered the registrar to send voting papers to "each voter" on the register of the General Council, not to each person on the register. Women were not "voters." Suppose a paper sent to a woman and a vote given and not objected to, the result would be that the Vice-Chancellor could not *ex proprio motu* disallow the vote, and a woman's vote would be counted.

The Court *adhered*.

Lord M'Laren. — Apart from the right to University representation which is now claimed, it is an incontestable fact that women never have enjoyed the Parliamentary franchise of the United Kingdom. Prior to the Reform Acts of 1831 and 1832 there were many varieties of the Parliamentary franchise. The vote in counties was confined to freeholders. In Scotland the borough members were elected by town councils,

Some of the English boroughs had a representation as wide as that of the present law; in the greater number the franchise was more or less restricted, but not always in the same degree or on the same type.

All varieties of the Parliamentary franchise had this element in common, that its exercise was confined to men; and even in the cases where the right of election was confined to a few burgage tenures, or even to a single tenement, if the owner was a woman she was not entitled to vote. In view of these facts, we must conclude thatit was a principle of the unwritten constitutional law of the country that men only were entitled to take part in the election of representatives to Parliament.

All ambiguous expressions in modern Acts of Parliament must be construed in the light of this general constitutional principle. We are not to be understood as invoking any merely technical rule of construction in this matter; what is meant is that if Parliament had intended to subvert an existing constitutional law in favour of women graduates, the intention would naturally be expressed in plain language, and therefore if ambiguous language is used it must be construed in accordance with the general constitutional rule.

By sect. 27 of the Representation of the People (Scotland) Act 1868, a vote for the election of a University member is given to "every person whose name is for the time being on the register" . . . . "if of full age and not subject to any legal incapacity." The qualification of "full age" was necessary, because the register of graduates might contain the names of men who had taken their degrees before attaining majority. The qualification "not subject to any legal incapacity" was also necessary; a peer, for example, might be on the register of graduates, but it was not intended that he should have a vote for returning a member to the House of Commons. It was not necessary to exclude women by express words, because at that time women could not lawfully be on the University register.

Now this is the Act of Parliament which created the University constituencies of Scotland, and therefore in its inception the University franchise had this element in common with the franchises of counties and burghs, that it was confined to men. It may here be observed that in the third, fourth, fifth, and sixth sections of this Act, which define the qualifications of voters in counties and burghs, the words used are "every man," so it appears that the expression "every person," which is used with reference to University elections, had the same meaning as "every man" in the earlier sections.

By the Universities Elections Amendment (Scotland) Act 1881 provision is made for taking the vote at University elections by means of "voting papers," and in particular by sect. 2, subsect. 3, the registrar in case of a poll is required to send through the post a voting paper "to each voter to his address as entered on the register of the General Council of the University, who shall appear from said address to be resident within the United Kingdom or the Channel Islands." The expression "each voter" here used could not give rise to any ambiguity as to sex, because at this date the University register was a register of men. The proviso of subsect. 16, excluding persons "subject to any legal incapacity," does not seem to have any material bearing on the present question.

The claim of the pursuers to vote at the election of a member for the Universities of Edinburgh and St Andrews is founded on their status as graduates of one of these Universities. By the Universities (Scotland) Act 1889 the Commissioners thereby appointed were empowered to make ordinances "to enable each University to admit women to graduation in one or more Faculties." By the Ordinance of 1892 this power was exercised, and women have been admitted to graduation in certain Faculties. The pursuers' names have been placed on the registers of the General Council of one of these Universities in right of their respective degrees. It may be observed that the Universities Act 1889 does not empower the University Commissioners to admit women graduates to the franchise; and if it had been intended that the degree should carry with it the right of voting at Parliamentary elections, we should have expected to find a provision to that effect in the Act of Parliament itself. It is quite certain that the University Commissioners had no power to make any deliverance on this subject, and the same observation applies to the powers of the University Courts in the execution of the ordinance. The pursuers' claim accordingly must rest on the Representation Act of 1868 and the Universities Elections Act 1881.

The argument must be that a franchise originally conferred on graduates who were necessarily men has been extended to women graduates, not by a direct enfranchising enactment, but by the indirect effect of an Act of Parliament which does not profess to deal with political privileges, but is concerned only with academic functions, and which, in the interests of the higher education of women, authorises the admission of women to graduation. The degree itself, or rather the right to take a degree, is not even conferred by the Act of Parliament, but is made dependent, first, on the judgment of Commissioners empowered to take evidence, and secondly, on the pleasure of the governing bodies of the respective Universities. It is difficult to conceive that the Legislature should have conferred the power of extending the franchise by devolution to a class of persons hitherto excluded by a constitutional rule, a power which it has always kept in its own hands, and it appears to us that there is abso-

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lutely no evidence in the terms of the Universities Act 1889 that Parliament intended to extend the franchise to women, or had any question of political privileges in view, when it empowered the University authorities to admit women to graduation. We think that the Representation Act 1868 and the Universities Elections Act 1881 must be construed now, as heretofore, with reference to the political disabilities of women, and that the circumstances of the pursuers being on the University registers does not remove the disability.

In consequence of an amendment made on the record at the hearing of the case, the pursuers contend that in any event they are entitled to receive voting papers, leaving it to the candidate or his agent to object to the vote if tendered, and to the Vice-Chancellor or his deputy to dispose of the objection, all in terms of the 10th subsection of section 2 of the Universities Elections Act 1881. It is, no doubt, true that if the registrar (taking a different view of his statutory duty) had sent the lady graduates voting papers, the votes might have been objected to and disallowed by the Vice-Chancellor.

But as our judgment on the main question is adverse to the claim of the lady graduates, it follows that no individual of the class has a cause of action for not receiving an invitation to give a vote which she could not lawfully exercise, or a title to sue for a declaratory finding that she is entitled to receive such a paper. We are therefore of opinion that the Lord Ordinary's judgment should be affirmed, and the reclaiming note refused.

That is the opinion of the Court. — 16*th November* 1907.

Counsel for Reclaimers, The Solicitor-General (Ure, K.C.), Kennedy, K.C., Munro, Mair; Agent, William Purves, W.S.—Counsel for Respondents, The Dean of Faculty (Campbell, K.C.), Macmillan; Agents, W. & J. Cook, W.S. A. M.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

190. Montgomerie and Company Limited *v.* The Burgh of Haddington.

I. BURGH — DRAINAGE — IMPROVEMENT SCHEME—CODE OF PROCEDURE UNDER PUBLIC HEALTH (SCOTLAND) ACT 1897 (60 & 61 VICT. CAP. 38), INDEPENDENT OF THAT UNDER BURGH POLICE (SCOTLAND) ACT 1892 (55 & 56 VICT. CAP. 55), AND SECT. 103 OF FORMER ACT, UNREPEALED—BROWN V. BURGH OF KIRCUDBRIGHT, 1905, 8 F. 77, FOLLOWED.

II. BURGH — DRAINAGE — IMPROVEMENT SCHEME—PUBLIC HEALTH (SCOTLAND) ACT 1897, SECT. 103—"REASONABLE NOTICE IN WRITING" OF PROPOSED WORKS TO PROPRIETORS OF LANDS AFFECTED—INSUFFICIENCY OF NOTICE—CIRCUMSTANCES IN WHICH ACTION FOR REMOVAL OF COMPLETED WORKS DISMISSED, THOUGH ORIGINAL NOTICE INSUFFICIENT.

III. BURGH — DRAINAGE — IMPROVEMENT SCHEME—PUBLIC HEALTH (SCOTLAND) ACT 1897, SECT. 109—SHERIFF—POWER OF SHERIFF TO ORDER ENQUIRY—OPINION OF LORD ADAM IN BROWN V. BURGH OF KIRKCUDBRIGHT, 1905, 8 F. 77, APPROVED.

IV. BURGH — DRAINAGE — IMPROVEMENT SCHEME — BURGH POLICE (SCOTLAND) ACT 1892, SECT. 217 — INTERFERENCE WITH RIVER—POWER OF PROPRIETORS TO OBJECT.

V. EXPENSES — PUBLIC AUTHORITIES PROTECTION ACT 1893 (56 & 57 VICT. CAP. 61), SECT. 3 — EXPENSES AS BETWEEN AGENT AND CLIENT—SCOPE OF SECT. 3 IN EXCLUDING OPERATION OF ACT.

Reclaiming Note against an Interlocutor of Lord Dundas.

(*Reported ante, Vol. XIV. p.* 183.)

The pursuers *reclaimed.*

The facts of the case appear from the previous report.

The questions raised on the reclaiming note were: (1) Whether the burgh of Haddington had acted correctly in proceeding under sect. 103 of the Public Health Act 1897, and whether that section was still unrepealed.

(2) Whether "reasonable notice in writing" had been given in term of sect. 103.

(3) If not, whether the pursuers were entitled to the remedy they asked—removal of the completed works.

(4) Whether, if they had received proper notice, the pursuers could have prevented the execution of the works, having reference to the power of the Sheriff under sect. 109 of the Public Health Act 1897.

(5) Whether sect. 217 of the Burgh Police Act 1892 applied to the circumstances of the case.

(6) Whether the defenders were entitled to expenses taxed as between agent and client under the Public Authorities Protection Act 1893.

The contentions of the parties appear from the Opinions of the Court.

The following authorities were referred to: *Menzies*, 1828, 3 W. and S. 235; *Bicket*, 1866, 4 M. H.L. 44; *Jackson*, 1872, 10 M. 913; *Cheetham*, 1875, L.R. 10 C.P. 249; *Roderick*, 1877, 5 Chan. Div. 328; *Krehl*, 1879, 11 Ch. Div. 146; *Swanston*, 1879, 11 Ch. Div. 838; *Orr Ewing*, 1877, 4 R. H.L. 116; *Grahame*, 1882, 9 R. H.L. 91; *Phillipps*, 1884, 12 R. 159; *Lewis*, 1888, 40 Ch. Div. 55; *M'Gavin*, 1890,

17 R. 818; *Kirkintilloch P.C.* 1890, 18 R. 67; *Hutchings*, 1898, 43 Solicitors' Journal 41; *Brown*, 1905; 8 R. 77; Public Health Act 1867, sects. 3, 7, 24, 71, 72, 73, 76, 93; Burgh Police Act 1892, sects. 4, 7, 8, 9, 10, 11, 12, 21, 23, 42, 43, 215, 217, 218, 219, 220, 221, 224, 237, 339, 361, 362, 363; Public Health Act 1897, sects. 3, 12, 101, 103, 104, 109, 113, 114, 122, 131, 133, 134, 166, 190; Town Councils Act 1900, sect. 8; Burgh Sewerage, etc. Act, 1901, sects. 1, 2, 3, 4, 5; Burgh Police Act 1903, sect. 3; Public Authorities Protection Act, 1893, sect. 3.

Sect. 217 of the Burgh Police Act 1892 provides:

217. Nothing in this Act contained shall be construed to authorise the Commissioners, contrary to any private right, to use, injure, or interfere with any sewers or other works already made or used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament, or for the purpose of irrigating lands, or to use, injure, or interfere with any watercourse, stream, river, dock, basin, wharf, quay, or towing-path in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors of any canal or navigation, shall have right and interest, without the consent in writing of the person legally entitled to grant the same; and nothing in this Act contained shall prejudice or affect the rights, privileges, powers, or authorities given or reserved to any person under any local or private Act of Parliament for the drainage, preservation, or improvement of land, or for or in respect of any mills, mines, machinery, canal, or navigation as last aforesaid.

Sect. 103 of the Public Health Act 1897 is quoted in the previous report. The other sections of the statutes under consideration are sufficiently cited in the opinions of the Court.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties in the pursuers' reclaiming note against the interlocutor of Lord Dundas, dated 6th July 1906, Recal the said interlocutor in so far as it finds the defenders entitled to expenses as between agent and client in terms of the Public Authorities Protection Act 1893 (56 & 57 Vict. cap. 61), sect. 1 (*b*); *quoad ultra*, refuse the reclaiming note; adhere to the said interlocutor reclaimed against, and decern; refuse the defenders' motion for expenses as between agent and client in terms of the said Public Authorities Protection Act 1893; find them entitled to expenses on the ordinary terms. . . ."

Lord Stormonth-Darling.—After mature consideration I have come to the conclusion that the Lord Ordinary's judgment in favour of the burgh of Haddington is right, and should be adhered to. The conduct of the case throughout has been marked by an ability which has only been equalled by its keenness. Now, where private interests conflict with an admitted public benefit, and the question comes before a court of law, the Court in my opinion ought to be strict to mark any neglect of the private interest which amounts to a failure to make compensation for the property either taken or injuriously affected. But where, as here, there is no case of that kind, but only a difference of opinion as to the precise method by which the public benefit is to be conferred and a criticism of the legal machinery which has been invoked in attaining it, I do not think that any such duty arises. Of course the public authority charged with the execution of the work must proceed according to law, but it is not every captious objection to their procedure that is to be listened to, particularly if it results in no serious or even sensible injury to the person objecting. And that, in my view, is a fair description of the kind of injury alleged here.

The case for the pursuers is, not that an improved system for the drainage of Haddington was altogether unnecessary, or even that the system actually projected and partially carried out was not a "great improvement" in the public interest; they admitted as much by their letter of 23rd June 1905. Their case as now presented, after a great part of the work has been done, is that they did not discover till 10th November of that year that the defenders were interfering with the *alveus* of the river Tyne which at the place in question is their property, or in which at least they have a common interest with others, the interference consisting, not in the discharge of sewage into the river, but in the laying of certain drain pipes *on* the surface of the *alveus*, instead of *in* the bed of the river, and thereby affecting the natural flow of the river opposite their mills; that the defenders could not, under the 217th section of the Burgh Police Act 1892, interfere with any stream without the pursuers' consent in writing; that they gave no such consent; and that, even if the defenders were justified in proceeding under the Public Health Act 1897 alone, they did not follow the directions of that Act, because they failed to give reasonable notice to the pursuers, as required by sect. 103, of their intention to carry their sewers through the property of the pursuers; and, in particular, did not send to them the report of a surveyor to the effect that such a course was necessary. The practical conclusion of the summons is that the defenders ought to be ordained to lift all their pipes and other structures, and restore the channel of the river to its former condition. It will thus be seen that the nature of the case leading to these rather startling conclusions is both complicated and involved. It means that, where a burgh is situate on a running stream, the town council of that burgh cannot improve its drainage, however desirable in the public interest, if the scheme involves any interference

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with that running stream, without the consent in writing of everybody who can qualify any sort of right or interest in that part of the stream. It also means that the administrators of a burgh must make up their minds, before they set a drainage scheme on foot, which of two extant and possibly inconsistent codes they are to follow, under penalty that, if they make a slip, they may be called upon, months after the work has been done, to undo it, at great public detriment and expense. This *may* be the result of too much legislation on a particular subject, or of want of care in framing the legislation; but it is not a result to be readily adopted.

The Lord Ordinary finds a sufficient justification for the interlocutor which he has pronounced in the recent First Division case of *Brown* v. *Magistrates of Kirkcudbright*, 17th November 1905, 8 F. 77, in which it was held that the procedure prescribed by the Public Health Act 1897 for a local authority in the making of sewers was a code complete in itself, and that a local authority was entitled to exercise the powers given by that Act (as the Magistrates of Kirkcudbright did), without regard to the procedure prescribed by the Burgh Police Act. That conclusion was necessary to the judgment, and none of the judges expressed any dissent from it. Undoubtedly it justified the decision in this case, so far as the Outer House was concerned, if the Lord Ordinary was of opinion, as he was, that the notice here given was in fact reasonable. *Brown's* case would not be equally binding on us, for we might take measures for the reconsideration of the point if we thought such a course desirable. But, so far as I personally am concerned, I am quite satisfied with the decision in *Brown's* case; I have no fault to find with it of any kind. And it was a unanimous judgment of the First Division.

It was urged by Mr Clyde for the pursuers that, while the defenders might have had an option to proceed either under the Act of 1892 or under the Act of 1897 before the passing of the Burgh Sewerage and Water Supply Act of 1901, they had no such option after the passing of that Act, and that *Brown's* case would have been, or ought to have been, decided otherwise than it was, if the provisions of the Act of 1901 had been properly brought before the First Division. I do not think so. The First Division had the Act of 1901 in view when they pronounced their judgment, and I do not see that it makes the great difference for which Mr Clyde contends. No doubt, by sect. 1, it calls the Act of 1892 "the principal Act"; and where sums of money have been borrowed for purposes of sewerage or water supply, it lays upon town councils the duty of providing the sums necessary for repaying the principal and for paying interest on such sums out of a special assessment to be made under the Act of 1892, with certain limitations as to amount, and certain provisions as to approval of the Local Government Board for Scotland, in the case of such prescribed amounts not being sufficient to meet the expenditure. It is also true that, by sect. 5 of the Act, the town council of any burgh, in addition to the powers conferred upon them by the Act of 1892 or any other Act, with reference to sewerage and water supply, are to have the same rights, powers, and privileges as are conferred by the Public Health Act of 1897 upon local authorities under that Act in districts other than burghs, with certain specified exceptions. Further, it is true that, to make these provisions harmonise with the course of legislation, sects. 101, 113, 133, 134, and 137 of the Act of 1897 are repealed. But all that does not get over the fact that sect. 103 of the Act of 1897 is not repealed; and, so long as it was left standing, it does not seem to me that it was in any respect *ultra vires* of the defenders to proceed under sect. 103, which gave them the power to construct within their district (which this extension undoubtedly was) "such sewers as they might think necessary for keeping their district properly cleansed and drained." *They* were made the judge of the necessity of such operations, at least in the first instance, and if the pursuers meant to challenge the necessity or to demand a report by a "surveyor" in addition to the plan (whatever it was) which was sent with the letter of the town clerk dated 20th June 1905, then was the time, in my judgment, for the pursuers to have formulated their demand. I agree with all that the Lord Ordinary says in his opinion on this part of the case; and, particularly in view of the town clerk's offer to give the pursuers "any further information," I think it is too late now for the pursuers to complain that they did not get reasonable notice. I am satisfied that the pursuers, on receipt of the letter of 20th June and its accompanying plan, knew perfectly well that the defenders intended to carry a new drain "into, through, or under" the pursuers' lands, and that, their reply having been an express approval of the scheme without any qualification either as to the level of the new drain or otherwise, they must be held to have been satisfied of its necessity and of the sufficiency of the notice generally. It is clear from the decision of the case of *Roderick* v. *Aston Local Board* in 1877, in 5 Ch. Div. 328, under the corresponding English Public Health Act of 1875, that a power to carry sewers "into, through, or under any lands whatsoever" cannot be read as if those words meant only "under."

In reaching the conclusion that the Lord Ordinary's judgment is right, I confess I do not share the doubts of my brother Lord Low as to the soundness of the Lord Ordinary's finding that the pursuers "have validly complied with the requirements of the Public Health Act 1897." These doubts are, as I understand,

founded on the view that the town clerk failed to disclose, either by his letter of 20th June or by the plan which accompanied it, that the two proposed new pipes were not to be laid at the same level as the old single pipe, and that this omission, though not due to carelessness or a desire to conceal anything, was yet such as to justify the pursuers' assumption that the two new pipes were to be so laid. But that assumption (the justification of which I doubt, particularly looking to the note on the plan No. 8 of process that the old 12-inch pipe was "to be lifted and relaid") ought only, in my view, to have led to an enquiry for more information which, be it observed, had been proffered in the town clerk's letter. At all events, it does not seem to me to negative what is the main issue on this part of the case, viz. whether the defenders gave "reasonable notice in writing" of the works which they proposed to execute upon private property.

It remains for consideration whether the proceedings of the Burgh of Haddington have been gone about in violation of sect. 217 of the Act of 1892, the section which provides that "nothing in this Act contained shall be construed to authorise the Commissioners" to do certain things, including using, injuring, or interfering with any watercourse, stream, river, dock, basin, wharf, quay or towing-path, in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors of any canal or navigation, shall have right and interest, "without the consent in writing of the person legally entitled to grant the same." It might be enough to rely, as the Lord Ordinary does, on the judgment in *Brown's* case as settling that the defenders did not require to resort to the Act of 1892 as authorising them to use, injure, or interfere with the river Tyne, inasmuch as sect. 103 of the Public Health Act of 1897 gave them the required authority; and all that sect. 217 says is that "Nothing in this Act contained, *i.e.* the Act of 1892, shall be construed to authorise the Commissioners to do" certain things. But, even if this were not so, I greatly doubt whether sect. 217 applies to this case at all. Reading the section as a whole, it looks to me very much as if the protection of the private owner was carried so far as to entitle him to withhold his consent altogether (instead of merely entitling him to receive compensation), for the reason that, in the exceptional cases specified, any interference with these "private sewers or watercourses," as the sidenote calls them, might defeat the object aimed at by some local or private Act of Parliament, and not at all that, in the very common case of a river bordered by a town, any exceptional protection was thought to be necessary to guard against any, even the smallest, interference with the flow of the stream. The danger of pollution is dealt with separately in the Public Health Act by reference to the Rivers Pollution Prevention Acts; but I never understood that the high doctrine of *Bicket* v. *Morris*, 1866, 4 M. (H.L.) 44, which related to building operations by an opposite neighbour on the *alveus* of a stream, was thought to be within the purview of sanitary or drainage statutes.

Moreover, if the pursuers were to insist on the view that their consent in writing was a necessary preliminary to any interference with the river Tyne, they ought, in my opinion, to have tabled their proposition at once, instead of reserving it till the works were well advanced. My belief is that the applicability of sect. 217 was a pure afterthought on the part of the pursuers, due to the ingenuity of their legal advisers.

I have not adverted to any of the oral evidence in the case, because I consider it almost entirely beside the question. And I cannot help observing that, in my opinion, municipal authorities deserve some commiseration for having to pick their way through such a tangle of redundant legislation as Parliament has provided for their guidance.

With regard to the point which was made as to the application of the Public Authorities Protection Act 1893, and as to which the Lord Ordinary has given effect to the defenders' demand, I agree that that part of his Lordship's interlocutor must be recalled, on the short ground that the Act itself declares, by sect. 3, that it shall not apply "to any action, prosecution, or other proceeding, ... on account of any act done in any case instituted under an Act of Parliament, where that Act applies to Scotland only, and contains a limitation of the time and other conditions for the action, prosecution, or proceeding." Now the Public Health Act, under which this action must be held to have been instituted (on the assumption that the defenders are to get their expenses), does contain, by sect. 166, a limitation of the time within which such action shall be commenced, and it also contains (at the beginning of the same section) "other conditions" applicable to the action.

Lord Low.—The first question to be determined in this case seems to me to be whether it was competent for the defenders to proceed under the powers conferred upon local authorities by the 103rd section of the Public Health Act 1897.

I am of opinion that that question must be answered in the affirmative, because the section applies to all local authorities, whether in burgh or in landward districts, and it has never been expressly repealed, nor, in my judgment, can it be held to have been repealed by implication.

After the passing of the Public Health Act 1897 a somewhat anomalous condition of matters arose in regard to public sewers and drains in burghs, because the Burgh Police Act 1892 contained a complete code in regard to these matters within burgh, and the Public Health Act also contained a complete code which was applicable

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to burghs as well as to other districts; and further, the assessments authorised by the two Acts differed both as to amount and as to the persons liable.

It was for the purpose of remedying, or at all events of partially remedying, that state of matters that the Burgh Sewage, Drainage, and Water Supply Act 1901 was passed. That Act, by amending certain sections of the Act of 1892, and repealing (as regarded burghs) certain sections of the Act of 1897, did away with the double method of assessment authorised by the two last mentioned Acts, and established one method of assessment for burghs. It further declared that as regarded burghs the Act of 1892 should be the principal Act, and it incorporated with that Act certain sections of the Act of 1897, and repealed certain sections of the latter Act.

That being the scheme of the Act of 1901 I think that one would have expected that all the provisions in the Act of 1897 which it was intended should still apply to burghs would have been incorporated in the Act of 1892, and that all provisions which it was intended should no longer apply to burghs would have been (*quoad* burghs) repealed. If that had been done, burgh authorities would have found the whole code applicable to them in the Act of 1892 as amended, together with the incorporated sections of the Act of 1897. But the course actually adopted by the Legislature was very different. As I have said, certain sections of the Act of 1897 were repealed, and other sections were incorporated into the Act of 1892, but there were also a number of sections in the former Act which applied to burgh as well as to other authorities which were neither incorporated nor repealed. It is true that a good many of these sections contained provisions identical, or practically identical, with what had already been enacted as regarded burghs in the Act of 1892, and so far as these sections were concerned it was immaterial that they were neither incorporated nor repealed. But there are also sections which contain provisions which have no equivalent in the Act of 1892. The 103rd section itself may be taken as an example. That section, *inter alia*, authorises all local authorities to construct sewers for the purpose of outfall or disposal or treatment of sewage without their district. It was admitted that (whatever may be said as to the other powers given in the section) no such power as that which I have quoted is conferred upon the local authority in burghs by the Act of 1892, and therefore, unless the 103rd section is still applicable to burghs, the local authority in a burgh has been deprived of a very important power which has been conferred upon all other local authorities. No reason was, nor, I imagine, could be, suggested for denying such a power to burghs; and indeed I should expect that it would be more frequently expedient or necessary that sewage should be disposed of outside the area under the control of the local authority in the case of a burgh than in the case of a country district. I therefore see no reason for holding that sect. 103 (and the remark applies to other sections in a similar position) does not apply to burghs, because, although it is not incorporated with the Act of 1892, it is not repealed. In taking that view I am confirmed by the judgment of the First Division in the case of *Brown* v. *Magistrates of Kirkcudbright*, 8 F. 77.

There is, however, another ground for holding that sect. 103 is still in force as regards burghs. By the 5th section of the Act of 1901 it is provided that "the town council of any burgh, as the authority under the principal Act, in addition to the powers conferred upon them by the principal Act or any other Act, shall with reference to sewerage or drainage or water supply within such area, have the same rights, powers, and privileges as are conferred by the Public Health (Scotland) Act 1897 upon local authorities under that Act in districts other than burghs, with the exception of the rights, powers and privileges conferred by sects. 122 and 131 of the last-mentioned Act, to which sections the present section shall not apply."

Now the two excepted sections are in express terms limited to districts of a "local authority, not being the local authority of a burgh," and in the part of the Act dealing with "sewers, drains, and water supply" there are other sections (at all events in regard to water supply) whose application is limited in the same way. It is plainly the powers contained in the latter sections which are conferred upon burgh authorities in addition to powers already possessed by them. The object, therefore, of the enactment is to add to and not to diminish the powers of burgh authorities, and the powers to which the addition is made are described as those conferred "by the principal Act" (that is, the Burgh Police Act 1892) "or any other Act." Now the Act of 1897 is another Act which confers powers upon burgh local authorities which they did not possess before (as, for example, by the 103rd section), and it seems to me to be plain that the Act of 1901, so far from taking away any powers conferred upon burgh authorities by any prior Act, conferred upon them powers which they did not previously possess.

I am therefore of opinion that the defenders were entitled to proceed, as they did in fact proceed, under the powers of sect. 103.

The next question is whether the defenders followed the procedure prescribed by that section. The part of the section applicable to this case is that which enacts that a local authority may construct a sewer "after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary) into, through, or under any lands whatsoever." The pursuers did not found upon the clause in regard to a surveyor's report, but they maintained that "reasonable

notice" of the works proposed was not given to them. Notice was, in fact, sent to the pursuers by the letter of the town clerk of 20th June 1905, and the pursuers' complaint is that the information given as to the character of the proposed sewer was not reasonably adequate in that not only did it not disclose that the new pipes were to be laid upon the surface of the bed of the stream instead of under the surface (as was the case with an existing pipe), but that the inference from the letter was that the new pipes were to be laid upon the same level as the existing pipe.

It seems to me that there are substantial grounds for that objection. The state of matters which existed when the notice was given was that a 12-inch pipe ran down the bed of the river from the Victoria Bridge to Spoutwell Brae, and the plan which was sent to the pursuers along with the letter of 20th June shewed that pipe, and alongside of it an 18-inch pipe. In the letter it was said that "the existing 12-inch water-closet sewage pipe" (which I understand to be the pipe which ran down the bed of the river) "will remain," but nothing was said about the 18-inch pipe shewn on the plan. The explanation of that I take to be that it did not occur to the town clerk that the laying pipes in the bed of the river below the Victoria Bridge could in any way affect the pursuers, and what he desired to make clear in the letter was what the proposed sewage arrangements above Victoria Bridge were—a matter in which he was aware that the pursuers were interested. The weir of the dam which supplies the pursuers' mills is immediately above Victoria Bridge, and the pursuers had objected to a discharge of sewage which under the existing system was made into the dam. By the proposed scheme that discharge was discontinued, and all the sewage was taken down the river by means of the two pipes, and what the town clerk desired to make clear was that the proposed scheme did away with a state of matters to which the defenders strongly objected. But although the town clerk did not refer in the letter to the 18-inch pipe, he sent a plan which shewed that pipe, and accordingly the pursuers were notified that if the scheme were carried through, an additional and larger pipe would be taken down the bed of the stream. The plan, however, shewed nothing in regard to the level at which the pipes were to be laid; but as the town clerk said that the 12-inch pipe would remain, I think that the pursuers were justified in assuming that the 18-inch pipe would not only be laid alongside of it, as shewn on the plan, but would be upon the same level

Now I think that it is established by the evidence that the 12-inch pipe was embedded in the channel of the river and did not shew above the level of the river bed, but to what extent that state of matters was due to the manner in which the pipe had been originally laid, and to what extent to sagging or sinking of the pipe, it seems to be impossible to ascertain with certainty. I think, however, that the pipe most probably was originally laid under the river bed. One thing seems to be clear, and that is, that neither the defenders nor the men of skill by whom they were advised ever considered the question of the level of the new pipes as compared with the level of the old pipe. It does not seem to have occurred to them that there was any question of that kind which required consideration, and for this reason: There were two fixed points between which the old pipe ran and between which the new pipes were to run, and did run when laid, the one point being an opening in the abutment of the Victoria Bridge through which the pipes were passed, and the other an iron pipe which crossed the river at Spoutwell Brae, and with which the pipes in question were connected. Now, obviously the natural and most efficient way to lay the pipes between these two points was to lay them upon a uniform gradient, that is to say, in a straight line from the one fixed point to the other, and it never occurred to the engineers to enquire whether the old pipe had or had not been originally laid in that way.

The failure, therefore, of the defenders to inform the pursuers that the new pipes would be above ground was not due to any desire on their part to conceal anything, nor can the town clerk be charged with carelessness in not having brought the matter to the pursuers' notice. On the other hand, the pursuers were, as I have already said, in my opinion justified in assuming that the new pipes would be in the same position as the old, that is to say, below the surface of the river bed, and it is not surprising that they felt aggrieved when they found that instead of the bed of the river remaining free from obstructions, two large pipes were laid upon it and covered with cement, thereby forming a structure of from four to ten feet in breadth. The pursuers aver, and they have adduced some evidence in support of the averment, that that structure renders their mills more liable to be flooded than they were formerly, and although I do not think that they have made out a strong case, it seems to me to be impossible to say that the risk of flooding may not have been to some, although probably to a very slight, extent increased.

Now assuming that the pursuers did not get that reasonable notice of the works proposed by the defenders which is required by the 103rd section, what is the result? The pursuers' demand, and it is their only demand so far as this action is concerned, is that the pipes should be removed. In order to determine whether or not that is a remedy which is open to the pursuers I shall consider what the position of matters would have been if the pursuers had received notice of the precise way in which it was proposed to lay the pipes, and had objected.

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It seems to me that notwithstanding an objection on the pursuers' part, the defenders could have proceeded with the works and laid the pipes exactly as they have done, because the 103rd section does not say that the consent of the persons to whom notice must be given is required, or that they may object to the proposed sewer. All that seems to be contemplated is that persons through whose lands it is proposed to take a sewer should have an opportunity of considering the matter, and stating their views to the local authority.

In expressing that opinion I am not leaving out of view the provisions of the 109th section of the statute, which enacts that "In case it may become necessary to enter, examine, or lay open any lands or premises" for the purpose of making plans, surveying, taking levels, and the like, and, *inter alia*, for the purpose of making sewers, "and the owner or occupier of premises refuses or withholds access and leave to perform the said operations, the local authority may, after written notice to such owner and occupier, apply to the Sheriff, who, if no sufficient cause be shewn to the contrary, shall grant warrant to the local authority, their officers and others thereby authorised, to enter and do all or any of the works or operations foresaid at all reasonable times in daylight." In terms of the 157th section of the Act, any order made by the Sheriff is final and not subject to review.

In the case of *Brown* v. *Magistrates of Kirkcudbright* there was some difference of opinion in regard to the power conferred upon the Sheriff by that section, Lord M'Laren taking the view that the Sheriff was empowered to consider and determine whether the operations proposed by the local authority ought or ought not to be allowed, while Lord Adam was strongly of opinion that the Sheriff's powers were limited to questions of procedure, and that he had no authority to consider whether the proposed sewer was necessary or not. I agree with Lord Adam. I think that the main function of the Sheriff is to regulate the way in which the work is to be proceeded with, so as to be as little burdensome as possible to the owner or occupier. No doubt it is made imperative on the Sheriff to grant warrant to the local authorities to enter the lands only "if no sufficient cause be shewn to the contrary," which implies that if sufficient cause be shewn to the contrary the Sheriff may refuse the warrant. I do not, however, think that that is inconsistent with the view which I take of the scope of the enactment, because there may be cases in which the Sheriff would be justified in refusing a warrant without considering or dealing in any way with the question whether or not the works were necessary. Suppose, for example, that a local authority proposed to construct a sewer through private lands in the exercise of the powers in the 103rd section, and attempted to enter the lands and commence operations without having given previous notice in writing to the owner or occupier, and without having obtained a report from a surveyor that the sewer was necessary, I have no doubt that the Sheriff would be entitled to refuse a warrant and to dismiss the application in respect that the local authority had not followed the statutory procedure. I am accordingly of opinion that the 109th section does not aid the pursuers, and indeed I did not understand their counsel to found upon that section.

I am therefore of opinion that if the defenders were entitled to proceed under the powers conferred by the 103rd section of the Act of 1897, without any limitation of these powers, except those contained in the section itself, and in the 109th section, the pursuers are not entitled to have the pipes in question removed. I take it that the Court will not order removal of a structure which can be immediately replaced, especially where, as here, there was no radical defect in the title of those who erected it, but merely an unintentional failure to comply with certain statutory formalities.

The question remains, however, whether the powers conferred by the 103rd section are not limited and qualified by the 217th section of the Act of 1892? By that section it is enacted "that nothing in this Act contained shall be construed to authorise" the local authority, *inter alia*, "to use, injure, or interfere with any watercourse, stream, river, dock, basin, wharf, quay, or towing-path in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors of any canal or navigation, shall have right and interest, without the consent in writing of the person legally entitled to grant the same."

It seems to me that if that enactment is applicable to the present case, and if it is to be construed literally, it is conclusive in the pursuers' favour, because the defenders did, without the pursuers' consent, use and interfere with a river in which the pursuers not only had an interest as owners and occupiers of mills, but of the *alveus* of which they were proprietors, either from bank to bank, or *ad medium filum* at the part where the pipes in question are laid.

The Lord Ordinary suggests that even if the section is applicable, the pursuers gave their consent in writing. I cannot assent to that view, because although the pursuers did in writing express their approval of the scheme, they did so in the belief, which they were justified in holding, that the pipes were to be laid under ground. If they had been aware that the pipes were to be laid above ground they would certainly not have approved of the scheme, nor given their consent to it.

But however that may be, I am of opinion that the 217th section does not apply to the present case. In the first place, the section, in terms, only applies to operations carried out under the powers conferred by the Act of 1892.

That appears from the opening words of the section, which are "Nothing *in this Act* contained shall be construed to authorise."

In like manner the language of the 103rd section seems to me to negative the idea that the powers thereby conferred are subject to any limitation. The power which is in question in this case is to construct a sewer "into, through, or under any lands *whatsoever*." The word "whatsoever" is plainly unnecessary except for the purpose of emphasis, and the inference appears to me to be that it was used in order to make it clear that the generality of the power was to be subject to no exception. I am therefore of opinion that it would be contrary to the declared intention of the Legislature to hold that the power conferred has been limited and curtailed, in the case of burghs, so as to be excluded altogether as regards the subjects enumerated in the 217th section.

If I am right in the view which I have already expressed that the 103rd section is not repealed by implication *quoad* burghs by the Act of 1901, the only ground upon which it could be contended that the 217th section applies to operations under the 103rd section would be that the Act of 1901, by declaring the Act of 1892 to be the principal Act, placed the 103rd section of the Act of 1897 in the position of an enactment which merely added to the powers conferred by the principal Act, and therefore fell to be read along with and as part of that Act. Now the Act of 1901 has left the 103rd section, along with the group of sections of which it is one, in a very anomalous position, because, while it makes the Act of 1892 the principal Act, and incorporates with that Act certain sections of the Act of 1897, and repeals other sections of the latter Act, it simply leaves the group of sections to which I have referred standing, without either repealing them or incorporating them with the principal Act. In these circumstances I do not think that it is legitimate to infer that the Legislature intended that the wide powers conferred upon all local authorities by the 103rd section should be limited in the case of burgh authorities alone by reading into that section the 217th section of the Act of 1892. To make that inference would be to construe the Act of 1901 either as incorporating the 103rd section with the Act of 1892, or as declaring that it should be read along with and as forming part of that Act. The section has certainly not been incorporated, and I do not think that there is enough to imply a direction that it shall be read as part of the Act of 1892. Accordingly, I am of opinion that the pursuers cannot found upon the 217th section.

Upon the whole matter, therefore, I have come to the conclusion that the interlocutor of the Lord Ordinary should be affirmed in so far as it assoilzies the defenders. I am not, however, prepared, for the reasons which I have given, to assent to the finding that the defenders have validly complied with the requirements of the Public Health Act.

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Lord Low

With regard to the question of expenses raised under the Public Authorities Protection Act, I need only say, without going into details, that an examination of the Act has led me to the same conclusion as that expressed by Lord Stormonth-Darling.

Lord Ardwall.—I concur entirely in the opinion of my brother Lord Low, which I have had the privilege of reading, and with which I entirely agree.

The Lord Justice-Clerk.—I have very little to add. This case has seemed to me to be attended with considerable difficulty. But I have come to the view that the judgment should be as proposed. I cannot say that I think the giving of notice under the Act was done with that clearness and formality which would be expected when notice was being given by a public authority proposing to interfere with a piece of property in which private proprietors had a substantial interest. I think that the procedure was loose, and not by any means a model for imitation by any public body. But it was treated by the pursuers as a notice without objection. Accordingly the work proceeded in the knowledge and under the observation of the pursuers. It seems to me that, knowing that important works were going on under the notice, the pursuers were not acting as they should have done in allowing these expensive works to be carried on and completed without taking steps to vindicate any rights they had which they saw were being encroached upon. Except upon the strongest grounds I could not hold that merely upon a question of notice an objector could come forward and require that the works erected should be removed, thus making a work involving great cost abortive, and compelling the adoption of some new and probably more expensive expedient. I agree with Lord Low in thinking that if the pursuers had objected, they could not have made good their objection to the works being executed under sect. 103 of the Public Health Act, if that Act applied. But further, in this case I have formed a very decided opinion that the pursuers have failed to prove in any reasonable degree that the works which were executed could cause any damage to their interests.

I do not add anything upon the question of application of the statutes. I entirely agree in the opinion that the Authority proposing to make the alterations were entitled to proceed under sect. 103 of the Public Health Act, and I agree with Lord Low in the views he has expressed as to the 217th section of the Act of 1892, in holding that the pursuers cannot found on this Act.—13*th November* 1907.

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Counsel for Reclaimers, Clyde, K.C., Horne; Agent, T. S. Paterson, W.S.—Counsel for Respondents, Dean of Faculty (Campbell, K.C.), Malcolm; Agents, John C. Brodie & Sons, W.S.

J. H. H.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

191. **Barclay Curle & Company Limited** *v.* **Sir James Laing & Sons Limited.**

I. Diligence—Arrestments—Process—Arrest of Corporeal Moveable—Petition for Recal of Arrestments — Competency—Ship in Course of Construction Under Contract Between Shipbuilder and Foreign Purchaser—Arrest of Ship, Completed but Undelivered, in Hands of Builder on Dependence of Action Against Purchaser — Prima Facie Right of Ownership in Arrestee—Arrestee Held Entitled to Proceed by Petition for Recal.

II. Sale — Contract of Sale — Ship—Delivery — Possession — Intention of Parties to Transfer Property in Ascertained Goods—Sale of Goods Act 1893 (56 & 57 Vict. cap. 71), sects. 17 and 18, Rule 2—Ship in Course of Construction Under Contract—Payment of Price by Instalments as Work Progresses — Intention to Transfer Property in Ship Before Delivery Not Expressed in Contract — Ship Completed and Five Out of Seven Instalments Paid, but Ship Not Delivered — Opinions (Expressed in Petition for Recal of Arrestments and not Deciding the Question as Between the Purchasers and the Builders) that Property must be Held to be in Builders—Observations per The Lord President on the Advisability of Expressing in a Contract the Intentions of the Parties as to when the Property Should Pass.

III. Diligence — Arrestments — Petition to Recal Arrestments — Ship — Ship in Course of Construction Under Contract Between Shipbuilder and Foreign Purchaser—Ship, Completed but Not Delivered, Arrested in Builders' Hands on Dependence of Action Against Purchaser—Circumstances in which Held That Prima Facie Title was in Builder and Arrestments Recalled Without Caution.

Petition for Recal of Arrestments.

This petition was presented on 1st November 1907 by Messrs Barclay Curle & Co., shipbuilders at Whiteinch, praying for the recal of arrestments which had been laid upon two steamers, the one lying in graving dock in the harbour of Glasgow, and the other in the petitioners' yard at Clydeholm, both being in course of construction in terms of an agreement between the petitioners and the Lloyd Sabaudo Societa Anonima Di Navigazione of Turin.

The petition set forth as follows:—

That by agreement between the petitioners on the one part and Messrs The Lloyd Sabaudo Societa Anonima Di Navigazione of Turin on the other part, made at Genoa on 11th February 1907, and ratified at Sunderland on 11th March 1907, the petitioners agreed to build and sell, and the purchasers, the said Lloyd Sabaudo Company, agreed to purchase, two new twin-screw steel steamers to be designed Nos. 468 and 469. The said agreement contained, among others, the following clause, viz. [quotes clause 7, *infra*].

On 29th October 1907 Sir James Laing & Sons, Ltd., carrying on business at Deptford Yard, Sunderland, in the county of Durham, and having their registered office at Deptford Yard aforesaid, on the dependence of a summons at their instance against the said Lloyd Sabaudo (Societa Anonima per Azioni), signeted 26th October 1907, arrested—(1) the vessel No. 468 mentioned in the said agreement, at present lying in the graving dock at Glasgow, belonging to the Clyde Navigation Trustees; and (2) the vessel No. 469, also mentioned in the agreement, at present in the petitioners' shipbuilding yard; and (3) in the hands of the petitioners a sum of £221,000, more or less, stated to be due by the petitioners to the said Lloyd Sabaudo, with all goods, gear, etc., in their hands, belonging to the said Lloyd Sabaudo.

The said ship No. 468 is due to leave the said graving dock not later than the morning of Wednesday the 6th November 1907, in order to undergo her trials off the port of Greenock, as provided for in Article 7 of the Agreement above set forth, and to leave the Clyde not later than Friday the 8th day of November 1907, so that after her official trial at Genoa she may be delivered to and accepted by the Lloyd Sabaudo Company at Genoa ready to proceed on voyage, after time for loading, etc., by the 25th of November 1907. The ship No. 469 will, the petitioners anticipate, be completed about the month of January next. In terms of the said agreement, the said two ships are the property of the petitioners.

The petitioners are not indebted in any sum to the said Lloyd Sabaudo Company, nor have they any goods, gear, etc., belonging to that company.

On 4th November 1907 answers were lodged for the said Sir James Laing & Sons Ltd. in the following terms:—

Admitted that the respondents, on the dependence of a summons at their instance against the Lloyd Sabaudo Company, have arrested the two vessels mentioned in the petition, and also the sum of £221,000 in the petitioners' hands due by them to the said Lloyd Sabaudo Company, and all goods, gear, etc., belonging to said last-mentioned Company. The letters and executions of arrestments are referred to for their terms. Not known and not admitted as to

the date or dates on which the vessel No. 468 is due for her trials or to leave this country. *Quoad ultra*, the statements in the petition are denied, under reference to the agreement mentioned for its terms.

Explained that the summons at the instance of the respondents against the Lloyd Sabaudo Company concludes for payment to the respondents of sums amounting in all to £220,091, 19s. 4d. due by that Company to the respondents as the balance of the purchase price of three steamers built for and sold and delivered by the respondents to that Company.

Explained further, that by the agreement between the petitioners and the said Lloyd Sabaudo Company it is provided that the purchase price of the said vessels, Nos. 468 and 469, should be payable and paid by cash instalments at successive stages of their construction, all as therein set forth. It was further provided that the vessels should be constructed under the inspection and superintendence of a representative to be appointed by the purchasers. The above provisions of the contract have been duly carried out, and, in particular, the purchasers have made payment to the petitioners of the stated instalments as these became due. The amount of said instalments so received by the petitioners, viz., £221,000 or thereby, is presently in the hands of the petitioners. The respondents aver that under said agreement between the petitioners and the Lloyd Sabaudo Company, it was the intention of parties, and it was agreed, that the property of the vessels under construction should vest in the purchasers during the progress of their construction, and that the property in said vessels, so far as constructed, is presently vested in the Lloyd Sabaudo Company. Said Company are not called hereto as respondents.

In these circumstances the respondents submit that the petition is incompetent and ill-founded, and should be dismissed. In any event, the respondents maintain that the arrestments should be recalled or loosed only on caution being found or consignation made to the full extent of the respondents' claims against the said Lloyd Sabaudo Company.

The agreement referred to in the Petition and answers contained *inter alia* the following clauses:

7. The vessels when completed to have steam trial or trials at sea off the port of Greenock and adjacent coast. The cost of such steam trial or trials shall be at the builders' expense, they finding crew for the safe navigation of the vessels and for the engine department, also coal and engine stores, but the purchasers shall provide any cargo which they consider necessary for the trial or trials, and shall pay any expenses incidental to loading same.

Delivery to be considered completed after the satisfactory official trial provided for, as follows:—

After the steam trial off the coast of Greenock, mentioned above, the boats are to again undergo the official trial off the Italian coast, but all the cost of transporting the ships from Greenock, the costs of the official trial, including insurance, coals, oils, stores, port and harbour dues, and any further expenses attached thereto, to be borne by the purchasers.

The vessels will not be considered as delivered to, and finally accepted by, the purchasers until the said ships have passed the official trial trip in Genoa, have been approved in Genoa by the Italian Emigration Authorities, and all conditions of the contract have been fulfilled

8. On completion of each of the steamers at Greenock upon the terms and conditions aforesaid, the builders shall, in exchange for the purchase money due to them up to and including delivery instalment, and for a bank guarantee for the final instalment, hand over to the purchasers or their representative, the builders' certificate, British Lloyd's certificate and classification, Suez canal certificate, also chain and anchor, and other certificates as usual or necessary, or shall give an undertaking to hand over such certificates to the purchasers as soon as they are respectively received.

9. The builders shall pay the British Lloyd and Registro Italiano classification fees, Italian Board of Trade measurement fees, and the launching dues if any, as usual.

10. The purchasers are entitled to appoint an expert to superintend the construction of the vessels and the machinery; and it is hereby agreed that no alterations or extra work are to be made or done or charged for without the consent in writing of the said purchasers, per their representative, specifying the extra sum to be paid, and the additional time agreed, for such alteration or addition.

This clause is subject to special clause of the specifications.

11. The steamers shall be at the risk of the builders until they finally leave the Port of Greenock, up to which date the builders shall keep them insured against fire and other risks to an amount equal to the purchase money paid in advance.

. . . . . .

Statement of Prices referred to in Contract of this date.

First steamer, £——
Second steamer, £——

Payable in cash instalments as follows for each steamer:—

1. —— on the signing of the contract.
2. —— of balance when keel is laid.
3. —— of balance when framed.
4. —— of balance when plated.
5. —— of balance when launched.
6. —— of balance when handed over to owners after steam trials at Greenock.
7. —— of balance, being the final instalment 6 months after delivery to owners at Genoa; this final instalment to bear interest from the date of delivery in Genoa until paid at the rate of 4% (four per cent.) per annum.

When the vessel is handed over to the owners at Greenock, the builders to give owners the builders' and other certificates in exchange for the sixth instalment and a bank guarantee from the Societa Bancaria Italiana, or other bank of equal standing, to be mutually agreed upon for the payment of the seventh instalment when it falls due.

The Sale of Goods Act provides as follows:—

Sect. 17. *Property passes when intended to pass.*—(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Sect. 18. *Rules for ascertaining intention.*—Unless a different intention appears, the following are rules

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for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

. . . . . .

Rule 2. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done or the buyer has notice thereof.

The case was heard in the Summar Roll on 5th November.

Argued for Respondents: The petition was incompetent and should be dismissed. The arrestee is not entitled to sue for the recal of arrestments used in his hands on the averment that the subjects arrested are his own property and not that of the common debtor without clear *prima facie* evidence in support of that averment. Where, as in the present case, the question is doubtful, the appropriate method of establishing the true ownership is in an action of furthcoming (*Vincent* v. *Chalmers*, 1877, 5 R. 43; *Brand* v. *Kent*, 1892, 20 R. 29; *Duffus*, 1857, 19 D. 430; *Bildstein & Bock*, 1872, 9 S.L.R. 512).

In the present case it was clear from the terms of the contract that the property had vested in the Italian purchasers during construction by the payment of cash instalments after inspection by the representative of the purchasers (*Simpson* v. *Duncanson*, 1786, M. 14204, Bell Com., 7th ed., Vol. I. p. 189; *Orr* v. *Tullis*, 1870, 8 M. 936, per Lord Neaves at p. 950; *Stewart & Co.* v. *Dobie*, 1879, 7 R. 396 at pp. 400 and 409; *M'Bain* v. *Wallace*, 1881, 8 R. (H.L.) 106, per Lord Watson at p. 116; *Seath* v. *Moore*, 1885, 12 R. 260, and 1886, 13 R. (H.L.) 57, per Lord Watson at pp. 62, 64 and 65; *Reid* v. *Macbeth & Gray*, 1904, 6 F. (H.L.) 25).

Argued for the Petitioners: The petitioners were entitled to immediate recal of the arrestments. According to the terms of the contract the property of the ship must be held to be in the builders. This was a contract for the sale of a specific article, viz., a completed ship (*Reid* v. *Macbeth & Gray*, *cit.*). The ship in terms of the contract was not completed when arrested. The contract must be construed according to the provisions of the Sale of Goods Act. By that Act the intention of parties, as read from the contract, regulates the point of time at which the property of the article sold is to pass. If the parties do not clearly indicate their intention on this point the ordinary rules of the Act will apply to the construction of the contract. According to these rules, it must be held that there was in the present case no intention to transfer the property in the ships before delivery (Sale of Goods Act, sects. 5 (1), 16, 17, 18, 62 (1)).

The authority of the rule attributed to *Simpson's* case, and followed in subsequent cases, has been displaced by the observations upon it of the Lord Chancellor and Lord Watson in *Seath* v. *Moore*, *cit.* See also *Wylie & Lochead* v. *Mitchell*, 1870, 8 M. 552.

The Court *recalled* the arrestments without caution.

The Lord President.—My Lords, Sir James Laing & Sons Ltd., an English registered company, having an alleged claim against an Italian company, called the Lloyd Sabaudo Societa Anonima Di Navigazione of Turin, arrested two ships which were being built for that company by Barclay Curle & Co. Ltd., a Scottish company, the said ships being in their yard in the Clyde; and the present petition is a petition at the instance of Barclay Curle & Co. for the recal of the said arrestments, Barclay Curle & Co. averring that the ships at this present moment are theirs, and do not as yet belong to the Italian company, although they are admittedly being constructed upon the orders of that company. So far as one of the ships is concerned it is very near delivery. All that it still requires is to pass its trial in the Clyde, and afterwards to pass a trial at Genoa.

My Lords, the authorities upon this matter are not very numerous, but I think it is well that we should on this occasion lay down, with perhaps somewhat more precision than has hitherto been employed, the rules which I opine must obtain as to the recal of arrestments. Two cases were quoted to us in somewhat recent times—the case of *Vincent* v. *Chalmers*, 1877, 5 R. 43, and the case of *Brand* v. *Kent*, 1892, 20 R. 29. Those were both cases where the petition for recal was presented by a third party—and by a third party I mean one who was neither the arrestee nor the common debtor—and it was laid down in these cases, and I have no doubt whatsoever laid down perfectly rightly, that such questions as he wished to raise could not be raised and determined in a petition for the recal of arrestments. If a creditor, whom we will call A, arrests in the hands of the arrestee B in respect of the debt of the common debtor C, it may very well be that the thing or the debt arrested is not really due to C, but is due to somebody else, and if that somebody else, D, wishes to raise the question, he cannot raise it by a petition for the recal of the arrestment; he must raise it by some other appropriate form of process. As to that law I do not think there is any doubt. There is as little doubt that the common debtor may always petition for the recal of the arrestments upon the ground that they are nimious and oppressive, and that these arrestments may be recalled, in some cases *simpliciter*, but much more generally on caution.

But there remains the case with which we are going to deal—the case of where the person who wishes to get rid of the arrestment is the arrestee. There have been cases where the arrestments

were recalled at the instance of the arrestee, and in particular we had cited to us the case of *Duffus* in 19 Dunlop, p. 430. The facts in *Duffus's* case were these. A ship was arrested as belonging to B. At the moment of the arrestment the ship was registered in the name of A, and A petitioned for the recal of the arrestment. It was argued for the arrester that the ship really belonged to B. Historically it had belonged to B, because it had been registered in B's name before it came to be registered in A's name. Their Lordships' held, and I think quite rightly, that that question could not be tried in that process; that they were bound to take the register as it stood, as being the proper evidence of title to a ship; and that, consequently, as the ship, according to the register, belonged to A it could not be arrested as if it had belonged to B. But I am bound to say, with great respect, although I think the judgment is perfectly right, I do not think that the criterion as laid down by the Lord Justice-Clerk in that case can, on further consideration, be supported. His Lordship there makes a distinction between moveables to which there is no written or statutory title, and moveables to which there is a written title, and he says: "In the ordinary case of moveables, to which there is no written or statutory title, it is no objection to the competency of an arrestment that the arrestee says he has no funds of the common debtor, or that the same thing belongs to himself by virtue of preference, compensation, or otherwise. For, in a furthcoming, he can appear and assert and make good his right; and if he is confident of his right to the money, may use it in the meantime." But then, he says that when there is an actual written title, "no arrestment can competently be used, according to rules applicable to such diligence, in direct contradiction to that title."

My Lords, I am afraid that distinction won't do, and for this reason. So long as the thing arrested is a claim for money or a debt, it is quite true, as his Lordship says, that in a furthcoming the arrestee can appear and make good his right, and, in the meantime, no prejudice is created. The arrestee cannot be made to pay the alleged debt till the furthcoming, and, in the meantime, his general funds are laid under no embargo. It is quite obvious that that is not so in the case of a corporeal moveable, and for this very good reason that, if a corporeal moveable is arrested, and the arrestee wishes to say that it is his own, the arrestee has no power of either starting himself, or getting others to start a furthcoming; and accordingly, if he had not some other way of getting rid of the arrestment, he would be in this uncomfortable position that a nexus would be upon the subject which would put him in danger to deal with it, and, at the same time, he would have no possible means of starting a furthcoming in which he could appear to vindicate his right. It seems to me that the true distinction is between the arrestment of debts or sums due and the arrestment of corporeal moveables. In the case of the arrestment of debts or sums due, I think that the rule as laid down by Lord Justice-Clerk Hope holds perfectly good. There is no reason why a question of whether a sum is due or is not due should be taken up in the inconvenient form of a petition for the recal of arrestment, and for the very simple reason that the arrestee is not in any way hurt or damnified by waiting until a furthcoming is raised. An arrestment in the hands of A of all monies due by him to B does not put a nexus upon any particular money in A's hands, it does not prevent A from going on with his business, and using any money that he has got; it only attaches such sum as A is due to B, and it leaves A perfectly free in the furthcoming that is directed against him to say that he is due no sum to B. As your Lordships will remember, a furthcoming really first of all defines the sum that is due by the one to the other, and then it transfers it for the benefit of the creditor, who has made the arrestment, by way of adjudication. Accordingly, as long as it is a debt, there can be no expediency in trying to unravel these questions in a petition for recal, and there can be no harm in allowing them to stand over until a furthcoming is raised, if it is ever raised.

But when it comes to a corporeal moveable then the position seems to me quite different. When a corporeal moveable is arrested in the hands of A as truly belonging to B, and A wishes to say that it is his own and not B's at all, then, I think, he has an immediate interest to get that question decided. What would then happen I think depends upon circumstances. It may be that A, the arrestee, admits that the article in question belongs truly to B, but at the same time says that he has certain claims over it. Take, for instance, the case of a person who has had a corporeal moveable entrusted to his care for the purpose of performing some operation upon it, and has a good lien upon it for his charges—in such a case as that the question of how much he is entitled to by way of lien could perfectly well be tried in the furthcoming. There you have practically the admission of the arrestee that the subject does belong to somebody else, and is therefore well arrested, subject only to the fact that he has certain claims upon it. But where he makes no admission of the sort, it seems to me that the general position is that the possession of a moveable is *prima facie* evidence that it is his property—that is to say, it is *prima facie* evidence except with regard to a certain class of people, such as warehousemen and so on, whose business it is to have in their possession the property of others. Accordingly, it seems to me that if a person arrests a corporeal moveable in the hands of somebody else, alleging it to belong to a third

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person, he has got at least to make a *prima facie* case for saying so; and if he cannot make a *prima facie* case then it seems to me that the arrestee, who has had the corporeal moveable in his hands arrested, is entitled to say: "No *prima facie* case has been made out, therefore I am entitled to have the arrestment recalled." But when a *prima facie* case is made out, then I hesitate to give any general definition, because I think each case will depend upon circumstances; it will depend upon circumstances in each case whether there should be an immediate determination of the question, or whether there might not require to be an enquiry—I mean that, although I think a petition for recal of arrestments is always, so far as may be, a summary process, yet I can imagine a case in which it would be right to have an enquiry.

Now, my Lords, applying these doctrines to the present case what I find is this—an uncompleted ship, that is to say, a ship that has not come into the position of being registered, when, of course, the proper title is the title of registration, but is still in the builders' yard. *Prima facie*, it seems to me that ship belongs to the builders. Accordingly, if any one arrests the ship upon the ground that it does not belong to the builder, but that it belongs to somebody else, I think he is bound to give a *prima facie* reason for that assertion. In this case the respondents table what they say fulfils my desire. They table the contract under which, admittedly, the ship is being built; and accordingly this case is one of those cases where it is possible to give a judgment without further enquiry. We have here, admittedly, the document on which, and on which alone, the transference of the ship from the builders, who created it, to the third party, to whom it is now said to belong, depends.

Accordingly the question of whether this ship should be allowed to be arrested, as it has been, or whether the arrestment should be recalled, seems to me to turn upon the interpretation of the contract. I think the *onus*, so to speak, rests upon the person who wishes to show that the ship belongs, not to the builder to whom it would what I call naturally belong, but to someone else. We have the contract before us, and that brings one to the consideration of that branch of the law which has been much discussed in recent years, I mean the branch of the law which was illustrated in the case of *Simpson* v. *Duncanson*, 1786, M. 14,204. I do not think it is necessary for your Lordships to try to add anything more to the elucidation of what was really originally decided in *Simpson* v. *Duncanson*. Probably a sufficient word, if not the last word, has been said about it in the judgment of Lord Watson in *Seath* v. *Moore*, 1886, 13 R. (H.L.) 57. One cannot help feeling that probably the doctrine of *Simpson* v. *Duncanson* had its origin in an endeavour to secure an equitable result in the teeth of what at that time was the very strict Scottish doctrine of the transfer of property, because there is no doubt that at the time of *Simpson* v. *Duncanson* you might contract in what terms you pleased — you might contract that property should pass—and yet it was impossible to make the property really pass without delivery, I mean delivery in the fullest sense of the word, including all forms of what may be called constructive delivery. But all that has now been altered. It was altered to a large extent by the Mercantile Law Amendment Act (19 & 20 Vict. cap. 60), although, as has been often pointed out, that Act did not really alter the true conception of where the property was, but merely interfered with the right which sellers and purchasers in old times would have had. But the whole matter has been really altered by the Sale of Goods Act (56 & 57 Vict. cap. 71), and now it is quite clear that by the law of Scotland if people choose so to contract they can pass the property of a thing which is being sold without delivery. That being so, it seems to me clear, and I think it should be clearly laid down, that if people want these consequences to happen they must really say so. There is not the slightest difficulty in so framing a contract, if it is wished, as between a shipbuilder and the person who is buying the ship, that the property in a gradually constructed ship shall be held to pass at certain stages; but if so, I think it must be clearly said.

My Lords, in the contract under discussion not only is that not clearly said, but I think the other thing is said. I think that the only sale that is found in this contract is the sale of a completed ship. It seems to me to resemble in that respect the contract in *Reid* v. *Macbeth & Gray*, 1904, 6 F. (H.L.) 25. Accordingly I am of opinion, upon the construction of this contract, that the property of the ship was not passed from Barclay Curle & Co., to whom undoubtedly it originally belonged, to the purchaser bit by bit as it came into existence. That question we cannot decide in this process, as in a question between Barclay Curle & Co. and the Italian purchaser, but we can decide it to the effect of saying whether the arresters have made out a *prima facie* case. I hold, accordingly, that the arresters here have not made out any case for the ship being the property of the common debtor, and that the arrestments fall to be recalled.

Lord M'Laren.—I have followed with much interest the exposition of this branch of the law given by your Lordship in the chair. I shall not attempt to go over the ground again, because I feel quite sure the various points of the case could not be put more clearly. But having regard to the large sum of money involved in this case, it may be right that I should state my opinion upon the point in which the parties to

this dispute are chiefly interested. First, I think a distinction, a clear distinction, may be drawn between the arrestment of a seagoing ship, under maritime law, and such an arrestment as we are here dealing with. In the ordinary case of the arrestment of a ship within the jurisdiction—it may be in a harbour afloat—there is no arrestee. The ship is simply arrested by description for a debt of the owners, and this particular form of arrestment was, I think, originally confined to the Admiralty Courts, who exercised jurisdiction *in rem*. But this is a case of an arrestment of a ship which, although finished—because I think she was to make her trial trip yesterday or to-day—is still in the hands of the builders, physically undelivered. In such a case, and it may be in the case of other corporeal moveables, if the builder of the vessel admits that it is not his property, if he admits that according to his contract it has passed to the purchaser, he would not be in a position to raise any objection to the arrestment, and we should not have the case that is now before us. But if he says that this ship is his property I see no reason why he should not be allowed to determine that question in a petition for the recal of arrestments, because I do not see how it can be determined in any other process; and even if it could, he is put to the inconvenience of having his property meantime under an embargo until the issue of a case which it is supposed will determine the question of right. Accordingly, where the person in whose hands the ship is arrested, in this case the builder, claims that the ship is his own property, then, agreeing with your Lordship, I should hold that his possession, physical possession, raises a certain presumption in favour of his claim, and that it lies with the arresting creditor to show by the contract or documents of title that the true ownership is vested in the common debtor.

In this case, when we examine the contract of sale under which this ship was built, and apply to it the principles of the Sale of Goods Act under which this particular principle of the law of England was practically extended to Scotland—that property may or may not pass to the purchaser according to the wishes of the parties—I say, when we apply that principle to this case, then, as a matter of intention, I see no reason to doubt that it was the wish of both the seller and the purchaser that the ship should remain the property of the seller until payment of the penultimate instalment of the price and the completion of the trials. If it had been intended that there should be partial transfers of the property at the successive stages of payment of the instalments, it would have been easy to express that in the contract of sale. As it was not expressed, I presume that the parties did not desire that the property should pass in stages, but that on the contrary the Italian company, being perfectly convinced of the ability and willingness of the builders to fulfil their obligations, were content to wait until the ship was ready for use before claiming or desiring delivery. For these reasons I agree that these arrestments should be recalled; and I only add that this is not a case where they should be recalled upon caution. That is one reason why it has been necessary to consider the matter as one of contract right, because the idea of finding a cautioner for £200,000 is altogether absurd.

Lord Kinnear.—I agree entirely with all your Lordship has said, and I have only a few words to add. I think it is very material to observe in the outset that the arrestment we are asked to recal is a real diligence, that is to say, it is a diligence affecting two vessels specifically described in the petition by numbers and description, and has the effect of laying an embargo upon these ships, so that, whatever the interests in the property of the ships may be, they cannot be removed from the dock and shipbuilding-yard in which they are at present. That this is a totally different thing from the arrestment of a debt, and that the true owner of the ship has a perfectly good interest and a good title to say that the arrestments should be recalled, so that he may deal with his own property in the ordinary course of his business, is, I think, for the reasons your Lordship has already given, perfectly clear. I do not think that we can in this process decide any question of right as between the petitioners and the firm for whom they were building the ships, so as to form a *res judicata* as between these two parties, and for this plain reason that the competing interest or competing right, if there be any such right or interest, is not really represented by any of the parties to this process. If the ships do not belong to Barclay Curle & Co., and do belong to the Italian Society, the Italian Society is not here, and therefore we cannot decide the question of property. But I think we can decide whether the ship can be effectually arrested as the property of the Italian company, and, if it cannot, then the arrestments must be recalled.

My reason for deciding that question in the way your Lordship has explained is put, I think, briefly, and also very clearly and decisively, by Lord President M'Neill in the case of *Duffus*, 1857, 19 D. at p. 442. His Lordship's opinion does not proceed upon the distinction taken in the opinion of the Lord Justice-Clerk upon which your Lordship has commented. The Lord President says: "The case of a ship is a peculiar one. It is peculiar as affects the nature of the property itself, and peculiar also as regards the nature of the title to that property. It is peculiar as to the manner in which the arrestments, once laid on, are to be followed up. Therefore, it is a case in which we are not to be led into the ordinary course of *in dubio* requiring caution. We must see our

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way more clearly in regard to the arrestment of a ship than in the ordinary case of arrestment"; and then he says that in such a case persons outside the jurisdiction ought not to be required to find caution. The doctrine with which he starts is, that in reference to this very peculiar arrestment, we must see clearly that the thing arrested is really subject to the diligence. Then he goes on to consider the question of title, and he says that upon the face of the title the ship is not the property of the common debtor for whose debts it is proposed to arrest it, and that the Court ought not to enter into an enquiry for the purpose of subverting the inference from the *prima facie* condition of the title. He says:—"If we were to enter into an enquiry as to the nature of the right in this ship, and to have proof of the facts adduced from Halifax, and then to enquire as to the law of that country and its effect upon this transaction, we would in effect expose these petitioners to all the evils which could arise from this vessel being detained till an ordinary action should dispose of this question." Therefore he declined to enter into that question for the purpose of setting up a right to use diligence against the *prima facie* fact of the title of property in the ship.

Now, although we have here a ship that has not yet arrived at the stage at which we can have the same kind of *prima facie* title as in the case of a registered ship, yet the principle upon which the Lord President proceeds appears to me to be perfectly applicable, because we have in this case clear *prima facie* evidence of property in the petitioner and not in the common debtor. I agree with your Lordship that if it had not been for the Sale of Goods Act we might have had some difficulty in considering how far the question of property in a ship might or might not be affected by the decision of the case *Simpson* v. *Duncanson*, 1786, M. 14,204, and of subsequent cases. The authority of *Simpson* v. *Duncanson* has been very much shaken, if not completely destroyed, by the observations that have been made upon it in the House of Lords, and it is extremely difficult to ascertain from the state of the record what was really decided. But the conclusive consideration, to my mind, upon that branch of the argument is that the law affecting the completion of rights of property by a contract of purchase and sale has been entirely altered by the Sale of Goods Act. At the date of that decision the law was that property could not pass without delivery, and the Court had to consider whether there had been, or had not been, something equivalent to delivery, in a case where it was plain upon the face of the facts that no actual delivery had taken place. Now, that is not the law. We have to seek the law as to the transference of property upon a contract of purchase and sale from the provisions of the Sale of Goods Act, and that makes it clear that the question is one of intention upon the contract. What is the intention of the contract? The particular rule of the Sale of Goods Act which is said to apply, besides the general provision that the intention of parties as to the time at which the property of the goods is to pass to the buyer, is to be determined by the contract, is rule 2 of sect. 18, that unless a different intention appears from the terms of the contract, "where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof." Now it appears to me that the operation of that clause in the particular question in hand is this, that where a contract has been made for the sale of a ship which is still in course of construction, although the ship may be so specifically identified as to fix it as the subject of the particular contract, still no property passes until it is in a deliverable state, or, in other words, until it is either delivered in a finished state or is so completed as to be ready for delivery, and is approved of by the buyer upon notice to him. Applying that rule to the terms of the particular contract in hand, I agree with your Lordship that upon the face of the contract there was no intention of delivery until the ship should be completed and sent to Genoa. Therefore there is under the contract no delivery, and the property still remains in the hands of the shipbuilder.

I do not depart from the observation with which I began, that we cannot decide the question of property as between the shipbuilders and the company with whom they had the contract; but we can decide, and I think we ought to decide, that there is a *prima facie* right of property in the shipbuilders, and that they ought not to be subjected to the extreme hardship and inconvenience of having their ship stopped in dock at the instance of a creditor of the firm for whom they are building, who cannot instantly verify that firm's preferable title to the ship. I agree especially with the observation made by Lord M'Laren, that to make it a condition of recalling the arrestments in this case that the shipbuilders should find caution would be altogether unjust and unreasonable. Therefore I agree that the arrestments should be recalled, so far as regards the ship, *simpliciter*.—*7th November* 1907.

Counsel for the Petitioners, Scott Dickson, K.C., D. P. Fleming; Agents, H. B. & F. J. Dewar, W.S. — Counsel for the Respondents, Solicitor-General (Ure, K.C.), Murray; Agents, Steedman, Ramage & Co., W.S.

W. A. R.

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(*Lord Mackenzie.*)

192. Alpine *v.* The Heritors of Dumbarton.

Church — Glebe — Application for— Burghal-Landward Parish — Held That the Minister of the Parish of a Royal Burgh Which Included a Landward District Outwith the Burgh Boundaries Was Entitled to a Glebe—Acreage of Landward District Necessary to Make a Parish Burghal-Landward—Cumming and Others (Heritors of Arbroath) v. Thomson (Minister of Arbroath), 1883, 20 S.L.R. 781, Distinguished.

On 27th March 1906 the Rev. George Alpine, minister of the parish of Dumbarton, presented a petition to the Presbytery of Dumbarton praying the Presbytery to design and set apart a glebe from the lands surrounding the manse. Following upon this petition, the Presbytery, after certain procedure, on 16th May 1906 designed and set apart 5·03 acres of land adjoining the manse, and forming part of the lands of Aitkenbar and Overtoun. Against this deliverance the heritors and a committee appointed by them appealed to the Sheriff-Substitute (Blair), who on 1st February 1907 pronounced decree finding that Dumbarton was a burghal parish, and that the minister thereof was not entitled to a glebe, and recalling the presbytery's deliverance. The Rev. George Alpine appealed against this interlocutor.

On 12th November 1907 the Lord Ordinary (Mackenzie) pronounced decree, *recalling* the Sheriff-Substitute's interlocutor; *finding* that Dumbarton was a burghal parish with a landward district annexed, and that the minister was therefore entitled to a glebe; *recalling* the deliverance of the Presbytery designating a glebe; and *remitting* to David Rankine, Esq., C.E., to inspect the lands in the parish of Dumbarton, and report to the Court where four contiguous acres of arable land could be most readily found in the parish nearest to the church and manse.

Lord Mackenzie.—The question, whether the minister of the parish of Dumbarton is entitled to a glebe or not, depends upon whether the parish is to be considered burghal-landward or burghal. If it is burghal-landward he is entitled to a glebe. If it is burghal, he is not.

In the argument for the heritors it was conceded that prior to the Act of 1644, cap. 31, the ministers of all parishes had similar rights as regards glebes. That Act contains an exception which is expressed in the following words:—"Borrowstoun Kirks being always excepted." In the Act of 1663, cap. 21, the expression is "except such ministers of royal burghs who have not right to glebes." The passage in Ersk. Inst., II. X. 59, dealing with the matter is to the following effect: "But the ministers even of royal boroughs, where any part of the parish lies in the country, have right to a glebe." This passage has been founded on in previous cases, and also in the present, in support of the contention that though the parish consists simply of a royal burgh, neither more nor less, yet if within its bounds there are fields and farms where, as it has been put, "the corn grows and the lark sings," then there is sufficient to entitle the minister to a glebe. This was not the view taken by Lord M'Laren in the Arbroath case in 1883—*Cumming and Others* (*Heritors of Arbroath*) v. *Thomson* (*Minister of Arbroath*), 20 S.L.R. 781. It was there held that although there were 800 acres of arable land in the parish but within the charter of erection of Arbroath into a royal burgh, yet as there had been no disfranchisement of any part of the lands of the royalty, the so-called landward district remained as much a part of the royal burgh as it ever had been.

It was argued for the minister here that the present case could be distinguished from the case of Arbroath in regard to a number of particulars. The views expressed by Lord Medwyn in *Auld* v. *Magistrates of Ayr*, 1828, 6 S. 1087, were pressed as warranting the conclusion in the present case, that the existence of a landward district, though within the bounds of the royal burgh, was sufficient to take away from the parish its burghal character. Lord Medwyn's views were, however, undoubtedly *obiter*. They were not necessary for the decision in the *Ayr* case, as admittedly Alloway, a landward district which formed part of the parish, had never been within the bounds of the royal burgh of Ayr. Lord M'Laren in the Arbroath case having the decision in *Auld* v. *Magistrates of Ayr* fully before him, intended to decide, and did decide the general question adversely to the contention of the minister in the present case.

The question here, as it appears to me, is whether there are not sufficient grounds for deciding the case in favour of the minister without in any way impugning the judgment in the case of Arbroath. If any substantial part of the parish, not within but outside the boundaries as defined by the charter of erection of the burgh of Dumbarton, lies in the country, so that it can be regarded as a landward district, the *dictum* of Erskine, as limited by the decision in the Arbroath case, would apply, and the minister will be entitled to a glebe.

The only charter in favour of the Burgh of Dumbarton which defines the boundaries of the Royalty is the one granted by James VI. in 1609. The heritors contend that this is not, strictly speaking, a charter of novodamus, but rather one of confirmation, ratifying all previously

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existing grants. It is not possible, however, from any previously existing grant, to identify the extent of the subjects which were erected into the royal burgh of Dumbarton. The original charter by Alexander II. in 1222 throws little light upon the matter, because it merely states that the King had "created a burgh at my new castle of Dumbrittan." The only title therefore in which the boundaries of the Royal Burgh of Dumbarton are defined is the charter of 1609. It is important to observe that by that Charter there is confirmed to the bailies, councillors, burgesses, inhabitants and community of the Burgh of Dumbarton and their successors the common lands of the burgh "within the special bounds and marches thereof in terms of their annual perambulation," of which they then were in peaceable possession. Then follows the description of the lands. It is a fair inference that the magistrates considered in 1609 that the territory of the burgh was limited by the bounds and marches marked out in their annual perambulation.

It was admitted by the heritors that the whole lands in the parish are not within the bounds of the Royal Burgh as defined by marches in the charter of 1609. No attempt was made on either side to shew what the precise line of the burgh boundary is. It is therefore not necessary to go into the evidence as to this, or to refer to the title to the fishings. It was conceded by the heritors that the lands which are within the parish but outside the boundaries as so defined are the lands of Kirkmichael. It is impossible these can be contained in the charter of 1609, because parts of the subjects which that charter bore to grant out are described as "Mercheand withe the said Williame Sempillis land of Kirkmichael on the north." If the subjects included in the charter of erection are described as bounded by other lands on the north, it necessarily follows that these lands are excluded. This makes it difficult to believe that the charter of 1609 ratified a previous grant to the burgh of these excluded lands. The lands of Kirkmichael so excluded from the description in the charter of 1609 are agricultural subjects of indeterminate extent. They extend, according to the admission of the heritors, to 300 acres. The minister puts their extent at more. It may be taken, however, at 300 acres.

The position of matters, therefore, is this: In 1609 a charter was granted to the royal burgh of Dumbarton by the Crown, which contains a description specifying what lies within the royalty, and this excludes the lands of Kirkmichael.

The heritors seek to meet this difficulty by contending that, although they cannot point to any title in favour of the burgh which expressly contains the lands of Kirkmichael, yet, as there is in the Crown titles of third parties a reference to the lands of Kirkmichael as within the liberty or within the territory of the burgh, this is sufficient to make them part of the burgh in a question with the minister. It is open to observation that no title has been referred to after the date of the Charter of 1609 that makes mention of the lands of Kirkmichael as being situated within the liberty or territory of the burgh. Even if the inference from the earlier titles were that the lands of Kirkmichael had at one time formed part of the territory of the burgh, it is evident from the terms of the Charter of 1609 that the Bailies who perambulated the bounds at that date, and who, it may be presumed, were the persons best acquainted with the boundaries of the burgh territory, did not consider that they then formed part of the Royal Burgh. This is not explained by suggesting that they had previously disposed of the property of these lands. It was of importance for them to preserve the original boundaries of the royalty unimpaired as regards jurisdiction and other matters.

Three titles are founded upon, earlier in date than the Charter of 1609, which are said to show that the lands of Kirkmichael did in 1609 form part of the Royal Burgh, and have continued to form part thereof down to the present date. These are No. 15/6 of Process, a letter of Gift by King Robert the Bruce in favour of William Fleming dated in 1321 of the land of Kirkmichael, which is described as being within the liberty of Dumbarton; No. 15/7 of Process, a Crown Charter in favour of Robert Hamilton of Fulwood, dated in 1465, in which the lands of Kirkmichael with pertinents are described as "lying within the territory of our Burgh of Dumbarton"; and No. 15/8 of Process, a Crown Charter in favour of Robert Sempill of Fulwood, dated in 1502, where the lands of Kirkmichael with pertinents are again described as "lying within the territory of our Burgh of Dumbarton." Counsel for the heritors admitted in argument that these two Crown Charters placed the title of Kirkmichael in an anomalous position. Whether they were kirk lands, as the name would suggest, and whether this had anything to do with it, does not appear. These are charters by the King of subjects said to be held burgage. A reference was made to Dallas's Styles, p. 527; but the Charter printed there shows that the lands had returned to the King on account of bastardy; (I apprehend a similar form would be followed in the case of escheat) but except in such cases, which I may call rather an interruption than a continuance of the title, the only way by which, so far as I am aware, subjects once held burgage, could return to the King to be granted out would be by resignation. I do not overlook the statutes by which castles and lands were annexed to the Crown, but except in certain cases these were inalienable. It was contended for the heritors that they had in these charters what was of importance for

their argument, namely a declaration under the hand of the sovereign that the subjects "are situated" within the territory of Dumbarton. If this is pleaded to the extent the heritors desire to carry it — that the tenure of the subjects was at that date properly burgage,—then there should have been *in gremio* of the charter a narrative shewing how the lands had returned to the King. Reference is made in the Charter of 1502 to the fact that the lands of Kirkmichael had been resigned in the hands of the Bailies of the Burgh of Dumbarton. So far, however, from this being the warrant upon which the Crown Charter proceeds, it is mentioned, as I read the charter, in order that its validity may be repudiated. The King grants and ordains that no prejudice or injury should be engendered or accrue to the Crown grantee or his heirs through any resignations made by the deceased father of the grantee, nor by the grantee himself, in the hands of the Bailies of the Burgh of Dumbarton, nor through infeftments and sasines granted thereupon by the Bailies, and that the King would not pursue the grantee or his heirs to the injury of himself or his heirs on account of the said resignations, infeftments, and sasines. It is difficult to reconcile this with the theory that, at the date of the Charter, the lands of Kirkmichael were held burgage. It was said that the practice was lax at this time, and reference was made in this connection to the Act 1567, cap. 27. That Act, however, proceeds on the preamble that great hurt was done within burgh by giving of sasines privately without any bailie and common clerk of burgh, and ordains that no sasine should be given within burgh of any land or tenement but by one of the Bailies of the Burgh and the common clerk thereof. The sasines following upon the resignations referred to in the Charter of 1502 are referred to as having been granted by the Bailies of the Burgh, and therefore would not be open to the objection contained in the preamble of the Act. The fact that there was an old controversy whether burgesses are individually Crown vassals, or whether the corporation or whole body of the town is the vassal, the individual burgesses holding of the Crown only as members of the corporation, does not aid the argument for the heritors. Their argument is not that these charters are consistent with a previously existing burgage history of the subjects. They found on them as instructing that the subjects are burgage. The reddendo in each of these charters bears to be in the one case the services, and in the other the services and duties due and customary from the said lands. Upon this it was maintained for the heritors that such a reddendo was applicable to ward holding, and therefore supported their arguments that the holding was burgage; and further, that the reference to custom shewed that the grant was not a new one. These titles are used as evidence to shew that the lands of Kirkmichael must have been included in the charter of 1222. I do not think the evidence of this is sufficient. Further, I am of opinion that the conveyancing history of the lands of Kirkmichael is inconsistent with the idea that in 1609 they were held burgage or formed part of the royalty of the burgh. This view is, in my opinion, confirmed by a reference to the deeds after 1609 relating to the lands of Kirkmichael. The first of these is No. 15/9 of process, which is a retour of special service of William Sempill in the lands of Kirkmichael, dated in 1641. In this the lands of Kirkmichael are not described as lying within the territory of the burgh of Dumbarton, but as lying in the parish of the burgh of Dumbarton. The reference to the territory of Dumbarton had then dropped out of the description. It appears from the evidence of Mr George Scott that from the date of this retour in 1641 there is not in any of the titles which he had examined, any reference to the situation of Kirkmichael as being either in the parish or the burgh territory. I should have observed that I do not think the expression in the retour of 1641, the parish of the burgh of Dumbarton, can be founded on with much effect by the heritors. It was maintained that this negatives the idea of there being a parish of Dumbarton apart from the burgh. I think it just leaves where it was the question whether there was a landward district annexed.

For the reasons above stated I feel bound to come to a different conclusion to that reached by the learned Sheriff-Substitute, who has bestowed great pains upon the case. I am unable to hold that Dumbarton is merely a burghal parish.

The charter of 1609 must, in my opinion, be taken as the measure of the rights of the burgh. There is, outside the limits of this charter, an area of agricultural land of sufficient extent to be called a landward district. It was contended that this area was so small relatively to the rest of the parish that it could not be held to constitute a landward district. The *dictum* of Erskine, however, is that where any part of the parish lies in the country, the minister, even of a royal burgh, has right to a glebe. In the case of *Auld*, the *obiter dictum* of the Lord Justice-Clerk is: "I have always understood a burrowstoun kirk to mean that of a burgh where there is no country district"; and the views which were expressed, also *obiter*, by Lord Medwyn were to the same effect. If the views of Erskine, and the *dicta* of the Lord Justice-Clerk and Lord Medwyn, were to be applied here, the existence of the lands of Kirkmichael in the parish would entitle the minister to a glebe.

In the *Arbroath* case Lord M'Laren expressed the opinion that these *dicta* could not be applied in the case of agricultural land within the charter of erection. This, however, is not the case with

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the lands of Kirkmichael, which are not within the royalty. I do not overlook the fact that in the *Arbroath* case there were about five acres in a similar position. This extent of land could not be held to be a landward district, and was not in that case represented to be so. Lord M'Laren's view was that it is the tenure that must determine the liability of the parish to provide a glebe. If the test of tenure be applied, I am of opinion, as already stated, that there is no evidence in the titles that the lands of Kirkmichael were held burgage in 1609. If the heritors had been able to shew that these lands were contained in the original charter, and if they were still described as lying within the territory of the burgh, then, though the holding was now direct of the Crown, these facts might have been sufficient to prevent their being held to be a landward district. This is dealt with by Lord Medwyn in the *Ayr* case. Here, however, I am unable to take the view that the heritors, upon whom the *onus* lies, have established that Kirkmichael was ever anything but a landward part of the parish.

If the test to be applied is that of tenure, it is not necessary to go into the various other points which were argued. I have given these all due consideration in regard to the position of the heritors and their relation to the church, manse, and glebe; the ownership of the teinds of Kirkmichael by the burgh, which is explained by the grant of patronage which they held; and the payment of stipend from the teinds of the lands within and outside the boundaries in the charter of erection. It is apparent that no distinction was made between Kirkmichael and agricultural subjects which were within the royalty, and the argument for the minister is thus weakened. The lands of Kirkmichael have, however, in my opinion, the necessary incidents of a landward district attaching to them.

As regards the plea of acquiescence, the facts are that the successive ministers have since 1632 had something in lieu of a manse, and since 1763 something in lieu of a glebe. When, however, the history of these matters is enquired into there is not, in my opinion, sufficient to support this plea.

The argument that the charter of 1609 was *ultra vires* it is not necessary to consider. I may, however, say that I do not think this sound. The saving clause in the ratifying Act may be held to apply to matters of private right. It could not affect the public law. I am unable to see how an Act passed in 1644 could disable the King from granting a charter in 1609.

Upon the whole matter I am of opinion that the minister is entitled to a glebe.—12*th November* 1907.

Counsel for the Appellant, Crabb Watt, K.C., Spens; Agents, Ronald & Ritchie, S.S.C.—Counsel for the Respondents, Chree, Macmillan; Agents, Dalgleish, Dobbie & Co., S.S.C. R. C. H.

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193. Grubb and Others *v.* The Perth Educational Trust.

PROCESS—PURSUERS—TITLE TO SUE—EDUCATION—ALLEGED DEFAULT OF GOVERNING BODY OF EDUCATIONAL TRUST—ACTION OF INTERDICT BY PUPILS APPLYING FOR BURSARIES AND THEIR FATHERS AND ADMINISTRATORS AT LAW—REMEDY PROVIDED BY STATUTE TO PERSONS HAVING A VESTED INTEREST IN THE ENDOWMENT—THE EDUCATIONAL ENDOWMENTS (SCOTLAND) ACT 1882 (45 & 46 VICT. CAP. 59), SECT. 46.

This was an action of suspension and interdict by certain pupils of Caledonian Road School, Perth, and Perth Academy, who were applicants for "Duncan Bursaries" for sessions 1907 to 1908, and their fathers and administrators in law, seeking to have the Perth Educational Trust and its Governors interdicted from awarding the "Duncan Bursaries" for said session until the parties entitled thereto had been ascertained by a competitive examination duly intimated by advertisement in terms of clause 26 of a scheme under the Educational Endowments (Scotland) Act 1882, for the administration of the endowments known as Sharp's Institution, etc.; and in particular to have the respondents interdicted from (1) fixing the value of said bursaries at less than the annual sum of £5 each, in addition to the annual fees payable by the bursar; and (2) giving a preference to pupils of promise who desire to complete the curriculum of Sharp's Institution.

The respondents pleaded, *inter alia*, no title to sue, and *argued* that the complainers, being persons having a vested interest in the endowment in the sense of sect. 46 of the Educational Endowments (Scotland) Act 1882, had a remedy provided to them by that section, and were bound either to make use of that remedy as the sole means of achieving their purpose, or at any rate to exhaust that remedy before applying for interdict.

The complainers *argued*: (1) that no remedy was conferred on them by the statute of 1882; and (2) that if it were, it was not an exclusive remedy which could bar them from proceeding by interdict.

Sect. 46 of the Educational Endowments (Scotland) Act is in these terms:—

If the governing body of any educational endowment fail to give effect to the provisions of any scheme approved under this Act, or of any provisional order made and confirmed under the Endowed Institutions (Scotland) Act, or the Endowed Institutions (Scotland) Act 1878, it shall be lawful for the Scotch Education Department, upon the application

of the town council of any burgh directly affected by such scheme or provisional order, or of the school board, or of any ratepayers (not less than twenty) of any burgh, or parish, or place directly affected thereby, or of any person or persons having a vested interest in the endowment or any part of it, and after such enquiry as they shall think proper, to send a requisition to such governing body, requiring them to give effect to the provisions of the scheme or provisional order; and the governing body shall comply with the said requisition without undue delay, and, if they fail, may be summarily compelled to do so by the Court of Session, on a petition and complaint at the instance of the Lord Advocate.

There was also an argument before the Lord Ordinary on the merits of the complaint, and in his opinion the Lord Ordinary expressed his view thereon, favourably to the complainers; but his Lordship decided the case on the preliminary plea, and *held* that the complainers had no title to sue.

Lord Guthrie.—The respondents plead no title to sue. They admit that the complainers have sufficient interest to entitle them to be heard against the decisions of the respondents which are complained of. But they allege that the Educational Endowments (Scotland) Act of 1882 (45 & 46 Vict. cap. 59), sect. 46, provides a remedy for the complainers, not utilised by them, and they maintain that no other remedy is open to the complainers, or otherwise that the complainers cannot come to the Court until their statutory remedy has been exhausted.

The complainers reply, *first*, that no remedy is conferred upon them by the statute of 1882; and *second*, that in any case their right to come to the Court is not excluded by the statute.

I construe sect. 46 in accordance with the respondents' argument. I reckon the complainers among the "persons having a vested interest in the endowment," reading *vested*, not in its technical sense, which it cannot mean, but as equivalent to *direct*. If so, it seems to me that the case falls within the rule laid down by Lord Tenterden in *Bridges*, 1831, 1 B. and A. 847,859, "where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other way." That rule was otherwise expressed by Lord Halsbury in *Pasmore*, 1898, A.C. 387,394, "where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute." The substance of the rule has been enforced in many Scotch cases, such as *Aberdeenshire Trs.* v. *Knowles*, 1811, Hume 262; *Portobello Magistrates* v. *Edinburgh Magistrates*, 1882, 10 R. 130, 137 per Lord Justice-Clerk; *Denny* v. *Board of Trade*, 1880, 7 R. 1019, per Lord President 1025, foot. If it be contended that either the statute as a whole, or public policy, warrants a departure from the general rule, I answer in the words of Lord Macnaghten in *Pasmore*, 1898, A.C. at p. 397: "Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation, and on considerations of policy and convenience. It would be difficult to conceive any case in which there could be less reason for departing from the general rule than one like the present."

I heard an argument also on the merits of the complaint tabled by the complainers against the actings of the respondents. I may briefly indicate my view.

The complainers object to the prospectus issued by the respondents in April 1907 in connection with the Duncan bursaries, in so far as it, *first*, does not prescribe competitive examination; *second*, intimates that in selecting bursars the respondents will give a preference to those pupils who propose to attend Sharp's Institution rather than the Perth Academy; and, *third*, fixes the amount of the bursaries at £9 each including the bursar's fees.

I think the complainers are right on all these points.

In regard to competition, the Scheme says in so many words that the bursaries shall "be awarded by competitive examination." I attribute the omission for the first time from the prospectus of any reference to competition to the respondents' resolution to hold themselves free, whatever qualifying examinations they may insist on, to dispense with the open competition which the Scheme contemplated and which has been in use ever since the approval of the Scheme in 1889. This seems to me contrary to a sound construction of the 26th clause of the Scheme.

As to the respondents' resolution to give a preference to those pupils of promise who desire to complete the curriculum of Sharp's Institution, I think this contravenes the true meaning of clause 26 of the Scheme. The clause has evidently been bungled. After the words "to complete the curriculum of the said Institution," should probably have come "or of the Perth Academy." But the contrast in the last sentence makes the matter clear. Bursaries can only be held at schools other than Sharp's Institution and the Perth Academy, with the consent of the governors. It follows that they can be held at whichever of these schools the bursars prefer, without any right of interference on the part of the Governors.

The third point relates to the amount to be paid to each bursar. The prospectus says, "The Governors offer eleven bursaries of £9 each, to include fees of the bursar." This does not carry out the scheme of clause 26, which provides: "These bursaries shall be of the annual value of not less than £5, and not more than £10, in addition to the fees payable by the bursar." The

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prospectus, on the other hand, offers a lump sum of £9 which it calls a bursary. It is not a bursary. It is a combination of a bursary and of an assumed sum for fees. But the Governors are bound to fix the amount or amounts of the bursaries, and to pay the fees in addition, however much they may amount to. The result of the prospectus is to prevent any bursars attending any but the earlier classes in Perth Academy, and thus by a roundabout method to limit the choice of the students to Sharp's Institution.—16*th November* 1907.

Counsel for Complainers, Graham Stewart, K.C., Macdonald; Agents, J. & J. Galletly, S.S.C.—Counsel for Respondents, Cullen, K.C., Sandeman; Agent, F. J. Martin, W.S.

C. H. B.

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(*Lord Johnston.*)

194. Hay's Trustees *v.* Baillie and Others.

Trust — Constitution — Uncertainty — Direction to Trustees to Divide Among "Such Societies of a Charitable or Benevolent Nature as They Should Select" Held Void From Uncertainty.

This was an action of multiplepoinding at the instance of the trustees of the late Mrs Hay of Holmwood, Uddingston, in which they sought to have it determined whether the bequest of residue in Mrs Hay's will was valid or void from uncertainty.

The facts of the case and the contentions of parties sufficiently appear from the Lord Ordinary's Note.

The Lord Ordinary *held* the bequest void from uncertainty.

Lord Johnston.—The late Mrs Hay of Holmwood, Uddingston, directed her trustees to apportion and pay over the free portion of the residue of her estate "to or amongst such societies or institutions of a benevolent or charitable nature in such proportions" as in their discretion they should think proper, but always to the exclusion of Roman Catholic societies or institutions. The validity of this bequest is challenged by the testator's next of kin, who maintain that it is void on the ground of uncertainty, in respect that though "charitable" has, since the case of *Crichton*, in 1828, 3 W. and S. 329, been recognised as sufficiently descriptive of a class of objects or institutions to receive effect in discretionary bequests of this nature, the alternative word "benevolent" is not so descriptive and has not been so recognised.

The trustees who support the bequest did not, I think, go the length of maintaining that "benevolent" and "charitable," taken by themselves as words in common use in the English language, are identical in meaning. But I think I may state their contention as embraced in these three propositions:

First, that in the collocation of words used by the testatrix the disjunctive "or" must be read as equivalent to the conjunction "and."

Second, that "benevolent" is identical with "charitable," or at least is used by the testatrix as equivalent to "charitable," so that the use of both words is a mere redundancy or surplusage.

Third, that the law of Scotland shews such favour to charitable bequests, that to give effect to the bequest it will read "benevolent or charitable" as intended to express no more than "charitable"; in fact, appeal is made to the principle of benignant interpretation of charitable bequests.

Taking these points in their order:

First, it is true that the conjunction "and" is sometimes read as having the same effect as the disjunctive "or." I cannot better illustrate this construction than by comparing the two cases of *Cobb's Trs.* (1894), 21 R. 638, and *Williams* v. *Kershaw* (1835), 5 Cl. & F. 111. In *Cobb's* case the words were "useful, benevolent, and charitable institutions"; in *Williams* v. *Kershaw* there were "benevolent, charitable, and religious purposes." In the former case the three adjectives were capable, in natural combination, of qualifying the same institution, and there was no call therefore to read the "and" as otherwise than conjunctive. Whereas in the latter case the three qualifications were not naturally found combined in the same institution, and therefore, to give a reasonable interpretation to the adjectives in combination, it was necessary to read the "and" as distributive and not conjunctive, and that necessity is the only justification of the interpretation (see Lord Rutherfurd Clark in *Cobb's* case at p. 641).

But where the distributive "or" is used there can never be the similar necessity for interpreting it as conjunctive. If the qualifying adjectives are mere equivalents, it does not matter whether they are connected conjunctively or disjunctively. If they are not mere equivalents, but being distinctive in meaning, are capable of alternative use, there is no necessity to construe the distributive "or" in any other than its natural meaning, and every reason for construing it in that meaning. And this, I think, will apply even though the adjectives disjunctively used have in part a common sense, that is, to a certain extent overlap.

I cannot therefore read "or" as equivalent to "and". No instance was quoted to me in which this has been done.

Nor do I think it possible to accept the argument in an alternative from, viz., that the terms "benevolent" and "charitable" are merely exegetical of one another. So to read them would be to go against a cardinal canon of

interpretation of such documents. It would be to deny to each word its natural and ordinary meaning, without any compelling reason. Presumably where a testatrix says benevolent she means benevolent, and when she says "or charitable" she means something different from benevolent. Moreover, which word is exegetical of the other? It must be contended that it is "charitable" which is exegetical of benevolent, as the latter comes first—as if the lady had said "benevolent," and then caught herself up, seeing that she had used too wide a word, and added, "by which I mean charitable." I cannot think it possible to put such a gloss upon the words, without finding an intention for her by my own surmise, and not from the words she uses.

Second, is "benevolent" equivalent to "charitable"? I think not. I think it may be said that everything which is "charitable" is "benevolent," as the less is included in the greater. But I do not think that everything "benevolent" can be included in the term "charitable," whether that term be used in the more technical English sense or in the less technical Scottish sense. On the contrast between the two words I refer to Lord Bramwell's judgment in *Pemsel's* case, L.R. [1891], A.C. 531.

I approach this question from the point of view expressed by Sir William Grant, M.R., in *Morice* v. *Bishop of Durham*, (1804) 9 Ves. 399, where he says: "The question is, not whether the trustee may not apply it upon purposes strictly charitable, but whether he is bound so to apply it." This has been repeatedly stated by other judges, and can not be controverted. If, then, "benevolent" covers more than charitable, though the trustees might confine themselves to what was strictly charitable, that would not support the bequest if they need not so restrict themselves, and might apply the funds committed to them to what is benevolent but not charitable. And if benevolent is not descriptive of a particular class of which the law can take cognisance, the bequest must, according to the well-established rule, fail.

The term "benevolent" has occurred in a number of cases in Scotland and England (1) by itself, (2) along with "charitable" or other terms used conjunctively, and (3) along with "charitable" or other terms used disjunctively. Where used by itself and where used disjunctively it has been rejected as indefinite, but where used conjunctively it has been sustained as not vitiating the bequest, provided its colleague is sufficiently definite on the ground that if a purpose is, for instance, charitable and therefore in the eye of the law definite, it does not render it indefinite that it must be not only charitable but also benevolent—*ça va sans lire*, though the converse may not hold true.

But before referring to the cases, a word as to the applicability of English cases in this question. I shall, under the third head, have to consider the specialties of the English law with regard to charities. But I find nothing in it which precludes English authorities on this particular aspect of the question being received in Scotland. Both in England and in Scotland "charitable" is accepted as in the eye of the law sufficiently descriptive of a particular class of purposes to be definite. There may be a question whether the limits of the class are quite the same in the law of the two countries, and I think, notwithstanding a certain generality of statement on the subject sometimes found, that they are narrower in Scotland rather than the reverse. But I apprehend that the question whether another descriptive term not "charitable" is sufficiently definite, or is too indefinite to be recognised, is the same question, whether it arises in Scotland or in England, and I am therefore prepared to accept English decisions on that point, not as authorities indeed, but as guides which I should hesitate to discard.

(1) In *James* v. *Allen* (1817), 3 Mer. 17, the word "benevolent" was used by itself, and Sir William Grant, M.R., holding that "though many charitable institutions are very properly called 'benevolent,' it is impossible to say that every object of a pious benevolence is also an object of true charity," determined, that as the property might consistently with the will be applied to other than strictly charitable purposes, the trust was too indefinite for the Court to execute, and could not receive effect. I acknowledge that by "charitable purposes" he means those purposes "specified in the statute of Queen Elizabeth," or that have been held to be within the analogies of that statute; but, as already stated, I find these purposes at any rate no narrower than the term "charitable purposes" as understood in Scotland.

In the preceding case of *Morice* v. *Bishop of Durham*, *supra*, where the expression used was "objects of benevolence and liberality," the same conclusion had been reached. Sir William Grant, M.R., points out, what is as true in Scotland as in England, that the general rule is that every trust must have a definite object, but that this doctrine does not hold good with regard to trusts for charity. "It is well settled," he says, "upon authority which it is too late to controvert, that when a charitable purpose is expressed, however general, the bequest shall not fall on account of the uncertainty of the object," and the words might since the case of *Crichton*, *supra*, have been used by a Scottish judge. But then, he asks, "is this a trust for charity? Do purposes of liberality and benevolence mean the same as objects of charity?" and these questions he answers in the negative.

There is a further passage in Lord Eldon's judgment in that case which has an important bearing on the present. "The principle upon which that trust [referring to *Browne* v. *Yeall*, referred to in 7 Ves. 50] was ill declared, is this.

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As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control so that the administration of it can be reviewed by the Court; or if the trustee dies the Court itself can execute the trust; a trust, therefore, which in case of maladministration could be reformed; and a due administration directed, and then, unless the subject and the object can be ascertained, upon principles familiar in other cases, it must be decided that the Court can neither reform maladministration, nor direct a due administration. That is the principle of that case." Now, although the Court in Scotland has not developed its Chancery jurisdiction on such precise and perhaps technical lines as has that in England, and although it has not been so ready to interfere in trust matters as the Court of Chancery does, by way of suits for administration and other uses (see Lewin on Trusts, ch. 24, sect. 2 (15) and (16), 11th ed. p. 753; and compare the Irish case of *Hagan* v. *Duff* (1889), 23 L.R. Ir. 516), it does intervene in its own way to correct abuses, prevent diversion, and settle and alter schemes; and I conceive that the principle enunciated by Lord Eldon is just as applicable in Scotland as in England, and that the reason why a trust for an indefinite purpose is refused effect in Scotland as in England, is just because the Court could not control its execution if called upon.

(2) Again, "benevolent" and "charitable" in conjunction have been sustained on the ground that the "charitable" bequest was not vitiated by the farther qualification of "benevolent;" as in *Hill* v. *Burns* (1826), 2 W. and S. 80; *Millar* v. *Black's Trs.* (1837), 2 S. and M. 866; *Cobb's Trs.* (1894), 21 R. 638; *In re Best* [1904], Ch. 354; and compare *In re Sutton*, L.R. (1885), 28 Ch. D. 464), where "charitable" is qualified by "and deserving." With reference to the case of *Cobb*, I am bound to notice that Lord Trayner would appear to regard "benevolent" and "charitable" as synonymous. But I can hardly consider what he says as a judgment to that effect, but rather as the acceptance of an assumed admission. I say assumed, because I think the argument was misconceived, and that no such admission was made. It was admitted that, standing the authority of *Hill* v. *Burns*, *supra*, no objection could be maintained to the expression "benevolent and charitable" in conjunction. Such argument as could be submitted was based on the adjection of the word "useful," upon which necessarily the whole stress was laid in support of the contention that the "and" should be read distributively.

(3) Where "benevolent" has been connected by the distributive "or" with "charitable," the effect has been held to be destructive of the definitions of the trust purpose (*Williams* v. *Kershaw*, 1835, 5 C.L. 1 F. 111; *In re Jarman's Estate* (1878), L.R. 8 Ch. D. 584; *In re Rilands* (1881), W.N. 173).

In these cases the same conclusion of indefiniteness or failure to particularise the class intended to be benefited was reached, which led to the judgment in the analogous cases of *Ellis v. Selby* (1836), 1 M. and Cr. 286, where the expression was "charitable or other purposes"; *Duncan* v. *Blair*, 1900, 3 F. 274 and 1901, 4 F. (H.L.) 1, where the expression was "charitable or public"; and *Grimond's Trs.* (1904), 6 F. 285 and (1905), 7 F. (H.L.) 90, where the expression was "charitable or religious."

Grimond's case is, I think, of special importance, as the last pronouncement of the House of Lords on the subject, and because the Lord Ordinary and the majority of the Inner House were in different ways prepared to give that restricted meaning to "religious" which would have made it, in their opinion, at least, as definite as "charitable," and which, had the judgment stood, would have justified such a restriction of "benevolent" as would have made it synonymous with "charitable."

My own opinion is that "benevolent" is a word of too wide meaning to be descriptive of a particular class of objects, and I find confirmation of this opinion in the English cases cited.

(3) Is there in Scotland such favour to charitable bequests that the Court will, to give effect to a testator's beneficent intention, read charitable so wide as to be equivalent to benevolent, or so restrict "benevolent" as to be equivalent merely of "charitable"?

Much has been said of the difference in Scottish and English law in the use of the word "charitable," and it is maintained that in England the word has a narrower and technical and in Scotland a wider and more liberal meaning. I admit that it has in England a technical meaning, but if not the same in result, I think it is wider rather than narrower than that which it has in Scotland.

In contrasting the law of England and Scotland I am unable to follow the reasoning of one of the learned judges in *Cobb's* case, *supra*, when he says that "nothing can illustrate more strongly the vital distinction between the two systems than to contrast the English cases of *Williams* v. *Kershaw*, *supra*, and *In re Jarman's Estate*, *supra*, with the judgments of the House of Lords sitting as a Court of Appeal from Scotland in *Hill* v. *Burns*, *supra*, and *Miller* v. *Black's Trustees*, *supra*." I have endeavoured to trace this contrast without success. The different result arrived at in these cases by the Courts of the two countries depend upon no distinction between their two systems of jurisprudence, but merely on the fact that the English Courts were dealing with terms actually or constructively distributive, and the Scottish Courts with terms actually conjunctive. But for this fact there would, I am satisfied, have been no difference in the judgments.

In England the expression "charitable" derives

its meaning from the Act of Queen Elizabeth passed to provide a control over maladministration of charities. That Act has received from the Court a wide interpretative application, in the same manner as our Triennial Prescription Act has received. And it covers charitable purposes of the eleemosynary character, educational purposes, religious purposes and certain public purposes, such as supply of water to a locality, building of sea dykes, etc.; but subject to this condition that each and all of these purposes must be public and not private in their purview, an excellent example of which is the case of *Cocks* (1871) L.R. 12 Eq. 574 (585). It is clear that some of these purposes would be benevolent but hardly charitable in any ordinary sense, and I think that there can be no doubt that trustees in Scotland with a discretionary power to apply funds to charitable purposes would be restrained from applying them to some of these.

In Scotland, on the other hand, there is no statutory foundation for the interpretation and no statutory jurisdiction conferred on the Court. But I think much has been borrowed from England. Apart from decision, it has often been stated from the Bench that "charitable" is indefinite in itself, and but for favour to charity would never have been accepted as descriptive of a sufficiently particular class of objects. But two leading decisions made it a *vox signata* in Scotland, and thenceforth determined that it must be accepted as sufficiently particular.

In *Hill* v. *Burns*, 1826, 2 W. and S. 80, the main question at issue was whether a testator could invoke the *alienum arbitrium* to any effect, in the distribution of his estate. On a review of prior Scottish cases Lord Gifford deduced the conclusion that the law of Scotland was more liberal in the construction of charitable than of other bequests, and held that the above position had been accepted. He then sustained without further reasoning, a bequest in favour of institutions for charitable and benevolent purposes established, or to be established, in or near Glasgow.

In *Crichton's* case, 1828, 3 W. and S. 329, Lord Lyndhurst, after laying down the proposition that to admit of discretion being conferred on trustees, the object of their discretion must be a particular class, decided that "charitable" by itself must be accepted as sufficiently particular. And that has been the law of Scotland ever since. But in determining this he had no direct authority except *Hill* v. *Burns*, *supra*, and it is clear that he went a good deal beyond it, and, I cannot help thinking, was much influenced by his English Chancery experience.

But though *Crichton's* case is the rule of Scottish law it does not determine what the limits of "charitable" are, and it does not follow from that decision that the favour for charity which has induced the Court to accept "charitable" as definition of a sufficiently particular class of objects, will further induce the Court to give to "charitable" a loose and vague meaning, so as to cover anything which may be classed as benevolent.

This subject has been matter of discussion in two later cases—in *Baird's Trustees* (1888), 15 R. 682, and *Pemsel's* case, L.R. [1891], A.C. 531. In the former case in Scotland the opinion of the Court was that "charitable" must, in interpreting the section of the Income Tax Act which gives relief to charitable institutions, have the meaning which they conceived it to have in the class of cases with which I am dealing, viz. the restricted sense of eleemosynary or material relief to physical necessity.

In the latter case, when the same question under the income tax had arisen in England, opinions were expressed that too narrow a view had been taken by the Scottish Court in *Baird's Trustees*, *supra*, and that whatever the term charitable might cover, if it required to be interpreted in applying a bequest such as that in the present case, the statutory meaning of the expression was much wider than they had assumed. Perhaps the most general definition of the view of the majority of the Court—for Lord Halsbury (L.Ch.) and Lord Bramwell dissented—was that given by Lord Herschell, to the effect that charity included even in Scotland anything done in relief of human need, whether physical, educational, or religious.

It has yet to be determined in a proper case of the application of such a bequest in Scotland as distinguished from a case under the Income Tax Acts, whether the view of the First Division in *Baird's Trust*, or that of the majority of the House of Lords in *Pemsel's* case, is the correct view. But in no event is there any ground for saying that "charity" and "charitable" in Scotland can receive a wider signification than it has received in England, or than Lord Herschell's attempted definition in *Pemsel's* case, and that is, I think, and on the authorities I have cited, very far short of benevolent.

For these reasons I have come to the conclusion that I must hold this bequest void from uncertainty.—14*th November* 1907.

Counsel for Pursuers and Real Raisers, C. D. Murray, Mair; Agents, Macpherson & Mackay, S.S.C.—Counsel for Claimants Miss Baillie and Others, Black; Agents, Laing & Motherwell, W.S. —Counsel for Claimants Rev. Andrew Morrison and Another, Macmillan; Agents, Dove, Lockhart & Smart, S.S.C.

R. S. B.

EXTRA DIVISION

Whitehouse v. R. & W. Pickett.

EXTRA DIVISION.

(Lords M'Laren, Pearson, and Ardwall.)

195. Whitehouse *v.* R. & W. Pickett.

INNKEEPER — LIABILITY — LOSS OF GUESTS' PROPERTY — ONUS OF PROOF—LIABILITY OF INNKEEPERS ACT 1863 (26 & 27 VICT. CAP. 41), SECT. 1—GOODS LOST THROUGH "FAULT" OF INNKEEPER—GOODS "DEPOSITED EXPRESSLY FOR SAFE CUSTODY" — CIRCUMSTANCES IN WHICH HELD (1) THAT GOODS NOT "DEPOSITED EXPRESSLY FOR SAFE CUSTODY," AND (2) THAT IT WAS NOT PROVED THAT GOODS LOST THROUGH "FAULT" OF INNKEEPER.

(*Reported ante, Vol. XIV. p.* 459.)

Reclaiming Note against an Interlocutor of Lord Salvesen.

The facts of the case appear from the previous report.

The Defenders *reclaimed* and *argued*: (1) Mr Buckley did not "deposit" his bag "expressly for safe custody." All he did was to give it to the "Boots" without saying anything to him or to either of the defenders about looking after it. (2) The bag was not lost through the "fault" of the defenders. By the Act of 1863 the *onus* of proving fault was put on the pursuer, and he had not discharged that *onus* (*Medawer* v. *Grand Hotel* [1891], 2 Q.B. 11; *O'Conner* v. *Grand International Hotel Co.*, 1898, 2 Ir. R. Q.B.D. 92; *Moss* v. *Russell*, 1884, 1 *Times*, L.R. 13; *Marchioness of Huntly* v. *Bedford Hotel Co. Ltd.*, 56 J.P. Rep. 539).

Argued for Respondents: (1) There was a deposit "expressly for safe custody." Mr Buckley had visited the hotel some seventy times in all, and each time put his bag in the office. It must have been put there for "safe custody" in terms of the Act, and it was not necessary for him to say so each time he handed it to the office, as the defenders knew it was valuable and that it was handed in to be taken care of. He was following the invitation in the notice exhibited in the hotel to leave valuables in the office. The notice referred to the Act of 1863, and could mean nothing else than that the defenders would, in terms of that Act, accept responsibility for valuables left in the office. (2) The bag was lost through the "fault" of the defenders. The *onus* was on the defenders to prove there was no negligence (Taylor on Evidence, sect. 376). The defenders got the bag and did not return it, and it was for them to prove there was no negligence. The facts were known only to the defenders, and the pursuer could not be expected to prove negligence when he could not know the facts (Bell's Com., 7th ed. Vol. I. p. 495, Note 3). There was negligence on the part of the defenders, apparent from the proof. It was either in the "Boots" in not telling the defenders the bag was handed to him to look after, or in the defenders in not keeping a proper watch on the bag (*Watson* v. *North British Railway Co.*, 1876, 3 R. 637; Bell's Prin., sects. 167 and 170).

The Court *recalled* the interlocutor reclaimed against, and found the defenders liable in damages to the amount of £30, which had been tendered by the defenders, and, *quoad ultra*, *assoilzied* the defenders.

Lord M'Laren.—The pursuer in this case, who is a manufacturing jeweller in Birmingham, employed Mr Buckley as a traveller to assist in the sale of his goods, and the claim is made against an innkeeper in Edinburgh with whom the traveller lodged, in respect of the loss of a bag containing jewellery to the value of about £1900. The traveller had been in the habit of resorting to this hotel on his visits to Edinburgh, and seems to have been known to the proprietors of the hotel, the Messrs Pickett, as well as to some of their servants. His bag, containing samples of jewellery, was of a different description and pattern from the ordinary tourist's bag, and was easily recognised as a receptacle used for trade purposes. On the day in question the traveller on arriving at the hotel was met by the porter, who took the bag out of his hand along with another bag in which he carried his personal effects.

At the same time one of the Messrs Pickett, who was in attendance in the bar-room—there was a bar-room and a private sitting-room with inter-communication—came forward to book a room for the traveller, telling him at the same time that he would find two of his friends in the coffee-room. While this colloquy was proceeding the porter deposited the bag in the bar-room, not exactly in the spot where the traveller had been in use to put it on former visits, but substantially in the same position and with the same protection from interference by outside persons. The traveller went out in the course of the afternoon and returned again, and after spending some time in the smoking-room he purposed retiring to rest, but before doing so he came to the bar-room and asked for his bag, because he thought it would be safer to have it in his bedroom. The bag was then found to be missing. I think it is common ground that the theft was committed by three professional thieves who had taken up their quarters as visitors at the hotel, apparently with some knowledge about the jeweller's traveller, and with the intention of appropriating his bag. The bag may have been taken during the absence of the Messrs Pickett from the bar-room where it was left, although their rule was that the office should never be left unoccupied, or it might be while the proprietor in charge was engaged in conversation by one of the confederates while another slipped round behind his back and walked off with the bag. The Act of Parliament limits the liability of

innkeepers to the sum of £30 except under two conditions. One of the exceptions is that negligence is proved, and the other exception is where such goods or property shall have been deposited expressly for safe custody with such innkeeper.

In this state of the facts it is maintained for the pursuer (1) that the placing his bag in the bar-room was equivalent to a deposit of the bag expressly for safe custody; and (2) alternatively that the bag was stolen in consequence of the negligence of the innkeeper. I am not satisfied that either of these grounds of liability is made out.

As to the first ground of action, I think that we must ascribe some definite meaning to the word "expressly." Without elaborating the suggested distinction, it may suffice to say that the statute contemplates that the innkeeper is to be liable for loss if it is made clear to him, when the property is deposited, that he is charged with the duty of safe custody, a duty which the innkeeper is not at liberty to decline, if he is invited to undertake it. I think the statute also contemplates that there may be a deposit of property which is not for the expressed purpose of safe keeping or safe custody, and that in such a case, if the property is lost or stolen without fault on the part of the innkeeper, his liability would be limited to the sum of £30. If my second proposition is disputed, and if the liability of the innkeeper is to be just the same whether the purpose of safe keeping is or is not expressed, that is equivalent to saying that the word "expressly" has no definite meaning; is in other words a mere expletive. But I am not prepared to treat the word "expressly" when used in a statute as a redundant expression, first because this would be contrary to what I think is a sound principle of construction, that in general every word in a statute must receive its ordinary meaning; and secondly because I think it may very well have been in the view of the legislature that a guest might be content to leave his property in the charge of the innkeeper trusting that he would take reasonable care of it, without seeking to put the innkeeper under the special responsibility that follows from a deposit for the express purpose of safe custody. In this connection I may point out that under the statute, if the innkeeper is charged with safe custody he may request the guest to put his property in a box which the guest is to lock and seal. This might not be convenient to the guest; and if the guest is a commercial traveller who wants his bag three or four times in the course of a day, it may very well be that rather than be at the trouble of having his bag locked and sealed every time he returns from a visit, he would be content to leave it in the office without going through these formalities, believing that his bag was secure against all probable risks in the innkeeper's hands.

On the facts of the case it is plain enough that the bag was put into the bar-room by the hotel porter without anything being said by word or sign as to the purpose for which it was left there; and Mr Reginald Pickett, the partner in attendance, who seems not to have observed the placing of the bag in the bar-room, had no opportunity of requiring that the bag should be put into a box and locked and sealed. I am therefore of opinion that the pursuer did not take the necessary step for bringing himself within the second exception of the statute, because he did not bring to the notice of Mr Pickett that he meant to charge him with responsibility for the safe custody of the bag. The fact that Mr Buckley went to the office for his bag late on Saturday night, in order, as he says, to take it to his bedroom, is, as I think, absolutely inconsistent with his case under this head. He did not need the bag until Monday morning, and if he understood that he had deposited it in terms of the statute, he had no occasion to take it to his bedroom, and I can only explain his doing so on the supposition that Mr Buckley considered the bag was lying in the office at his own risk, barring such negligence as would make the innkeeper liable in compensation. This was also the view of the other party, because neither of the Messrs Pickett knew that the bag was there, and cannot therefore be supposed to have entered into an express contract of safe custody regarding it.

Passing to the first exception of the statute, which I consider in the second place, I, of course, assume in this branch of the case that the bag was not expressly deposited for safe custody, but was simply put into a room which was under the control of the partners. This does not relieve the defenders from the obligation of taking all reasonable care of the property entrusted to them. The question then is, whether reasonable care was taken, or whether the property was stolen through the "default or neglect" of the innkeeper. The Lord Ordinary observes that the effect of the Act of Parliament was "to throw the *onus* upon the guest, whose property had disappeared in the innkeeper's custody, to prove that it had so disappeared through the default or negligence of the innkeeper or his servants," failing which proof the liability is limited to the sum of £30.

To this statement of the law, I give my unqualified adhesion. But then, if this statement is anything more than an unmeaning generality, it means this: that you do not fix responsibility on the innkeeper by proving that under the ordinary conditions of hotel business, the property disappeared.

If the guest, as a condition of recovering damages, undertakes the *onus* of proving negligence, he must be able to say in what the negligence consisted,—what is the duty to him which the innkeeper failed to perform. If he can only say, as the Lord Ordinary has said,

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in his review of the facts, "that the bag in question was stolen, and that it could not have been stolen but for the negligence of the defenders or their servants," this appears to be only another way of saying that the *onus* of proving reasonable care lies on the defenders, and that in the absence of evidence as to the cause of the disappearance of the property negligence is to be presumed. I cannot help thinking that in formulating the ground of judgment which I have just quoted, the Lord Ordinary had lost sight of the sounder statement of the criterion of responsibility which he developed in the first part of his opinion It is common ground that the bag was stolen by persons who had obtained admission to the hotel as guests, and I am not prepared to affirm that the fact that property left in the innkeeper's apartments was stolen is conclusive evidence of negligence on the part of the innkeeper.

It was argued to us that there was positive evidence of negligence, because the door of the bar-room was occasionally left unlocked, and only closed by the latch. Now, I think the care which an innkeeper is required to take of the property of his guest, will depend on the part of the house in which the property is left.

If a bag is left by the guest in the coffee-room, the innkeeper is responsible for the reputed honesty of his servants, but as these servants must occasionally leave the room, it would be hard on the innkeeper to say that he is to be responsible if the bag is stolen while the room is unguarded. In the case of goods left in a bedroom or in a private sitting-room, perhaps some higher degree of care may be exigible, but in no case can the care required by law be greater in degree than is consistent with the management of a hotel in the ordinary course of business. The bar-room, and Messrs Pickett's parlour which opened into it, were probably the safest places in the hotel for leaving valuables (assuming that it was not intended that they should be put into the hotel safe), because it was their practice not to leave these rooms unoccupied. But it is one question to consider what was the usual practice, and quite another question—what did the innkeeper bind himself to do in order to keep his guests' property safe? I cannot accept the suggestion that by merely receiving the pursuer's bag Messrs Pickett undertook as a duty to the pursuer that so long as he remained in the hotel they would never for one instant leave these apartments unguarded. I do not see how the business of a hotel could be carried on under such conditions; and if such a condition had been proposed to them I think the defenders would have replied, "We cannot bind ourselves that one of the family shall always be in these rooms, but if you wish to be absolutely secure, we will put your jewellery into the safe and undertake responsibility in terms of the statute."

On this part of the case my opinion is that the defenders, by receiving the bag without express instructions, only undertook to take such care of it as was consistent with the primary purposes to which these rooms were appropriated, viz., for the administrative business of the hotel; and I see no evidence of neglect on their part. They had no reason to suspect dishonesty on the part of the inmates of the hotel, and the fact that a gang of thieves, who were watching their opportunity to steal the bag, succeeded in purloining it when the innkeeper was either engaged at the bar or momentarily out of the room, does not, in my judgment, amount to evidence of negligent performance of the innkeeper's duty to his guests. I have not commented on the authorities which were cited, but I consider that the judgment I propose is consistent with the judgment of the Appeal Court in *Medewar* v. *The Grand Hotel*, 2 Q.B., 1891, p. 11, because in that case the judgment was for the defendant when the alleged negligence was only inferential and not supported by positive proof.

I am of opinion that the interlocutor under review should be recalled and the defenders found liable in damages to the extent of £30 and *quoad ultra* assoilzied.

Lord Pearson.—The Innkeepers' Liability Act of 1863 altered the common law by restricting their liability for the property of their guests to £30, except in two cases, namely, (1) where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ; (2) where such goods or property shall have been deposited expressly for safe custody with such innkeeper.

In those two cases the liability of the innkeeper is still a total liability.

I am not sure that the Lord Ordinary has sufficiently distinguished these two cases, for he says, "The case mainly insisted in was, that the goods having been put into the defenders' custody for safe keeping, and having been stolen through the negligence of the defenders or their servants, they are liable to compensate the pursuer for his loss." But clearly they are separate grounds of liability, and must be considered separately.

I take first the second case, under which the question is, whether the jewellery was deposited expressly for safe custody with the innkeeper; because if such an express contract is made out, the total liability of the defenders must be affirmed, whether there was negligence on their part or not. In my opinion the evidence does not establish any such deposit within the meaning of the Act. The parole evidence, taken by itself, is, I think, quite insufficient. Nor do I think the pursuer is more successful in making out a special undertaking to that effect founded on the notice which was exhibited throughout the hotel, bearing that the proprietors would not be re-

sponsible for any valuables left in bedrooms, but would "take charge of same in office," and adding a reference to the statute. That may well be construed as an invitation to make such a deposit expressly for safe custody as the Act contemplates; but it does not, in my opinion, import that the placing of the goods in the office has of itself that effect.

It remains to consider the other case mentioned in the statute, namely, where the goods are stolen, lost, or injured through the wilful act, default, or neglect of the innkeeper or his servant. It was argued for the pursuer that the burden of proof under this head of liability lies upon the innkeeper, and that it rests with him to show that he took all due care to prevent the loss of the goods. I do not think that this view is sound. The burden of proof may shift in the course of the enquiry; but in the first instance it lies upon the pursuer to establish the "wilful act, default, or neglect" on which he founds. Here the goods were in the office, having been put there by the defenders' servant with the cognisance and approval of the guest; and I take it to be established by the evidence that they were stolen from the office by three very expert thieves acting in concert, in one or other of the methods suggested in the argument. The Lord Ordinary holds, and I agree with him, that there is no direct evidence of negligence. But the ground of his judgment is, that on the evidence the bag in question could not have been stolen but for the negligence of the defenders or their servants. I cannot assent to that view. On the contrary, I think by far the most probable explanation of the theft, upon the evidence as it stands, is that the thieves—who, be it remembered, were at that time accepted and treated by all concerned as honest guests in the hotel—cheated the hotel officials into a false security by some of the tricks of their trade. This being so, I think the proof of negligence fails.

Lord Ardwall.—This case raises questions of some difficulty in the interpretation of the Act 26 & 27 Vict. cap. 41, and its application to the special circumstances which have been established by the proof.

The action has been raised for the purpose of recovering from the defenders, who are hotelkeepers at the Imperial Hotel, Edinburgh, the value of a bag of jewellery belonging to the pursuer, which was stolen from the office of the hotel, where it had been deposited by the pursuer's traveller on 17th February 1906. The Lord Ordinary has found that the defenders were guilty of negligence, and has given judgment against them for £1790, 3s. 6d. I am of opinion that the judgment ought to be recalled.

The pursuer's traveller, Mr Buckley, who was well known to the defenders, and had been a frequent guest at their hotel over a period of eighteen years, had been accustomed, and was known by the defenders to be accustomed, to carry with him in addition to his ordinary personal luggage a bag of valuables consisting of samples of jewellery and precious stones for exhibition or sale to the pursuer's customers.

The usual notice as to innkeepers' liability in terms of the Act of 1863 was hung up in the hall of the hotel, but there was another notice exhibited on the wall of the corridor of the first flat of the Imperial Hotel, and it would appear also in some of the bedrooms, to the following effect:—

"The proprietors of this hotel respectfully beg to intimate that they will not be responsible for any valuables left in bedrooms, but will take charge of same in office. See extract from Act of Parliament chapter 41, Vict. 26 & 27, in entrance hall." On the occasion of Mr Buckley's visit in February 1906, when the bag was stolen, his bag of valuables was, at his sight, deposited by the "Boots" in a corner of the office, and he got the number of his bedroom and the "Boots" took his other luggage up to that bedroom. But as hereafter noticed nothing was said or done to draw the attention of Mr Reginald Pickett, who was in the office, to the fact that the bag was deposited in the office. The evidence shows that there is always someone either in the office or in the bar parlour which adjoins it, there being a glass door between the two apartments which generally stands open. The bar parlour had, however, an entrance from the public passages of the hotel by a door which is generally unlocked. There is also a door into the office from the corridor close to the "service" window.

On the occasion of the theft the person in the office (Mr Reginald Pickett) most probably had his attention distracted from the bag by one of the thieves, while the other slipped in at the door of the bar parlour and took away the bag. Probably the bag was taken away at the time that Reginald Pickett was receiving the thief's bag at the "service" window for safe custody, and it is worthy of notice that he put it down in the very place from which Mr Buckley's bag had been removed a few seconds before. It appears from Mr Reginald Pickett's evidence that this corner in the office and the bar parlour are the safest places in the hotel for putting bags of valuables, and that indeed the defenders had no other place for depositing such a bag as Mr Buckley's, although they might have put the jewels, after being taken out of the bag, in a small safe. In these circumstances two questions arise: *First*, are the defenders liable in respect of the second subsection of sect. 1 of the said Act. An able argument was submitted by the pursuer's counsel founded on the notice above quoted, which was said to be a direction to guests in the hotel not to leave any valuables in their bedrooms but to take them to the office, where the proprietors say they will "take charge of same." It was

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Lord Ardwall.

argued that there could be only one object in depositing the bag in question in the office, namely, to put it in safe custody, and that this was the method of putting valuables into safe custody prescribed by the proprietors of the hotel themselves, and that therefore they are barred from maintaining that valuables put into the office are not put in there expressly for safe custody or that they are not responsible for them, as they impliedly undertake to be by the said notice. I consider there is very great force in this argument, but as matter of interpretation of the statute I cannot hold that depositing valuables in an office in pursuance of such notice as I have quoted without saying a word about them to the person in charge of the office or hotel would amount, in the words of the Act, to "depositing them expressly for safe custody" with the innkeeper.

Second. But assuming that the pursuer cannot bring his case within subsect. 2, the question still remains whether the defenders are not liable under subsect. 1, which is in the following terms: "Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ." The question under this section is whether the bag in question was stolen or lost through the default or neglect of the defenders or their servants.

According to the evidence of the defenders themselves, the only place where valuables contained in a bag of some bulk could be so deposited in their hotel was the office and bar parlour. These were the safest places in this hotel for the custody of valuables; and further, the office was the place where the defenders invited their guests to deposit their valuables and undertook to "take charge" of them. This being so, I am of opinion that if Mr Buckley had either handed his bag to Mr Pickett to take charge of, or after depositing it in the corner, or rather seeing it deposited there, had said to Mr Pickett, "That is a bag containing valuables, and I must ask you to take charge of it," a special duty would have been laid upon the defenders, and that in the circumstances it would have been their duty not only always to have had some person in the office, but also when there was only one person there who had various duties to discharge at the service window and otherwise, that they should have taken care to have had both the doors locked so that persons could not slip in and make away with valuables when the single occupant of the two rooms was engaged in other ordinary and necessary duties. But the facts raise a very different case, for I hold it clearly established by the evidence alike of Mr Buckley, Mr Pickett, and the witness James Sim, that the bag was deposited in the corner of the office behind an ice-chest without a word being said to Mr Pickett about the matter or his attention drawn to the bag in any way whatever. It seems that when Mr Buckley and Sim entered the office Mr Reginald Pickett was taking his dinner in the back parlour and came forward just as they were entering, looked up a book and gave a number to the "Boots," and then went out with Mr Buckley to introduce him to some friend of his in the coffee-room. So little was Mr R. Pickett aware that a bag of any kind, not to say of valuables, had been deposited in the corner of the office, that when later on in the evening he went to deposit the bag, handed in by one of the thieves in the same corner, he did not know that there should have been another bag there. Then it appears from Mr Buckley's own evidence, which is corroborated by the evidence of the Picketts, that on the occasion of Mr Buckley's visits his bag of valuables was never, as a rule, given in charge to either of the Messrs Pickett or other person in the office, but was put at Mr Buckley's pleasure either in the corner from which it was stolen on the occasion in question, or beside the safe under the sideboard in the bar parlour, and then if Mr Buckley wished to take it out for the purpose of going his round of customers with it, he just went in and took it out as it suited himself; and finally at night, when it was no longer matter of convenience for him to have the bag on the first floor, and when he could watch it himself, he walked into either the parlour or the office as the case might be and took the bag up to his bedroom without apparently saying anything about it to anyone. Indeed, it was when he wished to take the bag up to his bedroom on the occasion in question that he discovered that it had disappeared. This being the regular course of conduct on the part of Mr Buckley, it can hardly be suggested that the defenders had any special duty with regard to his bag, nor did he consider it of importance to lay any such duty upon them, which perhaps might have interfered with his having such ready access to the bag as he usually seems to have had. He chose to leave the bag in one or other of the places I have mentioned, content with the amount of security that was afforded by its being out of the view of the public and in private rooms dedicated to the use of the managers of the hotel, and to which in the ordinary case the public had not access, although apparently privileged customers like Mr Buckley were allowed to come in and out without any locking or unlocking of the doors which led into the passages of the hotel.

In these circumstances I do not think it can be held that the defenders were under any duty to take the special precautions I have above alluded to, and which I think they would have been bound to take if the bag had been in any way, however informally, put under their charge, even though not "expressly for safe custody." They gave the pursuer's bag, and apparently those of other persons, what might be called house-room

in any part that the customers pleased of the office or bar parlour, but they came under no obligation, express or implied, to work these two rooms otherwise than they were accustomed to do in the ordinary service of the hotel, and if customers chose to take advantage of the permission to leave their bags in these rooms and at the same time to have absolute freedom of access to them whenever they pleased, but without giving warning of any kind to the hotelkeepers that they were putting valuable property under their charge, I do not think that they can impute neglect to the hotelkeepers for not taking precautions beyond those which they usually took to exclude the public from their private rooms.

I may add that it appears to me that the principal neglect in the case was on the part of Mr Buckley in not putting his bag in special charge of the hotelkeepers. It was suggested that it was the duty of James Sim, the "Boots," to have done this when he took the bag into the office, and that he was negligent in not doing so. I cannot accept this view of the case. The "Boots" was merely the hand of Mr Buckley in carrying in and depositing his bag, and it was for Mr Buckley himself and not the "Boots" to tell Mr Pickett that he was giving the bag into his charge.

For these reasons I am unable to hold that negligence within the meaning of the first section of the Act has been proved against the defenders. I accordingly think that the Lord Ordinary's interlocutor ought to be recalled, and the defenders assoilzied with expenses.—18*th November* 1907.

Counsel for Reclaimers, G. Watt, K.C., Munro; Agents, Cuthbert & Marchbank, S.S.C.—Counsel for Respondent, M'Clure, K.C., J. R. Christie; Agents, Gardiner & Macfie, S.S.C. A. M.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

196. Thomson *v.* Thomson and Another.

I. Husband and Wife—Divorce—Adultery—Lenocinium—Facts Which Were Held Not to Amount to Lenocinium—Observations by the Lord President on What is Necessary to Support Plea of Lenocinium.

II. Expenses—Husband and Wife—Divorce—Adultery—Reclaiming Note—Wife, Unsuccessful on Her Reclaiming Note, Held Entitled to Expenses, on the Ground that the Case Was a Fair One to Try.

Reclaiming Note against an Interlocutor of Lord Salvesen.

(*Reported ante, Vol. XIV. p.* 643.)

The defender *reclaimed* against the Lord Ordinary's interlocutor granting decree of divorce.

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Argued for Defender: The husband had done something to promote, or at least had not prevented, the act taking place, when he might have prevented it. In that sense he was accessory to the deed. It was not necessary that he should do anything actively to make out the defence (Mackenzie's Criminal Law, Title xvii., par. 6, pp. 120, 121; *Wemyss* v. *Wemyss*, 1866, 4 M. 660; Bell's Principles, sect. 1532; *Donald* v. *Donald*, 1863, 1 M. 741, per Lord Ardmillan, p. 748). What the husband had done on the morning when his wife went to Gateshead was active incitement to adultery, considering his state of knowledge at the time. His conduct at any rate conduced to it. The words "Yes, go" were more than acquiescence, but acquiescence was sufficient (Fraser, Husband and Wife, Vol. II., pp. 1186, 1187). Counsel also referred to *Marshall* v. *Marshall*, 1881, 8 R. 702; *M'Intosh* v. *M'Intosh*, 1882, 20 S.L.R. 117; *Hunter* v. *Hunter*, 1883, 11 R. 359; *Monro* v. *Monro*, 1877, 4 R. 332.

Argued for Pursuer: In order to support this plea the husband must be a participant in or the direct cause of the wife's act. Here he did nothing either to create or contrive the occasion. It was not enough that he had in his mind suspicions as to his wife's conduct, and that he watched to see if his suspicions were well founded. It was necessary to connect the husband with the wife's act, by shewing that the wife placed reliance on something done by the husband, and this reliance must bring about the adultery. Clear proof was necessary to make out such a defence, and that was wanting here (Fraser, Husband and Wife, Vol. II. pp. 1193, 1194).

The Court *adhered.*

The Lord President.—This is an action of divorce at the instance of the husband on the ground of adultery; the fact of adultery is admitted; and the only ground on which the wife argues that decree should not be pronounced is her plea of *lenocinium.* The facts on which the plea is founded are these:—The parties were married in 1898, and after a short time the marriage was not a very happy one. Both parties seem to have been in fault. The husband seems to have been unfaithful, and the wife was addicted to drink. It is quite clear that for some time previous to the events to which I am going to refer the two had lost all affection for each other; and, so far as the pursuer was concerned, he would have been pleased if the marriage relationship between them came to an end.

The defender had formed an intimacy with another person whom she had met at Perth originally, and with whom for some time she had carried on a correspondence. This correspondence does not seem to have been of a very intimate character. It was carried on for the most part

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on post cards. A large number of these have been recovered and are produced in the case; but they contain nothing which is not of the most innocent description. I do not think that any impression could be drawn from the post cards adversely to the parties. I also think it is the case that for some time at least the pursuer did not know that this post card correspondence was going on, although at the end he did know that his wife was receiving communications from a man whom he did not know, but about whom he had heard.

The defender had been in the habit of leaving the family home at Portobello and going away for week-end visits; and, prior to the events I am coming to, the defender had gone away for a week-end visit, and it had come to the pursuer's knowledge that she had deceived him as to the place where she had been. It is only human experience to suppose that if a man's wife says that she is going for a visit to one place and goes to another, there is some motive for her doing so, and that the motive is likely to be not a very good one. Accordingly the pursuer's suspicions were aroused. They were still further aroused by a communication which he received from his sister-in-law to the effect that his wife had received an invitation to visit or at least to go and see this acquaintance whom he did not know, and who was staying at a considerable distance. There again it is human nature to suppose that a man would have suspicions if his wife, concealing the fact from him, went to visit a man in a far-distant town, and he would think she went there for no good purpose. That his suspicions were aroused by this communication is certain, for he went to consult his agents, and made arrangements for having his wife watched. In these circumstances the defender came to the pursuer and said that she wanted to go to Stirling for the week-end and asked for money. The pursuer gave her £2. The defender had had a sort of warning from her mother, who had got an inkling of what the pursuer was about in setting people to watch his wife, and had advised her daughter not to go away, because she was being watched. This had caused an uncomfortable feeling in the defender's mind, and she asked her husband, "Should I go?" and he said, "Yes; certainly go."

The defender was watched. She went to Gateshead, and there the adultery admittedly took place. She did not come straight back from Gateshead to Portobello, but went first to Cambusbarron, near Stirling, from which place she returned home.

It was argued for the defender that these facts disclosed a case of *lenocinium*, and it was maintained that what was proof of *lenocinium* was in each case a matter of circumstances. In this case the defender relied in particular on two facts:—(1) That the pursuer gave the defender a sum of money to enable her to carry out her purpose; and (2) that he encouraged her by the expression, "Yes; certainly go."

I think I should here leave the facts and consider the law in regard to *lenocinium*. I do not think that the difficulties of the question can be put in more appropriate language than is done by Lord Fraser in his treatise on the Law of Husband and Wife (p. 1186). The title under which it is dealt with is Connivance or *Lenocinium*, and the heading of the passage is: "Not connivance if the husband watch his wife whom he suspects." Lord Fraser says: "The difficulty is to determine when a husband's conduct ceases to be suspicious and justifiable watchfulness and becomes acquiescence. The husband's suspicions may be aroused, but it is no connivance on his part though he do not disclose his suspicions to his wife. He is entitled to observe her and to track her proceedings; and it is not concurrence in her guilt because he does not tell her what he is doing and favour her with admonitions. It is possible that a hint from him as to his suspicions might have saved her; but it is not connivance though he did not utter it. It is only where the husband goes beyond this, and gives facilities for the commission of the offence, and creates opportunities, that he is held to connive and to concur. His connivance then involves criminality, because that connivance occasioned or allowed the adultery to take place." I think these words are a very accurate statement of our law, and that the difficulty arises in the application of the law to each particular state of facts. The same view is supported by the opinion of one who, though not a jurist, is considered an authority on this matter. I refer to the opinion of Sanchez, which is quoted by Lord Fraser on p. 1187 of his work, and is as follows: "Sed an liceat eo fine offerre occasionem uxori ut adulteratur?" Which question he answers in the negative: "Quia id non solum est permittere sed co-operari et positive concurrere."

Now it seems to me that two things are clear. The one is that no judge will do well by trying to frame a definition of what amounts to *lenocinium*, because each case really depends on its own facts, and it would be impossible to frame a definition which comprehended all cases. The other is that there must be something on the husband's part of an active character. "Co-operari et positivé concurrere," says Sanchez, and I think that is an accurate description of our law.

I am aware that in another portion of Lord Fraser's work he says that "passive acquiescence will be sufficient to bar the husband, provided it appears to be done with the intention and in the expectation that the wife would commit the crime" (p. 1186); and he quotes a passage from Lord Stowell's opinion in the case of *Walker* (quoted in *Rogers* v. *Rogers*, 1830, 3 Hagg. Eccl. Cas. 59) to the same effect.

It has been pointed out by Lord President Inglis in *Wemyss* that the English doctrine on this matter has not the same historical origin as the Scots doctrine, and one cannot, therefore, say that an English authority is to be cited as a Scots authority might be, although the two doctrines come very near one another in practical application. After all, the distinction comes to be nearly a question of words. If I may use an expression which seems like a contradiction in terms, I would say that there is a sort of passive acquiescence which is equivalent to active acquiescence. To explain, I may take an analogy from another branch of law which is very familiar to us. There are certain cases where, for instance, in the negotiations for a contract, there is a relation between two parties which puts on one of them a duty of disclosure to the other; and if he fails to discharge this duty, the contract will be set aside because of the silence of the party. There are other cases where there is no duty of disclosure. In these the contract cannot be set aside on the ground that the party did not speak. But in the colloquies between the parties there may be occasions when silence amounts to assertion or representation, and in such a case the contract may be set aside on account of this silent acquiescence. I cannot help thinking that the distinct acquiescence of which Lord Fraser speaks would have to be of that character. It is not mere passive acquiescence, but acquiescence in such circumstances as to give it an active character. That there must be something done by the husband, I cannot doubt.

Applying that exposition of *lenocinium* to the present case I think the facts fall short of what is necessary to make out the defence. Here was a husband who did not know the facts, but strongly suspected that his wife had gone wrong. He hears of a project on her part in circumstances in which it is probable that she would commit adultery. I do not think he was bound to disclose his suspicions; I do not think he was barred from taking steps to observe the proceedings of his wife; I do not think so much stress can be laid on his use of the words "Yes; certainly go." We know what was in the wife's mind at the time. She put the question because she thought his answer would shew whether he knew what she intended to do. She took him to mean, "Yes; certainly go to the place you say you are going to, viz. Stirling." That seems to me to fall far short of contriving the infidelity or the occasion for it. On the contrary, I believe that the matter was *in dubio*, so far as the defender was concerned, almost to the last moment.

On the whole matter I am of opinion that the Lord Ordinary has come to the right conclusion, and that decree must be granted.

Lord Kinnear.—I agree that the plea of *lenocinium* cannot be supported, and therefore that the Lord Ordinary was right in giving decree of divorce.

Lord Dundas.—I agree. I think the proof falls distinctly short of what is necessary in law to support the plea of *lenocinium.*—29*th October* 1907.

Counsel for defender *moved* for expenses, on the ground that a reclaiming note was reasonable in the circumstances, and that the wife was entitled to maintain it at the husband's expense. Counsel for the pursuer opposed the motion. *Hoey* v. *Hoey*, 1884, 11 R. 905, and *Montgomery* v. *Montgomery*, 1881, 8 R. 403, were cited.

The Lord President.—We have consulted with the judges of the other Division in this matter in order to lay down a general rule in such cases.

Where a wife has been unsuccessful in the Outer House and then presents a Reclaiming Note, the question whether she is entitled to her expenses, being again unsuccessful, must depend on whether the case was a fair one to try. What I may call the *prima facie* view of the case is that the Lord Ordinary is right. And therefore it is for the wife to shew that the case is a fair one to try.

In this particular case we think that the question was one which it was fair to bring before this Court, and we therefore allow the reclaimer her expenses.—22*nd November* 1907.

Counsel for Defender, Constable, Pringle; Agents, Cowan & Stewart, W.S.—Counsel for Pursuer, Orr Deas, Fenton; Agents, Simpson & Marwick, W.S. F. A. U.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Low and Ardwall.)

197. Dougall *v.* Provost, Magistrates and Town Council of Dunfermline.

Lease—Warrandice—Eviction—Breach of Contract—Damages—Specific Damages—Lease of Agricultural Subjects—Public Right to Enter on Subjects for Purpose of Fishing Not Disclosed to Tenant—Eviction of Tenant From Full Enjoyment of Part of Subjects Let—Unsuccessful Action by Tenant to Defend Right Which Landlord Takes No Steps Either to Establish or to Negative—Circumstances in Which Held Landlord Liable to Tenant in Expenses of Unsuccessful Action.

Reclaiming Note against Interlocutor of Lord Dundas.

(*Reported ante, Vol XIV. p.* 656; and see *Dougall* v. *Lowe*, 3*rd February* 1906, *reported ante, Vol. XIII. p.* 831.)

The facts of the case sufficiently appear from

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Dougall v. Provost, Magistrates and Town Council of Dunfermline.

the previous reports and from the judgment of Lord Ardwall.

On 8th January 1907 the Lord Ordinary pronounced an interlocutor whereby he, *inter alia*, found that the defenders were liable to pay to the pursuer the expenses incurred by him in the previous action (*Dougall* v. *Lowe, cit. sup.*), and also the expenses for which the pursuer had been found liable in that action.

The Defenders *reclaimed* and *argued*: (1) The pursuer was not entitled to recover the expenses of the former action even if the case were taken as an ordinary case of breach of contract. Expenses had never been recovered as damages for breach of contract except in cases where the defenders denied the breach (*Straiton Estate Co. Ltd.* v. *Stephens*, 1880, 8 R. 299; *Hammond & Co.* v. *Bussey*, 1887, L.R. 20 Q.B.D. 79; *Agius* v. *Great Western Colliery Company* [1899], 1 Q.B. 413). Here the defenders had from the first admitted the right of the public to fish. (2) The present action was laid, not on breach of contract, but on breach of warrandice. What the pursuer was entitled to claim under the warrandice was not damages for breach of contract but indemnity for eviction. That did not include the expenses of an action (Bell's Prin., sect. 895; *Stephen* v. *Lord Advocate*, 1878, 6 R. 282). [Lord Low referred to *Inglis* v. *Anstruther*, 1771, M. 16,633.] Expenses could be recovered as damages only in cases where the rule of *Hadley* v. *Baxendale* (1854, 9 Ex. 341) applied. That rule did not apply to breach of warrandice. (3) In the previous action the pursuer had raised two questions: (*a*) the question of the public right to fish, and (*b*) the question of trespass. The defenders were not liable for any damage resulting from trespass. The pursuer's present claim was truly a claim for relief, which, to be successful, must be commensurate with the original liability (*Caledonian Railway Company* v. *Colt*, 1860, 3 Macq. 833, per Lord Chelmsford at p. 848; *Ovington* v. *M'Vicar*, 1864, 2 M. 1066). This was not so here; the pursuer could not have called on the defenders to take his place in an action laid on trespass.

Argued for the Pursuer: The case must be taken on the footing that the pursuer had been evicted. The defenders were therefore in breach of contract, and were liable for all damages naturally resulting from the breach. In particular, they were liable for the expenses of the former action, if these had been reasonably incurred (*Hammond* v. *Bussey, cit.*; *Agius* v. *Great Western Colliery, cit.*; *Kincaid & Co.* v. *Neilson & Sons*, per Lord Low, 29th July 1903, unreported). There was no distinction between breach of warrandice and breach of any other contract (Ersk., II. 3, 30 and 32; *Welsh* v. *Russell*, 1894, 21 R. 769). The statement in Bell's Prin., sect. 895, was inconsistent with other authorities (Bell's Lect., 3rd ed. I. 217, 219; *Straiton Estate Co. Ltd.* v. *Stephens, cit.*). It was immaterial that the former action had been laid on trespass. It appeared from the lease that nobody was entitled to fish except those who had permits from the defenders. The defenders had informed pursuer that they had not granted permits. According to the pursuer's information, therefore, which was derived from defenders, all fishers were trespassers. It was therefore impossible to separate the question of trespass from the question of fishing, and the action had been rightly laid on trespass.

The Court *adhered*.

Lord Ardwall.—By lease dated 29th November and 8th December 1904 the defenders let to the pursuer the farm of Highholm, near Dunfermline, for nineteen years from and after Martinmas 1903 at the rent of £150. The farm forms part of the common good of the burgh, and is bounded on the north partly by the Loch Fitty Burn and partly by Loch Fitty, into which the burn flows. The lease contains a clause reserving to the "proprietors," which word is therein defined as meaning "the Provost, Magistrates, and Town Councillors for themselves and as representing the whole body and community of the said Burgh," the whole game and fishings on the lands let, "with the privilege of fowling, hunting, sporting and fishing on the lands hereby let by themselves or others having written authority from them." It is matter of admission that the fishings in the said burn and loch are the only fishings to which the above reservation can refer. The lease contains the usual clause of absolute warrandice.

Shortly after the pursuer entered the farm, he found that members of the community of Dunfermline, and the public generally, were in the habit of entering upon the subjects let for the purpose of fishing in the said burn and loch. He challenged them, but was met with the contention that they were entitled as members of the community of Dunfermline to fish there, and to enter on his lands for that purpose. The pursuer complained about trespassers to the defenders about March 1904, and there have been produced in process a number of minutes and correspondence, the effect of which is very clearly set forth by the Lord Ordinary in the opinion delivered by him on 8th January 1907. I entirely agree with the conclusion at which the Lord Ordinary has arrived that the pursuer was justified in reading the Town Clerk's letter of 2nd May 1905 as an intimation that the defenders were not to take any action either to establish or to negative the existence of a right in the public which "they were not disposed to question" or as to the matter of trespass, and that he must take such steps as were necessary to defend himself. The pursuer accordingly raised an action on 8th June 1905 craving interdict against certain individual defenders molesting or interfering with him in the peaceable

possession and enjoyment of his lands, and from entering and trespassing on the same or injuring and destroying his crops. To this action the present defenders were also called for their interest. A proof was led in that action, and upon considering the same the Lord Ordinary, by interlocutor dated 3rd February 1906, found, *inter alia*, (3) that the compearing defenders as "members of the said community and ratepayers in the said Burgh are entitled to enter upon and use the banks of the said burn and loch respectively so far as aforesaid (that is, so far as lying within the farm of Highholm) for the said purpose of angling; and (4) that the pursuer has failed to prove that the said defenders or any of them have trespassed on the said farm and lands or have broken down, injured, or in any way interfered with the gates and fences upon and surrounding the same, or have injured or destroyed the pursuer's crops upon the same." He accordingly assoilzied the defenders, and found them entitled to expenses.

Besides having called the present defenders for their interest in that action, the pursuer's agent, on 8th July 1905, wrote to the Town Clerk enclosing a print of the open record, drawing special attention to the defenders' averments to the effect that they had enjoyed an immemorial right and privilege of fishing in the loch and burn on the town lands, and of using the banks thereof for that purpose, and desiring to be informed whether or not these statements were substantially true. He further intimated that if the defences were sustained the pursuer would look to the town to recompense him for all loss and damage he might suffer or had suffered, and that if in the course of the process it should appear that the Town Council had done anything to derogate from their lease to him he would hold them liable to pay all the expenses incurred by him in that action and those for which he might be found liable. This was a very plain intimation that if the pursuer failed in that action he would make the claims which he does in the present against the Town Council. On 12th June 1905 the Property Committee of the Town Council had agreed to recommend that the Town Council should not enter appearance to defend the action, and on 11th July the Town Clerk replied to the pursuer's agent that "the Town Council have not at any time conferred right on the inhabitants of Townhill or others to fish in the loch and burn, but they took no steps to prevent fishing." This was a very evasive answer, and left the pursuer without any knowledge as to how long the public had been in use to fish, or whether they had or had not a legal right to do so. Again, on 2nd November 1905, the pursuer's agent wrote to the Town Clerk intimating that a proof had been allowed in the action as to the alleged right of fishing, that the pursuer did not intend to reclaim against the interlocutor allowing the proof, but would do so if the Town Council so desired at their expense. The Town Clerk answered practically that they did not intend to do anything in the matter, and subsequently they declined to reclaim against the interlocutor of the Lord Ordinary of 3rd February 1906 already referred to, which has become final, and which the defenders, for the purposes of this action, admitted must be held to be well founded in fact and in law.

After intimating his claims to the Town Council, who refused to recognise them, the pursuer raised the present action, in which he concludes for declarator that he has been evicted from the full and peaceable possession of a portion of the subjects let to him by the defenders, and that he is entitled accordingly to an abatement of the sum of £30 per annum from the stipulated rent. There are then petitory conclusions: (1) for the sum of £66 sterling, being the amount of the abatement which he claims with interest at the rate of 5 per cent.; (2) for the sum of £100 sterling, being damage done to his crops and lands by persons resorting thereto for the purpose of fishing; and (5) the sum of £450, 18s. 6d. sterling, being the legal expenses for which the pursuer was found liable in the former action, and also those incurred by him in raising and prosecuting that action.

The Lord Ordinary has given decree of declarator as concluded for, but reduces the abatement from £30 to £5 per annum; and with regard to the petitory conclusions he has granted decree against the defenders for the sum of £10 sterling and interest; and in respect of the minute for the pursuer, No. 30 of process, has assoilzied the defenders from the conclusion for £100; and with regard to the third petitory conclusion he has found the defenders liable to pay to the pursuer the amount of the defenders' taxed account in the other action, and also the amount of the pursuer's accounts in that action as the same may be taxed by the Auditor of the Court, to whom he has made a remit for this purpose.

It is against the Lord Ordinary's findings with regard to the third of the petitory conclusions, namely, that for the defenders' and pursuer's expenses in the former action, that the defenders reclaim.

I entirely agree with the view that the Lord Ordinary has taken of this matter. The lands were let to the pursuer with no other reservation as regards fishing except of the right of the defenders and those having written authority from them. When he discovered that great numbers of the community of Dunfermline, without any such written authority, trespassed over his lands in pursuance of this alleged right of fishing, he naturally considered this a derogation from his rights under the lease and a partial eviction from the peaceable enjoyment of the subjects let. But on his complaining to the defenders they would neither admit nor deny

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the right of members of the community to fish in the said burn and loch; and as I have above explained under reference to the Lord Ordinary's opinion and to the minutes and correspondence, they practically told him that he must defend himself. He did so, and in my opinion he was entitled to do so with the view of vindicating his rights which were challenged by third parties. It was necessary for him to do so if he were to make a claim for abatement of rent, because, as I shall afterwards point out, he could not make such a claim successfully unless it had been judicially determined that he had suffered eviction. If the defenders had frankly admitted—and it was a fact which was within their knowledge, or ought to have been—that the community had exercised from time immemorial a right of fishing in the said burn and loch, the pursuer could then have brought his action directly against them; but I do not think he was safe to do so, looking to the attitude they adopted, without first endeavouring to protect himself against eviction. If he had been successful in that attempt he would have had no claim against the Town Council, because there would, in that event, have been no eviction; but having failed in the action without any fault on his part in the conduct of the process or otherwise, he is in the position of a person who has suffered eviction and who is therefore entitled to recompense.

The Court had the benefit of an able argument on both sides with regard to the law applicable to this claim for expenses in the former action, and I propose shortly to examine the authorities on the point.

There is no doubt of the general principle that where there has been a breach of contract the party who suffers from such breach of contract is entitled to damages against the party responsible for it; and such damages include not only the actual damage immediately and directly caused by the breach of contract, but also all damage arising out of it which might have been expected by the parties to the contract naturally to arise out of a breach, and such damage has been held to include, *inter alia*, legal expenses reasonably incurred in consequence of the breach of contract. (See the case of *Straiton Estate Co. Ltd.* v. *Stephens*, 1880, 8 R. 299; *Hammond*, 1887, L.R. 20 Q.B.D. 79; and *Ayius* v. *Great Western Colliery Co.* [1899], 1 Q.B. 413.)

But it was maintained that where an action is founded on warrandice, the expenses incurred in unsuccessfully defending a claim involving total or partial eviction from the subject warranted are not recoverable from the granter of the warrandice. For this proposition the defenders relied almost entirely upon certain *dicta* contained in sect. 895 of Bell's Principles. That passage begins with stating that "Warrandice is not an obligation to protect, but only to ndemnify in case of eviction." Taken by itself this would seem to imply that the indemnification must include expenses reasonably incurred in defending the claim; but then the author goes on to say, "Thus there is no action of warrandice till judicial eviction, unless the ground of demand be unquestionable and proceeding from the fault of the seller." This passage, again, would seem in doubtful cases, such as the present, to justify judicial resistance to the claim, as until that was settled the obligation of warrandice would not arise. But further on the author continues thus: "The person bound in warrandice is entitled to have notice of the claim or attempt to evict, but the buyer is not bound to enter into a litigation in defence of the right, provided he give due notice. If he undertake the defence without notice, and omit the proper plea, the seller will be free. The seller is not bound to defend against the claim, and if the buyer choose to do so while the seller declines it, and fails, he is not entitled to the expense of litigation."

It is the last clause that is founded on by the defenders. But the authority cited by Professor Bell for the clause is the case of *Inglis*, 1771, M. 16,633. Now in that case the action concluded for reimbursement of expenses incurred in defending a commission to a certain office. The challenge was unsuccessful, so there was no eviction, and it was held that eviction is the sole foundation for an action upon warrandice, and that the pursuer had no claim for reimbursement of expenses, as there had been no eviction. It is manifest that this decision does not support the doctrine laid down in the text. But the doctrine laid down in the decision is, I think, quite undoubted, and is supported by other decisions, the reason of it being that if an unfounded claim is made against the subject warranted, that is not a matter for which the granter of the warrandice is in any way to blame; it is only the misfortune of the person who is in possession of the subject that a third party has preferred an unfounded claim against such possession, and he has no recourse for expenses except against the person who attacked him, in the usual way. This doctrine was also laid down in the case of *Stephen* v. *The Lord Advocate*, 1878, 6 R. 282, where the Crown having, by a separate action of declarator, succeeded in having its right to the use of certain piers and accesses sustained, was held not responsible for the expenses of an unsuccessful defence which its tenant had maintained in the Small Debt Court in answer to a claim for the use of these piers and accesses, the ratio of this decision also being that the Crown having given the tenant possession of a subject from no part of which he had been legally evicted, they were not liable for the loss caused to him by a groundless but successful action having been brought against him and wrongly decided in the Small Debt Court. Neither of these decisions militates against the

pursuer's claim for expenses in the present action; indeed they seem in a negative sense to support it, because the ground of refusing expenses in both cases was that there was no eviction, and therefore no loss for which the granter of the warrandice could be held in any way to blame. In the case of *Welsh* v. *Russell*, 1894, 21 R. 769, it was held that there was a case of partial eviction similar in some respects to what occurred in the present case, the eviction there consisting in the imposition of a right of way upon a heritable subject purchased by the pursuer, but otherwise the case does not seem to have much bearing on the present, the pursuer's case being there thrown out because he claimed compensation for total eviction and not damages for partial eviction.

In Erskine's Institutes, II. iii., 32, in dealing with the question of warrandice, the following passage occurs: "Yet intimation of distress is not precisely necessary, for the purchaser's right of recourse continues competent to him without such intimation, if evidence is not brought that in the action of eviction he had submitted to some irrelevant defence or subjected himself to an incompetent means of proof" (*Clerk*, 23rd June 1681, M. 16,605); and the same author in his Principles, II. iii., 13, states the law as follows:— "Regularly the grantee, when the eviction is threatened, ought to intimate his distress to the granter that he may defend the right granted by himself; but though such intimation should not be made, the grantee does not lose his right of recourse, unless it shall appear that in the process of eviction he has omitted a relevant defence or subjected himself to an incompetent means of proof."

The last passage quoted from Bell's Principles, it seems to me, is itself obscure, is not supported by the decision on which it professes to be founded, is at variance with the doctrine that warrandice is a contract of indemnity, and with the general doctrine applicable to breaches of all contracts.

It falls, however, to be noticed that the passage quoted from Professor Bell comes under the general head of "sale of land." His doctrine of warrandice as regards leases is to be found in sects. 1208 and 1253 of the Principles, where he deals with the implied warrandice contained in the contract of lease, the warrandice being that the subject exists, shall be made effectual to the tenant, and fit for its purpose; and, so far as I know, an action of damages for breach of such warrandice in leases covers all loss caused by the breach, unless it be indirect and consequential.

A passage from Professor Montgomerie Bell's Lectures on Conveyancing, 3rd edition, pp. 217 and 219, and in the first edition at p. 207, was quoted by the counsel for the pursuer to shew that in the view of that able and experienced practitioner the party evicted was entitled to the expenses of an unsuccessful defence. He says: "It will be observed that the party against whom eviction is threatened has in some views a better claim if he is unsuccessful than if he prevails, because though unsuccessful in defending the subject, he will get his expenses, besides the value of the subject evicted, from the granter of the obligation of absolute warrandice, whereas if successful he indeed preserves to himself the subject but does not get his expenses"; he then proceeds to give some very good advice as to what the granter of the warrandice should do in such a case.

It appears to me that the true result of the authorities is that if an action of eviction be properly defended, and if, notwithstanding such defence, eviction follows, the granter of the warrandice will be liable, not only for the direct loss caused by the breach of warrandice, but for all expenses properly and reasonably incurred in defending the rights which he and the granter alike had an interest to defend.

It was strongly contended by counsel for the defenders that at all events full expenses in the other action should not be allowed because, it was said, there were two branches of that action, one concerning the right of the public to fish, and their presence on the pursuer's farm in pursuance of that right, and the other concerning ordinary trespass unnecessarily committed by persons founding on their fishing rights, but which trespass was not necessary for the exercise of these rights; and it was maintained that according to the Lord Ordinary's judgment the pursuer had not made out a case of damage by trespass, and therefore that all the expenses applicable to that part of the case should be disallowed, and that this should be done by way of modification of the total expenses.

The Lord Ordinary disregarded this argument, and I think he has done rightly. In the first place, the witnesses who spoke to the latter branch of the case were necessary to the former part, and indeed it is no easy matter, as a question of fact, to say when what may be called legitimate trespass ended and illegitimate trespass began; and in the second place it is certain that both kinds of trespass arose from the alleged right of fishing which the Lord Ordinary has found to exist.

For these reasons I do not think that any useful distinction can be drawn between the one part of the expenses and the other; and having regard to what was the origin of the whole proceedings, I do not think the pursuer should be deprived of any part of his expenses.

I accordingly propose that the Court should adhere to the Lord Ordinary's interlocutor of 8th January 1907 reclaimed against, and find the defenders liable to the pursuer in expenses since the date of the said interlocutor, and remit the account thereof to the Auditor to tax and to report to the Lord Ordinary, with power to the Lord Ordinary to decern for the taxed amount thereof and remit the cause to the Lord Ordinary to proceed therewith.

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The Lord Justice-Clerk and *Lord Low* concurred.—20*th November* 1907.

Counsel for Pursuer, M'Clure, K.C., A. M. Anderson; Agent, John Stewart, S.S.C.—Counsel for Defenders, Scott Dickson, K.C., Murray; Agents, Morton, Smart, Macdonald & Prosser, W.S. J. S. M.

OUTER HOUSE.

(*Lord Salvesen.*)

198. Govan *v.* J. & W. M'Killop.

PROCESS—PROOF OR JURY TRIAL—REPARATION—QUESTION INVOLVING (A) CONSTRUCTION OF STATUTE, AND (B) MEDICAL EVIDENCE—ALLEGED DEATH OF PERSON FROM PTOMAINE POISONING CONTRACTED THROUGH FOOD SUPPLIED IN A RESTAURANT—ACTION BASED ON FAULT AT COMMON LAW AND BREACH OF WARRANTY UNDER STATUTE—FORM OF ISSUES—THE SALE OF GOODS ACT 1893 (56 & 57 VICT. CAP. 71), SECT. 14, SUBSECT. 1.

The pursuer was the widow of Alexander Govan, managing director of Argyll Motors Ltd., Alexandria, and the defenders were owners and managers of the Grosvenor Restaurant, Glasgow. In this action she claimed £10,000 damages for the death of her husband, on the ground that he died from ptomaine poisoning contracted by partaking of lobster soup supplied in the defenders' restaurant. The pursuer's averments of fault on the part of the defenders were as follows :—

The defenders were responsible for the supply of said food, and they were bound, as public caterers, to provide for their customers good and wholesome food, which said lobster soup was not. Mr Govan ordered the lobster soup for consumption by him on the premises, and it was supplied by the defenders for that purpose. They wrongfully, and in breach of their contract with Mr Govan, failed to supply him with lobster soup suitable for human consumption as food, although Mr Govan, as they knew, relied absolutely on their care and on their skill and judgment to give him food in a wholesome condition. The defenders, in so acting, were in breach of the warranty implied by sect. 14 (1) of the Sale of Goods Act 1893, to the effect that the lobster soup supplied by them as aforesaid was reasonably fit for human food. Moreover, the defenders were grossly negligent of their duty to Mr Govan to provide soup which could be eaten with safety. They knew, or ought to have known, that said food was not fit for consumption by their customers. In any event, if the defenders had taken reasonable precautions and exercised proper care they would have detected the unsoundness of said food, and they failed in their duty to Mr Govan, as their customer, by not taking such precautions.

The defenders in their answers denied that the pursuer died from ptomaine poisoning. Mr Govan died on 27th May 1907, and under a Sheriff's warrant the defenders had his body exhumed, and a post-mortem examination made on 18th June. They averred that, as disclosed by the post-mortem examination, Mr Govan's death was due to hæmorrhage in the brain and not to ptomaine poisoning.

Sect. 14, subsect. 1, of the Sale of Goods Act 1893 is in the following terms :—

Where the buyer expressly, or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

The pursuers proposed the following issues for the trial of the cause :—

1. Whether, on or about 17th May 1907, the defenders in the course of their business as purveyors supplied lobster soup to the pursuer's husband, Alexander Govan, knowing that said lobster soup was required for consumption by him as food; whether said lobster soup or part thereof was not fit for human consumption; and whether pursuer's said husband, relying on defenders' skill as purveyors, partook of said lobster soup and was in consequence thereof seized with illness which caused his death, to the loss, injury, and damage of the pursuer?
2. Whether the illness which resulted in the death of the pursuer's said husband on or about 27th May 1907 was caused through the fault of the defenders, to the loss, injury, and damage of the pursuer?

Damages laid at £10,000 sterling.

The defenders contended that the issues should be disallowed and the case sent to proof.

The argument sufficiently appears from the Opinion of the Lord Ordinary.

The issues proposed were *approved* of for trial of the cause by a jury.

Lord Salvesen.—The pursuer is the widow of Alexander Govan, and the defenders are restaurateurs in Glasgow. The pursuer's case is that her husband was supplied with lobster soup in the defenders' restaurant, and that his death was due to ptomaine poisoning contracted through partaking of this soup.

She submits two issues which she proposes for the trial of the cause—the one being laid upon sect. 14, subsect. 1, of the Sale of Goods Act 1893, and the other being the ordinary issue of fault. The defenders do not dispute the relevancy of the action, but they maintain that it is unsuited for trial by jury on various grounds.

The first ground is that a question of law may be raised as to the applicability of the Sale of

Goods Act. I was unable, however, to get any clear indication from the defenders' counsel of the nature of the possible legal question. I apprehend that, if the pursuer is able to satisfy a jury of the propositions and facts which are embodied in the first issue, there can be little doubt of her right to recover compensation. In some cases it may be a very difficult question whether a person who purchased goods which proved to be unwholesome or dangerous, relied upon the seller's skill. But I do not think it can be seriously contended that a purveyor does not impliedly warrant that the food which he supplies shall be fit for human consumption.

The other ground on which I was asked to withdraw the case from a jury is that the medical evidence will be conflicting, and that the nature and symptoms of ptomaine poisoning are matters upon which medical science has not arrived at any definite conclusion. In my opinion that is not a sufficient ground, in a case appropriated by statute for jury trial, for my exercising the discretion—which I no doubt possess—of directing the enquiry to be by proof. In accident cases we are familiar with the most difficult questions as to the nature and extent of a man's injuries, and his prospects of recovery, being determined by a jury on the most conflicting evidence of medical experts; but I have not been referred to a single case where this was considered a good ground for withholding the cause from the tribunal which the Legislature has considered most appropriate. The defenders founded on a recent decision of Lord Guthrie in the Outer House (*Stocks* v. *Holstein*, 1907, 14 S.L.T. 339), where his Lordship, under very similar circumstances, ordered a proof; but one of the reasons which led him to that conclusion does not exist here, because no objection is taken to the form of the issues proposed. Of course a jury, before they can find for the pursuer, must reach the conclusion in point of fact that her husband died from ptomaine poisoning, and that such poisoning was the result of his eating food supplied to him in the defenders' restaurant. That may be a difficult question of fact; but it is one upon which a jury is just as likely to be right as a judge; and I think the pursuer might well complain of not having her compensation—if successful—fixed by the tribunal which is supposed to be best able to assess damages for other than pecuniary loss, and of the lack of finality which a decision by a Lord Ordinary has as compared with the verdict of a jury. I shall accordingly approve of the issues proposed for the trial of the cause.—14*th November* 1907.

Counsel for Pursuer, The Lord Advocate (Shaw, K.C.), Wilson, K.C., M. P. Fraser; Agents, Patrick & James, S.S.C.—Counsel for Defenders, Clyde, K.C., Macmillan; Agents, Auld & Macdonald, W.S. J. W. F.

1st Div.

Toal v. The North British Railway Co.

FIRST DIVISION.

(The Lord President, Lords Kinnear and Dundas.)

199. Toal *v.* The North British Railway Company.

Reparation—Relevancy—Railway Company—Damages for Personal Injuries——Negligence—Averment of Duty on Company's Servants to Close Carriage Doors Before Setting Train in Motion Held Irrelevant.

Appeal from the Sheriff Court of Lanarkshire at Glasgow.

In this action Toal, a Glasgow craneman, sued the North British Railway Company in the Sheriff Court at Glasgow for damages in respect of injuries suffered by him, and for which he averred that the Railway Company were responsible.

The pursuer's averments were to the effect that on an evening in November 1906, after alighting from a train on the defenders' railway at College Street Station, Glasgow, and whilst standing on the platform there, he was struck and knocked down by the open door of a carriage of the train when again in motion and leaving the platform, that he fell upon the rails, sustaining injuries which permanently incapacitated him from following his ordinary employment. He also averred that the station was in total darkness at the time of the accident. His averments of negligence were in the following terms:—

The said accident to the pursuer was due to the fault and negligence of defenders' servants, for whom defenders are responsible. When said train was stopped at said platform, there were no porters or officials on the platform to see that the doors of the carriages were closed before the train was restarted. It is the duty of defenders, and is the invariable practice of railway companies, to close the doors of compartments before a train is allowed to leave the station, but this the defenders and their servants culpably and negligently failed to do on the occasion of this accident to pursuer. The defenders and their said servants were also negligent in respect that they set said train in motion without closing said door. If the guard of said train or any of defenders' porters had been on said station and had paid attention to their duty, they would have closed the door which struck pursuer, before the train was allowed to restart from said station, and the said accident would have thus been avoided. The pursuer believes and avers that the guard of said train was negligent, and did not come to the platform at said station, and failed to have regard for the safety of pursuer and others on said platform by having said door shut. Defenders' servants were also negligent in that they failed to have the lamps at said station lighted, as the station was in complete darkness at the time said accident happened, with the exception of the lights from within the carriages of the train in which

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pursuer had been a passenger. If said platform had been lighted, the pursuer could have easily seen that said carriage door was swinging open, or some other passenger would in all probability have closed same, failing attention to their duty by the servants of the defenders, whose duty it was to close same before the train was allowed to restart. The defenders' servants were thus reckless and negligent, and caused said accident to the pursuer.

The defenders admitted the injuries, but denied liability, explaining that the station was properly lighted, that after the train drew up in the station the doors were properly closed, and that when the signal was given for restarting a number of people, including the pursuer, ran alongside the train cheering the Celtic football team, who occupied a saloon carriage on the train. They averred that the accident was caused or materially contributed to by the negligence of the pursuer in so doing, and in failing to observe the necessary precautions to avoid stumbling and falling upon the line.

They pleaded, *inter alia*, irrelevancy and contributory negligence.

The Sheriff-Substitute (Boyd) allowed a proof before answer.

The pursuer appealed to the First Division of the Court of Session for jury trial and lodged an issue in ordinary form.

The defenders objected to an issue being allowed, and *argued*: The pursuer's averments instructed no relevant case of negligence against the Railway Company. There was no duty on the defenders to close the carriage doors before the train was allowed to move from the platform.

The pursuer *argued* that there was such a duty to close the carriage doors, and quoted the *dicta* of Lord Chancellor Cairns in the case of *Metropolitan Railway Co.* v. *Jackson*, 1877, 3 Ap. Cas. 193, at p. 198, in support of this contention.

The Court *dismissed* the action.

The Lord President.—My Lords, I am unable to find in this record a relevant averment of negligence against the defenders. The pursuer sets forth that on a certain date he travelled in a train which stopped at College Street Station. He alighted. He then says that while he was standing on the platform—he does not tell us how long he had been standing there—he was struck and knocked down by an open carriage door, and his leg slipped down between the platform and the train. The train was in motion at the time the pursuer was struck, and after it had passed the pursuer fell on to the rails. Now, the only facts that are there given to us are that the pursuer got out of the train, that he stood upon the platform, and that while there he was knocked down by an open carriage door. He must, of course, necessarily have been so close to the edge of the platform as to permit of the door knocking him down. The only averment of negligence that is made in these circumstances against the Company is this:—"It is the duty of the defenders, and is the invariable practice of railway companies, to close the doors of compartments before a train is allowed to leave the station." I say in passing that this "leaving the station" is rather an ambiguous phrase, and I rather fancy that the writer of the sentence which I have just read meant by "leaving the station" really the starting of the train. The only doubt raised in my mind as to that is that in the next sentence he says this: "The defenders and their said servants were also negligent, in respect that they set said train in motion without closing said door." However that may be, I take the last averment as being the substance of the negligence averred, viz. that there was negligence in respect that the train was set in motion without the doors being closed.

My Lords, I think that is an impossible averment of negligence to allow to go to a jury, seeing that it is common knowledge, from the practice of railway companies, and indeed from the necessities of the case, that a great deal of the service of suburban trains would be practically impossible if it were absolutely necessary to close every door before the train was allowed to start. That it is a quite proper precaution for railway servants to close the doors, so far as they can, before the train starts, I do not doubt, but that is a perfectly different thing from saying that if a door is not closed before the train is allowed to move there is negligence on the part of the Railway Company. There is no averment that the train was started so quickly as to give no proper opportunity to alight. All that is said is that it is negligence, because the train was started while a door was still open. My Lords, I do not think that is common sense. I think, therefore, your Lordships should dismiss this action as being wanting in relevancy of averments against the Railway Company.

I think that is a safer ground to go upon than what was also urged on us—the disclosure of contributory negligence on the part of the pursuer in bar, because, although no doubt I do think the chances, so to speak, are all in favour of it being the man's own fault that he allowed himself to be struck by the door of a railway carriage while on the platform, still that is not a universal proposition. There may have been circumstances in which he was not able to get away, and the proof of contributory negligence must, of course, lie upon the person who is alleging it—namely, the defender. But before the defender is put to any such proof there must be a case of negligence against him. It is there, I think, that this case fails, and I am therefore for dismissing the action.

Lord Kinnear.—I agree. I only add that I do not find any averment that the defenders did

not give the pursuer time to alight, and that he was knocked down before he had time to step from the carriage to a safe place. There is no averment of that kind, and in the absence of an averment of that kind I think the case rests exactly as your Lordship has put it.

Lord Dundas.—I also agree. I only add that to my mind the case is an extremely plain one.—31*st October* 1907.

Counsel for Pursuer, Munro, J. A. Christie; Agents, St Clair Swanson & Manson, W.S.—Counsel for Defenders, Solicitor-General (Ure, K.C.), Grierson; Agent, James Watson, S.S.C.

W. A. R.

FIRST DIVISION.

(The Lord President, Lords Dundas and Mackenzie.)

200. Parish Council of Govan *v.* Parish Council of Glassary.

Poor Law—Settlement—Acquisition of Residential Settlement by Female Pauper—Education Act 1901 (1 Edw. VII., cap. 9), sects. 1 and 2—Held that Provisions of the Education Act 1901 Do Not Affect the Age at which a Female Pauper is Capable of Acquiring a Residential Settlement, or Change it from Twelve to Fourteen.

This was a Special Case to which the Parish Councils of Govan and of Glassary, Argyllshire, were respectively the first and second parties.

The statement of facts and contentions of the parties were in the following terms:—

1. Joanna Margaret Robertson Mackenzie, now a lunatic pauper in the Govan District Asylum, was born at Lochgilphead, in the parish of Glassary, on 19th December 1885.

2. The said Joanna Margaret Robertson Mackenzie (hereinafter referred to as "the pauper") is the lawful child of John Mackenzie, architect's draughtsman, who died at Slockvullin, in the parish of Kilmartin, on 18th February 1894, and Joanna M'Corquodale, wife of the said John Mackenzie, who died at 24 Budhill Avenue, Shettleston, in the parish of Glasgow, on 26th September 1901.

3. The said John Mackenzie, who was born at Lochgilphead aforesaid on or about 9th January 1859, had, at the date of his death in February 1894, no residential settlement in any parish, and accordingly his settlement at that date was in the parish of his birth, the parish of Glassary.

4. From 3rd July 1894, when she was between eight and nine years of age, until 15th April 1902, when she was aged sixteen years and four months, the pauper resided continuously in the Orphan Homes, Whiteinch, in the parish of Govan. During her residence in these homes up to the age of fifteen the pauper was sent out each day to a public school for her education.

5. After leaving the said Orphan Homes at Whiteinch in April 1902, until the date of her admission to the said Govan District Asylum on 8th May 1904 at the age of eighteen years and five months, the pauper was in domestic service. Her residences during this period were as follows [*here followed a list of residences in various parishes in or about Glasgow*]. Until about two weeks before her admission to the said asylum the pauper was a bright, intelligent girl.

6. If the pauper became capable of acquiring an independent settlement when she attained the age of twelve years in December 1897, then, by her continued residence in the said Orphan Homes thereafter until April 1902, the pauper acquired a residential settlement in the parish of Govan, which settlement she had not lost at the date of her becoming chargeable as a pauper. The parish of Govan would accordingly, in that event, be the parish liable for the pauper's maintenance.

7. The Parish Council of the parish of Govan, however, maintain that in consequence of the Education (Scotland) Act 1901 (1 Edw. VII. cap. 9) no child can now be held to become capable of acquiring an independent settlement until it has attained the age of fourteen. If this contention be sound, then the pauper's residence of two years and four months in the parish of Govan, after attaining the age of fourteen, and before becoming chargeable, was not sufficient for the acquisition by her of a residential settlement in the parish of Govan. The pauper did not subsequently and prior to her becoming chargeable acquire a settlement elsewhere, and accordingly, as her father died leaving only a birth settlement, she would, in this view, take her own birth settlement, which is in the parish of Glassary, and that parish would be liable for her maintenance, and bound to relieve the parish of Govan of the sums expended by it on such maintenance.

8. The Parish Council of the parish of Glassary, on the other hand, maintain that no change has been made by the Education (Scotland) Act 1901 in the time at which a child becomes capable of acquiring an independent settlement, and that the time at which a child is capable of commencing to acquire an independent settlement falls to be determined independent of the provisions of that Act. They accordingly contend that by her residence in the parish of Govan for four years and four months after attaining the age of twelve, and before becoming chargeable, the pauper acquired a residential settlement in the parish of Govan, which she had not lost at the date when she became chargeable, and that therefore the parish of Govan is liable for her maintenance.

The following Questions of Law were submitted:—

1. Did the said Joanna Margaret Robertson Mackenzie, the pauper, become capable of acquiring an independent settlement on attaining the age of twelve years? Or,
   Did she become capable of acquiring an independent settlement only on attaining the age of fourteen years?
2. Are the first parties, the Parish Council of the parish of Govan Combination, liable for the maintenance of the said Joanna Margaret Robertson Mackenzie, the pauper, so long as she continues chargeable? Or,
   Are the second parties, the Parish Council of the parish of Glassary, liable for such maintenance?

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Parish Council of Govan v. Parish Council of Glassary.

The Education (Scotland) Act 1901 provides as follows:

Sect. 1. It shall be the duty of every parent to provide efficient elementary education in reading, writing, and arithmetic for his children who are between five and fourteen years of age.

Sect. 2. It shall not be lawful for any person to take into his employment any child (1) who is under the age of twelve years or (2) who, being of the age of twelve years and not more than fourteen years, has not obtained exemption from the obligation to attend school from the School Board of the district in the manner provided in the next following section. . . .

The following cases were referred to in argument:—

For the First Parties: *Craig* v. *Craig & M'Donald*, 1863, 1 M. 1172; *Parish of St Cuthbert's* v. *Parish of Cramond*, 1873, 1 R. 174; *Greig* v. *Ross*, 1877, 4 R. 465, per Lord Gifford at p. 468.

For the Second Parties: *M'Lennan* v. *Waite*, 1872, 10 M. 908; *Parochial Board of Elgin* v. *Parochial Board of Kinloss*, 1893, 20 R. 763.

The Court *answered* the first branch of the first question in the affirmative, and the first branch of the second question in the affirmative.

The Lord President.—My Lords, it seems to me that this is a very plain case. It is admitted that but for the Education Act this case falls directly under the decision in *Craig* v. *Greig & M'Donald*, 1863, 1 M. 1189, because here is a child, with her father dead, who, since the time of the father's death, and at her puberty, acquired a residential settlement. Now the only thing that is said to prevent the application of the decided case is that since the time of the decision the Education Act of 1901 has been passed. The Education Act of 1901, by the first section thereof, makes it the duty of every parent to provide efficient elementary education in reading, writing, and arithmetic for his children who are between five and fourteen years of age. Accordingly, the second section prohibits persons from taking into their employment children being of the age of twelve and not more than fourteen who have not obtained an exemption from the School Board. It is argued that, because of that Act, there is therefore a disability upon a female child who, although of the age of puberty, that is to say, over twelve, is still under fourteen, doing those things which really go to the acquiring of a residential settlement.

My Lords, it would be a very curious result if it were so, because, undoubtedly, I think it is easy to say that the Legislature in passing the Education Act of 1901 had not the remotest notion that they were dealing with the Poor Law. I do not think any such result follows, for a very simple reason. It has been said again and again, alas! too truly, that all these Poor Law Rules embodied in the decisions are artificial to the highest degree. How artificial in cases of this sort can easily be gathered when one thinks how practically impossible it is for a female child of twelve years of age to earn its own livelihood. But there is the rule, artificial as it is, that when the father is dead and the child is emancipated and comes to the age of puberty, it is in a position in which it is theoretically supposed to be earning its own livelihood. Therefore I think the answer to the argument is a very easy one, that, although the Act imposes certain duties upon parents to provide the child with elementary education, it does not affect the theoretical capacity of the child to earn its own livelihood. The practical capacity, as I understand, in 999 cases out of 1000 is not there, although theoretically it is. One can conceive of a child who, for some reason or other, was so gifted as to be able to perform upon an instrument such as the violin, and who, at such tender years, could make sufficient money to earn her own livelihood, and who at the same time might have quite enough hours of the day which she might devote to reading, writing, and arithmetic. But, my Lords, the answer is a simple one—that the Act which has been quoted has really nothing to do with the subject which is before us. Accordingly, I am for answering the first branch of the first question in the affirmative, and the first branch of the second question in the affirmative also.

Lord Dundas.—My Lords, the question raised in this Special Case is a very short one, and (although it has to deal with Poor Law Settlement) I think it is a very simple one. The first parties maintain that, in consequence of the Education (Scotland) Act 1901, no child can be held to become capable of acquiring an independent settlement until it has attained the age of fourteen; and they seek to apply that doctrine to the effect that, in the case of females, the age at which they become capable of acquiring such a settlement has been altered from twelve to fourteen. My Lords, I think that contention is unsound. The Act 1 Edw. VII. cap. 9 is entitled "An Act to Regulate the Employment and Attendance of Children at School in Scotland." It is an Education Act pure and simple. It does not profess in any way to deal with the Poor Law, nor can it, in my judgment, be held to do so by any reasonable implication. I think it is plain, as your Lordship has pointed out, that the statute relied upon has nothing at all to do with the subject of the Poor Law. We must therefore, in my opinion, negative the contention of the first parties; and I agree that the questions should be answered as your Lordship proposes.

Lord Mackenzie.—I concur.—*2nd November* 1907.

Counsel for First Parties, Dean of Faculty (Campbell, K.C.), Orr Deas; Agents, Mackenzie, Innes & Logan, W.S. — Counsel for Second Parties, Hunter, K.C., Addison Smith; Agents, R. Addison Smith & Co., W.S. W. A. R.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

201. Alexander *v.* Marmor Limited, *et e contra.*

Company—Director—Illegal Payment—Payment to Director of Expenses Incurred in Travelling to Attend Board Meetings Held to be Illegal.

These were cross actions to which the parties were Marmor Limited, a Company having its registered office in London, and Mr Alexander, a merchant resident in Glasgow, one of the directors of the Company. In the first action Alexander sued the Company for the sum of £525, alleged to be due to him by the Company in payment of his fees as director. The Company, in defence, averred that these sums had already been paid, with the exception of a balance of £114, of which they tendered payment. The defences in effect amounted to the statement of a counter-claim in the Company against Alexander, which claim included, *inter alia*, a sum of £279, 6s., which had been paid to him for travelling expenses, and which it was alleged the Company were entitled to recover. The Lord Ordinary (Dundas) held that the question so raised could not be raised by way of defence merely, and sisted the action in order that the Company might raise a counter-action.

A counter-action was accordingly raised in which the Company sued Alexander for, *inter alia*, the said sum of £279, 6s. In this action the pursuers averred that in 1902 the defender applied to the Board of Directors to authorise payment to him of his expenses incurred in travelling to attend the meetings of the Board; that the directors passed a resolution that travelling expenses should be paid to directors; that the defender accordingly applied to and received payment from the Company of the sum sued for, being seven guineas for each of thirty-eight attendances. They claimed repayment upon the ground that the said resolution and payment were irregular, *ultra vires*, and illegal, and that the Company and its directors had no power to authorise and make such payment.

The defender denied that the said resolution and payment were illegal or *ultra vires* of the Company, and explained that, even if the payment were *ultra vires* of the Company, the action of the directors in authorising the payment was protected under the Articles of Association of the Company. The clause of the Articles of Association upon which the defender mainly relied is quoted in the Lord Ordinary's judgment *infra*. The defender made other averments in support of a plea of bar, to which, for the purpose of this report, it is not necessary to refer more particularly. He pleaded, *inter alia*—

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5. The payment now challenged not being illegal or *ultra vires* of the Company, *et separatim* being protected by the Articles of Association of the said Company, the pursuers are not entitled to repayment of the sum claimed.

6. The defender being entitled to receive payment of said sum of £279, 6s., is not bound to make repetition of it to the pursuers.

The Lord Ordinary repelled, *inter alia*, these pleas and ordained the defender to make payment to the pursuers of the sum of £279, 6s.

Lord Dundas.—The matter involved in the first conclusion of the summons may, I think, be disposed of upon the pleadings, without the necessity of enquiry by way of proof. Payment to the defender of travelling expenses, though made and accepted in perfect *bona fides*, was, in my opinion, illegal. I find no warrant for it in the Articles of Association of the Company. By Article 77 the "remuneration" of each director (except the chairman) is declared to be £200 *per annum*. But the defender founds upon Article 92, which, under the head of "Indemnity to Officers," provides that "the directors, trustees, and officers of the Company shall be indemnified out of the funds of the Company against all costs, charges, losses, damages, and expenses which they shall respectively incur and be put to in the execution of their respective offices, or by reason or on account of any contract, act, deed, matter, or thing which shall be made, done, permitted, entered into, or executed by them respectively on behalf of or *bona fide* in the interest of or with the view of benefiting the Company, notwithstanding that the same may be *ultra vires* in point of law." These words of indemnification are wide; but I do not think that the expenses incurred by a director in arriving at the Company's board room to attend meetings (be the distance long or short) can be held to be expenses incurred by him in the execution of his office. Such expenses must, in my judgment, be included in the remuneration for which he agreed to give his services. The director, I take it, executes his office in the board room, but not on the way thither. It is, I consider, part of his ordinary duty, for which he is paid, to go to the place where the meetings are held. I should have come to this conclusion, apart from authority; but I am fortified in it by the opinion of Farwell, J. (now L.J.) in the case of *Young* [1905], 1 K.B. 687. The clause there under consideration is not, I think, materially different from Article 92 of this Company's articles, and I assent to the general observations made by his Lordship as to the position and duty of directors in this matter. . . .

The defender *reclaimed.*

The argument appears sufficiently from the Lord President's Opinion, *infra*.

The Court *recalled* the Lord Ordinary's interlocutor in so far as it decerned the defender to make payment to the pursuers of the sum of £279, 6s., and in lieu thereof found that he was bound to make payment of the said sum, and, *quoad ultra*, *adhered* to the interlocutor.

The Lord President.—There are here two

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actions. The leading action was at the instance of Mr Alexander against a Company called Marmor Ltd., and in it Mr Alexander sued for fees due to him as director. The defence was that he had already been paid, except as to a certain balance which was tendered; but the true matter of dispute between the parties was whether in an accounting between the parties the Company were entitled to get back from Mr Alexander a sum of £279, 6s. which he had been paid in the name of travelling expenses, and also whether they were entitled to get from him a sum of £100 due upon certain shares which had been allotted to him. The Lord Ordinary held that these questions could not be raised by way of mere defence, but must be raised by counter-action, and accordingly a counter-action was raised by the Company against Alexander for these two sums. It is in that action that the operative decree of the Lord Ordinary has been pronounced. What his Lordship has done is: he has decerned against Mr Alexander for £279, 6s., and he has allowed a proof as to the £100. In the reclaiming note parties have agreed that there must be a proof about this matter of the £100, as to whether it has been paid or not; but they are not at one about the £279, 6s.

Now the first question that arises upon the £279, 6s. is whether the payment as originally made was an illegal payment. It is common ground that the travelling expenses in question are not travelling expenses incurred in any particular journey on which Mr Alexander was sent by the other directors, such as a visit of inspection to quarries or anything of that sort, but simply represent Mr Alexander's own expenses in arriving at the scene of the Company's meetings, the Company's meetings being held in London, whereas Mr Alexander lived in Scotland. It is also common ground between the parties that these expenses were authorised to be made by the directors, and that they have never been submitted to one of the authorising meetings of the Company. In these circumstances Mr Alexander pleads Article 92 of the Articles of Association of the Company, which is in these terms:—"The directors, trustees, and officers of the Company shall be indemnified out of the funds of the Company against all costs, charges, losses, damages, and expenses which they shall respectively incur and be put to in the execution of their respective offices, or by reason or on account of any contract, act, deed, matter, or thing which shall be made, done, permitted, entered into, or executed by them respectively on behalf of or *bona fide* in the interest of or with the view of benefiting the Company, notwithstanding that the same may be *ultra vires* in point of law." I am clearly of opinion that these expenses do not come under either of these heads. I do not think that a payment to a director, in order to get from his own dwelling-house to where the Company has its meetings, is an expense which he is put to in the execution of his office. He only begins to execute his office for the Company at the directors' meetings. I am not doubting that a payment of travelling expenses could be perfectly well made to a director where the director, at the request of the other directors, undertakes any special visit of inspection, or undertakes to go anywhere where he would not naturally be, in the interest of the Company. If, for instance, this company had wished any of their quarries inspected, even if these quarries had been in Greece or any other far-away part of the world, I do not doubt that it would have been a perfectly good charge to charge the travelling expenses of the director who was sent out there. But the ordinary expense which a man incurs in getting from where he himself chooses to live to the seat of the Company's business, does not seem to me to be expense that is incurred in the execution of his office at all. As little could it be expense that falls under the second head, which truly deals with another and different class of matter altogether. That means that if the directors or officers of the Company have done something in the interests of the Company *bona fide*, they should be paid for the expenses that they have incurred in that, even although it may be afterwards found to be *ultra vires* of the Company. That has to do with a different category of circumstances. Therefore I have come to the conclusion, without any difficulty, that we should start the matter by finding that these expenses were illegally paid by the directors to the particular director, and the consequence is that in a question with the Company he is bound to refund this illegal payment. . . .

Accordingly I think the Lord Ordinary has come to a right conclusion. As regards the actual form of the judgment, he has made a decerniture for payment, which, of course, is not what was meant. I would advise your Lordships to recal the Lord Ordinary's interlocutor in so far as it decerns the defender to make payment to the pursuers of the sum of £279, 6s., and in lieu thereof find that the defender is bound to make payment, and, *quoad ultra*, adhere to the interlocutor.

Lord M'Laren.—I agree with all that has been said by your Lordship in the chair. On the first branch of the case I think it is perfectly clear that directors' duties in general are to be performed at Board meetings, for the business of directors of companies necessitates meetings for consultation, and the fees allowed to the directors cover the expenses of going to the Board meetings. Of course, if a director is sent anywhere on a delegated duty, it is equally clear that he has to be paid his expenses, because I do not think that his colleagues would be able to secure the services of one of their number to go upon a distant journey except under the condition that he

should be relieved of the expenses that he incurred in the interests of the Company. . . .

Lord Kinnear.—I concur.—*7th November* 1907.

Counsel for Defender and Reclaimer, Hunter, K.C., Horne; Agents, Morton, Smart, Macdonald & Prosser, W.S.—Counsel for Pursuer and Respondent, Scott Dickson, K.C., Jameson; Agents, Boyd, Jameson & Young, W.S.

W. A. R.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

202. Morton *v.* French and Others.

Writ — Authentication — Execution by Mark—Privileged Document—Nomination of Beneficiary Under Friendly Societies Acts—Held that Such a Nomination Was Not a Privileged Document, and that Execution by Mark Before Witnesses was Not a Valid Authentication.

Appeal from the Sheriff Court of Lanarkshire.

This was an action of multiplepoinding for the purpose of having determined the right to a sum of £36, 8s., due under a contract of insurance between the late Mrs Mary French and the Liverpool Victoria Legal Friendly Society, which was an industrial insurance company registered under the Friendly Societies Acts. Mrs French died on 7th January 1906, and Morton claimed the policy money in virtue of a nomination thereto in his favour, and James French and Elizabeth Macdonald claimed the sum as Mrs French's next of kin.

The next of kin pleaded, *inter alia*: "The nomination under which the said James Morton claims not being a writing under the hand of said Mary French, is of no effect."

The Friendly Societies Act 1896 provides by sect. 56 (1)—

"A member of a registered society (other than a benevolent society or working men's club) or branch thereof, not being under the age of sixteen years, may, by writing under his hand, delivered at, or sent to, the registered office of the society or branch, or made in a book kept at that office, nominate a person to whom any sum of money payable by the society or branch on the death of that member, not exceeding one hundred pounds, shall be paid at his decease."

The nomination was as follows:—

"I, Mary French, of 57 Jamieson Street, Govanhill, Town of Glasgow, not being under the age of sixteen years, hereby revoke all previous nominations, if any, made by me, and do hereby nominate James Morton, of 32 Carfin Street, Govanhill, Town of Glasgow, to receive the money payable on my death on insurance dated 25/6/04 (5316782) (as per ordinary branch policy) in accordance with the table of assurance and rules of the above named society in use at the date of such assurance and any alterations or amendments of the said rules.

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"Signed by me in presence of two disinterested witnesses this twenty-first day of June one thousand nine hundred and five,

Signature	her Mary × French. mark
(In case of a female, state if single, married or a widow.)	Widow.
(The person nominating must here state what relation, if any, he or she is to the person nominated.)	Friend.
First witness	William Shearer,
Address	9 Kelvingrove Street, Glasgow.
Second witness (who must be the agent or collector)	Geo. Evans,
Address	111 Allison Street, Glasgow.

"I hereby certify that the signatures of the witnesses and member are genuine, and that they are in the handwriting of the persons named, and that I was present when they attached their signatures, and that I signed my name at the same time as witness.

Signature (of agent or collector)	Geo. Evans,
District	Glasgow.
Agent	Stephen H. Payne, 143 West Regent St.
Collector's name	Geo. Evans,
Collector's address	111 Allison Street, Glasgow."

The Sheriff-Substitute (Davidson) *found* that Mrs French had duly nominated James Morton to the policy money and ranked him to the fund *in medio*.

On appeal the Sheriff (Guthrie), without recalling the Sheriff-Substitute's finding as to the validity of the nomination, *held* that the next of kin were entitled to the policy money.

James Morton appealed to the Court of Session.

Argued for Appellant: This was neither a will nor a formal document. It was in the nature of an assignation. Such a society as this was bound to recognise and follow a practice, such as had been proved in the case, of giving effect to a signature by mark in making a nomination (*Marito's Case*, 1867, L.R. 2 Ch. Ap. 596). In an ordinary contract signature by mark was sufficient, and this was such a case (*Baker* v. *Denning*, 1838, 8 A. and E. 94; Addison on Contract, 10th edit., p. 38). In another view this was a highly privileged document, and it should receive such privileges in the matter of signature as were given to privileged documents. Documents *in re mercatoria* were allowed to be authenticated by mark, and such execution ought to be given effect to in a document specially permitted by Act of Parliament for the reasons which moved Parliament to provide for such nominations.

Argued for Respondents: Signature by mark was held sufficient only in the case of documents

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in re mercatoria. A nomination such as this was really of the nature of a will (*Baxter* [1903], P. 12). By the law of Scotland signature of a will by mark was not sufficient (*Stirling Stuart* v. *Stirling Crawfurd's Trs.*, 1885, 12 R. 610, per Lord M'Laren at p. 617). And that was the law with regard to all documents not *in re mercatoria* (*Graham* v. *M'Leod*, 1848, 11 D. 173; *Crosbie* v. *Wilson*, 1865, 3 M. 870; Bell's Conveyancing, 3rd ed., I. 49; Ersk., III. ii. 7, 8). Bell's Com., I. 342, stated what were writs *in re mercatoria*, and such deeds as the present were not included. The only methods of executing other deeds were the old method with four witnesses and two notaries, and the method prescribed by sect. 41 of the Conveyancing Act of 1874.

The Court *held* that the nomination founded on by James Morton was invalid, in respect it was not duly authenticated.

The Lord Justice-Clerk.—I think that the document founded on in this case is not one which can receive effect. In my opinion it is not legally signed and authenticated. I am satisfied that this is a case in which no relaxation can be allowed of the rule of law as to the authentication of deeds. Our law has always been very strict in that matter, and it does not depend on custom but on distinct statutory enactment. In certain cases where formality is not required, authentication by mark has been allowed. I allude to the class of writings known as *in re mercatoria*, but we are not here dealing with a document *in re mercatoria*. It is a deed which is practically testamentary in its nature. It is a revocable deed, and one which the party who signs can set aside. It has been held in England that such a document may be testamentary in its character, and with that I agree. The only remaining question is—Does the mode of authentication fall within any special expression as to the manner of nomination contained in the Act? In some cases—*e.g.* under sect. 16 of the Marriage Notice (Scotland) Act 1878—a person who is unable to write is allowed to adhibit his signature by a cross or other mark. But here the words of the statute simply are "by writing under his hand," without specifying the mode of signing. Where a relaxation in the rule as to signing is allowed, it has been specifically done by Act of Parliament. Here we have no such relaxation by the Friendly Societies Act, under which alone we are. We must therefore follow the universal rule of law, to which no exception has been made.

I propose that the first plea in law for James French should be upheld.

Lords Stormonth-Darling, *Low*, and *Ardwall* concurred.—21*st November* 1907.

Counsel for Appellants, A. M. Anderson; Agent, J. S. Morton, W.S.—Counsel for Respondents, Spens; Agents, Macpherson & Mackay, S.S.C.

F. A. U.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

203. Mackenzie *v.* Cluny Hill Hydropathic Company Limited.

Master and Servant—Wrongful Act of Servant—Liability of Master—Manager of Hydropathic Establishment Interfering to Settle Dispute Between Guests—Detaining Guest in Manager's Room Against Her Wish—Whether Manager Acting Within the Scope of Employment—Issue Allowed.

Reclaiming Note against an Interlocutor of Lord Salvesen.

In this action the pursuer, Mrs Mackenzie, sued the defenders for damages in respect of a wrong alleged to have been committed by their manager at their hydropathic establishment, the wrong consisting in having detained her in his private room against her will for a period of about fifteen minutes.

The pursuer stated:—

Cond. 2. On or about 19th August 1906 the pursuer was residing at the defenders' hydropathic, Forres, owned by the defenders, who are a limited company. The manager thereof at said date was Thomas M'Nair, who was entrusted by the defenders with the management of the hydropathic and the supervision of the comfort of the guests in the defenders' hydropathic.

Cond. 3. Late in the evening of the date in question the defenders' said manager went to the recreation room, where pursuer was, and requested her presence in his private room, saying that a lady, who was ill, wished to see her, and in accordance with the said request the pursuer went to the said private room. The pursuer went to the said room by request of the said Thomas M'Nair, believing, as was the fact, that in making the said request he was acting as the defenders' manager.

Cond. 4. When the pursuer arrived in the said private room she found there a Mr and Mrs Robertson, who were her fellow-guests in the hydropathic. The said Mrs Robertson had, for some reason or another unknown to the pursuer, conceived an ill-will against her. There were also present Mrs M'Nair, wife of the said Thomas M'Nair, and the said Thomas M'Nair. The pursuer was detained for a considerable period against her will in the said private room, and an assault was committed upon her by the said Alexander Robertson. The said Alexander Robertson also slandered her by calling her a low woman, and alleging she had previously caused disturbances "here." The pursuer endeavoured to leave the manager's room. She put her hand on the handle of the door and the said Alexander Robertson then stepped between her and the door, and struck her hand from the handle. Mr and Mrs Robertson then both placed themselves against the door to keep it shut. The pursuer then pointed out to the defenders' manager that she was being forcibly detained in the said room, and asked him to see that she was allowed to leave, but this the said manager refused to do.

The said manager, for some fifteen minutes, then aided and abetted the Robertsons in preventing the pursuer from leaving the said room in manner aforesaid. The said manager neither ordered nor even requested the Robertsons to let the pursuer out, nor did he ring the bell or take any other steps open to him to have the pursuer's detention ended. Had the defenders' manager requested the Robertsons to allow the pursuer to leave the room, the pursuer believes and avers they would have done so. Had the manager summoned assistance by ringing the bell, or in any other way, assistance would have been forthcoming, and the pursuer's detention ended. Although the pursuer was anxious to leave the said room, and so expressed herself to the defenders' manager, she was nevertheless detained and prevented from leaving the said room for a considerable period (about fifteen minutes) by the said manager, who said he would not allow her to leave the room till she apologised to Mrs Robertson for slamming a door in her face—a thing she, the pursuer, had never done.

Cond. 5. In asking pursuer to go to his private room, and in detaining her there against her will as aforesaid, the defenders' manager was acting within the scope of his employment and in the supposed furtherance of the defenders' interests. He had no right, in the circumstances, to induce the pursuer to go to his room when he knew, as he did, that the Robertsons had an ill-will towards her, and that she would be unprotected, and he was bound to have at once seen that she, the defenders' guest, was allowed to leave the room when she wished to. He failed in his duty, and along with Robertson and his wife, detained her in the said room for a considerable period. Such detention was illegal and improper, and the defenders are liable therefor to the pursuer for the loss, injury and damage occasioned thereby.

The pursuer pleaded:—

"1. The pursuer having suffered loss, injury and damage through the wrongous and illegal actings of the defenders' servant as condescended on, decree should be granted as craved.

"2. The defenders' servant, acting within the scope of his authority from the defenders, having wrongously induced the pursuer to enter his private room, and thereafter having wrongfully detained the pursuer there as condescended on, decree should be granted as craved."

The defenders pleaded that the action was irrelevant.

The Lord Ordinary *found* that the allegations of the pursuer were not relevant, and *assoilzied* the defenders.

Lord Salvesen.—The pursuer of this action avers that on 19th August 1906 she was a guest in the hydropathic belonging to the defenders, that on the evening of that day she was summoned by the manager to his private room, and that when she arrived there she was slandered and assaulted by two fellow guests, Mr and Mrs Robertson. She has already raised an action against these persons in which issues have been adjusted—there being no question of the relevancy of her averments as against them. She maintains, however, that she has a separate ground of action against the present defenders on the ground that their manager detained her in the room against her will for a considerable period (about fifteen minutes). She avers that in doing so he was acting within the scope of his employment, and in the supposed furtherance of the defenders' interests.

The injury which the defenders' manager is said to have done to the pursuer is so small as to be almost microscopic. It is not said even in the amended record that he laid hands upon her, or that he in any way actively contributed to her detention in the room. This is part of her grievance against Mr Robertson, who is said to have stood against the door and prevented her opening it. The complaint against the manager seems rather to be that he did not intervene to protect her against the Robertsons by ringing the bell, or otherwise summoning assistance, or by requesting the Robertsons to permit her to leave. It is not suggested that he could thereby have prevented the alleged assault, but only that he might possibly have shortened her detention in the room by some minutes. Even against the manager, therefore, it does not appear to me that it would be possible to construct a relevant case. It follows that if there can be no action against the servant because of his *non*-intervention in the quarrel between the pursuer and the Robertsons there can be no possible claim against his employers.

There is, however, another and separate ground on which I think that the defenders are entitled to be assoilzied. It was decided in the case of *Poulton*, L.R., 1867, 2 Q.B. 534, that the scope of a servant's authority is always limited to such acts as the employers could lawfully do themselves. For a mistake or excess in committing such an act by a servant, his employer may well be held responsible, but not for an act which the employers cannot be supposed to have authorised, because they had no authority to do it themselves. I assume that it is part of the duty of a manager of a hydropathic to attend to the comfort of the guests, as the pursuer avers, but it would be odd if I were required to hold that this impliedly authorised him to be a party to the detention of one guest in order to gratify the ill-will of another. The pursuer was unable to cite any authority for such a novel proposition. The only case referred to was that of *Bryce* v. *The Glasgow Tramway Company*, 1898, 6 S.L.T. 49. It has, in my opinion, absolutely no application. The act which the servant in that case was alleged to have done in a careless and reckless manner was an act which it was his duty towards his employers and in their interests to do, and accordingly the action was well directed against his employers.

I shall accordingly assoilzie the defenders, and I have the less hesitation in doing so as it appears to me to be plainly in the interests of the pursuer that she should not be embarrassed with a second action for damages arising out of the self-same *species facti* as have already been remitted for trial by a jury. If she succeeds in that case, she will recover full compensation for all injury that she has suffered; if she fails, it is scarcely conceivable that she could recover against the present defenders.

The pursuer *reclaimed*.

Argued for the Pursuer: The action was relevant. The wrong complained of was distinct from the assault referred to. It was an actionable wrong for the manager of the hydropathic to detain the pursuer in his private room against her will. He was restraining her freedom. It was a monstrous thing for

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such a manager to say he would not allow a guest in the establishment out of his private room until she apologised to another guest. There was no doubt he was acting within the scope of his employment in trying to settle disputes between the guests. It was for the peace and harmony of the establishment that the manager should have power to do such a thing at times, and he must be the judge of the time to do it. If in doing a thing which he had power to do he did an actionable wrong the defenders as his employers were liable. It was absurd to say that whenever he did what was illegal he did not render them liable because they could not be assumed to authorise an illegal act. That would put an end to all actions against a master for a wrong committed by his servant. If he was authorised in the course of his employment to do what he was doing at the time in a legal manner, the defenders would be liable for an illegal manner of doing it. Counsel referred to *Citizens Life Assurance Co. Ltd.* v. *Brown* [1904], A.C. 423; *Wood* v. *North British Railway Company*, 1899, 1 F. 562; *Dyer* v. *Munday* [1895], 1 Q.B. 742; *Poulton* v. *London and South-Western Railway Company*, 1867, L.R. 2 Q.B. 534; *Limpus* v. *London Omnibus Company*, 1862, 1 H. and C. 526; *Ward* v. *General Omnibus Company*, 1873, 42 L.J. C.P. 265; *Ellis* v. *National Free Labour Association*, 1905, 7 F. 629; *Maxwell* v. *Caledonian Railway Company*, 1898, 25 R. 550; *Bryce* v. *Glasgow Tramway and Omnibus Company*, 1898, 6 S.L.T. 49. The application of the principle *de minimis non curat lex* had no place in the case of reparation for a wrong.

Argued for Defenders: There was no relevant statement that the act complained of was in the scope of the manager's employment. It was necessary in all cases against a master for the act of his servant for the pursuer to aver (1) employment, and (2) facts from which the Court could infer that the act complained of was done for the master's benefit. The first was admitted. As to the second there might be either of two cases. The authority might be to make a contract and the action might be laid on contract. In that case the master was, *prima facie*, liable; he took the risk of the servant exceeding his powers. But where the action was laid on a wrong committed, *prima facie* the master was not liable, because he there took no risk. Here the *onus* was on the pursuer, and he was bound to shew that the manager was acting for the master's benefit in what he did. But it appeared from the condescendence that he was not so acting, because it was stated that the other guest, Mrs Robertson, had conceived an ill-will towards the pursuer, that the manager knew this, and that he intervened on her behalf in order to try and extract an apology from the pursuer to her. That could not be acting for the benefit of the defenders. Counsel founded on *Limpus* v. *London Omnibus Company*, *cit. supra*; *Wardrope* v. *D. Hamilton*, 1876, 3 R. 876; *Lundie* v. *MacBrayne*, 1894, 21 R. 1085; *Gillespie* v. *Hunter*, 1898, 25 R. 916. The maxim *de minimis non curat lex* was applicable. The pursuer had already sued an action against the Robertsons and obtained damages on the same *res gestæ* as were founded on here. There was only one incident. The pursuer was not entitled to split it up into the subject of several actions (*Ferguson* v. *Colquhoun*, 1862, 24 D. 1428; *Hassan* v. *Paterson*, 1885, 12 R. 1164). She had suffered no damages from any detention she might have been subjected to, and an action for damages in the circumstances averred was ridiculous.

The Court *recalled* the interlocutor of the Lord Ordinary and *allowed* an issue in the following terms, viz.:—

"Whether, on or about 19th August 1906, the defenders' manager, Thomas M'Nair, acting within the scope of his employment by the defenders, having induced the pursuer to enter his private room in the defenders' hydropathic establishment, wrongously detained her there,—to her loss, injury and damage?

"Damages laid at £400."

The Lord Justice-Clerk.—I cannot see any ground for treating this case as one which ought to be disposed of without the facts being first ascertained. Such cases necessarily depend very much on the particular facts, and if this record does not present such features as make it necessary to assume that the manager of the hydropathic establishment was not acting in the course of his employment, then I think it must be allowed to go to trial.

I do not think a case of this kind can be dealt with on any application of the *de minimis* principle, at least until the whole facts are found. It is the facts alone on which the question of *de minimis* can arise.

We had a suggestion from the Solicitor-General that the manager could not be acting in the course of his employment, because the pursuer says that he induced her to go to his room because a fellow-guest had conceived an ill-will toward her and he knew it, and that therefore he was acting not as manager but in the private interests of the other guest. That, of course, is a statement which she will be entitled to prove. But the case is of this kind, that this lady says that she went willingly to the manager's room and was detained there against her will for an appreciable time. The manager certainly got her to go there while acting in the course of his employment, and I do not see any ground for saying that on the statements made on this record he must have ceased so to act before she was detained. I must say I think the statement quoted to us from the opinion of Lord Lindley in the case of the *Citizens Life Assurance Company*

v. *Brown* [1904], A.C. 423 at pp. 427–8, is applicable to this case. "The law upon this subject cannot be better stated than it was by the acting Chief Justice in this case. He said: 'Although the particular act which gives the cause of action may not be authorised, still if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant.'" I can have no doubt that the manager of a hydropathic establishment is authorised to interfere in the way referred to in this case when there is a quarrel between guests, and to bring them together to have the matter put right. If in the course of so doing he commits an actionable wrong, I have no doubt the master is liable. I propose to your Lordships that we allow an issue.

Lord Stormonth-Darling.—It is only because we are reversing the judgment of the Lord Ordinary that I add anything to what has been already said by your Lordship. The main question at this stage of the case is whether there are relevant averments of an actionable wrong for which the manager's principal, *i.e.* the Hydropathic Company, may be liable. I think it must be admitted that the wrong, if wrong there was, was a very small one, for the averments of the pursuer at most amount to this, that the manager persuaded the pursuer to enter his private room, and detained her there against her will for some fifteen minutes.

I think, however, that these averments are relevant, and that the case must go to a jury. I am accordingly in favour of allowing an issue, although I hope that parties may yet see their way to settling this insignificant dispute. I think it unnecessary to attempt to improve on the statement of the law applicable to such cases, which has already been made by many eminent judges. I am content to take the statement quoted by your Lordship from the opinion of Lord Lindley in the *Citizens Life Assurance Co.* v. *Brown* [1904], A.C. 423. Applying that law, I think the facts must be ascertained, unless it clearly appears from the pursuer's own averments that the servant was *not* acting in the course of his employment.

Lord Low.—I am of the same opinion. We are asked to throw out this action upon three grounds: *first*, that there are no relevant averments of an actionable wrong; *second*, that upon the averments it is evident that the manager was not acting within the scope of his employment or in the course of his duty; and *third*, that in any event the whole affair was trifling and the damage suffered negligible. In regard to the first of these grounds I have no doubt that a wrong, and in my view not a trifling wrong, has been averred. It is averred that the manager detained this lady in his room for fifteen minutes after the assault had been committed, and refused to let her go until she made an apology. If that be true it was an outrage, and a relevant case has been stated.

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Lord Low.

As to the second ground I have nothing to add to what has been said by your Lordship. It cannot be doubted that the manager, at first at all events, intervened in his capacity as manager, and there must be enquiry to find out whether in his subsequent actings he abandoned that capacity and acted as a private individual. As to the third ground, if an actionable wrong was committed, it does not matter that, *prima facie*, the pursuer sustained but little injury; she is, at any rate, entitled to ask a jury to assess the damage.

Lord Ardwall.—I regret that I feel bound to concur with the opinion your Lordships have expressed that this case must be sent to a jury. I cannot accept without considerable qualification the law laid down by the Lord Ordinary; and although the case is a narrow one, I am not prepared to say that it is irrelevant. While there is much force in Mr Murray's contention that the whole affair was really one incident, which a jury have already considered, and for which they have already awarded the pursuer a certain sum of damages, still, if the averments are carefully scrutinised, it is apparent that two separate wrongs are complained of: *firstly*, slander and assault by Robertson (the case already considered by a jury); *secondly*, illegal detention by the manager (the case in which an issue is now asked). It cannot, therefore, be maintained that the pursuer is not entitled in law, if not in equity, to bring a second and separate action. I express no opinion as to the nature of the injury she sustained; that is a question for the jury.—*23rd November* 1907.

Counsel for Pursuer, G. Watt, K.C., Spens; Agents, Bryson & Grant, S.S.C.—Counsel for Defenders, Solicitor-General (Ure, K.C.), C. D. Murray; Agent, Robert Stewart, S.S.C.

F. A. U.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

204. Macandrew *v.* Dods.

Dean of Guild—Appeal—Appeal against Interlocutor in which Petition Sisted that Parties might Establish their Rights by Action at Law—Lining opposed before Dean of Guild Court as Transgressing Building Restrictions in Petitioner's Title—Circumstances in which Held Inexpedient to Disturb the Discretion of Dean of Guild, and Interlocutor Sisting Cause Affirmed — Observations by the Lord President as to Extent of Dean of Guild's

1ST DIV. DISCRETION TO REFER TO COURT OF SESSION DIFFICULT QUESTIONS OF CONSTRUCTION AND ENQUIRIES INTO DISPUTED QUESTION OF FACT.

Macandrew v. Dods.

Appeal from the Dean of Guild Court at Edinburgh.

This was a petition to the Dean of Guild Court by Colin Macandrew, proprietor of ground situated at No. 13 Lauriston Gardens, Edinburgh, asking warrant to the petitioner to erect upon the said premises, buildings consisting of offices and lavatory. The petition was opposed by Dods, a contiguous proprietor in Lauriston Gardens. The respondent's opposition was mainly upon the ground that the erection of the proposed buildings would be a contravention of two restrictions imposed upon the petitioner by his title, and enforceable by the respondent, viz.: (1) a prohibition against the erection of buildings other than villas upon the subjects; and (2) a prohibition against the erection of buildings thereon exceeding a certain height. The respondent also averred that in 1899 an application was made to the Dean of Guild by the present petitioner for a warrant very similar to that now craved; that on that occasion the parties in right of the feu now owned by the respondent opposed the application on grounds identical with those now put forward; in those proceedings the Dean of Guild having considered the whole cause, sisted the petition to enable the rights of the petitioner and the then respondents respectively to be established in the Court of Session, but that no further steps were taken at that time by the petitioner to establish his rights. The petitioner denied the respondent's statements as regards the said restrictions, and averred especially, with regard to (1) that if any restriction existed such restriction was only against feuing the subjects for the erection of buildings other than villas, not against the erection of such buildings by the petitioner; and with regard to (2) that the plot of ground upon which it was proposed to build was not within the area to which the alleged restriction applied. The circumstances of this application appear more fully from the Dean of Guild's note, *infra*.

The respondent pleaded, *inter alia*:—

2. The questions raised in this process being questions of heritable right, are not competent for decision in the Dean of Guild Court, and the petition accordingly falls to be dismissed or sisted till such questions are competently determined.

6. The same questions as are here agitated having been raised in this Court in 1899, and the then Dean of Guild having allowed the petitioner an opportunity of establishing his right in the Court of Session, of which he has not availed himself, he is barred from pursuing the present petition, or otherwise the same should be dismissed or sisted.

The Dean of Guild pronounced the following interlocutor:—

Having heard counsel for the parties, and considered the whole cause, sists the petition to enable the petitioner to establish his alleged rights in the Court of Session, and decerns.

Note.—The petitioner acquired certain land on the west side of Lauriston Gardens from Beattie's trustees by disposition dated 30th March, and subsequent dates, 1889. In that disposition the only restriction upon the land was expressed as follows:—"Declaring that the said Colin Macandrew and his foresaids shall be bound, as by acceptance hereof he binds and obliges himself and his foresaids, not to feu the piece of ground hereby disponed, except for the building of villas, unless with the consent of the feuars in Lauriston Gardens, to whom we or our predecessors in office, as trustees foresaid, have undertaken the like obligation in the feu-rights granted by us to our foresaids; and also that in so far as we are or may be held to be under any obligation ourselves not to erect on the said piece of ground any other buildings than villas, unless with consent foresaid, the said Colin Macandrew and his foresaids shall be under the same obligation, it not being intended to impose on them any obligation against themselves erecting other buildings than villas, unless such obligation already exists upon us, in which case the same obligation shall continue to exist, and shall be binding on them; which burden, obligation, and declaration hereinbefore contained are hereby created and declared to be real servitudes and burdens upon and affecting the piece of ground before disponed, and as such are appointed to be recorded in the Register of Sasines, as part of these presents, and inserted or validly referred to in any notarial instrument to follow hereon, and in all future transmissions and investitures of the said piece of ground or any part or portion thereof, under pain of nullity of the deed, writ or instrument from which the same shall be omitted." The respondent is the owner of the house and ground immediately to the north of the petitioner's land. The respondent's land was feued by feu-contract dated 9th and 10th December 1863, between Beattie's trustees and William Gibson. The respondent's land was feued with reference to a feuing-plan, and in the feu-contract it is declared that the said feuing-plan is referred "to for no other purpose whatever than as shewing the position of the ground hereby feued, the said parties of the first part reserving right to themselves and their successors to deviate therefrom as they shall think proper in regard to the unfeued ground, except that the said feuing-ground shall only be feued for the erection of villas." In the said feu-contract there is also the following declaration:—"Declaring that the house of Lauriston Lodge and grounds surrounding the same, as shewn on said plan, which has now been feued, shall not be used for such purposes as shall be a nuisance to the said William Gibson and the other feuars, and declaring that no building shall be erected by the said parties of the first part (*i.e.* the granters), or by their feuars on the grounds of Lauriston Lodge southward of the plot of ground marked A on the said feuing-plan feued to Adam Beattie to the extent of the breadth of that plot on the south side thereof, and to the south boundary of the grounds of Lauriston Lodge, of greater height than the boundary wall of the back-ground of the houses, being 6 feet high, with the exception of summer houses, which may be erected of a greater height, and the said parties of the first part shall take the feuars from them bound to this effect, and to submit to them the plans of any contemplated summer houses to obtain the approval

of the party of the second part (*i.e.* the said William Gibson) or his foresaids before erection thereof." There is no dispute that the lands of the petitioner are part of the lands of Lauriston Lodge. The respondent maintains that (1) there is a valid restriction in the petitioner's title of his land, so that only villas can be erected on it. Admittedly the petitioner's proposed building is not a villa. The respondent also maintains (2) that the petitioner's land is part of the land subject to the servitude created by the respondent's title. The petitioner denies that the land is subject to that servitude.

In 1899 the petitioner made a similar application to this Court, and the respondent avers that that application was for warrant for a building on the same land as the petitioner now proposes to build on. The application in 1899 was opposed by the then owner of the respondent's feu. This Court sisted the petition in 1899 to enable the rights of parties to be established in the competent Court. The petitioner did not proceed after this Court's judgment in 1899 to establish his alleged rights. The Dean of Guild sees no reason for going back on the judgment of the Court in 1899, and therefore he again sists the petitioner's application, and for the reasons expressed in his opinion in 1899 he thinks that it lies on the petitioner to establish his rights.

The petitioner *appealed* to the Court of Session.

In addition to the argument upon the merits which was submitted to the Court, it was *argued* for the Petitioner and Appellant: The Dean of Guild might competently dispose of this question, and he had unduly withheld his jurisdiction. The petition should therefore be remitted back to him for his judgment on the merits.

Argued for the Respondent: It was competent for the Dean of Guild to use his discretion in the matter as to whether he should dispose of a difficult point of law or should allow parties to obtain the judgment of the Court.

The Court *dismissed* the appeal, *affirmed* the interlocutor appealed against, and remitted the cause to the Dean of Guild.

The Lord President.—My Lords, this case is not one that comes under quite ordinary circumstances. The proprietor of ground in Edinburgh wished some years ago to put up certain buildings. He was then opposed upon grounds which depended upon rights as shewn in the title both of the opponent and of himself, and at that time the Dean of Guild pronounced an interlocutor sisting the case, because he considered that the matter had better be determined in an action at law, and not by pronouncing an interlocutor upon the merits of the case in the Dean of Guild Court. The proprietor at that time acquiesced in that view, and did nothing. He gave up for the time his proposal to build, and he did not raise an action. He then comes back again to the Dean of Guild Court, and he repeats his crave to have a decree of lining granted; and the Dean of Guild of the present time has repeated the interlocutor of his predecessor. An appeal has been taken against that interlocutor by the person who wants to build. His counsel has urged upon your Lordships that the Dean of Guild here has unduly withheld his own jurisdiction, and that the case ought to go back to him again with a behest from your Lordships that he should proceed to dispose of the merits of the case.

Now, my Lords, I am exceedingly far from laying down the proposition that it is not proper of the Dean of Guild to take up questions of legal restriction, where there is no proper competition of heritable right, and where the questions are merely whether the restriction applies or not, however hard and difficult these questions may be. The Books are full of cases where the Dean of Guild in the first instance has had to decide difficult legal questions, and his decisions have come up for review at this Court. If this case had been one where the whole question turned upon the construction of a legal document, and upon construction alone, then I think your Lordships would have been probably inclined, either to send it back to the Dean of Guild or, as has been urged by counsel, to have proceeded at once yourselves to a determination of the case. When the particular restrictions that we have to deal with here are brought before our notice, it is abundantly made clear to me that there is one of them at least that cannot be finally determined without settling a disputed question of fact, and accordingly there has got to be an enquiry.

Now, my Lords, I am certainly not going to start the idea that parties who want an enquiry into these matters are entitled to come to the Inner House and then ask the Inner House to have an enquiry before themselves. Accordingly the only form of enquiry that should be allowed is either to send the case back to the Dean of Guild for enquiry, or to allow the matter to be raised at law. I do not say that if the Dean of Guild had chosen to take up an enquiry any objection would have been made. But he did not. It was a question of discretion, and it was a question of discretion in circumstances where he found that his predecessor had pronounced an interlocutor to that effect some years before, and that no opportunity had been taken to give effect to that interlocutor. That being so, I do not think it is expedient, in the circumstances of this case, to disturb the discretion of the Dean of Guild. I think, therefore, that as there are difficult questions here of construction, and also one question resting upon the determination of fact, they had better be determined by an action at law; all the more that the question of fact seems to me to be a question of fact which really will turn upon questions of evidence rather than upon questions of a practical character, such as the Dean of Guild is specially entitled to determine. We are told here that the plan upon which this matter turns is lost. It is, therefore,

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not a question of simply going to the ground with a plan—that is to say, it is not a surveyor's question, where the Dean of Guild certainly would be a very good person to determine it. It really comes to be a question of evidence. What sort of evidence I do not quite know: but I suppose it will either be whether certain adminicles will really do instead of the plan, or whether these adminicles have been so lost that, the plan also being lost, the restriction, such as it is, must be held *pro non scripto*. All these things depend upon legal, and not upon surveying considerations. I therefore think that in the whole circumstances of the case, which I look upon as a peculiar one, the Dean of Guild was right, and your Lordships should affirm his interlocutor; the case, of course, being sisted in order that the petitioner may raise the question by appropriate action at law.

Lords Kinnear and *Dundas* concurred.—31*st October* 1907.

Counsel for Petitioner and Appellant, Chree, Macmillan; Agents, Menzies, Bruce-Low and Thomson, W.S.—Counsel for Respondent, Hunter, K.C., A. M. Mackay; Agents, Waugh & M'Lachlan, W.S. W. A. R.

SHERIFF COURT.

(*Sheriff-Substitute Shennan and Sheriff Cullen, K.C., at Dunfermline.*)

205. Home Drummond and Others *v.* Thomson and Others.

SHERIFF—JURISDICTION—INTERDICT—HELD THAT THE SHERIFF OF A COUNTY HAS NO JURISDICTION TO GRANT INTERDICT AGAINST PARTIES RESIDENT WITHIN THE COUNTY, IN RESPECT OF THE ILLEGAL USE BY THEM OF A HERITABLE SUBJECT (SALMON FISHING) SITUATED IN ANOTHER SHERIFFDOM.

In this action, which was raised in the Sheriff Court of Fife and Kinross at Dunfermline, the pursuers craved the Court "to interdict, prohibit and discharge the defenders," all of whom resided in Kincardine, county of Fife, "and each of them, from fishing for salmon or fish of the salmon kind in any part of the river or estuary of the Forth, with the nets known as drift nets or hang nets, and from placing or setting nets of that description in any part of the said river or estuary, and from fishing for salmon or fish of the salmon kind in any part of the said river or estuary with any description of net in the mode of fishing known as drift-net or hang-net fishing."

The facts and defenders' pleas appear from the Notes of both the Sheriff-Substitute and the Sheriff.

The Sheriff-Substitute (Hay Shennan) sustained the defenders' plea of "no jurisdiction," and dismissed the action. He added the following Note.

Note.—The pursuers are proprietors of salmon fishings in the Forth, and the defender Thomson is the lessee of salmon fishings situated lower down the river than the pursuers' fishings. It is stated that the other two defenders are fishermen in Thomson's employment. Pursuers aver that on 21st August 1906 defenders fished in an illegal manner at a place in the parish of Airth and county of Stirling. Defenders all reside at Kincardine, in the county of Fife. The petition prays that the defenders be interdicted from fishing for salmon in the mode of fishing known as drift-net or hang-net fishing in any part of the river or estuary of the Forth. The defenders plead incompetency, and no jurisdiction. No doubt these pleas run into each other, since lack of jurisdiction is one form of incompetency. But I understand that the plea as to competency was intended specially to raise the question whether the remedy sought was of such a character that it could ever be granted in the Sheriff Court. As I am of opinion that I have no jurisdiction, it is unnecessary to deal with this phase of the plea of incompetency, but it is proper to state that, as at present advised, I am of opinion that it is competent to grant in the Sheriff Court an interdict of the kind prayed for, to take effect within the territorial limits of the sheriffdom only.

The pleadings raise no question of heritable title, but only the simple issue of fact whether defenders used a method of fishing for salmon which has been declared by the House of Lords to be an illegal method. Further, there is no doubt that defenders are amenable to the jurisdiction of this Court, on the ground of residence within the sheriffdom. But jurisdiction is defined not only in regard to persons, but also in regard to subject-matter, and the real question in this case is, whether the subject-matter is one on which the Sheriff of Fife and Kinross has power to adjudicate? It is therefore necessary to consider what the subject-matter of the action is. When the question relates to moveable rights or to personal obligations which may be fulfilled anywhere (*cf.* Ersk. Inst., I. ii. 17), it is enough to found jurisdiction that the defender has his residence within the Sheriffdom to the Court of which he is cited. But "if the subject in question be immoveable, the judge of the territory where it is situated is the sole judge competent, so far as he hath cognisance of heritable rights; for things that are immoveable are incapable of shifting places, and must therefore be restored in that place where they lie, and by the warrant of the judge whose jurisdiction reacheth over them" (Ersk. Inst., I. ii. 17). The test seems to be this:—Where does the act or obligation fall to be performed? Where is the decree to be worked out?

Obligations relating to moveables and personal

obligations (even a personal obligation to convey land) can be implemented anywhere, and accordingly in such cases the debtor in the obligation is sued in the court which has jurisdiction over him *ratione domicilii*. But the obligations and duties relating to the use of an immoveable subject can be fulfilled only at the place where the immoveable subject is. This is true even of a negative obligation, such as an interdict creates, because such an obligation is prestable only in the vicinity of the subject itself. The matter of jurisdiction in the case of immoveable subjects is dealt with in an English case, in which the British South Africa Company sued the Mozambique Company in the English Courts for trespass to lands situated in South Africa (L.R. 1893, App. Cas. 602). The general rule was admitted that the court of the *locus* is the court to deal with all such questions, but pursuers specially founded their case on the statutory rules of procedure of the English Courts. The House of Lords, however, affirmed the general rule, and refused to sustain the action.

Now the subject-matter of this action is the mode of using the right of salmon fishing in the river and estuary of the Forth, an area which extends into three sheriffdoms. The action is essentially a possessory one. It is a mistake to suppose that possessory questions are only those in which effect is given to possession for seven years. "In cases where no question of heritable right arises, where the heritable right is admitted and undisputed, but where the parties are at issue as to the mode in which they may use and enjoy their respective rights, the Sheriff has undoubted jurisdiction to regulate *ad interim* the mode of possession, and this apart altogether from the usage during the last seven years" (per Lord Gifford in *Sutherland* v. *Thomson*, 29th Feb. 1876, 3 R. 485 at p. 494). This action is neither more nor less than one to regulate the exercise of a heritable right—the right of salmon fishing—an immoveable subject. This being so, the defect of jurisdiction is plain. The Sheriff of Fife and Kinross can only regulate the right of salmon fishing within the sheriffdom. Here I am asked to regulate it within two adjoining sheriffdoms as well, and the illegal act complained of, on which the prayer for interdict is founded, is one which took place in one of these adjoining sheriffdoms. In my opinion, the decree which pursuers ask is plainly *ultra vires* of the Sheriff of Fife and Kinross, and indeed is a decree which only the Court of Session can grant. The matter may be well illustrated by supposing that pursuers here were praying (as they might) for an order for the removal of fixed engines in the Forth in a question of interim possession. It would be plainly incompetent for the Sheriff of Fife to grant warrant for the removal of a fixed net or fixed engine, situated in a part of the Forth which is in the sheriffdom of Stirling. I see no distinction in principle between that case and the case of interdict against fishing in a certain manner within that same part of the Forth. The negative remedy and the positive alike can be given only by a judge having jurisdiction over the territory affected.

If pursuers wish an interdict as wide as they crave, they must go to the Court of Session for it. If they are content with an interdict limited to the sheriffdom of Stirling, Clackmannan and Dumbarton, grounded on the alleged illegal fishing within that sheriffdom, I should think there is little doubt that the Sheriff of Stirling has jurisdiction at least over the tacksman Thomson, for the principle affirmed in *Culross District Committee* v. *Smith-Sligo's Trs.*, 19 R. 58, seems as applicable to a tenant as to proprietor.—15*th October* 1906.

The pursuers appealed to the Sheriff (Cullen, K.C.), who adhered to the interlocutor of the Sheriff-Substitute, and added the following note:—The pursuers, who are proprietors of salmon fishings on the rivers Forth and Teith, seek to protect their fishings from injury by obtaining interdict against an alleged illegal mode of fishing practised by the defenders in the lower waters of the Forth. The area within which the interdict is intended to operate lies partly within the county of Fife, and partly within other counties outwith the territorial jurisdiction of the Sheriff of Fife and Kinross. The pursuers' case accordingly involves the proposition that the Sheriff of Fife and Kinross has jurisdiction to interdict illegal fishing for salmon in any of the counties of Scotland, on the suit of those having interest, provided the persons sought to be interdicted are *ratione domicilii* subject to his jurisdiction.

There is little or no direct authority to be found on this class of question. On the principles laid down as applicable to jurisdiction generally, it appears to me that this is a case in which jurisdiction arises *ratione rei sitæ*. It would certainly, I think, be so as between the jurisdiction of the courts of different countries. The Courts of Scotland would not, I take it, assert jurisdiction to interdict illegal fishing for salmon, or say the use of real property so as to create a nuisance to adjoining proprietors, in England, although the party sought to be interdicted were subject to their jurisdiction *ratione domicilii*. It does not necessarily follow that the jurisdiction of the Sheriff of a county in Scotland is similarly limited in relation to other counties of this country. But in the absence of authority to the contrary, and none has been advanced, the Sheriff's jurisdiction is left to be deduced from the same principles, and I am of opinion that on the application of these principles, the conclusion arrived at by the Sheriff-Substitute is sound.

This conclusion appears to be corroborated by the decision in the case of *Culross District Committee* v. *Smith-Sligo's Trs.*, 19 R. 58. In that case the pursuers complained of injury occasioned

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by the defenders illegally abstracting water from pipes belonging to them. Jurisdiction was held to arise *ratione rei sitæ*, and the defenders were held to be subject to the jurisdiction of the Sheriff of Fife and Kinross, and to be competently put under interdict by him, although not subject to his jurisdiction *ratione domicilii*. The pursuers argued that, *esto* the judge of the *situs* had jurisdiction, there was a concurrent jurisdiction in the judge of the domicile. No authority was cited in support of the existence of such a concurrent jurisdiction, and it seems to be inconsistent with the principles laid down by Erskine in the passage from the Institutes quoted in the Sheriff-Substitute's note.—*3rd December* 1907.

[The pursuers appealed to the Court of Session, but the appeal was withdrawn.]

Agent for Pursuers, J. Currie Macbeth, Solicitor, Dunfermline.—Agent for Defenders, J. R. Stevenson, Solicitor, Dunfermline. A. J. L. L.

OUTER HOUSE.

(*Lord Dundas.*)

206. Boustead *v.* Dempster, Moore & Company Limited.

Patent — Design — Registration — Infringement—Infringement in Ignorance of Registration—Patents, Designs and Trade Marks Act 1893 (46 & 47 Vict. cap. 57), sect. 58 (a) — Ignorance of Registration Not a Good Defence to Action Based on sect. 58 (a)—Werner Motors Ltd. v. A. W. Gamage Ltd. [1904], 2. Ch. 580, Distinguished.

This was an action at the instance of Lawrence Twentyman Boustead against Dempster, Moore & Co. Ltd., concluding for payment to the pursuer of £100 as a statutory forfeit under the Patents, Designs, and Trade Marks Act 1883, sect. 58. The pursuer was the proprietor of a design applicable to the manufacture of tree-bark perforators registered under the Patents, Designs and Trade Marks Acts 1883 to 1902. The pursuer averred that the defenders had contravened his copyright in the said design by applying it to tree-bark perforators and selling the same in large quantities, and in particular that they sold 1000 of the said perforators to the Selangor Rubber Company during April and May 1906. The defenders, in answer to these averments, admitted that they supplied to the said Company a lot of knives for perforating the bark of rubber trees similar to the knife in the design registered by the pursuer, and explained that a sample of a knife wanted by the Selangor Company was given to them, and that they sold and supplied a quantity in terms of the sample. The defenders further explained (Cond. 3) that at that time they were unaware that the pursuer had registered a design applicable to the knives sold by them, and that when the pursuer intimated the fact to them they undertook not to make or sell any more of said knives, and that the said undertaking was honestly given by the defenders, and was accepted by the pursuer, and had been faithfully kept.

The Patents, Designs, and Trade Marks Act 1883 provides—

58. During the existence of copyright in any design—

(*a*) It shall not be lawful for any person without the licence or written consent of the registered proprietor to apply such design or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered, for purposes of sale to any article of manufacture or to any substance artificial or natural or partly artificial and partly natural; and

(*b*) It shall not be lawful for any person to publish or expose for sale any article of manufacture or any substance to which such design or any fraudulent or obvious imitation thereof shall have been so applied, knowing that the same has been so applied without the consent of the registered proprietor.

Any person who acts in contravention of this section shall be liable for every offence to forfeit a sum not exceeding fifty pounds to the registered proprietor of the design, who may recover such sum as a simple contract debt by action in any court of competent jurisdiction.

By sect. 7 of 51 & 52 Vict. cap. 50, which amends the said Act, it is provided "that the total sum forfeited in respect of any one design shall not exceed £100."

The pursuer pleaded:—

"In respect of the defenders' contraventions of the pursuer's copyright, the pursuer is entitled to decree for the statutory forfeit as craved."

The defenders pleaded, *inter alia*:—

"2. The pursuer is barred by his acceptance of the undertaking mentioned on record.

"3. The defenders should be assoilzied in respect the pursuer's averments, so far as material, are unfounded in fact."

Proof was led before the Lord Ordinary.

The Lord Ordinary *decerned* against the defenders for payment of £40 with expenses.

Lord Dundas.—The pursuer here demands a "forfeit," which he estimates at £100, in respect that the defenders have contravened his copyright in a registered design. Contravention is now admitted. But the defenders resist the pursuer's demand upon various grounds. In the first place, they found upon an undertaking made on their behalf, which is referred to in Answer 3, and plead "3. The pursuer is barred by his acceptance of the undertaking mentioned on record." The plea is, in my opinion, untenable. The pursuer never, so far as I see, acted so as to bar himself from suing the defenders for damages or penalty. They next argued—though the point is not made the subject of a specific plea in law upon the record—that they were unaware when they supplied the goods that the pursuer had a registered design; and upon this ground

they claim immunity. I am not, as at present advised, satisfied that the defenders were unaware of this fact. But it is not, in my judgment, necessary to decide the point in one way or the other; because I do not think that, assuming it in the defenders' favour, it would afford them a relevant defence. The action is brought for a penalty under sect. 58 of the Patents, Designs and Trade Marks Act 1883 (46 & 47 Vic. cap. 57), and not for damages under the 59th section. It is laid on subsect. (*a*) of sect. 58, and not on subsect. (*b*) thereof. Now it appears to me as matter of construction that the first of these subsections is intended to strike at the manufacturer or producer of the goods, and the second at the retail seller; and that under (*a*) it is not necessary, as it is under (*b*), to bring home to the contravener knowledge of the registration of the design. The distinction proceeds upon a perfectly intelligible basis, and I observe that the construction above suggested is that which is adopted by text writers upon the subject (see Fulton's Law and Practice relating to Patents, Trade Marks and Designs, 3rd ed., p. 421; Copinger's Law of Copyright, 4th ed., p. 444 and p. 449). But the defenders' counsel insisted that it had been decided in England that want of knowledge was a good defence to a claim under subsect. (*a*), and not only to one under subsect. (*b*). The case relied upon is *Werner Motors Ltd.*, 1904, 1 Ch. 264, and 1904, 2 Ch. 580, also reported in 21 R.P.C. at pp. 137 and 621, decided by Byrne, J., and the Court of Appeal. The decision is not binding upon me; but I should, of course, treat with high respect what is decided or observed by the judges in England. I do not, however, find, on examining the case, that it supports the defenders' proposition. The point really decided in *Werner's* case was, to quote from the rubric (21 R.P.C. 622), "that the applicant for the patent of an article, and for registration of a design for the shape of a similar article, is not, under the Patents, etc., Act 1883, put to an election, but may secure both." But the question of the defendants' knowledge or ignorance that the design was registered was incidentally canvassed to some extent. The plaintiffs claimed an injunction and damages. Their statement of claim was apparently (21 R.P.C. 138, ll. 15 to 22) based upon both subsections of sect. 58; but I gather from the report of the argument for the plaintiffs (p. 141) that the case really made against the defendants was under subsect. (*b*); and Byrne, J., expressly states (21 R.P.C. 145, l. 38) that "the defendants have not themselves applied the design." I find nothing therefore in *Werner's* case to warrant the proposition that ignorance of the fact of registration is a good defence to an action based, like the present, solely upon subsect. (*a*). I consider that I am free to construe the section for myself; and I accordingly construe it in the sense already indicated, and repel the defence based upon a contrary construction. Lastly, the defenders argued that the pursuer had failed to prove damage to the extent of £100, or to any definite extent. But the pursuer sues not for damages but for the statutory penalty. I think this remedy was provided to meet cases like the present, where the amount at stake is not large, and it might be difficult and costly to establish a case of specific damages (see Copinger, 4th ed., p. 449). As to the *quantum*, I am of opinion, upon the best consideration I can give to the matter, that decree for £40 will meet the justice of the case.—15*th November* 1907.

Counsel for Pursuer, Sandeman; Agents, Waddell & M'Intosh, W.S.—Counsel for Defenders, Dickson, K.C., Spens; Agents, J. & J. Ross, W.S. A. M.

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OUTER HOUSE.

(*Lord Dundas.*)

207. Smith's Trustees *v.* Smith's Trustees.

Succession — Trust Disposition and Settlement — Vesting — Postponement — Vesting Subject to Defeasance—Direction to Trustees to Divide Residue of Moveable Estate Among Children Equally, the Shares to be Payable on Attaining Majority — Declaration that Shares Not to Vest Till Respective Terms of Payment —Share of Child Predeceasing Term of Payment to be Paid to Issue of Predeceasing Child Alive at Truster's Death, Whom Failing, to Truster's Surviving Children or Their Issue—Direction to Trustees to Maintain Lunatic Son—Direction that In Event of Recovery Lunatic Son to be Entitled to Payment of His Share—Provision in Favour of Lunatic Son Quoad Ultra Revoked—Death of Lunatic Son Without Recovery—Held (1) That Share of Lunatic Son Did Not Vest in Him Prior to His Death; (2) That Said Share Vested on Death of Lunatic Son in Children of Truster then Surviving and Issue of Children Who Had Predeceased Leaving Lawful Issue, Equally per Stirpes.

The circumstances of this case appear from the Lord Ordinary's Opinion.

The following authorities were referred to:—*Douglas* v. *Douglas*, 1864, 2 M. 1008; *Johnston* v. *Johnston*, 1868, 7 M. 109; *Robertson and Others*, 1869, 7 M. 1115; *Muir's Trs.* v. *Muir*, 1889, 16 R. 954; *Bryson's Trs.* v. *Clark*, 1880, 8 R. 142; *M'Laren's Trs.* v. *M'Laren*, 1907, 15 S.L.T. 238; *Young*, 1862, 4 Macq. 314.

The Lord Ordinary pronounced the following interlocutor:—"Finds (1) that the shares of the truster's moveable estate and of the proceeds of the heritable estate destined to his son Frederick

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did not vest in him prior to his death on 27th December 1906; and (2) that the said shares vested as at that date in the children of the truster then surviving and the issue of children who had predeceased leaving issue, equally among them, share and share alike *per stirpes*."

Lord Dundas.—Mr Lewis Smith, wholesale bookseller and stationer in Aberdeen, died on 24th October 1880, leaving a trust disposition and settlement dated in 1860, and two codicils thereto, dated respectively in 1875 and 1879. The pursuers and real raisers of this action of multiplepoinding are the trustees surviving and acting under the settlement and codicils. The testator was survived by his widow and by ten children, all of whom had attained majority prior to their father's death. A daughter, Elizabeth, died in 1883, unmarried and intestate. The widow died in 1884. The fund *in medio* is the part of the truster's estate which has been retained by the trustees for behoof of one of the sons, Frederick Smith, who died on 27th December 1906, unmarried and intestate, and who had for a period of years prior to his death been an inmate of James Murray's Royal Asylum at Perth. At Frederick's death there survived, and still survive, three children of the testator, and families of five other children, who had died between 1884 and 1906, leaving issue. By the settlement, the truster disponed to his trustees All and Whole the estate, heritable and moveable, which should belong to him at his death. By the second purpose the trustees were directed to pay to the truster's widow the whole free annual proceeds of the heritable estate during her life. By the third purpose they were directed to pay to her one third part of the free residue of the personal or moveable estate. The fourth purpose directed the trustees, out of the personal estate, to maintain the testator's son, Lewis Smith, then a patient in the lunatic asylum at Perth, in a comfortable manner and as his situation might require, and that during all the days of his life; but declaring that, if he should permanently recover his reason, the said obligation on the trustees to support him should cease, and he should be at the same time entitled to payment of the provision in his favour thereinafter mentioned. It may be noted for what it is worth, that the testator, at some subsequent period, wrote and initialled on the margin opposite this fourth purpose the following words: "I also direct my trustees to make similar and equal provision for my son Frederick, being of weak mind and requiring to be protected in his justrights." The fifth purpose contained, *inter alia*, the following provisions: "The residue of my said personal or moveable estate shall (under the declarations, reservations, and exceptions aftermentioned) be divided among all my sons and daughters equally between and among them, share and share alike; declaring that their proportions thereof shall be payable to them, if daughters, on their respectively attaining majority or being married, whichever of these events shall happen first; and if sons, on their attaining majority; . . . but declaring that the said provisions . . . . shall not become vested interests in them until the respective terms of payment thereof; but on the death of any one of them before such term of payment, the provision to any of them so dying leaving lawful issue shall be divided equally among his or her issue alive at the period of my death, and failing such issue shall belong to my surviving children or their issue, equally among them *per stirpes*; but declaring that the share of my son Lewis shall not be payable unless in the event of his recovering his reason, the provision herein before made for him being all that is necessary on his account during his illness." By the sixth purpose the trustees were directed, upon the death of the testator's widow, to sell the whole of the heritable estate, and to "divide the price among and between my whole surviving children equally among them, share and share alike, in like manner and subject to the exceptions and exclusions, regulations and provisions above prescribed for the division among them of the residue of my personal estate, including the conditional exclusion of my son Lewis. . . ." The testator's second codicil "explains," *inter alia*, "that as regards my son Frederick, the provisions for him I direct my trustees to make the same as the provisions made by me for my son Lewis in all respects, and I recal my settlement as to Frederick *quoad ultra*."

It is stated that the trustees set aside a share of the truster's moveable estate and of the proceeds of the sale of the heritage for behoof of Frederick Smith, and applied the income thereof and part of the capital towards his maintenance until his death.

In these circumstances, competing claims are made to the fund *in medio*. It is claimed, in the first place, by the executor-dative of Frederick Smith. This claimant maintains that the fee of one-tenth share of the truster's moveable estate vested in Frederick *a morte testatoris*, and that the fee of one-ninth share of the proceeds of the heritable estate vested in him upon his mother's death in 1884, his sister Elizabeth having predeceased Mrs Smith unmarried and intestate. The theory of the claim, as presented by Mr Lippe, was that Frederick had attained majority prior to his father's death, that the "period of payment" of the shares of moveable estate was, in the case of sons, majority; that Frederick's share therefore became a vested interest in him at the said "period of payment"; and that similarly, as regards the proceeds of the heritable estate, Frederick's share vested in him by his survival of the date of his mother's death. I think these arguments are unsound. It is true that, in the normal case, each son's share vested in him on his survival of the appointed period of

payment, viz. the death of his father as to the moveable estate (he being then major), and that of his mother as to the heritable estate. But a special code was expressly provided for the case of *Lewis*, and made applicable by the codicil to Frederick, by which the share was not to become payable unless in the event of his recovering his reason. I think, therefore, that no right vested in Frederick, because he died before the period of payment, and therefore of vesting, applicable to his case, had arrived.

If this view is correct, a question next arises as to the period at which the beneficiaries entitled to Frederick's share fall to be ascertained. Mr Chree, on behalf of one set of claimants, argued that Frederick's share of moveables vested *a morte testatoris*, and his share of the proceeds of the heritable estate vested, on his mother's death, in his brothers and sisters who were surviving at those dates respectively, subject only to possible defeasance, in the event of Frederick recovering his reason. Mr Kemp, for a different set of claimants, maintained that vesting in Frederick's share did not take place until his death, when his shares, both of the moveable and the heritable estate of his father, vested in his brothers and sisters surviving at that date, viz. 27th December 1906, and the children of predeceasers, *per stirpes*. I am of opinion that the latter contention is well founded, and that the former is erroneous. The difference between them in practical result is not great. It is only, as I understand, that in the one view the representatives of Miss Elizabeth Smith would, and in the other view would not, be participants in Frederick's share of the moveable estate. But I consider that Mr Kemp's argument is to be preferred, because I think the words "my surviving children" ought, according to ordinary canons of construction, to be read as referring to the event, viz. the death of a son before the term of payment of his share, upon the occurrence of which the division of his share amongst other persons was to take place.

In reaching this conclusion I have not left out of view that in the case (which has not occurred) of a son dying before the term of payment, leaving issue, his provision is directed to be divided equally among his issue "alive at the period of my death." It seems to me that this direction might have created considerable difficulty, supposing, for example, that a son of the truster had married after his father's death, and died in minority, leaving issue. By the strict terms of the settlement, that issue would apparently have been excluded from any share of the residue; while, on the other hand, the share could not, I apprehend, have been claimed by the surviving children of the testator, who are only called in default of issue. But I think that speculation as to events which might have occurred, but have not in fact happened, ought not to affect my construction of that part of the clause which has, as events have turned out, come into operation. . . .—15*th November* 1907.

Counsel for Pursuers and Real Raisers Lewis Smith's Trustees, as such and as Claimants, J. H. Henderson; Agents, Morton, Smart, Macdonald & Prosser, W.S.—Counsel for Claimants John Rae Smith's Trustees, and Others, Chree; Agents, Morton, Smart, Macdonald & Prosser, W.S.—Counsel for Claimants William Fides Smith and Others, Kemp; Agents, A. & A. Campbell, W.S.—Counsel for Claimant Frederick Smith's Executor-dative, Lippe; Agents, Henry & Scott, W.S. A. M.

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OUTER HOUSE.

(*Lord Mackenzie.*)

208. Allison and Others *v.* Anderson and Others.

I. Succession—Legacy—Object of Bequest—Held That a Legacy to the "India Mission of the Church of Scotland, Bombay," Did Not Lapse Owing to the Abandonment of the Mission in the City of Bombay Prior to the Testator's Death, There Being a Mission in Bombay Presidency.

II. Succession—Testamentary Writings—Held that Letters of a Deceased Person Who Had Left a Will Could Not be Construed as Operating a Bequest.

III. Donation—Held that an Expression of Intention to Transfer Property Without an Actual Transference Did Not Constitute a Donation—Promise—Rei Interventus.

This was a multiplepoinding brought by the executors of Miss Charlotte Anderson with reference to the distribution of her estate.

In regard to the two questions decided by the Lord Ordinary, the facts bearing on the first question are given in the Opinion.

With reference to the second question, the claimant, Robert David Duncan Matthew, made the following averments in support of his claim:—

"In or about May 1905, and prior to the execution of her settlement and codicils, Miss Anderson expressed her intention of making a gift to the claimant of her property, Bishop's Croft or Yard, Abernethy, and, on or about 12th June 1905, she instructed Mr G. L. Anderson, solicitor, Newburgh, to prepare a formal conveyance of said property in favour of the claimant. Said property had passed to Miss Anderson upon the death of her brother, Mr Thomas Stuart Anderson, in April 1905. Messrs Pinkerton & Sneddon, solicitors, Newburgh and Perth, were the law agents employed to wind up Mr Stuart Anderson's affairs, and they had possession of the titles of said property, and did not deliver them to Mr G. L.

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Anderson until only a day or two before Miss Anderson's death. The entry which Mr G. L. Anderson made in his instruction book at the time, under date 12th June 1905, is in these terms:—'Robert David Duncan Matthew, residing at Walnut Grove, Kinfauns, near Perth. Disposition by Miss Anderson to R. D. Matthew and his heirs and assignees of property, Abernethy, and also superiority of property there, the vassal in which is Alex. Beatson. Feu-duty £4 0s. 4d. yearly, *i.e.* of Alex. Beatson's feu.' Miss Anderson also informed Mr Sneddon, of Pinkerton & Sneddon, that she intended to give said property to the claimant. Miss Anderson was aware of the delay that was likely to be caused in preparing said formal conveyance, and accordingly, with the intention of preserving evidence of her wishes, she wrote on 10th May 1905 a letter to the claimant's mother, containing *inter alia* the following statement:—'My reason for writing you to-day is to tell you that I am going to give Aunt Nancy's Abernethy property to Bobby. The income from it will be a little help to him, now that he is not so able to work as formerly. . . . As lawyers are very dilatory, it will be some time before the titles can be made out in Bobby's name (I have to be infeft first), I think it well to let you know what my intentions are.' By said letter Miss Anderson intended to make, and did make, a *de presenti* gift of the said property to the claimant."

He also averred that about the same date Miss Anderson wrote to her heir-at-law informing him of what she had done, and that she thereafter treated the property as belonging to the claimant; that she paid over the rents of the property collected at Martinmas 1905 to the claimant, and that it was believed she verbally informed the tenants of the property that she was no longer proprietrix, and that, on 13th December 1905, she wrote to one of the tenants, "Bishop's Croft is no longer my property." Further, he averred that—

"Early in February 1906 the claimant's sister, Miss Agnes Matthew, at the request of the claimant, wrote to Miss Anderson, inquiring if his property were insured, and on 11th February 1906 Miss Anderson wrote in reply, 'Tell Bobby that his house is insured, and the banker here will send the policy. The next payment will be in May.' Miss Anderson had paid the premium in May 1905, and the next premium was payable in May 1906. Miss Anderson thereupon instructed her banker, W. Morison, who was also agent for the insurance company, to change the policy to the claimant's name by the next time of payment, and on 26th June 1906 it was so changed to his name. The claimant paid the premium due in May 1906."

There was no reference to Bishops Yard property in Miss Anderson's settlement or codicils.

The Lord Ordinary *sustained* the claim for the Foreign Mission Committee of the Church of Scotland, and *repelled* the claim for Robert David Duncan Matthew.

Lord Mackenzie.—This is a multiplepoinding for the distribution of the estate of the late Miss Charlotte Anderson, daughter of the late Thomas Anderson, banker, Newburgh, Fife, who died on 28th February 1906. She left a holograph settlement and codicils, which are said in the summons to be all dated 27th May 1905. I doubt if this date is correct as regards the last codicil, or as regards the alteration on the original holograph settlement; but the date does not seem to be of importance as regards the questions to be decided.

Two questions have arisen for decision:—

1. The testatrix left a legacy in the following terms:—"To the India Mission of the Church of Scotland, *Bombay* Branch, the sum of one thousand pounds (£1000)." Then follow a number of legacies to institutions which are named. The Foreign Mission Committee of the Church of Scotland claim this legacy. They aver that they "up till about the year 1892 had a branch mission which carried on mission work in the city of Bombay, but the institution in connection with the mission there was sold and the proceeds invested, and the investment is now known as the 'Bombay Endowment Fund,' the income of which has for the last two or three years and is presently being applied for the purpose of the mission work at Poona, which is in the Bombay Presidency, and is under these claimants' control."

Miss Anderson's executors maintain that this legacy has lapsed. They aver "As regards the legacy of £1000, bequeathed in the first codicil to the India Mission of the Church of Scotland, Bombay Branch, it is believed and averred that the Church of Scotland had not, at the date of death of the testatrix, and has not now, a mission in Bombay, though there was some years ago a mission in connection with the said Church in Bombay, which has been abandoned. This legacy has accordingly lapsed, and the said £1000 falls to be treated as part of the ultimate residue of the said estate."

I am of opinion that the argument for the executors fails. The leading words of the bequest are that it is to the India Mission of the Church of Scotland. The words *Bombay* Branch merely indicates work carried on in a particular district of that Mission. I think on a fair construction of the bequest Bombay does not mean the city, but the Presidency of Bombay. The reference in the codicil by the testatrix to her brother who died and was buried at places within the Presidency explains the motive of the bequest. The testatrix seems to have purposely left the terms of the bequest wide. But even if the bequest meant a branch of the India Mission of the Church of Scotland in the city of Bombay, it is not said that the work is to be carried on in that city. The executors found on the fact that there was a certain mission in the city of Bombay which has ceased to exist, but they do not aver, and cannot suggest, that it was a mission which was exactly described by the words of the bequest. Nor do they say that the mission carried on at Poona, which is within the Bombay Presidency, and

about one hundred miles from the city of Bombay, is of a character which does not satisfy the terms of the bequest. The executors do not aver that the testatrix meant the old mission in the city of Bombay. They do not aver that the testatrix was ignorant of the fact that the institution in that city had ceased fourteen years before her death. I am accordingly of opinion that the Foreign Mission Committee of the Church of Scotland is entitled to be ranked and preferred to the legacy of £1000 in question, with interest at the average rate of the interest obtained by the executors on the trust investments from 28th February 1906 until payment.

2. Robert David Duncan Matthew, who states he is a first cousin once removed of the testatrix, claims that he is entitled to a property called Bishop's Croft or Yard, Abernethy, in virtue of a gift made to him by the testatrix during her lifetime; or alternatively, that certain letters which are founded upon are to be construed along with the other testamentary writings of the deceased as operating a valid bequest of the property in his favour. The contrary claim is for the residuary legatees. Now, in order to make an effectual *inter vivos* gift there must be a transference of the money or property to the person whom the donor wishes to benefit. An expression of intention is quite insufficient to complete the gift (*Thomson, etc.* v. *Dunlop*, 1884, 11 R. 453; Lord Young, at p. 458). The averments for the claimant appear to me to contain nothing more than an expression of intention on the part of the deceased, and to be insufficient, even if proved, to instruct a gift. Nor do they, as was suggested, contain a promise upon which there has been *rei interventus*. The claimant states that he has paid a premium of insurance on the property, but this was in May 1906, after the death of the testatrix. I think it is impossible to regard the letters founded on as in any way testamentary writings. The bequest of residue in the testamentary writings is free from ambiguity. There is no express mention in the settlement or codicils of the Bishop's Croft, but the claimant cannot found upon these letters as shewing what the testatrix meant. I am accordingly of opinion that Matthew's claim should be repelled.—16*th November* 1907.

Counsel for Miss Anderson's Executors, D. F. Campbell, F. C. Thomson; Agents, Boyd, Jameson & Young, W.S.—Counsel for The Foreign Mission Committee of the Church of Scotland, C. N. Johnston, K.C., Hon. W. Watson; Agent, A. L. Menzies, W.S.—Counsel for R. D. D. Matthew, Paton; Agents, Davidson & MacNaughton, S.S.C. R. C. H.

OUTER HOUSE.

(Lord Guthrie.)

Outer House. *Lord Guthrie.*

209. Hanton *v.* Hatje.

Hanton v. Hatje.

Slander — Relevancy — Statements in Letter by Master in Reply to Law Agent of Dismissed Servant Demanding Arrears of Wages—Privilege—Malice—No Sufficient Averments of Malice—Action Dismissed—Question Whether Averments of Malice Apart From Incidents of Dismissal Necessary.

This was an action by a dismissed cook against her former employer, a hotel-keeper carrying on the Grand Hotel, Lerwick, concluding for reparation for slander.

The pursuer's material averments were as follows:—

The pursuer was in the employment of the defender from 12th February until 15th May 1907. With reference to the statements in answer, it is admitted that the pursuer was in the defender's service as kitchen-maid from January until May 1906. In May 1906 she left of her own accord, as she was not prepared to serve any longer as kitchen-maid. Thereupon the defender repeatedly requested her to come back on trial for a fortnight as cook. She accordingly returned, and as the defender expressed himself highly satisfied and offered to engage her as cook, she remained as cook until the end of September 1906. [It appeared from the defender's uncontradicted averments that the pursuer left defender's service in September 1906, and returned thereto in February 1907.]

On Wednesday, 15th May 1907, about 5.15 in the afternoon, the pursuer went into the kitchen of the hotel to prepare dinner, which had been ordered for 7 p.m. She found Mrs Hatje, the defender's wife, standing in the kitchen. On the pursuer's entering, Mrs Hatje turned to her and said, "You are drunk." The pursuer denied the accusation, but Mrs Hatje declined to withdraw it, and asserted that the pursuer had got drunk upon liquor supplied to her by the barmaid. The explanations in answer, so far as not coinciding herewith, are denied. In particular, it is denied that the pursuer was under the influence of drink, or that there was any occasion for or that she had any duty of being in the kitchen at four o'clock. There was no fixed time for the pursuer being in the kitchen, and when convenient she was accustomed to rest in her bedroom, which she was doing upon the afternoon of May 15th, prior to 5 p.m.

The said statements were wholly false and without any foundation, and were made by Mrs Hatje solely for the purpose of insulting the pursuer and wounding her feelings. The pursuer, as Mrs Hatje knew, was perfectly sober.

The said false accusation was highly insulting to the pursuer, and damaging to her character as a cook. It constituted a grave charge against her as a servant, which she could not afford to pass by. It was impossible for the pursuer to remain in the service of the defender and his wife, and she was entitled and bound to give up her place. She informed Mrs Hatje that she would leave the hotel, and asked her for the arrears of wages then due to her, but Mrs Hatje

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replied, "You will not get a farthing." The pursuer left the Grand Hotel on the evening of May 15th.

As a consequence of the pursuer's resenting Mrs Hatje's accusation against her, and leaving the service of the defender, the defender and his wife were incensed at her, and they further determined not to pay her the wages due to her. The defender at the said date, viz., 15th May 1907, was owing the pursuer wages for the period from 12th March to 15th May, amounting to the sum of £3, 16s. Upon 17th May the pursuer, through her solicitor, Mr Alexander Sutherland, S.S.C., Lerwick, wrote to the defender requesting payment of the said sum. Upon the same day the defender wrote a letter to Mr Sutherland in the following terms :—

"A. Sutherland, Esq.

"*The Grand Hotel,*
"*Lerwick, 17th May* 1907.

"Dear Sir,—In reply to your letter regarding claim of wages by Christina Hanton, kindly inform her that she will not get one penny ; she has been drunk, which can be testified by all the rest of the servants, and left without giving any warning, and particularly behaving herself in such a manner during my absence from home ; I think she ought to be well punished. Furthermore, I have a letter in my possession from her at the time of engagement, that in the event of her getting drunk she would forfeit all her wages.

"She may take any proceedings against me if she likes.—I am, yours truly, William Hatje."

The said letter is produced and referred to. The statements in answer, so far as not coinciding herewith, are denied. In particular, it is denied that the defender guaranteed to Reid, Tait & Company, drapers, Lerwick, an account for clothing supplied to the pursuer. The defender is called upon to state when he paid the account for £2, 16s., and to produce receipt therefor.

The statements in the said letter to the effect that the pursuer was drunk are of and concerning the pursuer, and are false and calumnious. They represent that the pursuer had been drunk while in his service and unable to perform her duties as cook. The defender made the said statements in the knowledge that they were false, and solely for the purpose of injuring the pursuer, and to escape, if possible, from paying his just debt. By the said letter the defender approved of and adopted the false and calumnious accusation made by his wife. The statements in the said letter were made maliciously and without probable or any cause. The object of the defender in making them was to vent his ill-will at the pursuer for leaving his service, and, particularly, to try to escape paying the arrears of wages justly due by him, and to defraud the pursuer of the said sum of £3, 16s. The statements in the said letter to the effect that the defender had a letter of the pursuer's in his possession agreeing that she should forfeit wages in the event of her getting drunk, and that he had a right to retain her wages under such letter, are false, and were made with the intention of browbeating the pursuer and intimidating her into abandoning her claim for wages. He still persists maliciously and illegally in retaining the pursuer's wages, on the pretext that she was drunk upon 15th May.

On the adjustment of issues the defender *argued* that the pursuer's averments were irrelevant, it being necessary to aver malice, and malice not being relevantly averred.

The following cases were cited :—*Milne* v. *Smiths*, 1892, 20 R. 95 ; *Mackay* v. *M'Cankie*, 1883, 10 R. 537 ; *M'Donald* v. *Rupprecht*, 1894, 21 R. 389 ; *Campbell* v. *Cochrane* 1905, 8 F. 205 ; *M'Ewan* v. *Watson*, 1905, 7 F. (H.L.) 109 ; and *Sheriff* v. *Denholm*, 1897, 5 S.L.T., p. 234.

The Lord Ordinary *held* that malice was not relevantly averred, and *dismissed* the action.

Lord Guthrie.—The letter of 17th May 1907 from the defender to the pursuer which is complained of was written in reply to a letter of the same date from the pursuer's solicitor to the defender. The letter from the pursuer's solicitor has now been produced, and in view of its terms, the pursuer admits that, if she gets an issue, it must contain the word "maliciously."

The action raising a clear case of privilege on the pursuer's averments, the question remains whether the pursuer has made averments of malice to go to a jury. No malice extraneous to the incidents connected with the pursuer's dismissal are alleged. It is admitted that it would not have been enough for the pursuer to allege that the defender acted maliciously, or even that his statements were known by him to have been false. Some motive for so acting, it is conceded, must be set out. The motives here alleged for falsely charging the pursuer with having been drunk are said to have been two : *first*, the defender's anger at the pursuer leaving his service ; and *second*, to try to escape payment of £3, 16s., the arrears of wages due by him to her. That is to say, that, subsequent to the dismissal, the defender invented a charge which he knew to be false, and did so for these two pertinent reasons. It appears to me that the case so made fails on the pursuer's own averments. The charge of drunkenness was no afterthought, originated by the pursuer giving up her place. According to Condescendence II., the defender's wife made the accusation before the pursuer had even proposed to leave the service. As to the defender himself, in the letter from Mr Sutherland, the pursuer's agent, which is made part of the record by the reference to it in Condescendence V., it is clearly stated that it was in consequence of an antecedent accusation of drunkenness that the pursuer left the defender's service. If so, the pursuer's case on malice is self-contradictory and cannot be remitted to probation. In those circumstances I do not find it necessary to consider the argument which was submitted to me, based on Lord M'Laren's opinion in the case of *Campbell* v. *Cochrane*, 1905, 8 F. 205, 214, that "in order to make a relevant case of malice there must be facts alleged which are independent of the cause of dismissal, independent of the immediate cause of circulating the slander, from which the jury might legitimately infer some antecedent ill-will or indirect motive as the origin or cause of the slander." I hesitate to say that a case could not be figured

in which relevant averments might not be made of malice originating out of the dismissal itself.

The pursuer made a separate point on the phrase in the defender's letter:—"I think she ought to be well punished." It was argued that this language was at least reasonably capable of being construed by a jury as inferring malice, the defender having no legitimate interest to bring punishment on the pursuer. Taken in connection with the rest of the sentence, of which the clause forms a part, I do not think the words in question mean anything more than that, if the pursuer gets no money, it will serve her right for her conduct in being drunk and leaving without warning.—19*th November* 1907.

Counsel for Pursuer, G. Watt, K.C., Jameson; Agent, S. F. Sutherland, S.S.C.—Counsel for Defender, Thomson; Agent, W. J. Lewis, S.S.C.

C. H. B.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Dundas.*)

210. Leggat Brothers *v.* Moss' Empires Limited and Another.

I. Diligence — Arrestment — Arrestment ad Fundandam Jurisdictionem—Validity — Subject of Arrestment — Held that Arrestment Must Attach Subject Capable of Being Made Effectual in Arrestment in Execution.

II. Diligence — Arrestment — Subject Arrestable—Arrestment in Hands of B of Debt Due by B to A after B has Handed Cheque to A in Payment of Debt but Before Cheque Cashed—Arrestment Held Inept.

Reclaiming Note against an Interlocutor of Lord Ardwall.

This was an action of furthcoming at the instance of Leggat Brothers, printers, Glasgow, against Moss' Empires Ltd. as arrestees, and George Gray, an actor and playwright residing in London, as principal debtor.

In 1905 Gray guaranteed to the pursuers the payment of a printing account of the Events Publishing and Advertising Company, which was due to the pursuers by Mussett, the Glasgow manager of Moss' Empires Ltd. Mussett failed to pay his debt, and the pursuers proceeded to sue Gray upon the guarantee. Gray was a domiciled Englishman, and in order to found jurisdiction against him Messrs Leggat on 14th June 1906 used arrestments in the hands of Moss' Empires Ltd. Decree in absence was obtained against Gray in that action for the payment of a sum of £125, and certain arrestments were used on that decree. It was to make the latter arrestments effectual that the present action was raised. The defence of George Gray to this action was that the arrestments of 14th June were ineffectual to constitute jurisdiction against him, and the decree and arrestments forming the subject of the present action were therefore inept. It was common ground between the parties that during the week ending 16th June 1906 the defender, Gray, was fulfilling an engagement with Moss' Empires Ltd. in Glasgow, for which Moss' owed the defender a salary, and that in the course of that week a cheque was sent from Moss' head office in London to their Glasgow manager to be handed to the defender, Gray, in payment of the said salary. The arrestments *ad fundandam jurisdictionem* were used in Moss' hands at 4.20 p.m. on Thursday, 14th June. The parties differed as to the precise point of time at which the cheque arrived and was handed over to the defender. The defender upon the point averred that in the course of that week—

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He applied to the chief accountant of the Company in London for payment of his salary in advance. In response to this request the chief accountant by letter, dated 13th June 1906, forwarded to the manager of the Company in Glasgow a cheque directly in favour of this defender for the amount of his salary. This defender received the cheque from the Glasgow manager on the morning of Thursday, 14th June 1906, and duly granted receipts therefor. On the same day, before 2.30 p.m., he endorsed the cheque and handed it for onerous consideration to a creditor, who subsequently cashed it. The arrestment used by the pursuers was not laid on till later in the afternoon of the 14th June 1906. By that time this defender had been paid the whole sum due to him as above set forth; there were no funds belonging to him in the hands of the arrestees and the arrestment attached nothing. The Court had accordingly no jurisdiction over this defender, and the decree subsequently obtained by the pursuers was wrongous and inept.

The pursuers' averments were as follows:—

Explained that the cheque referred to was forwarded to the Glasgow Manager of Moss' Empires Ltd. from their London office on 14th June 1906, and reached Glasgow on 15th June 1906, by which time the arrestment had been effectually laid on in the hands of Moss' Empires Ltd. The defender on 15th June 1906 got possession of the cheque without the consent of the said Glasgow manager, and at once cashed it before the said Glasgow manager had time to stop payment thereof. The arrestment thus effectually attached the defender's salary, and in respect thereof the Court had jurisdiction to pronounce the said decree in absence against him.

The Lord Ordinary (Ardwall) allowed parties a proof of their averments, and on the evidence led *assoilzied* the defenders. The Lord Ordinary's judgment proceeded on the ground that the facts as established by the proof substantiated the case made on record by the defender, and that accordingly the arrestments used upon the afternoon of 14th June 1906 did not attach any funds due or belonging to the defender. The point of law

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argued to the Inner House was not argued before the Lord Ordinary.

The pursuers *reclaimed*, and *argued*:—

The arrestments used had been sufficient to found jurisdiction against Gray, even though the Lord Ordinary were right in holding that the cheque had been handed to Gray on the 14th, because, admittedly, it had not been cashed until the 15th, after the arrestments had been put on. The mere giving of a cheque does not operate as payment to extinguish the debt of the granter (Bills of Exchange Act 1882 (45 & 46 Vict. cap. 61), sect. 74). The debt remains until the cheque is cashed (*Cohen* v. *Hale*, 1878, L.R. 3 Q.B.D. 371). Even granting that it operated conditional payment, there remained a conditional indebtedness, which was a suitable subject for arrestment to found jurisdiction, until the cheque was paid. The English cases cited by the respondent proceeded upon this assumption. In order to found jurisdiction it was not necessary that the arrestments should be effectual to lay a *nexus* upon the subjects arrested (*North* v. *Stewart*, 1890, 17 R. (H.L.) 60).

Argued for the Respondents: In ordinary circumstances the granting of a cheque operates conditional payment. If the cheque is met upon presentment it operates *retro* in extinguishment of the debt (Chitty on Contracts, 14th ed. 628; Byles on Bills, 16th ed., 24–29; *Pearce* v. *Davies*, 1834, 1 Moore & Rob., 365; *Carmarthen Railway Co.* v. *Manchester Railway Co.*, 1873, L.R. 8 C.P. 685; *In re Palmer*, 1881, L.R. 19 Ch. D. 409). The granter is not bound, on diligence being used in his hands, to stop payment of the cheque. Payment by cheque is, in fact, payment subject to a resolutive condition that should the cheque be dishonoured the debt will revive. This was the ratio of the decision in a series of cases, including that of *Cohen*, relied on by the reclaimers. These decisions establish the proposition that a garnishee order will be effectual if served upon a debtor who stops payment of a cheque, but not if served upon one who does not do so (*Cohen* (*cit.*); *Elwell*, 1884, 1 C. and E. 362; *Belshaw* v. *Bush*, 1851, 11 Scott's C.B. Rep. 191; *Currie* v. *Misa*, 1875, L.R. 10 Ex. 153; *Hall* v. *Pritchett*, 1887, L.R. 3 Q.B.D. 215; *Stott* v. *Fairlamb*, 1883, 53 L.J. Q.B. 47). In ordinary cases of mercantile dealing a debt may be extinguished by means of payment other than in strictly legal tender. Payment by cheque or bank draft is held to be cash payment in questions as to illegal preferences in bankruptcy (*Carter* v. *Johnstone*, 1886, 13 R. 698; Bell's Com., II. 202; Bell's Pr. 2327), and in a question as to payment for shares in a company before allotment (*Glasgow Pavilion Ltd.* v. *Motherwell*, 1903, 6 F. 116). Even assuming that the granter could stop payment whilst the cheque was still in the hands of the payee, he could not effectively do so where, as in the present case, the cheque had been endorsed to a third party for value. That negotiation constituted a new creditor, who alone could sue on the cheque (*Clydesdale Bank* v. *M'Lean*, 1883, 10 R. 719, 11 R. (H.L.) 1). Arrestments to found jurisdiction although, unlike other forms of diligence, laying no *nexus* on the subjects arrested, still must have for their subject what was capable of being made effective. In this case nothing had been arrested that could be made effective, as the debt had been extinguished before the arrestments were laid on.

The Court *adhered*.

The Lord President.—My Lords, Mr Gray, who is the defender in this action of furthcoming, granted a guarantee in favour of Messrs Leggat Brothers, the pursuers, for a debt due to them by one Mussett. Musset had not paid his debt, and Messrs Leggat were anxious to raise an action against Gray upon the guarantee, Gray having refused to pay without legal process. Gray was an Englishman and not subject to the jurisdiction of the Scottish Courts, and accordingly Messrs Leggat sought to subject him to the jurisdiction of the Scottish Courts by arrestments *ad fundandam jurisdictionem* in the hands of Moss' Empires Ltd., a Scottish registered company, who owed Gray money from time to time, in respect that Gray was a person who took engagements with Moss' Theatre of Varieties. With that purpose Messrs Leggat used arrestments in the hands of Moss' Empires Ltd. at 4.20 p.m. upon Thursday, June 14. The arrestment was immediately followed by service of the action, and in that action Messrs Leggat eventually obtained a decree in absence. They subsequently, on the dependence of the action, arrested other sums of money, and the present action is one of furthcoming as regards the sums of money so arrested. The defence to the action is that there was no jurisdiction in the action in which decree was got, and the defence of no jurisdiction admittedly depends on whether the arrestments *ad fundandam* were good or not. There is a great deal of controversy as to the precise state of the facts, but in order to see the questions that arise, I may take first what is common ground between the parties. There is no doubt that during the week which began on Monday the 11th and ended on Saturday the 16th of June, Gray was fulfilling an engagement for which Moss' Empires would owe him a salary, and in ordinary course the salary would have been paid at the end of the week. There is no doubt also that Gray, having had a hint that it was possible that he might be proceeded against under this guarantee, had telegraphed to Moss' head office in London requesting that his salary might be paid before the usual day; and there is no doubt that, acceding to that request, Moss' Empire office in London sent, during the course of the week, a cheque made out directly to Gray, which they addressed to the Glasgow

manager, Mussett, with directions to him to hand it over to Gray.

Now the controversy on the facts is when that cheque arrived and was handed over. Gray says that it arrived on the morning of Thursday the 14th, and that it was then handed over by him to a certain friend of his, Cosens, for value, the value consisting partly in a sum which he had already received from Cosens and partly in an undertaking on Cosens' part to give him the balance of the cheque. Leggat Brothers, the pursuers, on the other hand, contend that the cheque was not received until the morning of Friday the 15th, and was then handed to Gray. It is common ground between the parties that the cheque, as a matter of fact, was cashed in the early morning of Friday the 15th, although there is again a discrepancy of statement, the pursuers saying that it was cashed by Gray himself, and the defenders saying that it was cashed by Cosens. As I have already said, the arrestments were laid on at 4.20 on Thursday afternoon, and the question arises whether at that time there was anything to arrest.

My Lords, we had a very satisfactory and good argument from the Bar in this case, and a point has been raised in the Inner House, which does not seem to have been argued before the Lord Ordinary, and which logically comes first, because if the decision on it were to go in a certain way it would make enquiry as to the disputed facts unnecessary. The pursuers, who, of course, are contending for the validity of the arrestments, say that even supposing the defender's story were correct, *i.e.* that the cheque arrived on Thursday morning and was endorsed or handed to someone else even for value on that Thursday, yet inasmuch as it was admittedly not cashed until Friday, therefore at a quarter past four on Thursday afternoon there was still a debt owing by Moss to Gray. In other words, they say that the effect of handing the cheque by the debtor to the creditor is not to operate payment, but that the relation of debtor and creditor still exists until the cheque is cashed and the creditor, either directly or through someone else, gets possession of the money.

In order to investigate that question I think it is first of all necessary to clear one's mind upon the true nature of an arrestment. There is a great deal of authority, and there has, at one time or another, been a good deal of controversy upon the precise nature of an arrestment *ad fundandam*. I am not going through all these authorities to trace the development of the doctrine, but I think I am correctly summarising them when I say this. All admit that the proceeding is exceedingly anomalous. Nobody exactly knows what was its historical origin, but I think that while there has been perhaps a vacillation of opinion as to whether an arrestment *ad fundandam* does or does not create a *nexus* upon the property arrested, the opinion has come to be quite settled that although no *nexus* is created—at least after jurisdiction is founded and the action has commenced—yet the origin of the whole proceeding can be traced to the idea that when the arrestment was laid on there was some property to be taken in execution.

My Lords, I think the authority which most directly supports what I am now saying is the case of *Trowsdale's Tr.* v. *The Forcett Railway Company*, 1870, 9 M. 88. The question there was as to the class of subject that was arrestable. The Lord Justice-Clerk there says: "It is perfectly true that in point of fact an arrestment *ad fundandam* does not fix the subject arrested within the jurisdiction, for the arrestee may safely part with it, and it so far differs from an arrestment in execution; but it does not follow, and is not, in my opinion, the law, that there is any difference between the two kinds of arrestment in regard to the subjects arrestable. I know no better statement of the law than is to be found in the opinion of Lord Corehouse (concurred in by a number of other judges) in the case of *Cameron* v. *Chapman*, 1838, 16 S. 907, at p. 918. 'If,' says Lord Corehouse, 'an arrestment *jurisdictionis fundandæ causa* was, as the defenders assume, a process by which a moveable subject is fixed down in this country, and rendered, in so far as jurisdiction is concerned, the same in all respects as a heritable subject, there might be some plausibility in their argument. But assuredly that is not the case. . . . It is not necessary to enquire on what principle the custom is founded of arresting moveables to found the jurisdiction against their owner being a foreigner. It is plainly in opposition to the general doctrine, both of the Roman law and modern jurisprudence, both of which admit the maxim *actor sequitur forum rei*. It was borrowed in Scotland from the law of Holland, where, as Voet observes, it had been introduced, contrary to principle, from views of expediency, and for the encouragement of commerce. We are of opinion, therefore, that it must not be carried further in any case than is expressly warranted by authority and precedent.'" In the same case of *Trowsdale's Tr.*, Lord Neaves, after also observing that the arrestment is an exception to the rule that a creditor must go to the *forum* of his debtor, and that it had been introduced gradually, says: "The principle rests on the fact that there is something within the jurisdiction of the Court which can be specially taken in execution of any decree which may be pronounced." And accordingly the Court held in that case that there could not be an arrestment *ad fundandam* founded on the arrestment of books and papers, because these were not articles which could be taken by diligence.

My Lords, I do not find that there is any subsequent authority which in any way infringes the authority of *Trowsdale*, and in particular I

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do not find anything inconsistent with that in a judgment which is, of course, of paramount weight and authority—the judgment of the House of Lords in *North* v. *Stewart*, 1890, 17 R. H.L. 60. Lord Watson there also refers to the earlier history of arrestments, and says: "The sole purpose and effect of an attachment"—that is, the modern form of arrestment *ad fundandam*—"is to fix the locality of the subjects arrested in Scotland, and thereby to render their foreign owner liable to be convened in a process issuing from the Court of Session at the instance of the arrester for recovery of a personal debt. As soon as the foreign owner has been duly made a party to that process, the arrestment is spent, and the arrestee is no longer, as in a question with the arrester, under any obligation to retain in his hands the moveables which it affected." But that is entirely consistent. In other words, the doctrine, which after a certain amount of doubt, especially, I think, as shewn in the case of *Malone & M'Gibbon* v. *The Caledonian Railway Company*, 1884, 11 R. 853, may now be held to be firmly established by the case of *North*,—the doctrine, namely, that an arrestment *ad fundandam* does not create a *nexus* as against the arrestee which prevents him from parting with the subject—that doctrine is perfectly consistent with the other doctrine, that the origin of the process was the idea that there should be property which could be taken in execution; and consequently when you are considering whether a subject is arrestable to found jurisdiction, as was being considered in the case of *Trowsdale's Tr.*, the true criterion is whether the subject is something which, if it were arrested in execution and the diligence were worked out, could be made available by the creditor in the debt.

Now, my Lords, I find the same idea developed in the *dictum* of Lord Kinnear in the case of *Lucas' Trs.*, 21 R. 1096. His Lordship there says: "An arrestment and furthcoming is an adjudication preceded by an attachment, and the essential part of the diligence is the adjudication. It follows that an arrestment is futile unless it can be followed up and the diligence worked out by a decree effectually transferring from the common debtor to the arresting creditor the obligation which was originally prestable to the former by the arrestee. The proceedings for this purpose may vary according to the nature of the debt." Now, no doubt, in that case his Lordship is speaking of furthcomings upon arrestments which had been used in dependence. But if, as I have submitted to your Lordships, the origin of the arrestment *ad fundandam* rested upon the same principle, then the test, which is a good test for an arrestment in execution, is an equally good test for an arrestment *ad fundandam*. That being so, and assuming the facts to be as stated by the defender, I come to the question whether there was anything in this case which could have been made available to a creditor by the arrestee. That is to say, Moss' Empires having, by the time when the arrestment was laid on, sent a cheque in payment of their debt which had been received by Gray, was there anything resting owing by Moss' to Gray which could have been made available in execution? I am bound to say I think clearly not. I think that really the question here resolves itself into one of ordinary mercantile dealing. In one sense, there can be no payment except in legal tender duly received: but in another sense there can be payment, and there is payment every day, which is made otherwise than by legal tender. The most familiar instance is payment by bank notes—by any bank notes in Scotland, and by bank notes other than Bank of England notes in England. That is an ordinary and common form of payment. Well, in modern times I think it is an equally common form of payment to pay by a cheque upon the debtor's own bank account. A cheque, after all, is merely an order on a third person to pay, and it is very analogous to an order on a third person to hand over hard cash. It is perfectly true and quite obvious that when a creditor takes a cheque he takes it on the hypothesis that the cheque is going to be honoured; but if when he goes to the bank the cheque is not honoured, either by the bank refusing to pay, or by the bank being unable to pay, as would be the case if it had stopped payment in the interval, then there is no question that he would still have an action against his original debtor. But I do not think that that very obvious consideration creates any difficulty, or alters the state of affairs when a cheque is ordinarily taken in payment. I do not know that it is necessary to refer the matter to any particular legal category; but if it is, I should rather suppose that the honouring of the cheque was a condition resolutive, and that if payment of the cheque failed to be made, the effect would be that no payment had been made, and the original debt would be set up again. But I am really not concerned as to whether that, which is after all a mere theory, is right or not. The point remains that according to ordinary commercial practice, payment by cheque is recognised, and it seems to me that payment is complete the moment that the creditor has accepted the cheque as in payment, subject always to the condition that the cheque will be met when presented.

My Lords, I have put the matter upon what I think are the ordinary rules of mercantile dealing, but such authority as there is points in the same direction. I refer particularly to two cases which were quoted to us at the Bar. The first case was that of *Carter* v. *Johnstone*, 1886, 13 R. 698, where a distinction is made most markedly between the handing over of a person's own cheque and the endorsing of other people's cheques in which he was the payee, and it was held that one was struck at by the Bankruptcy

Act, while the other was saved as a cash payment. Lord Shand, after speaking of actual cash payments, says: "It is quite true that certain equivalents to cash payments have been recognised, and in practice at least have been understood to be effectual and not struck at by the statute. A draft or order produced from a banker and transmitted to a creditor in another town, and a debtor's cheque on his own banker . . . . have all been regarded as equivalents for cash payments, or different forms of making cash payments." And Lord Adam in the same case says: "It is said that these endorsements were granted in the ordinary course of trade, and that a bank cheque on a man's own bank being equivalent to cash, the rule should be extended to such a case as the present. The two cases, however, are very different; in the first place, in actual business a draft on a man's own banker is universally held to be equivalent to a cash payment." The second case was that of *The Glasgow Pavilion Ltd.*, 1903, 6 F. 116, where Lord Young says: "Now, that payment by a cheque which is accepted and duly honoured is a payment in cash, as the expression is used in our law, is, I think, a question not capable of being easily disputed. No creditor is bound to receive payment of a debt due to him by cheque or otherwise than in the current coin of the realm. A creditor may even refuse to accept Scottish bank notes, and insist on his debtor bringing him current coin of the realm to the amount of his debt. Nevertheless, if he choose to accept these bank notes in payment, I do not think it is capable of being disputed that he would be held, according to our law and practice, to have been paid in cash. In the same way, if he receives, although not bound to do so, a cheque from his debtor, and gives him a receipt for the sum contained in the cheque, that is regarded as a payment in cash if the cheque is duly honoured, and the payment in cash is not at the date of the honouring of the cheque, but at the date of its receipt by the creditor." My Lords, that seems to me precisely to meet the case in point. Although there the Court was dealing with the application of the principle to a different matter—namely, the question whether the directors of a company before proceeding to allotment had received payment of the requisite sum in respect of the shares applied for—yet I do not think that the difference of application makes any difference to the doctrine.

Certain English authorities were quoted to us. One of them seemed at first sight to be adverse to the opinion I have expressed—I refer to the case of *Cohen* v. *Hale*, 1878, 3 Q.B.D. 371—but I have come to be satisfied that it is not. That was a case where there was a garnishee order, which is very analogous to an arrestment. The question came to be whether the garnishee order had attached anything. In that case the garnishees had granted a cheque in payment of the debt, but the cheque was stopped before it was presented. The whole point of the judgment is that when a cheque is stopped it is as if it had never existed, and that does not of course touch the question of what is the effect when the cheque is not stopped, but, on the contrary, passes into the hands of the person to whom it is made out and is eventually cashed. I think the matter is made quite clear by the decision in the case of *In re Palmer*, 1881, 19 Ch. Div. 409, where it was held that there was no duty in a person who had given a cheque to stop it in the interests of any other creditors. As little can there possibly be a duty in the interests of those who wish to do diligence. Accordingly, my Lords, upon this part of the case I am clearly of opinion that assuming the cheque to have been received by Gray on the morning of Thursday the 14th, that paid the debt, subject to the condition that the cheque should be honoured, which it was. Accordingly, at twenty minutes past four on Thursday afternoon there was no debt due by Moss to Gray, and therefore nothing which could have been made available in a furthcoming if there had been an arrestment in execution in Moss's hands. That being the proper criterion to apply in considering whether or not there was a good arrestment *ad fundandam*, it follows that the arrestment which was laid on was inept.

[After dealing with the facts]:—I therefore come to the conclusion that it would certainly not be wise to disturb the findings in fact of the Lord Ordinary, who after all has seen the witnesses and heard the evidence. If Cosens and Gray are speaking the truth, there can, of course, be no question as to what is the true state of the case. Upon the whole matter, therefore, I am of opinion that we should adhere.

Lord Kinnear.—The question of difficulty in this case is one of fact, and as that depends on a conflict of testimony, in the course of which each side charges the witnesses of the other with perjury, I should be very slow to differ from the Lord Ordinary, who heard the witnesess and has given us his opinion upon their credibility. But looking at the evidence independently, as we are bound to do, as if it were brought before us for the first time, I have come to the same conclusion as your Lordship and for the same reasons. I agree with the Lord Ordinary and with your Lordship, and do not repeat the considerations upon which I think that conclusion is justified. I therefore take the fact to be that the defender received a cheque from the arrestees in payment of the debt on 14th June, and that the arrestments founding jurisdiction were not used until a later hour of that day. The question therefore is, on that assumption as to fact, Was there anything arrested? And I am of opinion, with your

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Lordship, that there was nothing. We had a very interesting discussion as to whether the delivery and acceptance of a cheque really extinguished the debt during the interval between its acceptance and the payment of the money by the bank; but I confess to thinking that the interest of the question is rather abstract and logical than practical. As between a debtor and a creditor the delivery of a cheque payable on demand is, according to the intentions of both parties, payment of the debt; and it is in fact as well as in intention payment if there is in truth money in the bank to pay it and it is cashed. It is beyond all question that Moss intended to pay the defender, and the defender intended to take payment by cheque payable on demand, and further, that when the cheque was presented it was duly cashed. As between the debtor and the creditor that seems to make an end of the whole matter. I do not think it is material to consider whether, according to one argument, the payment by cheque is a conditional payment suspended in its full operation until the cheque is cashed, or whether, according to the other view, it merely suspends the creditor's remedies until it is seen whether the cheque will be honoured or not. In either view there may be a contingent liability still in the debtor if it should turn out that the cheque is not cashed. The question is whether that contingent liability is a proper subject for the diligence of arrestment or not. Now it appears to me to be perfectly clear that if the arrestment now in dispute had been an arrestment in execution, it would have been inept. There was no interest of the defender's in the hands of the arrestees except, if it be an exception, a potential claim against them on a contingency which did not happen, and which was dependent upon conditions of fact which it is now certain never existed. He might have had a claim if the cheque had been dishonoured, but it was not; and if that potential claim had been arrested it would have attached nothing, because it would have been perfectly obvious as soon as the arresting creditor proposed to carry his diligence into operation by furthcoming, that there was nothing in the hands of the arrestee at the time, the possible contingency on which there might have been something not having happened.

I, of course, keep in view what your Lordship has explained—the distinction between arrestments in execution or on the dependence, and arrestments for founding jurisdiction, and we must take it as now settled in law that an arrestment for founding jurisdiction really attaches nothing. But then it does not follow that such an arrestment will be good if, in fact, there is nothing to attach. I think the contrary is the law, because, although there is no actual *nexus* laid upon moveables or debts that are arrested for founding jurisdiction, still in order to make the arrestment effectual at all, it must bear to attach something which is properly subject to diligence. I cannot find in any of the cases that it has ever been suggested that an arrestment for founding jurisdiction will be good although the subject which it bears to attach was not attachable by arrestment in execution. I think the authority of the case of *Trowsdale's Tr.*, 1870, 9 M. 88, to which your Lordship referred, is conclusive to the contrary. The doctrine is that, whatever be the origin of arrestment for founding jurisdiction, it proceeds upon the hypothesis that there is in fact something within the jurisdiction of the Court which can be specifically taken in execution of any decree which may be pronounced. I think it is a good test of the validity of an arrestment for founding jurisdiction to enquire whether it purports to affect any property or fund which could be taken in execution.

Now, as I have said, it seems to me perfectly clear that if the arrestment now in question had been an arrestment in execution, or if it had been followed up by arrestment on the dependence of the action, nothing would have been attached, and for that reason and others which your Lordship has given, I am of opinion that this arrestment is altogether inept. If there be any novelty in the question as actually raised (and I think there is, because so far as direct authority goes it is a new point whether this was or was not an effectual arrestment *ad fundandem*), then I think the rule for our decision is furnished by the opinion of the Whole Court in *Cameron* v. *Chapman*, 1838, 16 S. 907, in which Lord Corehouse, after pointing out the opposition between the doctrine of a jurisdiction founded on the arrestment of moveables and the general principles of jurisdiction both in our own law and in the Roman law, goes on to say that while an artificial method has been so established, the Court are of opinion that it must not be carried further in any case than is expressly warranted by authority and precedent. Now I think we are asked to carry it further in this case than it has ever been carried in any previous decision, so far as I know or counsel at the Bar were able to inform us. I therefore agree that we should adhere to the Lord Ordinary's interlocutor.

Lord Dundas.—I am entirely of the same opinion and upon the same grounds. Your Lordships have dealt with the case so exhaustively, both as regards the law and as regards the facts, which I think present more difficulty than the law, that it would be idle for me to attempt to add further words on my own behalf.—*5th November* 1907.

Counsel for the Pursuers, Hunter, K.C., Macmillan; Agents, Macpherson & Mackay, S.S.C.—Counsel for the Defenders, M'Clure, K.C., Constable; Agents, Blair & Cadell, W.S.

W. A. R.

OUTER HOUSE.

(*Lord Mackenzie.*)

211. Hardie *v.* Brown, Barker & Bell.

I. Process — Decree — Suspension—Held that a Husband Seeking to Suspend a Decree Against Him for Goods Ordered by His Wife Must Find Caution.

II. Diligence — Charge — Suspension — A Charge to Pay Suspended Because of the Omission of the Name of the Payee.

III. Diligence — Charge — Suspension — Objections to a Charge to Deliver Articles and to Pay a Sum Within Seven Days under Pain of Poinding and Imprisonment, that (1) The Period Within Which Delivery Was to be Made Was Not Separately Stated, and (2) It Was Not Stated What Omission would Involve Imprisonment, and What, Poinding—Objections Repelled.

In this action, John Hardie, Green Tree Inn, Kirkcaldy, sought to suspend a decree pronounced on 20th March 1907 in the Sheriff Court at Kirkcaldy by the Sheriff of Fife and Kinross in an action at the instance of the respondents, and a charge following upon said decree.

On 6th December 1904 the complainer's wife, by a letter in her own name, requested the respondents to send her the articles of furniture mentioned in the charge as hereinafter quoted, and thereafter signed an agreement to take these articles on hire from the respondents. The instalments payable for the articles under the agreement fell into arrear, and the respondents raised an action against the complainer and his wife, in which they sought delivery of the said articles and payment of the amount of the arrears (as limited to the price or inventoried capital value of the articles). In this action the respondents obtained decree against both defenders in the terms quoted in the Lord Ordinary's opinion.

Following upon this decree the complainer and his wife were charged to implement the decree conform to charge dated 19th April 1907. The charge was in these terms :—

"I, Henry Wright, sheriff officer, by virtue of an extract decree from the Sheriff Court Books of Fife and Kinross, and warrant by the Sheriff of said shires thereon, dated at Kirkcaldy the twentieth and twenty-seventh, both days of March Nineteen hundred and seven years, at the instance of Brown, Barker & Bell, cabinetmakers and upholsterers, 70 Union Street, Glasgow,—*Pursuers*; against John Hardie, 160 High Street, Kirkcaldy, and Mrs Annie Hardie, 160 High Street aforesaid, wife of and residing with the said John Hardie, and the said John Hardie as her curator and administrator-in-law,—*Defenders*, in His Majesty's name and authority, and in name and authority of the said Sheriff, hereby lawfully charge you, the said John Hardie and Mrs Annie Hardie, jointly and severally (*first*) to deliver to the pursuers the following articles of household furniture and others hired by the pursuers to you the defenders on or about the eighth day of December Nineteen hundred and four, viz. one four-foot six-inch cabinet, one bedstead, one spring mattress, one flock mattress, and one hearth rug; and (*second*) to make payment of Fifteen pounds two shillings and sixpence, with interest thereon from the twenty-fourth day of September Nineteen hundred and six, and Sixteen pounds seventeen shillings and ten pence of expenses, and that to the said within seven days next after the date of this my charge to you, under the pain of poinding and imprisonment so far as competent. This I do upon the Nineteenth day of April Nineteen hundred and seven years, before and in presence of Henry Wright, jun., residing in Kirkcaldy, witness to the premises. Four words delete.

HENRY WRIGHT, sheriff officer."

The grounds for suspending the decree and charge are given in the Lord Ordinary's Opinion.

Lord Mackenzie.—This is a note of suspension presented by John Hardie, who, with his wife, till recently resided at 160 High Street, Kirkcaldy. They now reside at Green Tree Inn, High Street, Kirkcaldy. The respondents are cabinetmakers and furniture dealers in Glasgow. The note sets out that the complainer has been charged jointly and severally with his wife, under a pretended decree pronounced on 20th March 1907 in the Sheriff Court at Kirkcaldy, at the instance of the respondents, *first*, to deliver to the respondents certain articles of household furniture, alleged to have been hired by the respondents to the complainer and his wife; and *second*, to make payment of £15, 2s. 6d., with interest from 24th September 1906, and £16, 17s. 10d. of expenses, "under pain of poinding and imprisonment so far as competent." It was not argued on behalf of the complainer that there was any *ex facie* irregularity in the decree. The case that he desired to make against it was that there was nothing in the circumstances to make him jointly and severally liable with his wife, and that she had not his authority or consent to make the contract for hiring the furniture which is contained in her letter of 6th December 1904, printed in Ans. 2. As it was not contended that the decree contained any *ex facie* irregularity, I am of opinion that before challenging it the complainer is bound to find caution. This, it was intimated at the Bar, he was not prepared to do, and accordingly I think that as regards the decree the note of suspension must be refused, in respect the complainer is not prepared to find caution.

The charge is in a different position. The copy charge for the complainer is No. 6 of process. It is printed in Statement 6, and three

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objections were stated to it on behalf of the complainer.

1. That the period within which the articles of furniture were to be delivered was not specified in the charge. I am of opinion that this objection is not well founded, because the printed words "within seven days next after the date of this my charge to you" are, in my opinion, applicable as much to the decree *ad factum præstandum* as to the decree for payment of money.

2. That the charge bears to be given "under pain of poinding and imprisonment so far as competent." It was pointed out that imprisonment was only competent for failure to perform the decree *ad factum præstandum*, and that the debt for which decree was granted was not within the classes of debts for which a debtor may be imprisoned. It was argued that inasmuch as the debtor could not tell from the charge which part of the decree the pain of imprisonment was applicable to, the charge was bad. Now it does not appear that there is any statutory form of charge. As is explained by the Lord Justice-Clerk (Inglis) in the case of *Williamson* v. *MacLachlan*, 1866, 4 M. 1091 at p. 1095: "If a charge is so expressed as to convey to the person charged sufficient information of what he is required to do, and the warrant and authority on which the requisition is made, it complies with all that the common law requires." There does not, therefore, appear to be any necessity for inserting in the charge the nature of the pains and penalties. The complainer, however, says that, if they are inserted, they must be inserted correctly, and described with sufficient distinctness to enable him to understand what they are. His contention was that a charge in the form complained of might be equivalent to a threat of imprisonment in the event of his failure to pay the sums which he was charged to pay. It may be that the charge is open to this criticism. The respondents' answer, however, to this point seems to me to be conclusive. They found upon the Sheriff Courts (Scotland) Extracts Act 1892 (55 & 56 Vict. cap. 17), and say that the decree in the present case exactly follows the form given in schedule 12 of that Act. The charge, they point out, exactly follows the form of the decree; the decree is precisely in the form of the statutory schedule, and therefore the sheriff officer has done all that was incumbent upon him. I think the respondents' contention upon this head is sound.

3. That the charge is blank in the name of the payee. This, to my mind, is a fatal objection to the charge. The complainer is first charged along with his wife jointly and severally to deliver to the pursuers the articles of furniture; they are then charged to make payment of the two sums of money, but the complainer is not told by the charge to whom the payment is to be made. In the complainer's copy of the charge he is merely told that payment is to be made to the said, and then follows the blank. In the copy charge for his wife the blank is filled up with the word "pursuers." Now matters of diligence have always been held to be *strictissimi juris*. Even without authority I should have been disposed to hold that the omission of the name of the payee was fatal of the charge. There is an expression of opinion in the case of *Shiells* v. *Reid*, 1829, 7 Shaw 535, by Lord Mackenzie on page 541, to the following effect: "The creditor must take his risk of all failures by the messenger, in observing the natural essentials of the dilgence in the copy left for the debtor, as well as other things; as if the messenger should, for instance, in the copy, omit the name of the creditor, his own name, or a material part of the letters, or the command given by virtue of them, there plainly must be a nullity, whatever might be the hardship on the creditor, who might not see the copy." This was no doubt *obiter*, but I take the same view as regards the omission here. It was argued that matters are not so strictly viewed now as they were in 1829, and no doubt a merely clerical error producing no misapprehension would not now be held fatal to the diligence. It was maintained that the words in print, "and that to the said," necessarily brought in a reference to what had gone before, but the name of the sheriff officer occurs before as well as the designation of the pursuers in the action.

I am accordingly of opinion that the reasons for suspending the decree should be repelled; that the charge given the complainer must be suspended *quoad* the payment of the sums of money; and that the reasons for suspending the charge given the complainer to deliver the articles of furniture should be repelled. The complainer is, in my opinion, entitled to expenses. —16*th November* 1907.

Counsel for Complainer, Morison, K.C., Gillon; Agents, P. Morison & Son, S.S.C.—Counsel for Respondents, Constable; Agent, Alex. Ross, S.S.C. R. C. H.

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212. Watson's Executor *v.* Allan and Others.

I. Succession—Legacy—Object of Gift—Insufficient Designation — Evidence as to Object Intended — Proof Allowed of Averments That by a Bequest to "Foreign Missions" in Five Specified Countries, "or Any Other in the Foreign Field Suitable," the Testator Intended to Benefit Certain Foreign Mission Schemes—Title of a Church Committee on Foreign Missions to Claim Bequest.

H. Trust — Uncertainty — Held that a Bequest to Foreign Missions Generally Would be Void from Uncertainty — Macintyre v. Grimond's Trustees (1905, 7 F. (H.L.) 90) Followed — Failure to Nominate a Trustee with Power to Select Beneficiary from a Class.

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This was a multiplepoinding brought by the Rev. William Watson, the executor nominated under the holograph will of Dr Donald Allan, for the determination of questions arising on the bequest of residue contained in that will, and for exoneration and discharge. The will was dated 23rd June 1900, and the testator died on 24th August 1906.

The clause of the will in which the bequest of residue was made is given in the Lord Ordinary's Opinion.

The claimants were Robert Allan and others, the whole parties interested in the deceased's intestate succession, who maintained that the bequest of residue was void from uncertainty, and, further, that, in any event, the Missions represented by the other claimants were not sufficiently identified as the Missions to which the deceased intended to make the bequest; the Rev. John M'Murtrie, D.D., and others, the office-bearers of and representing the Foreign Mission Committee of the General Assembly of the Church of Scotland; and the Rev. Alexander Miller, D.D., and others, the Joint Secretaries of and as such representing the Foreign Mission Committee of the United Free Church of Scotland, and the Joint Treasurers of that Committee. The claims of the two Church Committees, and the facts averred in support of these claims, are set forth in the Lord Ordinary's Opinion.

The Lord Ordinary *allowed* a proof before answer of the averments of the two Church Committees.

Lord Mackenzie.—This is a multiplepoinding with reference to the residue of the estate of the late Dr Allan, Evanton, Ross-shire, who died on 24th August 1906.

He left a holograph will dated 23rd June 1900, by which, after leaving certain special legacies, he dealt with the residue of his estate in the following manner:—"The residue of my property I give and bequeath for the benefit of Foreign Missions in India, China, Africa, and South America, or any other in the foreign field suitable. I appoint the Rev. W. Watson, Kiltearn, as my executor, at a remuneration of twenty pounds sterling." The next of kin maintain that this bequest of residue is void from uncertainty, and that they are accordingly entitled to succeed as heirs *ab intestato*.

Claims have been lodged by the office-bearers of the Foreign Mission Committee of the General Assembly of the Church of Scotland; and also by the joint secretaries of and as such representing the Foreign Mission Committee of the United Free Church of Scotland, and the joint general treasurers of the United Free Church of Scotland, who, as such, are joint treasurers of the Foreign Mission Committee. These two sets of claimants originally claimed that each was entitled to the whole of the residue, but these claims are not insisted in, and they now make common cause against the next of kin. Their claims are alternative. First, each claims to be ranked and preferred along with the other to the whole of the residue in equal portions absolutely; or, otherwise, they claim to be ranked and preferred to the whole of the residue in equal portions, subject to such directions with regard to the distribution of the said equal portions among the foreign missions as may be directed by the pursuer and real raiser, the executor. No claim is lodged by the executor.

The first alternative is based upon the argument that, on a sound construction of the settlement, the bequest of residue was not for the benefit of the purposes of foreign missions, but was for the benefit of certain definite foreign mission schemes; that is to say, the Churches put their claim upon the ground that this is a case of a bequest to definite legatees insufficiently designed, and that under the authorities they are entitled to prove who the testator intended to benefit (*Scottish Missionary Society*, 1858, 20 D. 634; *Wilson's Exrs.*, 1869, 8 M. 233). It is averred that the testator was born in the parish of Kiltearn and practised medicine in Bonar Bridge for about twenty years; that he then, about 1886 or 1887, left Bonar Bridge and settled at Evanton, where he lived until his death, and practised to a limited extent. He was thus a domiciled Scotsman, and had been a member of a Church in Scotland all his life. In the claim for the Foreign Mission Committee of the Church of Scotland it is averred: "At the date of his death the testator was in full communion with the Church of Scotland, having for the last six years prior to his death attended his brother-in-law's church in the parish of Kiltearn. During that period he gave general contributions to the parish church at Kiltearn, and, through that church, to the schemes of the Church of Scotland, including the Foreign Mission Scheme of that Church. Prior to December 1900 the testator had been a member of the Old Free Church of Scotland, but upon the union of that Church with the United Presbyterian Church, he attended and became a member of the Church of Scotland, and continued to be so until his death."

The Foreign Mission Committee of the United Free Church aver "He regularly contributed to the Foreign Missions of the Free

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Church of Scotland at Bonar Bridge, and thereafter in Kiltearn, the parish in which Evanton is situated, up to the date of the union of the Free Church and United Presbyterian Church in 1900. After that date, as there was no United Free Church in his district, the testator in December 1900 became a member of the Church of Scotland at Kiltearn, of which his brother-in-law, the pursuer, was and is minister. The foreign missions formerly carried on by the Free Church of Scotland are now, and have been since the union of that Church with the United Presbyterian Church, carried on in their entirety by the United Free Church of Scotland." Each of these claimants avers that the Foreign Missions of the claimant's Church are those designated by the testator as entitled to his residue, or alternatively, that the residue fell to be equally divided between them. It is also averred that the Church of Scotland and "the United Free Church of Scotland are the only two Churches in Scotland who have foreign missions of an organised character. They both have extensive missions in India, China, and Africa as well as in other places." These averments appear to me to be sufficient to entitle the claimants to a proof.

The alternative contention for the Churches is founded upon a proposition well settled in law, and which is thus stated by the Lord Chancellor (Lord Lyndhurst) in *Crichton* v. *Grierson*, 1828, 3 W. & S. 329: "According to the authorities in the law of Scotland, it is quite clear that a man may, in the disposition of his property, select particular classes of individuals and objects, and then give to some particular individual a power after his death of appropriating the property or applying any part of his property to any particular individuals among that class whom that person may select" (*Blair* v. *Duncan*, 1901, 4 F. (H.L.) 1 at p. 5).

If, however, the testator did not intend to bequeath his residue to certain foreign mission schemes, if he intended to bequeath it for the benefit of foreign mission purposes generally, I am unable to hold, in view of the decided cases, that this was a sufficient selection of particular classes of individuals and objects. Assuming that the term foreign missions occurring in a will such as this is necessarily confined to religious missions and excludes all others, *e.g.*, medical missions, the case seems to me to fall directly under the case of *Macintyre* v. *Grimond's Trs.*, 1904, 6 F. 285, 7 F. (H.L.) 90, for the reasons given by Lord Moncreiff in the Court of Session, which were expressly approved by the Lord Chancellor in the House of Lords. I am of opinion that Dr Allan's bequest, if it is so interpreted, is not sufficiently specific to be supported. A bequest for religious purposes is not in Scotland construed as meaning a bequest for charitable purposes.

Even if it could be held that the testator had selected particular classes of individuals and objects, he has failed to give to some particular individual power after his death of appropriating the residue. It is to be observed that there is here no trust. The bequest of residue is a direct bequest. The testator's brother-in-law is appointed as his executor. It is said that under the Executors (Scotland) Act 1900, sect. 2, the term "executor" is equivalent to trustee. In my opinion this does not affect the point of importance, which is that no discretionary power of selection is given to any one under the will, nor do I think that such a power can be implied (*Low's Exrs.*, 1873, 11 M. 744). As is pointed out by Lord M'Laren in *Robbie's Judicial Factor*, 1893, 20 R. 358 at p. 363, the appointment of *hæres fiduciarius* with a power of selection is essential to the existence of such a bequest, because in the absence of such a grant of power of selection the legacy would fail from uncertainty.

If the claimants represent the Foreign Missions which the testator intended to benefit they do not need to be selected by the executor in the exercise of any discretionary power (on the mere question of relevancy I do not find it stated on record that he has selected them); if the claimants require to be selected by the executors before becoming entitled to anything under the residue clause, then they are obliged to found upon a bequest which, as I have already said, is not sufficiently definite. The duty which would, according to the claimants' argument, be placed upon the executor would be the definition of a class, not the selection from a class defined.

It only remains to notice that an argument was stated against the title of the claimants. It was maintained that the bequest was to Foreign Missions and that they were not Foreign Missions that were claiming. I do not think there is anything in this plea. The only persons *in titulo* to grant a discharge for the Foreign Missions of the Church of Scotland and the United Free Church of Scotland would be the persons in whose names claims have been lodged.—21*st November* 1907.

Counsel for the Pursuer and Real Raiser, Chree; Agent, H. H. Macbean, W.S.—Counsel for Robert Allan and Others, Macmillan; Agent, Alex. Ross, S.S.C.—Counsel for the Church of Scotland Committee, Hon. W. Watson; Agent, Alan L. Menzies, W.S.—Counsel for the United Free Church Committee, Cowan; Agents, Cowan & Dalmahoy, W.S. R. C. H.

OUTER HOUSE.

(*Lord Guthrie.*)

213. Carrigan *v.* Cleland.

Process — Summons — Instance—Pupil—Capacity to Sue—Pupil Suing for Damages for Personal Injuries Without Father's Concurrence—Father Permanently Residing Abroad.

This was an action of damages by a pupil child, who at the time of the accident after-mentioned resided with his father, a labourer in Glasgow, for personal injuries alleged to have been caused to the pursuer by a kick from a horse which was being led by an employee of the defender along the streets of Glasgow. The pursuer averred that his father had since the date of the accident gone to America and permanently taken up his residence there.

The defender pleaded, *inter alia*, that the action was incompetent in respect (*a*) that it was raised against the will, *et separatim* without the sanction, of the pursuer's tutor and administrator-in-law, and (*b*) that the pursuer was in pupillarity.

The defender *argued* in the Procedure Roll that it was incompetent for a pupil to raise an action without the concurrence of his father, where the father was alive and able to act, had no separate interest, and resided at a known address. A pupil has no capacity to sue by himself, and the Court has never clothed a pupil with such capacity by the appointment of a *curator ad litem*, except in cases where the father was either dead or possessed of an interest adverse to the pupil's. Possibly the Court might intervene also where the father could not be communicated with; but here the father's address was known.

The pursuer *argued* that this was a fitting case for the intervention of the Court. It was sufficient to justify such intervention that a pupil has no tutor within the jurisdiction of the Court (Mackay's Practice, p. 147, sect. 12).

The Lord Ordinary *dismissed* the action as incompetent.

Lord Guthrie.—The injured person in this action of damages is a pupil. His father is alive. But the action is not raised by the father, but is brought at the pupil's instance. The defender pleads that the action is incompetent in respect that it is raised by a pupil without the sanction of his tutor and administrator-in-law. The pursuer asks the Court to appoint a curator *ad litem* to him, by whom, if the curator thought fit to proceed with the action, it would be carried on. The pursuer's averment about his father is "at the time of the accident after-mentioned he lived with his father, James Carrigan, a labourer, at 91 Dale Street, Bridgeton, Glasgow. His father has since gone to the United States of America, where he has permanently taken up his residence."

The pursuer's counsel appealed to the cases in which it has been held that the Court may recognise an action brought into Court by a pupil without the conjunction, in the instance, of a father or other administrator, and where the absence of a legal pursuer has been cured by the judicial appointment of a curator *ad litem*. The defender replied by pointing out that in these cases, as they are detailed in Fraser on Parent and Child, page 209 *et seq.*, the father was either dead or adverse. He admitted that to these categories might perhaps be added the case where the father cannot be communicated with. But he maintained that the mere fact of the father's residence being, temporarily or permanently, out of the jurisdiction, whether in England or in the United States, would not entitle the Court to take the admittedly strong step of recognising an action in which there is, strictly speaking, no pursuer.

I think the defender is right. The exception to the general rule seems to have been introduced on the ground of sheer necessity, to avoid what would amount to a denial of justice. In this case there is no basis of necessity to warrant the application of the exception. The father is admittedly alive, and it is not alleged either that he declines to raise the action or that he has any adverse interest, or even that there is any difficulty in communicating with him. — *26th November* 1907.

Counsel for Pursuer, Crabb Watt, K.C., Lippe; Agent, E. Rolland M'Nab, S.S.C.—Counsel for Defender, Moncreiff; Agents, Simpson & Marwick, W.S. C. H. B.

OUTER HOUSE.

(*Lord Salvesen.*)

214. Caird and Another *v.* Thomas Adam and Others.

Process — Issue — Reparation — Counter-Issue—Action of Damages for Personal Injuries—Injury to Passenger When Boarding a Steamer — Effect of Condition on Ticket Excluding Liability—Knowledge of Condition—Form of Counter-Issue.

On 8th April 1907 William Caird, a commercial traveller, was injured while attempting in Bressay Sound, from a small boat, to board the defenders' passenger steamer "St Rognvald." On 18th April he died at the Royal Hotel, Tain. His widow then brought the present action to recover damages for the loss of her husband, averring that his death was the result of injuries

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he had sustained through the fault of the defenders.

The defenders averred that "Mrs Caird's husband while travelling with the 'St Rognvald' between Lerwick and Kirkwall on the occasion in question, was travelling in virtue of a ticket issued to him by the defenders. One of the conditions of this ticket provided that 'This ticket is issued subject to all the conditions mentioned on the Company's sailing bills, and that the Company is not liable for any loss, injury, delay or accident to passengers or their luggage however the same may be carried, whether by negligence of their servants or otherwise, nor for any sea, river or steam risks whatsoever.'" The pursuers' averment in answer was a denial, and they pleaded, *inter alia*: "*Esto* that the deceased William Caird was travelling between Lerwick and Kirkwall in virtue of a ticket issued to him by the defenders, having on it the conditions set forth by them, the pursuers are not thereby barred from insisting in the present action, and the defenders' plea thereanent ought to be repelled."

The defenders pleaded, *inter alia*: "The said William Caird having accepted defenders' travelling ticket subject to the conditions contained in it and being aware of said conditions, the defenders are entitled to be assoilzied from the conclusions of the summons."

The defenders proposed the following counter-issue: "Whether at the time of the accident to the said William Caird he was a passenger by the defenders' steamer 'St Rognvald' from Lerwick to Kirkwall under and in terms of the conditions which are set forth on the ticket issued by the defenders to him, whereby the defenders are not responsible for personal injury to him while a passenger?"

The form of the issue was objected to by the pursuers, and it was argued that there should be added to the issue whether Caird was aware of the conditions contained in the ticket and assented to them. Knowledge of and assent to the conditions are essential (*Stevenson* v. *Henderson*, 1875, 2 R. (H.L.) 71).

Argued for Defenders: This is the form of issue approved of in *Grieve* v. *The Turbine Steamers Ltd.*, 1903, 11 S.L.T. 379, where the facts are identical with those in the present case. The question for the jury is: Had Caird reasonable notice of the conditions? (*Parker* v. *South-Eastern Railway Company*, 1877, 2 C.P.D. 416; *Richardson, Spence & Co. and the "Lord Gough" Steamship Co. Ltd.* v. *Rowntree*, 1894, A.C. 217).

The Lord Ordinary, following the case of *Grieve*, approved of the form of the counter-issue as proposed, but ordered the defenders to amend their record by adding an averment of knowledge by Caird of the conditions on the ticket.

Observed by Lord Salvesen that if he were the judge presiding at the trial he would direct the jury that Caird was not a passenger under and in terms of the conditions set forth in the ticket unless he knew or must be held bound to know of the conditions and assented to them either expressly or implicitly.—31*st October* 1907.

Counsel for Pursuers, Watt, K.C., Munro; Agents, Garden & Robertson, S.S.C.—Counsel for Defenders, Clyde, K.C., Armit; Agents, Beveridge, Sutherland & Smith, S.S.C.

N. A.,
for J. W. F.

OUTER HOUSE.

(*Lord Guthrie.*)

215. Lochgelly Iron and Coal Company Limited *v.* Sinclair.

Workmen's Compensation Act — Unrecorded Agreement to Pay Compensation to Injured Workman—Cessation of Payment —Subsequent Warrant to Record Agreement — No Application for Review — Liability on Employers to Pay From Date of Warrant to Record—Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), Sched. I, sects. (8) and (12).

This was a Note of Suspension by the Lochgelly Iron and Coal Co. Ltd., brought to suspend a charge to pay the sum of £87, 18s. 9d., being one hundred and five weeks' compensation under a memorandum of agreement entered into by them with the respondent under the Workmen's Compensation Act 1897, or alternatively to suspend the charge *quoad* the sum of £57, 15s. 9d., being the compensation in respect of the period elapsing between the last payment to the respondent and the date of the Sheriff's warrant to record the agreement.

The workman was injured on 12th October 1904; the complainers paid him compensation at 16s. 9d. a week, the rate agreed on in said unrecorded memorandum of agreement, up to 25th January 1905, when they averred that his incapacity ceased, although no application for a review of the weekly payment was made by the complainers under sect. (12) of Sched. I of the Act. Thereafter the respondent brought an action in the Court of Session based on the same accident, concluding for damages at common law (*ante*, 13 S.L.T. 103). On the complainers being, on the 8th July 1905, assoilzied from the conclusions of said action in respect the respondent was barred by having elected to accept compensation, the respondent, on 17th February 1906, applied for and on 18th May 1906 obtained from the Sheriff-Substitute warrant to record said agreement, and said agreement was recorded on 20th December 1906. The complainers on 3rd April 1906 had applied to the Sheriff-Substitute to grant an arbitration, and this application was sisted pending the petition by the respondent for

warrant to record the agreement. On warrant to record being granted, the Sheriff-Substitute refused the complainers' application for an arbitration, and an application by the complainers for a stated case on appeal against this refusal was refused by the First Division on 23rd October 1906 (1907, S.C. 3). The respondent having meantime charged the complainers to pay the full sum of compensation in terms of the agreement from their cessation of payment on 25th January 1905 to 30th January 1907—a period of one hundred and five weeks—this note of suspension was brought.

The arguments of the parties appear in the Lord Ordinary's Opinion.

The following cases were cited, in addition to those mentioned in the Lord Ordinary's opinion: *Beath & Keay* v. *Ness*, 1903, 6 F. 168; *Fife Coal Co. Ltd.* v. *Davidson*, 1906, 13 S.L.T. 703.

The Lord Ordinary *suspended* the charge only *quoad* the period from cessation of payment to the date of the warrant for recording the agreement, *i.e. quoad* the sum of £57, 15s. 9d.

Lord Guthrie.—In connection with an accident on 12th October 1904 the respondent was paid compensation for total incapacity by the complainers, in accordance with an unrecorded agreement entered into between them, under the Workmen's Compensation Act 1897. Warrant to record the agreement was granted on 18th May 1906. No application for review has been made by the complainers under sect. 12 of the first schedule of the Act of 1897.

The complainers have been charged by the respondent to pay £87, 18s. 9d., being one hundred and five weeks' compensation from 25th January 1905, the last date of payment, to 30th January 1907. The respondent was not in the complainers' service after the accident.

The complainers maintain that they are not liable in payment of any part of the sum charged for, or otherwise that there can be no claim against them for the period prior to 18th May 1906, the date of the Sheriff-Substitute's warrant to record the agreement. The respondent's case is that even if wholly or partially recovered after 25th January 1905, the complainers remained, and remain, liable under the statutory agreement for the weekly payments, until review, under sect. 12 of the first statutory schedule; or otherwise, he maintains that he acquired a right from the date of the warrant to record, which endures till statutory review.

In my opinion the respondent's alternative contention is well founded.

By sect. 8 of the second schedule of the 1897 Act provision is made for recording a memorandum of agreement. The section proceeds: "Thereupon the said memorandum shall for all purposes be enforceable as a Sheriff Court judgment." I see no warrant for holding that a charge can be given on an agreement prior to the date of the warrant to record (*Steel* v. *Oakbank Oil Co.*, 1902, 5 F. 244; *Cavaney* v. *Pumpherston Oil Co.*, 1903, 5 F. 963; *Nimmo* v. *Fisher*, 1907, S.C. 890).

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After recording, or warrant to record, it appears to me that the right to payment continues till review under sect. 12 of the first schedule, except in three cases: *first*, where the same employer has actually paid a sum equal to the amount of the weekly payment, whether that payment be made in name of statutory compensation or as wages; if paid as wages, it will be held, so far as it goes, to include the statutory compensation (*Beath & Keay* v. *Ness*, 1903, 6 F. 168); *second*, where it is proved that there was an agreement, express or implied, between the employers and the workman that the weekly payments should cease; or, *third*, where it is proved that the workman has admitted that the incapacity has wholly ceased.

In this case no payment of any kind was made by the complainers to the respondent subsequent to 25th January 1905, and I do not find any averment of agreement, express or implied, between the complainers and respondent that the weekly payment should cease, or any relevant averment of admission that the incapacity had wholly ceased. The authorities do not seem to me to establish the proposition, which I cannot find in the statute, that an employer's liability would terminate on proof that, if the workman had chosen, he might have earned the same wages as before the accident, or even on proof that, in point of fact, he did earn such wages from other employers, unless, in the latter case, it might be held that such conduct, on the part of the workman, involved what Lord Stormonth-Darling called a "practical admission" by the workman that his incapacity had totally ceased. (See *Nimmo & Co. Ltd.* v. *Fisher*, 1907, S.C. p. 890.)—16*th November* 1907.

Counsel for Complainers, Horne, Strain; Agents, W. & J. Burness, W.S.—Counsel for Respondents, A. M. Anderson; Agent, C. Strang Watson, Solicitor. C. H. B.

OUTER HOUSE.

(*Lord Johnston.*)

216. Holland *v.* County Council of Lanark.

Reparation — Relevancy — Negligence—Duty to Public—Dangerous Place—Safety of Children—Held That Owners of Property Were Not Responsible For Accident to a Child Caused by Defective Fencing When Access to Ground Could Only be Obtained by Trespass on Ground of Third Party.

The facts of this case and the contentions of parties sufficiently appear from the Lord Ordinary's note.

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The Lord Ordinary *dismissed* the action.

Lord Johnston.—The pursuer's averments in this case when his condescendence is read in connection with the answers to the defenders' statement of facts are not intelligible without something of the nature of a plan. He has failed to afford any assistance by way of a plan, and I have been obliged to have recourse to defenders' plan No. 8 of process for an explanation of the *locus* to enable me to understand the averments of parties. I do not assume that its accuracy is admitted, and I only use it as illustrative, and to enable me to understand the averments. When these are pictorially explained it turns out that the pursuer's original statement was most misleading, and, instead of correcting it, when faced with the true facts as to the *locus*, he has endeavoured to continue the disguise of the true facts by a confused mass of explanations in answer, which make it extremely difficult to ascertain what his real ground of complaint and true case really is. The record now runs in this simple matter to twelve pages of print, and, owing to the pursuer's attitude, it is, as I have said, very confused. I have no doubt that this has resulted from the difficulty which the pursuer's counsel have experienced in making anything like a relevant case.

In his condescendence the pursuer sets forth that in April 1907 he resided at 2 Pretoria Street, Cambuslang; that at a distance of less than thirty yards from his house there lay a disused quarry, situated in a piece of waste ground belonging to and occupied by the defenders, the Middle Ward of Lanarkshire District Committee; that the said ground was situated at the side of the tenement where the pursuer resided; that its sides were steep and dangerous ("its" referring grammatically to the ground, though I suspect intended to refer to the quarry); that it, presumably the ground, was fenced from the street where the pursuer resided, but that this fence was old and dilapidated, and in particular was broken down for a distance of 17 feet near the end of the tenement where the pursuer resided; that on 19th April 1907 the pursuer's son, aged six, was playing on said waste ground at the side of pursuer's tenement, when he fell into the quarry and was drowned, the water being 11 feet deep and the bank steep. And, accordingly, he now claims damages for the death of his son, which he attributes to the fault and negligence of the defenders in failing to sufficiently fence said waste ground and quarry, the waste ground beside said breach in said fence being, as he says, in close proximity to a populous neighbourhood where children abound, and being constantly used as a playground by children, and being also largely frequented by members of the public.

On the face of the pursuer's record as it at first stood, there was a *prima facie* case for enquiry, as the duty of the defenders and their alleged fault were matters of degree depending on the circumstances. It is doubtful whether there was sufficient specification, but at any rate there were the rudiments of a relevant case. But then the pursuer is forced to admit that his statement that the waste ground is situated at the side of the tenement where he resides; that it is fenced from the street where he resides by a sleeper fence, which is broken down for a distance of 17 feet near the end of the tenement where the pursuer resides, is entirely misleading.

Pretoria Street is a *cul-de-sac*. The pursuer lives in a tenement at the inner end of it, facing the end of the waste ground in question, but separated from it by the breadth of Pretoria Street, from which it is divided by an admittedly sound and sufficient fence; but continuing from the *cul-de-sac* end of Pretoria Street, there is a narrow strip of ground about 12 feet broad and 225 feet long, lying between the back of Buchanan Square and the rest of said waste ground. This strip of ground belongs to a Mr Hugh Glen. It neither belongs to nor is occupied by the defenders. The houses of Buchanan Square form its south-east boundary, having no access to it. A fence separates it from the defenders' waste ground on the north-west. Part of this fence has admittedly been broken down. The further end, 12 feet wide on the north-east, is securely fenced, and, what is material to the present case, it is separated from Pretoria Street by another fence at its south-west end, also 12 feet long, which is thus described by the defenders: "The said fence at the end of Pretoria Street originally consisted of three horizontal bars with upright staves nailed thereon. The said horizontal bars were 3 inches in width, and were at the time of the accident attached at the one end to the fence enclosing the property of the Lanarkshire County Council, and at the other end to an upright post. The distance between the ground and the first bar was 2½ inches; between the first and the second 2 feet; and between the second and third 2 feet 11½ inches—the total height from the ground being 5 feet 11 inches. At the time of the accident the upright staves had been torn down by trespassers, but the horizontal bars remained." And the defenders add, "If the pursuer's child came from the pursuer's house to the breach in the fence on defenders' ground before referred to, as the pursuer avers, the child must have passed out of Pretoria Street, in which pursuer's house is situated, and crawled between the bars in said fence or climbed over them on to the strip of private ground belonging to Hugh Glen, as mentioned in Statement 1 hereof, and thence through said breach made in the fence on said ground occupied by defenders." The explanation given by the defenders is that miners and workmen, whom the police are unable to stop, have made these breaches in the two fences in order by trespass to make a short cut to their work.

Now to these pointed averments all that the pursuer can say is, "Not known and not admitted." The facts in question lay under the eye of the pursuer, who lived within a few yards of the *locus*, and, following the rule of our practice that where such facts are not denied, but declared to be not known and not admitted, this must be read as an unqualified admission. The pursuer attempts to bolster up his case by calling Mr Glen's 12-foot strip of ground a "natural playground" for children, though what he means by "natural" I cannot imagine, unless the human child's natural inclination to trespass is the criterion of its natural playground; and I think he somewhere also says that the strip of ground is used as a footpath by miners and the public, though he gives no indication of the terminus *a quo* or *ad quem*.

The reality of the pursuer's case, as he is driven to admit it, is that the pursuer's child first trespassed on to private ground, not the defenders', by climbing or getting through a fence, which, though partially injured by prior trespassers, was still a fence sufficient to indicate that members of the public had no right on the strip of private ground; that, having already trespassed on the private property of Mr Glen, he further trespassed on the private property of the defenders by passing through a breach in their fence, also made by adult trespassers in the neighbourhood. In failing to protect themselves against such trespass I cannot hold that the defenders were guilty of any negligence or breach of duty to the pursuer and his child, which could render them liable to the claim now made by the pursuer.

It is true that there are cases in which the duty which a proprietor, and, in particular, in which a public authority (though it is as proprietor and not as a public authority that the defenders are sued) owes a duty of protection to the public, where they must see that the protection to the adult is also sufficient protection to the child. But I know of no law which, where they owe no duty to the adult, requires them to protect the juvenile trespasser. I shall therefore find that the pursuer has set forth no relevant case and dismiss the action, with expenses.—22*nd November* 1907.

Counsel for Pursuer, Crabb Watt, K.C., Findlay; Agent, E. Rolland M'Nab, S.S.C.— Counsel for Defenders, Wilson, K.C., Mitchell; Agents, Ross Smith & Dykes, S.S.C. R. S. B.

OUTER HOUSE.

(*Lord Mackenzie.*)

217. Prentice *v.* Shearer.

I. Donation—Mortis Causa—Held That Delivery Was Necessary to Constitute a Donation of Money—Mitchell v. Wright, 1759, M. 8082, Followed.

II. Donation — Mortis Causa — Transference of Money to a Person Partly for His Own Benefit and Partly to Make Payments to Others Sustained as a Donation.

III. Donation—Mortis Causa—Proof of—Held That a Donation to a Person Could Not Be Proved by the Unsupported Oath of That Person—Presumption.

In this case the pursuer, Mrs Prentice, as executrix of the deceased Andrew Hutchieson, sought to have the defender, William Shearer, ordained (1) to make payment to her of the sum of £230, 11s. 7d., and (2) to produce an account of his intromissions as vitious intromitter with the estate of the deceased, and make payment of the sum of £400, or such other sum as should be ascertained to be due by the defender as the balance of his intromissions; or in the event of his failing to produce an account, to make payment of the sum of £400.

A proof was allowed, and the material facts proved are given in the Lord Ordinary's Opinion.

In addition to the cases noticed in the Lord Ordinary's Opinion the case of *The National Bank of Scotland* v. *Mackie's Trs.*, 1905, 13 S.L.T. 383, was cited.

Lord Mackenzie.—The pursuer of this action, Mrs Prentice, is the niece and executrix-dative *qua* next of kin of the late Andrew Hutchieson, a retired blacksmith, who died, aged sixty-nine, unmarried and intestate, at Wanlockhead on 11th May 1907. She sues the defender for payment of £230, 11s. 7d. The defender, William Shearer, is a lead washer, and resides at Wanlockhead.

The defence is that the sum sued for was distributed by the defender in accordance with instructions given him by the deceased on the day of his death. The defender pleads that the sums of money were given as donations *mortis causa*.

The facts of the case are that the deceased, who lived alone, and had given up work four years before his death, was taken ill on Tuesday, 7th May 1907. On Wednesday, 8th May, the defender had a talk with him, when the deceased said, "I was just wanting to see you because I will never get better, and I want to see if you will go to Sanquhar and lift the money, because I want my affairs settled, because I will never be better this time." The defender is seventy-five years of age, and was an intimate friend of the deceased. He says he was "mostly every day about his house in my spare time." He explains that his step-mother was a sister of the deceased's father. The defender did all matters of business for the deceased, who "could do nothing in that way," though able to read and sign his name. When the deceased on Wednesday the 8th asked the defender to go to Sanquhar,

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he added, "You need not come back again when you go to-morrow morning." At the same time the deceased handed the defender a deposit-receipt for £220, endorsed. On Thursday morning the defender went to Sanquhar, cashed the deposit-receipt, and received £10, 10s. 1d. of interest. In the afternoon he returned with the money and handed it, £230, 10s. 1d., to the deceased, who was sitting by the fireside. The witness explains what followed:—"When I handed him the money, I said, 'You had better count it,' and he counted it and handed it back to me. He said, 'Now, William, take that and put it past where you ken to get it, because I want you to settle the affairs, who it is to be given to, what I am going to do with it.' I took the money into my own possession then and put it into a corner of the drawer, because I thought it was as well putting it into his drawer as taking it home, because it was there under my control. I put it into a drawer in the deceased's house. . . . . He just said that I was to put that money past so that I could get his affairs settled, and he would tell me what to do, or something to the same effect, how he was going to divide it." No one else was present upon either Wednesday or Thursday. On Friday the defender saw the deceased, but other persons were present, and nothing was said about the money.

On Saturday the 11th the defender was with the deceased from twelve till three, when the doctor came. He had been up, but was then in bed. The doctor asked him if he could not go to the infirmary, but the deceased said there was something materially wrong with him and there was no use going. The doctor sounded him, and said there was no use of his going to the infirmary, his lungs and heart were entirely choked up; and he would not be there above a day or two at most, before he was brought back. Later in the day the deceased saw John Mitchell and his wife. Mrs Laidlaw (these were all neighbours), and at about 8.30 p.m. the Rev. Mr Blair, the minister of the parish. Mr Blair judged that the deceased was in perfect possession of his mental faculties. He thought he was in a dying condition, and engaged in religious exercises with him. After this he asked if he could be of assistance in arranging his worldly affairs, but received the reply, "No the noo." The minister then indicated to him that he might not be spared to see him again. The deceased then said "Shearer kens," or "Shearer 'll ken." He also added that he would tell Shearer what to do. The minister then left. Mrs Mitchell and Mrs Laidlaw had also gone, leaving in the room with the deceased only the defender and John Mitchell. The latter was sitting at the fire, the defender at the side of the bed. The deceased was in bed. This was about nine o'clock at night.

The defender then said to the deceased, "'Well, Andrew, what am I to do? What's to be done?' He rose up on his elbow in the bed and told me how the money was to be divided to various parties and to give them the various sums, and I noted them down on a wee bit of paper, because my memory was not very good; when he was giving me it off in that way, I wrote it down to keep it in my mind." The amounts so noted were—Mrs Mitchell £60, William Watson £20, Mrs Laidlaw £15, the defender £60, the pursuer £10, Janet Mitchell £5, James Williamson £2. With reference to the sum of £10 to be given to the pursuer, the defender explains that the deceased proposed £5, and only raised it to £10 in consequence of his remonstrance. A watch was to be given to a son of John Mitchell, but it was not considered any use noting this. After this the defender said: "'Now, Andrew, there's part of the money left, and you have not made a will, you know, and Jane will heir everything in the house, and she will get the remainder when you have no will.' He said 'No, no.' I said, 'Well, how will I do then? Will I appropriate it to myself?' and he gave me a nod. He did not reply in words, but he gave me a nod, as much as to say yes, I expected." John Mitchell corroborates the defender on all points except that he did not hear the deceased make any reply to the defender's last question. Nor did he see him make any sign. He was not looking at the deceased. There is no evidence that there was any note on the paper about the balance. A few minutes after, while the defender was counting up what the sums came to, and after the next-door neighbour, Robert Williamson, had come in, Hutchieson fell back in his bed, dead.

The defender at once sent John Mitchell to the Rev. Mr Blair with the paper, to let him see the amount given to the various persons. This he did. Mitchell then returned, and the defender took possession of the £231, 10s. 1d. in his presence. He took the money to his own house and put it away. On Monday he got envelopes, put the money for each person into a separate envelope, and addressed each one. The funeral was on Tuesday, and after it the defender delivered the envelopes to the donees.

There had been disagreements of old standing between the pursuer and her uncle, the deceased; he disliked her and told others of his dislike; she had for years seen little of him; and on more than one occasion the deceased said she would inherit nothing at his death. As regards the donees it is amply proved that there were good reasons why the deceased should desire to shew them favour. They were neighbours, some of them related to him, and his housework had been done by some of them without remuneration. The pursuer herself in cross-examination has nothing to say against any of them except the defender. He had apparently been on friendly terms with her

until she arrived, in response to his telegram, after the death. The defender would not tell her about the money gifted away till after the funeral, and she seems to have been ill pleased. The following day (Monday) the defender took her to the house and gave her a deposit-receipt for £40, which was in the drawer, and also a Store receipt for £4. She got her envelope with £10 in Mrs Laidlaw's house, and handed one of the deceased's watches to the boy John Mitchell.

The difficulty in the case is as regards the law. The defender maintains that these gifts are donations *mortis causa*. The decision appears to me to turn upon whether there was delivery, actual or constructive, of the contents of the deposit-receipt to the defender. If there was, then the principle laid down in several cases, the earliest being that of *Mitchell* v. *Wright*, 1759, M. 8082, described as a very important case by the Lord President in *Morris* v. *Riddick*, 1867, 5 M. 1036, would apply. There the father of the deceased had received from him 1000 merks on deathbed on the understanding that if the deceased recovered it was to be at his disposal, but if he died it was to be given to his sisters. This was held not a legacy but a gift or donation *mortis causa*. On the other hand, the pursuer's counsel contended that it was not possible to distinguish this from the case of *Thomson* v. *Dunlop*, 1884, 11 R. 453, where the deceased had handed a savings bank book kept in name of herself and another to that other person three days before her death, who claimed to distribute the money in accordance with directions given years before. This was held to be a verbal appointment of an executor to administer according to verbal directions, and therefore invalid as a donation and as a will. It was not contended here that the gifts should be regarded as nuncupative legacies.

I am of opinion that the present falls under the class of cases of which *Mitchell* v. *Wright* is an example, and not under *Thomson* v. *Dunlop*. The view I take of the evidence is that the deceased intended the defender to take possession of the money when he uplifted it from the bank, and to deliver it in accordance with the instructions he was to give him. The defender placed the money in the deceased's drawer because he thought that it was as well there, but he regarded it as under his control. No doubt it may be said that the fact of delivery depends on the evidence of a single witness, the defender. I think, however, there is sufficient corroboration in the evidence of John Mitchell, who heard the defender ask the deceased who he was to give the money to. This implies that the money had previously been put into the possession of the defender, and that he had it to give.

It was strongly maintained that delivery was not necessary, on the authority of the cases of *Macfarlane's Trs.*, 1898, 25 R. 1201, *Gibson* v. *Hutchison*, 1872, 10 M. 923, *Crosbie's Trs.*, 1880, 7 R. 823, and *Blyth* v. *Curle*, 1885, 12 R. 674. Deposit-receipts, however, taken in name of donor and donee, payable to either or survivor, are in a different position from money as regards delivery. There must be delivery or its equivalent in the case of cash or bank notes. I think there is here sufficient to instruct this. See Lord Deas in *Gibson* v. *Hutchison*, *supra cit.*

I have no doubt that the defender was a perfectly honest witness.

The instructions given him, so far as noted on the paper, are, I think, proved by his evidence and that of John Mitchell. The Rev. Mr Blair also corroborates their evidence to a certain extent. The defender, however, has not made out to my satisfaction his right to retain the balance of £58, 10s. 1d. There is a presumption against donation which must be rebutted. The evidence of the donee alone is not sufficient (*Thomson*, 1882, 9 R. 911, per Lord Young; *Sharp* v. *Paton*, 1883, 10 R. 1000, per Lord M'Laren). There is no corroboration of what the defender says, that the deceased nodded when he asked if he was to appropriate the balance. The deceased instructed him to put down £60 opposite his own name, and to that extent I think this gift to him is proved. The gift of £58, 10s. 1d. I hold not proved. This is not because I do not believe what the defender says on the point, but because the evidence of the person to whom the gift is said to have been made is not sufficient, in the circumstances brought out in the proof, to instruct donation. The sum of £58, 10s. 1d. accordingly falls into intestacy.

The pursuer will be found entitled to this amount, but under deduction of £6, the amount of the funeral expenses paid by the defender.

In the circumstances I think the defender is entitled to one-half of his expenses.—26*th November* 1907.

Counsel for Pursuer, Morton; Agent, R. J. Calver, S.S.C.—Counsel for Defenders, Ingram, Mercer; Agents, J. & A. Hastie. R. C. H.

OUTER HOUSE.

(*Lord Dundas.*)

218. Debenham *v.* Gillanders.

Expenses—Fees to Counsel—Undefended Action for Payment of Agent's Account—Remit to Taxing Master—Counsel's Fee for Moving for Remit to Taxing Master Allowed in Addition to Fee for Moving for Approval of Taxing Master's Report.

In this action Alfred Edward Debenham, solicitor, 52 Cheapside, London, sued Mrs Euphemia Barclay or Gillanders, Claridge's Hotel, Cape Town, South Africa, for the amount contained in a business account incurred in England by the defender to the pursuer.

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The action was undefended.

On the pursuer's motion the account libelled was remitted to the taxing master in London to tax. On a subsequent motion by the defender the Lord Ordinary approved of the report of the taxing master, decerned in absence against the defender, with expenses, and remitted the account when lodged to the Auditor of the Court to tax and report. The Auditor disallowed the following items in the account: Instructing counsel to move for remit to taxing master in London, 6s. 8d.; paid counsel for fee and clerk, £1, 3s. 6d. The Auditor allowed fees of the same amounts to the agent and counsel and his clerk for moving for approval of the taxing master's report.

The Auditor added the following note to his report:—

"The Auditor has allowed the same fees as he has ascertained were allowed by the Lord Ordinary (Fraser) in the case of *Hunters* v. *Alexander*, 1882, 19 S.L.R. 619. It has always been the Auditor's practice to allow only one fee to counsel in such actions as this."

The pursuer lodged a note of objections to the Auditor's report, objecting to the disallowance of the above items.

The following authorities were referred to:—*Hunters* v. *Alexander* (*cit.*); *Newlands* v. *Gillanders and Another*, 1905, 12 S.L.T. 825.

The Lord Ordinary *sustained* the objections.—*9th November* 1907.

Counsel for Pursuer, Sandeman; Agent, Andrew Newlands, S.S.C. A. M.

EXTRA DIVISION.

(*Lords M'Laren, Pearson, and Ardwall.*)

219. Harper *v.* Stuart.

I. Servitude — Constitution — Aquæductus — Circumstances in which Held No Implied Reservation Ex Necessitate.

II. Servitude — Constitution — Prescription — Underground Water in Artificial Channel — Question Whether Capable of Being Subject of Servitude to Effect of Preventing Proprietor of Servient Tenement From Interfering With Said Water by Operations In Suo.

III. Servitude — Prescription — Aquæductus—Circumstances in which Held That Change During Prescriptive Period in Mode of Exercising Right Did Not Interrupt Running of Prescriptive Period.

Reclaiming Note against an Interlocutor of Lord Mackenzie.

This was an action of suspension and interdict at the instance of Frank Vogan Harper of Dunlappie, Forfarshire, against Mrs Page or Stuart of Lundie, Forfarshire, praying the Court "to interdict the respondent and all others acting by the authority of her or her factors or agents from interrupting, diminishing, or polluting, or in any way interfering with the supply of water to the house, offices, cottages, and estate of Dunlappie, belonging to the complainer, drawn from two or more springs situated on the respondent's estate of Lundie, near the eastern corner thereof, and in particular through a well also situated on said estate, all as indicated on the plan to be produced in process; from removing or in any way interfering with the piping and cisterns or receiving-boxes or any of them placed or laid down by the complainer or his authors for the purposes of said supply, and from making excavations, pits, puddle trenches, dams, embankments, or any other works with a view of forming a loch, pond, or dam, or any other works upon ground part of the said estate of Lundie upon or in the neighbourhood of the said springs upon that estate, the water from which is led into the said well, so as to interrupt, diminish, pollute or in any way interfere with the said supply of water to the said house, offices, cottages, and estate of Dunlappie; and from instructing, attempting, or executing any other works which may in any way interrupt, diminish, pollute, or in any way interfere with the said supply of water to the said house, offices, cottages, and estate; and from inciting, employing, or requesting other persons to do any of the things foresaid; and further, to ordain the respondent to restore to their former position the said piping and cisterns or receiving-boxes or such part thereof as may have been removed or interfered with by the respondent or by the instructions of her or her said factors or agents to fill up any such excavations, pits, or trenches made by her or by the instructions of her or her said factors or agents upon the said ground, and to level the surface of the said ground and restore the ground to the state in which it was prior to the said operations; and to grant interim interdict, or to do otherwise in the premises as to your Lordships shall seem proper."

Proof was led before the Lord Ordinary.

The following narrative of the facts of the case is taken from the Lord Ordinary's Note:—

The complainer, who is proprietor of the estate of Dunlappie, seeks to interdict the respondent, who is proprietrix of the adjoining estate of Lundie, from interfering with his water supply.

These two estates belonged in 1845 to Lord Kintore, and were both let at that time to Dr Guthrie. In that year the water supply in dispute was made. The boundary between Dunlappie and Lundie was then, as now, the middle of a road which runs north and south, Dunlappie being to the east, Lundie to the west. A few feet west of this road, and running parallel with it, is a ditch. The purpose of forming a water supply in 1845 was to bring water to the mill dam of Dunlappie (then called Easterton). A conduit

was begun on Dunlappie, which was built all the way to the ditch, thus crossing the westmost half of the road, and the intervening strip of land belonging to the Lundie estate. This is afterwards referred to as the Dunlappie conduit. The work of construction was then proceeded with on the Lundie side of the ditch. A built drain (described in the evidence as the box drain) was carried across what is now field No. 81 on the last Ordnance Survey Map (No. 41 of process) for a distance of about 150 yards. This box drain discharged into the ditch on the side opposite to the Dunlappie conduit at a point 13½ feet higher up, measured diagonally across the ditch. There was no connecting pipe across the ditch, but the mouth of the Lundie box drain was at such an angle that a large portion of the Lundie water, after mingling with the water in the ditch, must have found its way down the Dunlappie conduit. At the mouth of the box drain were placed stones so that a pool or dipping place was formed, and this is marked as a well on the latest Ordnance Survey.

The first use made of the Lundie box drain water for domestic purposes was by the inhabitants of the Burnhead cottages (on Dunlappie) dipping their stoups into this dipping place or well. This was at or about the time the box drain was made. Shortly afterwards Dr Guthrie put a pipe into the Dunlappie conduit and brought the water into his house. It is described as very good drinking water. The separation of the estates took place in 1861, when Lord Kintore conveyed Lundie to Mr Shepherd (the respondent's author) and by a later conveyance in the same year disponed Dunlappie to Mr Carnegie (the author of the complainer). In 1897 the complainer bought Dunlappie, and in the same year the respondent's father, Colonel Page, bought Lundie.

Until 1898 Dunlappie continued to get water through the conduit made in 1845. After the complainer became proprietor of Dunlappie he placed in 1898 (under circumstances which are in dispute in this case) a cistern on the west side of the ditch, on Lundie, connected this with the Lundie box drain, and then led a 4-inch pipe from the cistern under the ditch on to Dunlappie by a track slightly to the south of the old conduit, then through a sand trap and filter and so on to Dunlappie House. The respondent drew the water for Dunlappie House through the cistern until the present year, when in consequence of the difference which arose, he moved it slightly to the north and placed it nearer the ditch on the other side of the fence of field No. 81, still continuing to draw water direct from the box drain.

The cause of the difference between the parties was a project Captain Stuart formed shortly before his death this year to make a pond on portions of field No. 81 and the adjoining field to the north No. 33. The complainer, Mr Harper, was apprehensive that if the pond was made his water supply might be interfered with. Parties unfortunately very soon got to arm's length with each other on this question. The complainer's right to the water supply, so far as Lundie box drain was concerned, was challenged; he was requested to remove his cistern, and a correspondence followed between the parties' law agents, in which the legal positions they maintained were formulated. The proposal to form the pond has been dropped. I think if it had been proceeded with it would have interfered with the flow of water down the box drain. The legal question, however, remains, which is whether the complainer has a right of servitude as regards the box drain laid in 1845 across field No. 81 on Lundie? The subsidiary question (if the preceding is determined in favour of the complainer) is whether he is entitled to maintain his cistern in the position it presently occupies on Lundie or on the other side of the fence, or whether he must take his supply, as before 1898, from the ditch?

The Lord Ordinary issued the following interlocutor:—

"Interdicts, prohibits, and discharges the respondent, and all others acting by the authority of her or her factors or agents, from interrupting, diminishing, or in any way interfering with the supply of water to the house, offices, cottages, and estate of Dunlappie belonging to the complainer, drawn from two or more springs situated on the respondent's estate of Lundie, near the eastern corner thereof, and in particular through a well also situated on said estate, all as indicated on the plan No. 41 of process; from removing or in any way interfering with the piping and cisterns or receiving-boxes, or any of them, placed or laid down by the complainer or his authors for the purposes of said supply, and decerns; finds the complainer entitled to expenses."

Lord Mackenzie [after narrating the facts as above].—The first argument advanced by the complainer in support of his right to prevent interference with the water coming through the Lundie drain was founded on the titles of parties in 1861. I have been unable to discover anything in the deeds which will support this contention. The conveyance of Lundie was earlier in date than that of Dunlappie, and there is no reservation in favour of the granter of the right now sought to be established. Accordingly, the principle that a granter cannot derogate from his own grant applies, and the complainer's argument, in my opinion, fails. Nor is there sufficient evidence, even if this would avail the complainer, to shew that this particular water supply was a necessity to the estate of Dunlappie. Evidence was led for the respondent as to water on Dunlappie estate, especially that which is said to come from a place called Tarry Lock, with a drainage area of 200 acres. It does not appear necessary to go into this.

The strength of the complainer's case is in his plea that he has acquired right by possession for the prescriptive period to the water supply laid down in 1845, including the water which comes down the Lundie box drain. For this purpose the years of prescription must be held to commence with the separation of the estates in 1861. In my opinion it is established by the evidence that the possession has been of the necessary duration and character to establish a servitude right of aqueduct in favour of Dunlappie House, and of *aquæhaustas* in favour of the Burnhead cottages, as regards the water in question. The respondent maintained that the true view was to regard Lundie as the dominant and Dunlappie as the servient tenement. The natural fall of the ground is from Lundie to Dunlappie; field No. 81, which contains 18 acres, is of a boggy nature, and any drainage from it would naturally be into the ditch in question. Accordingly the respondent urged that what had been done was merely in the exercise of her natural rights, and that to give effect to the complainer's contention would, or might, seriously interfere with the proper drainage of field

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No. 81, on new and approved principles. Water which is percolating or seeping through the ground, even if assisted by an ordinary agricultural drain, must be received by the lower proprietor; it is discharged upon his land as a burden he is bound to receive, and he cannot by using it for any length of time acquire right to have its flow continued. This law must, of course, be conceded by the complainer, but the history of this water supply appears to me to take the case out of the category to which the respondent would assign it. There can be no doubt, from the evidence, that the water in question was not originally thrown as a burden upon Dunlappie. The Dunlappie conduit was introduced into the ditch for the purpose of bringing water to Dunlappie. The respondent does not dispute the right of the complainer to maintain the Dunlappie conduit, and this involves the exercise of a servitude right as regards the western half of the road and the strip of Lundie lying between the road and the ditch. The servitude, in my opinion, extends further. I think the evidence established that the Lundie box drain was placed in field No. 81 in order to tap a new supply, and not for the purpose of draining the field. Although there was no *opus manufactum* to conduct the water from Lundie across the ditch and into the conduit, yet the Lundie box drain and the Dunlappie conduit were laid in such a position relatively the one to the other as to constitute the former, in my opinion, an integral part of the system. Another consideration shews that it is unlikely those who made the drain on Lundie had primarily in view field drainage for the benefit of Lundie, and it is this, that the drain mouth is not taken to the lowest point of the field. It is not quite clear on the evidence whether the intention at the time the drain was made was to provide a domestic water supply to Dunlappie House (the witness Dalgetty says it was) or only to provide water for the mill (which is the evidence given by Dakers). It is to be observed that if the intention was to provide a domestic water supply, then the point to which the box drain mouth was taken was the most suitable for giving a sufficient head of water to the house. The water flowing through the Lundie box drain never fails, and was recognised by those who drank it as spring water. The ditch, on the other hand, though it has a course of about four-fifths of a mile before it receives the Lundie water, and receives six feeders, draining an area of 380 acres, is described as being pretty dry at times to the north.

The case for the respondent is that the Lundie box drain is an ordinary leader drain which conveys surface water, and it is necessary to examine the evidence upon this point. [His Lordship proceeded to examine the evidence as to the character and purpose of the box drain.]

Upon the evidence, therefore, I am of opinion that the box drain was not put in as an ordinary agricultural leader drain, but was laid in order to lead the water, including that from the spring, in a defined channel, and that the water does flow through it, with a "continuity of parts," for the purpose of augmenting the supply to Dunlappie.

From the position of the mouth of the box drain and the Dunlappie conduit on the other side, I think an inspection would suggest there was a connection between the two. This is the view of Mr Fettes, who was over the ground with Mr Shepherd, the owner of Lundie, forty years ago, in connection with the Lundie drainage. The drain in question was then discovered, and Mr Fettes saw on the other side of the ditch a 5-inch pipe to take the water away from the well at the box drain mouth, which was then partly built with stones.

No objection was ever made by Mr Shepherd to the proprietor of Dunlappie drawing water from the ditch through this 5-inch pipe. It is in evidence that until recently the Lundie fence ran along the east side of the ditch. It had always, however, been carried round the well so as to leave an access to those coming from the Burnhead cottages who desired to dip their pitchers. The position of the fence, and the fact of recourse being had to the well for water, must have been within the knowledge of the proprietors of Lundie. A point was made for the respondent in regard to the contamination which must necessarily follow from the use of manure on the field. The answer to this, however, is that the field has been under crop before, and the water has apparently not been rendered unfit for use.

Down to 1898 the water for Dunlappie House, as already stated, was drawn from the supply coming down the conduit from the ditch. In March of that year Mr Harper approached Mr Arnot, a neighbouring farmer, who was looking after Lundie, to get permission to put a cistern in on the Lundie side of the ditch, and connect it direct with the Lundie drain, so as to get the water absolutely clean, without its first going through the ditch. I hold it proved that Mr Arnot explained the matter to Captain Stuart, and that he gave his consent, which was communicated to Mr Harper. . . . In reliance on this permission Mr Harper put in at a cost of £120 a cistern and pipe which communicated directly with the Lundie box drain, and led the water under the ditch and through Dunlappie, on a line south of that followed by the previous drain as indicated on Mr Fettes' plan No 38. The conduit was then closed. This cistern was used without complaint until shortly before the present proceedings. I think the possession had of the Lundie water since 1898 is sufficient, when combined with the enjoyment since 1861, to complete the years of prescription, and that the proprietor of Dunlappie had a right of servitude prior to the removal of the cistern to its present position. It was removed in consequence of a challenge in 1905 on behalf of Captain Stuart of Mr Harper's right to have the tank. Mr Harper then removed it to its present site, in the mistaken belief that he was taking it off the Lundie property. It is still on Lundie, but in its present position adds nothing to the burden. The effect, so far as concerns the respondent, is practically the same as if it had remained where it was. I am therefore of opinion she is not entitled to insist on its removal.

The prayer of the note was criticised, and it was pointed out that no spring had been located. There is, however, no doubt that water from springs is led down to the well in question. Though the plan No. 37 put in by the complainer does not shew accurately the line of the drain in question or the position of the other drains in the field, there is no question as to the position of the well mentioned in the prayer, and the respondent's plan No. 41 shows the box drain which feeds it. I am not prepared to grant interdict against polluting, because it is not suggested the respondent has been polluting the water. Questions may arise hereafter in regard to the cropping and manuring of field No. 81. Subject to this exception, I am of opinion that the complainer is entitled to interdict in terms of the first two branches of the prayer, which is all that was asked, and with expenses.

The Respondent *reclaimed* and *argued*: Prior

to 1861 the two estates of Dunlappie and Lundie were a *unum quid*. They were separated in 1861, when Lundie was sold to the reclaimer's author. There was no reservation in the titles of Lundie of any rights in favour of Dunlappie. Consequently Dunlappie could have no rights of *aquæhaustus* or *aquæductus* on Lundie in 1861, as there was no express reservation of such rights, and no implied reservation *ex necessitate* as in *Cochrane* v. *Ewart*, 1860, 22 D. 358, and 1861, 4 Macq. 117 (*Shearer* v. *Peddie*, 1899, 1 F. 1201; *Wheeldon* v. *Burrowes*, 1879, L.R. 12 Ch. Div. 31). Consequently if these rights had been acquired by Lundie at all, it could only have been by prescription since 1861. But Dunlappie was the lower tenement and could not prescribe a right to get this water from Lundie, as it was drainage water which the lower tenement was bound to receive. The fact that the lower proprietor had received such drainage water for forty years could not prevent the upper proprietor from stopping it on his own ground (*Chamber Colliery Co.* v. *Hopwood*, 1886, L.R. 32 Ch. Div. 549). In any event the use of the water could only be ascribed to tolerance, and use on tolerance could not found a prescriptive right (*Macnab* v. *Munro Ferguson*, 1890, 17 R. 397). The drains were merely for the purpose of draining the fields in question. It was impossible to prescribe a right to get percolating water, though put into a drain (*Greatrex* v. *Hayward*, 1853, 8 Exch. 291; *Wood* v. *Waud*, 1849, 3 Exch. 748; *Campbell* v. *Bryson*, 1864, 3 M. 254; *Chasemore* v. *Richards*, 1859, 7 H.L. Cases (Clerk), 349; *Milton* v. *Glen-Moray Glenlivet Distillery Co. Ltd.*, 1898, 1 F. 135; *Allen* v. *Taylor*, 1880, L.R. 16 Ch. Div. 355). The proprietor could always use percolating water *in suo*. Merely putting it into a drain did not make it into a stream (*M'Nab* v. *Robertson*, 1896, 24 R. (H.L.) 34). At most Dunlappie had only enjoyed a right to take water from the ditch, and that right they had enjoyed for thirty-seven years only, from 1861 to 1898. In 1898 Dunlappie ceased to take water from the ditch and took it from another point on Lundie. Dunlappie was not entitled to add the two periods from 1861 to 1898 and from 1898 to 1905 together to make up the prescriptive period (*Earl of Kintore* v. *Pirie & Sons Ltd.*, 1903, 5 F. 818, and 8 F. (H.L.) 16).

Argued for the Respondent: Dunlappie had two servitude rights over Lundie, *aquæductus* and *aquæhaustus*. The right of *aquæductus* was established, because it was clear that the pipe on Lundie from the ditch to the *medium filum* of the road was laid, not to drain water off Lundie, but to provide Dunlappie with a water supply. The right was completed either by possession for the prescriptive period or by implied reservation *ex necessitate* (*Cochrane* v. *Ewart, cit.*). The right of *aquæhaustus* was established in the same way by the drawing of water for forty years from the well. The water to which a right was established was the water coming from the box drain, which was the only perennial flow. Having the right of *aquæductus*, the change made in 1898 was only exercising it *civiliter*. It imposed no new burden on Lundie. It was not like a right of way which could only be exercised in one way. The two periods up to 1898 and after could be added together to complete the prescriptive period. It was the same right that was exercised before and after 1898. If it was a new right, then it was established *rei interventus*, owing to the *opus manufactum* Dunlappie made with Lundie's consent or acquiescence (Bell's Principles, 946). It was possible to prescribe a right to percolating water. The English cases cited referred to two tenements with a common stream or percolating water, and had no reference to a case when a servitude was established (Bell's Principles, 1108; *Magistrates of Ardrossan* v. *Dickie*, 1903, 14 S.L.T. 349; *Smith* v. *Police Commissioners of Denny*, 1880, 7 R. (H.L.) 28).

The Court *issued* the following interlocutor:—

Find (1) that the complainer has acquired by prescriptive use a right of servitude to lead water for the use of Dunlappie estate from the stream or ditch on the estate of Lundie at and from the point some 13½ feet or thereby distant from the mouth of the box drain on Lundie estate . . . . and that by means of a 5-inch tile, or alternatively a square conduit or other water passage, laid under the road, and extending to the said ditch; but find with regard to this servitude no interdict is necessary, in respect that it is not proved that the respondent has ever proposed to execute any works which would interfere therewith; (2) that the substitution of other means of aqueduct from Lundie estate to Dunlappie since 1898, and the cessation of the use of the tile drain or conduit above referred to, does not entitle the respondent to have the years from 1898 onwards deducted from the years of prescription as in a question of aqueduct between the two estates, and that for these years the present means of aqueduct must be held to have been a substitute for the aqueduct which the complainer has enjoyed since 1861; (3) that the complainer is not entitled to have on the estate of Lundie any other means of leading water from the said estate than those above mentioned, and in particular is not entitled to have thereon the piping and cisterns or receiving-boxes mentioned in the prayer of the note; (4) that for more than forty years the inhabitants of the cottages on the estate of Dunlappie known as the Burnhead cottages have been in constant and uninterrupted use to draw water for drinking purposes from the mouth of the said box drain

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at the spot marked "well" on the plan No. 38 of process; (5) that the respondent's husband, now deceased, contemplated making a pond at or near the said drain mouth or well, but that this proposal has been abandoned by the respondent, and that no other interference with the said drain mouth or "well" is at present proposed by the respondent; therefore find it unnecessary to grant any interdict with regard to the said "well," under reservation of all questions, and in particular of the question as to whether the supply of water at the said drain mouth or "well" is capable of being the subject of a servitude to the effect of preventing the proprietor of Lundie from interfering by operations *in suo* with the water in said box drain and "well": with these findings refuse the prayer of the note of suspension and interdict and decern; find the reclaimer entitled to expenses . . . .; modify said expenses to two-thirds of the taxed amount thereof. . . .

Lord Ardwall.—In this case the complainer, who is proprietor of the estate of Dunlappie in the county of Forfar, seeks to have the respondent, who is proprietor of the neighbouring estate of Lundie, interdicted from interrupting, diminishing, or polluting an alleged supply of water to the house, offices, and cottages on the estate of Dunlappie, "drawn from two or more springs situated on the respondent's estate of Lundie, and in particular through a well on said estate, or from removing or interfering with a receiving-box and piping which had been placed on the estate of Lundie by the complainer," and the two main questions in the case are: *First*, whether the complainer has a right of *aquæductus* through the estate of Lundie, and if so, what is the extent and nature of that right? and *second*, whether the complainer has a right of *aquæhaustus* from the "well" or pool at the end of the box drain which comes down through the field on Lundie estate, which is marked No. 81 on the Ordnance Survey Map No. 41 of process?

The said two estates both belonged, prior to 1860, to the Earl of Kintore, and it appears from the evidence that somewhere about 1845 a certain Dr Guthrie was tenant of both estates or farms, as they then were, on the Kintore estate. At that time there was a threshing-mill upon Dunlappie supplied with water by a mill-dam, and it appears that Dr Guthrie, being desirous of augmenting the supply to this mill-dam, had a built stone drain constructed through Dunlappie up to, and a few feet beyond, the march between Lundie and Dunlappie, so as to get the water from what the witness Dakers, who made the drain, calls a "bit burnie," and which has been referred to in the proof as the ditch running alongside the road which forms the march between the two estates. At that time there was apparently a small bog in what now forms the said field No. 81, and, partly with the view of possibly getting additional water out of that bog, and partly with the view of draining the field, Dr Guthrie instructed Dakers to make a built stone drain there as far as the bog went. Dakers says that the two drains were made at the same time for the purpose of giving a water supply to Dr Guthrie's threshing-mill. It seems that in leading this drain up the bog it collected a considerable quantity of water of the description of spring water, but from first to last there is nothing to shew that any spring was ever discovered or much less located on any part of the said field, and my own impression is that there being in that field a clay sub-soil with sand above it, this drain through the bog tapped the underground water which naturally had percolated down through the light upper soil, but was stopped from sinking farther down by the clay sub-soil. Though not arising from springs, this water, of course, would present all the characteristics of pure spring water.

It seems that some time after these operations had been carried out, it was discovered that the water which came down the ditch, and which in dry weather consisted mostly of water from the drain in the field No. 81, was good drinking water, and it began to be used as such on Dunlappie, although there was a well of drinking water there before that time. According to Dakers there was no well made at the end of the stone drain through field No. 81; the people from the Burnhead cottages just came and got water from the end of the drain, but subsequently apparently some stones were put in to make a kind of pool or well into which they dipped their pitchers. There was a distance of some thirteen and a half feet between the point where the drain through Lundie came in on one side of the ditch or burn and where the conduit or built stone drain to Dunlappie drew the water out of the ditch from the other side.

Things remained in this state till the year 1860, when Lord Kintore sold the estate of Lundie to a Mr Shepherd, conform to Minute of Sale dated 22nd and 23rd February 1860, and it is common ground that no reservation of any right in favour of Dunlappie which Lord Kintore still retained was made in the disposition of Lundie. Subsequently Dunlappie was sold by Disposition recorded 11th November 1861 to a Mr William Carnegie, and no servitude in favour of Dunlappie was constituted by said disposition. It is certain therefore that there is no grant of servitude by constitution or reservation in the title-deeds of the parties, and the Lord Ordinary has held, and I agree with him, that the existence of the stone built drain from the ditch in question to Dunlappie was not a matter of such necessity to Dunlappie as to bring the case within the rule of *Cochrane* v. *Ewart*, 22 D. 358 and (1861) 4 Macq. 117.

The question still remains whether a servitude

has been constituted in favour of Dunlappie by prescriptive use, and if so, what is the nature and extent of that servitude? A positive servitude can only be constituted by prescription to the extent and in the manner in which possession of it has been exercised upon the land of the alleged servient tenement; and as it is founded upon the acquiescence of the proprietor of the alleged servient tenement, there can be no prescription of any right beyond that which has been visibly and clearly asserted and used during the prescriptive period. It is therefore very necessary to consider what since 1861 has been the apparent and evident possession and use had of Lundie estate by the proprietors of Dunlappie.

There is no doubt that the conduit which was carried up through the Dunlappie fields and under the old road till it met the ditch or stream on Lundie was situated, after it passed the *medium filum* of the road, upon the Lundie estate, and has been there since 1861 onwards for the purpose of intercepting and taking in water from the ditch on Lundie estate. I may here notice that at some time, probably before the division of the estate, a 5-inch tile drain was laid in or alongside of the old stone drain under the road and up to the "ditch."

But until the operations in 1898, and apart from the question of *aquæhaustus* by the cottages at Burnhead, both of which matters I shall afterwards advert to, there was no use or possession had of the lands of Lundie for the purpose of taking water in the box drain down to Dunlappie House other than what I have just mentioned. The Lord Ordinary has held, apparently on some of the evidence as to what was done in 1845, that the box drain which comes down through the said field No. 81 of the Lundie estate is part and parcel of the same scheme, or, as he words it, "is an integral part of the system" which was started in 1845 for the purpose, as he holds, of bringing the water from the former bog on the field No. 81 down to Dunlappie, although, as he admits, there was no *opus manufactum* to conduct the water from the field on Lundie across the ditch and into the conduit or 5-inch tile drain.

But although it may have been the scheme and intention of Dr Guthrie when he carried out the operations already referred to to bring the water from the field No. 81 down to Dunlappie, yet there having been no reservation whatever when Lundie was given off, the complainer is not entitled to found upon anything that was intended prior to 1861, but is only entitled to found on the rights exercised by himself and his predecessors from and after that date. Now, beyond having a 5-inch tile reaching to the ditch on the lands of Lundie and then encroaching for the length of a few feet, there was no possession had or asserted by the proprietors of Dunlappie of the lands of Lundie; their possession ended at the ditch end of the five-inch tile or conduit. Mr Shepherd and his successors might have objected if they pleased immediately after the disposition of Lundie to the conduit or tile underneath the road as being in derogation of the grant made by Lord Kintore, who at that time remained proprietor of the estate of Dunlappie, but apparently they did not see the necessity for doing so. They had, however, no reason to suppose that by the presence of a 5-inch tile drawing water from the natural stream in the ditch there was any servitude being constituted against them with regard to the drain on their own land which entered the said ditch some thirteen feet farther up its course, and which, so far as they could see, was nothing but an ordinary field drain just of such a size and description as leader drains usually are, and a drain, moreover, which began and ended entirely on their own land, and was not and never had been connected with the conduit or tile leading to Dunlappie under the road. There was nothing to lead them to connect this drain with the conduit which led out of the ditch farther down, because between the two places there was a stream of water which consisted, not only of the water which came down through the field No. 81, but of all the water which, whether spring or surface, found its way into the ditch or "burnie" in its course of four-fifths of a mile above where the supply was taken off for Dunlappie during which it received some six small rivulets or drains from a catchment area of about 380 acres. The right to take water from an open stream or ditch does not infer a right over all the sources from which that ditch derives its water. I am satisfied, therefore, that the servitude of *aquæductus* on the estate of Lundie ended at the point where the conduit or pipe received the water from the natural stream in the ditch. Erskine, II. ix. 13, thus defines the servitude we are now dealing with: "The servitude of *aquæductus* is the right that anyone has of carrying water in conduits or canals along the surface of the servient tenement for the use of one's own property." Now it seems to me impossible to hold that there was, as is now maintained for the complainer, any such servitude over the natural stream in the ditch or over the drains of the respondent's field No. 81.

The Lord Ordinary has apparently adopted the view regarding the original operations presented by the witness Dakers, but I must say I am disposed to treat the evidence of that witness with some reserve. He endeavours to have it believed that there was a box drain practically the whole way from Dunlappie up to a point one hundred yards above the ditch. Now it is proved, if anything can be held to be proved in this case, by the evidence of the engineers and others, that there is no connection, and can be no connection, between the drain which ended on the Lundie

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side of the burn and the drain which ran off on the other; and I think it is pretty clear that one reason of their being thirteen and a half feet apart was that in time of rain Dr Guthrie could get for his mill dam a larger supply of water than would have come merely from the drain in the field No. 81 on the plan. It is quite proved that there is no trace of there ever having been a junction of any sort between the two drains. Then the view suggested by some of the respondent's witnesses seems to have been adopted by the Lord Ordinary to the effect that the box drain in field No. 81 was from its construction evidently not intended for a drain at all, but for a watercourse, and that this is shown from its being different from the rumble drains which were afterwards put in and which join it at various places. Now, I think it is perfectly clear on the proof that before tile drains were introduced—and, as Mr David Arnott says, "there were no tile drains in these days"—there were two kinds of drains used. The one was a built conduit or box drain. These were used as leaders or main drains where a swamp or bog was to be drained, and were built of dry stones on both sides with a cover on the top; but as they were expensive, and it was troublesome often to find stones of a sufficient size for covers, the smaller drains which led into the main drains were made in the form of what are known as rumble drains, which were simply stones more or less carefully put into a trench with the larger ones on the top and then covered up with earth. So it is in vain to say that the construction of this particular drain in field No. 81 was sufficient to notify the proprietors of Lundie that it was anything more than a field drain, and that it did drain the field there can be no manner of doubt. It is not merely matter of evidence but of common knowledge that before tile drains were introduced the invariable method of draining fields or bogs was by means of built box drains (or, as they are often called, conduits) with spurs or feeders consisting of rumble drains leading into them. I may add that in my own experience these box drains are generally of larger dimensions than that in field No. 81, so there was nothing in the size of that drain to draw more attention to it than to any other box drain.

It appears that up till 1898 the respondent never interfered with the servitude of taking water from the ditch by means of the old conduit or pipe. I cannot hold that the proposal to create a pond would necessarily have had the effect of diminishing the supply of water in the ditch, for after the respondent's pond had been once filled (and I may say I see no objection to his utilising water on his land for the purpose of making a pond), the same amount of water must necessarily have flowed into the ditch over the sluice or breastwork of the pond as the case might be. It seems that the intention of making a pond is now abandoned, and therefore, so far as this part of the case is concerned, there is no call for an interdict.

I must now turn to what happened in 1898. The question for consideration is whether by what was done, or suffered to be done, in that year a new servitude of *aquæductus* was granted in room and place of the old, and whether the period during which this new servitude was enjoyed can be added to the years of enjoyment of the old servitude, with which I have already dealt, for the purpose of validating not the old but the new servitude as it is now claimed to exist. It is necessary to notice that what was done was really to create an entirely new water supply for Dunlappie. (1) Instead of the water being taken from the ditch it was taken from the drain at a point some way up in the said field No. 81; (2) instead of a supply of mixed water, partly surface and partly underground water, what is now taken is underground water; (3) instead of an encroachment of a pipe or conduit for the length of a few feet on the estate of Lundie, there is an encroachment of several feet and the establishment of a square water tank on a field of the Lundie estate; and (4) instead of the water being conveyed by the old conduit to Dunlappie, it is conveyed in a lead pipe and carefully filtered on the way. It is evident that there is thus now claimed a servitude of a very different kind from that which existed up to 1898. It is a servitude for the supply of pure underground water for domestic uses only instead of an ordinary supply of mixed water from a ditch for the use of a mill dam, and not primarily for drinking purposes. This new servitude imposes a burden of a very different character on the proprietor of Lundie compared with the old servitude, because if it be held that the proprietor of Dunlappie has a servitude for procuring pure drinking water from a point in the field No. 81, belonging to Lundie, it might be held to follow that the proprietor of Lundie was not entitled to carry out any such operations as might pollute that supply, such, for instance, as heavily manuring the field where the drain is situated. Again, it might be held that he was not entitled to alter the drainage arrangements of the field generally; and the further burden was laid on Lundie, namely, of allowing the proprietor of Dunlappie to come on to the lands of Lundie for the purpose of repairing or rebuilding the cistern, or repairing or re-laying the lead pipes; and lastly, the creation of this new servitude might have the effect of preventing the proprietor of Lundie from using his own land in such way as he pleased, for example, by making a pond on it, which would be quite within his power, provided he restored to the ditch as much water as entered his pond, but would be beyond his powers if he was obliged to respect the supply of underground water from the box drain in field No. 81.

Since the new supply was made in 1898, the

pipe or conduit through the road has been shut up, and the conduit through Dunlappie no longer conveys water to the mill dam or house. In short, a new water supply has been created, and an entirely new servitude is sought to be imposed. Now, for the creation of a new servitude by grant, especially where it implies such a serious burden on a neighbouring proprietor as is implied in that now claimed, it is, I think, the law, as stated by Professor Bell in his Principles, sect. 992, "that such a servitude may be constituted in the charter either of the dominant or the servient tenement, or in a separate deed, contract, or missive, or other authentic writing, holograph or tested;" and Erskine says (II. ix. 3) that conventionally servitudes are constituted either by grant where the will of the party burdened is expressed in a written declaration by which the servitude is imposed, or secondly, by prescription. In the present case no writing is put forward as the foundation of the entirely new servitude now claimed by the complainer, and in my opinion it is incompetent to prove the imposition of such a burden by verbal communications. But, even assuming that it were competent, I do not think that even verbal consent to the servitude by a person competent to grant it has been proved in the present case. . . .

But it is argued that by allowing the cistern and pipes to remain on Lundie from 1898, previous to Mrs Stuart's entry to the property of the estate, down to 1905 without question, the respondent must be held barred by acquiescence from seeking to have them removed. Now, even if the respondent and Captain Stuart did know precisely where this tank and pipes were situated, I think their not taking any notice of it must be ascribed to tolerance rather than to acquiescence, but I do not think that there was even tolerance, and that for the reason that neither Captain Stuart nor Mrs Stuart knew what way the water supply arrangements had been made in 1898 before they came to reside on the property. This appears from Captain Stuart's letter to the complainer, No. 12 of process, and is not wonderful, as the tank was sunk 2 feet in the ground and was covered over with grass like the rest of the field. The lead pipes also were sunk in the ground, to the depth of 18 inches or 2 feet, and both having been in that position from 1898 till 1900, almost all trace of the work would have disappeared, except to a critical observer, and as already noticed it had only taken a day or two to put in the cistern pipe on Lundie. (See the complainer's evidence.)

I am therefore of opinion that on none of the grounds put forward by the complainer can it be held either (1) that a grant of the servitude now claimed was made in 1898; or (2) that the respondent is barred by acquiescence from now objecting to the operations then carried out on Lundie.

As to the alleged important nature of the operations, while the respondent says that it cost about £120 to put in the cistern and the line of piping, it must be remembered that there was a sand trap, a filtering well, and another cistern in the Dunlappie field besides the piping, the whole way to Dunlappie, and that the making of a 2-feet square tank upon Lundie was a very small and inexpensive portion indeed of the total work, and that is, of course, all that the proprietor of Lundie is concerned with. The other works can still be utilised for water taken in at the old conduit or 5-inch tile.

It is not unworthy of notice also that when the complainer was found fault with for having his cistern on Lundie, he broke it up and removed it and put in a new box cistern inside the Lundie fence, but between it and the ditch. This was done in June 1906, and it appears from the evidence of the complainer that he changed the position of the cistern under the belief that the fence was a march fence, and that by what he did he was taking it off Lundie property on to Dunlappie. It is undisputed that the cistern and some of the pipes are still on Lundie, and I am of opinion that the complainer is bound to remove them and is not entitled to interdict against the respondent doing so failing his doing so himself.

The other question is with regard to the right of *aquæhaustus* from the so-called well at the mouth of the box drain on the field No. 81 on the Ordnance Survey Map.

On this question I am of opinion that if this place is to be viewed as a well in the ordinary sense, the complainer has established a prescriptive right to the servitude of *aquæhaustus* from it, as I think it is proved that after the box drain was made, and the cottagers at Burnhead became aware of the excellent quality of the underground water which came down the drain, they have used it as drinking water summer and winter; and although there was no well formed at the time the drain was made, yet subsequently the cottagers themselves seem to have formed a pool deep enough for them to dip pitchers into by placing a number of large stones a short way below the mouth of the drain, and these at the same time served the useful purpose of keeping the ditch water from mixing with the drain water except in times of high flood. Had the proposal to make a pond at this place been still insisted in, it would have been necessary to consider the question whether by the use I have referred to the servitude of *aquæhaustus* had been constituted over the estate of Lundie, but I think there is no reason as matters now stand for granting the interdict against the respondent interfering with this well, as she is not threatening to do so. In my opinion the question is one of considerable difficulty. If the so-called well in question had itself been the site of a natural spring, I think the case of *Wallace*, 16th June

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1761, M. 14,511, would have been an authority for holding that the respondent was not entitled to interfere with that spring. But the difficulty in the present case is that undoubtedly the water is brought into the so-called well by an artificial drain which was not made for the purpose of bringing water for the supply of the Burnhead cottages, although it has been used for that purpose. This case is accordingly very different from the case of *Smith* v. *The Police Commissioners of Denny and Dunipace*, 1880, 7 R. (H. L.) p. 28, where the well was supplied by a natural spring rising at that spot. In the present case I notice that the Lord Ordinary has adopted in his interlocutor what is said in the prayer of the note regarding the origin of the water in question being in two or more springs on the estate of Lundie. I have only to say that there is no evidence of there being any spring on the estate of Lundie from which the water in question comes. That it is underground water is undoubted, but that may quite as well come by a percolation into the drain from a water-bearing stratum as from a natural spring. But whether this is so or not, the authorities seem rather to be to the effect that a servitude cannot be constituted by prescription or use over underground water coming from an artificial drain whether it comes from springs or only from percolation, at all events to the effect of preventing the proprietor of lands through which such water comes from diverting it by ordinary drainage or other lawful operations *in suo*.

See *Wood* v. *Waud*, 1849, 5 Ex. (W. H. and G.) 748 at 778; *Greatrex* v. *Hayward*, 1853, 8 Ex. (W. H. and G.) 291; and *Rawstron* v. *Taylor*, 1855, 11 Ex. (H. and G.) 369.

The principle of these cases seems to be that where a proprietor for his own convenience has laid a drain or made a water channel, and although other persons and adjoining proprietors have taken advantage of such works for their own convenience, yet their having done so, even for the prescriptive period, does not give them a title as a matter of right to prevent the upper proprietor from taking away the supply by altering the level of his drains or performing other lawful operations on his own lands. See the observations of the Judges in *Cruickshanks & Bell* v. *Henderson*, Hume's Decisions, p. 507. It will, however, be time enough should the proprietrix of Lundie proceed to divert the drain, to consider whether or not she is entitled to do so. At present it is not alleged that she intends to do so.

I am accordingly of opinion that no case has been made out for interdict, and that the note ought to be refused.

There are one or two observations which I would like to make in addition to what I have already said. I consider it out of the question for the respondent to maintain, as her counsel did at the proof, that, by having ceased to use the 5-inch tile and the conduit to Dunlappie since 1898, the proprietors of Dunlappie have lost their right to prescribe for the remaining three years which were required to prescribe a right to the supply from the ditch. It is true that since 1898 the 5-inch tile has been shut up and the conduit disused, but this was done under what I have held to be the erroneous but *bona fide* belief on the part of the complainer that he had obtained a right to substitute his new system and piping for the old water supply, and I think it would be inequitable and unjust that he should be prejudiced by what has been done. Even although the two servitudes were very different from each other in the manner and extent of their exercise, they were alike in this, that they were both rights to a supply of water from Lundie.

Lord Pearson.—I concur.

Lord M'Laren.—I also concur in Lord Ardwall's opinion. The chief point in the case is that while a variation was made in the manner of bringing in the water in the year 1898, we do not look upon that as beginning a new course of prescriptive right. If that were so, the right which was already in course of being acquired would be entirely lost. I think the true principle is that the possession of the original watercourse and of the watercourse as altered when put together amount to forty years complete, and that the complainer is entitled to put them together, but that only to the effect of getting such a supply of water and by such means as he and his predecessors had received for the period of forty years.—16*th November* 1907.

Counsel for Reclaimer, M'Lennan, K.C., Lippe; Agents, Macpherson & Mackay, S.S.C.—Counsel for Respondent, Blackburn, K.C., Spens; Agents, Gillespie & Paterson, W.S. A. M.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

220. Wm. Cory & Sons Limited *v.* Kopajtic.

Ship—Collision—Merchant Shipping Act 1894 (57 & 58 Vict. cap. 60), sects. 418, 419 (4), and 424—Collision Regulations, Articles 15 (e) and 16—Fog—Duty of Ships in Fog—Excessive Speed—Failure to Stop on Hearing Fog Signal Ahead—Improper Manœuvre—Altering Course Before Locating Position of Other Vessel—Vessel Not Under Command—Circumstances in which Held That Vessel was Under Command—Application of Collision Regulations and of Provisions of Merchant

Shipping Act, Relating to Collisions, to Foreign Ships Outside British Jurisdiction.

Reclaiming Note against an Interlocutor of Lord Salvesen.

On 10th February 1907 the steamship "James Joicey" of London and the steamship "Kostrena" of Fiume collided near the Cross Sands off Yarmouth at a point beyond the three-mile limit.

Wm. Cory & Sons Ltd., the owners of the "James Joicey," brought an action of damages against Andrea Kopajtic, the master of the "Kostrena," as representing the ownership of that vessel in this country.

The pursuers averred, *inter alia*:—

Cond. 3. The collision was caused entirely through the careless navigation of those in charge of the "Kostrena," for whom the defender is responsible. In particular, they failed to go at a moderate rate of speed in the fog, and when the fog signal from the "James Joicey" was heard, apparently forward of their beam, to stop their engines and navigate with caution. They also failed to go full speed astern before the collision, and improperly altered their course before the collision by porting their helm; they also failed to keep a proper look-out, and regularly to give the appropriate fog signals, all in contravention of the regulations for prevention of collisions at sea.

Andrea Kopajtic brought a cross action against Wm. Cory & Sons Ltd. He averred, *inter alia*:—

The said collision was caused entirely through the fault and unskilful navigation of those in charge of the "James Joicey," and by their failing to observe the regulations for prevention of collisions at sea. . . . The "James Joicey" was in fault (1) in being under way in the fog, having regard to the fact that she was not under command and that there was a large number of steamers in the immediate vicinity; (2) in proceeding at an excessive speed in the fog; (3) in failing to stop her engines, on hearing forward of her beam the fog signals of the "Kostrena," and thereafter to navigate with caution; (4) in failing, on approaching the "Kostrena," to slacken her speed or stop or reverse; (5) in failing to keep a proper look-out; (6) in failing to keep out of the way of the "Kostrena"; and (7) in failing to give the signals provided for by Art. 15 (*e*) of the said regulations. In contravening the said regulations, the "James Joicey" is, in terms of sect. 419, subsect. 4, of the Merchant Shipping Act 1894 (57 & 58 Vict. cap. 60), deemed to be in fault.

The actions were conjoined. Proof was allowed and led.

The import of the proof sufficiently appears from the judgment of the Lord Ordinary.

The Merchant Shipping Act (57 & 58 Vict. cap. 60) provides:

Sect. 418. (1) Her Majesty may, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, make regulations for the prevention of collisions at sea, and may thereby regulate the lights to be carried and exhibited, the fog signals to be carried and used, and the steering and sailing rules to be observed by ships, and those regulations (in this Act referred to as the collision regulations) shall have effect as if enacted in this Act.

(2) The collision regulations, together with the provisions of this part of this Act relating thereto or otherwise relating to collisions, shall be observed by all foreign ships within British jurisdiction, and in any case arising in a British Court concerning matters arising within British jurisdiction, foreign ships shall, so far as respects the collision regulations and the said provisions of this Act, be treated as if they were British ships.

Sect. 419. . . . (4) Where in a case of collision it is proved to the Court before whom the case is tried, that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary.

Sect. 424. Whenever it is made to appear to Her Majesty in Council that the Government of any foreign country is willing that the collision regulations, or the provisions of this part of this Act relating thereto or otherwise relating to collisions or any of those regulations or provisions should apply to the ships of that country when beyond the limits of British jurisdiction, Her Majesty may, by Order in Council, direct that those regulations and provisions shall, subject to any limitation of time, conditions, and qualifications contained in the Order, apply to the ships of the said foreign country, whether within British jurisdiction or not, and that such ships shall for the purpose of such regulations and provisions be treated as if they were British ships.

The Collision Regulations provide:

Art. 15. . . . The words "prolonged blast" used in this Article shall mean a blast of from four to six seconds' duration.

. . . . . .

In fog, mist, falling snow or heavy rainstorms, whether by day or night, the signals described in this Article shall be used as follows, viz.:

. . . . . .

(*e*) A vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuvre as required by these rules, shall . . . . at intervals of not more than two minutes, sound three blasts in succession, viz. one prolonged blast followed by two short blasts. . . .

Art. 16. Every vessel shall, in a fog, mist, falling snow or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. . . .

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

It was stated at the Bar that the Government of Austria had adopted the Collision Regulations but not the provisions of the Merchant Shipping Act.

On 11th June 1907 the Lord Ordinary found that the collision was caused solely through the fault of those in charge of the "Kostrena."

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He added the following Note:—

Lord Salvesen.—These counter actions arise out of a collision which took place on the 10th of February 1907, between the Austrian steamship "Kostrena" and the British steamship "James Joicey." At the time of the collision there was a dense fog. The sea was smooth, and there was a light wind from the south-west. The collision took place some distance north of the Middle Cross Sand Lightship, which is situated off the coast of Norfolk and in a north-easterly direction from Yarmouth. Both vessels were seriously damaged, but the question of liability is the only one which I have to determine at present.

There is a remarkable agreement as to the point of time at which the collision occurred. Roughly speaking, it may be taken that the moment of impact was about twelve o'clock noon on the 10th, which was a Sunday. At that time the fog was so dense that, according to the evidence of those on board the "Kostrena," a vessel could not be seen at a greater distance than four or five hundred yards; while, according to the evidence of the master of the "James Joicey," a vessel could only be seen a hundred yards away. The second officer of the "Kostrena" says that the "James Joicey" only became visible at two to three hundred metres from the "Kostrena"; and probably the truth lies somewhere between his figure and that of the master of the "James Joicey." The fog was therefore of such a character that it was incumbent on both vessels to proceed at a moderate rate of speed, more especially in the locality in question, which is in the direct track of all the traffic passing from Scotland and the Baltic southwards to London and through the English Channel.

The fog had commenced on the evening of the preceding day; and about 9 p.m. the "James Joicey" was in collision with another vessel called the "Syria." In that collision she had her stem from the 13-foot line upwards carried away; and although the damage was somewhat above the waterline, it was so near it that the forward collision compartment soon completely filled. For some time thereafter she was accompanied by the "Syria," but about 2 a.m., as there appeared to be no immediate danger to the "James Joicey," the vessels parted company and the "James Joicey" proceeded on her course. At 9.30 a.m. she passed the Newarp Buoy at so short a distance that the officer in charge was able to see the buoy itself, notwithstanding the continuance of the fog. According to the whole evidence the engines were from that time kept moving dead slow, except for ten minutes between 10.50 and 11, during which they were put to half speed.

After this collision with the "Syria" the "James Joicey" exhibited two red lights, indicating that she was not under command; and next morning the captain had them replaced with two black balls, which constitutes the corresponding day signal. In my opinion this latter signal ought never to have been exhibited. The engines of the "James Joicey" were uninjured, and so was her steering gear. It is true that she was not able to proceed at full speed, and could not therefore manœuvre so rapidly as if she had been uninjured; but there was nothing to prevent her proceeding dead slow or even with her engines at half speed, which according to the expert evidence would give her a movement through the water of about six knots. I was referred on this point to two cases—The "*Hawthornbank*" [1904], P.D., pp. 120 and 129, and the "*P. Caland*" [1893], A.C., p. 207. The former was the case of a sailing ship which had been injured by a collision, her foretop mast and head stays with sails and gear having been carried away, and her bows stove in. She had hoisted her lower maintop sail, and was moving through the water at about three knots, and she was held to be not under command although she was being steered in a definite course which she was able to alter, although very slowly. That was a very special case, and the present seems to me to be practically ruled by the decision of the Privy Council in the second case referred to. Here the vessel was able to proceed at five or six knots an hour. She could stop and reverse her engines, which were uninjured; and she could steer, although she would not answer her helm so quickly as when going at a higher speed. A vessel in such circumstances cannot, in my opinion, be described as being "not under command"; and I think the master of the "James Joicey" made a mistake in exhibiting a signal to that effect. Fortunately for her, however, it is not said that the signal in any way misled the "Kostrena," or could have done so looking to the very short period which elapsed from the time that it was seen until the collision. The sounds signal, which in a fog is prescribed with the view of warning vessels that they are in the vicinity of a ship not under command, was not sounded, and strange to say, does not appear even to have been known to the master of the "James Joicey."

As neither vessel had an opportunity of observing the other until the collision was imminent, the evidence as to speeds, courses and navigation must be derived exclusively from the witnesses on board each. There is only one matter with regard to which there is a complete conflict of evidence. According to the "Kostrena," the whistle of the "James Joicey" was heard about three points on her port bow, and before the collision she was seen on the port side crossing at an angle of 45° from port to starboard. The witnesses from the "James Joicey," on the other hand, deponed that the "Kostrena" was on her starboard bow when her whistle was first heard, and that she was seen crossing at a broad angle on a port helm from the starboard to the port side of the "James Joicey." This curious conflict is difficult to explain; but the real evidence enables me to prefer the story of the "James Joicey." The vessels were practically approaching on parallel courses; and I am satisfied, for reasons that I shall afterwards explain, that the "Kostrena" was going at a much higher rate of speed than the "James Joicey." If, therefore, the "Kostrena" ported her helm, as her witnesses say, some short time before the collision, it was impossible that the collision could have occurred, unless the "James Joicey" had previously starboarded and was proceeding at a much higher rate of speed. On the other hand, the collision is amply explained by the "Kostrena" porting her helm when she had the "James Joicey" on her starboard bow. The only evidence for the "Kostrena" that tends to support her case is that given by Captain Tait, who says that, taking the courses of the two vessels described in their logs, the "James Joicey" would pass to the westward of the "Kostrena." The value of that evidence, however, depends on the distance at which the "Kostrena" passed the Middle Cross Sand Lightship, which is a mere matter of estimate, and also on the assumption that the courses of the two vessels were maintained with mathematical accuracy.

The next question is, What were the respective speeds of the two vessels prior to the collision? It is admitted that for an hour the "James Joicey" had

been going against the tide, while the "Kostrena" had the tide with her. If, therefore, each vessel had her engines going dead slow, which would represent a speed through the water of three knots, the actual speed over the ground of the "Kostrena" would be much greater than that of the "James Joicey." The only scientific calculation of the strength of the tide during the hour preceding the collision is made by Captain Cowie, who puts it at 2·64 knots per hour. On that assumption the "Kostrena" would be moving at least 5·64 knots as against a speed of ·36 knots for the "James Joicey." Even if the tide was only flowing a knot and a half an hour, as some of the witnesses estimate, the "Kostrena" would still be going at 4½ knots or three times as fast as the "James Joicey." Mr Dickson asked me to hold that the "James Joicey" must have been going at half speed. There is no evidence whatever from which I could draw that inference. The engineer's log book, which is carefully kept, records that for nearly an hour before the collision her engines were kept moving dead slow; and the distance she covered in the previous four hours is entirely consistent with the entries in the log. The Solicitor-General in the same way asked me to hold that the "Kostrena" had her engines moving at half speed. I think I am not at liberty to draw this inference either, and I cannot hold it proved that the "Kostrena" was going at a greater rate of speed over the ground than 5½ or 6 knots. Considering the fog which prevailed, I am of opinion that this was in excess of a moderate speed. It was sought to be justified on the ground that the "Kostrena" would not have steerage way unless she were going at least three knots through the water. I cannot accept that evidence, because cases frequently occur of vessels moving only from one to two knots through the water, and yet having sufficient steerage way to navigate narrow channels. The "Kostrena" was therefore to blame for infringing the first part of Art. 16 of the Regulations for Preventing Collisions at Sea.

The "Kostrena" was also, in my opinion, further to blame for infringing the second paragraph of Art. 16. This paragraph is in the following terms:—"A steam vessel hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over." On her own shewing, the "Kostrena" did not observe this regulation. At 11.45 she heard the whistle of a vessel that she now believes to have been the "James Joicey" about three points on her port bow. It was imperative that she should then stop her engines. The reason of the rule, as explained by the Lord Justice-Clerk in the case of "*The Warsaw*," 1906, 8 F. 1013, is "to give opportunity of accurate observation of sound"; and it is noticeable that according to the engineer's log the "Kostrena" had done this on previous occasions. The excuse suggested for not complying with the rule, that if the "Kostrena" lost steerage way her position might be endangered because of the number of vessels whose signals she heard on all sides, is untenable. The fact that the locality was crowded with shipping made it all the more necessary for the "Kostrena" to observe the rule. It does not, of course, follow that the engines should remain stopped, but I think it may be assumed in this case that if the rule had been complied with the "Kostrena" would in all probability have correctly located the position of the "James Joicey" as on her starboard bow, and not on her port bow; and that she would further have made the collision less likely by having had her way considerably reduced.

It follows from what I have said that the "Kostrena" was still further to blame in porting her helm before she had ascertained the correct position of the approaching vessel. On the theory that that vessel was still three or four points on the "Kostrena's" port bow the manœuvre is unintelligible; although, if the position of the "James Joicey" had been correctly located, it would of course have been harmless. It was this manœuvre which directly led to the collision, and brought the "Kostrena" across the "James Joicey's" bows at an angle variously estimated at from 60 to 90 degrees. The only possible explanation seems to be that the master of the "Kostrena" realised when he heard the second blast from the "James Joicey" that she was not in the position he originally believed, and that for the moment he lost his head.

It is a more difficult question whether the "James Joicey" was also to blame, and no less than seven charges are made against her in Cond. 3, some of which, however, are no longer insisted in. I have already dealt with the first two and the seventh. The fourth, fifth, and sixth are not supported by the evidence; and, as I understood from the counsel for the "Kostrena," were not insisted in. There remains the third charge, which is to the effect that the "James Joicey" was to blame in failing to stop her engines on hearing forward of her port beam the fog signals of the "Kostrena," and thereafter to navigate with caution. This charge rests on a single entry in the mate's log, which puts the time when the "Kostrena's" whistle was heard at 11.50 a.m.; whereas, according to the evidence, the engines were not stopped until a few minutes before the collision. The complete entry is as follows:—"About 11.50 a.m. heard a steamer's whistle on her starboard bow; our engines were stopped, and a whistle was again heard on starboard bow, and almost at the same time a steamer loomed out of the fog." The engineer's log records that the engines were stopped at 11.57, and were put full speed astern at 11.59. Reading these two documents together, it was powerfully argued that the "James Joicey" must be taken to have heard the first whistle of the "Kostrena" on her starboard bow at 11.50, that the engines were not stopped until seven minutes later, and that the collision occurred about 11.59 or 12 o'clock. In my opinion, this is not the only construction of the documents. The mate's log, which records the time of hearing the first whistle as about 11.50, may also be read as implying that the engines were thereafter immediately stopped; and that is what the captain and mate say in their evidence, the only difference being that they place the time when they heard the first blast at 11.54 or 11.55, and put the collision at 11.57, or two or three minutes earlier than the engineer. It is no doubt strange, if the "Kostrena's" whistle was being regularly sounded, that it had not been heard by those on board the "James Joicey." But the *onus* of proving a breach of a statutory regulation, which raises a presumption of fault, is on the person who alleges it; and, in my opinion, the evidence is insufficient to justify the conclusion which the "Kostrena's" counsel pressed upon me. Even if the "James Joicey" heard the whistle at 11.50, and failed to stop, I do not see how that could have contributed to the collision. Moving, as she was, only from a half to one knot per hour over the ground, she could not have remained stopped for

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more than a fraction of a minute before she would entirely lose her way; and it is difficult to suggest how she could have been navigated with greater caution than she actually was. I accordingly pronounce the "Kostrena" solely to blame for the collision.

Andrea Kopajtic *reclaimed* and *argued*: I. The "Kostrena" was not in fault. (1) Her speed was not excessive. The true test was not speed over the ground but speed through the water (*i.e.* the rate at which her engines were going) (Marsden's Collisions at Sea, p. 490; *"The Resolution,"* 1889, 6 Asp. Mar. Cas. 363; *"The Germanic,"* Times newspaper, 22nd February 1896). There was a tide of about two and a half knots, and on the Lord Ordinary's figures the "Kostrena's" speed was not excessive. (2) The "Kostrena" was not in fault in not stopping in terms of Art. 16. In view of the large number of ships surrounding her it would have been dangerous to do so. Further the Merchant Shipping Act did not apply to foreign ships outside the three-mile limit (Merchant Shipping Act 1894 (57 & 58 Vict. cap. 60), sects. 418 (2) and 424; *Martensen* v. *Peters*, 1906, 8 F.J.C. 93; *The "Magnet,"* 1876, L.R. 4 A. & E. 417; *The Queen* v. *Keyn* (the *"Franconia"*), 1876, L.R. 2 Ex. D. 63; *The "Fanny M. Carvill,"* 1888, L.R. 13 A.C. 455, at p. 460; *The "Saxonia,"* 1862, 15 Moore P.C. 262); and the statutory presumption of fault (Merchant Shipping Act, sect. 419 (4), did not arise). II. The "James Joicey" was in fault. (1) She could not proceed at full speed and she was thus hampered in avoiding other vessels. Therefore she was not under command (*The "P. Caland"* [1893], A.C. 207; *The "Hawthornbank"* [1904], p. 120). She was thus in fault (*a*) in being under way in a fog, and (*b*) in not giving the signal prescribed by Art. 15 (*e*). It was for her to shew that this fault did not contribute to the collision (The Merchant Shipping Act sect. 419 (4); *The "Duke of Buccleugh,"* [1891], A.C. 310; *The "Arratoon Apcar,"* 1889, L.R. 15 A.C. 37. *The "Warsaw,"* 1906, 8 F. 1013). (2) Apart from her being not under command, she had proceeded at an excessive speed. (3) It was also proved that she did not stop on hearing the "Kostrena's" whistle (Art. 16). This appeared from the logs, which were the best evidence in this matter (*The "Eleanor,"* 1809, 1 Edwardes 135; *Campbell* v. *Tyson*, 1841, 4 D. 342; *The "L'Etoile,"* 1816, 2 Dodson 106; *Clyde Shipping Co. Ltd.* v. *Miller*, 1907, 44 S.L.R. 920). (4) Lastly, the "James Joicey" was in fault in starboarding her helm just before the collision.

Argued for Respondents: I. The "Kostrena" was in fault. (1) She had infringed Art. 16 by proceeding at an excessive speed in fog and by not stopping when she heard the "James Joicey's" whistle. She was also in fault in altering her course before she had located the "James Joicey." (*The "Warsaw," cit.*; *The "Resolution," cit.*). II. The "James Joicey" was not in fault. She was under command. Her steering gear was unaffected and she could stop and reverse. No doubt she could not go at full speed, but that was not required in fog (Art. 16). She was therefore under command, and was not in breach of Art. 15 (*e*). It was proved that she went at moderate speed, and that she stopped on hearing the "Kostrena's" whistle. Her starboarding her helm was a proper manœuvre in the circumstances.

The Court *adhered*.

The Lord Justice-Clerk.—We have had a very able debate in this case, and have had very able assistance from the nautical assessor. The conclusion to which I have come, and in which your Lordships concur, is that the decision of the Lord Ordinary is right. As in those cases generally, so in this case, there is a considerable conflict of evidence. I have found myself quite unable to accept the estimate given by the captain of the "Kostrena" as to her distance eastward from the Middle Cross Sand Light when she passed. It is quite certain that she was a great deal nearer than the captain thought, and that if she had not been a great deal nearer, this collision could not possibly have happened whatever the "James Joicey" might have done. That they were approaching one another, the "James Joicey" going southwards towards the Middle Cross Sand Light and the "Kostrena" going northward, and that they were within narrowish limits as regards their courses, I cannot doubt. It is clear that if the "Kostrena" had kept the course her captain says she was keeping she could hardly have got into the position of being on the "James Joicey's" starboard bow. I am not satisfied that she kept that course accurately. I am not well satisfied with the accuracy of the evidence given by those on board the "Kostrena." It seems that this steamer was steered by hand, and steering in the fog the steersman may often have got off his course, and before he got on to it again he might be on a line which, while it looked quite correct, was only parallel with the course originally intended to be steered. That he came up to the eastwards of the Middle Cross Sand Light I have not the slightest doubt. Now when he got a certain distance up he heard the sound of a steamer as he says broadish upon his port bow. That was his belief, and I shall assume that it was his honest belief; but in that he may have been considerably mistaken, and unless he looked at his compass at the very time at which he heard the blast, he could not be certain that at the moment the head of his vessel was exactly on the course which he intended. If so that might make a great difference.

Now, what was his duty when he heard that sound? I think the whole question turns upon

this. I think his duty under the regulations plainly was at once to stop his engines until he had located the sound correctly. The regulation ordering the stoppage of a vessel in such circumstances is imperative, being a regulation based entirely upon the necessity of stopping as much as possible all sound on board the vessel in order that those in charge may more accurately locate the sound when they hear it again. The captain of the "Kostrena" did not do that but went on, and in that I think he was distinctly in fault, unless he can put forward circumstances which made it impossible for him to obey the rule. What are the circumstances that he says necessitated his disobeying that rule? They are that there were a number of other vessels there blowing horns. There was no corroboration of that; although there was a special signal given, probably by a fishing boat at anchor. But even if he had heard several other horns blowing round him in different directions, then, wherever they were, there was no reason in the world why he should not stop. By stopping he would not be any the more in danger from these other vessels. And hearing several signals, the duty to stop so as to locate sound correctly was all the more essential. So far as I can see, therefore, we have the "Kostrena" in direct violation of one of the most imperative regulations applicable to foggy weather. Then what happened is, that the captain, without having stopped so as to locate the sound, took it for granted that he had a right to port his helm, and did port his helm; and the case against him is that he should not have altered his course until he had located the vessel, which he certainly had not done. Now then the "Kostrena" is found committing two distinct faults. One was going on without stopping and thereby preventing the locating of the sound, and the other was porting her helm when nothing had been done to ensure correct location.

Now let us turn to the "James Joicey." The "James Joicey" was going south upon a course S. ½ W., having passed close to the North Cross Sand buoy, and her case is that when the "Kostrena" loomed in sight she was on her starboard bow and was upon a port helm. That the "Kostrena" was upon a port helm is true, and that she was upon the "James Joicey's" starboard bow may be taken to be true in the whole circumstances of the case. She stopped her engines, and the order was given to reverse the engines and to starboard the helm. Now the nautical assessor told us that when that order was given the effect of the *starboarding* action would not take place without some time elapsing—within the time probably that the two vessels might meet. The assessor tells us that so far as the course of the vessel is concerned, if the master of the "James Joicey" did that—reversed his engines and went astern on a starboard helm—the effect would necessarily be the same as if he had ported and gone ahead; and he would be right in reversing his engines and starboarding if the other vessel was going to starboard upon a port helm, seeing that the starboarding of the helm when the vessel was going astern would produce the same effect as porting the helm when going ahead. Up to this point I can see no fault that can be attributed to the "James Joicey." But then it is argued that the "James Joicey" was in fault in respect that she did not give the signal for a vessel not under control. I am not satisfied from all that we have learned that she was a vessel not under control. The only thing that was in question as to whether she was under control or not was the effect of the injuries to her in a previous collision, resulting in water coming in at the bows and setting her down forward so that she could not steer. But the fact is, that she could steer and did steer. But then, it is said further, that she was giving signals in daylight and at night which indicated that she was a vessel not under control. That, of course, would be prudent on the part of the master of a vessel not under control even in degree; but we must hold, on the advice we have received, that she was a vessel under control—that is to say, she was under control at the speed at which she could move, and in the circumstances was quite capable of doing what another vessel could do in the case of an emergency. No doubt it was not a high speed; a high speed could never have been attained in her state, and would have been wrong even if possible, as she was in fog; but going at this slow speed she was under control. We were referred to the case of the "*P. Caland*," in which Lord Herschell gave an opinion, and in which the vessel in question was a great deal more out of control than the vessel in this case. There it was held that it could not be said reasonably that the vessel was out of control. Even if it were otherwise, and the question was whether she might have misled the "Kostrena" by not giving the signal that she was not under control, that question would resolve itself into this, Did that in any way contribute to what happened? In my opinion it did not, because what the "Kostrena" had to do according to the regulations, and knowing that a steamer was there, was to stop and wait until she could locate its position. The purpose of the stopping is for location, and she should have stopped and located the other vessel, and that was an absolute duty on the part of the master, whether the other vessel was a vessel under control or a vessel not under control. Therefore I come to the conclusion that the Lord Ordinary is right in holding that the "James Joicey" was not to blame for what occurred. There is another point to which I need to refer, and that is the question whether the regulations in the circumstances apply to a foreign vessel. I can only say this, I never

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heard of that question being raised before. We had a case of exactly the same kind as this in this Division and the point was not raised; and there was also a case in England in which it was not raised. In these circumstances I do not think we are called upon to decide any such question, nor do I think it would affect the decision in this case, because I am clearly of opinion that the "Kostrena" was to blame by taking the wrong course. What she did was essentially bad seamanship.

I would therefore move your Lordships to adhere to the interlocutor of the Lord Ordinary.

Lord Stormonth-Darling and *Lord Low* concurred.

Lord Ardwall.—I am of the same opinion. The "Kostrena" was undoubtedly in fault. The first and very serious fault on her part was that she did not comply with Art. 16 of the regulations as soon as she heard the fog signal of the other vessel in a position which she had not ascertained. The imperative requisition in Art. 16 is that "a steam vessel hearing apparently forward of her beam the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until the danger of collision is over." It is unquestionable, according to the evidence of those on board of the "Kostrena" herself, that she did not stop. Of course, the object of stopping in such a case is to locate the sound so as to find the position of the other vessel. She cannot locate the sound well until her engines are stopped. As was pointed out in the passage read from the Lord Justice-Clerk's opinion in the case of the "*Warsaw*," the object of a vessel stopping in these circumstances is that those on board should be freed from the noise of her own engines and of rushing through the water so as to be able to distinguish by the sounds made by the other vessel the direction and distance from which they come. Now, the "Kostrena" failed to stop her engines. The only excuse given for that failure is that there were a great number of steamers about; but the evidence shows that that really was no excuse at all. The second mistake which the "Kostrena" made was that she improperly ported her helm. That raises the question of the position in which these two ships approached each other. We have had the advantage of a consultation with the nautical assessor, and he is of opinion that taking the courses that the vessels were on, the "Kostrena" must have had the "James Joicey" not on her port bow but upon her starboard bow. Of course, the "Kostrena" must have been very much further to the west than we are led to suppose from the evidence, but in the circumstances the "Kostrena" might easily have got inshore of the course of the "James Joicey" owing to her shifting her course, to avoid vessels, and owing perhaps to the tidal currents. It is absolutely certain that if she had not been inshore of the course of the "James Joicey" just before the collision, the two courses never could or would have crossed each other. I must hold that somehow or other the "Kostrena" must have got inshore of the course of the "James Joicey," and therefore, when she approached the point where the courses were to cross each other, she must have had the "James Joicey" on her starboard bow. Now, in that state of matters it was a wrong manœuvre on the part of the "Kostrena" to port her helm and thereby run straight across the bows of the "James Joicey." With regard to her excessive speed, which is the third fault charged against the "Kostrena," that is shown by the nature and direction of the injuries inflicted on the two ships by the collision, and I am satisfied that although the speed may not have been very great, yet it was a speed greater than she should have been proceeding at through fog. With regard to the "James Joicey," the first point made against her is that she did not stop when she heard the whistle of the "Kostrena," and that is founded upon the entries of the time in the mate's log. I agree with what was said by your Lordship in the chair in the course of the discussion, that the mate's log must not be read too literally or strictly in a case of this sort. At that moment when the whistle sounded those in command of the "James Joicey" were all concerned with trying to escape from a collision, and I have no doubt that the log was written afterwards, for the simple reason that it could not be written up at the time when the mate was on the bridge. On the other hand, the engineer's log is in a totally different position. The engineer is in the engine room, and when he gets a signal from the bridge he looks at the clock, and after he has carried out the order he marks down the very moment that the telegraph rang, so that it is a record which, unless it can be clearly shewn that it was written up afterwards, is a record of the highest importance and is most reliable. I am therefore of opinion on the best evidence we have, and comparing it with the other evidence in the case, that the "James Joicey" did stop when she heard the fog signal of the other vessel. It is said that she manœuvred improperly by starboarding her helm and reversing her engines. The order to starboard and the order to reverse are two distinct orders given at the same time, one to the man at the wheel by word of mouth, and the other to the engineer by the telegraph. These orders were proper in the circumstances and did not contribute to the collision; on the contrary, they tended to lessen the risk of collision, and mitigated, so far as was possible, the force with which the vessels collided. The evidence as to speed shews that the "James Joicey" was not being navigated at too great a

speed in the fog. There is a fourth point of blame brought against the "James Joicey," and that is that she failed to comply with Art. 15 (*e*) of the regulations in not giving one prolonged blast followed by two short blasts. The first thing to be said about that is that it is really irrelevant to the present case, because it cannot be said that those on board the "Kostrena," who did not stop under Art. 16 when they heard the ordinary foghorn, would have stopped if they had heard this other signal. But apart from that altogether, I consider that this ship, the "James Joicey," could not well be regarded as a ship not under command. It is true that it is a duty to put up or give by sound a signal appropriate to a ship not under command; but whatever may be said about that in ordinary circumstances it is clear that it did not matter here, because the ship was going at a low speed, and that at that low speed she was quite under command. In short, the fact of the matter was that the "James Joicey" was practically reduced from an eight or a nine knot vessel to a four knot vessel by reason of the fact that it would be dangerous to force her through the water at great speed. At the slower speed she was quite under command, and as that speed was the proper speed in going through fog the master was not required to sound the number of whistle signals prescribed by Art. 15 (*e*). Accordingly, I think that the charges put forward against the "James Joicey" have broken down, and that for the reasons I have already mentioned the "Kostrena" was alone to blame.—27*th November* 1907.

Counsel for Reclaimer, Murray, Carmont; Agents, Beveridge, Sutherland & Smith, S.S.C.—Counsel for Respondents, Hunter, K.C., Spens; Agents, Boyd, Jameson & Young, W.S.

J. S. M.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Low.*)

221. Davidsons *v.* Logan.

2nd Div. Davidsons v. Logan.

I. Arbitration — Award — Validity — Reduction — Landlord and Tenant — Agricultural Subjects — Obligation to Put Subjects into Tenantable Condition—Landlords' Obligation at Entry of Incoming Tenant—Outgoing Tenants' Obligation at Ish—Submission to Arbiters to Fix Sum Necessary to Fulfil Landlords' Obligation to Incoming Tenant to Put Buildings, Fences, etc., into Tenantable Condition and Repair—Award of Sum Necessary to Fulfil Outgoing Tenants' Obligation to Landlord to Put Buildings, Fences, etc. into Tenantable Condition—Held Award Invalid.

II. Arbitration—Agricultural Valuation — Award — Validity — Reduction — Submission to Arbiters, and in the Event of Their Differing in Opinion, to Oversman — Award Bearing to be Joint Award of Arbiters and Oversman — Parole Evidence That Award Was Truly the Award of Arbiters Alone—Held (Diss. Lord Stormonth-Darling) That Award Invalid — Parole Evidence Inadmissible to Contradict Award—Hope v. Crookston Brothers, 1890, 17 R. 868, Distinguished.

III. Process—Record—Reduction—Ground of Action Not Pleaded on Record—Circumstances in Which Pursuer Held Entitled to Decree on Ground Not Stated on Record.

Reclaiming Note against Interlocutor of Lord Ardwall.

(*Reported ante, Vol. XIII. p.* 404; *Vol. XIV. pp.* 57 *and* 686.)

This was an action brought by Alexander Davidson, senior, and Alexander Davidson, junior, farmers, Whitton, in the county of Roxburgh, against Abraham Logan of Whitton, to obtain reduction of certain awards issued by arbiters. The facts of the case sufficiently appear from the previous reports and from the judgment of Lord Low.

On 22nd January 1907 the Lord Ordinary granted decree of reduction.

The Defender *reclaimed*, and *argued*: The Lord Ordinary was wrong in holding that at common law the landlord was bound to put the fences into such a condition that they would last from entry to ish (Ersk., II. vi. 3; Bank., I. xx. 10, II. ix. 21; Hunter, Landlord and Tenant, 4th ed., II. 219, 220; *Haining & Douglas* v. *Grierson*, 1807, Hume 829; *Mossman* v. *Brocket*, 1810, Hume 850). Under the lease the defender was bound to put the fences into "good order"—*i.e.* into such a condition that they would last from entry to ish. But under the submission the question sent to the arbiters was: What sum was required to put the fences into "tenantable condition"? That meant the condition in which an outgoing tenant was bound to leave the fences. No doubt, if the operative clause of the deed were ambiguous, it should be construed in the light of the narrative clause (*Orr* v. *Mitchell*, 1893, 20 R. (H.L.) 27, *rev.* 19 R. 700). But here the meaning of the operative clause was clear, and the narrative was ambiguous. If the defender's construction of the submission were right the award must stand, because the arbiters had decided the question submitted to them, and it was no objection that their decision was wrong (*Holmes Oil Co. Ltd.* v. *Pumpherston Oil Co.*

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Ltd., 1891, 18 R. (H.L.) 52; *Caledonian Railway Co.* v. *Turcan*, 1898, 25 R. (H.L.) 7; *Lanarkshire and Dumbartonshire Railway Co.* v. *Main*, 1895, 22 R. 912; *Glasgow City and District Railway Co.* v. *MacGeorge, Cowan & Galloway*, 1886, 13 R. 609). Further, the objection that the arbiters had considered the wrong question was not stated on record. The cases cited by the Lord Ordinary (*Mackay & Son* v. *Leven Police Commissioners*, 1893, 20 R. 1093; *Adams* v. *Great North of Scotland Railway Co.*, 1890, 18 R. (H.L.) 1; *Alexander* v. *Bridge of Allan Water Co.*, 1869, 7 M. 492) no doubt shewed that the construction of the submission was for the Court, but that was not disputed. (2) The award was not invalid on the ground of informality. This was not a case of a formal arbitration, but of a valuation. It was not necessary, because it was proved not to be customary, in the district, to have a written nomination of an oversman, or a formal devolution on him. *Lang* v. *Brown* (1855, 2 Macq. 95) and *Frederick* v. *Maitland* (1866, 3 M. 1069) were distinguishable, being cases of formal arbitrations where no special custom was proved. But in truth the award was the judgment of the arbiters, the oversman's signature being adhibited only to prove that he was present. The parties had therefore got the decision of the tribunal for which they had stipulated and the award must stand (*Nivison* v. *Howat*, 1883, 11 R. 182; *Hope* v. *Crookston Brothers*, 1890, 17 R. 868).

Argued for the Pursuers: The phrase "tenantable condition" might mean (1) the condition into which the landlord was bound to put the fences in a question with an incoming tenant; (2) the condition in which an outgoing tenant was bound to leave the fences in a question with the landlord. These two things were materially different (*Mossman* v. *Brocket*, *cit.*), because the tenant was not bound to make good damage resulting from tear and wear (Bell, Leases, I. 238; Rankine on Leases, 232; *Johnstone* v. *Hughan*, 1894, 21 R. 777), or from inevitable accident (Bell, Prin., section 1253). Further, it was proved that these two distinct meanings of the term "tenantable condition" were recognised by local custom, and local custom must be taken into account (Hunter, Landlord and Tenant, II. 239; *Wigglesworth* v. *Dallison*, 1 Smith L.C. 545). Accordingly the phrase "tenantable condition" in the operative clause of the submission was ambiguous, and fell to be construed in the light of the narrative clause. The narrative clause made it plain that the question submitted to the arbiters was: What sum of money was required to fulfil the landlord's obligation under the lease to put the fences into a condition which would satisfy the claims of an incoming tenant? It was proved by the evidence of the arbiters that the question which they decided was: What sum was necessary to put the fences into such a condition as would satisfy the landlord's claim against an outgoing tenant? This evidence was competent, because, while it was not competent to examine an arbiter as to the method by which he arrived at his award, it was competent to ask him what was the question which he decided (*Duke of Buccleugh* v. *Metropolitan Board of Works*, 1872, L.R. 5 H.L. 418; *In re Dare Valley Railway Co.*, 1868, L.R. 6 Eq. 429). The arbiters, therefore, had not decided the question submitted to them, and the award was invalid (*Glasgow City and District Railway Co.* v. *M'George, Cowan & Galloway*, *cit.*; *Alexander* v. *Bridge of Allan Water Co.*, *cit.*; *Adams* v. *Great North of Scotland Railway Co.*, *cit.*; *Holmes Oil Co.* v. *Pumpherston Oil Co.*, *cit.*; *Lanarkshire and Dumbartonshire Railway Co.* v. *Main*, *cit.*, per Lord Low). The fact that this ground of challenge was not tabled on record was immaterial, because that matter was within the knowledge of the arbiters and was not within the knowledge of the pursuers (*Bile Beans Manufacturing Co. Ltd.* v. *Davidson*, 1906, 8 F. 1181). (2) The award was also invalid in respect that there had been no written appointment of an oversman and no devolution on him (*Frederick* v. *Maitland*, *cit.*; *Lang* v. *Brown*, *cit.*). No doubt the award would not be invalidated by reason of the fact that the oversman had gone with the arbiters to value the subjects, or even, possibly, by the fact that he had signed the award. But here the award bore to be the award of the arbiters and the oversman, and was invalid as being the award of a tribunal which the submission had not set up. Parole evidence for the purpose of shewing that the award was the award of the arbiters alone was incompetent, because it would contradict the award (*Miller & Son* v. *Oliver & Boyd*, 1903, 6 F. 77; *Duke of Buccleugh* v. *Metropolitan Board of Works*, 1872, L.R. 5 H.L. 418 at p. 434). *Nivison* v. *Howat* (*cit.*) and *Hope* v. *Crookston Brothers* (*cit.*) were distinguishable.

The Court *adhered* to the interlocutor of the Lord Ordinary, and found the pursuers entitled to additional expenses.

Lord Low.—The Lord Ordinary has reduced the awards of the arbiters which are challenged in this case upon two grounds: first, that they did not determine the question which was submitted to them, but dealt with another question; and secondly, that the awards bear to be the awards of the arbiters and oversman, and are signed by the oversman as well as the arbiters, although the arbiters were agreed upon their award and the matter was never devolved upon the oversman.

In regard to the first of these grounds of reduction, I am of the same opinion as the Lord Ordinary. The submission arose in this way. By lease executed in February 1904 the defender Mr Logan let the farm of Whitton in Roxburgh-

shire, of which he is proprietor, to the pursuers for a period of nineteen years from Whitsunday 1904, with breaks in favour of either party at Whitsunday 1914 and Whitsunday 1919. Mr Logan had, prior to the pursuer's entry, farmed Whitton himself, and he was therefore both outgoing tenant and landlord. By the lease the pursuers bound themselves to take over the dung upon the farm, the waygoing crop of 1904, and certain plant, machinery, and house fittings, at a valuation, and they also agreed "to accept of the whole houses and buildings, with the water supply thereto, and pipes and connections thereof, roads, drains, ditches, dykes and fences on the said farm, when the same have been put into good order, and the alterations and additions upon the steading made as arranged, as being in tenantable order and condition."

In April 1904 a submission was prepared, apparently upon Mr Logan's instructions, whereby he and the pursuer submitted to the determination of two arbiters mutually chosen, and in case of their differing in opinion, to an oversman to be chosen by them, in the first place the amount to be paid by the pursuers for the dung and other things which by the lease they were bound to take over at valuation, and in the second place "the sums payable by me the said Abraham Logan to us the said Alexander Davidson, senior, and Alexander Davidson, junior, in respect of any houses and buildings, with the water supply thereto, pipes and connections thereof, roads, drains, ditches, dykes and fences on the said farm, not being in tenantable condition and repair as at the entry thereto of us the second parties."

The matter submitted to the arbiters in the second place involved, in any view, a departure from the terms of the lease, because it substituted for the landlord's obligation to put the houses, fences, and so on in good order, a payment by him to the tenants of the sums required to put these subjects into tenantable condition and repair. It appears that that alteration in the nature of the landlord's obligation had not, prior to the preparation of the submission, been arranged between him and the pursuers, but the latter took no objection to the alteration, and executed the submission.

The pursuers' contention is that what was referred to the arbiters was to estimate the amount which it would cost Mr Logan, as landlord, to put the buildings, fences, and the like in good order as stipulated in the lease. What the arbiters did, however, was to estimate the amount which it would have cost Mr Logan as outgoing tenant to put the subjects into tenantable condition and repair as at the termination of a lease, and it was argued for Mr Logan that they were right upon a sound construction of the submission, in making their estimate upon that footing.

Now, it seems to me not to be open to question that the obligation undertaken by Mr Logan in the lease to put the buildings and fences into good order, was undertaken by him as landlord, and not as outgoing tenant; and I think that it is equally plain that the intention of the parties to the submission was that the arbiter should determine the amount of money required to fulfil that obligation.

The difference in phraseology between the narrative of the submission and the operative clause which formulated the question which the arbiters were to determine, was founded on by Mr Logan's counsel, who argued that the words in the latter clause—"tenantable condition and repair"—were invariably used to designate, and were recognised as meaning the condition and state of repair in which an outgoing tenant was bound to leave buildings and fences at the termination of his lease, and were therefore not open to construction, and could not be modified or controlled in any way by reference to the narrative.

I am of opinion that that argument is not well founded. It is beyond dispute that the obligation which lies upon a landlord at common law to put buildings and fences at the commencement of a lease in tenantable condition and repair, involves more and is more onerous than the obligation which lies upon the tenant to leave these subjects in like condition and repair at the end of the lease. To take one example out of many which might be given:—If a fence were, at the beginning of a lease, worn out, so that it was no longer capable of being repaired, the landlord would be bound to renew it, but no such obligation would rest upon a tenant at the end of a lease, because he is not responsible for the effects of inevitable wear and tear, and is not bound to renew what, from that cause, has become worn out. It was therefore essential, in the present case, that the arbiters should know whether the obligation upon which they were to put a money value was the obligation of a landlord at the beginning of a lease, or of an outgoing tenant at the end of a lease. I should have thought that no one could have read the submission without seeing that it was the landlord's obligation which was in question, because the submission itself recites the clause in the lease in regard to the condition of the buildings and fences, and the landlord states that he has agreed to pay such sum as the arbiters shall fix in respect of any buildings and fences not being in the stipulated condition.

It was said that the use of the words "good order" in the narrative, and of the words "tenantable condition and repair" in the operative clause indicated that what was actually submitted to the arbiters was something different from what was referred to in the narrative, or at all events that the question submitted was more accurately expressed in the operative clause, in either of which cases the latter clause must

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rule. I do not think that there is any real inconsistency between the narrative and the operative clauses. In the first place, I am inclined to think that a landlord's obligation to put buildings and fences into "tenantable condition and repair" at the beginning of a lease, is substantially equivalent to an obligation to put them into good order, because I cannot imagine such subjects being in "tenantable condition and repair," when intended to serve the purposes of a lease for (say) nineteen years, unless they were in good order. But however that may be, the clause in the lease, which is recited in the submission, shews that in the present case the expression "tenantable condition and repair" was equivalent to "good order," because the tenants bound themselves to accept the buildings and fences "when the same have been put in good order," as being in tenantable condition and repair.

It therefore seems to me to be clear that what was referred to the arbiters was to estimate the amount which would be required to implement the obligation undertaken by the landlord to put the buildings and fences at the beginning of the lease in the condition stipulated by the lease. Therefore, as the arbiters have frankly admitted that what they estimated was the amount which an outgoing tenant would require to expend in order to fulfil his obligation to leave the subjects in tenantable condition and repair at the end of his lease, I am of opinion that the award cannot stand, because the arbiters have not determined the question submitted to them, but another question altogether.

It was, however, argued for Mr Logan that the pursuers were not entitled to decree of reduction upon that ground, because they have neither averred nor pleaded it. I agree with the Lord Ordinary that that contention cannot be sustained. I can very well understand that it never occurred to the pursuers that the arbiters had entirely misapprehended the question which was put to them, and the defences do not disclose that what the arbiters had dealt with was the obligation of the outgoing tenant. But that state of the pleadings cannot prevent justice being done between the parties, because, whenever the arbiters admitted that they had not dealt with the question referred to them, there was, in my judgment, an end of the case. Further, the alleged defect in the pleadings could even now be put right by an amendment of the record, but I do not think that in the circumstances that formality is necessary.

In regard to the second ground upon which the Lord Ordinary has held the awards to be liable to reduction, I have felt some difficulty. I entirely assent to the view that in agricultural arbitrations, where the question is the value of such things as a way-going crop or the dung upon a farm, and where the arbiters are chosen because their experience in such matters enables them, by inspecting the subjects, to fix the value, it is desirable that there should be as few formalities as possible. Further I think that in such arbitrations mere irregularities will not vitiate an award even if they are of a kind which would be fatal in other classes of submissions where the duties of the arbiters are more of a judicial character.

In this case the submission was not one purely for valuation, because the arbiters had to fix the amount which would be required to enable the landlord to implement his obligation to put the buildings and fences into good order. No doubt the arbiters might be expected to be able to determine by their own inspection what required to be done, but I think that the probability is that they would further require to call in the aid of tradesmen to advise them as to the cost of such repairs and renewals as they might deem to be necessary.

Still the submission was substantially one for valuation, and in such a case, if it appeared that the parties had obtained the honest opinion of the gentlemen selected upon the questions submitted to them, I should not regard mere irregularities of procedure as being sufficient to nullify the award.

In the present case there is only one matter which has occasioned me difficulty, and that is the fact that the awards under reduction, bear to be the awards of "the arbiters and oversman." I have great difficulty in regarding that as a mere irregularity or informality. In the case of *Lang* v. *Brown* (1855, 2 M.Q. 93), Lord Chancellor Cranworth laid it down very emphatically that when an award is challenged the question always is whether it is one which the parties agreed should be binding on them. Now in this case the parties agreed to abide by the award of the two arbiters mutually chosen, or in the case of their differing in opinion, of an oversman, but they never agreed to accept a joint award of the arbiters and the oversman. It therefore seems to me that the matter is one of substance and not merely of form.

It is true that in this case the arbiters were agreed; and apparently the oversman (who quite properly had accompanied the arbiters when they inspected the subjects) was made a party to the award and signed it, simply to indicate that he approved of the conclusion at which the arbiters had arrived. But that that was the position of matters could not be discovered from the award itself. For anything that appears to the contrary in the award the arbiters might not have agreed, but might have called in the oversman to settle their differences and then issued an award jointly with him. If that had been what actually occurred, I think that there could be no doubt that the award would have been bad, and, in any view, I have difficulty in reconciling myself to the idea that a written award which bears to be a joint award

can be proved by general evidence to be an award by the arbiters only, with in addition an irregular, ineffective, and unnecessary concurrence by the oversman.

The case of *Hope* v. *Crookston Brothers* (1890, 17 R. 865) was founded on. In that case a joint award by the arbiters and the oversman was sustained. The parties, however, had agreed that any disputes in regard to a contract for the sale and purchase of hay should be settled by arbitration in Liverpool "in the usual way," and it was proved that the course which had been followed was according to the custom in Liverpool.

If in the present case it had been proved to be the recognised custom in Roxburghshire, in agricultural arbitrations, where the oversman has accompanied the arbiters when inspecting the subjects, for a joint award to be issued by the arbiters and oversman, the question would have been very different, but although there is evidence that that course is sometimes adopted no such general custom is established.

I therefore agree with the Lord Ordinary that the awards, bearing as they do to be joint awards of arbiters and oversman, cannot be sustained.

Lord Stormonth-Darling.—I concur with Lord Low in the main ground of judgment which he proposes. I think that not only is the common law obligation of a landlord at the commencement of a lease to put the buildings and fences on the farm into "tenantable condition and repair" (which, of course, could be altered by express contract) equivalent to an obligation to put these into good order, but I think that the lease itself in the present case makes it clear that this was the thing submitted to arbitration, because the tenants bound themselves to accept the buildings and fences as being in tenantable condition and repair only "when the same had been put into good order." And as this was (confessedly) not what the arbiters did, I agree that their awards, so far as challenged, cannot stand.

But I do not think that we can avoid, if only as affecting the matter of expenses, the duty of forming and expressing some opinion on the technical grounds of reduction to which also the Lord Ordinary has given effect. It would have been enough, no doubt, for the pursuers to rely solely on the ground that the arbiters had mistaken the nature of the thing submitted. But they did not choose to do so. On the contrary, they chose to state every ground, good and bad, on which the awards could be attacked. On some of these points (I think on most of them) the Lord Ordinary is against them. In particular, he holds that the parties, by acquiescing in the arbiters acting without written acceptances, are barred from reducing the submission on the ground that there were no written acceptances. He also expresses the opinion that the arbiters and oversman acted quite rightly in proceeding together to make the inspections, and he gives very good reasons why any other mode of procedure would be quite unworkable. Further, in view of the fact established at the proof, that there was never any devolution upon the oversman, nor any necessity for such devolution, for the simple reason that the arbiters were agreed, his Lordship really comes to the conclusion that the objection founded on there being no devolution in writing, although the oversman signed the awards, had no substance in it. The Lord Ordinary no doubt states his opinion that wherever there is a formal written submission the nomination of both arbiters and oversman ought to be in writing. But that seems to me to be attaching far too much weight to mere matters of formality and procedure, at all events in rural arbitrations, which truly partake much more of the nature of valuations, between which and regular arbitrations our Courts have always drawn a broad distinction (see, *e.g.*, the case of *M'Gregor* v. *Stevenson*, 1847, 9 D. 1056). Indeed I claim the first part of the Lord Ordinary's opinion as really negativing the idea that these awards ought to be reduced on any ground except the substantial one on which Lord Low has proceeded. Be that as it may, my own opinion is that there is no ground for reducing these awards on any of what may be called the technical grounds. It was because the Second Division, as constituted on 25th May 1906, thought that the Lord Ordinary had erred in accepting these technical objections as sufficient to justify reductions *de plano* that we recalled his Lordship's interlocutor and remitted to him to allow a proof before answer. The proof thus taken has of course been considerably lengthened by the pursuer's insisting upon these formal objections, and even adding to their number. In the result it seems to me to have been shewn that there was no substance in the technical grounds, although it has also disclosed that there was a real and sufficient ground for reducing some of the awards, because the arbiters had not applied their minds to the sum which was necessary to put the fences, etc. into good order.

I should therefore have been in favour of limiting our judgment to what I consider the true ground, and if your Lordships had agreed with me, of marking our sense of the pursuer's failure to establish his technical objections by modifying the expenses to which he is to be found entitled.

The Lord Justice-Clerk.—I concur with both your Lordships that the so-called award in this case cannot stand. But upon the technical questions as to the procedure of the arbiters and oversman, and which can only affect the question of expenses, I agree with the views expressed by Lord Low. I entirely assent to the general view that submissions such as this, which relate to farming matters, are not to be too strictly dealt

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with as regards procedure. But relaxation of rules of sound procedure must not be carried too far. Where only detail matters are concerned, mere technicalities may be held not sufficient ground for setting aside an award, evidently fairly arrived at. But the difficulty in this case is that the irregularities which took place make it plain that the party complaining of the procedure did not get the benefit in the arbitration of what was stipulated for, viz. that in the event of the arbiters differing, he was entitled to the decision of the oversman. He was entitled to know the fact whether the arbiters differed, and whether they referred the matter on that ground, and to consider whether he should ask the oversman to hear him or bring matters before him for consideration. Now the case as it presents itself to us indicates, if anything, that the award was an award made both by the arbiters and the oversman in conjunction, or in the form of one of the deliverances, an award by one arbiter and the oversman. Such awards presented to a party could give him no certainty as to what had been done, whether the arbiters had considered the case and had differed, and therefore had devolved the matter upon the oversman, or whether the oversman had never had any devolution made to him, but had proceeded without any such devolution to take part in disposing of the matters in dispute. It seems to me that the objection to such procedure is substantial. I cannot hold that the party to the arbitration, who felt aggrieved by the so-called award, can without injustice be put in the position of having to accept an award as to which it does not appear that the procedure was truly the procedure contemplated by him in entering into the arbitration as shewn by the terms of the submission. I have only to say further that I do not think that the case of *Hope* has any bearing on this case. It proceeded on custom of a port. That overruled any ordinary law applicable to such a case. Here there is no ground shewn for dealing with the matter on any other footing than that the law must be applied, there being nothing to shew any distinct custom which could justify a decision not in accordance with the legal principles applicable in the circumstances of the case. —29*th November* 1907.

Counsel for Pursuers, M'Lennan, K.C., Murray, Hamilton; Agents, Murray Lawson & Darling, S.S.C.—Counsel for Defender, Solicitor-General (Ure, K.C.), Lord Kinross; Agents, Russell & Dunlop, W.S. J. S. M.

OUTER HOUSE.

(*Lord Johnston.*)

222. Hunter's Executrix *v.* General Accident Fire and Life Assurance Corporation Limited.

Insurance—Accident—Coupon Insurance Policy — Conditions of Policy — Period Covered by Policy One Year From Date of Registration—Date of Registration When No Proper Register Kept—Offer and Acceptance—Coupon Policy Not Registered Till Fully Marked and Filed by Company and Acceptance Issued—Cause of Claim Emerging Within One Year of Registration —Conditions as to Intimation of Claim Referable to General Condition as to Period Insured.

This was an action by the Executrix of a person who held an accident coupon insurance policy with the defending Company for payment of a sum due under the policy in consequence of the death by accident of the assured. The facts of this case and the contentions of parties sufficiently appear from the Lord Ordinary's Note.

Lord Johnston. — The late Adam Turnbull Hunter, of Hawick was injured in the Elliot Junction railway accident on 28th December, and he died from the injuries received on the following day, 29th December 1906. He held a coupon insurance policy of the General Accident Fire and Life Assurance Corporation Ltd., and notice of his injuries and death was given to the Company by Mr Hunter's executrix on 2nd January 1907, the notice being received by the Company on the following day at their head office in Perth. The Company have denied liability, on the ground that the deceased's insurance with them had expired before the accident to him occurred; and *separatim*, that the claim on his behalf was not timeously made. The executrix now sues the Company for the £1000 contained in the coupon insurance policy.

The method of insurance by this Company is peculiar, and requires for the determination of this case very minute attention to details. What the Company term its coupon insurance policy is not always in the same form; but though they do not make it clear, as do other forms which were shewn me, what these premiums charged for the various risks undertaken were, I confine my attention to Nos. 13 and 19 of process, which were originally in one piece—the former being retained by the insured and the latter sent by him to the Company. The Company, besides issuing what they call their coupon insurance policies direct, issue them through, *inter alios*, Messrs Charles Letts & Co., the publishers

of a well-known diary. The document, of which Nos. 13 and 19 of process before they were separated was a specimen, is inserted in each copy of Messrs Letts & Co.'s Diary, and represents to the purchaser of the Diary that the Company will insure him on certain terms and conditions against death from railway accident. I cannot agree with the learned Solicitor-General that this document is an offer by the Company, which becomes a contract the moment the request for registration, to be immediately referred to, is received by the Company. With all the favour in the world for mercantile bargains and even rustic transactions, I conceive that the law expects something in the way of authentication to make a document a binding part of such transaction, and will not receive a mere leaflet, containing no signature or pretence of signature, scattered broadcast, like an advertisement, which indeed it is, over the country as an obligatory document.

No. 13 of process, which I shall term the coupon, sets forth, reading it short, that £1000 will be paid, under the following conditions, by the Company to the representative of any person killed or fatally injured in a railway accident while travelling as an ordinary paying passenger, "should death result within three calendar months after such accident." And the following conditions above referred to are there stated:— "Provided (1) that at the time of such accident the person so killed or injured was the owner of the publication in which the insurance coupon is inserted; (2) that such person had duly caused his or her name to be registered at the Head Office of the Corporation in Perth; (3) had paid the fee for registration and cost of acknowledgment; (4) that notice of claim is sent to the Registered Office of the Corporation at Perth within fourteen days of the occurrence of the accident; and (5) that such claim be made within twelve months of the registration of the holder's name." The numbers indicating the several conditions are mine.

Appended to this coupon was the counterfoil No. 6 of process, entitled Form of Application for Registration, to be detached and forwarded in a closed envelope to the Insurance Company, and then follow these words—"To the General Accident Assurance Corporation Ltd., General Buildings, Perth, N.B.

"In accordance with the terms of the insurance coupon to which this is attached I request you to register my name as below, for which purpose, and also to cover cost of acknowledgment, I enclose remittance, value . . . ." the value to be inserted varying with the particular risk desired to be covered. There then follow spaces for the signature, address and designation of the applicant, and for the date of the signature. In my opinion this form of intimation, or request for registration, are in law the offer or first part of the contract, and the Company have got to do something in the way of acceptance to make the contract complete. Possibly registration of the applicant's name might be sufficient, and certainly the acknowledgment, or intimation of registration which they are in use to send, would be sufficient.

One of the principal difficulties in the present case is to determine what the Company mean by registration, and whether indeed anything which they do can legitimately bear that name. To clear up the Company's practice in general, and to ascertain what was done in Mr Hunter's case in particular, the parties have agreed, by joint minute, on certain facts, and supplemented these by a short proof.

The practice of the Company is as follows:— On receiving a counterfoil, or form of application, for registration at their office in Perth, either over the counter or by post, it is the duty of a clerk to stamp it with an indiarubber stamp bearing the amount of the remittance or premium, and the date of the document being received. To facilitate this stamping the counterfoils are sorted into bundles according to the remittance, whether 2d., 6d. or 1s. At the close of the same day the gross number of counterfoils of each class received are entered in the respective columns on one line of the Account Book No. 16 of process; the gross number of counterfoils of all grades is entered in the next column, and the amount of money received in remittance or premiums is entered in the last. I do not think that on any conceivable view can this book be termed a register. The entries are in gross, and not in detail, and the object is not to record the insurances, but to record the cash received during the day; and as a check upon the correctness of the cash, the gross number of the insurances of each grade producing the cash are inserted.

So far, the evidence is clear as to the Company's practice, but in what follows there is indefiniteness, because there is irregularity, owing to the business being of an irregular or spasmodic character; and in one important point the evidence is unsatisfactory, notwithstanding the pains taken by counsel to come to an agreement about facts.

What follows, though in what order is not made certain, is (1) the marking on the counterfoil of a running number; (2) the acknowledgment of which No. 21 of process is a blank form, and No. 7 of process that sent to Mr Hunter; and (3) the filing in alphabetical order of the counterfoils in small bundles of 50 or 100, according to circumstances, of which bundles No. 22 of process is an example. As to these bundles there is this to be noted—as they are arranged alphabetically, it follows that they are not in the order of these running numbers, and as the counterfoils come in irregularly, it depends on the supply how many days are included in a particular bundle. For instance, No. 22 of process contains the letter

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"A" for 27th and 28th December 1905, but when it was made up nobody knows.

From a consideration of the above, taken in connection with the presumption from circumstances, I conclude, for it is not definitely proved, that the running number is only put on the counterfoil at the same time as the acknowledgment which refers to it is filled up, and that the filing in bundles is the last operation. From a comparison of Nos. 21 and 7 of process it is apparent that the acknowledgment form has not the running number on it when blank, but that the running number is put on by some method of consecutive printing, when the acknowledgment is being filled up. Further, I conclude that when the date stamp is impressed on the day of receipt upon the counterfoil the running number is put on, the acknowledgment filled up and despatched, and the counterfoil filed at no definite interval or intervals after receipt of the request for registration.

To take Mr Hunter's case as a particular example:—He bought his Letts' Diary on or before Christmas Day 1905. He filled up and posted the counterfoil on 25th December. It was admittedly received at the Company's office in Perth on 26th December. As the Company kept the 26th as well as the 25th as a holiday, it was not opened till 27th, and on that day was impressed with the stamp $\frac{\text{6d.}}{\text{27th Dec. 1905}}$. It is not definitely proved when it received its running number, etc. But I must assume that it was numbered $\frac{\text{LC}}{2}$ 7727 (which means $\frac{\textit{Letts' Continental}}{\text{2nd year}}$, number 7727) on 29th December 1905, the day on which the acknowledgment No. 7 of process was filled up. Though filled up on 27th December this acknowledgment was not forwarded, for a special but insufficient reason, until the 3rd of January 1906, accompanied by an explanatory letter No. 14 of process.

It will be apparent that as the accident occurred on 28th December 1906, much depends on the date of registration. If the date of registration be held to be the 29th December 1905, as maintained by the learned Solicitor-General, the accident would have occurred more than twelve months from the date of registration. If the date of registration be held to be 29th December 1905 or any later date, then the accident would have occurred before the expiry of twelve months from the date of registration.

I asked the learned Solicitor-General what was the Company's register, and he candidly admitted that they had none, and, looking to the nature of the business, could not afford to have one, but he maintained that registration in the sense of the Company's practice was the act of stamping the counterfoil with the date of receipt, and if this were not accepted, then as registration might, and possibly should, have been effected on the date of receipt, that that date must, in a question between the insurer and the insured, be held to be the date of registration. If the stamping with the date of receipt were not registration the learned Solicitor-General declined to tie himself to any other date. No other date, in fact, would suit his purpose.

I am of opinion that the mere stamping of the date of receipt upon the counterfoil was in no sense registration, and I am further of opinion that the principle *quod fieri debet infectum valet*, while it may be appealed to by the party creditor in an obligation *ad factum præstandum*, who seeks to enforce the obligation, cannot as of right be founded on by the debtor in such obligation in order to avoid the obligation. Though counsel for the defenders declined to suggest any other act than the stamping of the counterfoil with the date of receipt as the act of registration, I am inclined to think that the nearest thing they can shew to registration is marking the counterfoil with its running number. For I cannot hold the act of filing the counterfoil to be such. It is too impalpable and too indefinite as to time. Now I hold the marking of the running number to have taken place on the 29th December 1905, just before filling up the acknowledgment No 7 of process, which was ultimately forwarded to Mr Hunter on 3rd January following. What, then, does the acknowledgment say? It says this—"Perth 29/12/1905. A. T. Hunter, Esq. No. $\frac{\text{L.C.}}{2}$ 7727. Dear Sir,—We have received your intimation of the purchase of Messrs Charles Letts & Co.'s insurance coupon, with sixpence in stamps enclosed, and have registered your name as being insured against accidents, etc. In future communications please quote above number," referring to the running number, marked, as I hold, *unico contextu* with the filling up of the form of acknowledgment, on the counterfoil. I think that the insured was entitled, as he had no other information as to the date of registration and was not bound to enquire into the Company's practice, to accept as fact that the registration had at any rate not been made earlier than the date on which the letter of acknowledgment stating that his name had been registered bore. It was essential that the assured should know the date of registration with a view to the renewal of the insurance if that was desired; and I hold that the Company are barred from trying to fix the assured with any earlier date than that of their own acknowledgment in order to avoid liability owing to his failure to renew. The date of actual registration is the earliest point of time at which the Company can maintain that there was a completed contract. Personally I do not think that there was a completed contract until the Company had not only registered Mr Hunter's name but issued their acknowledgment. For I

am not to be held as determining that there was any contract until the issue by the Company of something equivalent to an acceptance of Mr Hunter's offer. I find that in the letter of acknowledgment bearing a lithographed signature, which in the circumstances must be held to bind the Company. But though dated 29th December 1905, this acknowledgment was not issued till 3rd January 1906. But for the present purpose it is enough, in my opinion, to assume it issued of the date it bears.

If, then, the date of registration is held to be the 29th December 1905, the accident occurred within twelve months of that date.

But the defenders maintain another ground for avoiding liability. They say that the insurance is under the condition (4) that notice of the claim is sent to their registered office within fourteen days of the occurrence of the accident (this they admit was done); and (5) that such claim be made within twelve months of the registration of the holder's name (this they say was not done, whether the date of registration be, as they hold, the 26th December 1905, or, as I hold, the 29th of that month). I find myself unable to give effect to this contention, as I think, in view of the whole terms of a somewhat confusing document, to do so would disappoint the natural and just expectation of the ordinary person to whom the document is addressed (*Life Association of Scotland* v. *Foster* (1873), 11 M. 351, per Lord-President Inglis at p. 358 and Lord Ardmillan at p. 371). At the outset of the coupon insurance policy it is represented to the members of the public that if their death is occasioned by railway accident they will, on insuring with the Company, receive £1000 should death result within three calendar months of such accident. I do not think that any ordinary person reading the subsequent conditions would arrive at the conclusion that if he was injured within twelve months, and notice of the accident was duly given, his representatives were to be cut off from all claim if he lingered on for a few days beyond the twelve months, though dying within three months of the accident, so that notice of the actual death could not be given within the twelve months. If the Company mean this by their so-called policy, I think they should state it in such language, and print it, not in the minute pica of No. 13 of process, but in such legible type as would make it clear to those to whom the document is addressed, and give them a chance of understanding it. Instead of that, they veil what they now say is their meaning under a cryptic distinction between "notice of claim" and "making of claim." I am sure that no ordinary insured would read the first as "notice of a contingent claim," which if it was not, in certain cases such as the present, preceded by the second, "the making of the actual claim" free from any contingency would be futile. I think that whatever meaning may be deduced from the terms used in the different parts of the coupon by their piecing together by a skilled lawyer, the ordinary reader to whom these terms are addressed would understand them to mean, "provided your claim attaches within twelve months of the date of registration of your name, by reason of your accident within that time, and you give notice of your accident within fourteen days of it, and you die within three months of the accident, your representatives will be paid."

The defenders commence by advertising a wide and general offer to the public, in unmistakable language. If this is to be whittled down, it must be done so clearly, and so that those to whom it is addressed may understand it. The contract is not what the defenders mean to deduce from misleading and inconsistent phrases, but what those in the position of the pursuer will reasonably suppose their general statement in its entirety to convey. The insured is not to be caught by allowing the Company to put a different interpretation on the word "claim" in two consecutive lines of their policy, without any explanation to their customers that they intend a distinction and what that distinction is.

I do not think that any ordinary person reading this document could conceive, for instance, that this Mr Hunter, injured within the twelve months and actually dying, not merely within three months of the accident, but within the twelve months, his representatives would be denied the benefit of the policy, because, though they could give notice of the accident within fourteen days of its date, they could not give notice of the death before the lapse of the twelve months. If the Company mean that, why do they not say in the very forefront of their advertisement after the statement, "Should death result within three calendar months after such accident" in plain words, "provided it occurs within twelve months of the registration of the holder's name, and notice is given of the accident within fourteen days of its occurrence"? As I think that this document must be interpreted *contra proferentem*, and would reasonably be interpreted, as I have indicated, by the class to whom it is addressed, I reject the defenders' second line of defence.

But were it necessary, I should be prepared to hold that this contract was not complete until actual issue on 3rd January 1906 of the acknowledgment No. 7 of process, on the day before which in the following year the notice, not only of the contingent claim, but of the actual claim, was given. If they chose to hold up their acknowledgment for some days I do not think that that entitled them virtually to antedate their acknowledgment in a question with the late Mr Hunter and his representatives, or fixes him and them with a knowledge of his registration prior to 3rd January 1906.—26*th November* 1907.

Counsel for Pursuer, N. J. D. Kennedy, K.C.,

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W. Thomson; Agents, Steele & Johnstone, W.S. —*Counsel for Defenders, Solicitor-General (Ure, K.C.), Constable; Agents, Bonar, Hunter & Johnstone, W.S.* R. S. B.

[*Errata.*—In the above report, p. 572, first column, in the 23rd line from the foot, for "27th" read "29th"; and in the 16th line from the foot, for "29th" read "26th."]

REGISTRATION APPEAL COURT.

(*Lords Stormonth-Darling, Pearson and Johnston.*)

223. Niven *v.* Stewart.

ELECTION LAW — BURGH FRANCHISE — OCCUPYING TENANCY — JOINT TENANTS — FIVE JOINT TENANTS OF PREMISES OF WHICH RENTAL WAS £45—TENANCY IN TRUST FOR VOLUNTARY ASSOCIATION—ONE OF TRUSTEES CEASING TO HAVE ANY CONNECTION WITH THE ASSOCIATION—RIGHT OF REMAINING TRUSTEES TO VOTE—HELD NOT ENTITLED IN RESPECT THERE WERE FIVE TENANTS AND THE RENTAL DID NOT ALLOW A VALUE OF £10 TO EACH TENANT — REPRESENTATION OF THE PEOPLE (SCOTLAND) ACT 1832 (2 & 3 WILLIAM IV. CAP. 65), SECTS. 11, 12—REPRESENTATION OF THE PEOPLE ACT 1884 (48 VICT. CAP. 3), SECTS. 5, 7 (7), 12.

Special Case.

This was a case stated on appeal from a decision of the Sheriff-Substitute (Balfour) at Glasgow, at the Registration Court for the Burgh of Glasgow held at Glasgow on 2nd October 1907.

The case set forth:—

Archibald L. Niven, sewing machine maker, 342 South York Street, Glasgow, a person whose name appeared in the list of voters for said burgh, objected to John Stewart, brush manufacturer, residing at Park Road, Giffnock, as not having been entitled on the last day of July 1907 to have his name inserted in the list of voters for said burgh.

The objections lodged in Court by the said Archibald L. Niven were to the following effect:—

"The parties objected to have not been the occupants of the premises at 207 Rutherglen Road, Glasgow, for the statutory period, and they are not occupants of the premises.

"There are five persons responsible for the rent of these premises, and the rent is insufficient to give a £10 qualification to each."

The following are the facts disclosed at the hearing of the case:—

1. That the name of the said John Stewart appeared in the list of voters for the Blackfriars and Hutchesontown Division of the burgh of Glasgow for the year 1907–8 as joint tenant and joint occupant of premises at 207 Rutherglen Road.

2. That in said list of voters the names of Peter G. Stewart, brush manufacturer, residing at 27 Queen Mary Avenue, Glasgow, William D. Tait, compositor, 17 Castle Mansions, Cathcart, and John Watt, compositor, residing at 110 Thistle Street, Glasgow, also appeared as joint tenants and joint occupants of said premises.

3. That under the lease (which was produced in Court) said premises are let to the said John Stewart, Peter G. Stewart, William D. Tait, John Watt, and Thomas Anderson, Glasgow, at an annual rent of £45.

4. That under said lease the said premises are let to be occupied for the purpose of an organisation termed the Independent Labour Party.

5. That under the provisions of the Lands Valuation Acts, the factor for said premises returned to the Assessor for the burgh of Glasgow the names of the said John Stewart, Peter G. Stewart, William D. Tait, John Watt, and Thomas Anderson as tenants and occupants of said premises for the year 1907–8, and that said names were entered in the Valuation Roll by said Assessor.

6. That the name of the said Thomas Anderson was deleted on appeal from the Valuation Roll by the Assessor, on the ground that he had ceased to be a member of the said Independent Labour Party, and proof was led before me which established that Thomas Anderson had no connection with the Independent Labour Party as occupiers of the premises in question.

7. That the rental of said premises entered in the Valuation Roll is £45 per annum.

8. That the said premises are occupied as reading and billiard rooms of the said Independent Labour Party, and are the headquarters of said organisation in the locality, and there are about one hundred members of said organisation.

9. That the said premises have been occupied in this way for the qualifying period, and that the names of the said John Stewart, Peter G. Stewart, and John Watt were enrolled as voters for the burgh of Glasgow in respect of said premises for the year 1906–7.

I repelled said objections.

The Questions of Law for the opinion of the Court were:—

1. Was the said John Stewart properly entered in the list of voters for the Blackfriars and Hutchesontown Division of the burgh of Glasgow for the year 1907–8 as joint tenant and joint occupant of premises at 207 Rutherglen Road, Glasgow?

2. Was the rental qualification of the said John Stewart sufficient to entitle his name to be entered in said list in respect of said premises?

The sections of the statutes are sufficiently quoted in the opinion of Lord Stormonth-Darling.

Argued for Appellant: There were five tenants, and that did not give a qualification of £10 each on the rental of the premises. It was of no consequence that one had ceased to be a member of the Independent Labour Party. The question of tenancy must be judged by the lease alone (*Russell*, 1863, 1 M. 313, 314). Sect. 4 of the Act of 1884 contained prohibitions against the multiplication of voters, as by faggot voters, and this assumed the maintenance under the new franchises of the old rules as to joint tenants each requiring the qualification. It was thus settled that when there were several joint tenants the rent of the premises must be divisible so as

to give each the minimum (*Blair* v. *Torrance*, 1868, 7 M. 319; *Blackwood* v. *Moffat*, 1870, 9 M. 7; *Wainwright* v. *Aiken*, 1893, 21 R. 163).

There was no appearance for the respondent.

The Court *sustained* the appeal, and *remitted* to the Sheriff to delete Stewart's name from the roll.

Lord Stormonth-Darling.—This is an appeal from a decision of the Sheriff-Substitute of Lanarkshire pronounced in a Registration Court for the Burgh of Glasgow, repelling certain objections to the entry of the name of John Stewart in the list of voters for the Blackfriars and Hutchesontown division of the burgh, as joint tenant and joint occupant of premises at 207 Rutherglen Road, Glasgow. It appears from the facts stated in the case that there is a written lease, which was produced in Court, that under it the premises are let to John Stewart and four other persons at an annual rent of £45; and that they are so let to be occupied as reading and billiard rooms for the purposes of an organisation termed the Independent Labour Party, which contains about a hundred members. It is also stated in the case that the name of one of these five persons (Thomas Anderson) was deleted on appeal from the Valuation Roll by the Assessor, on the ground that he had ceased to be a member of the said Independent Labour Party, and the Sheriff-Substitute adds that a proof was led before him which established that Thomas Anderson had no connection with the Independent Labour Party as occupiers of the premises in question. The effect of this deletion of Anderson's name from the Valuation Roll (I assume on his own appeal, for I do not see that anybody else had any right or interest to bring it) and the establishment of the fact of his want of connection with the Labour Party may have thrown some doubt on his right to occupy the premises at the date when the Sheriff considered the case; but of course it could not affect the question of his liability for the rent during the endurance of the lease, both past and future.

The Sheriff-Substitute notes that the qualification of these persons, being three of the five persons named in the lease (other than the respondent and Thomas Anderson) depend on the same questions of law; and the questions are: 1. Was the said John Stewart properly entered in the list of voters for the Blackfriars and Hutchesontown division of the burgh of Glasgow for the year 1907–8 as joint tenant and joint occupant of premises at 207 Rutherglen Road, Glasgow? 2. Was the rental qualification of the said John Stewart sufficient to entitle his name to be entered in said list in respect of said premises? I am of opinion that both questions must be answered in the negative.

The statutory right of a person to be entered in the list of voters for a burgh as joint tenant and joint occupant of premises in that burgh depends on the combined effect of sect. 5 of the Representation of the People Act 1884, sect. 7 (7), and sect. 12 of the same Act, and sects. 11 and 12 of the Act 2 & 3 Will. IV. c. 65. Sect. 5 of the Act of 1884 provides: "Every man occupying any land or tenement in a county or borough in the United Kingdom of a clear yearly value of not less than £10 shall be entitled to be registered as a voter, and when registered to vote at an election for such county or borough in respect of such occupation, subject to the like conditions respectively as a man is, at the passing of this Act, entitled to be registered as a voter and to vote at an election for such county in respect of the county occupation franchise, and at an election for such borough in respect of the borough occupation franchise." Sect. 7 (7) defines the "borough occupation franchise" in Scotland as meaning the franchise enacted by the 11th section of the Act of 1832. That section is only partially repealed by the Act of 1884, sect. 12, and even this partial repeal is subject to the exception of enactments containing "conditions made applicable by this Act to any franchise enacted by this Act." Now one of the conditions of sect. 11 of the Act of 1832 which is thus saved is that the person whose claim is under consideration by the Sheriff must have been for a period of not less than twelve calendar months previous to the last day of July in any year after 1832 in the occupancy of any qualifying subjects in such burgh. So far, nothing is said about joint occupants. But sect. 12 of the Act of 1832, after enacting certain provisions about successive occupancy of premises of the requisite value and so on, provides that "where such premises shall be of the yearly value of twenty pounds or upwards, and shall be jointly occupied by more than one person, each of such joint occupiers shall be entitled to be registered and to vote, provided his share and interest in the same shall be of the yearly value of ten pounds or upwards."

Now, keeping in view that, during part at least of the qualifying period of twelve calendar months previous to the last day of July, five persons were responsible for the rent of £45, can it be said that the share and interest of any one of them was of the yearly value of ten pounds or upwards? Clearly not; and on this short ground I move your Lordships to sustain the appeal and delete from the roll the names of the respondent and the other persons dependent on the same questions of law.

Lord Pearson.—In this appeal we are under the disadvantage of having no appearance for the respondent. After careful consideration I have not been able to find any sufficient answer to the appellant's argument, in the case as stated by the learned Sheriff. It is agreed that the value of

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the premises is £45 a year. That value will afford a £10 qualification for four joint tenants and occupiers, but not for five. Now it is true that the result of the Sheriff's judgment is to place four joint tenants and occupiers on the roll, and no more; and this is in conformity with the Valuation Roll, as altered by the Assessor on appeal. But the Valuation Roll, while it is *prima facie* evidence of the statements which it contains, may be overruled by better evidence; and here the Sheriff expressly finds that under the lease (which was produced in Court) the premises were let to five gentlemen, including the claimant, at an annual rent of £45. Now that is the best possible evidence that five persons were joint tenants of the subjects; and as the value will not support five votes, it seems to follow of necessity that none are qualified. The learned Sheriff, in paragraph 6, explains the Assessor's deletion of one of the names upon a ground which has no necessary connection whatever with the continuance or cessation of his liability as tenant under the lease. And while the remainder of that paragraph may be read, though I doubt whether it really can be read, as meaning that there were only four occupiers during the qualifying period, there were at any rate five joint tenants during that period, or during part of it, and that is enough to show that none of them is entitled to be put upon the Voters' Roll.

Lord Johnston.—The first question which requires to be considered in this case is the effect of the entry in the Valuation Roll. The original entry in that roll was of five persons, including the respondent, John Stewart, as tenants and occupants of the premises 207 Rutherglen Road, Glasgow. But on appeal the Valuation Roll was altered by the deletion of the name of one of the said five persons, viz. Thomas Anderson, not because he had ceased to be tenant, but because he had ceased to be a member of the Independent Labour party, for whose behoof the said five persons were tenants, apparently in trust, of the premises. I am at a loss to know what concern the Valuation Appeal Court had with this fact. Anderson's defection from the ranks of the party did not affect his tenancy, however much it may have affected his actual occupancy of the premises, and the Assessor was perfectly right in inserting his name as tenant in the Valuation Roll. The rental is fixed by the Valuation Roll at £45.

The Valuation Roll is made conclusive as to the value of premises by the Representation, etc. Act 1884, sect. 11 (*Harkness* v. *Scott*, 1899, 2 F. 286), the authority of such cases as *Stevenson* v. *Millar*, 1880, 8 R. 8, and *Dunbar* v. *Rule*, 1883, 11 R. 167, decided under prior statutes, being now superseded. But the Valuation Roll is not made conclusive on any other point, and is therefore no bar to one considering the real facts of this case, so long as we accept the value of the premises as £45, as appearing in the Valuation Roll.

This, then, being a claim to the burgh occupation franchise, the evolution of that franchise has been as follows:—The Reform Act of 1832 conferred the franchise in respect of occupancy, "either as proprietor, tenant, or liferenter" of premises in burghs of the value of £10.

The Representation of the People Act 1868 introduced the household franchise, irrespective of value, which is, in a sense, an occupation franchise but involves occupation, not merely as owner or tenant or liferenter, but as inhabitant, and is irrespective of the value of the premises. It is therefore designated, not as an occupation but as a household franchise. This Act further introduced a county occupation franchise depending on tenancy of a £14 value in counties, but it leaves the burgh occupation franchise of 1832 untouched.

The Representation of the People Act 1884 assimilated the occupation franchise in counties and burghs, declaring by sect. 5 that "every man occupying any land or tenement in a county or burgh" of £10 value shall be entitled to the franchise in the county or burgh respectively, subject to the like conditions respectively as governed the county and burgh occupation franchises and the burgh occupation franchise at the passing of the Act. Although this section refers to nothing except "occupation," the interpretation clause, sect. 7, subsect. 7, refers back for the meaning of "burgh occupation franchise" to the Reform Act 1832, sect. 11. This section I have already referred to, and pointed out that it requires as the basis of the occupancy either ownership, tenancy, or liferent. But then the interpretation section of the Representation, etc. Act 1884, sect. 7, subsect. 8, adds that any "enactments amending or relating to the county occupation franchise or burgh occupation franchise other than the sections in this Act on that behalf mentioned, shall be deemed to be referred to in the definition of the county occupation franchise and the burgh occupation franchise in this Act mentioned." (See also the same Act, sect. 12.) That seems to me to let in the provisions of the Reform Act 1832, sect. 12, which, with reference to the occupation franchise created by the previous section of that Act, provides thus for a case of joint occupancy: "Where such premises shall be of the yearly rent or value of £10 or upwards, and shall be jointly occupied by more than one person, each of such joint occupiers shall be entitled to be registered and to vote, provided his share and interest in the same shall be of the yearly value of £10 or upwards." There must therefore not only be joint occupancy, but that occupancy must be as owner, tenant, or liferenter, and the share and interest in the tenancy must be of £10 value. Mr Anderson having retired from the Independent Labour Party, the four other tenants may have the sole

occupancy, but their share and interest depends, not on the occupany, but on the tenancy, and in calculating that share and interest they cannot discard Mr Anderson, their joint tenant. The share of each is therefore only a fifth of £45, or less than £10 in value. Stewart has therefore no sufficient tenancy qualification for the occupation franchise.

I desire at the same time to reserve my opinion as to whether Stewart and the other three persons, who are in the same position, are occupying in the sense of the statutes. They may be joint tenants, but I doubt whether they occupy as joint tenants, and not merely by reason of membership of the Independent Labour Party's Club, sharing the occupancy with the hundred other members of whom we are told it is composed.—28*th November* 1907.

Counsel for Appellant, R. S. Brown; Agent, S. F. Sutherland, S.S.C. F. A. U.

HIGH COURT OF JUSTICIARY.

(*The Lord Justice-General, Lords M'Laren and Kinnear.*)

224. Fairbairn and Others *v.* Lochryan Oyster Fishery Company Limited and Another.

Justiciary Cases—Instance—Complaint at Instance of Incorporated Company and a Person Not Connected With the Company—Officer of Company Not Conjoined in Instance—Instance Held Good.

Stated Case.

This was an appeal against a conviction obtained in the Sheriff Court at Stranraer against the appellants on a complaint at the instance of the respondents, charging a contravention of sect. 2 of an Act for the Better Protection of the Oyster Fisheries in Scotland by fishing on a portion of Lochryan with a seine net.

The case set forth the facts as follows:—

The agent for the appellants stated the following objections to the complaint:—

1. No title to prosecute.
2. Instance defective.
3. Incompetent.

. . . . . .

The Sheriff-Substitute (Watson) repelled the whole objections stated for the appellants, and the appellants pleaded not guilty. The Sheriff-Substitute adjourned the diet to the 21st day of November.

At this adjourned diet the appellants adhered to their plea of not guilty.

Evidence was then led for the respondents. . . .

In the course of the proof the agent for the appellants objected to the production of Part III. of the Eighteenth Annual Report of the Fishery Board for Scotland, which was put in evidence by the respondents, with special reference to a Report of an Inquiry on the Action of the Herring Seine Net by T. Wemyss Fulton, M.D., contained therein. The objection was disallowed. . . .

The Sheriff-Substitute, in respect of the evidence adduced, convicted each of the appellants of the contravention charged, and therefore adjudged each of them to forfeit and pay the sum of ten shillings of modified penalty, and, in default of payment by them respectively within eight days, decerned and adjudged the appellants respectively to be imprisoned for the space of three days from the respective dates of their imprisonment.

The Questions of Law for the opinion of the High Court of Justiciary were, *inter alia*:

2. Is the instance defective, in respect that the manager or other official of the respondents, the Lochryan Oyster Fishery Co. Ltd., is not associated with the Company as complainer?
4. Is the conviction bad in respect of the admission of the evidence which, as above stated, was objected to by the appellants?

The instance of the complaint was as follows:—

> The complaint of the Lochryan Oyster Fishery Co. Ltd., incorporated under the Companies Acts, and having its registered office in Manchester, lessees of the Lochryan Oyster Fishery aftermentioned, and John Alexander Agnew Wallace, Esq., of Lochryan, Cairnryan, Wigtownshire, proprietor of said fishery, with consent and concurrence of John Marquis Rankin, Esq., Procurator-Fiscal of Court at Stranraer, for the public interest.

The record of proceedings contained, *inter alia*, the following:—

The following documents were produced in evidence by the complainers, viz.:—

9. Part III. of the Government Blue Book, being the Annual Report of the Fishery Board for Scotland for the year 1899.

Argued for Appellants: (1) A complaint at the instance of an incorporated company without the conjunction of an officer of the company was bad. Such an officer was required to represent the Company in the Court (*Great North of Scotland Railway Co.* v. *Anderson*, 1897, 2 Adam 381, per Lord Trayner at 384). In the case of a prosecution at the instance of several persons jointly, it was incompetent for one to proceed with the prosecution if the instance, so far as another was concerned, was bad. (2) A volume had been tendered as evidence, and made part of the complainers' case, which was not evidence. That was incompetent, and the conviction therefore proceeded on incompetent evidence.

Argued for Respondents (counsel being asked to speak only on the second objection): The volume had been shewn to a witness who was asked whether he agreed with what was there stated. The book, being thus produced, was

High Court of Justiciary

Fairbairn and Others v. Lochryan Oyster Fishery Co. Ltd. and Another.

lodged in process; but it was not made part of the evidence in the case.

The Court *answered* Question No. 2 in the negative, and *remitted* to the Sheriff-Substitute to report whether the volume in question was merely put to a witness with a view to ascertaining whether the witness agreed or disagreed with the opinions expressed therein on the herring seine net, or whether it was admitted as evidence *in causa* without being put to a witness.

The Lord Justice-General.—This is a case where a complaint is brought against certain fishermen for having contravened the provisions of an Act for the Better Protection of the Oyster Fisheries in Scotland, inasmuch as they did, in a part of Lochryan known as "The Field," unlawfully and wilfully trawl with a seine net. Several objections have been stated. The first is as to the instance, the complaint being at the instance of the Lochryan Oyster Fishery Co. Ltd., incorporated under the Companies Acts, and John Alexander Agnew Wallace, Esq., of Lochryan, with consent and concurrence of the Procurator-Fiscal. It is said that this is bad, because an incorporated company cannot make a good instance unless they are coupled with some officer who may appear in Court and act on their behalf. I have not been able to see that that is a good objection. The conduct of the case in court is another matter, but I do not see how they can be said not to have a title to prosecute. In the case which was quoted to us it seems to have been said that in practice it was in use to conjoin one of the Company's officers. I do not see how that makes the instance any better, nor do I see why there should be any difference between the rules which prevail in civil cases and those which prevail in criminal matters.

But, apart from that, the instance of Mr Wallace in this case was perfectly good, and he could not be prevented from going on with the case if, for example, the other prosecutor did not come to take part in the proceedings.

[His Lordship then dealt with certain objections which do not require to be referred to.]

There is one objection which, in one view, may be of a more serious character. The Sheriff-Substitute has told us that "in the course of the proof the agent for the appellants objected to the production of 'a book' which was put in evidence by the respondents," and the objection was disallowed. That is rather an ambiguous statement. It is said that the agent objected to the production. It is afterwards said that the book was put in evidence. It is clear that, inasmuch as one of the questions here was whether fishing with a seine net came within the proviso of the section a contravention of which is charged, and the book dealt with the action of such a net, it was material on the question whether it answered the description of the instrument given in the statute. And it is clear that if this book was improperly put in evidence, the Sheriff-Substitute was making up his mind upon evidence which was not evidence in the case. On the other hand, if what was done was that the book was shewn to a witness, and he was asked whether he agreed with a statement in the book, that was a proper thing to do. The proper sequel to that would be, in a civil case, if the book was put in anywhere, that it should be put in process, not in evidence. In a criminal case there is no list of process separate from the list of things put in evidence. The book was simply put in. If I found that that was the only use made of it I should deem it a very strong thing to overturn a decision because the book was put in evidence. But as the parties are not agreed as to what is the state of the facts on this matter, it is necessary that we should make a remit to have them ascertained before we can proceed.

Lords M'Laren and *Kinnear* concurred.—31st *May* 1907.

In obedience to the remit of the High Court of Justiciary, the Sheriff-Substitute (Watson) reported that it was not the case that the Report in question was admitted as evidence *in causa* without being put to a witness; that it was shewn to and produced by a witness, James Scotland, who was questioned with reference to the said Report.

The Court *answered* question No. 4 in the negative.—5*th December* 1907.

Counsel for Appellants, Orr, K.C., Moncrieff; Agents, Simpson & Marwick, W.S.—Counsel for Respondents, Dickson, K.C., Munro; Agents, Garden & Robertson, S.S.C. F. A. U.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

225. Liquidator of James Donaldson & Company Limited *v.* Thomas White & Park.

Company—Liquidation—Law Agents' Lien—Companies Act 1862 (25 & 26 Vict. cap. 89), sect. 115—Order for Production of Documents in Hands of Agents Without Prejudice to Agents' Lien—Quaere Whether Liquidator Entitled to Have Access to Documents Without Thereby Becoming Bound to Give Agents a Preference in Liquidation for Their Account—Terms of Order for Production Granted — In re South Essex Estuary and Reclamation Co. (1869, L.R. 4 Ch. 215), per Lord Hatherley, Followed.

Report by Lord Dundas.

On 12th September 1907 James Maxton Graham, C.A., Edinburgh, official liquidator of

James Donaldson & Co. Ltd., presented a note to the Lord Ordinary (Dundas), in which he prayed his Lordship (2) ". . . . to appoint this note to be served upon the said Thomas White & Park, and to allow them to lodge answers within eight days after service; and thereafter, on resuming consideration of this note, to ordain Hope Park, Thomas William Saidler, and Alexander White, being the only known partners of the said Thomas White & Park, to appear before your Lordship on a day to be fixed by your Lordship, for the purpose of being examined upon oath concerning the affairs, dealings, estate, and effects of the said James Donaldson & Co. Ltd., and to produce all books, title-deeds, papers, writings, or other deeds or documents in their custody or power relating to the said James Donaldson & Co. Ltd."

The Petitioner averred, *inter alia*:

The said Thomas White & Park are in possession of documents belonging to the Limited Company, or to which the liquidator is entitled to access. The liquidator has made application to the said Thomas White & Park to produce these documents, but (although they have in connection with the liquidator's said application prepared an inventory thereof) they refuse either to produce the documents or to exhibit the inventory, on the ground that they have a lien over the documents.

The Companies Act 1862 (25 & 26 Vict. cap. 89) provides:—

Sect. 115. The court may, after it has made an order for winding up the company, summon before it any officer of the company, or person known or suspected to have in his possession any of the estate or effects of the company or supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the court may require any such officer or person to produce any books, papers, deeds, writings or other documents in his custody or power relating to the company . . . . nevertheless in cases where any person claims any lien on papers, deeds, writings or documents produced by him, such production shall be without prejudice to such lien, and the court shall have jurisdiction in the winding up to determine all questions relating to such lien.

Sect. 117. The court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs, dealings, estates, or effects of the company. . . .

On 22nd November 1907 the Lord Ordinary reported the cause to the Second Division of the Court.

He added the following note:—

Lord Dundas.—The liquidator presents this note under sects. 115 and 117 of the Companies Act 1862 (25 & 26 Vict. c. 89). The prayer of the note, so far as the present question is concerned, craves the Court to ordain certain law agents to appear before the Court "for the purpose of being examined upon oath concerning the affairs, dealings, estate, and effects of the said James Donaldson & Co. Ltd.; and to produce all books, title-deeds, papers, writings, or other deeds or documents in their custody or power relating to the said James Donaldson & Co. Ltd." The first branch of this prayer echoes the language of sect. 117; while the second is based upon sect. 115; but omits, oddly enough, any reference to its proviso in regard to lien, which raises the point here at issue. Any order which is made would require to be expressly "without prejudice to such lien." The liquidator's counsel proposed to restrict his crave at this stage to the first branch above quoted, with the frankly professed object of endeavouring, if possible, to obtain sufficient information, in the course of the examination, as to the nature and contents of the various documents, without incurring any liability for the law agents' account which he apprehended might possibly arise if an order to produce was executed. A precedent for this course was said to exist in the Outer House case of *Fergusson* (*Barr & Co.'s Liquidator*) 1902, 10 S.L.T. 456). But that case is not, in my opinion, in point as a precedent; for I observe from the report that "counsel having agreed that the examination should not be used to obtain a *précis* of the titles, the respondents did not oppose the motion." I think the proposal to restrict the crave is inexpedient and unnecessary. It was explained during the discussion that the apprehensions entertained by the liquidator were based upon an analogy derived from the law of bankruptcy. It may, I think, be taken as settled that if a trustee in sequestration obtains possession, upon his own demand, of documents under reservation of a lien, he will be liable for payment of the amount secured by the lien, even though he should find upon investigation that they are of no value whatever to the estate or the creditors (*Renny & Webster* v. *Myles*, 1847, 9 D. 619). I see that in the recognised text-book on bankruptcy (Goudy, 3rd ed. p. 600) the learned author, after referring to *Renny & Webster's* case, thinks "it is doubtful if the same results would arise were the trustee simply to inspect the titles in the agent's office, exercising his right to examine all the bankrupt's deeds and securities so as to judge if it will benefit the estate to take up the property to which they relate. It is thought that the agent would have no claim for a preference in such a case, if the trustee declined to take up the property." I am disposed, as at present advised, to agree with the opinion embodied in the sentence last quoted. But it is, in my judgment, unnecessary to pursue the topic; for we are here dealing, not with a sequestration, but with a statutory liquidation. It has been decided in England, with reference to sect. 115 of the Act of 1862, that where the solicitors of the company have a lien for costs on documents relating to the company in their possession, the official liquidator may nevertheless compel their production, without prejudice to the lien, though in many instances this would render the lien valueless (*In re South Essex Estuary and Reclamation Co.*, 1869, 4 Chan. 215). I should be prepared to follow this case, which I think is directly in point, and to grant the crave of both branches of the prayer of the note, already referred to, adding the words "without prejudice to any lien which the respondents or any of them may have or claim over the same." I may add that I think the examination and production would, in this case, be competently and most conveniently conducted by a commissioner, and not by the Court itself. The liquidator is, in my judgment, entitled to the production craved, in order to see whether the documents or any of them are such as

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he desires to acquire, in the interests of those whom he represents; and, in my opinion, that production and inspection of them by him will not, *per se*, impose any liability upon him for payment of the law agent's account. The validity of the lien and the ultimate effect of it in relation to what the liquidator may see fit to do after production has been made, are matters which do not appear to arise at this stage. The question raised is one of general importance, and has not, so far as I know, been decided in Scotland. I have therefore reported it to the Court, to obtain their instruction and guidance; and in doing so I have thought it right to state my own opinion upon the matter.

Argued for Petitioner: If the petitioner desired to use the documents he was no doubt bound to pay the respondents' account in full. But he was entitled to have them produced in order that he might decide whether he wished to make use of them, and that without becoming bound to give the respondents a preference (*South Essex Estuary and Reclamation Co.*, 1869, L.R. 4 Ch. 215, per Lord Hatherley). The Lord President's *dictum* in *Renny & Webster* v. *Myles*, 1847, 9 D. 619, did not apply to liquidations under the Companies Acts. Accordingly the Court should grant an order for production containing a declaration that the respondents were not entitled to a preference by reason merely of the documents being produced. Alternatively, the petitioner was entitled to an order in the terms suggested by the Lord Ordinary, or to an order under sect. 117.

Argued for Respondents: Under sect. 115 production of documents was to be without prejudice to the respondents' lien. If the liquidator got an access to the documents he at once became bound to give a preference. If he did not, the lien was worthless, because it would be impracticable to prevent him using the documents. Lord Hatherley's dictum *In re South Essex Estuary and Reclamation Co.* (*cit.*) was wrong. The respondents had no objection to the liquidator getting an order under sect. 117, or an order in the precise terms of sect. 115.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the report by Lord Dundas to them of date 22nd November 1907, Direct the said Lord Ordinary to proceed in the liquidation by granting the crave of both branches of the prayer of the note without prejudice to the lien claimed by the respondents, in accordance with the opinion expressed by him in the said report; find no expenses due by or to either party since the date of the Lord Ordinary's interlocutor reporting the cause."

The judgment of the Court was delivered by

The Lord Justice-Clerk.—The Court will follow the judgment of Lord Hatherley in the case of the *South Essex Estuary Co.*, and will direct the Lord Ordinary accordingly.—*4th December* 1907.

Counsel for Petitioner, Dean of Faculty, (Campbell, K.C.), Constable; Agents, Davidson & Syme, W.S.—Counsel for Respondents, Graham Stewart, K.C., Sandeman; Agents, Parties.

J. S. M.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling Low and Ardwall.)

226. Turnbull *v.* Brien.

Aliment — Repayment — Pupil Left an Orphan, Maintained by Brother-in-Law in Humble Circumstances—Action to Recover Sums Paid as Aliment From Pupil After He Has Emerged From Pupillarity and Has Succeeded to a Small Sum of Money—Held Aliment Given Animo Donandi and Action Irrelevant.

Appeal from the Sheriff Court of the Lothians and Peebles at Edinburgh.

James Turnbull, labourer, 22 Albert Street, Edinburgh, brought an action in the Sheriff Court at Edinburgh against John Brien, 22 Albert Street, Edinburgh, to obtain payment of the sum of £26.

The pursuer averred:

Cond. 1. The pursuer is a labourer, and resides at 22 Albert Street, Edinburgh. The defender, who is a brother of the pursuer's wife, being bereft of a home by the death of his father, the pursuer agreed with the defender to take him into his home as a boarder, and accordingly the defender went to reside there on 13th May 1897. . . .

Cond. 2. For two years after the said 13th May 1897, the defender, who was then between eleven and twelve years of age, continued to reside with the pursuer and contributed nothing towards his own maintenance. He attended school during said period, and the pursuer, at his own expense, maintained the defender. . . .

Cond. 3. The defender thereafter in due course served an apprenticeship as a mason, and continued to reside with defender, and contributed towards his maintenance until 30th June 1906, when he left the pursuer's house and went to reside elsewhere. During his residence with pursuer the defender repeatedly promised to pay the pursuer for said maintenance, but he has failed to implement said promise. . . .

On 21st January 1907 the Sheriff-Substitute (Guy) *dismissed* the action as irrelevant.

The pursuer appealed.

The following authorities were cited. For the pursuer: Elchie's Notes on Stair, p. 48; Ersk., III. iii. 92; Bell's Prin., sect. 533; Fraser, Parent and Child, 3rd ed., pp. 116–120; *Steven* v. *Simpson*, 1791, M. 11,458; *Wilson* v. *Archibald*, 1701, M. 11,427; *Mongreenan* v. *Blair*, 1624, M. 11,432 and 8918; *Gourlay* v. *Urquhart*, 1697, M. 11,438; *Lady Lugton* v. *Hepburn and Crichton*, 1672, M. 11,435; *Cunningham* v.

M'Gachen, 1831, 9 S. 472; *Drummond* v. *Swayne*, 1834, 12 S. 342; *Forbes* v. *Forbes*, 1869, 8 M. 85, per Lord Cowan at p. 91; *Campbell* v. *Macfarlane*, 1885, 12 R. 713. For the defender: *Ligertwood* v. *Broun*, 1872, 10 M. 832; *M'Gaws* v. *Galloway*, 1882, 10 R. 157, per Lord Justice-Clerk Moncreiff at p. 162.

The Court *dismissed* the appeal.

Lord Stormonth-Darling.—The Sheriff-Substitute has sustained the first plea in law for the defender, which is that the action is irrelevant, and has dismissed the action. I think that the Sheriff is right. The pursuer is a labourer and the husband of the defender's sister; and says that, in May 1897, he took the defender, who was then an orphan of eleven, into his house, and continued to support him until he began to serve his apprenticeship as a mason. The pursuer now sues the defender for the amount of the aliment furnished up to May 1899. After that date, as I understand, no claim is made, because the boy contributed enough to cover his maintenance until 1906, when he left the pursuer's house. The claim is thus obviously made in respect of aliment afforded to a pupil. I am of opinion that aliment allowed to a pupil by a person who is not under a natural obligation to support him, must be considered to have been afforded *ex pietate*, and that there is no relevant claim against the pupil, even if he succeeds to a small sum of money in after life. If it be said that the defender is under a moral duty under these circumstances to reimburse the pursuer for his expenditure, I am afraid that the answer is that we have nothing to do with moral duties, and that a legal obligation cannot be incurred by a person who is not a legal *persona*. The pursuer further avers that the defender promised to pay for his maintenance, but I think that that averment is irrelevant, because there is no statement as to the terms of the promise, or as to the time at which it was made. I propose, therefore, that the appeal should be dismissed and the judgment of the Sheriff-Substitute affirmed.

Lord Low.—I am of the same opinion. It has always been recognised that cases of this description must be treated each according to its own special circumstances. The special circumstances of this case, as averred by the pursuer, are as follows. In 1897 the pursuer's brother-in-law, aged between eleven and twelve years, was left an orphan and destitute, owing to his father's death. The pursuer took him into his own home and maintained him there for two years, until he obtained an apprenticeship, and was able to pay for his board and lodging. Now the plain inference from these facts seems to me to be that the pursuer acted from a very natural and proper sense of duty, without any ulterior motive, and without any idea of making a subsequent claim. The circumstances of the case seem to me to preclude the idea that the pursuer thought at the time that this boy was incurring a debt which he might afterwards be called upon to pay. I am convinced that the idea of claiming repayment is an afterthought, suggested by the fact that the young man has now come into a little money. I am therefore of opinion that the Sheriff-Substitute has rightly decided this case.

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Lord Ardwall.—I concur. The question is whether the aliment afforded by the pursuer to the defender was supplied *animo donandi*, or with the intention that a debt should be created against the defender. We had a careful and interesting citation of old authorities from Mr Steuart in support of the latter alternative, and there are *dicta* which to a certain extent support his contention. But I think that the tendency of the more recent authorities is to consider the question whether in cases such as the present the aliment supplied was intended to be a donation or a debt as one depending on the circumstances of each case and not on any fixed rules or presumptions of law. And in the present case a consideration of the facts disclosed on the record leads me to the conclusion that the aliment, repetition of which is now sued for, was given *ex pietate* as a donation and with no intention that it should form a debt against the defender. I therefore agree with the judgment of the Sheriff-Substitute.

The Lord Justice-Clerk concurred. — *5th December* 1907.

Counsel for Pursuer, G. C. Steuart; Agents, Mackay & Young, W.S.—Counsel for Defender, Morton; Agent, R. J. Calver, S.S.C.

J. S. M.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

227. Marshall & Co. *v.* Pennycook.

I. Caution—Cautioner for Contractor in Contract for Construction of Waterworks—Default of Contractor—Contractor Unable to Carry on Contract Work—Held that Where Contractor in Default Cautioner Entitled to Discharge His Obligation by Taking Up the Contract and Completing Contract Work.

II. Caution — Co-cautioners — Action for Contribution by One Co-cautioner Against Another — Release of Cautioner by Surrender of Security over Principal Debtor's Estate—Cautioners for Contractor Under Contract for Construction of Waterworks—Failure of Principal Debtor to Proceed—

2ND DIV.

Marshall & Co. v. Pennycook.

CONTRACT TAKEN UP BY ONE OF TWO CO-CAUTIONERS — INTERRUPTION OF WORK PREVENTED BY CAUTIONER'S INTERVENTION—SURRENDER OF SECURITIES OVER PRINCIPAL DEBTOR'S ESTATE—RIGHT OF CREDITOR TO RETAIN SUMS OF MONEY DUE TO PRINCIPAL DEBTOR IN EVENT OF WORK NOT BEING CARRIED ON TO CREDITOR'S SATISFACTION—MONEY PAID TO PRINCIPAL DEBTOR'S ASSIGNEES—HELD CO-CAUTIONER NOT FREED BY PAYMENTS IN RESPECT WORK HAD BEEN CARRIED ON TO CREDITOR'S SATISFACTION.

III. CAUTION—CO-CAUTIONERS — DEFAULT OF PRINCIPAL DEBTOR—CONTRACT TAKEN UP BY ONE OF TWO CO-CAUTIONERS—ACTION AGAINST CO-CAUTIONER FOR CONTRIBUTION — OUTLAYS — FEE FOR SUPERINTENDENCE — EXTRA EXPENSE OCCASIONED TO CAUTIONER IN CARRYING ON HIS OWN BUSINESS IN CONSEQUENCE OF HAVING TO ATTEND TO CONTRACT WORK—CIRCUMSTANCES IN WHICH FEE FOR SUPERINTENDENCE ALLOWED AS AN OUTLAY.

Appeal from the Sheriff Court of Roxburgh, Berwick, and Selkirk at Jedburgh.

On 13th October 1902 a contract for the construction of waterworks was entered into between the Town Council of the burgh of Selkirk, first parties, and D. M'Donald & Son, contractors, Hawick, and James Alexander M'Donald, the sole partner of that firm, second parties, and Messrs James Marshall & Co., builders and contractors, Hawick, and James Marshall, sole partner of that firm, and James Pennycook, builder, Hawick, cautioners for the second parties. The material clauses of the contract, and of the general conditions and stipulations appended thereto, are sufficiently set forth in the judgment of Lord Low.

On or about 16th July 1904 the contractor M'Donald was taken seriously ill, and was unable to attend to the contract work. The cautioner James Marshall accordingly intervened and completed the contract. In doing so, a loss of £242, 16s. 4d. was incurred. James Marshall & Co. then brought the present action against James Pennycook to recover one-half of the loss sustained.

Proof was allowed and led. The import of the proof sufficiently appears from the judgment of Lord Low.

On 26th July 1906 the Sheriff-Substitute (Baillie) granted decree for the sum of £92, 18s. 5d.

On 14th December 1906 the Sheriff (Chisholm) *affirmed* the Sheriff-Substitute's interlocutor with the additional finding in fact "that the loss to the cautioners would have been greater if the pursuer had not, immediately on M'Donald's incapacity emerging in July 1904, taken up the work and completed it."

The Defender *appealed* and *argued*: On the evidence the pursuer in taking up the contract had acted not as cautioner but as voluntary *negotiorum gestor*, and was not entitled to call on the defender to contribute. But even if the pursuer had acted as cautioner the defender was not liable. The liability of the cautioners could not emerge unless M'Donald was in default. But if M'Donald were in default the Town Council were entitled and, in a question with cautioners, were bound to withhold payment of the sums certified for by the engineer. In fact they had not done so, but had paid these sums to M'Donald's assignees. It was trite law that if securities over the estate of the principal debtor were given up, the cautioner was *pro tanto* freed from his liability (Ersk., III. v. 11; Bell's Prin., sects. 254, 255; 1 Bell's Com., M'Laren's edition, p. 366; *Hume* v. *Youngson*, 1830, 8 S. 295; *Sligo* v. *Menzies*, 1840, 2 D. 1478; *Mayor of Hull* v. *Harding* [1892], 2 Q.B. 494). A right to retain money belonging to the principal debtor was a right of security (Bell's Prin., sect. 264; 1 Bell's Com., M'Laren's edition, p. 376; Hudson on Building Contracts, third edition, p. 646; *Calvert* v. *London Dock Co.*, 1838, 2 Keen 638; *Ranger* v. *Great Western Railway Co.*, 1854, 5 Clark (H.L.) 72, per Lord Cranworth, L.C., at p. 107). The defender was therefore not liable for the sum sued for, the sums improperly paid away being larger than the amount of the loss sustained. In any view, the pursuer was not entitled to charge a fee for superintendence. He was not entitled to make a profit out of his co-cautioner.

Argued for Pursuer: On the evidence the pursuer was acting as cautioner when he took up the contract. His action had resulted in minimising the loss, and the defender was bound to pay one half (*Wolmershausen* v. *Gullick* [1893], 2 Ch. 514). There had been no liberation of securities. The Town Council were entitled to withhold payments only in the event of the work not being carried on regularly or to their satisfaction. That event had never happened. The pursuer's intervention had prevented the work from being interrupted, and had thus prevented the event from happening which alone could bring the security fund into existence. The fact that the pursuer's action had this result did not liberate the defenders (*Fleming* v. *Wilson*, 1823, 2 S., N.E., 296; *Hume* v. *Youngson*, *cit.*, per Lord Pitmilly). The fee for superintendence was truly an outlay. The pursuer had been caused extra expense in carrying on his own business in consequence of having to attend to the contract work. Counsel also cited *Clydebank Engineering and Shipbuilding Co. Ltd.* v. *Castaneda*, 1904, 7 F. (H.L.) 77.

The Court *dismissed* the appeal.

The judgment of the Court was delivered by

Lord Low.—A cautionary obligation for the due performance of a contract for the construction of works, generally, I imagine, results in a payment of damages for any loss sustained by the employer in the event of the contract not being duly performed. If, however, upon the failure of the contractor, the cautioner is able and willing to step in and complete the work, I see no reason in principle why he should not implement his cautionary obligation in that way, especially if, as in the present case, the creditor in the obligation consents to his doing so.

Upon the evidence I think that there is no doubt that the pursuer intervened and carried on M'Donald's contract because he was cautioner, and as cautioner, and it seems to me also to be proved that that was the best course to follow in the interests of the cautioners, because the pursuer's witnesses, whose evidence is uncontradicted, say that if when M'Donald became incapacitated the pursuer had not carried on the contract, but the Town Council of Selkirk had been forced to do the work themselves, the loss would have been much greater.

If that be so, then the action of the pursuer was for the benefit of the defender, because if the Town Council had been compelled to take up the work, the defender would undoubtedly have been liable for any loss which was incurred.

The defender denies that he was aware that the pursuer had taken up the contract as cautioner, and although he admits that the pursuer asked him to go to Selkirk and assist with the work, he says that he understood that he was asked to do so merely in the capacity of a friend and not as co-cautioner. I regret to say that I cannot regard the defender's evidence as being at all trustworthy. I am satisfied that he knew perfectly well that the pursuer was taking up the work as cautioner, and it is also proved that he was pressed both by the pursuer and Mr Purdom to co-operate, but that he refused to do anything, or to express any opinion upon the course which ought to be adopted. My impression is that he hoped that by refusing to say or do anything, while the pursuer completed the work, he might ultimately escape liability altogether.

If there were nothing else in the case I should have no hesitation in agreeing with the learned Sheriffs, but there was one point argued before us, which does not seem to have been stated in the Court below, and which requires careful consideration.

In the contract for the execution of the works it was provided that monthly payments should be made to the contractor "only on certificates of the said engineer, at the rate of 80 per cent. of the estimated value of the work executed by the second party, the remainder being paid, one half on the date of the completion of the work, and the other on the expiration of the period of maintenance before mentioned, the first party, however" (and these are the important words), "always having power to withhold payment on any certificate, should the works not be carried on regularly or to their satisfaction."

Now when ,on the 13th of July 1904, M'Donald was seized with an illness which incapacitated him bodily and mentally, there was a sum of £400 due to him, for payment of which the engineer had granted a certificate. Subsequently the Town Council, with the consent of the pursuer, paid that sum partly to a Glasgow firm who had supplied to M'Donald the pipes required for the works, and partly to a bank which had advanced the money required for wages, M'Donald having assigned his right to these parties. The defenders argued that the Town Council ought to have exercised the right given to them by the clause which I have quoted, and withheld payment of the £400, which would have been more than sufficient to cover the loss sustained by the pursuer in completing the works; and that as the Town Council chose to pay away the fund, and thereby deprive the defender, as cautioner, of a security to the benefit of which he was entitled, he was freed from his obligation, and neither the Town Council nor the pursuer, who consented to the payment, had any claim against him.

In considering that argument I think that it is necessary to read, along with the clause in the contract upon which the defender founds, certain provisions in the general conditions and stipulations which were appended to, and formed part of, the contract.

By the 15th of these conditions it was provided that if the contractor should from bankruptcy, insolvency, or any other cause, be prevented from proceeding with the work with the requisite expedition, or fail to perform the same in a proper manner, the Town Council might, after written notice to the contractor, take the whole works out of his hands, and complete them themselves, in which case the contract should, at the option of the Council, become void as to the contractor, and "the amount already paid to the contractor shall be deemed to be the full value of the work executed by him up to that time, and no further claim shall be made by the contractor for work which may have been done by him up to that time."

Now if the pursuer had not intervened it seems to be certain that the result of M'Donald's illness would have been that the work would have come to a standstill, because M'Donald had no means and no one to carry on the contract for him. The position of matters contemplated by the 15th condition would therefore have arisen, and the Council would have been compelled to take the work into their own hands, or to employ another contractor. In that event I do not doubt that they would have been entitled to retain, and probably, in a question with the cautioners, would have been bound to retain, the £400 in question. But the occasion never

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arose for the Council to consider whether or not they would put an end to the contract and do the work themselves, because the pursuer stepped in and carried on the contract in M'Donald's name, and there was never any failure to carry on the work with the requisite expedition, or to perform the same in a proper manner. And it seems to me that the pursuer gives very good reasons for taking up the contract at once, and not allowing any interruption or delay to take place. He had for some time been visiting the work every day and keeping M'Donald up to the mark, and he knew exactly what the position of matters was. It appears that the pipes were being laid near the river Ettrick, and below the level of the river, and during the very week in which M'Donald took ill, the pipe trench had been flooded, and it was very important that the damage thereby caused should be put right at once, as delay would apparently have resulted in increased damage and greater expense. Then there was a squad of men employed who knew the work, and the pursuer desired to retain their services, because if he had not done so there might have been considerable delay in getting another set of workmen together, and in the meantime the works would have been stopped and the Council might have exercised their powers under the 15th condition, which according to the evidence would have resulted in greater loss to the cautioners. It therefore seems to me that the pursuer by his prompt action did what was best in the interests of all concerned—of the cautioners as well as of the Town Council.

The circumstances, therefore, never having arisen in which the Town Council were entitled to put in force the powers of the 15th condition, were they entitled (and therefore bound in the interest of the cautioners) to withhold payment of the £400 in terms of the clause in the contract?

Now under that clause the Council are authorised to withhold payment only "should the works not be carried on regularly and to their satisfaction." As matter of fact that condition of matters did not exist, because, owing to the intervention of the pursuer both before and after M'Donald's illness, the works had been and were being carried on regularly and to the entire satisfaction of the Council. No doubt the Council knew that what had induced the pursuer to carry on the contract was the fact that he was cautioner, but I do not think that that is of any importance as regards the present question. What is of importance is that M'Donald's contract was carried on without interruption and in a satisfactory manner. That being so, the Council had no right to withhold payment of a sum which had been certified as due and payable to M'Donald. In like manner the pursuer could not have required the Council to withhold payment of the money, because, by virtue of the right to intervene which his position as cautioner gave him, he had simply stepped into M'Donald's place, and was carrying on the contract for and in the name of the latter.

It therefore seems to me that the pursuer having adopted the course which he did there could be no question of withholding payment of the £400. Accordingly, the defender cannot found upon payment of that sum as freeing him from his obligation. If he is freed from his obligation it must be because the pursuer was not justified in adopting the course which he did, and that his having done so has been to the defender's prejudice. I have already said that in my opinion, so far from that being the case, the course adopted by the pursuer was the best which he could have followed in the interests of the cautioners, and accordingly the defender is, in my judgment, bound to relieve the pursuer of one half of the loss which has been incurred.

Some English authorities were quoted for the purpose of shewing that payment by an employer in a contract such as the present, to the contractor, of money which the employer was entitled to retain as security for the due completion and maintenance of the work, had the effect of freeing the contractor's surety or cautioner, at all events to the amount so paid. These authorities would have been directly applicable to the present case had the Town Council of Selkirk paid away the 20 per cent. which under the contract they were entitled to retain, one half till the completion of the work and the balance till the expiration of the period of maintenance, but, in my judgment, they have no application to the £400 in question, which was not a security fund under the contract, but a sum which, although it had been certified as due and payable to the contractor, the Council would have been entitled to retain if a condition of matters had arisen which in fact never did arise.

The only other question is in regard to one item in the account lodged by the pursuer, bringing out the loss sustained in completing the contract. That item is a charge of £75, being fee for superintending the work for nine months. It is proved that if a fee for superintendence is allowable at all the amount charged is moderate. I am of opinion that the charge must be allowed. It was necessary that someone should superintend the work, and if the pursuer had not done so himself he would have required to employ and pay someone else. I think, however, that the pursuer was quite right to supervise the work himself, because the attitude taken up by the defender had placed him in a very delicate position, and he was bound to see that the work was conducted as economically and efficiently as possible. To superintend the work, however, took up time which the pursuer would otherwise have devoted to his own business, and caused him additional expense in carrying on that business to an amount apparently, at all events, equal to the fee charged.

Upon the whole matter I am of opinion that the appeal should be dismissed and the interlocutor of the Sheriff affirmed.—29*th November* 1907.

Counsel for Pursuers, Hunter, K.C., Jameson; Agents, Fyfe, Ireland & Co., S.S.C.—Counsel for Defender, Morison, K.C., Macmillan; Agents, P. Morison & Son, S.S.C. J. S. M.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

228. Grant *v.* Glasgow and South-Western Railway Company.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 1 (1)—Accident Arising Out of and in the Course of the Employment — Onus of Proof — Railway Constable—Facts From Which Arbitrator Held Entitled to Draw the Inference That Accident Arose Out of and in the Course of Employment.

Stated Case.

This was a case stated under the Workmen's Compensation Act 1897, on a claim at the instance of the widow and children of Thomas Steele Grant, who was at the time of his death in the employment of the Glasgow and South-Western Railway Company. The Sheriff-Substitute at Ayr (Shairp) awarded compensation, and the Railway Company *appealed*. The stated case set forth the facts, *inter alia*, as follows:—

Thomas Steele Grant, doorkeeper or station policeman at Ayr passenger station, was run over by a train on siding No. 6 at said station, between ten and eleven o'clock in the forenoon of the 3rd day of July 1906, and sustained bodily injuries which caused his death on the same day in Ayr County Hospital.

When he was injured as aforesaid he was employed by the said company as door officer and station policeman at Ayr passenger railway station, and was dressed in railway police uniform. His duties were to go to and from a bank in Ayr with cash boxes, to despatch these cash boxes to different local railway stations of the said railway company, to attend in the guards' room, keep stationery for passenger guards, write up these guards' train arrival books, make out returns for them to be sent to the superintendent, and to keep unauthorised persons from being on, in, or about the said passenger railway station premises, and the entrances, exits, and platforms of said passenger railway station. In the execution of his duty of putting unauthorised persons (there is no evidence that such persons were present on the occasion in question) off No. 1 platform at said railway station, who, on being chased by him up the said platform past the end of the station buildings, might cross the sidings at said station where the accident occurred to get away from him, he was entitled to follow these persons, and see them off the railway company's premises, and himself to cross said sidings, including siding No. 6, or, similarly, to follow such persons from the loading bank shewn on the plan, No. 8 of process, across siding No. 6, in the direction of No. 1 platform.

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The following are among the rules and regulations for the guidance of the officers and men in the service of the said railway company, viz.:—"24. (*a*) The servants of the company, more especially those engaged in the working of trains and in shunting and other similar operations, must not expose themselves to danger, and all are requested to prevent, as far as they possibly can, such exposure on the part of their fellow servants, and to spare no opportunity of warning those who neglect to take proper care; (*b*) reckless exposure of himself, or others, to danger on the part of any servant of the company will be treated as an offence against the company's regulations, and punished accordingly.

"25. (*a*) No person other than a servant of the company, in the execution of his duty, must be allowed to be, or walk, upon the railway, unless provided with written or printed permission to do so, signed by a properly authorised officer of the Company.

"(*b*) Unless instructions are issued to the contrary, any person trespassing must be requested to leave the Company's premises, and, on complying, must be warned not to go or pass thereon again. If such person refuse to quit, he must be requested to give his name and address, which must be handed to the nearest stationmaster or other superior officer with a report of the circumstances. In the event of the offender refusing his name and address, he must be detained and given in charge of the police.

"26. The Company's servants must not walk upon the line, except when it is necessary for them to do so in the execution of their duty."

About ten minutes before ten o'clock in the morning of the said third day of July 1906, Stanley Capstick, a railway vanman in the employment of the said railway company, drove the said Thomas Steele Grant and a number of cash boxes from said railway station to the Ayr branch of the National Bank of Scotland Limited, which is situated in Sandgate Street, and there delivered the contents of the cash boxes, and the said Stanley Capstick thereafter drove his van down High Street while the deceased Thomas Steele Grant went up that street towards Ayr passenger railway station, and about fifteen or twenty minutes past ten o'clock in the morning of said last mentioned day, was seen, shortly before he was injured, proceeding on foot in the direction of said passenger railway station along Kyle Street, which joins Smith Street; in Smith Street, near its junction with Kyle Street, there is a gate leading to a loading bank for horses and cattle, and said sidings, as shewn on the plan, No. 8 of the Arbitration Process, which gate should be locked except when something is being admitted or moved to or from said loading bank, but which gate was open at the time the said Thomas Steele Grant was injured. Nobody saw the said Thomas Steele Grant pass through said gate on said morning, and there is no evidence to shew how or why he came to be at the spot on siding No. 6 where he was injured. About 10.40 in the morning of the said third day of July 1906, Andrew Watt, one of the said railway company's engine-drivers, felt that the tender of his engine, which was taking carriages from siding No. 6 to make up a train, had passed over something, and stopped his engine, when he discovered that the tender, which was in front of the engine, had passed over the said Thomas Steele Grant, whom he had not previously seen; and the

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said Thomas Steele Grant, who was forthwith removed to Ayr County Hospital, was found to have sustained compound comminuted fracture of both arms and both legs, and compound fracture of both thigh bones, and died in said hospital on the same day from the injuries he had received.

Upon these admitted or proved facts, I found that the said Thomas Steele Grant might, in the course of his duties as station policeman, have legitimately been at the spot at which he was accidentally injured, and that it had not been proved that he was there for any other purpose than the discharge of his said duties as station policeman; that, accordingly, the said personal injuries which the said Thomas Steele Grant received, and which resulted in his death, were caused by an accident arising out of and in the course of his employment as a station policeman under the said railway company.

The Question of Law for the opinion of the Court was:

Seeing that the spot where the said Thomas Steele Grant met with his injuries was one where he might legitimately and necessarily have been for the discharge of his duties as station policeman, but that it was not proved why he came to be at that spot at the time of the accident, or for what purpose he had gone there, was the arbiter entitled to presume and hold that the deceased was at that spot for the discharge of his duties as station policeman, and that, accordingly, the said personal injuries were caused to him by accident arising out of and in the course of his said employment as station policeman by the said Glasgow and South-Western Railway Company?

Argued for Appellants: The Sheriff-Substitute was not entitled to find that the accident arose out of the employment, because the deceased might have been at the place of the accident on the business of his employers. The *onus* was on the claimants to prove that the accident arose out of the employment, and they did not discharge that *onus* unless they proved that he went to the place on his employers' and not on his own business. *Prima facie*, he had no business to be where he was. The case was different from *M'Nicholas* v. *Dawson* [1899], 1 Q.B. 773, because there the workman was engaged in the business of the employers, although he was committing a breach of a regulation. The Sheriff-Substitute's finding in fact was that the deceased "might have been" where he was in the course of his duties. That was the fullest possible deduction he was entitled to draw from the facts stated, and it was not enough. The *onus* on the claimants was to prove that he was there in the course of his duties. Counsel quoted *Haley* v. *United Collieries Ltd.*, 1907, S.C. 214, per Lord Kyllachy at p. 216.

Argued for Respondents: The Sheriff-Substitute was entitled to draw the inference from the facts which he did; and his inference was that the accident arose out of the employment. The facts stated were consistent with the inference, and justified it. It was not necessary to exclude all possibilities (*M'Nicholas* v. *Dawson, cit. supra*). The inference drawn was, considering all the circumstances, a reasonable inference to draw (*Mitchell* v. *Glamorgan Coal Co.*, 1907, 23 T.L.R. 588).

The Court *answered* the question stated by declaring that the accident arose out of and in the course of the deceased's employment with the appellants, and *affirmed* the award of the arbitrator.

The Lord Justice-Clerk.—The way in which this case is stated by the Sheriff as arbiter is rather embarrassing. The facts as disclosed in the statement of the Sheriff are that this man, in accordance with his duty, went out of the station to do a certain thing for his employers, to take, as I understand, money boxes to the bank, and that he was returning undoubtedly to go back to his duty. In order to go back to his duty he had to go into the station, as it was there his duty was to be done. He might go back by the road round by the entrance to the hotel, or he might go back by the sidings. He might find the way by the sidings the more convenient of the two ways. He might also very well think that as it was part of his duty to prevent loiterers hanging about any part of the station premises, he would go over by the sidings and would take a look round as he came back. All these things are conjectural. All we have found in the case is that he chose to go back to the station by these sidings. There is no case made against him that he was guilty of wilful misconduct. I do not think that could be maintained. Of course, there was more risk in crossing the sidings while there may have been shunting operations going on than there was in going by the ordinary entrance to the station. But he was a railway servant and able to look after himself, although sometimes through inadvertence a railway servant meets with an accident, and sometimes a railway servant does not take sufficient care and is killed. But the question really is, Was the deceased when he was on that spot and killed, in such a position that the accident which happened arose out of, and in the course of, his employment as a servant of the Railway Company? I should be prepared to affirm that statement, and would be prepared to make that really our answer to the question which is put to us by the Sheriff in a somewhat unfortunate form.

Lord Low.—I have felt the question at issue to be attended with much difficulty, chiefly by reason of the way in which the case has been stated by the Sheriff-Substitute, but in the end I have come to the same conclusion as your Lordship.

No doubt a person claiming compensation under the Act must prove that the injury arose out of, and was sustained in the course of, the injured party's employment. But I agree with Mr Menzies that the *onus* may be shifted,

especially when the claim is by a dependant of a workman who has been killed, and whose evidence is therefore not available. If in such a case facts are proved the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment, I think that it falls upon the employer, if he disputes the claim, to prove that the contrary was the case.

Here the workman was station policeman at the railway station at Ayr. He had been in the town lodging certain money boxes at a bank in the performance of his duty, and when last seen alive he was walking along Smith Street (which is near the station) towards the station. The inference is irresistible, that having fulfilled a special duty, he was returning to the station to resume his general duties. The next thing which is known is that he was found mortally injured upon a siding close to the station, having no doubt been knocked down by a train which was being shunted. It cannot be said that the place where he was found negatived the idea that he could have been in the course of his employment when the accident happened. On the contrary, I do not think that it can be disputed that the station siding was, so to speak, within his jurisdiction as station policeman.

Therefore, although the way in which the case is stated, and especially the form of the second question (which is the only one we have to dispose of), is very embarrassing, the main facts are plain enough, and therefore I think that the difficulty may be overcome by answering the question as proposed by your Lordship.

Lord Ardwall.—I agree with your Lordship in the chair. I consider that the second question as put is unfortunately stated, and that the course to be taken ought to be as your Lordship suggests. The facts here apparently are quite simple, and I have some difficulty in seeing how the Sheriff-Substitute could have any doubt as to certain portions of the case. This unfortunate man, now deceased, was what is known as a railway policeman. But then he had some other duties, and one of them, as stated very distinctly in the case, was to go to a bank in Ayr from the station with cash boxes and deposits. It is also stated that on the morning on which he was killed he had been attending a vanman to the bank, and after the cash boxes were deposited the vanman went away to the stables with his horse, and this policeman in the discharge of his duties, having discharged one of them, went back to discharge another of them—namely, the duty of acting as policeman at Ayr Station. In doing so he was seen last in Kyle Street about 10.20, and at 10.30 unfortunately he was run over at a siding. I think it is perfectly evident from these facts, so much so that I may say it is proved, that in returning from his duty of depositing the cash boxes and going back to his duty as a policeman at the station he took a route which led him across the said siding, and in doing so was run over in the way narrated in the case. Now he had a right to be on the siding; and, furthermore, we can readily imagine, as has been said by your Lordship in the chair, that one reason why he may very reasonably be supposed to have taken this route was that he could take a look round the sidings at the end of the passenger platform to see that no evil-disposed persons or mischievous boys were loitering about. That would be essentially in the discharge of his duty as a policeman; and accordingly I think it is proved, or, if not directly proved, it is a clear inference from the facts which have been held to be proved, that when this accident happened he was in the course of his employment as a station policeman. Now the Sheriff-Substitute has put in a clause in the second question which I do not think it was necessary or proper to put in when he says "that it was not proved why he came to be at that spot at the time of the accident, or for what purpose he had gone there." In addition to what Lord Low has said in regard to the *onus* shifting, I think a very proper observation was made by Mr Menzies, that while in the general case it would be incumbent upon the claimant in an arbitration of this sort to prove why a deceased person was at a particular place, and to prove that the purpose he had gone there for was a purpose necessarily in the course of his employment, yet that in the case of a policeman the matter is really very different. Of course, every case must be taken upon its own facts. A railway policeman's duties are to go anywhere about a station for the purpose of seeing whether there are evil-disposed or mischievous persons loitering about, ready either to pilfer articles from carriages or trucks, or damage the Company's property; and it might be absolutely impossible in many cases for those claiming on the death of a railway policeman to tell what was in his mind in being at a particular place. He would keep that to himself. He might have been drawn anywhere about the station premises in the discharge of his duty, but nobody could tell after his death what was the particular purpose that took him there. I therefore think this case, which is the case of a policeman, cannot be decided on the same footing as an ordinary case would be, and that the same kind and amount of proof is therefore not required, provided the deceased was in a place where he had a right to be, and where it may be reasonably supposed that he would not have gone except in the discharge of his duties as a policeman. I therefore agree with the judgment proposed by your Lordship.—22*nd November* 1907.

Counsel for Appellants, Macmillan, Garson; Agents, J. C. Brodie & Sons, W.S.—Counsel for Respondents, G. Watt, K.C., T. A. Menzies; Agents, Hutton & Jack, Solicitors. F. A. U.

BILL CHAMBER. *Lord Guthrie.*

Somervell v. Tait and Others.

BILL CHAMBER.

(*Lord Guthrie.*)

229. Somervell *v.* Tait and Others.

BANKRUPTCY — TRUSTEE — ACCOUNTING — PETITION FOR PAYMENT OF MONEY—ACCOUNTING CONCLUSIONS ANCILLARY TO CONCLUSIONS FOR PAYMENT TO BANKRUPT—RELEVANCY—BANKRUPTCY (SCOTLAND) ACT 1856 (19 & 20 VICT. CAP. 79), SECT. 86.

This was a petition by James Somervell of Sorn, whose estates were sequestrated on 12th February 1901, against John Scott Tait, C.A., Edinburgh, the trustee on his sequestrated estates, and the commissioners thereon, and also against The Edinburgh Life Assurance Company, who were alleged to be responsible for the actings of the commissioners. The petition craved decree against the respondents to account for their intromissions and management as trustee and commissioners, or as being responsible for the commissioners, to reinstate the petitioner in his estates free of all charges or encumbrances subsequent to the date of sequestration, and to pay jointly and severally, or severally, to the petitioner the sum of £150,000, or otherwise the sum of £250,000, or such other sum as might turn out to be due to the petitioner on a true accounting. The petitioner based his right to call for an accounting on sect. 86 of the Bankruptcy Act, 1856, which is in these terms:—

> The judicial factor, the trustee, and commissioners shall be amenable to the Lord Ordinary and to the Sheriff, although resident beyond the territory of the Sheriff, at the instance of any party interested, to account for their intromissions and management, by petition served on them; and in case it shall appear that such application ought not to have been made, the party complained of shall be entitled to his full expenses, to be either retained out of the funds, or recovered from the party complaining, as the Lord Ordinary or the Sheriff shall direct.

The petition contained, *inter alia*, averments to the following effect:—

1. That the trustee had failed to call to account Guy Duke, Braehead, Kilmarnock, now deceased, first judicial factor and afterwards trustee on the petitioner's estates, and Francis More, also now deceased, 24 St Andrew Square, Edinburgh, who succeeded the said Guy Duke as trustee, for certain actings and intromissions alleged by the petitioner to have been *ultra vires* and made in *mala fide*.

2. That the trustee and commissioners wrongously refused an offer by The Clydesdale Bank, Ltd., whose claim for £26,616 was ultimately upheld by the Court, to withdraw their claim for a payment of £1400.

3. That the trustee and commissioners, in fraud of the unsecured creditors, presented a petition for disentail of the estates of Sorn and Hamilton's farm.

4. That the trustee, with the approval of the commissioners, embarked on vexatious and unnecessary litigation.

5. Failure to pay creditors, and particularly to pay interest and premiums due to the Edinburgh Life Assurance Company, when the rents of the farms charged with the loan were sufficient to pay them, and approval of this course by one of the commissioners, as representing the said Assurance Company, in order to enable the Company to claim penal interest.

6. Failure to pay an annuity to petitioner's mother, and to claim return of income tax.

7. That the trustee, with the approval of the commissioners, illegally insured the petitioner's life, and failed to have the estates inspected, kept in repair, etc.

8. The incurring of unnecessary expense, failure to concur in the letting of certain mineral fields, and delaying to pay creditors for the purpose of keeping up the sequestration and injuring the petitioner; and

9. Failure by the commissioners to superintend the proceedings of the respective trustees.

The arguments of the parties sufficiently appear in the Lord Ordinary's opinion.

The following authorities were cited by the respondents: Goudy on Bankruptcy, pp. 242, 378, 379; *Bell* v. *Gow*, 1862, 1 Macph. 84; *M'Adam* v. *Martin's Tr.*, 1884, 12 R. 358; *Henderson* v. *Henderson's Trs.*, 1882, 10 R. 188; *Wilson* v. *Alexander*, 1803, M. 13,968; and *M'Taggart's Reprs.* v. *Watson*, 1835, 1 S. & M'L. 553.

The Lord Ordinary *dismissed* the petition, with expenses.

Lord Guthrie.—The petitioner asks the Court to ordain his trustee in bankruptcy and the commissioners and the Edinburgh Life Assurance Company, and Mr Adam Wood, as responsible for the actings of two of the commissioners, "to account for their intromissions and management as trustee and commissioner foresaid, and to reinstate the petitioner in his estates free of all charges and encumbrances subsequent to the date of sequestration, and to pay to the petitioner, jointly and severally, or severally, the sum of £150,000 sterling; or otherwise to pay to the petitioner, jointly and severally, or severally, the sum of £250,000 sterling, or such other sum as may be ascertained in the proceedings to follow hereon to be the true sum due to the petitioner on a proper accounting with, and management of, the petitioner's sequestrated estate, all in terms of sect. 86 of the Bankruptcy (Scotland) Act 1856."

It was pointed out by counsel for the trustee and commissioners that the conclusions for accounting were merely ancillary to a demand for payment of money to the bankrupt himself,

and for his reinstatement in his estates. It was maintained that whatever might be the bankrupt's rights under sect. 86 of the 1856 Act to call on the trustee and commissioners to account for their intromissions and management, and to make up to the estate for any monies lost through their fault (as to which no admission was made), it was clear that the bankrupt could have no title to obtain an accounting that was merely ancillary to a demand for payment to himself, which, standing the sequestration, would be illegal. The petitioner got time to consider this objection, and at a later discussion tabled an amendment designed to meet it. This amendment, however, was subsequently withdrawn. The petition therefore falls to be considered as it stands.

I am of opinion that the respondents' contention is sound both in the representation of the conclusions for accounting as merely ancillary to a demand for payment to the petitioner himself, and in the argument that, standing the sequestration, no such payment can be asked in favour of the petitioner himself. The case is *a fortiori* of *Duke* v. *More*, 1903, 6 F. 190, per Lord M'Laren, pp. 194, 195.

I therefore dismiss the petition, and with expenses.

It is right to add that other questions of competency and relevancy were also argued before me at great length. The trustee and commissioners maintained that the conclusions of the petition were outwith the scope of sect. 86 of the Act, in so far as (1) the accounting asked for was merely ancillary to a demand for payment of money; and (2) even if it were competent to couple a demand for payment to the trust estate with a conclusion for accounting, such demand was not competent where, as here, it was a demand for payment of damages. So far as the petition sought to saddle the existing trustee with liability for failure to call his predecessors to account for their alleged wrongous acts, a separate objection was maintained to the competency by counsel for the trustee and commissioners. Counsel for the Edinburgh Life Assurance Company argued that no warrant was afforded by sect. 86 for a petition against persons neither trustees nor commissioners, but said to be responsible for the actings of commissioners.

On the relevancy, it was maintained that in so far as the averments were specific the acts complained of were all, or most of them, matters of discretion, into which the Court would not enquire, even although the averments might be peppered with averments of fraud.

In the view I take of the case, it is not necessary for me to consider these questions, or the formidable arguments and citation of authority by which they were supported.—16*th November* 1907.

For Petitioner, Party.—Counsel for Respondents the Trustee and Commissioners, Horne; Agents, R. & R. Simpson & Lawson, W.S.—Counsel for The Edinburgh Life Assurance Company, Macphail; Agents, Mackenzie & Kermack, W.S. C. H. B.

Bill Chamber. *Lord Guthrie.*

Somervell v. Tait and Others.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling and Ardwall.)

230. Denholm's Trustees *v.* Denholm's Trustees.

Succession—Testament—Construction—Subject of Gift—Gift With Power to Consume Such Portions of Capital During Lifetime of Donee as He Might Find or Think Necessary — Power to Donee to Realise, Sell and Dispose of Estate—Gift of Such Portions of Estate as Might Be Unconsumed by Donee at His Death to Trustees for Certain Purposes — Estate Realised by Donee and Immixed With Own Funds—Held (Dissenting Lord Ardwall) That Donee Had Gift of Fee Subject to Limitations, and That Onus Was on Person Claiming Estate to Shew There Was Some Unconsumed.

(Reported ante, Vol. XIV. p. 394.)

By mutual settlement executed by a husband and wife, the wife, in consideration of provisions made in her favour by her husband, conveyed to him, in the event of his survivance, her whole estate, "with full power to my said husband to consume such parts or portions of the capital during his lifetime as he may find or think necessary, and also power to him to realise, sell and dispose of my said estates, heritable or moveable, by public roup or private bargain, as he may think proper, and in general to deal and intromit therewith as freely as I could have done myself"; and she conveyed "such portions as may be unconsumed by my said husband" to trustees at his death for certain purposes. Power was reserved to the spouses to alter the settlement during their joint lives by mutual deed, and to the survivor to do the same, "but only in so far as regards our separate estates." The husband survived. After a second marriage he executed a deed by which he revoked, so far as he competently could do so, the mutual deed above mentioned. On his death the present action was raised by the trustees nominated in the mutual deed by his first wife against the trustees nominated by the husband in his subsequent deed for an accounting. The defenders pleaded that by virtue of the terms of the mutual deed the surviving husband had a full and unlimited fee in his first wife's estate. This plea was repelled, and a proof was allowed.

Evidence was led before Lord Dundas, who

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held that the only portion of the deceased wife's estate unconsumed by her surviving husband at the date of his death was a bond for £6000, and gave decree in terms of the conclusions of the summons in respect of that bond, and, *quoad ultra*, assoilzied the defenders.

His Lordship added the following note to his interlocutor, viz. :—

Lord Dundas.—On 5th June 1906 I decided that, upon a sound construction of Mr and Mrs Denholm's mutual settlement, Mr Denholm did not take a full vested right in and to the whole estate of his deceased wife; and, *quoad ultra*, I allowed a proof. In the opinion then delivered, I pointed out that I did "not propose at present to attempt to define the limits of the restrictions upon Mr Denholm's right of fee, or those of his power to 'consume' his wife's estate." On 7th November 1906 the Second Division adhered to my interlocutor. The case is reported in 14 S.L.T. 394. All, therefore, that was determined up to that point was that Mr Denholm's right was not one of full fee; its precise nature and extent have now to be considered. It may be well to recal the terms of the *sixth* purpose of the mutual settlement. The words used at the outset of the clause were, standing by themselves, sufficient to confer upon Mr Denholm an absolute fee in his wife's estate. The clause continues: "With full power to my said husband to consume such parts or portions of the capital during his lifetime as he may find or think necessary, and also power to him to realise, sell and dispose of my said estates, heritable or moveable, by public roup or private bargain, as he may think proper, and in general to deal and intromit therewith as freely as I could have done myself." Mrs Denholm proceeded to appoint her husband to be her sole executor; and upon his death, if he should survive her, she assigned to trustees (who are now represented by the pursuers), "All and Sundry my said estate or such portion as may be unconsumed by my said husband" in trust for the purposes thereafter specified. It seems, therefore, that what would have otherwise been an absolute fee in Mr Denholm is limited by the destination to other parties of so much of the wife's estate as might be "unconsumed" by him at his death. In Lord Stormonth-Darling's words (14 S.L.T. 396), Mr Denholm had "a right limited to sale, administration, and consumption during his lifetime." To attempt a closer definition of his right, one must, I apprehend, study the clause as a whole, and endeavour to give due weight to all its parts. On the one hand, I think that the wide expression—"and in general to deal and intromit therewith as freely as I could have done myself"—must be read so as to harmonise with the power to "consume such parts or portions of the capital during his lifetime as he may find or think necessary"; and, on the other hand, the latter phrase must be taken in conjunction with the wider words. The result, in my judgment, is that Mr Denholm was undoubtedly entitled to "consume" the whole of his wife's estate during his lifetime — though he might not dispose of it by *mortis causa* deed—subject to the rather unsubstantial qualification that he himself should "find or think" it necessary to do so. The word "consume" has no special or technical signification. The main idea etymologically is, I think, that of taking complete possession. Dr Johnson defines it as "to waste; to spend; to destroy." The "unconsumed" portion, if any, of Mrs Denholm's estate must, therefore, in my judgment, be represented by what now remains extant, and can be identified as having formed part of it. I was referred to cases in which clauses, more or less similar to the present, were construed by the Court. The light to be derived from these is at best indirect. It may be sufficient to allude quite briefly to two of the decisions. In *Reddie's Trs.*, 1890, 17 R 558, a surviving widow had power under a mutual settlement "to use or encroach on the funds, means and estate hereby conveyed on either side." The Court held that these words must be "read in a reasonable sense"; that the widow was not entitled to give the estate away without consideration; but that, in so far as necessary for her maintenance, she might encroach upon the capital,—"only for herself, and not for anyone else." The language of the deed in *Reddie's* case was obviously much more restricted than that here under consideration. A case more nearly resembling the present is *Sprot*, 1855, 17 D. 840. There a husband declared that his wife, if she survived him—(which she did)—should "be at liberty to appropriate out of the stock of my said trust estate such sum or sums, from time to time, as she may find needful for her own use, over and above the free income, or as she desires to have for her own purposes and disposal, without limitation as to the amount of such sum or sums." It was held that the widow was not entitled, as in exercise of this power, to dispose of the whole estate by *mortis causa* deed. The Lord Justice-Clerk (Hope) pointed out that the "appropriation out of the stock . . . . clearly refers to an act of the wife, in her lifetime, taking the sums herself for her own use. Her deed of settlement is not such an act at all. She has appropriated nothing out of the stock"; but his Lordship also made it plain that the widow could, during her life, "have gone any length in the way of expenditure."

Subject, then, to the views which I have expressed, the question that arises seems to be one of fact, viz. what, if any, "portion" of Mrs Denholm's estate can be shewn to have remained extant and "unconsumed" by Mr Denholm at the time of his death? It is now admitted by the defenders—although they disputed it down to the date of their letter of 21st January 1907—that one such portion of the estate remains "unconsumed"; namely, a bond in Mrs Denholm's favour for £6000 over the estate of Press, which is described in the summons and condescendence. But it appears that the whole rest of her estate was realised by Mr Denholm during his life, and its proceeds immixed with his own funds, so as to make it impossible to identify them or trace their subsequent history. Mr Denholm was a stockbroker, and prior to 1894 had also an insurance agency. His business books were kept with regularity; but he seems to have made no private record at all of the income and out-goings, either of his own means or of his wife's estate. He had several bank accounts, and would shift money from one to another of these. When he realised successive portions of his wife's heritable estate, he immediately placed the proceeds in one or other of these accounts, immixed them with his own funds, and went on drawing upon the account for his ordinary expenditure and other purposes. Upon this general sketch of the situation, a question as to *onus probandi* arises. The pursuers' counsel argued that it was for the defenders to prove "consumption" by Mr Denholm so far as they could do so; that to "immix" is not necessarily to "consume"; that, as Mr Denholm had kept no private accounts, it was impossible for the defenders to prove that any definite

portion of his wife's estate had been "consumed" by him; and that the pursuers were therefore entitled to receive and administer the amount of her estate as known to exist at the date of her death. I think that this argument is erroneous. It lies, in my opinion, upon those who seek to administer "such portion" of Mrs Denholm's estate "as may be unconsumed by" her husband, to identify the whole portion of it which they say is unconsumed, as they have succeeded in identifying the bond for £6000. It is true that Mr Denholm was his wife's executor; but he was also the fiar (subject to the qualifications already explained) in her estate. He was not, I apprehend, under any obligation to keep account of that estate, though it would have been more regular to do so. He intromitted with her estate and mixed it with his own; and if the pursuers are, in these circumstances, unable—as I think they are—to trace or identify it (with the exception of the bond) they fail, in my judgment, to discharge the *onus* of proving that it remained "unconsumed" at Mr Denholm's death. Now, the nature and value of Mrs Denholm's estate at her death are shewn in a statement, No. 10 of process, to which I shall afterwards have to allude more particularly. The correctness of the statement is impugned upon certain heads by both parties, but may be held as sufficient for present purposes. If one discards the bond for £6000, which remains "unconsumed," a balance of *jus relictæ* from the estate of Mrs Denholm's former husband, and "paraphernal effects" of trifling value, it appears that that lady's estate consisted, at her death, of three heritable properties. The first of these—a house in Manor Place—was sold by Mr Denholm in 1895 and the price placed immediately in one of his bank accounts. I may observe in passing that I think the pursuers have failed to prove in fact that a part of these proceeds was used in paying off a bond for £917 or thereby upon another property belonging to Mr Denholm; and further that, even if the alleged application of this money had been established, I should have been disposed to hold that Mr Denholm had "consumed" it within the meaning of the settlement. In 1900, the subjects in High Street were acquired by the Corporation of Edinburgh; and the property in South Bridge had been sold by Mr Denholm in the previous year. In both of these cases, as in that of Manor Place, the price was placed by Mr Denholm in bank, and immixed with his other funds. In my opinion, Mr Denholm thus "consumed" his wife's estate (except the bond), according to the ordinary use of the word, and its meaning in the mutual settlement. But the pursuers' counsel argued that it would be little short of absurdity to say that Mr Denholm could "find or think" it necessary to "consume" the whole of his wife's estate,—excepting the said bond. It was, they urged, proved that he had a stockbroking business worth not less than £2000 a year, besides heritable properties of his own; and in 1899 he succeeded to a fortune of about £27,000 under the will of a Mrs Booth. I think that Mr Denholm's professional income is overstated at the above figure; but the truth is that, as Mr Cockburn Miller frankly puts it, "it is somewhat difficult to determine accurately the position of a man who has not made a balance-sheet shewing his own affairs, and I don't know if we have knowledge of all his assets or liabilities." Further, it appears to be at least highly probable that, when Mr Denholm sold the Manor Place house in 1895, he might "find or think" it necessary to use and consume the price for his own purposes; because his assets consisted chiefly of heritage, and of certain bank stock which he utilised as cover against overdrafts on his account. A similar observation may, I think, be fairly made as to the sales of Mrs Denholm's other two properties and the "consumption" of their prices by Mr Denholm; for he had not, it seems, actually received any part of his succession from Mrs Booth's estate until after the completion of these transactions. There is at all events no evidence to shew that Mr Denholm did not find or think it necessary to consume the estate which he had in fact mixed with his own funds. The pursuers' counsel presented a further argument, based upon the statement No. 10 of process to which I have already referred. This statement is continued in Mr Denholm's ledger, and is signed by him as being as near as possible a correct statement of the estate of his late wife at the date of her death, "and is engrossed here with reference to the directions expressed in my will, dated 17th April 1902." This will is a very lengthy document, and seems to have been the outcome of deliberations between the testator and his law agent, extending over a series of years. It contains a clause of forfeiture directed against his two daughters and his stepson in the event (which has not occurred) of any of them raising questions, *inter alia*, "with reference to the distribution or division of the estate left by their mother, my wife, or taking exception or making any objection to the amount thereof as the same may be set forth in any statement subscribed by me." The pursuers' counsel maintained that Mr Denholm's subscription of No. 10 of process, coupled with the clause just quoted, sufficiently instruct an intention on his part that the amount or value of the estate belonging to Mrs Denholm at her death should, upon his death, pass to the trustees of her own will, for the purposes expressed by her in the mutual settlement, notwithstanding his intromissions with it during his life. I leave out of account entirely such fragments of oral testimony as exist in the proof as to Mr Denholm's expressions of intention in regard to his wife's estate. Such passages, if competent—which I doubt—are quite vague and inconclusive. In my opinion, the documents founded upon are not sufficient to rebut the strong presumption, arising from the facts of the case, that Mr Denholm intended to consume, as in my judgment he actually did consume, during his lifetime, the whole of his wife's estate, except the bond for £6000. The evidence discloses that Mr Denholm was made fully aware by his successive law agents, Mr Dalziel and Mr Kerr, of his powers of consumption, and that he deliberately abstained from putting his wife's estate beyond those powers by creating a separate trust. Further, it is made clear by Mr Kerr's evidence that the purpose for which the statement No. 10 of process was prepared and subscribed was not that which was suggested in the argument for the pursuers. Mr Kerr states that he had no knowledge of Mr Denholm's dealings with his wife's estate; but that he advised him to put upon record a definite statement of the amount of it, as received by him at her death, "to prevent any question when he was dead. The real purpose was to fix the amount of the estate as at her death as received by him, so that there might be no question by beneficiaries coming forward and saying, 'This is far more than the sum our mother left.'" I confess that I am unable to understand from Mr Kerr's evidence—the truth of which I accept implicitly—the precise idea which he had in mind in so advising Mr Denholm; but whatever the idea may have been, Mr Kerr's statements establish be-

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yond question that it was not in order to secure that the original amount of Mrs Denholm's estate should be taken out of Mr Denholm's estate, so as to be made subject to the trust purposes of her settlement. I may add that, in considering the case, doubts have occurred to my mind as to the admissibility of Mr Kerr's evidence upon this matter, though no objection to its competency was suggested by the pursuers' counsel either at the proof or in his speech at its conclusion. But, for the reasons stated, I should arrive at the same result apart altogether from Mr Kerr's evidence. Upon the whole matter, therefore, I think that the pursuers are entitled to decree substantially in terms of the conclusion of the summons for declarator and delivery; and that, *quoad ultra*, the defenders are entitled to absolvitor.

I have not found it necessary to advert in detail to the evidence given by the accountants engaged on either side. But I may say that these gentlemen appear to have gone into the whole case, upon such materials as were available, with great ability and industry; and I have not failed to study carefully their oral evidence, and the numerous "States" which they produced as explanatory of and relative to the same.

The pursuers *reclaimed*.

Argued for Reclaimers: Mr Denholm was a liferenter with power to consume and administer. Consumption implied a personal user. It must be to fill a need, not to make up businees books. It must be shewn that he had applied his mind to the matter and found encroachment on the capital of his wife's estate was necessary. The *onus* was on the defenders to prove consumption of all portions of the estate which were not forthcoming, and to shew the purposes for which they were consumed. Mr Denholm's duty as administrator was to account or prove consumption. Counsel referred to *Houldsworth* v. *Brand's Trs.*, 1875, 2 R. 683 at 690; *In re Thomson's Estate*, 1879, 13 Chan. Div. 144; *Reddie's Trs.* v. *Lindsay*, 1890, 17 R. 558 at 564; *Sprot* v. *Pennycook*, 1855, 17 D. 840 at 850, 853.

Argued for Respondents: The *onus* of proof was on the reclaimers. Mr Denholm had power to do what he liked with his wife's estate during his lifetime. He was not a mere liferenter, and was not bound to keep accounts. Consumption was completed by conversion and appropriation. The proper distinction was between capital hoarded and capital used for reproduction. That was the sense in which John Stuart Mill used the word consume, and it was the proper sense to employ here.

The Court (*dissenting* Lord Ardwall) *adhered*.

The Lord Justice-Clerk.—This case is not unattended with difficulty, as is demonstrated by the fact that there is a difference of opinion between your Lordships upon it. Your Lordships have both very fully and very clearly stated the grounds of the opinions you have formed, and by your kindness I have had an opportunity of considering these opinions. Before doing so I had arrived at the conclusion that it could not be held in this case that there was any ground for holding that the funds which are in question had not been consumed by the deceased Mr Denholm during his life, and that having been so consumed the demand made in this case cannot receive effect, as I hold he was entitled to consume as he did, and was not bound to keep accounts by which the mode and details of consumption should be capable of ascertainment. Having considered your Lordships' opinions, I have come to the conclusion that my view formed on consideration is right. And as Lord Stormonth-Darling's carefully formed and expressed opinion expresses very fully and exactly my views on the case, I feel it to be unnecessary to restate them at length.

Lord Stormonth-Darling.—This case came before this Division more than a year ago, and was then heard by Lord Kyllachy, Lord Low, and myself. What we then decided, affirming the Lord Ordinary, was that on a sound construction of the mutual settlement by the spouses, the late Mr Denholm did *not* take a full and unlimited right of fee in the estate of his first wife. I then said, delivering the judgment of the Court, that, taking all the clauses of the deed together, "their true effect was to cut down the absolute right of fee originally conferred on the husband, not to a liferent (because a liferent would have been inconsistent with the powers which she (the wife) wished him to have), but to a right limited to sale, administration, and consumption during his lifetime." The Lord Ordinary has now taken a proof, and, as the result of it, has in substance found that the whole estate of the first wife, with the exception of a bond for £6000 over the heritable estate of the husband, was "consumed" by him during his lifetime, within the meaning of the mutual settlement. I think the Lord Ordinary is right.

If the passage I have quoted from the former judgment of this Court be well-founded (and it was not challenged), there was an absolute right of fee originally conferred on the husband by the wife's conveyance. It is not qualified in any way, by trust or otherwise. It is a conveyance of "my whole estates," under burden of debts, as well as of certain annuities which the lady creates by the settlement, and under burden also of maintaining and educating her whole children, including her son by a former marriage. Then follow certain powers which, as we formerly found, were truly rather limitations of the husband's rights than powers properly so called, and, in the event of his surviving her, she appoints him her sole executor. Consistently with that, the trust conveyance which she goes on to make to her own trustees at her husband's death is limited to "my said estate, or such portion as may be unconsumed by my said husband." The conveyance to the husband, therefore, is in point of title absolute, and differs in that respect from the

right conferred on the wife in the English case cited by Mr C. D. Murray of *In re Thomson's Estate*, 1879, 13 Ch. D. 144, where it was controlled by the words "for the term of her natural life," although words were added which gave the wife some power of disposition over the capital. These words were, "To be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof, subject only to the payment of my just debts and funeral expenses and the charge of proving and registering this my will." The practical effect of this form of conveyance was as nearly as possible the same as Mrs Denholm's conveyance here. But in point of title the Court could not hold that the donee of this power had anything but a life interest, or any right to affect by testamentary instrument what remained undisposed of at her death, which was what the donee in that case tried to do. Here there was no such attempt by Mr Denholm, for he did not try to take advantage of the circumstance that his title was absolute in point of form. I agree that the attempt would have been unsuccessful if he had made it, because of the limitation of his powers to consumption during his lifetime; and there was no real repugnancy between that limitation and the absolute nature of the title.

But that leaves untouched the question, What was the meaning of the "full power to my said husband to consume such parts or portions of the capital during his lifetime as he may find or think necessary" which Mrs Denholm gave him? It may be that such a power is exceptional and, if you like, rather anomalous. It does not fit in exactly with our ideas of either fee or liferent. But it was used by a testatrix who had plainly unbounded confidence in her husband (as shewn, *e.g.*, by her entrusting him with the maintenance and education of her son by a former marriage and making him guardian of the boy), and she must also be taken to have known that, although he was a landowner, and living at a very bountiful rate, he was a stockbroker and liable to considerable risks in business. Accordingly, when she made him the absolute judge of what parts or portions of her estate (amounting in all to between £10,000 and £11,000 in houses and money) it was "necessary" for him to "consume" during his lifetime, and what portion he was to leave "unconsumed" at his death, I think she was doing a very different thing from giving the net income of her whole estate to trustees and superadding a discretionary power to them to encroach upon capital as they might deem necessary, which was what the husband did in his part of this mutual deed. I therefore attach no importance, except as affecting mutuality, to the recital with which the wife's conveyance opens: "In like manner, and in consideration of what is before written." The two conveyances, so far as affecting construction, must each be regulated by its own terms. And therefore, when the Lord Ordinary comes to the conclusion that the "unconsumed" portion of Mrs Denholm's estate must be represented by what now remains extant, and can be identified as having formed part of it, I cannot but agree with him. Mr Robertson-Durham, after a careful examination of the documents in process and of the books kept by the late Mr Denholm, shewing his financial transactions, is asked whether he can identify any of the estate extant at his death as belonging to his wife. And his answer is: "Only the £6000 bond over Press; everything else, so far as I can follow the items, was consumed by Mr Denholm, immixed with his estate and swallowed up."

Now, it is not disputed by the wife's trustees that her estate, both heritable and moveable, was in point of fact realised and immixed with the husband's funds by being paid into his various bank accounts, and that it is impossible now to trace the proceeds. The case would have been different if all that the husband did, when he realised the house property belonging to his wife, had been to reinvest the proceeds in some other recognisable form. That might not have been "consuming" the proceeds any more than if he had put them into the traditional old stocking and had kept them there. But what he did was not that. He used the money to pay off debt and reduce overdrafts, and he dealt with it generally in such a way that the most skilled accountants cannot tell what became of it in the end. For aught I know, this very impossibility of tracing the proceeds may account for the extremely wide terms of Mrs Denholm's part of the will. Knowing that her husband was immersed in fairly large money transactions, that he had several bank accounts (frequently overdrawn), that his landed and house property was burdened, and that he had need of capital both for his own and his clients' purposes, she may have wished to give no third party the right to enquire what he did with her money any more than with his own, and so may have used an indefinite term to cover his use of the money in any way that he found most for his advantage. Certainly I cannot accept the reclaimers' main argument, viz., that "consumption" means only personal user, for it seems to me that that, besides creating at the outset the difficulty of settling what "personal user" means, would be giving no effect to the words "as he may find or think necessary," which are the words of the will. Nor do I think that this difficulty is got over by implying some vague kind of trust, where trust there is none. There is always, of course, the ultimate arbitrament of conscience. But I must say, in fairness to the late Mr Denholm, that nothing has either been established by the proof, or advanced in argument, to shew that there was any failure on his part to observe the rules of good conscience as regards the beneficiaries ultimately and contingently called under his wife's part of the

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settlement. By his own will he seems to have dealt with them all (his stepson as well as his own two daughters) as one family. By that instrument he no doubt mentions provisions as made both by her and himself for their children, and there is a clause of forfeiture of any share or interest under his own will in the event of any of the children making any claim (inconsistent with his will) or raising any question about a statement subscribed by him relative to her estate at the date of her death. But that statement merely referred (and referred, apparently, with substantial accuracy) to the different items of her property, heritable and moveable, and does not of course touch the question in any way of what Mr Denholm was entitled to do by way of consumption of his wife's estate during his own life. I do not therefore see that either the statement No. 10 of process or the passages in Mr Denholm's own will materially affect the only question of importance in the case, viz., whether the husband did "consume" the wife's estate by using it to pay his debts, and so making it impossible of identification.

I think that the test proposed by Mr Constable for the husband's trustees is the true one, viz. whether the husband was bound to keep accounts of his wife's estate. And I think there is no ground for saying that he was. If he was not so bound there is an end of the argument that the mutual will contained anything in the nature of a trust or *quasi* trust. I demur altogether to the notion that although Mr Denholm may not have been bound himself to keep accounts, his trustees are under an obligation to account to his wife's trustees for anything except the bond for £6000. Beyond that, what are they to account for, and where are the materials for enabling them to do so? It is suggestsd that the document No. 10 of process forms an acknowledgment under Mr Denholm's own hand that, to the extent of the difference between the sum of £6000 in the bond and the sum of £10,000 which he acknowledges to have received as the net amount of his late wife's estate at the date of her death, he never "consumed" his wife's estate, or intended to consume it. That seems to me rather a strong inference to draw from a document made out *alio intuitu* altogether. It is also an attempt to divert the question from the construction of Mrs Denholm's will in 1893 to the meaning to be attached to a jotting of Mr Denholm's made with reference to his own will in 1902. But the strongest objection to the suggested inference is that the fact of consumption or non-consumption is to be ascertained, not from ambiguous declarations, but from positive acts of his own.

I agree with the Lord Ordinary that the *onus probandi* lies on the pursuers. It is for them to shew that there was any portion of the wife's estate "unconsumed" at the husband's death: it is the very groundwork of their title. They have had no difficulty in shewing that with respect to the £6000 bond, because it remained exactly as it was at the lady's death. But *quoad ultra* they have, in my judgment, failed to shew that any portion remained unconsumed when their trust title emerged; and on the whole matter I am for adhering to the Lord Ordinary's interlocutor.

Lord Ardwall.—This is an action raised by the trustees of the deceased Mrs Denholm against the trustees of her husband the deceased George Denholm. It concludes, first, for declarator regarding a sum of £6000 contained in a heritable bond by Mr Denholm in favour of his wife; the Lord Ordinary has granted decree in terms of that conclusion, and the defenders acquiesce therein. The second conclusion of the action is for count, reckoning and payment, whereby the amount due by Mr Denholm at the time of his death to the pursuers may be determined. A proof has been led with reference to this conclusion, and it has now to be decided whether, under the mutual settlement of Mr and Mrs Denholm, dated 10th November 1891, the pursuers, who are Mrs Denholm's trustees under that settlement, are entitled to the accounting and payment they ask.

The important facts seem to be as follows:—

On 10th November 1891 Mr and Mrs Denholm executed the mutual settlement under consideration. Mrs Denholm died in 1893. She left heritable estate which, after discharging the bonds secured over it, realised about £4752, the bond for £6000 above referred to, and a small amount of money, in all about £10,100. The details of the estate are given with sufficient accuracy in the statement signed and authenticated by Mr Denholm in reference to his own will, to which I shall afterwards refer.

At Whitsunday 1895 Mr Denholm sold the house 43 Manor Place, Edinburgh, which had belonged to his wife, at a price which, after paying the bond thereon and expenses, left £2690. At Whitsunday 1899 he sold the one-half of the property 92 South Bridge at a price which, after paying expenses, left £1482. The High Street property was compulsorily taken by the Corporation of Edinburgh in pursuance of an Improvement Scheme in August 1900, and the value of Mrs Denholm's half thereof, after deducting expenses, amounted to about £580. The proceeds of all these properties were at once carried into one or other of Mr Denholm's three bank accounts and merged with his other funds. It is explained by the accountants who examined his books that he kept no private accounts of his expenses of living, education of children, or anything else, so that it cannot be said what he spent year by year in these ways. It is important to notice, however, that long before his

wife's death he was possessed of capital to the amount of about £5000, and that in February 1899 he succeeded to a sum of £27,000 under the will of a certain Mrs Booth. On 17th April 1902 he made a will, in which he revoked the mutual settlement so far as regarded his own estate, and gave directions with regard to it, and shortly after he drew up the statement already referred to and had it engrossed in one of his books with reference to the directions expressed in his will. He adopted the statement and docquet as holograph, and, in addition, had it witnessed by his cashier. At his death Mr Denholm's estate was found to amount to about £40,000. He had been, from the time of his marriage to Mrs Denholm onwards, in business as a stockbroker, and it is estimated that he had a professional income, generally speaking, of about £2000 a year, but, as he speculated a good deal on his own account, it is difficult to say precisely what his annual income was, and possibly the figures above given as to his capital at various times and at his death are sufficient for the purposes of this case.

From the above statement it appears that the only portion of Mrs Denholm's estate which can now be said to exist *in forma specifica* is the £6000, about which there is now no question. The whole of the rest of her estate was immixed with her husband's funds and may be regarded as having been invested in his business, because although it appears, so far as the direct application of it was concerned, to have been used for general expenses, yet, by so using it, Mr Denholm was enabled to keep more money in his business. It is now indistinguishable from the rest of Mr Denholm's estate, but, if the defenders are bound to account for it to the pursuers, there seems no practical difficulty in recovering it, as Mr Denholm's estate is well able to pay the whole amount sued for.

On these facts the Lord Ordinary has held that the whole estate of Mrs Denholm, "with the exception of the bond for £6000, was consumed by the late George Denholm, her husband, within the meaning of the mutual settlement referred to on the record"; and he says in his note that the question is what portion of Mrs Denholm's estate can be shewn to have remained extant and unconsumed by Mr Denholm at the time of his death.

I cannot agree with the view taken by the Lord Ordinary and now concurred in by your Lordships. This case was formerly brought before this Division on a reclaiming note by the defenders, and it was then decided (see 1907 S.C., p. 61) that under the said mutual settlement the husband "did not take a full and unlimited right of fee in the whole estate of the wife," and the first question to be determined is, What was the nature of the husband's right in that estate? In my opinion he was constituted a trustee upon the said estate, in the first place for payment of Mrs Denholm's debts, deathbed and funeral expenses, and executry expenses; second, for paying her two aunts free annuities of £10 sterling each at Whitsunday and Martinmas in each year, and for the purpose of maintaining and educating the whole of her children out of the income of the estate. It is not said that Mr Denholm is to have a liferent of the estate subject to these burdens, but I think that must be held as implied.

With regard to the capital, there are two powers given to Mr Denholm. First, the power of consuming such parts or portions of the capital during his lifetime as he might think necessary—in other words, a power of encroachment—on the construction of which this case largely turns; and second, a power of administering and using the estate. Then upon the death of her husband, should he survive her, Mrs Denholm dispones and assigns to certain trustees who are the pursuers in this action "All and Sundry my said estate or such portion as may be unconsumed by" her husband in trust for certain purposes which are therein specified. I think it plain that these provisions have the effect of placing the husband in the position of a trustee with very large powers of administration and use of the estate, but with a limited power of consumption, and the result in law is that should he use the estate by mixing it up with his own, or taking investments in his own name, his trustees would, notwithstanding, be liable to account for that estate upon his death subject only to deduction of such portions as they could shew to have been consumed in terms of the only power to encroach on capital conferred by the deed.

From the provisions above recited it is, I think, apparent that the husband as trustee was bound to defray out of the income of the estate the life annuities and the expense of maintaining and educating the children, and this could only be done by his retaining the capital of the estate and applying the income to these purposes. The only power given to him to encroach upon the capital I shall afterwards more particularly consider; but it is plain that so far as not consumed in terms of the power, the testatrix intended that the whole of the capital of the estate, however dealt with under the power of administration, should be available for the purposes of her trust after her husband's death, to carry out which trust she appointed trustees in succession to him.

I have difficulty in understanding what view the Lord Ordinary takes of the character in which Mr Denholm held his wife's estate, but he has apparently reached the conclusion that under the combined powers of consumption and administration Mr Denholm was entitled, as soon after his wife's death as he pleased, to realise her whole estate and mix it with his own funds, and thus free himself and his executors from all

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obligation whatever to account for it to the beneficiaries under the mutual settlement. I do not think that this view is tenable. It is, I think, at variance with the former decision in this case, because it results in this, that while by the general scheme of the deed the husband had not an absolute right to the fee, yet under the powers in the same deed he could at once secure such right to himself as soon as he pleased after the death of his wife by the simple process of realising the estate and mixing it with his own and thus defeat the whole of the carefully-drawn provisions with regard to the use to which the income and finally the capital of the estate were to be put. The Lord Ordinary adverts to the dispositive clause as helping to lead to this result. It is as follows:—"I, the said Sarah Louisa Liddall MacLaren or Denholm, do hereby give, grant, assign and dispone to the said George Denholm, my husband, in the event of his surviving me, All and Sundry my whole estates, heritable and moveable, real and personal, of whatever description, together with the whole writs, titles and instructions thereof, but under burden always," etc. Now I would point out that the terms of this gift are of little importance in the present question, because they are the terms in which almost every trust disposition is granted, and are as near as may be the same terms as Mr Denholm himself uses in giving his part of the trust estate over to his trustees, and although Mr Denholm is not named a trustee, yet if the directions given him and the powers and duties entrusted to him were those appertaining to trustees, I do not think that his character as such is altered by what the Lord Ordinary calls the absolute terms in which the disposition is granted. Mr Denholm by the deed is nominated his wife's "executor," and it has been decided that if an executor is charged with duties implying a continuing trust he is in the same position as if he had been nominated a trustee (*Ainslie* v. *Ainslie*, 1886, 14 R. 209). In the next place, it appears to me that the Lord Ordinary has mixed up with the power to consume the power of realising and administering the estate, which is a totally separate power, and ought not, in my opinion, to be confused with the very special power given Mr Denholm to consume the capital thereof which precedes it.

I will now proceed to consider what is the meaning and effect of the clause giving power to consume capital.

1. I first take the clause by itself, prefixing, however, the words which immediately precede it in the mutual settlement, and which I think are not unimportant. It is in these terms: "Also under burden of maintaining my whole children, including the said William Benjamin Liddall MacLaren, until they are capable of maintaining themselves, and of educating them in a manner befitting their station, with full power to my said husband to consume such parts or portions of the capital during his lifetime as he may find or think necessary." The word "consume," I take it, simply means to use up, but it is a word which is appropriate to the use by way of supporting or keeping in comfort a husband or children, and is not so appropriate as an expression equivalent to squandering and dilapidating an estate. In Mr Denholm's part of the mutual settlement, which I shall presently advert to, the trustees are directed to pay over parts of the capital to Mrs Denholm, but of course Mr Denholm being himself the trustee, it would have been ridiculous to direct him to pay over to himself, and accordingly the power takes the form of a power "to consume" such parts or portions, etc., the capital being in his own hands. But the power given is not to consume such parts of the capital as he may think proper, or as he may please, but as "he may find or think necessary." Effect must be given to these last words, and the only reasonable effect which can be given to them is to hold that they limit the husband's power of consuming to what he might find or think necessary for the comfortable maintenance of himself and his own and his wife's children. It would be doing violence to these words to hold that they could possibly apply to such a cause as mixing the whole of his wife's estate with his own, or that his doing so can be held in any sense to be an exercise of the limited power of consumption conferred on him.

2. This settlement, however, is a mutual settlement, and although there was a power of revocation given to the husband which he has exercised with regard to his part, yet the original mutual deed should be read as one, and being a mutual settlement it ought to be so interpreted as to render the provisions made by the husband and wife in favour of each other respectively as nearly as possible counterparts of each other. This observation is applicable to all mutual settlements. It is so more particularly in this case, because the provision made by Mrs Denholm in favour of her husband which is now under consideration is introduced by these words: "And in like manner, and in consideration of what is before written, I, the said Sarah Louisa Liddall MacLaren or Denholm, do hereby," etc.

Taking then, first, the provisions under the fourth head of Mr Denholm's part of the mutual settlement, we find them to be these. (1) The net income of his whole estate, under burden of certain annuities, is to be paid to his wife as an alimentary allowance for herself and "our children"; then follows this clause: "And my trustees are hereby authorised to pay over to her from time to time for her use such portion or portions of the capital of the said residue as my trustees may deem necessary, or which they think she may require, she being always bound to maintain our said children, and that until they

are capable of maintaining themselves, and to educate them in a manner befitting their station." I have above quoted the corresponding clause in Mrs Denholm's part of the deed, and comparing these two clauses, I remark that the contemplation of the later clause in the deed is that the capital of the estate shall be preserved for the ultimate beneficiaries except such portion, not as her husband may consume, but as he may find or think necessary to consume. This is almost in terms the same direction as is given to the trustees by the first portion of the deed, and I think it would do violence to the intentions of both parties to the deed—and it is a mutual one—to hold that the husband was entitled to squander or appropriate all his wife's estate as he pleased without ever putting the question to himself whether the consumption of capital was necessary presumably for the purposes of the needful expenses of himself and the children. It will be noticed that what the trustees in the former part of the deed are bound to do, is to pay over to Mrs Denholm such parts of the capital as they may deem necessary or which they think she may require, and my opinion is that the power given to Mr Denholm was not intended to be a whit wider than that given to the trustees; in other words, that the power given to Mr Denholm to consume parts or portions of the capital during his lifetime as he might find or think necessary was a limited power only, a power to be exercised *sub modo*, although the duty is put upon himself and not other trustees to act as a good trustee ought to act, and as the trustees in his own portion of the deed are directed to act.

But now follows a clause which, I think, has been mixed up by the Lord Ordinary with the power to consume capital, but which has nothing to do with it, being concerned with a wholly different power, namely, of administration. That clause is in the following terms: "As also power to him to realise, sell and dispose of my said estates, heritable or moveable, by public roup or private bargain as he may think proper, and in general to deal and intromit therewith as freely as I could have done myself." It will be noticed that this clause is introduced by the words "and also," and that it deals with a power which seems to be purposely kept quite distinct from the power to consume given in the immediately preceding clause. I think, therefore, that it cannot be supposed that the words "to deal and intromit therewith as freely as I could have done myself" apply at all to the power to consume, but only to the power of realising, sale, and administration. A power of administration and reinvestment will be found in almost every trust deed, but the peculiarity of the power under consideration is that while in the ordinary case trustees are by law strictly prohibited from using trust funds for their own purposes or investing them in their own businesses, in the present case Mr Denholm has practically unlimited power of using and investing the money, just, in fact, as if for these purposes it was his own, as the power indeed sets forth, and I cannot help thinking that it was the intention of both parties by this clause to enable Mr Denholm to invest in his own business, directly or indirectly, such portions of his wife's realised estate as he thought proper. This of course would be a great convenience to him in carrying on the business of a stockbroker, but the fact that he did so invest it in his business through his bank accounts, cannot reasonably be held to have the effect of absolving him from all obligation to account for money so invested to those who ultimately have the beneficial right to it. I accordingly am of opinion that this clause adds nothing whatever to the power to consume portions of the capital, and indeed has nothing to do with it. And as matter of construction I consider it out of the question to hold that the words "to deal and intromit therewith as freely as I could have done myself," are to be tacked on to the clause giving power to the husband to consume such portion of the capital as he might think necessary. It was doubtless with the view of giving Mr Denholm full power to change these investments, and, if he pleased, to have the command of this money during his lifetime for the purposes of his business, that the power took the somewhat unusual form it did; but I think that a sound construction of the whole of this part of the deed, keeping always in view the provision made by Mr Denholm himself regarding his capital, is that Mr Denholm should have the use of the income of the estate, for the word "liferent" is used in no part of the deed; that he should be entitled to consume such portions of the capital as he might think or find necessary, and should have practically unlimited power to handle the estate and invest it in such way as he pleased. I therefore revert to what I have already said, that the deed, by first giving an absolute disposition and then inserting provisions which imply, as has been held by the former decision, limitations on the absolute right, has truly the effect of placing Mr Denholm in the position of a trustee with power to encroach on the capital of the estate should he think or find it necessary for certain purposes, and with the widest powers to invest and use the rest of the capital as he pleased during his lifetime, but subject, of course, to an obligation to account for such capital to the ultimate beneficiaries—an obligation, I may observe, not the least inconsistent with the right to use the capital in his business or otherwise and to mix it with his own funds.

If I am right in what I have already said, I think it follows that the defenders are bound to account to the pursuers, as Mrs Denholm's trustees under the mutual settlement, for the whole value of Mrs Denholm's estate except such part thereof as they can shew to have been consumed under

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the power to consume which I have just been dealing with. In all cases where trustees or persons in the position of trustees are charged with the management and administration of funds belonging to a deceased person, it is undoubted that it is for them to account for those funds to persons having the ultimate beneficial interest in the reversion; and if they cannot shew affirmatively that capital funds have been properly consumed or used under the powers in the trust deed, they must make good these funds out of the general estate of the trustee in the event of his death if such estate is sufficient for the purpose.

Now there is no doubt here of the sufficiency of the estate, for Mr Denholm left some £40,000, and the fact that under the power of administration in the trust deed he mixed his wife's funds with his own cannot absolve his trustees from the obligation to account. It appears to me, I must say, absurd to hold that they can escape that obligation merely because Mr Denholm mixed his wife's estate with his own, and because that estate accordingly does not now exist in its original form. I can find nothing in the scheme of the mutual settlement to countenance such an extraordinary result.

But I think that the pursuer's case derives great support from a consideration of Mr Denholm's will and the statement which is incorporated and practically forms part of it. I may first observe that Mr Denholm having left the sum I have mentioned, and having been all his life apparently in prosperous circumstances, and all along having had considerable capital at his command, there was really no necessity for him to consume any portion of the capital of his wife's estate, and there are indications in some parts of the oral evidence, the competency of which I cannot admit, that it was not his wish to do so. But a consideration of the deeds I have referred to, I think, makes it plain that not only did he never exercise the power to consume the estate, but never intended to do so, and was under the belief that after his death the whole of the capital of Mrs Denholm's estate as at her death should be and would be disposed of in terms of her part of the mutual disposition and settlement. Mr Denholm's will is dated 17th April 1902. It sets forth the reserved power to revoke in the mutual settlement as regarded the separate estate of each party, and that his estate had been very considerably increased since the date of the mutual settlement. The deed then proceeds thus: "All which make it highly expedient that I should execute a new will giving expression to my wishes as regards the disposal of my means and estate after my death." He then defines that estate, and says that it is to be referred to hereinafter as the "trust estate." It may be mentioned that Mrs Denholm had been previously married to a Mr MacLaren, and that her son of that marriage, named William Benjamin Liddall MacLaren, survived both Mr and Mrs Denholm. Then by her marriage with Mr Denholm Mrs Denholm had two daughters, both of whom survived their parents. In Mr Denholm's will the following provisions occur: "Further, I specially declare that in the event of my daughters, or either of them, or my stepson, the said William Benjamin Liddall MacLaren, raising any question with reference to the distribution or division of the trust estate, or taking exception or making any objection to my power to revoke said mutual settlement, or claiming that any part of the trust estate falls thereunder or is thereby in any way regulated, or raising any question with reference to the distribution or division of the estate *left* by their mother, my wife, or taking exception or making any objection to the amount thereof, as the same may be set forth in any statement subscribed by me, they or any of them raising such questions regarding such distribution or division, or taking exception or making any objection or claiming as aforesaid, with reference either to the trust estate or to the estate of their mother, shall forfeit right, not only for themselves, herself or himself, but also for their, his, or her issue in and to any share of or interest in the trust estate as aforesaid, which shall thereupon accresce to the other beneficiaries in their order and in terms of this my will and any codicil thereto."

The statement referred to in the foregoing passage is the statement No. 10 of process. It sets forth the whole net value of Mrs Denholm's estate at the date of her death (being over £10,000), and appended to it is the following docquet:—

"The above is as near as possible a correct statement of the estate of my late wife at the date of her death, and is engrossed here with reference to the directions expressed in my will, dated 17th April 1902.

"The above adopted as holograph.

"(Signed) GEORGE DENHOLM.

"(Signed) William Dickison, witness,
cashier to George Denholm."

But although it is, as it professes to be, a statement of Mrs Denholm's estate "at the date of her death," it is clear from the directions expressed in Mr Denholm's will, and which the statement is signed with reference to, that Mr Denholm intended that the whole amount there set forth should be regarded as the estate of his wife and as falling under the mutual disposition and settlement executed by her. No other satisfactory construction can be put on the passage in his will, taken along with the statement. He refers to the possibility of his stepson jeopardising "the provisions made for him by his mother and myself." It will be noticed that what he provides against is any of the children raising questions with reference to the distribution or division of "the estate left by

my wife"; not the balance or the unconsumed portion of "my wife's estate," but the "estate *left* by my wife," and he fixes the amount of it by a reference to the statement. Now the three heritable properties belonging to his wife had been realised and the proceeds carried into Mr Denholm's bank accounts in the years 1895, 1899, and 1900, and now in 1902 he treats the whole of his wife's estate as extant and as subject to the provisions of her settlement, and he warns her children under penalties against calling in question the amount of that estate as set forth by him in the statement under his hand. I think these propositions are legitimate inferences from the paragraph above quoted from the will, taken in connection with the statement I have referred to. First, That by the phrase "the estate of their mother" or "the estate left by their mother," is meant the estate set forth in the separate statement above referred to, amounting, as therein stated, to £10,100; second, that the trust estate (that is, the estate dealt with by Mr Denholm in his will) excludes and is contrasted with the estate of Mrs Denholm, or, as it is called, the estate of their mother; third, that Mr Denholm regarded the amount of his wife's estate as defined in the separate statement as still extant and falling to be dealt with under the mutual settlement, Mr Denholm's own trust estate being dealt with by his will.

I do not think it is possible to have clearer evidence that Mr Denholm considered that he had not consumed any part of his wife's estate in the sense now contended for by the defenders, and that, notwithstanding that he had taken the use of it in his business and otherwise by throwing a great part of it into his bank accounts, he contemplated that it should be dealt with after his death as his wife's separate estate, and that his trustees should account to Mrs Denholm's trustees for the amount set forth in the statement referred to which is signed with reference to his will, and which includes all the monies which for many years before had been mixed with his own funds, and could not be traced as separate sums of money. I consider it manifest from this that Mr Denholm did not consider that he had consumed any part of his wife's estate or exercised the power to do so, and this, I think, is the best evidence we can have that he did not, in the words of the mutual settlement, "find or think necessary" to consume any portion of it, and never supposed for one moment that the effect of his taking the use of the money was equivalent to "consuming" it.

On the whole matter I am of opinion first, that the power to consume such parts or portions of his wife's estate as he might find or think necessary, was a power to be exercised *sub modo* and as a conscientious trustee would exercise it; second, that there is no evidence that Mr Denholm ever exercised that power or ever found or thought it necessary to do so. On the contrary, there is to be found in his own will and the statement referred to therein the best evidence now possible that he did not consider that he had either consumed or appropriated his wife's estate to any extent; third, that Mr Denholm's using the proceeds of the realised portions of his wife's estate in his own business and for his own purposes, while legitimate under the very wide powers of use and administration given to him, does not absolve his trustees from accounting for the value of his wife's estate although that may no longer exist *in forma specifica*, the estate left by him, which includes *ex hypothesi* the proceeds of part of his wife's estate, being amply sufficient to allow for the payment of the amount of his wife's estate to the pursuers, who are the persons entitled to administer it under the mutual trust disposition and settlement.

I am accordingly of opinion that the latter part of the Lord Ordinary's interlocutor should be recalled, and that the defenders should be ordered to lodge an account bringing out the amount of the capital of Mrs Denholm's estate as at this date, subject to all burdens and expenses properly chargeable against it.—*29th November* 1907.

Counsel for Reclaimers, Johnston, K.C., C. D. Murray; Agents, M. J. Brown, Son & Co., S.S.C. —Counsel for Respondents, Hunter, K.C., Constable; Agents, Bruce, Kerr & Burns, W.S.

F. A. U.

FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear, and Pearson.*)

231. M'Lennan *v.* M'Lennan.

Husband and Wife—Curatorial Power of Husband—Married Woman's Property (Scotland) Act 1881 (44 & 45 Vict. cap. 21), sect. 5—Wife Living Apart From Husband With His Consent—Meaning of "Consent"—Sale of Business Carried On by Wife—Refusal of Husband to Sanction Sale—Petition to Dispense With Husband's Consent to Sale—Averments Upon which Held That Wife was Living Apart from Husband With His Consent and Petition Granted Without Enquiry.

Reclaiming Note against an Interlocutor of Lord Salvesen.

(*Reported supra*, p. 460.)

The Petitioner *reclaimed* and *argued*: The pleadings as a whole were sufficient to shew that no enquiry was necessary. They shewed that the petitioner was living apart from her

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husband, and that she was doing so with his consent. The passages in the answers referred to by the Lord Ordinary were inconsistent with the general tenor of the answers. There was no averment that the wife had deserted her husband, and therefore his consent to their living apart must be presumed. The husband's curatorial duty to his wife was to protect her from suffering damage from her own acts, and there was no averment that the sale of the business would be to her detriment (*Bryce*, 1878, 5 R. 722 at p. 728). There was sufficient material in the averments to justify an application to the Court to exercise its discretionary power and dispense with the husband's consent (*Niven*, 1883, 20 S.L.R. 587).

Argued for Respondent: The respondent in his answers clearly averred a case of no consent. He averred four occasions on which the respondent's offer to join the petitioner had been refused. Short of overt act, they shewed that every means had been taken by the respondent to induce the petitioner to live with him. No admission of consent could be inferred from these answers, and proof must be allowed.

The Court *recalled* the Lord Ordinary's interlocutor and granted the prayer of the petition.

The Lord President.—This is an application to the Court by a married lady, who has for some years conducted a business, to dispense with the consent of her husband to a deed relating to that business—namely, a deed in which she proposes to sell it. Her husband has refused to give that consent, and she makes this application under the 5th section of the Married Woman's Property Act of 1881. The answer that is made by the husband, who appears, is that she is not within the words of that section, the words of the section being that where a wife is deserted by her husband, or is living apart from him with his consent, then such dispensation may be granted by the Court. The husband says that she is not a wife who is either deserted by her husband or is living apart from him with his consent. The Lord Ordinary has thought it necessary to allow a proof upon that matter; but in the argument before your Lordships counsel for the petitioner have asked your Lordships' judgment upon the facts as disclosed by the respondent, the husband. That is to say, they are content to put their case as if everything which the respondent says in his answers were proved upon a proof. I think they are quite entitled to take that position, and I do not think that the respondent can ask that we should go through the trouble of a proof in order simply to put in the mouth of witnesses what he has put in his statement. He cannot expect to prove more than he has averred, and if what he has averred is taken for the purposes of the argument as true, it surely is not for him to complain. Taking all that is averred as absolutely true, it seems to me that this lady is in the position which is contemplated by sect. 5, because I think she is a wife who is living apart from her husband with his consent. The state of affairs, as disclosed by the husband's answers, and I look at nothing else, is that these parties, who were married secretly, have, as a matter of fact, never lived openly as husband and wife before the world. There were certain reasons as to why they should be married secretly originally. There may have been, and I assume that there was, a different view between the spouses at a subsequent time as to the cogency of these reasons as preventing a change of their position, and as preventing their taking up life as married people in the face of the world. Whatever the view may be as to who was right as to the cogency of the reasons, the fact is that no change was *de facto* made, and that this separate life went on just as it had commenced. In fact, as disclosed to us, the parties, except for a short honeymoon when they were married, have never lived together as man and wife; and according to the two tests of living as man and wife—that is to say, living at bed and board, as the expression is—they have lived at neither, although as a matter of fact they seem to have actually seen each other very frequently. It seems to me, when one looks at the section of the statute, and the reason why it is put there, one sees that in a case of this sort the Court is not called upon to go into the matter in the way in which it would have to go into it in a purely consistorial case; that is to say, if parties were asking for divorce for desertion or for separation, a different class of enquiry would require to be made. What seems to me to be desiderated by the statute is that the wife is *de facto* living apart from the husband, and that *de facto* the separation from the husband is due either to the husband's desertion, or to his consent, which I really think comes to no more than a *non renitentia* on the part of the husband to the state of affairs. It has been urged by Mr Fraser, and I take his statement, as we are bound to do, that the husband on many occasions objected to this state of affairs; but I think the fallacy of the argument based thereupon rests in this, that a person may often consent to a thing to which he greatly objects and against which he protests. You may consent in fact to something which you do not at all like, and which you would much sooner have otherwise. Upon the circumstances as disclosed by the husband himself, I think it is perfectly clear in this case that there was consent in fact by the husband to the wife living apart from him as she did.

In granting this petition your Lordships are really just exercising the curatorial power from the same point of view as the husband; and the only proper point of view of the husband in exercising his curatorial power is, not how it will affect himself, but how it will affect his wife's

interests. It is shewn to us that this lady has had a successful business in the city, and not being in very good health she wishes to turn her business into money. That seems perfectly right from the point of view of the wife, and I cannot doubt that any prudent husband would give his consent. Accordingly I think we ought to recal the Lord Ordinary's interlocutor and grant the prayer of the petition.

Lords M'Laren, Kinnear and *Pearson* concurred. —21*st November* 1907.

Counsel for Petitioner, Dean of Faculty (Campbell, K.C.), Macmillan; Agents, Campbell & Smith, S.S.C.—Counsel for Respondent, Solicitor-General (Ure, K.C.), M. P. Fraser; Agents, Patrick & James, S.S.C. W. A. R.

FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

232. Parish Council of Kinloss *v.* Morgan and Others.

Poor—Parish—Legacy—"Poor of the Parish"—Bequest to Parish Council for the Benefit of the Poor of the Parish—Held That Bequest Might Be Applied for Benefit of Poor Persons Other Than Those in Receipt of Parochial Relief.

This special case was concerned with the interpretation of a provision in the testamentary settlement of the late Rev. J. A. D. Dunbar, of Seapark and Kinloss. The fourth purpose of the said settlement was in these terms:

"I leave and bequeath in the first place for the benefit of the poor of the parish of Kinloss the sum of Two thousand pounds; and in the second place for the benefit of the poor of the burgh of Forres the like sum of Two thousand pounds; declaring that the legacy to the poor of Kinloss parish shall be paid over by my trustees to the Parish Council of that parish to be administered by them for behoof of said poor, and that the legacy to the poor of the burgh of Forres shall be paid over by my trustees to the Town Council of Forres, to be administered by them for behoof of said poor."

The parties to this special case were the Parish Council of Kinloss of the first part, and certain ratepayers and paupers in the parish, of the second and third parts respectively.

The parties' contentions were:—

The first parties maintain that the bequest being given for the benefit of the poor of the parish, subject to administration by them as the proper parochial authority, is a bequest exclusively for behoof of the legal poor persons entitled to parochial relief. The second parties, on the other hand, maintain that the terms defining the objects of the bequest are open to construction, and that on a sound construction of the clause in question in said trust disposition and settlement, the intention of the testator was to benefit the occasional poor, or poor persons not in receipt of parochial relief, or at all events to include such within the class of persons entitled to participate in the benefits of the bequest.

The Questions of Law included the following:—

I. Is the bequest for the benefit of the poor of the parish of Kinloss contained in said trust disposition and settlement limited to the poor of said parish who are in receipt of parochial relief? Or

II. Are the first parties entitled to apply said bequest for the benefit of poor persons who are not in receipt of such relief?

Argued for the First Parties: The first parties were the body entrusted with the statutory duty of administration of poor relief in the parish, and could not make payments to persons other than the statutory recipients of poor relief without the sanction of the Court (*Liddle* v. *Kirk-Session of Bathgate*, 1854, 16 D. 1075, per Lord President at p. 1079 and Lord Rutherfurd at p. 1082; *Whyte* v. *Kirk-Session of Kinglassie*, 1867, 5 M. 869, per L. Deas at p. 883; *Flockhart* v. *Kirk-Session of Aberdour*, 1869, 8 M. 176; *Paterson's Trustees* v. *Christie*, 1899, 1 F. 508).

Argued for the Second and Third Parties: The question was one of construction of the settlement merely, and the first parties were bound to administer the fund according to the ascertained intention of the testator. On a sound construction of the clause in question, all poor persons, whether in receipt of parochial relief or not, were entitled to share in the benefits of the legacy.

The Court *answered* the second alternative of the first question in the affirmative.

The Lord President.—The late Rev. John Archibald Dunbar Dunbar, of Seapark and Kinloss, by a clause in his trust disposition and settlement, left a legacy in the following terms [His Lordship quoted the fourth purpose *sup.*].

The question raised before your Lordships by this special case is whether the Parish Council of Kinloss, who are entitled to this legacy of £2000, are bound to administer it for the "legal" poor alone, as that expression has been currently used; that is to say, are they bound to put this legacy into their coffers along with the rates, or are they entitled to administer it as a separate fund, and to apply the benefit of it to any such people as may be held to fall within the description of "poor" in the ordinary significance of that word?

Like all such matters it turns on the question of testamentary intention, and, if it had not been for the complication of authority, I should have thought the matter was too clear for argument. The result of putting this legacy into the coffers of the Parish Council would be, not the relief of the poor, but the relief of the ratepayers of the parish. That such was the intention of the testator cannot for a moment be suspected,

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There is, however, a certain amount of authority on the interpretation of the word "poor," but on consideration I have come to the conclusion that it does not stand in the way of giving to this bequest the effect which I believe the testator intended.

The decided cases all turned on what sums fell or did not fall to be dealt with under sect. 52 of the Poor Law Amendment Act of 1845 (8 & 9 Vict. cap. 83). Let me remind your Lordships of what that Act really did. It introduced for the first time into Scotland a thoroughly national system of Poor Law administration, and it created powers for a universal assessment for relief of the poor, but it also enabled the new Poor Law authorities, who were created by the Act, to make use of any existing funds that were devoted to the relief of the poor. Hence we have sect. 52, which transferred the existing funds to the new parochial boards. Now the questions raised on that section were whether certain bequests fell or did not fall within the words of the section. It is to be observed that that section only applied to existing funds, and had no application to any subsequent bequest, and now that it is more than half a century old it is obvious that the questions that arise under such a destination in modern times are very different from those that fell to be decided under that section. There is this further observation to be made, that the question which is now before us could not have arisen in the old days prior to 1845. For in these days the distinction between able-bodied poor and others, with regard to the right of relief, had not been settled, and if you had used the phrase "legal poor" in these days it would not have been known what you meant. The kirk-session, who were then the only body in charge of the poor, relieved any necessitous person, and did not confine their relief to the legal poor in the modern sense. So that, in their former days, when a testator left a bequest for such purposes, it would never occur to him that any distinction could be drawn as to the persons to be benefited according as he left the administration of the bequest to the then poor authority, viz. the kirk-session, or to others. He would believe that, however he destined it, it would be applied for the relief of necessitous persons in the same way. Consequently, if in these decisions the words have got a certain significance, that interpretation has been put on them in the light of what I have been saying, and it will not necessarily apply to a bequest made by a modern testator under totally different conditions of the Poor Law.

There are expressions, particularly in the opinion of Lord Rutherfurd, in the case of *Liddle*, 16 D. 1075, that seem to go the length of laying down the law that the word "poor" means "legal poor" only. I don't think that that view of the law has been adopted in subsequent decisions, and I will only instance the *dictum* of Lord Deas in the case of *Flockhart*, 8 Macph. 176 at p. 182, where he says: "I do not call in question the principle of the cases of *Bathgate* and *Linlithgow*, that the words 'for behoof of the poor' did not necessarily mean those who are called the 'legal poor,'—that is to say, the poor who by law may claim relief; and that it is in every case a question of circumstances whether that construction is to be put on the words or not." I think that is a just statement of the law; and, therefore, as far as authority goes, I do not think it can be said that "poor of the parish" is limited to the "legal poor" only.

I also think that the implication that was sought to be drawn from the fact that the body chosen to administer the bequest was the Parish Council, loses its force when we consider that the Parochial Board existed solely for the purpose of administering the Poor Law, while the Parish Council has many other duties to perform. Where the body chosen existed only for the relief of the poor, the natural implication was that it was intended that the bequest should be administered in the same way as the only other funds in their hands. Here the selection of the Parish Council was no doubt occasioned by the fact that the testator wanted to benefit the people within two areas well known to himself, namely, the parish of Kinloss and the burgh of Forres; and therefore he selected the Parish Council of Kinloss and the Town Council of Forres to be the administrators, as best defining the areas to be benefited. I think therefore that he used the word "poor" in the sense in which it is used in ordinary language, and that the word must be held to cover any necessitous person. The second alternative of the first question will therefore fall to be answered in the affirmative.

Lord M'Laren. — I agree that the Parish Council who put these questions are in no way restricted as to the class of persons who may be put on the roll of beneficiaries, except in so far that they must be poor persons in the ordinary sense. In so deciding we are in no way enlarging the meaning of the word "poor." It is the Poor Law Act and the decisions of the Court which, for the purposes of the administration of public funds, have put a limited meaning upon the word—or perhaps it would be more accurate to say, have divided the poor into two categories: those who from age or physical infirmity are unable to gain a livelihood by industry, and those who are able to work but who are unable to find employment. The first of these classes is the object of the benefits of the Poor Law, the second is not. But in the construction of Mr Dunbar's bequest we have nothing to do with this artificial distinction, because his bequest has to be applied for the benefit of the poor of the parish, a description of persons which includes able-bodied but necessitous poor, as well as those who are

poor and infirm. I have no doubt that it would be open to this Parish Council to give assistance to persons having a legal claim as an addition to the relief given from the rates, as well as to others who have no claim upon the rates. I am of opinion that the second branch of the first question should be answered in the affirmative.

Lords Kinnear and *Pearson* concurred.—22*nd November* 1907.

Counsel for the First Parties, Macpherson; Agent, Robert Stewart, S.S.C.—Counsel for the Second and Third Parties, D. Anderson; Agents, Grieve & Simpson, W.S. W. A. R.

OUTER HOUSE.

(*Lord Dundas.*)

233. Wilsons and Clyde Coal Company Limited *v.* Rowan.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 1 (3)—Charge by Workman for Payment of Compensation Awarded by Sheriff in Petition for Review of Compensation—Agreement between Parties Prior to Award for Deductions to be Made from Compensation Awarded—Suspension of Charge—Suspension Not Excluded by sect. 1 (3) of Workmen's Compensation Act 1897—Charge Suspended Quoad the Deductions Agreed on.

This was a Note of Suspension at the instance of the Wilsons and Clyde Coal Company Limited against William Rowan, contractor, Lochgelly. The note set forth that the complainers had been charged at the instance of the respondent to make payment of 15s. a week as from and after 24th June 1907 by virtue of a certified copy judgment under the Workmen's Compensation Act 1897, in a petition at the instance of the complainers against the respondent, dated at Kirkcaldy 24th June 1907. The complainers prayed the Court *simpliciter* to suspend the said charge and whole grounds and warrants thereof; *et separatim*, to suspend the said charge *quoad* the sum of £3, 13s. 4d.

The facts of the case were as follows. The respondent on 12th December 1905, while in the employment of the complainers as a stone miner, sustained injuries at the time totally incapacitating him for work. The complainers and respondent agreed that the compensation payable to the respondent during total incapacity was £1 a week. A memorandum of this agreement was registered, and compensation was paid at this rate till 24th June 1907. The complainers applied by petition to the Sheriff of Fife for review of the weekly payments in terms of sect. 12 of the first schedule of the Workmen's Compensation Act, 1897, and proof was fixed for 13th March 1907. Prior to that date the parties, at the respondent's request, agreed that the proof should be postponed till 3rd May, and subsequently till 14th June 1907. The complainers averred that they acquiesced in the postponement of the proof on an agreement that the Sheriff's interlocutor when pronounced should take effect as if it bore the date of 13th March, and that the complainers were to go on paying compensation at the rate of £1 a week till the Sheriff's judgment, but that when the judgment was pronounced they should be allowed to deduct from the compensation then awarded any overpayments for the period from 13th March till the date of the Sheriff's judgment. This agreement the Lord Ordinary held to be proved by the correspondence between the parties' agents. The Sheriff delivered his judgment on 24th July 1907 and reduced the compensation to 15s. a week. The overpayments between 15th March and 24th July amounted to £3, 13s. 4d. The respondent claimed payment of compensation at the rate of 15s. per week from 24th July 1907, and charged the complainers therefor. The sum charged for amounted to £5, 0s. 9d., of which the respondents only disputed liability for £3, 13s. 4d.

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Sect. 1 (3) of the Workmen's Compensation Act 1897 is as follows:—

> If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act, ... or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this Act, be settled by arbitration, in accordance with the second schedule to this Act.

The complainers pleaded, *inter alia*:

"3. The respondent being barred *personali exceptione* from claiming from the complainers more than £1, 17s. 5d. of the sum charged for, suspension, either *in toto*, or at any rate *quoad* £3, 13s. 4d. of the sum charged for, should be granted."

The respondent pleaded, *inter alia*:

"2. The warrant for the charge sought to be suspended being in order, the reasons of suspension fall to be repelled.

"3. The present process is excluded by sect. 1, subsect. 3, of the Workmen's Compensation Act 1897, and by sect. 14 of the first schedule annexed to the said Act."

The Lord Ordinary *sustained* the second alternative branch of the third plea in law for the complainers, and *suspended* the charge *quoad* the sum of £3, 13s. 4d.

Lord Dundas.—The complainers have been charged by the respondent for payment to him of 15s. per week, as from and after 24th June 1907, in virtue of a judgment under the Workmen's Compensation Act 1897, pronounced by the Sheriff-Substitute at Kirkcaldy on the said date

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in a petition at their instance for review, by way of diminution of the compensation being paid by them to the respondent at the date of their application, under an agreement between the parties. The amount actually charged for was £5, 0s. 9d.; and the complainers say that the charge ought to be suspended *quoad* the sum of £3, 13s. 4d. This sum represents the difference during the period from 13th March to 24th June 1907, between the rate of 20s. per week, which was the standard of the original agreement of the parties, and 15s. per week, which was the rate decerned for by the Sheriff-Substitute as from and after 24th June. I have come, not without reluctance, to the conclusion that the complainers' contention must prevail. The proof in the application to the Sheriff-Substitute was fixed for 13th March. It appears that, at the request of the respondent, and with consent of the complainers, that diet was postponed to 3rd May, and again to 14th June. I do not think that there is really any dispute as to the terms and conditions upon which the complainers agreed to the postponement of the diets of proof. The correspondence produced is admitted to be genuine, and counsel for both parties, at the discussion in the Procedure Roll, very properly agreed that a proof in this Court ought, in the circumstances, to be avoided if possible. Upon a consideration of the record, the correspondence, and the arguments of counsel, I think that I can decide what the agreement between the parties—originally verbal, but confirmed and extended in scope by writing—really came to. The verbal agreement seems to have been that the proof should be postponed on condition that the Sheriff's interlocutor, when pronounced, should take effect as if it bore the date of 13th March. As the correspondence proceeded, the parties, through their agents, appear to have agreed that the complainers were to go on paying 20s. per week to the respondent until the Sheriff's judgment was pronounced; but that when that judgment was obtained, and if it should be for a diminished rate of compensation, the complainers should be allowed to make deduction of any overpayment they had made, as if the reduced rate contained in the Sheriff's judgment had been decerned by him on 13th March. If this was, as I think it was, the agreement of parties, there was nothing, so far as I see, illegal in it; it did not, I think, involve any question under the Workmen's Compensation Act; it was simply a collateral agreement between parties litigants, and not one involving any difficulty in its extrication.

The respondent's counsel argued, in support of his 2nd plea in law, that suspension should be refused, because the warrant for the charge is *ex facie* in order. But I think that an orderly proceeded charge may be suspended, if it can be shewn that it would not be in accordance with justice that the charge should be allowed to take effect. In the present case, if the terms of the agreement between the agents of the parties was as I have indicated, it appears to me that the complainers are entitled to the suspension which they crave.

The third plea in law for the respondent consists of two branches, the second of which was not insisted in at the discussion. The first branch is based upon sect. 1 (3) of the Act of 1897. I am not sure that the arbiter might not, in this case, have been competently and properly invoked to decide the question which I am now determining. But the complainers had their own reasons for declining to agree to such a course; and I cannot affirm that they were not entitled to resort, as they have chosen to do, to the method of suspension. It appears to me to be regrettable that a matter involving such a paltry sum should be made the subject of proceedings in this Court. But counsel for the complainers stated that other cases similar to the present are in dependence, which may be ruled by this decision; that considerations of general policy are involved, and that the only competent method of obtaining justice was that to which their clients have resorted It is sufficient for me to say that the present case appears to be competently raised, and that I must therefore dispose of it in the manner and for the reasons indicated.—13*th November* 1907.

Counsel for Complainers, Horne, Strain; Agents, W. & J. Burness, W.S.—Counsel for Respondent, G. Watt, K.C., Wilton; Agent, D. R. Tullo, S.S.C. A. M.

SHERIFF COURT.

(*Sheriff-Substitute Reid and Sheriff Crawford, K.C., at Banff.*)

234. Henderson *v.* Hossack.

CAUTIONER—POINDING—INTERDICT AGAINST SALE—BOND OF CAUTION—DAMAGES—HELD THAT THE WORDS "PAYMENT TO THE DEFENDER OF ALL DAMAGE WHICH HE MIGHT SUSTAIN" OCCURRING IN A BOND OF CAUTION GRANTED BY A PARTY FOR BEHOOF OF THE PURSUER AS A CONDITION OF HIS OBTAINING INTERIM INTERDICT, COVERED BOTH THE JUDICIAL AND EXTRA-JUDICIAL EXPENSES TO WHICH THE DEFENDER HAD BEEN PUT IN DEFENDING THE INTERDICT PROCEEDINGS.

In this case the pursuer, who had been the defender in an action of interdict in which interim interdict had been granted, on caution being found, raised an action in the Sheriff Court of Aberdeen, Kincardine and Banff at Banff, against the cautioner for the pursuer in the interdict proceedings, and, founding on his right to payment "of all damage" in terms of the bond of caution, claimed payment as "damages" of

both the judicial and extra-judicial expenses to which he had been put in defending the action of interdict.

The defender (the cautioner) pleaded that "the claim for expenses, judicial and extra-judicial, not being covered by the bond of caution," he was entitled to absolvitor. The facts and arguments of the parties appear from the notes of both the Sheriff-Substitute and the Sheriff. The Sheriff-Substitute (Reid) held that the word "damages" covered the costs, and granted decree. He added the following note:—

Note.—On 31st August 1906, the pursuer, in virtue of a decree obtained at the Small Debt Court at Banff on 31st July 1906 for £5, 10s., poinded a horse and cart then in the possession of his debtor, Abraham Glickman. On 21st September 1906, Morris Glickman, a relative of Abraham Glickman, and who had apparently for a time been residing with him, presented a petition for interdict against the pursuer selling the horse and cart; and interim interdict was granted, on caution to the extent of £20, for payment to the defender of any damage which he may instruct he has sustained by the granting of the interim interdict craved, should it ultimately be found that the pursuer was in the wrong in seeking said interdict. On 24th September 1906 the defender, who was acting as agent in Court for the said Morris Glickman, lodged a bond of caution by himself, which proceeded on the narrative that "Considering that the Sheriff-Substitute granted interim interdict as craved, on the pursuer" (the said Morris Glickman in the interdict process) "finding caution acted in the Books of Court to the extent of £20, for payment to the defender" (in the interdict) "of all damage which he might sustain," he (the defender) bound and obliged himself to make payment "of whatever sum of money the Court may modify as the damages which the said Alexander Henderson" (the pursuer) "has or shall have sustained by the granting of said interdict, should it ultimately be found that the pursuer" (in the interdict) "was not entitled to the same."

The pursuer in the interdict failed to appear at the diet of proof, he having, it was stated, left the country some time before, and the action was dismissed with expenses.

This action is raised by the defender in the interdict proceedings, as pursuer, to recover from the defender, the cautioner of Morris Glickman in the interdict proceedings, certain sums in name of damages, for which the pursuer contends the defender is liable under his bond of caution in the interdict.

The two items are (1) a sum of £5, 18s. 1d., the judicial expenses, and (2) the sum of £8, 7s. 6d., the extra-judicial expenses in the same process. These sums of money have been spent by the pursuer in consequence of the wrongous proceedings in the interdict by the defender's principal, and for whom he became cautioner, and I am of opinion that they fall under or are covered by the defender's bond of caution. It was contended on benalf of the defender that the defender's liability under his bond was limited to the deterioration of the subject (the horse and cart), in consequence of the proceedings in the interdict. I cannot adopt this limited construction of the terms of the bond of caution, and the words used, as I read them, cover expenses incurred in consequence of the interdict, as well as damages occasioned to the subjects through the proceedings of interdict. If the defender's construction of the bond was to be sustained, a cautioner would never be liable for expenses occasioned by his principal's wrongous proceedings, and in the event of the principal's insolvency or disappearance (as in this case), the expenses of the interdict would fall wholly on the person who is eventually found to be in the right.

The practice apparently in the Court of Session is to include in the bond of caution special liability for expenses as well as damages occasioned by the suspension or interdict proceedings, while in the Sheriff Court the form of bond does not appear to include expenses specially. But although not included specially, it does not follow that they are not to be included under the general head of damages occasioned by the interdict; and no sufficient reason has been stated, in my opinion, why they should be allowed in the Court of Session and not in the Sheriff Court. It was also contended that the limitation of liability to £20 shewed that expenses were not meant to be included under damages. It appears to me that the words limiting liability were used and intended merely for the purpose which they express, and cannot be founded on as indicating in any way what kind of claims were to be included under the head of damages.—6*th August* 1907.

The defender appealed to the Sheriff (Crawford, K.C.), who *affirmed* the interlocutor of the Sheriff-Substitute, except in so far as it continued the cause, and added the following note:—The facts are clearly narrated in the judgment under review. For a judgment debt of £5 odds, the pursuer was lawfully proceeding to sell a horse and cart belonging to his debtor, which he had poinded. Morris Glickman intervened with an action of interdict, and interim interdict was granted upon a bond of caution by the present defender. I need not repeat its terms. If the pursuer was to be prevented from following out his diligence, which gave him a complete remedy, he was entitled to security that the interim interdict would not prejudice him pecuniarily, and that if the action of interdict failed, he should be in as good a position as before. In the circumstances, the expenses of the action of

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interdict were precisely the item of pecuniary damage, which had most to be guarded against. If the word "damage" in the bond did not cover those expenses, and objection had been taken to it on that ground, I do not think that any judge would have granted interim interdict, if he thought that interpretation correct. Objection was not taken, and the question now is, whether that was an oversight on pursuer's part. His agent followed Mr Sellars' Sheriff Court Styles, in which there is no separate mention of expenses. In the form of bond in the Juridical Styles used in the Court of Session there is a separate obligation for expenses. The case of *Stewart* v. *Forbes*, 1897, 24 R. 1112, is an example of such a separate obligation. But it also shews that the expenses of an interdict case are a proper charge against a cautioner. Besides the argument that the form used in the Court of Session shews that expenses must be specified, it was argued that as expenses must be claimed in an action, the rule must be the same. The analogy is, to my mind, fallacious. In an action the pursuer makes a certain claim, and if he also claims the expenses of enforcing it, he must say so. That is the settled rule, an arbitrary rule, not in the sense that it is in any way unjust. But it would have made no difference which way it was settled. But then the pursuer's claim in an ordinary action is not one for damage, except in actions of damages, where the damage must be specified and relevantly averred. But in a question between a pursuer holding a decree and a cautioner who intervenes to enable a third party to get interim interdict, the loss incurred by defending the action of interdict is damage in the strictest sense, quite as much as the deterioration of a poinded subject. Therefore I think that the Sheriff Court style is the more logical of the two. But *ob majorem cautelam*, I think it would be more prudent to mention expenses.

It follows that no distinction can be drawn between judicial and extra-judicial expenses. The principle which rules expenses between party and party is not applicable. The question is what pecuniary damage the pursuer has unavoidably incurred. But extra-judicial expenses must be rigidly taxed. In this case they exceed the judicial expenses. I can hardly conceive that that is susceptible of legitimate explanation. For example, the fact stated at the Bar, that there were two agents, one, I think, at Aberdeen, cannot enlarge the defender's liability.—19*th October* 1907.

Agent for Pursuer, Alexander F. Spence, Solicitor, Banff; Agent for Defender, George A. Cumming, Solicitor, Banff. A. J. L. L.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

234. Ferguson, Shaw & Sons *v.* The American Cotton Oil Company.

I. AGENT AND PRINCIPAL—NATURE OF CONTRACT—PERSONS HELD OUT BY FOREIGN PRINCIPALS AS SOLE AGENTS IN THIS COUNTRY FOR THE SALE OF THEIR GOODS — INVITATION TO PUBLIC TO ORDER THROUGH AGENTS—CONTRACT BETWEEN PRINCIPALS AND AGENTS THAT AGENTS SHOULD BUY FROM PRINCIPALS AND SELL TO PUBLIC AS PRINCIPALS—HELD THAT THE PUBLIC WAS ENTITLED TO RELY ON THE FOREIGN PRINCIPALS AS BEING PARTIES TO THEIR CONTRACTS WITH THE ACCREDITED AGENTS.

II. AGENT AND PRINCIPAL—SOLE AGENT FOR FOREIGN PRINCIPALS' GOODS — SALE TO MEMBER OF THE PUBLIC—SALE UNDER MARKET PRICE—SALE DUE TO AGENT'S PECUNIARY DIFFICULTIES KNOWN TO PURCHASER — HELD THAT AGENT WAS NOT ACTING AS AGENT IN MAKING THE CONTRACT AND THAT HIS FOREIGN PRINCIPALS WERE NOT LIABLE ON IT.

Appeal from the Sheriff Court of Lanarkshire at Glasgow.

This was an appeal in an action of multiplepoinding raised in the Sheriff Court at Glasgow, the fund *in medio* being certain barrels of oil which were held by the pursuers, who were storekeepers in Glasgow. The facts are set forth in the following excerpts from notes to interlocutors issued by the Sheriff-Substitute (Boyd).

This is an action of multiplepoinding at the instance of Thomas Hayman & Son, storekeepers, Glasgow, against (*First*) the trustee on the sequestrated estates of John M'Nairn & Co.; (*Second*) The American Cotton Oil Company, New York; (*Third*) The International Banking Corporation, London; and (*Fourth*) Ferguson, Shaw & Sons, oil merchants, Glasgow. The question really arises between the second and fourth parties. The latter bought from M'Nairn & Co. fifty barrels X 2 and fifty barrels Y 2 of cotton oil, and paid for them before delivery. M'Nairn & Co. became bankrupt, and delivery was stopped. The American Cotton Oil Company, from whom M'Nairn & Co. had received the goods, claimed them, on the ground that the property had never passed from them to M'Nairn & Co. Ferguson, Shaw & Sons maintain that they bought from M'Nairn & Co. as agents for the American Cotton Oil Company.

It is admitted that M'Nairn & Co. were appointed exclusive agents in Scotland, and later, in the United Kingdom, for the American Cotton Oil Company. The appointment was advertised in the "Glasgow Herald" of 22nd April 1898, and with the approval

of the American Cotton Oil Company, M'Nairn & Co. had the appointment printed on their letter paper.

These two lots of oil were sold to M'Nairn & Co. by the American Cotton Oil Company on 12th September 1904, on invoices which bore that the price was payable by a draft at sixty days' sight with documents attached. The oil was shipped on 28th December 1904, on the Anchor Line steamer "Ethiopia," at New York. On 30th December 1904 a bill of lading was granted by the Anchor Line, making the oil deliverable to the American Cotton Oil Company's order, and on its arrival the oil was put in the stores of the pursuers, in name of the Anchor Line, for behoof of the holders of the bill of lading. The American Cotton Oil Company, on shipment, negotiated a draft for the price with their bankers in New York, and this, along with the bill of lading and policy of insurance, was forwarded by the said bankers to their Glasgow correspondents, who had the draft accepted by M'Nairn & Co., and retained the same until it should be retired by the acceptors.

On 31st January 1905, Ferguson, Shaw, & Sons bought from M'Nairn & Co. two hundred barrels P.S.Y. American cotton oil, including the two lots of X 2 and Y 2. They paid the price and received an invoice and delivery order on the pursuers Hayman & Son. The delivery order was immediately lodged and honoured to the extent of one lot of fifty barrels and three barrels of another lot of fifty. The remainder of the lot has been otherwise dealt with, leaving, as before explained, lots X 2 and Y 2 for decision here.

The draft matured on 13th March 1905, but as M'Nairn & Co. became bankrupt on 9th February 1905, the American Cotton Oil Company met it, and at the same time got up the bill of lading and insurance policy, which had never left their correspondents' hands. On 31st March 1905 the American Company presented to the Anchor Line the bill of lading for the two lots X 2 and Y 2, and they took on payment of freight and charges, granted to the American Company, a delivery order on the pursuers for the oil, which was refused as claimed by other parties.

The question is, What was the position of M'Nairn & Co. when they sold the oil to Ferguson, Shaw & Sons? The latter say that M'Nairn & Co. acted as agents for their disclosed principals the American Company, who were in fact the vendors. The American Company say that M'Nairn & Co. were buying agents—distributing agents, with the sole right of buying their goods and selling them in this country: that all the agency meant was that M'Nairn & Co. got a monopoly of the business, but that to any buyer here they were merchants, keeping any profit and suffering any loss. In this contention they maintain that they are not contradicting the documents of contract between them and M'Nairn & Co., but construing them.

But even assuming that as between the American Company and M'Nairn & Co. the latter were only distributing agents and not the real vendors in sales in this country, their description as agents for the American Company was so explicit and so public that I think Ferguson, Shaw & Sons might successfully shelter themselves behind it, unless there were some circumstances to bring home to them that M'Nairn & Co. were acting on their own behalf. To ascertain this, one must attend in particular to the features of this special transaction.

On 31st January 1905 Mr Stevenson met Mr Ferguson in Lang's Restaurant in Glasgow, and told him that he was pressed for money, and he offered the oil at 1s. per cwt. below the market price. Mr Ferguson immediately accepted the offer and paid cash. There was no mention of the American Company as being interested in the sale. It was what is known as a "spot" sale, that is, a sale of goods already in this country and on the spot for immediate delivery; there was no contract note, only an invoice was necessary. The motive of the sale was to put Mr Stevenson in funds which he badly needed. If the oil had been the property of the American Company this price would have gone to them, and Mr Stevenson's gain would only have been a few pounds as commission. I think it follows that Mr Ferguson thought he was dealing with M'Nairn & Co. directly as vendors and not as agents, and, if so, Ferguson, Shaw & Sons' claim, which is based on M'Nairn's alleged agency, must in my opinion fall.

The Sheriff-Substitute, after a proof, found in fact that the American Cotton Oil Company sold two lots of cotton-seed oil, of fifty barrels each, to John M'Nairn & Co; and on arrival in this country, per the Anchor Line steamer "Ethiopia," it was placed in the stores of the pursuers, Thomas Hayman & Son, in Glasgow; that a draft for the net price, with documents attached, was forwarded by the said American Cotton Oil Company to their correspondents in Glasgow; that the said draft became payable on 13th March 1905, but the said John M'Nairn & Co. became bankrupt on 9th February 1905, and the draft and documents were never in their possession, but were retired by the American Cotton Oil Company; found in law that the property in the said goods never passed from these claimants, and they, being in possession of the documents of title, were entitled to be ranked and preferred in terms of their claim; therefore *ranked* and *preferred* the American Cotton Oil Company to the oil in dispute.

In the course of the proof Mr Ferguson gave, in cross-examination, the following evidence:—

The sale price was 15s. 3d., which was about 1s. a hundredweight below the market value of that particular day. Cotton Oil had jumped up. It was a cheap sale. I thought I was getting a good bargain. Mr Stevenson pressed me very hard to buy, and he expressed the view that he was hard up at the time. I understood at the time that he was rather badly wanting money. Of course if he were selling as an agent for a principal he would not be entitled to give a cheap price owing to the fact that he personally was hard up. I did not understand perfectly well at the time that Mr Stevenson was making a transaction for his own benefit. (Q.) How do you account for his saying to you that he was hard up, and pressing you to buy on that account? (A.) I can account to-day from my knowledge of his flour embarrassment; he was embarrassed in the purchase of flour and he wanted money. It was he personally who was hard up; he did not say it was the American Cotton Oil Company that was hard up. It is not clear to me now that he was making the sale for himself.

Ferguson, Shaw & Sons *appealed*.

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Argued for Appellants: (1) M'Nairn & Co. were constituted and held out in Scotland as the exclusive agents of the American Cotton Oil Company by documents, published advertisements and correspondence. The dealings of Ferguson, Shaw & Sons with M'Nairn had all been on the footing of agency. In these circumstances private instructions by the principals to their agents did not bind Ferguson, Shaw & Sons, to whom they were not communicated. The evidence of the Oil Company, therefore, in so far as it was directed to shew that the term agent did not mean agent, but buyer or something else, was irrelevant. The term agent implied a mandate that the agent was entitled to bind his principal in any contract within the scope of his ostensible authority. Apparent authority to vend was real authority as in a question with the public. Cases cited on the question of fraud had no application. A principal was always liable for the fraud of his agent when the agent was acting within the scope of his authority. In addition to that rule there was another, that when an agent exceeded his authority and was fraudulent the principal was liable if he took benefit from the fraud. If one party had to lose by the act of M'Nairn & Co., the American Company should be the losers, because they put M'Nairn in the position in which he was enabled to cause loss to one or other. (2) There was nothing to shew that this contract was in any way different from previous contracts between the same parties, or that the purchaser did not look to the known principal. The mere fact that he knew that the agent was hard up, or badly wanting money, did not suggest that the agent desired to make a contract of a different kind from others. It would only suggest to the purchaser that he was in want of ready cash, and not that he was insolvent. There was no notice to the purchaser that the agent was in the act of committing a fraud.

Argued for Respondents: (1) The word agent was not a *nomen juris*. It was an elastic term, and capable of explication by proof. There were various kinds of agents, and a distributing agent, such as we had in this case, who bought the goods from his principal and sold them as himself a principal, was a well-known form of the relation. M'Nairn & Co. were all along principals so far as Ferguson, Shaw & Sons were concerned. And their relation to the American Oil Company might well be termed agency. The question of agency was one of circumstances, and the man who treated with another as agent assumed the *onus* of proving what the agent's powers were. There was fraud on the part of Stevenson in this transaction. The American Company as principals were not therefore bound by his act unless they took benefit from it, and they did not. (2) The contract was obviously made to meet the personal convenience of the seller, and an allowance on the price was given for that reason. The sale was therefore made, not for the benefit of the principal, but for that of the agent. In these circumstances Ferguson had knowledge which shewed or should have shewed him that this was not an agency transaction.

The following authorities were quoted, viz.: *Clydesdale Banking Co.* v. *Paul*, 1877, 4 R. 626; *Hockey* v. *Clydesdale Bank*, 1898, 1 F. 119; *Hambro* v. *Burnand* [1904], 2 K.B. 10, per Collins, M.R., at 19; *Byrant, Powis & Byrant* v. *Quebec Bank* [1893], A.C. 170; Smith's Mercantile Law, 11th edition, p. 155, 157; *Ruben* v. *Great Fingall Consolidated* [1904], 2 K.B. 712; *M'Dowall and Neilson's Tr.* v. *J. B. Snowball & Co. Ltd.*, 1904, 7 F. 35; Addison on Contracts, 303, 306; Parsons on Contracts, I. 46; Bell's Com., I. 505, 506, 507, II. 508; M'Laren's Notes, 511; *Baines* v. *Ewing*, 1866, 35 L.J. Ex. 194.

The Court *found* in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against, and *dismissed* the appeal.

The Lord Justice-Clerk.—The competition in this case relates to certain parcels of oil which were shipped from America to Glasgow by the American Cotton Oil Company, and which are in the hands of the Anchor Line of steamers. It is clearly established by the evidence that some time previous to this dispatch of goods to this country, the American Oil Company had appointed the firm of M'Nairn & Co. to be their exclusive agents for the sale of their oil. It is further conclusively proved that they held out M'Nairn & Co. to proposing purchasers of their oil as being their sole agents, and that any business done must be through their agents, one exception only being stipulated for—any supply to Lever Brothers, the makers of Sunlight soap. They informed such proposing buyers that they were represented for the sale of their various brands by M'Nairn & Co., whom they, in plain words, called their "agents," and expressed the desire to "be favoured with your business through them," stating that "we cannot make offers except through our agents."

It seems to me plain that M'Nairn & Co. were held out as being the American Company's agents in quite distinct terms, and without any qualification whatever. So far, the case seems clear enough. In any ordinary sale M'Nairn & Co. must be held to be selling for the American Cotton Oil Company by delegated authority, binding that Company as if they themselves had directly made the contract of sale. In that view of the case it is unnecessary to consider any question as to whether as between themselves the Company and M'Nairn & Co. had some special arrangement whereby, although the latter were held out as agents, and only as agents, the

position of M'Nairn & Co. to the Oil Company was of a special nature, and did not put M'Nairn & Co. in the position of ordinary agents. Of that the customers could know nothing, and certainly the claimants Ferguson, Shaw & Sons knew nothing.

If, then, the sale which is in question here had been a sale in the ordinary course of business, in which the purchasers dealt with M'Nairn & Co. under the accrediting of them by the Oil Company as their agents, the disposal of the case would have been easy. But the case is complicated by special circumstances, which require careful attention. It appears that M'Nairn & Co., being in financial straits, were endeavouring to obtain money to tide them over their difficulties, and that Mr Stevenson, who was the sole partner of M'Nairn & Co., met Mr Ferguson in Lang's luncheon-room in Glasgow, and there offered him a quantity of American Company's oil on the footing of a spot sale—that is, a sale with the goods at hand or on the sea, and so ready for delivery. It is admitted by Ferguson that at the time Stevenson pressed him to buy, indicating that he personally was "hard up" and "badly wanting money," and that he was willing to sell at a cheap price, 1s. per cwt. below the market price of the day, the market being a rising one. Now Mr Ferguson is driven to admit that if Stevenson were selling for a principal he would not be entitled to give a cheap price because he was personally hard up. That being so, it is very difficult to see how it can be held that Ferguson, in buying, can be held as doing anything else than buying from Stevenson as a principal. If so, he did not effect a purchase from the Oil Company through an agent of theirs, and that being so, it follows that M'Nairn, his principal, having failed to give him delivery of the oil which he professed to sell, he cannot get delivery from the Oil Company, from whom he did not buy.

The evidence leads me clearly to the conclusion that Ferguson cannot be held in this particular transaction to have dealt with M'Nairn & Co. as agents for the American Oil Company, and, if so, his firm cannot be held entitled to carry off the Company's oil, which forms the fund *in medio*.

If this be a sound view of the case upon the facts, it becomes unnecessary to consider the question whether the property had ever passed, or whether it was still in the American Oil Company, whatever was the position of M'Nairn & Co. towards them. But I may say that on that question, had it been necessary to decide it, my view would have been the same as the Sheriff-Substitute's. The Oil Company, which had never parted with the goods, could not be held liable to suffer because M'Nairn & Co. had fraudulently, for their own purposes, professed to be able to give immediate delivery as on a spot sale, they being no parties to the fraud, and obtaining nothing by it.

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Lords Stormonth-Darling, Low and *Ardwall* concurred.—*29th November* 1907.

Counsel for Appellants, Lord Advocate (Shaw, K.C.), Moncrieff; Agents, Webster, Will & Co. S.S.C.—Counsel for Respondents, Dickson, K.C., Horne; Agents, Constable & Sym, W.S.

F. A. U.

OUTER HOUSE.

(*Lord Salvesen.*)

235. Forrest's Trustees *v.* Rintoul's Trustees and Another.

I. Property — Title to Land — Personal Bar.

II. Property — Disposition — Mutuality — Contract by Reservation.

By disposition dated in 1883, Rintoul disponed to Forrest and others the surface of the lands of A. The disposition narrated that by lease dated in 1875 the whole minerals below these lands had been let to Baird, the termination of this lease being Whitsunday 1903. The disposition provided that until Whitsunday 1903 the mineral tenants should have all the powers and privileges conferred by the lease, and that the disponees during that period should have no claim in respect of the tenant's operations. The lease was one of the writs appended to the disposition, and the plan of the subjects let was communicated to the disponees.

The disposition further provided that if after the termination of the lease there should remain unwrought minerals in the lands, the same should thereafter belong to the disponees, and that the disponees should be bound to execute and deliver in their favour a valid conveyance of the same. In implement of this obligation the disponer executed and delivered a disposition dated in 1904 and a supplementary disposition dated in 1905.

After the disposition of 1904, but before the disposition of 1905 had been executed and accepted by the disponees, the parties first became aware that the disponer's title to part of the minerals was subject to challenge. In the event of such a challenge proving successful, the results as regards title would be, that at the date of the disposition in 1883 the property of part of the minerals disponed must be held to have been already vested in the disponees. As regards the minerals lying beneath one small area of the lands, the disponer did not at the date of the action assert or qualify any title in his favour, but *quoad ultra* he maintained that the title to the whole minerals had at the date of the disposition been duly vested in him. His

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title, as at that date, to part of the minerals was admitted. It was further admitted that during the currency of the lease the minerals had been worked by the tenants in the areas as to which the title was either in dispute or was admittedly not in the disponer, and that no mineral had been worked in the area which was the disponer's undisputed property. It was disputed whether the workings could or could not have been profitably restricted to this latter area.

In an action in which the disponees claimed damages in respect of the working by the disponer's tenants of mineral which was, at the date of working, the property of the disponees, *held*, assuming in favour of the pursuers that they could establish a title to part of the minerals independent of the disposition granted in 1883 by the defender, that the pursuers were not entitled to damages in respect (*a*) that the pursuers did not conclude for reduction of the disposition of 1883 on the ground of mutual error, and (*b*) that this deed contained a contract regulating the rights of parties in the premises, and in particular conferring upon the defender a license to work the minerals through his tenants, which contract was binding on the pursuers, *inter alia*, by reason of their acceptance in 1904 and 1905 of beneficial provisions conferred thereby.

The facts of the case sufficiently appear from the opinion of the Lord Ordinary.

Lord Salvesen.—The pursuers are proprietors in trust of the lands of Auchinraith and Woodhouse, in Lanarkshire, which contain valuable seams of coal. In this action they sue for a sum of £7000 as the value of a quantity of coal, which is said to have been illegally removed by Messrs William Baird & Co. Ltd., and their predecessors, under a lease granted in their favour by the late Peter Rintoul, father of Robert Rintoul, whose trustees are the leading defenders. The mineral tenants, William Baird & Co. Ltd., have also lodged defences; but they were not represented at the debate, as the other defenders have assumed responsibility for their workings. I shall accordingly speak of Rintoul's Trustees as "the defenders."

It is common ground that the lands of Auchinraith originally extended, so far as the mineral field in question is concerned, to the *medium filum* of the river Clyde; and part of the claim in this case relates to coal which is said to have been worked beneath the *solum* from the south bank of the river to its centre line. The other illegal workings are said to have taken place immediately to the south of the river, beneath land the surface of which is the property of the Caledonian Railway Company, or at one time belonged to that Company. A reference to the plan in process shews the disputed areas on the north marked with the numbers 5 and 6; and there are various other numbers applicable to the ground over which the Railway Company's line is constructed, or which was at one time acquired by them for accommodation works. The two largest pieces of ground shewn on the plan were part of the lands called respectively "Gardiner's" and "Jackson's" lands of Auchinraith. These lands are held under different titles; and it is not disputed that the minerals in the said large area forming part of Jackson's lands, during the period of the workings in question, belonged to the defenders or their authors.

In 1847 the titles disclose that John Gardiner was proprietor of the lands to the west of the green line which bisects the areas in dispute. In that year he sold the portions Nos. 1, 1*a*, 3, and 10 on the plan, and the ground to the south of 10, on which a railway was afterwards constructed, to the Caledonian Railway Company. In 1850 he sold the portions Nos. 2, 7, 8, 4, and 12 to the same Company. The conveyances by him in favour of the Company proceed upon the narrative that compulsory powers had been granted for the construction of a railway, and that the lands disponed required to be taken and occupied by the Company for the site of its railway and for accommodation works and other purposes. The defenders now admit—what they disputed on record—that under these conveyances the Railway Company only acquired the surface of the lands disponed, and that the property in the minerals remained in the disponer. The defenders, however, base their title to the minerals on a disposition dated 1st and 12th March 1853, under which the Railway Company disponed to William Forrest the lands so acquired by them, except in so far as they were actually used at that time for railway purposes. As the Railway Company, however, owned only the surface of the lands, they could give no better title to their disponee than they themselves possessed; and the defenders, who derive their title from William Forrest, would not thereby have become vested in any of the minerals if the Railway Company had been the sole disponers. The disposition, however, bears to be granted "with the special advice and consent of John Gardiner of Auchinraith, in the parish of Blantyre, and the said John Gardiner for himself his own right and interest"; and as John Gardiner was the owner of the minerals the defenders maintain that under this disposition there was conveyed the whole of the lands described *a cœlo ad centrum*. The pursuers, on the other hand, maintain that the conveyance of 1853 only conveyed the lands as vested in the Caledonian Railway Company, and that John Gardiner was conjoined as a disponer merely for the purpose of curing any defect that there might be in the Railway Company's title in respect of the statutory provisions as to the sale of surplus lands. On the other hand, they, as I understood, admitted that the title was one under which the minerals

below the estate might be acquired by prescriptive possession.

The boundary on the north is, in this disposition, the river Clyde; and, as there is a conveyance of "all rights and pertinents belonging to the said portions of land above conveyed, and all such right title and interest in and to the same as we or our foresaids are or shall be possessed of," the defenders say that the conveyance included the *solum* of the river Clyde up to the centre, notwithstanding that no account is taken of this area in the measurement, and that the land conveyed is described as an enclosure. Precisely the same question arises with regard to "Jackson's" lands, which were disponed to the defender's author by disposition dated 13th and 17th May 1853. The ground so known is therein described as follows:—"All and Whole that piece of ground lying on the north side of the said railway, and extending to six acres and 22·853 thousandth decimal parts of an acre or thereby, marked number 4 on the said plan; and bounded . . . . on the north by the river Clyde."

In this state of the titles,—which gave Mr Rintoul an undoubted right to the whole surface of the lands in question, at all events up to the southern bank of the river Clyde, and to the minerals in Jackson's lands, which formed the largest part of the coal-field,—Mr Rintoul let to William Baird & Co., by a lease dated 16th July 1875, the term of entry under which was declared to be Whitsunday 1872, the whole seams of coal so far as unwrought lying in and under said subjects. In addition, probably, *per incuriam*, there was let the coal under the Railway Company's lands to which Mr Rintoul had no title whatever, and which belonged either to Mr Gardiner of Auchinraith and his successors or to the pursuers' author. This lease was admittedly communicated to the latter in 1883, and constituted one of the writs appended to the disposition in his favour by Robert Rintoul after referred to. The plan of the subjects let was also communicated to the pursuers' author, John Clark Forrest, in 1883. This plan included all the subjects now in dispute, the minerals in which are claimed by the pursuers.

In 1880 Peter Rintoul conveyed to the Caledonian Railway Company, first, certain parts and portions of land extending to 1 acre, 1 rood, 5 poles and ¼ of a pole, which may be described as part of Gardiner's lands of Auchinraith adjoining the railway; and second, a strip of ground adjoining the railway which formed part of Jackson's lands—but under reservation of the whole mines and minerals in the lands thereby conveyed.

It may be assumed that as the defenders' author let the whole minerals in the lands delineated on the plan in question, he believed that he was the owner of these; and for nearly thirty years no person has disputed his claim, although the coal has been worked continuously and in large quantities by the mineral tenants from 1875 onwards. The pursuers' author, John Clark Forrest, must also have believed that he had no claim to these minerals, for he accepted a disposition dated 14th, 15th and 16th November 1883, by Robert Rintoul in his favour, the terms of which are consistent only with the view that he recognised the right of the disponer to the minerals in the lands in question. By this disposition the surface of the lands was disponed to Mr Forrest, along with other lands which it is not necessary to mention. This deed contains a reference to the lease granted in 1875 to William Baird & Co., and provides that until the term of Whitsunday 1903, being its actual termination, "the mineral tenants should have all the powers and privileges conferred by the said lease upon the tenants, and that the disponee and his foresaids, during the said period, should have no claim in respect of the operations of the said mineral tenants." The deed further provides that if after Whitsunday 1903 there should remain any unwrought coal, etc., in the lands, the same should thereafter belong to the disponee (Mr Forrest), and that the disponer should be bound to execute and deliver in his favour a valid conveyance of the same with his whole right, title and interest, present and future therein.

On the expiry of the mineral lease in 1903, the pursuers demanded and obtained from the defenders a disposition, dated 7th and 9th May 1904, which conveyed to them "All and Whole, the whole coal and other metals and minerals, in so far as still unwrought, lying in and under" the lands described in and disponed by the disposition. They say that they were unaware at that time of their right to the claim made in this action. They became aware of it, however, on their own admission some time prior to March 1905, when a supplementary disposition was granted conveying to them substantially the minerals in the lands disponed to the Caledonian Railway Company by the disposition of 1880. Even now they do not propose to set aside the disposition of 1883, by which they acquired the surfaces of the land, or the disposition of 1904, by which they acquired the coal still remaining unwrought. They propose, therefore, to take the benefit of deeds which they say were executed under essential error, and which, on that ground, might be reduced, and at the same time to make claims which were expressly excluded by their acceptance of the disposition of 1883.

In my opinion this position is inadmissible. If in 1883 the pursuers had claimed the minerals now in controversy, it is not by any means certain that they would have been able to acquire the surface from Mr Rintoul on the same terms. Further, even if they could it does not follow that the workings would have been conducted without regard to the particular lands below

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which the coal lay. It would certainly have been in the interests of the defenders and their author to have induced the mineral tenants to work out the coal under Jackson's lands, and not to touch the coal in the disputed areas; and although the pursuers say that the mineral workings could not conveniently have been confined to Jackson's lands, the defenders were at all events entitled to the opportunity of limiting them, as far as possible, to these lands. Under the disposition of 1904, which the defenders were bound to grant by the obligation in the deed of 1883, the pursuers got the benefit of all coal remaining unwrought under Jackson's lands; yet they now wish to make the defenders responsible for the coal which their tenants have taken out in the disputed areas, so that if their claim is admitted they would get a double advantage from their silence. I feel myself, therefore, on the admissions of parties, in a position to dispose of the case by sustaining the 1st and 6th pleas for the defenders, Robert Rintoul's Trs., and assoilzieing the whole defenders from the conclusions of the action.

[Said pleas in law were as follows:—

"1. In respect that the pursuers do not offer restitution of the rights acquired by them under the disposition of 14th and 15th November 1883, and do not conclude for reduction of the same, the action is incompetent.

. . . . . .

"6. In respect of the *rei interventus* following upon the disposition of 14th and 15th November 1883, *et separatim* of the personal exception arising in terms of the said deed against them, the pursuers are excluded or barred from asserting a title to the said minerals or from disputing these defenders' title thereto.]"

My view is that if the pursuers did not choose to found upon the mutual error under which they allege the disposition of 1883 to have been granted to the effect of setting aside the disposition, they must be dealt with exactly on the same footing as if no error in fact existed. If so, it is plain that they have homologated the lease of 1875 with regard to the whole coals thereby let, and have expressly barred themselves from claiming any compensation in respect of the operations of these mineral tenants.

In this view it is unnecessary to dispose of the somewhat difficult questions of title which were raised. I may say, however, that if I had been in the pursuers' favour, I should have thought it better to reserve these until there had been enquiry as to the extent of possession. —*23rd November* 1907.

Counsel for Pursuers, Clyde, K.C., Chree; Agents, Menzies, Bruce-Low & Thomson, W.S.—Counsel for Defenders Rintoul's Trustees, Dean of Faculty (Campbell, K.C.), Moncrieff; Agents, Fraser, Stoddart & Ballingall, W.S.—Counsel for Defenders William Baird & Co. Ltd., Horne; Agents, Webster, Will & Co., W.S. J. W. F.

FIRST DIVISION.

(Exchequer Cause.)

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

236. Eadie and Others *v.* Magistrates of Glasgow.

I. BURGH — ACCOUNTS — COMMON GOOD — APPLICATION OF COMMON GOOD TO CERTAIN PURPOSES—TIMEOUS CHALLENGE—TOWN COUNCILS ACT 1900 (63 & 64 VICT. CAP. 49), SECTS. 94, 95, 96, 109—SIR WILLIAM RAE'S ACT 1822 (3 GEO. IV. CAP. 91), SECTS. 1 TO 4 AND 9 AND 10—BURGH REFORM ACT 1833 (2 & 3 WILLIAM IV. CAP. 76), SECT. 32—GLASGOW MUNICIPAL ACT 1879 (42 & 43 VICT. CAP. CXXIII.), SECT. 10.

II. PROCESS — CITATION — CORPORATION — DEFENCES—ACTION AGAINST CORPORATION IN WHICH ALL MEMBERS CITED NOMINATIM AS BEING THE MEMBERS OF SAID CORPORATION—DEFENCES ENTERED IN SAME FORM—MINUTE OF DISCLAIMER BY CERTAIN MEMBERS—CIRCUMSTANCES IN WHICH HELD THAT DISCLAIMING MEMBERS WERE NOT CITED AS INDIVIDUALS, AND MINUTE REFUSED.

III. PROCESS—DISLCAIMER—MINUTE OF DISCLAIMER BY MEMBERS OF CORPORATION CITED NOMINATIM—DEFENCES ENTERED IN SAME FORM—CIRCUMSTANCES IN WHICH MINUTE REFUSED.

Reclaiming Note against an Interlocutor of Lord Johnston.

(*Reported supra, p.* 379.)

The Defenders *reclaimed.*

After the reclaiming note had been sent to the Roll of the First Division, certain of the defenders lodged a minute of disclaimer in which they stated that they had given no instructions or authority for appearance being entered in their names, and *moved* in Single Bills that their names be taken out of the case and that they be found entitled to their expenses against the remaining defenders who had lodged defences.

The motion was *opposed* by the petitioners and by the remaining defenders.

The Court *refused* the motion.

The Lord President.—The point which is before us arises out of a petition and complaint presented by certain burgesses of Glasgow in order to have certain expenditure of the Common Good Fund of the city of Glasgow, which they allege to be illegal, checked. The Common Good of Glasgow is administered by the Corporation of Glasgow, the Lord Provost, Magistrates

and Town Council, and accordingly in the petition, which is based, *inter alia*, upon an Act 2 & 3 Geo. IV. cap. 91, in the prayer of the petition warrant is asked for service upon "The Right Hon. William Bilsland, Lord Provost," then follows a string of names and addresses, and at the end of these names and addresses come these words, "all members of the Town Council of Glasgow, being the Lord Provost, Magistrates and members of the Town Council of the City and Royal Burgh of Glasgow, and to ordain them to lodge answers hereto, if so advised, within eight days after such service; and thereafter, upon resuming consideration hereof, with or without answers, and after such enquiry as to your Lordships shall seem proper, to disallow the said item of £2457, 2s. 1d., as a charge against the Common Good or Revenues of the City and Royal Burgh of Glasgow . . . . and to ordain the said account to be rectified accordingly." Now to this petition answers have been put in, and these answers have been put in in precisely the same form as was set forth in the prayer of the petition, viz. "For The Right Hon. William Bilsland, Lord Provost, etc.," followed by the list of names and by the concluding words I have just read, "all members of the Town Council of Glasgow, being the Lord Provost, Magistrates and members of the Town Council of the City and Royal Burgh of Glasgow."

Mr Gordon appears for six of these gentlemen, and in a Minute he says that they gave no instructions or authority for appearance being entered in their names, and upon that he moves that his disclaimer should be sustained, that the names of these parties be taken out of the case, and that they be found entitled to their expenses against the others who have lodged defences. It seems that something of the same character was done in the Outer House upon the motion of certain other of the defenders, but that is a matter which is not before us.

I have come to the conclusion that there is no ground for this motion. If answers were put in for these individuals as individuals, and if these individuals say that they never gave any authority, it is clear that they are entitled to have their names taken out of the unauthorised paper and entitled to their expenses against the persons who put in the unauthorised paper. But it seems clear that the simple answer here is that there was no appearance for these individuals as individuals.

The common way of citing a Corporation is to cite it by its corporate name. This seems to be the appropriate manner of citing all common law corporations, and I think the Corporation of Glasgow is a common law corporation. But further, the Corporation of Glasgow has the right of citing and of being cited by its corporate name assured to it by several Acts. But though that is so, I have never heard that a pursuer might not cite members of a corporation, provided he goes on to explain that he cites them not as individuals but as members of the Corporation. That this has been done here is clear from the print. So I think that when these answers were put in, echoing the prayer of the petition, they were put in for the Corporation and not for the individuals cited. Mr Gordon's clients may say that they do not wish to defend the action, but they cannot avoid being there in their representative capacity only as long as the majority of the Corporation desires to defend.

Lords M'Laren, *Kinnear*, and *Pearson* concurred.—12*th November* 1907.

Upon the main question the arguments of counsel and the various statutory provisions involved are fully summarised in the opinions of the Lord Ordinary and of the Lord President *infra*.

The Court of new repelled the preliminary plea for the defenders, and ordained the defenders to produce in process a detailed account with relative vouchers of the item of expenditure in dispute.

The Lord President.—The only point raised in the petition and complaint at this stage was whether certain objections that had been stated to the petition and complaint at the instance of the burgesses against the Town Council are in time or not, and that depends upon the regulations laid down for making objections to the accounts in the Act of Parliament dealing with the accounts. The Act of Parliament that deals generally with the accounts of municipal bodies in Scotland is the Act of 1900. But there is a provision in that Act by which what are known as the larger burghs are enabled by resolution to prevent the Act applying to their accounts, and really to maintain the *status quo ante*. That provision was taken advantage of by Glasgow. The Act which deals with the Common Good, the expenditure of which is here called in question, is the Act of 1822. That Act, by the first section, requires that the accounts of the Common Good and revenues of every royal burgh in Scotland, made up to the day preceding the general annual election of magistrates in each burgh, shall be annually stated and deposited in the manner directed by this Act. Then in sect. 3 there is what I may call a time-table, which I really need not go through, but which provides for the time within which objections may be taken and explanations called for, and then, if the explanations are unsatisfactory, there is allowed an appeal to the Court of Exchequer. Assuming that that time-table applies, it is admitted that these objections are in time. But the respondents, the Town Council of Glasgow, say that they are not in time, and for this reason. They say that although under the Act

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the accounts are to be made up to the day preceding the annual election of magistrates, which is some time in November, this has been changed by subsequent Act of Parliament, and that the time has been changed with it, and if the time-table is reckoned from the 31st May, which is what I may call the modern date, then it is equally admitted by both parties that these objections are not in time.

Now the first change that took place was in the Municipal Reform Act of 1833, which changed the time of making up and bringing down the account from the date of the election to the 15th day of October. One can easily see for what reason that was done. It was done at the time of the great reform of municipal corporations; and it was done, not I think for the purpose of making any difference in the objections that might be made to the accounts, but for the purpose of allowing the electors—who were now brought into existence, in the proper sense of the word, for the first time—to consider whether there had been undue expenditure or not in view of their choice of their future representatives. But that again was altered, so far as Glasgow was concerned, by the private Act of 1879, called the Glasgow Municipal Act. That Act in sect. 10 provides that the state of affairs which was required to be made up annually—that is, the then existing one, the one on or before 15th October—shall be made up as at the 31st day of May, and then it goes on to say that "no other annual state of affairs or account than that hereby authorised shall be required to be made up by them." That, of course, is perfectly plain; the date provided by that Act of 1879 for the Glasgow annual state of affairs is the 31st May and no other date in the year. But the Act does not deal with the question of objections to the accounts; that is allowed to remain upon the old statute.

It has been urged to us by Mr Macmillan, the learned counsel for the appellants, who said everything that could be said, that it is very awkward and very ungainly to have a time-table for objections starting from a different date from the time at which the account is to be made up. I think that may be conceded. But nevertheless what the learned counsel is asking us to do here is to take away these burgesses' right of objection—for that is what it comes to—simply because these burgesses have not been able to put together two Acts of Parliament and spell out a different result from what the Act of Parliament really says. I do not think that argument can be given effect to, for this very plain and simple reason that, if in the Act of 1879 the Glasgow Town Council wanted to change the calendar during which objections could be made, nothing in the world was easier than to say so. If, on the contrary, they left the matter alone, then I think the Act of Parliament must be read according to its plain letter as it stands, and we are not by inference to read into the Act of Parliament different dates from what are there set forth. Therefore I am of opinion that the Lord Ordinary has come to a right decision.

[His Lordship afterwards dealt with the terms of the order to be pronounced, holding that the defenders should be ordained to produce the items of and vouchers for the expenditure of the whole sum of £2457, and not merely those relating to the sum of £1142.]

Lord M'Laren.—I should have thought that a great Corporation like the municipality of Glasgow, when any part of their administration is challenged, would be anxious that the fullest light should be thrown upon their management of funds entrusted to them. Agreeing with your Lordship as to the proper construction of these statutes, I do not participate in the scruples which the Magistrates and Council seem to have as to the regularity of the present proceedings, but think they are perfectly within the scope of the statutes. Indeed it is as much in the interest of the Corporation as of the ratepayers that the legality of this expenditure should be determined by the Court, in order that in future cases there may be a guide to town councils as to how far they are entitled to burden the Common Good. I rather think I have seen some indications that municipal bodies are inclined to take too much out of the Common Good, and it is just as well that they should be reminded that such charges are subject to statutory audit or enquiry when necessary. The question will always be, whether the subject of the expenditure is fairly within the scope and duties of municipal bodies, and is for municipal purposes. I agree in all the observations your Lordship has made upon the Acts of Parliament.

Lord Kinnear.—I agree upon the simple ground which your Lordship has stated, that we cannot disregard the plain words of the Act of Parliament in order to make a series of Acts more coherent than Parliament itself has found necessary.

Lord Pearson concurred.—21*st November* 1907.

Counsel for Petitioners and Complainers, Scott Dickson, K.C., Hon. W. Watson; Agents, Macrae, Flett & Rennie, W.S.—Counsel for the Glasgow Corporation, Hunter, K.C., Macmillan; Agents, Campbell & Smith, S.S.C.—Counsel for Disclaiming Defenders, Hon. H. D. Gordon; Agents, Calder, Marshall & Walker, W.S.

W. A. R.

OUTER HOUSE.

(*Lord Salvesen.*)

237. Cassidy *v.* Bilsland and Others.

PROCESS—DISCLAIMER—EXPENSES—DEFENDER—ALLEGATION BY ONE OF SEVERAL DEFENDERS THAT DEFENCES LODGED WITHOUT HIS AUTHORITY—QUESTION OF AUTHORITY A DISPUTED FACT—PROCEDURE—FORM OF INTERLOCUTOR.

The pursuer in this action was the holder of a certificate of licence for 67 Carrick Street, Glasgow, and he sought to reduce a pretended deliverance of the Licensing Appeal Court held in Glasgow on 7th May 1907, which professed to sustain an appeal against, and to recal a deliverance of, the Licensing Court granting a renewal of said certificate. The grounds of reduction were, *inter alia*: (1) That the said Appeal Court was not validly convened and constituted; and (2) that the appeal to the said Court was not truly authorised by the parties' appellant. The pursuer called as defenders (1) the whole members of the said Appeal Court entitled to act, and its clerk; (2) certain persons alleged to be householders in Glasgow and to have been objectors in the Licensing Court and respondents in the Appeal Court. Among the latter was David Moore, residing at 81 Carrick Street, Glasgow. The action concluded for reduction and that "the defenders, but only such of them as appear to oppose the conclusions hereof, ought and should be decerned and ordained" to pay the pursuers' expenses. Defences were lodged on behalf of all the defenders.

Before the closing of the record, David Moore, one of the said defenders, lodged a minute of disclaimer narrating that he had given no authority to said defences being lodged in his name, and moved the Court to sustain said minute and to find Messrs Clark & Macdonald, the agents responsible for the lodging of said defences, liable to him in (1) the expenses of the disclaimer; (2) relief from all expenses to which he might be liable in a question with the pursuer.

For Messrs Clark & Macdonald it was stated that they did not now maintain their authority to defend for the minuter, but that originally they possessed *prima facie* authority in having received instructions from their Glasgow correspondents along with the service copy summons served upon the minuter, and acted in good faith.

Counsel for the minuter stated that the minuter was not even a householder or entitled to object in the Licensing Court, that his objection in the Courts below had been unauthorised, and that possession of said service copy summons in this action was obtained in the following circumstances. Messrs Clark & Macdonald's Glasgow correspondent called in minuter's absence at his address at Glasgow, and demanded and received the service copy from the minuter's mother, who was aged and unable to understand the purpose of the demand, even if it had been explained to her, as it was not.

These statements were not admitted.

In these circumstances it was maintained for the minuter (1) that he was at least entitled to the expense of the disclaimer; (2) that he was and remained liable to the pursuer for expenses incurred up to date by virtue of the implied mandate of the advocate's gown, and was therefore entitled to relief from these.

The Lord Ordinary expressed the view that as there was a difference of facts on which (the matter being so small) he was not inclined to allow a proof, he could not dispose of the question of expenses in this process, and pronounced the following interlocutor:—"The Lord Ordinary, of consent of the defenders Robert Henderson and others, sustains the minute of disclaimer for David Moore, No. 9 of process; and on the question of expenses, reserves the disclaimer's right to constitute his claim for said expenses in any competent Court against the person or persons who used his name without his authority."—16*th November* 1907.

Counsel for Minuter David Moore, A. M. Mackay; Agent, R. S. Carmichael, S.S.C.—Counsel for Defenders Robert Henderson and Others, J. Duncan Miller; Agents, Clark & Macdonald, S.S.C. *For* J. W. F., A. M. M.

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(*Lord Salvesen.*)

238. Dick *v.* Inglis and Another.

ARBITRATION—AWARD—OVERSMAN—DEVOLUTION—OVERSMAN APPOINTED BY ARBITERS UNDER A WRITTEN AGREEMENT—FAILURE OF ARBITERS TO AGREE—AWARD BY OVERSMAN—HELD THAT WRITTEN MINUTE OF DEVOLUTION NOT NECESSARY FOR VALIDITY OF AWARD.

The Opinion of the Lord Ordinary sufficiently reports this case.

The oversman, who was called for any interest he might have, did not lodge defences.

Lord Salvesen.—This is an action for the reduction of an oversman's award, in a reference entered into between the pursuer and defender. There are various grounds on which the award is challenged, most of which require enquiry; but the pursuer maintained that he was entitled to have the award set aside *de plano*, on the ground that there was no signed minute of devolution by the arbiters devolving the reference upon the oversman, and that the award was consequently a nullity.

The reference in question was constituted by

Outer House. *Lord Salvesen.* — Dick v. Inglis and Another.

minute of agreement and submission, dated 24th and 31st August 1906, entered into between the pursuer as the incoming tenant of the farm of Broomknowe, Forfarshire, and the defender as the outgoing tenant. By this deed the parties submitted and referred to John Milne and David Morgan Graham, as arbiters and valuators, to visit and examine and thereafter to determine the true and correct values of certain subjects which were enumerated. The deed conferred power on the arbiters to appoint an oversman to act in case of difference between them. By minute dated 31st August 1906 the arbiters accepted office, and appointed John Robertson, farmer, West Drums, Brechin, to be their oversman, and he at the same time accepted of the office of oversman. This minute was executed before the arbiters had commenced to value any of the articles to be taken over by the pursuer. In taking this precaution, in case of difference, the arbiters acted according to a practice which has now become very general, and which has been approved of by the Court.

According to the pursuer's averments, one of the arbiters — Mr Graham — being dissatisfied with some information he had obtained with regard to the oversman, declined to adjust the prices of the various items with his co-arbiter until he had received satisfactory explanations from the oversman.

Thereafter Mr Milne called upon Mr Graham to pronounce a finding, intimating that he would hold his refusal to do so as a devolution of the reference upon the oversman; and as Mr Graham persisted in his attitude, the oversman was applied to and issued an award signed on 25th November 1906. It is admitted that he proceeded to act in the submission without a minute of devolution in his favour having been signed by the arbiters.

The pursuer avers that the arbiters had not differed as to the prices of the various items to be valued by them; but although it is unnecessary that I should decide this at present, there appears to me sufficient in the pursuer's averments to shew that they differed as to procedure; and any deadlock, whether occasioned by a difference on the merits or a difference as to the procedure to be followed, seems *prima facie* to justify the oversman in proceeding with the submission to him. As it is admitted, however, that a proof will be required on the other parts of the case, I shall not further deal with this question in the meantime.

There is admittedly no case in which it has been held that where there is a written appointment of oversman by the arbiters, a written devolution of the submission on him is necessary as matter of solemnity. The best writers on the subject all concur in the view that in a formal reference there ought to be a written minute of devolution as well as a written appointment of the oversman, but none of them categorically affirms that such a devolution is essential to the validity of the oversman's award, and I confess that I am unable to see why it should be. It was expressly decided in the case of *Colquhoun* v. *Corbett*, 1784, 2 Pat. 626, that it was competent to prove by parole evidence that two arbiters have differed in opinion, and that thereafter the oversman had a right to intervene and to pronounce a decreet arbitral. It is plain that this judgment would not have been necessary unless there had been no written devolution by the arbiters on the oversman, and, indeed, it appears from the statement of facts in the case that such a devolution was not in fact executed. The award was signed by the oversman and one of the arbiters, to wit, the arbiter who had called upon the oversman to proceed. It seems to have been assumed that if a difference of opinion had really arisen between the arbiters the interference of the oversman was well warranted; and this was the view both of the Court of Session and of the House of Lords. Lord Chancellor Thurlow gave his judgment in a single sentence to the following effect: "I am of opinion that, in the circumstances of this case, the umpire had a right to interfere"; and the order of the House of Lords expressly treats this as the ground of decision.

The pursuer, however, founded upon two more recent cases which, at first sight, seem to conflict with the decision just referred to. The first was the case of *Frederick* v. *Maitland*, 1865, 3 M. 1069; but that case is distinguishable on the ground that the oversman had neither a written appointment nor a written devolution in his favour. In the case of a formal submission it has always been held that a nomination of the oversman must be in writing. The passage in Lord Cowan's opinion on which stress was laid seems to me not to conflict, but rather to support, the decision in *Colquhoun* v. *Corbett*. He says: "But such a nomination [that is, of an oversman] is never made under a formal submission except in writing; and in this case a written devolution was necessary in order to validate the appointment of the oversman; and, further, to give the oversman jurisdiction to act, even when regularly appointed, the arbiters must have differed in opinion. Now there exists no evidence either of difference of opinion between the arbiters or the appointment of the oversman, whether at the outset of the proceedings or upon the arbiters having differed." This opinion seems to proceed on the assumption that if there had been a written appointment of the oversman, and evidence that the arbiters had differed in opinion, the oversman would have been entitled to act.

The other case is that of *Sinclair* v. *Fraser*, 1884, 11 R. 1139. In that case a petition was presented to the Sheriff praying for decree ordaining an arbiter to join with his co-arbiter in issuing an award; or otherwise to join with his

co-arbiter in devolving the submission upon the oversman. The Sheriff-Substitute having examined the arbiters, found, in point of law, that a declinature by one of the arbiters to proceed in the reference constituted such a disagreement as to call the umpire's powers into exercise; and he ordained the arbiters to execute a devolution in favour of the umpire. The Sheriff recalled the interlocutor, and dismissed the action on the ground that it was unnecessary; for if—as the pursuer alleged—the arbiters had differed in opinion, no minute of devolution was required to devolve the submission on the oversman. The Sheriff proceeded as follows: "The arbiters having at the outset appointed Mr Winton as oversman in the event of their differing in opinion, the difference of opinion between them was of itself sufficient to devolve the submission on the oversman whenever the arbiters differed. The proper course for the pursuer was to have called on the oversman to proceed with the submission which had in consequence devolved upon him."

That judgment was reversed by the Second Division—Lord Young dissenting; and the decision undoubtedly creates a difficulty. I do not, however, read it as doing more than affirming the proposition that the appellant had selected a competent remedy (not necessarily the only remedy), and one which, in the circumstances of that case, was highly expedient. Lord Craighill, who gave the only reasoned opinion in support of the decision, nowhere says that an oversman acting under a written appointment might not have proceeded with the reference if the arbiters differed; and I think it would be unfortunate that such a rule should be established. In the present case, where the subjects to be valued would all pass out of existence within a few months, the whole reference might be rendered nugatory by one of the arbiters refusing either to proceed with the valuation or to devolve the reference on the oversman; for the case of *Sinclair* shews that a very considerable time might elapse before a final judgment was obtained on such a petition as was there presented. It is true that where there is no written minute of devolution, there is always a risk of the award being set aside, if it can be established that the arbiters never differed so as to bring the oversman's jurisdiction into operation. But in the nature of things it appears to me that this risk must be a very small one, and not comparable to the disadvantage to which the other remedy is exposed.

I shall accordingly make a finding in terms of my opinion, so as to enable the pursuer to have my decision reviewed at this stage, and allow parties a proof of their averments.—27*th Nov.* 1907.

Counsel for Pursuer, Chree; Agents, Bruce & Black, W.S.—Counsel for Defender, T. B. Morison, K.C., Hamilton; Agents, Sharpe & Young, W.S. J. W. F.

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Corporation of Glasgow v. Caledonian Railway Co.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

239. Corporation of Glasgow *v.* Caledonian Railway Company.

I. Road—Railway—Road Crossed by Railway—Obligation on Railway Company to Maintain Bridge and Approaches—Railways Clauses Consolidation (Scotland) Act 1845 (8 & 9 Vict. cap. 33), sect. 39—"Public Highway" or "Private Street"—Circumstances in which Road Held Not to be Public Highway at Time Railway Bridge was Constructed.

II. Road—Railway—Railway Crossing Private Road—Obligation on Railway Company in Special Act to Carry Private Road Across Railway by Bridge—No Express Obligation in Act to Maintain Roadway—Caledonian Railway (Additional Powers) Act 1872 (35 & 36 Vict. cap. cxiv.), sects. 4 and 26—Circumstances in which it was Held That There was No Obligation on the Railway Company to Maintain Roadway.

Reclaiming Note against an Interlocutor of Lord Salvesen.

(Reported ante, Vol. XIII. p. 4, *and Vol. XIV. pp.* 11 *and* 360.)

The pursuers *reclaimed.*

The facts of this case appear from the previous reports.

In addition to the argument which was put before the Lord Ordinary, and which is fully dealt with in his Note—that is to say, the argument that the road in question being *de facto* a public road, the duty of its maintenance lay upon the Railway Company—the reclaimers further *argued* that the terms of the Special Act, The Caledonian Railway (Additional Powers Act) 1872 (35 & 36 Vict. cap. cxiv.), under which the railway in question was constructed, imposed such a duty on the Railway Company. The sections of the latter Act and of the Railways Clauses Act referred to in argument read as follows:—

The Railways Clauses Consolidation (Scotland) Act 1845.

Sect. 39. *Crossing of roads.*—If the line of railway cross any turnpike road or highway, then, except where otherwise provided by the Special Act, either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge . . . . and such bridge, with the immediate approaches, and all other works necessarily connected therewith, shall be executed, and at all times thereafter maintained, at the expense of the Company. . . .

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The Caledonian Railway (Additional Powers) Act 1872.

Sect. 4. Subject to the provisions of this Act, the Company may make and maintain . . . . the railways hereinafter described. . . . The railways . . . . referred to and authorised by this Act are: . . . . (A) Railway No. 2 . . . . (the railway in question).

Sect. 26. In constructing Railway No. 2, the following provisions shall be binding on the Company, who shall construct the works hereinafter specified in the manner hereinafter directed.

. . . . . .

(3) The road or thoroughfare numbered on the deposited plans 4, in the parish of Calton, may be diverted as shewn on those plans, and shall be carried over the railway by a bridge not less than forty feet wide between the parapets, and the diverted road shall not be less than forty feet wide between the fences.

The argument upon this point appears fully from the judgment of the Lord President, *infra*.

The Court *adhered* to the interlocutor reclaimed against.

The Lord President.—My Lords, the question in this case is whether the Caledonian Railway Company are bound to maintain the highway which goes over their bridge in Strathclyde Street. The case as argued before the Lord Ordinary seems to have turned entirely upon whether the words "public highway," as used in sect. 39 of the Railways Clauses Act, do or do not apply to a road or street in the position of Strathclyde Street. That depends on whether the expression "public highway" means public *de jure*, or means a highway to which as at the date the public are *de facto* admitted. My Lords, upon this matter I agree with the Lord Ordinary. I think we must take the word "public highway" as meaning public *de jure*, because I think that is the only thing that squares with the general conception of the Railways Clauses Act. The Railways Clauses Act, of course, is an Act of general application which is framed with the view of being read into special Acts which shall hereafter come into being.

When a railway goes through the country it is quite certain that it will meet roads, and those roads must be in one of two conditions. They must either be public roads in the full sense of the term—that is to say, public roads *de jure*, whether these roads were turnpike or whether they were statute labour does not matter—or they must be private roads. In the case of a railway meeting a private road it would, of course, be necessary, quite apart from the question of a road, for the railway company to take the land, because, quite apart from the question of the road as a road, the soil belongs to the proprietor *a cœlo usque ad centrum*; and if the railway company want to occupy that soil, at whatever height of the stretch that comes *a cœlo ad centrum*, they must of course take the land. Accordingly, I think it follows from that quite clearly that there is no necessity for making any special provision as to what railway companies should do when they cross private roads as roads. Of course the effect of taking a person's road, and going through it and blocking it up, may be of great moment to the proprietor in question, and his interests are safeguarded in the Act in other ways, in particular in two ways: in the first place, there are the sections which give compensation for injurious affections; but, more than that, there are all the sections which deal with what are known as accommodation works. I only mention that to shew that I have not forgotten it, and merely in order to exclude that *fasciculus* of sections which, beginning with the 16th section of the Scottish Act—and there are corresponding sections in the English Act—deal with the interference which railways may make with roads, not with the view of permanency, but with the view of construction of the line. Those stand by themselves upon another basis. But passing from private roads to public roads there is, of course, nobody from whom to take the surface of the road: the surface of the road does not belong to anyone who can be compensated and paid. My Lords, probably at different periods of legal history there have existed different theories as to the actual property of the *solum* of public roads, and I am not sure that even at this modern time the legal theory in England and in Scotland is quite the same. But however that may be, I think I may say without doubt that no one ever heard of a road authority being compensated for the surface of a public road being taken, and accordingly it was necessary to make some provision that public roads should not be interfered with, and that provision is represented by sect. 39. It seems to me, therefore, that upon the construction of the general scope of the Act, sect. 39 was only meant to deal with public roads in the fullest and proper sense of the word—*de jure* public roads. That, of course, only leaves the question of fact as to whether this was a public road or not. The Lord Ordinary enquired into the whole matter, and I think has come to a conclusion that cannot be avoided, that this road at the time this railway was authorised was not a public road, although no doubt it was a road which was used by large numbers of the public, and no doubt practically would always be so: but still and none the less it seems to me the legal position of the road was that if the superior of the ground and the whole of the feuars had chosen to come to an agreement, they might have shut up the road if they wished, either replacing it by another or not as seemed good to them. Accordingly, on the ground on which the Lord Ordinary has put his judgment, and so far as the case was argued before him, his judgment is perfectly right.

But, my Lords, there is another aspect of the case which was argued before your Lordships,

but which was not, I think, argued before the Lord Ordinary, and which, I confess, has given me a great deal more trouble to make up my mind upon than the other, and that is this: this particular bridge owes its existence to a special provision of the Act of 1872 under which it was made (Caledonian Railway (Additional Powers) Act 1872 (35 & 36 Vict. cap. cxiv.)). First of all, there is what I may call the ordinary works clause in sect. 4, and one of the works is a railway called Railway No. 2, which is the railway upon which admittedly this bridge stands. Then in sect. 26 of the same Act there comes the following provision:—"In constructing Railway No. 2 the following provision shall be binding on the Company who shall construct the works hereinafter specified in manner hereinafter directed." Then certain works, with which I need not trouble your Lordships, are specified, and then subsect. 3 says: "The road or thoroughfare numbered on the deposited Plans 4 in the parish of Calton may be diverted as shewn on these plans, and shall be carried over the railway by a bridge not less than forty feet wide between the parapets, and the diverted portions of the road shall not be less than forty feet wide between the fences." The bridge which is there referred to is admittedly this bridge over Strathclyde Street; and accordingly the question is whether the fact of this particular bridge being a special work enjoined by the Act of Parliament does not impose upon the Railway Company, quite apart from the general sections of the statute, the duty to maintain. My Lords, the 4th section of the Act, the works clause, says that the Company may make and maintain the works aftermentioned, and undoubtedly this is one of the works aftermentioned. But, my Lords, I think it is quite certain that, although at one time it was held both in this Court and in England that such a provision created a contract between the Company and anybody who could shew an interest that the works should be carried out, that doctrine was long ago upset, and the law in this Court was laid down first in the case of *Lord Blantyre*, 1853, 16 Dunlop 90, and was approved by the House of Lords in several cases, and especially in the case of *Edinburgh, Perth and Dundee Railway Company* v. *Philip*, 1857, 2 Macqueen 514. It is not merely well settled, I think, that, as regards construction, the powers are permissive merely, but I notice there is quite a recent case in which that has been in terms applied not only to the construction, but to the maintenance of a work once constructed. I refer to the case *Reg.* v. *The Great Western Railway Company*, 1893, reported in 62 L.J. Q.B. 572. Accordingly, upon those authorities it is, I think, quite clear that the Railway Company are not bound to maintain in respect of the works clause. Clause 26, however, is not permissive. That clause is an obligatory clause on the Railway Company if they construct Railway No. 2 at all. They need not construct Railway No. 2, but if they do, then clause 26 is obligatory. Therefore, it is quite certain that they were bound, whether they liked it or not, if they diverted the road, to carry it by this bridge over the railway; and the whole question therefore comes to be, What is the effect of the omission of the word "maintain"?

My Lords, so far as I can discover, and I have searched with considerable diligence the authorities, this is a new question. I have not been able to discover any case in either England or Scotland where that question arose as in the case of a work which was specially enjoined by the special Act. I have not found a case where the thing in question is a bridge specially enjoined by the special Act and crossing a private road. There are plenty of cases where the bridge specially provided for crosses a public road, but then, of course, the peculiar question does not arise, because it is perfectly obvious that the general sections apply. But upon the best consideration the only conclusion I can come to is that the omission of the word "maintain" is fatal to the construction of the pursuers. It seems to me that the very anxiety with which in the general statute the word "maintain" is always put in shews that if it were not there there would not be an obligation of maintenance. "Maintain" is put in not only in sect. 39, but it is put in also in all the clauses that deal with accommodation works. In a clause of this sort I think that the person who was stipulating for the work, who, I suppose, would be the proprietor, must fairly be taken as *proferens* of the clause, and that the clause must be construed literally according as it stands. I am not omitting the consideration that I think this argument really logically leads to this, that the Railway Company are not bound to maintain the structure of the bridge any more than they are to maintain the roadway. I say that notwithstanding the concession on the part of the Railway Company's counsel in one part of the argument that they were so bound. I do not think that concession ought logically to be made. But I do not think that fact in any way shocks me, for this very good reason, that it would be perfectly evident that the Railway Company would be bound to maintain the structure of the bridge, not because they were made to by the terms of the obligation, but for their own security. If they allowed the bridge, being an overhead bridge, to get out of order and become in a dangerous condition, it is quite evident that they would subject their own property to grave risk, and subject themselves to very grave risk of damages if through the falling of any portion of the bridge anybody who was using their railway was hurt. Therefore I do not think that the absence of an actual clause binding them to maintain the structure of the bridge

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very much matters. Upon the whole matter, and I found the point one of some difficulty upon which to make up my mind, I have come to the conclusion that in a doubtful case we must take the Act as we find it, and inasmuch as there is an obvious distinction made between making and maintaining in other sections where we find making and maintaining, the section must be read literally as it stands. Consequently here there is no obligation upon the Railway Company to maintain this bridge upon the ground of the special clause, because maintenance is not there expressed, and there is no obligation in the general clause, because this bridge is not over a road to which the general clause applies. The fact that there may be bridges to which an obligation of maintenance on the part of a railway company does not apply, seems to me to be recognised—although I do not put too much stress upon this argument—by another statute—namely, the Abandonment of Railways Act 1850 (13 & 14 Vict. cap. 83), which in sect. 22 deals with the matter thus:—"Be it enacted that, where the line of any railway so authorised to be abandoned shall have been wholly or partially laid out, and no road shall have been carried across such line of railway by means of a bridge or tunnel over or under such railway, which bridge or tunnel the Company to whom such railway belonged would, in case the same had not been abandoned, have been liable to keep in repair, then in every such case except where such bridge or tunnel shall, with the permission of said Commissioners, be by such Company removed, and such road restored to the like or an equally convenient and good state as the same was in, before it was interfered with by the makers of such railways, to the satisfaction (in the case of difference between such Company and the owner or persons having the management of such road) of the Commissioners, such Company shall pay to the owner of such road, if it be a private road, or to the trustees, surveyors of highways, or other person having the management of such road, if it be a turnpike or other public road, a sum of money, to be determined by arbitration as aftermentioned, in lieu and discharge of their liability to keep such bridge or tunnel, and also the roadway, over the same in repair." Now, I think that is quite consistent with the view that I have taken, because, in the first place, it distinguishes between the case of public and private roads, and then in all these things it distinguishes between the cases where the Company would, if the railway had not been abandoned, have been liable to keep it in repair, and cases where it would not. Accordingly, I think it is fair to say that it was in the contemplation of Parliament when it enacted that section that there might be bridges in just the condition I have come to the conclusion this one was, namely, a bridge over a private road which the Railway Company were not under obligation to repair; and I remind your Lordships that that bridge could not be an accommodation bridge, because, so far as an accommodation bridge is concerned, there is always the obligation to make and maintain.

My conclusion, therefore, is that this special point does not disturb the result arrived at by the Lord Ordinary.

Lord M'Laren.—I am of the same opinion. I agree with your Lordship that the difficulty in the case is that there are no precedents to guide us as to the construction of the Caledonian Railway Company's private Act. Under the works clause the Company, of course, were under no obligation to make the Railway No. 2 over which this bridge is constructed. But then if they did decide to exercise the power to make the railway, it was obligatory upon them to construct the bridge. The clause authorising the Company to construct the bridge, from its form and substance, appears to be of the nature of what is called a protection clause—a clause possibly drawn or at any rate suggested by the proprietor whose interests it was intended to safeguard. Therefore I think it must be taken that this protection clause represents all that has been claimed from the Company for the interference with the continuity of the road by the railway being run across it. Now, as the Act only puts the Company under obligation to construct, and says nothing about maintenance, it follows, as I think, that no action can be brought by the city to compel the Company to maintain the road. What would happen in the case of a railway being abandoned seems to be quite clear, but of course we have not that point before us. It is only useful by way of illustration of what, I venture to think, is the conclusion to be drawn from the two clauses of this private Act which are under consideration.

Lords Kinnear and *Pearson* concurred.—*29th November* 1907.

Counsel for Pursuers and Reclaimers, Lord Advocate (Shaw, K.C.), Dean of Faculty (Campbell, K.C.), M. P. Fraser, Crawford; Agents, Campbell & Smith, W.S.—Counsel for Defenders and Respondents, Clyde, K.C., Cooper, K.C., Orr Deas; Agents, Hope, Todd & Kirk, W.S.

W. A. R.

HIGH COURT OF JUSTICIARY.

(*Lords M'Laren, Kinnear and Pearson.*)

240. **Greig** *v.* **M'Leod.**

Justiciary Cases — Licensing Acts — Allowing Assistant to Sell to Child Under Fourteen Years of Age—Failure to Give Instructions to Assistant—Sale Outwith Knowledge of Licensee—Licensing

ACT 1903 (3 EDW. VII. CAP. 25), SECT. 59—CONVICTION SUSTAINED.

Stated Case.

This was an appeal by stated case against a conviction obtained against the appellant in the police court at Leith on a complaint which charged a contravention of sect. 59 of the Licensing Act 1903, by allowing a sale of liquor to a child under the age of fourteen years, contrary to that section.

The case set forth :—

This is a cause wherein the appellant was charged in the Leith Police Court, on the 10th day of July 1907, at the instance of the respondent, with contravening sect. 59 of the Licensing (Scotland) Act 1903, in respect that, on the 29th June last, within the licensed premises occupied by him at 23 and 24 Bridge Street, Leith, he did knowingly allow David Inglis, an assistant in said premises, to sell and deliver exciseable liquor, namely—a half pint of ale and a half pint of porter, to Beatrice Nicholson, an orphan, residing with John Furlong, a labourer, residing in Carpenter's Land, Coburg Street, Leith, who was then eleven years and two months and under fourteen years of age, for consumption off the said premises, such exciseable liquor not being sold and delivered to the said Beatrice Nicholson in corked and sealed vessels in quantities not less than one reputed pint for consumption off said premises only.

The appellant at the said diet of appearance on 10th July pled not guilty, and the diet was adjourned to 13th July, at 10 o'clock. On said latter date the appellant again appeared, and, adhering to his plea of not guilty, the case went to proof. After hearing evidence for the burgh prosecutor and for the respondent, and having heard the burgh prosecutor and the appellant's agent, I adjourned the diet to 18th July for judgment. On said latter date I pronounced judgment.

The following facts were held by me to be proved, viz. : On the evening of Saturday, 29th June, between nine and ten o'clock, the said Beatrice Nicholson entered the appellant's licensed premises mentioned in the complaint by the jug bar. The jug bar is entered from the street by a separate door from that by which the public bar is entered. The public bar and the jug bar are divided outside the bar by a screen which is carried the breadth of the counter, and both are supplied from behind the counter. Beatrice Nicholson ordered half a pint of ale and half a pint of porter from David Inglis, an assistant in the appellant's shop. The said David Inglis has been in the appellant's employment as assistant since he purchased the business seven years ago. The said David Inglis supplied the said Beatrice Nicholson with the liquor ordered, as libelled. The appellant was not at the time either in the public or jug bar, but was engaged in a room in another part of the shop, and Beatrice Nicholson was supplied by the said David Inglis outwith the appellant's presence and actual personal knowledge. The said Beatrice Nicholson had left the appellant's shop without his having seen her, and he only saw her when she was brought back to the shop by the police, who noticed her leaving the shop with the beer and porter in open pitchers, and immediately took her back to the shop to ascertain whether she had been supplied there, and by whom she had been served.

The said Beatrice Nicholson was eleven years and two months of age, and her appearance in the witness box shewed that she was diminutive and youthful looking even for a girl of that age. She had previously frequented the shop with her mother. Her family was well known to the said David Inglis, who had a conversation with the mother about the girl's age, the mother stating that the girl was a twin and diminutive for her age. Inglis must or ought to have known that the girl was under fourteen years of age.

No notice was displayed in the appellant's shop warning assistants to be careful to observe the provisions of the said section of the Act alleged to be contravened, and it was clear to me that sufficient instructions, verbal or written, had not been given to the said David Inglis not to supply children under fourteen years of age with exciseable liquor, except as provided in said section.

No complaint before the present has been made against the appellant or his servants.

On the facts proved I found the appellant guilty as charged, fined him in the sum of twenty shillings, and in default of immediate payment, sentenced him to seven days' imprisonment.

The Question of Law for the opinion of the Court was: Do the facts proved warrant a conviction?

The Licensing Act 1903 provides by sect. 59 :

LIX. *Sale of exciseable liquors to children under fourteen illegal.*—(1) Every holder of a certificate who knowingly sells or delivers, or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of exciseable liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such exciseable liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only, shall be liable to a penalty not exceeding forty shillings for the first offence, and not exceeding five pounds for any subsequent offence.

Argued for Appellant: The essence of the charge was knowledge on the part of the accused. That was expressly negatived by the stated case. The sale took place outwith his knowledge and presence. In order to support a conviction, there must be either knowledge or connivance on the part of the accused. Nothing less would do. Failure to give instructions could never be the same thing as knowingly allowing a sale. The section was a repetition of sect. 2 of the Intoxicating Liquors (Sale to Children) Act 1901 (1 Edw. VII. cap. 27). The following cases had been decided under that Act, viz.: *Emary* v. *Nolloth*, [1903], 2 K.B. 264; *Conlon* v. *Muldowney* [1904], I.R. 2 K.B. 498; *M'Kenna* v. *Harding*, 1905, 69 J.P. Cas. 354. No doubt in these cases instructions had been given, but if instructions were necessary such instructions as were there given were insufficient.

Counsel for the respondent was not called on.

The Court *dismissed* the appeal.

Lord M'Laren.—In this case the question is, What constitutes an offence against the Licensing (Scotland) Act 1903, sect. 59? That section

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imposes a penalty on "every holder of a certificate who knowingly sells or delivers, or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of exciseable liquor to any person under the age of fourteen years, for consumption by any person on or off the premises, excepting such exciseable liquors as are sold or delivered in corked and sealed vessels."

In the present case the facts as found proved by the magistrate made it clear that such liquor was supplied in an open vessel to a girl of eleven years of age, whose appearance was suggestive that she was even younger, and that no notice or instructions had been given to the assistant, David Inglis, not to supply children under fourteen years of age in such a manner. The question is, therefore, the liquor having been sold in these circumstances by an assistant, has an offence been committed? In the case of *Emary* v. *Nolloth* we have the authority of Lord Alverstone for this construction of the provisions of the section, that if a person in the position of the appellant delegates the conduct of his business to another, he is responsible for the acts of the person to whom he has given the institorial power, as if he had made the sale himself. Now I think it is not an illegitimate extension of the rule thus laid down if I say that every licensee who delegates the conduct of a part of his business, is at least responsible to the extent that he must give instructions to his assistant as to compliance with Acts of Parliament which regulate the spirit trade.

The magistrate here has given the facts very clearly, and we must take his findings as conclusive on the facts. He says: "It was clear to me that sufficient instructions, verbal or written, had not been given to David Inglis not to supply children under fourteen years of age with exciseable liquor, except as provided in the section." In the absence of any such instructions, I think it is consistent with a sound construction of the statute to hold that if the appellant does not instruct his assistant to give obedience to the requirements of the statute, he must be taken as assenting to what is done under his authority, and that in this case he has contravened section 59 of the Act. I am therefore of opinion that the argument for the appellant fails, and that this appeal falls to be dismissed.

Lord Kinnear.—I agree with your Lordship. I only desire to add that the question which the case purports to raise is one of fact, and I see no ground in law for disturbing the magistrate's finding on the facts.

Lord Pearson.—I am of the same opinion.—*4th December* 1907.

Counsel for Appellant, Munro, Welsh; Agents, Garden & Robertson, S.S.C.—Counsel for Respondent, Horne; Agent, R. H. Miller, S.S.C.

F. A. U.

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(*Lords M'Laren, Kinnear and Pearson.*)

241. **Stewart** *v.* **Todrick.**

Justiciary Cases—Motor Car—Regulation by Secretary for Scotland—Ultra Vires—Local Authority—Road Partly in Burgh and Partly in County—Management Devolved on County Council by Burgh Authority under Roads and Bridges Act—Motor Car Act 1903 (3 Edw. VII. cap. 36), sects. 9, 18—Roads and Bridges Act 1878 (41 & 42 Vict. cap. 51), sects. 11, 47—A County Council Held to be the Local Authority Entitled to Petition the Secretary for Scotland for an Order Regulating the Rate of Speed on a Road Partly in County and Partly in Burgh, the Burgh Authority having Devolved the Management of the Road on the County Council.

Bill of Suspension.

This was a bill of suspension of a conviction obtained against the suspender in the Sheriff Court at Haddington on a complaint which charged

That Daniel Stewart, motor car driver, No. 70 Donaldson Street, Kirkintilloch, on 3rd July 1907, on the public highway leading between East Linton and Dunbar, and particularly at a part thereof in the village of West Barns, in the parish of Dunbar, in the county of Haddington, near the Public Hall, West Barns, he being the driver of a motor car then on said public highway, did drive said car along said highway, place aforesaid, at the rate of 17 miles per hour, being a speed exceeding 10 miles per hour, contrary to the Motor Car Act 1903, sect. 9, and the Motor Cars Regulation (County of Haddington) (No. 2) Order 1905, dated 31st October 1905, regulating the speed of motor cars within certain limits or places in the county of Haddington.

The grounds of suspension and the answers thereto were as follows:—

Stat. 2. The complaint was served upon the complainer, and in answer thereto he appeared before the Sheriff-Substitute at Haddington, on the 15th day of July 1907, when the diet was adjourned to the 12th of August 1907. At this adjourned diet the complainer's agent pleaded that the complaint was irrelevant, but the objection was repelled. The Sheriff-Substitute convicted the complainer of the contravention charged and fined him £5, which was immediately paid at the Bar.

Ans. 2. Admitted that the first or pleading diet was on 15th July 1907. Explained that the case was adjourned till the 22nd July 1907, when evidence was led. No objection was taken to the relevancy of the complaint, but, in cross-examination of the witnesses for the prosecution, it came out that there was a doubt as to whether part of the road in the

village of Westbarns was or was not in the burgh of Dunbar. The agent for Daniel Stewart (the present complainer) produced a sheet of the Ordnance Survey, shewing that for a certain distance the centre of the public road in the village of Westbarns is the boundary of the burgh of Dunbar, and gave evidence in support thereof. No interlocutor was pronounced repelling a plea on the relevancy, and no objection thereto was noted.

The case for both prosecution and defence was closed on 22nd July, but the Sheriff-Substitute, to allow time for consideration of the point raised, adjourned the diet to 12th August, when he gave his decision convicting the complainer.

Stat. 4. The complainer maintains that the Motor Cars Regulation (county of Haddington) (No. 2) Order 1905, dated 31st October 1905, referred to in the complaint, which pretends to regulate the speed of motor cars over the portion of the road on which the complainer's car was travelling, is invalid and *ultra vires* in respect that the regulations were not made by the Secretary for Scotland on the application of the local authority of the area in question as provided by sect. 9 (1) and sect. 18 of the said Act. In terms of said regulations and of sect. 10 of said Motor Car Act, the County Council of Haddington have placed posts on the east and west side of the said village of West Barns. One of these posts has been placed at a point 40 yards west of the bridge which crosses the Biel Burn, and the other at a point 40 yards east of the road which leads to the school, both on the road leading from East Linton to Dunbar. These posts purport to indicate the limits within which the speed of motor cars must be restricted to the rate of 10 miles per hour. The distance between these two points is about 480 yards. The County Council of the county of Haddington is not the local authority within the meaning of said Motor Car Act for the portion of said road marked off by the said two posts. The said portion of roadway is partly within the area of the said County Council as local authority and partly within that of the Town Council of the burgh of Dunbar, which is a royal burgh. For the space of 213 yards or thereby, the boundary between the burgh of Dunbar and the landward portion of the parish of Dunbar runs along said roadway. Within that distance the centre of the roadway forms the southern boundary of the said burgh for a distance of 130 yards, and for the remaining 83 it forms the northern boundary of a detached portion of the said burgh. The said roadway is accordingly for part of the distance mentioned in said regulations not within the jurisdiction of the County Council of the county of Haddington, as local authority within the meaning of said Motor Car Act 1903.

Ans. 4. Denied that the Order referred to is *ultra vires* of the Secretary for Scotland, and reference is made to separate Statement of Facts for respondent. Admitted that the County Council of Haddington, as the local authority in terms of the Order referred to, and of the provisions of the Motor Car Act 1903, placed posts at the east and west ends of the village of Westbarns, on which are displayed copies of the Order referred to, indicating that the speed of motor cars on the road between the posts is limited to 10 miles per hour. The distance between the two posts is 544 yards. Admitted that for a certain distance the boundary of Dunbar burgh appears from the Ordnance Survey to be the centre of the road in the village of Westbarns. *Quoad ultra* denied.

Stat. 5. The said order was obtained solely upon the application of the County Council of Haddington. The Town Council of the burgh of Dunbar, who are the local authority entrusted with the management of said roadway for part of said distance, equally with the County Council of Haddington, took no steps to have said road scheduled or an order obtained from the Secretary for Scotland with reference thereto. Said order was therefore wholly inept, or at all events it was invalid and *ultra vires quoad* that part of the roadway which was not within the jurisdiction of the said County Council. Further, the complaint is irrelevant from want of specification as to the precise point at which the alleged offence was committed, or upon which side of the road the car was travelling. The northern half of the said roadway, within said limits to the extent foresaid, is situated entirely within the burgh of Dunbar, and no offence was committed by driving a car thereon over ten but under twenty miles per hour. On behalf of the complainer the burgh boundaries were pointed out to the Sheriff-Substitute in evidence given by the town clerk of Dunbar, and no evidence was led by the respondent as to which side of the road the car travelled on.

Ans. 5. Admitted that the Order was obtained solely upon the application of the County Council of Haddington, which is the road authority of said county and the local authority within the meaning of said Motor Car Act. The *locus* libelled in the complaint was quite specific. *Quoad ultra* denied.

Statement of Facts for Respondent.

Stat. 1. In the end of 1904 the County Council of the county of Haddington, which is the Road Authority of said county and the Local Authority within the meaning of the Motor Car Act 1903, with a view to the safety of the public, applied to the Secretary for Scotland to have the speeds of motor cars restricted within certain limits in the county. One of the roads referred to in the application was the main road passing through the village of Westbarns. Notice of the application was advertised in the local papers, "The Haddingtonshire Courier" and "The Haddingtonshire Advertiser" of 2nd December 1904, and parties objecting were requested to lodge objections with the Secretary for Scotland at the Scottish Office, Whitehall, London, within fourteen days of the date of publication of the advertisement. Parties objecting were also asked to send a copy of such objections to the county clerk.

A further advertisement was inserted in the said local papers of 17th February 1905, intimating that the Secretary for Scotland had appointed Alexander Stuart, Esq., advocate, General Superintendent to the Local Government Board, as Commissioner to hold a public enquiry in regard to the foresaid application, and that such public enquiry would be held in the County Buildings, Haddington, on Monday, 27th February 1905. Objections were lodged by one individual and by two motor clubs to the application *in toto*, but no objections were lodged or stated for the Town Council of the burgh of Dunbar, or by any other person, with regard to the part of the road in question in the village of Westbarns. Thereafter the Regulation Order was made by the Secretary for Scotland, of date 31st October 1905.

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STAT. 2. The part of the road as defined by the Secretary for Scotland's Order is the main road passing through the village of Westbarns, from 50 yards before the first to 50 yards beyond the last house. The area within which the speed limit is restricted is indicated by a post placed on the north side of the road at the west end of the village and a post on the south side of the road at the east end of the village. The distance between the two posts is 544 yards. Each post has a copy of the Secretary for Scotland's Regulation affixed to it, and is surmounted by a hollow disc with 10 M. P.H. (10 miles per hour) printed upon it.

STAT. 3. The evidence led on 22nd July at the trial applied not to the whole of the road lying between the two posts, but to 400 yards of it measured from the eastmost post westwards to Westbarns public hall, over which an uninterrupted view was obtainable. From an Ordnance Survey sheet produced, and from evidence given by the present complainer's agent, Mr White, town clerk of Dunbar, it appeared that for 83 yards of the 400 the boundary between the burgh of Dunbar and the county is the centre of the public road, the northern half of the road for this distance being within the burgh. For the remainder of the said 400 yards the road lies wholly within the county and outwith the said burgh. From the evidence of Mr White, it also appeared that the roads within the burgh of Dunbar were maintained by the County Council, the Town Council of Dunbar paying the County Council for doing so. Application having been duly made, in terms of the Motor Car Act 1903, to the Secretary for Scotland, by the County Council, which, as the County Road Authority and the Local Authority within the meaning of said Act, has jurisdiction over the road in question, the Secretary for Scotland was entitled, if he thought the safety of the public required it, to pronounce the Order founded on. The population of the burgh of Dunbar, according to the last census, is 3357. For the purposes of said Act, the said burgh is to be deemed to form part of the county of Haddington.

The suspender pleaded:

"1. The complaint is irrelevant from want of specification.

"2. The said regulation of the County Council of Haddington is invalid and *ultra vires*; *et separatim* is invalid and *ultra vires quoad* the portion of said roadway not under their jurisdiction."

The Motor Car Act 1903 provides:

Sect. 9.—(1) Sect. 4 of the principal Act (which relates to the rate of speed of motor cars) is hereby repealed, but a person shall not, under any circumstances, drive a motor car on a public highway at a speed exceeding twenty miles per hour, and within any limits or place referred to in regulations made by the Local Government Board with a view to the safety of the public on the application of the local authority of the area in which the limits or place are situate, a person shall not drive a motor car at a speed exceeding ten miles per hour.

Sect. 18. In the application of this Act to Scotland—

(1) A reference to the Secretary for Scotland shall be substituted for a reference to the Local Government Board; and

(2) A reference to the council of a royal, parliamentary, or police burgh, containing within its boundaries, as ascertained, fixed, or determined for police purposes, a population according to the census for the time being last taken of or exceeding fifty thousand, shall be substituted for a reference to the council of a county burgh, and every other burgh shall be deemed to form part of the county within which it is situate; and

(3) the road authority of any county or of any royal, parliamentary, or police burgh shall be the local authority within the meaning of the provisions of this Act which relate to the rate of speed and the erection of danger boards.

The Roads and Bridges (Scotland) Act 1878 provides:

Sect. 11. In each county the management and maintenance of the highways and bridges within the county shall be vested in and incumbent on the county road trustees, and the management and maintenance of the highways and bridges within each burgh situated in or partly situated in such county shall be vested in and incumbent on the burgh local authority.

Sect. 47. The highways and bridges situated within any burgh shall be by virtue of this Act transferred to and vested in the local authority of such burgh, and such local authority shall have the entire management and control of the same, and shall possess the same rights, powers, and privileges, and be subject to the same liabilities in reference to such highways and bridges (including the construction of new roads and bridges) as the trustees under this Act possess and are liable to in reference to roads, highways, and bridges (including as aforesaid) in the landward part of the county, including the right to any assets belonging thereto, and shall also have and may exercise with reference to the construction, maintenance, and repair of the roads, highways, and bridges within their respective boundaries, such and the like powers and authorities as they possess with reference to any streets within their respective boundaries: Provided that the local authority of any burgh not containing more than ten thousand inhabitants according to the census last taken may, by a resolution passed at a meeting summoned for the purpose, on not less than one month's notice, by special advertisement, devolve the management and maintenance of the highways and bridges within the boundaries or forming the boundary thereof upon the trustees of the county within which such burgh or any portion thereof is situated, on payment to such trustees of such an annual sum or upon such terms as may be agreed upon.

Argued for Suspender: The road was partly in the burgh and partly in the county. Therefore both the burgh and the county authorities ought to have petitioned for the regulation. As they did not do so, the regulation proceeded on an invalid petition, and was therefore *ultra vires*. The county authority had no power to procure the passing of a regulation affecting a road outwith their jurisdiction, and any regulation passed at their instance was invalid. The fact that the County Council had imposed on them the management and maintenance of this road by the Town Council under sect. 47 of the Roads and Bridges Act 1878 did not make the County Council the local authority under the

Motor Car Act. The County Council were thereby merely made the contractors for the upkeep of the road. "Management and maintenance" did not cover the control of the traffic on the road (*Lanarkshire Road Trs.* v. *Kelvinside Estate Trs.*, 1886, 14 R. (H.L.) 18). "Maintenance" meant the upkeep of the fabric of the road only; and "management" must be read as *ejusdem generis* with maintenance.

Argued for Respondent: It was incompetent in a case of this kind to question the validity of a regulation which was *ex facie* valid (*Crichton* v. *Forfar County Road Trustees*, 1886, 13 R. J. 99; *Institute of Patent Agents* v. *Lockwood*, 1894, 21 R. (H.L.) 61). The Order had been laid before Parliament and was therefore unchallengeable, not having been objected to. Further, the objection was not that the Order was outwith the powers of the Secretary for Scotland, but that the people who set the Secretary in motion were the wrong people. No one was entitled to complain of this unless perhaps the people who were entitled to petition. If they did not, certainly no one else had any title to do so. The active consent of the burgh to the petition would have been sufficient. The want of any objection on their part when an enquiry was held, was at least equivalent to tacit consent on their part. But the County Council were the local authority under the Motor Car Act. It was the policy of that Act to treat all small burghs as parts of the county (sect. 9 (4) (*b*)). But the arrangement under the 1878 Act put all difficulty at an end. So long as that arrangement subsisted the burgh authority had nothing to do but pay. The whole control and management were in the hands of the County Council. The local authority *quoad* this road was the authority which managed and maintained it, viz. the County Council.

The Court *refused* the bill and *sustained* the conviction.

Lord M'Laren.—We have had a very full and interesting argument upon the questions raised in this case, and especially concerning the validity of the Regulation Order made by the Secretary for Scotland under the authority of the Motor Car Act 1903. By sect. 9 of that Act it is provided that "within any limit or place referred to in regulations made by the Local Government Board with a view to the safety of the public, on the application of the local authority of the area in which the limits or place are situate, a person shall not drive a motor car at a speed exceeding ten miles per hour." By sect. 18 it is provided that in the application of the Act to Scotland, "Secretary for Scotland" shall be substituted for "Local Government Board," and that "the road authority of any county, or of any royal, parliamentary or police burgh, shall be the local authority within the meaning of the provisions of this Act which relate to the rate of speed and the erection of danger boards." Now, sect. 9 is a provision relating to rate of speed, and accordingly when, under that section, power is given to make regulations, the only authority entitled to apply to the Secretary for Scotland for such regulation is the local authority, that is, the road authority in the county or burgh, as the case may be. But we are informed of a fact which does not appear in the bill of suspension but is disclosed in the answers, that, acting under the authority of the Roads and Bridges Act 1878, and particularly under sect. 47, the burgh of Dunbar has, in the words of the statute, "devolved" upon the County Council of Haddington the "management and maintenance" of the road in question "forming the boundary" of the burgh. I assume for the purposes of this case that all the requirements of procedure as to devolution were carried out. There is a general presumption that all public acts have been carried out in conformity with law, and I assume that it is so in this case. This devolution having taken place, can it be doubted that, so long as it continued, the whole administration of this road passed to the County Council of Haddington? It is quite certain that the burgh of Dunbar no longer possesses the power of administration, and cannot in any reasonable sense be considered the road authority. Unless the County Council is the road authority, we are shut up to this paradoxical result, that there is no road authority having control of the road in question. I think there can be no doubt that the effect of the devolution was to make the County Council the road authority, not only for the purposes of the Roads and Bridges Act, but also for the purposes of the Motor Car Act. I am confirmed in this opinion by the terms of the proviso to sect. 47 of the Roads and Bridges Act, which enacts that "any such resolution of the local authority of a burgh may be rescinded, with the consent of and on such terms as may be agreed upon with the county road trustees, and thereupon the original rights, powers, privileges and liabilities of the said local authority shall revive in full force and effect." It would be difficult in any view to say what would be left, after the "management and maintenance" had been devolved, except a naked right of property, but I read the proviso as putting a wide interpretation upon the terms "management and maintenance," and as making it clear that under these words are included all the "rights, powers, privileges and liabilities" originally possessed by the burgh.

If such be the construction of the two Acts with which we are concerned, then the Order made by the Secretary for Scotland is in conformity with the statute, and must be obeyed. But I reserve my opinion on the question whether an Order made by a Department of Government in the exercise of authority conferred by Parliament, can be challenged as being *ultra vires* in

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a summary proceeding for the recovery of penalties. It is not to be supposed that an order going beyond the powers conferred by Parliament has authority in an absolute sense, but it may well be that it is to be treated as a good order until it is disaffirmed by a Court having jurisdiction to determine its validity. I see great inconvenience in admitting that, whenever a defender is brought before a court of summary jurisdiction, he is entitled to raise the question of the validity of the Order which he is said to have transgressed. In this case the judge having jurisdiction is the Sheriff; but offences against orders such as the one in question are not infrequently tried in a court where the judge is not a trained lawyer, and I should not like to commit myself to the proposition that such a judge has authority to absolve the accused on the ground that the Order is *ultra vires*. For the present I only say that I am not satisfied that this Court of Appeal would have power to determine a legal question which could not be raised in the court of first instance.

I am of opinion that the bill of suspension should be refused and the conviction sustained.

Lord Kinnear.—I agree in desiring to express no view upon the question last mentioned by your Lordship, but I am clearly of opinion that the suspension should be refused.

On 31st October 1905 the Secretary for Scotland pronounced an Order, upon the application of the County Council of Haddington, forbidding any person to drive a motor car at a speed exceeding ten miles per hour within certain specified limits, and on 12th August 1907 the complainer was convicted of an infringement of this Order. It is admitted that the complainer has no right to challenge this conviction upon the merits, since there is no appeal upon the question of fact. But he objects to it upon the ground that the Order which he transgressed was *ultra vires*, because the statute allows the Secretary for Scotland to make such an Order on the application only of the local authority of the county or burgh where the road is situated. It appears that for a certain not very considerable distance the road to which the Order applies is situated upon the boundary between the county of Haddington and the burgh of Dunbar, the true boundary being the *medium filum* of the road, and it is said that the Secretary for Scotland had no power, on the application of the county of Haddington, to issue an order affecting the portion of the road lying within the boundaries of the burgh of Dunbar, seeing that the County Council had no authority over this portion of the road. I do not think it necessary to consider whether, even if they had no other authority than that which extended to the *medium filum*, that would not have been enough to support the application on a sound construction of the Act of 1903, and to enable them to consider the question of the speed at which motor cars could be driven on their own half of the road. I do not think that question arises. It is quite obvious that the management of such a road as this would be impossible if the two local authorities had not the good sense to provide by agreement for a uniform administration of the whole; and accordingly, in terms of the 47th section of the Roads and Bridges Act 1878, these two local authorities had come to an arrangement by which the burgh of Dunbar "devolved" upon the County Council of Haddington the "management and maintenance" of the road. It is argued that all that was handed over was the "management and maintenance," the burgh retaining certain other rights and privileges, comprehended under the term "control." I do not consider it necessary to decide what were the exact powers which were devolved upon the County Council, for I think it enough to say that when they took over the "management and maintenance," they became for certain purposes the road authority—and the only road authority—not only over their own half of the road, but also over the half which lies within the boundaries of the burgh, and by sect. 18 of the Act of 1903, the road authority is declared to be the local authority within the meaning of sect. 9. If the burgh of Dunbar had any right to maintain that the title to apply for an Order regulating the speed of motor cars was one of the rights retained by them—and I express no opinion as to that—I am clearly of opinion that no one else has the right to maintain it. The whole procedure had the assent of the burgh, at least they stated no objections to it; and I do not think that the accused has a title to raise such a technical objection as this, when all the persons who could claim to be the road authorities are agreed on what has been done.

I accordingly agree that the suspension should be dismissed.

Lord Pearson.—I am of the same opinion. I have nothing to add as to the circumstances in which and the pleas upon which a statutory Order such as this can be challenged. On the merits, we must bear in mind the peculiar circumstances found here, viz. a road forming the boundary between the burgh of Dunbar and the county, where the duty of management and control fell on each authority respectively up to the *medium filum* of the road. That was a case calling for some regulation by agreement between the two parties; and accordingly the burgh here has devolved the management of the road in question on the County Council. In consequence of this agreement the County Council became the road authority as regards the management of the road, and as such was the proper party to apply for the Order in question.—*4th December* 1907.

Counsel for Suspender, D. Anderson; Agent, A. C. D. Vert, S.S.C.—Counsel for Respondent, Solicitor-General (Ure, K.C.), Orr, K.C., A.-D., A. M. Anderson, A.-D.; Agent, W. S. Haldane, W.S., Crown Agent. F. A. U.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

242. Hay & Company *v.* Torbet.

I. Payment—Appropriation of Payments—Account Current—Debts Guaranteed By Cautioners—Change in Creditor Firm—Rule in Devaynes' Case, 1816, 1 Merivale 530, That Credit Items Set Against Debit Items in Order of Date—Rule Not an Absolute Rule of Law, But Only a Presumption — Circumstances Where Held That Presumption Excluded in Respect That Payments Made Subsequent to Change in Creditor Firm Had Been Specifically Appropriated by Creditor to Debts Incurred Subsequent to Change.

II. Payment—Appropriation of Payments—Account Current—Terms of Account Rendered by Creditor to Debtor—Opinions That Rule in Devaynes' Case Did Not Apply to Account in Question in Respect That Account Not an Account Current.

(Appeal from the Sheriff Court of Perthshire at Perth.)

On 7th May 1904 Robert D. Torbet, postmaster, Balbeggie, and David Cromb, farmer, Balbeggie, granted a guarantee in favour of Messrs Hay & Co., auctioneers, Perth, whereby they guaranteed "full and final payment of all purchases made, or that may be made, and of all sums advanced, or that may be advanced, by you to Alexander Cromb, dairyman, St Martins, Balbeggie, with interest at the rates, as may from time to time be charged by you, declaring that the said sums shall not exceed the total of seventy-five pounds sterling (£75)."

On 1st August 1904 the business of Messrs Hay & Co. was transferred to a limited company—Messrs Hay & Co., Ltd. No notice of this change was sent to the cautioners.

On 26th January 1905 Hay & Co. Ltd. rendered an account to the principal debtor, Alexander Cromb, bringing out a balance due by him to them as at 2nd January 1905 of £87, 10s. 10d. The account was in the following terms:—

Account, Mr Cromb, Woodside Cottage, Balbeggie, and Messrs Hay & Co., Ltd., Perth.

1904.				
Feb.	19.	To 1 cow,	£13	12 6
„	26.	„ 1 do.,	15	7 6
Mar.	4.	„ 1 do.,	18	0 0
Apr.	29.	„ 1 do.,	10	10 0
May	13.	„ 1 do.,	8	15 0
„	„	„ Insurance,	0	1 6
July	15.	„ 1 cow,	12	15 0
„	„	„ Insurance,	0	1 6
„	29.	„ 1 cow,	8	0 0
„	„	„ Insurance,	0	1 6
Aug.	10.	„ Southtown hay,	11	14 6
Sept.	3.	„ Windeye sale,	2	11 4
Oct.	14.	„ 2 cows,	28	12 6
„	„	„ Insurance,	0	1 6
„	29.	„ Southtown stocking sale,	11	5 0
Nov.	12.	„ Southtown sale,	2	4 6
			£143	13 10

1904.							
Mar.	14.	By cash,	£4	0	0		
Apr.	11.	„ do.,	4	0	0		
May	10.	„ do.,	4	0	0		
June	20.	„ do.,	3	0	0		
July	15.	„ do.,	5	0	0		
Aug	16.	„ do.,	4	0	0		
Oct.	10.	„ 1 cattle,	8	7	0		
„	24.	„ 1 do.,	7	2	6		
Jan.	2.	„ 2 do.,	21	5	0		
						60	14 6
						£82	19 4
		To interest,				4	10 0
						£87	9 4
		Insurance on cow, 14 Oct.,				0	1 6
						£87	10 10

On 26th July 1905 the cautioner, Torbet, wrote to Hay & Co. withdrawing his name from the guarantee.

On 25th August 1905 the principal debtor, Alexander Cromb, became bankrupt. The present action was then brought at the instance of Hay & Co. and Hay & Co. Ltd. against Torbet to recover, *inter alia*, the sum of £67, 4s. 6d. for which the pursuers alleged that the defender was liable under the said guarantee.

After sundry procedure proof was allowed and led. The import of the proof sufficiently appears from the judgments.

On 2nd July 1907 the Sheriff-Substitute (Sym) decerned against the defender for the sum of £67, 4s. 6d.

The defender appealed to the Sheriff (Johnston) who, on 15th October 1907, adhered.

The defender *appealed* and *argued*: If there was an account current between the parties, then, in the absence of express appropriation, the rule in *Clayton's* case (*Devaynes* v. *Noble, cit. infra*) applied, and items on the credit side fell to be set against items on the debit side in order of date (*Devaynes* v. *Noble*, 1816, 1 Merivale 530, 3 Ross L.C. (Commercial Law)

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subsequent payments into the account as to make Cromb, as far as possible, pay his way.

Lord Low concurred.

Lord Ardwall.—The principal facts in this case are not in dispute. On 7th May 1904 the defender granted to Hay & Co., a firm of auctioneers, the guarantee which is No. 4 of process, by which he guaranteed the debts that might be due to Hay & Co. by a dairyman called Alexander Cromb, to the amount of £75. After certain dealings had taken place between Hay & Co. and Alexander Cromb, the business of Hay & Co. was transferred, with its rights and obligations, to Hay & Co. Ltd., who were duly incorporated under the Companies Acts on 1st August 1904, and on that date took over the assets and liabilities of Hay & Co. At that date the sum of £67, 4s. 6d. was due to Hay & Co. by Alexander Cromb, and this action is brought for recovery of that sum with periodical and other interest.

The parties are agreed that the defender is not liable for any advances made or goods supplied by Hay & Co. Ltd. to Alexander Cromb after the incorporation of the limited company, but the defender further maintains that the guaranteed debt has been extinguished by payments made by Alexander Cromb to Hay & Co. Ltd. after 1st August 1904, and the only question which was discussed on the appeal was whether the defender was entitled to have such payments imputed to the extinction of the debt of £67, 4s. 6d. I am of opinion that he was not so entitled, and that accordingly the judgment of the Sheriff ought to be affirmed.

This case is of some interest as being, so far as the citation of authorities at the debate was concerned, the first case in which the question of appropriation of payments to account of particular debts has been raised in this Court since the authoritative judgment of the House of Lords in the English case of *Cory Brothers & Co.* v. *Owners of "The Mecca"* [1897], A.C. p. 286.

Two points were raised at the debate: First, whether the account No. 18 of process, which was the only account rendered by Hay & Co. Ltd. to the principal debtor, was so stated as to infer a presumption against the pursuers that the payments to account claimed by the defender had been appropriated by the pursuers to the items due by Mr Cromb to them in order of date, or, in other words, whether No. 18 of process was a proper account current between the parties similar to that between a banker and his customer; and, second, whether, on or after 1st August 1904, the payments made by Mr Cromb to Hay & Co. Ltd. were appropriated by them from time to time to particular transactions.

The general law regarding the appropriation of payments was laid down with great clearness by Lord Macnaghten in the case above quoted, p. 293. He says: "When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment, the right of application devolves on the creditor. . . . The creditor has the right of election up to the very last moment, and he is not bound to declare his election in express terms. He may declare it by bringing an action, or any other way that makes his meaning and intention plain. Where the election is with the creditor, it is always his intention, express or implied or presumed, and not any rigid rule of law that governs the application of the money." The noble and learned Lord states this as the law of England; but in this matter the law of England and the law of Scotland are identical, and have been so since the leading case known as *Clayton's* case—better known in Scotland as *Devaynes'* case—was decided.

According to the above statement of the law, and it being admitted that no appropriation was made at the times of payment by the debtor, the question in the present case comes to be whether by rendering to the principal debtor the account No. 18 of process, the pursuers, Hay & Co. Ltd., appropriated the payments in question to the first items in their account against Mr Cromb? I am of opinion that they did not.

In considering this question it is obvious that a great deal must depend on the form of the account, because if the account is so stated as to entitle the debtor to assume that there has been appropriation by the creditor of certain payments to certain items of debt, the result will be that the creditor will be barred from going back upon that appropriation. Now, the account No. 18 of process is not stated as a proper account current at all. It first contains a record of all the goods sold or advances made to Mr Cromb by the pursuers, and next, below that, a record of all the payments made by Mr Cromb to the pursuers. Each of these columns is added up, the one deducted from the other, and a balance struck. Now, it appears to me that this is very far from being an account current. It was argued for the defender that an account stated in this way was in no view essentially different from an account stated with the debit and credit entries running side by side with each other, and that the fact of its not being so stated in the present case might simply be due to there not being room on the same sheet of paper so to state it. I do not think that this argument can be accepted seriously. If the debit and credit entries had been placed side by side that might have raised a presumption of more or less force to the effect that the entries were to be set against each other in order of date; in short, that the account was an account current. In the present case there are two summations, and the fact that the one is deducted from the other in

order to shew the balance due certainly cannot turn what is merely a summation of items of debit separately from the items of credit into an account current. Assuming that the pursuers desired to render a statement to Alexander Cromb shewing the amount of his indebtedness to them, but without inducing him to believe that they were stating their account as an account current, it is difficult to see in what other form they could have stated their account. I therefore have no doubt whatever that the account No. 18 of process contains in itself nothing that the debtor was entitled to rely on as an appropriation of particular payments to particular items of debt, and nothing to shew that the creditor appropriated or intended to appropriate payments in that way.

The two leading cases regarding the appropriation of payments in order of date, to extinction of debit entries in order of date, namely, *Devaynes'* case, 1816, 1 Mer. 530, and the case of *Bodenham* v. *Purchas*, 2 B. and Al. 39, were both cases of bankers' accounts, and indeed bankers' accounts are the typical examples of accounts current. In *Devaynes'* case Sir William Grant, who was the Master of the Rolls, says that where an account current is kept between parties as a banking account "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in which is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first payment on the credit side. The appropriation is made by the very act of setting the two items against each other."

This rule has been adopted both in England and in Scotland, but, as pointed out by the noble and learned Lords who decided the case of "*The Mecca*," the rule in *Devaynes'* case had come to be considered a rule probably of much more force and stringency than had ever been intended by the Master of the Rolls when he laid it down, although several cases *prima facie* falling within the doctrine in *Devaynes'* case have since the decision in that case been decided otherwise owing to their peculiar circumstances. The case of "*The Mecca*" was a case in which the account was stated very much in the same way as the one in the present case, and there it was held that there was no account current between the parties, and no other circumstances making it appear that the creditor intended to make any appropriation.

Among the Scotch cases which were cited at the debate the case of *Lang*, 1859, 22 D. 113, may be taken as typical of the ordinary current account. In that case it was an account between agent and client, but the agent had from time to time been accustomed to make advances to or on behalf of the client, and, on the other hand, the client from time to time made payments to the agent by cash or by bill or note, and the account current was kept in practically the same way as a banker's account, although the relation of the parties was that of agent and client. It was, accordingly, there held that the account was an account current to which the principle of *Devaynes'* case was applicable.

The case of *Dougal* v. *Lornie*, 1899, 1 F. 1187, was a typical case of a different kind of account. That was a case of a plumber's account divided into sections according to work done from time to time, and the amount sued for was the fifth of a series of accounts rendered in a similar way. For the work charged in these accounts various payments to account had been made, and it was there held that indefinite payments to account of a tradesman's account were not to be ascribed to the items or sectional amounts in order of date so as to preclude the debtor from subsequently challenging any item in the account. Lord Adam there pointed out that "the rule in *Devaynes'* case applies to cash accounts current, and has no application whatever to a tradesman's account. Payments to account of a tradesman's account go not against individual items in order of date, but against summation."

There may, however, be accounts current consisting of entries other than proper cash entries. The case of *M'Kinlay* v. *Wilson*, 1885, 13 R. 210, was a case of this kind. That was a case where two horse dealers had frequent dealings with each other, and in the account sued for by M'Kinlay, which was titled "Account current," horses and harness and cash were entered on the debtor side of the account, and horses, cash, and other things were entered on the other, the dates on both sides being consecutive. There prescription was pleaded, and it was against that plea that the pursuer pleaded that the account was an account current, and that prescription was excluded. Before deciding the question of prescription, a proof was led, and on that proof the Court was satisfied that it was the intention of parties that the transactions should be set against each other from time to time as they occurred, and that the account therefore was rightly stated as an account current, the one side of the account being set against the other, and that accordingly the plea of prescription should be repelled. (See opinion of Lord Adam, p. 217.)

The case of *Batchelor*, 1892, 19 R. 903, forms a useful contrast to *M'Kinlay's* case, for there it was held that a merchant's account with cross entries was not a proper account current. There was no proof in that case, and it was decided simply upon the account as it stood, Lord Trayner saying "This is simply a merchant's account."

From an examination of the various cases which were quoted at the debate it is evident that the important alteration in the statement of the law that was introduced by the decision

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in the case of "*The Mecca*" is this, that while in several of the former causes the law was stated to the effect that failing appropriation by the debtor or the creditor the law appropriated payments to items of debit in order of date, in the case of "*The Mecca*" the law was stated to the effect that failing appropriation of the money by the debtor, the appropriation of the money is governed by the intention of the creditor expressed, implied, or presumed, and that such intention may be presumed from the form and statement of the account rendered by the creditor to the debtor. Applying this law to the present case, my opinion is that it cannot be presumed from the account No. 18 of process that the creditor intended to appropriate payments to account made after 1st August 1904 to the items of debt in order of date, and that by making the claim and raising this action for £67, 4s. 6d. they have shewn that they do not so appropriate them.

But the pursuers maintain further that if any presumption arises from the statement of the account, that is displaced by the fact that at the times of the payments which the defender seeks to impute in order of date to the debt incurred by Cromb before 1st August 1904 they were appropriated by the parties to particular items; and to begin with, that the very first payment after 1st August, namely, £4 on 16th August, was paid for hay bought at Southtown sale, and in response to a letter dated 11th August 1904. This is established by the proof. The course of dealing with the new firm accordingly commences with a payment appropriated to a specific item. Again, it is proved that certain cows were paid for by instalments of £1 per week, and then again it appears that Hay & Co. Ltd. were frequently finding fault with Mr Cromb for not paying for particular purchases which he made from them, and for not sending in stock to be sold by them so as to pay for such purchases. In short, without going into further details, I am of opinion that it appears from the whole of the proof that when those who had the management of Hay & Co. Ltd.—who, of course, had a responsibility to the Company—commenced dealing with Mr Cromb on and after the incorporation of the Company, they dealt with each transaction between them and Cromb separately as it arose, and demanded and received payments to account of the particular transactions. This course of dealing is quite inconsistent with treating these transactions as parts and portions of an account current. But further, it proves the appropriation of particular payments to particular transactions, and therefore excludes the idea that the payments on 16th August and onwards were payments which the defender is entitled to have imputed towards the debt which had been incurred previous to that date.

On both the grounds above dealt with, I am of opinion that the judgment of the Sheriff should be affirmed, and the case remitted back in order that the question of interest may be dealt with.—17*th December* 1907.

Counsel for Pursuers, Dean of Faculty (Campbell, K.C.), Jameson; Agents, Carmichael & Miller, W.S.—Counsel for Defender, Hunter, K.C., J. Macdonald; Agents, Menzies, Bruce-Low & Thomson, W.S. J. S. M.

SECOND DIVISION.

243. **Burgoyne** *v.* **Walker.**

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

I. REPARATION — MASTER AND SERVANT — LIABILITY OF MASTER FOR FAULT OF SERVANT—SERVANT OF A PRO HAC VICE SERVANT OF B — LIABILITY OF OWNER OF VESSEL FOR FAULT OF MASTER — ARRANGEMENT BETWEEN OWNER OF TRAWLER AND FISHERY BOARD BY WHICH TRAWLER ALLOWED TO FISH IN PROHIBITED WATERS IN CONSIDERATION OF GIVING UP PART OF CATCH TO FISHERY BOARD OFFICIAL WHO WAS CARRIED ON TRAWLER TO POINT OUT LOCUS WHERE FISHING SHOULD TAKE PLACE—NO RIGHT IN FISHERY BOARD OFFICIAL TO INTERFERE WITH NAVIGATION OF VESSEL — DEATH OF FISHERY BOARD OFFICIAL IN CONSEQUENCE OF NEGLIGENCE IN NAVIGATION BY MASTER OF TRAWL BOAT—HELD THAT MASTER WAS ACTING AS SERVANT OF TRAWL OWNER, NOT OF FISHERY BOARD, AND OWNER LIABLE IN DAMAGES.

II. MASTER AND SERVANT — FELLOW-WORKMAN—SHIPMASTER AND FISHERY BOARD OFFICIAL—HELD THAT FISHERY BOARD OFFICIAL CARRIED ON TRAWL BOAT TO POINT OUT PLACES WHERE FISHING SHOULD TAKE PLACE UNDER AGREEMENT BETWEEN OWNER AND FISHERY BOARD WAS NOT A FELLOW-WORKMAN WITH MASTER OF TRAWL BOAT.

Appeal from the Sheriff Court of Aberdeen, Kincardine and Banff at Aberdeen.

This was an action brought by Mrs Jeannie Peters or Burgoyne, 13 Skene Street, Aberdeen, widow of the deceased John Darling Burgoyne, as an individual, and also as tutor to her pupil son, against Andrew Walker, managing owner of the steam trawler "Star of Hope," Aberdeen, to recover damages in respect of the death of the said John Darling Burgoyne.

Proof was allowed and led.

The following findings in fact were made by the Sheriff-Substitute:

(1) That on 5th December 1905, about 1.30 a.m., the steam trawler "Star of Hope," belonging to the defender, stranded on the coast near Collieston, owing to the recklessness and negligence of the skipper of the vessel; (2) that, as a consequence, the pursuer's husband, John Darling Burgoyne, a servant of the Fishery Board of Scotland, perished from exposure about six hours later; and (3) that, at and before the time of stranding, the skipper and the said John Darling Burgoyne were engaged in trawling for fish, under an arrangement whereby the skipper remained the servant of the defender, and the said John Darling Burgoyne remained the servant of the Fishery Board of Scotland.

With respect to the arrangement between the defender and the Fishery Board, the pursuer made the following averments which were established at the proof:

Cond. 2. In pursuance of their scientific investigations, the officials of the Fishery Board for Scotland in charge of the Board's station at Nigg from time to time arrange with the owners of trawl-boats fishing from the port of Aberdeen to carry on board their boats an employee of the Fishery Board, who is allowed to collect from the catches, and retain for the use of the Board's officials, specimens of different kinds of fish. In return for this service, trawl-boats carrying a Fishery Board employee are allowed to fish within restricted waters, and are allowed to retain the catches got therein without rendering themselves liable to a charge of illegal trawling. . . . . Neither the Fishery Board nor its representatives on board such trawl-boats, nor anyone in its employment, has, as a consequence of the arrangement referred to, any concern with the navigation or management of any trawl-boats so engaged.

The nature of the control exercised by Burgoyne over the trawler sufficiently appears from the Sheriff-Substitute's Note.

On 11th January 1907 the Sheriff-Substitute (Henderson Begg) decerned against the defender for payment of (1) £300 to the pursuer as an individual, and (2) £150 to the pursuer as tutor of her pupil son.

He added the following note:—

[After considering the question of fault] The arrangement between the Fishery Board and the defender was a very peculiar one. I think that it is accurately set forth in Articles 2 and 4 of the pursuer's Condescendence, with this exception, that the vessel was not flying the flag of the Fishery Board. The chief question in the present case is whether that arrangement involved the doctrine of *collaborateur* as between Burgoyne and the skipper; and the answer to the question admittedly depends on whether the two men are to be held to have been in the service of a common master at the time of the accident (*Johnson* v. *Lindsay & Co.*, L.R. [1891], A.C. 371). The defender maintains that while Burgoyne continued throughout to be in the service of the Fishery Board the skipper had become *pro hac vice* the servant of the Board; the vessel, with skipper and crew, having passed from the possession and control of the defender into the possession and control of the Board. Of course, from the time of leaving port, on the voyage in question, the vessel was outwith the personal possession and control of the defender, just as she would have been in any ordinary trawling cruise in the North Sea. But what the defender means is that, through Burgoyne being on board the vessel, the Fishery Board possessed the vessel, and controlled the master and crew. When one looks into the matter, however, the control exercised by Burgoyne turns out to have been of a very limited character. He was entitled to indicate the places in Aberdeen Bay where the trawling operations were to be conducted, and to prescribe the length of the drags, so as to get live fish. But I do not see that he had any further control of the skipper and crew; and, of course, he had no right to interfere with the navigation of the vessel. The skipper was on board, not merely to navigate the vessel, but also to look after the defender's interest in the fish caught, the defender's share of the fish being generally about ninety per cent. of the catch. Of course, the skipper and crew were engaged and paid by the defender, and Burgoyne could not have dismissed any of them. In these circumstances I do not think that any of the authorities to which I was referred in the course of the extremely able argument to which I had the pleasure of listening, would justify me in holding that the skipper was the servant of the Fishery Board *pro hac vice*. Adapting the words of Lord Watson, in the case above mentioned, to the present case, I hold that the circumstances are not such as to shew conclusively that the skipper submitted himself to the control of the Fishery Board, and either expressly or impliedly consented to accept the Board as his master for the purpose of the common employment—trawling for fish.

The other authorities to which I refer are *Rourke* v. *White Moss Colliery Co.*, 1877, L.R. 2 C.P. Div. 205; *Donovan* v. *Laing Construction Syndicate* [1893], 1 Q.B. 629; *Cairns* v. *Clyde Navigation Trs.*, 1898, 25 R. 1021; and *Connelly* v. *Clyde Navigation Trs.*, 1902, 5 F. 8. . . .

The Defender *appealed* and *argued*: (1) On the evidence the master was not in fault. (2) In any event he was not the servant of the defender at the time. It was settled law that a person who was the general servant of A might become *pro hac vice* the servant of B (*Johnson* v. *Lindsay & Co.* [1891], A.C. 371, per Lords Watson and Herschell; *Rourke* v. *White Moss Colliery Co.*, 1877, L.R. 2 C.P.D. 205; *Donovan* v. *Laing, Wharton & Down Construction Syndicate, Ltd.* [1893], 1 Q.B. 629; *Conelly* v. *Clyde Navgation Trs.*, 1902, 5 F. 8; *M'Fall* v. *Adams & Co.*, 1907, S.C. 367; cf. *Cairns* v. *Clyde Navigation Trs.*, 1898, 25 R. 1021). In each case it was for the Court to determine whether the servant had so submitted himself to the control of B as to become his servant. The important considerations were what was the nature of the work, and by whom was it being carried out. Here the work of the Fishery Board, not of the trawl owner, was being carried out by the Fishery Board with hired plant. The Fishery Board official had right to control the operations by pointing out the place where fishing should be carried on. The master was therefore the servant of the Fishery Board at the time of the accident. This view was supported by the fact that under the

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bye-laws framed by the Fishery Board in pursuance of the Herring Fishery (Scotland) Act 1889 (52 & 53 Vict. cap. 23), sect. 6 (1) and (2), fishing could be carried on only by persons employed by the Board, or by persons having permission in writing. There was no written permit in the present case, and unless the trawler was in the employment of the Fishery Board, the fishing was illegal.

Counsel for the pursuer were not called on.

The Court *dismissed* the appeal.

The Lord Justice-Clerk.—In this case we have had a very able argument from Mr Murray. Having carefully considered the case and the interlocutor and note of the Sheriff-Substitute, I have come entirely to concur in everything that the Sheriff-Substitute has said. In this particular case the vessel undertook to fish in certain waters in which the Fishery Board were entitled to prevent any one from fishing, although they were entitled to sanction fishing in these waters, on certain conditions, for the purposes of scientific research. These conditions were that the trawl owners were to take as their share the entire catch except a certain quantity of plaice, which were required for scientific purposes; and, in order that the fishing might be conducted in such a manner as the Fishery Board considered suitable, an official of the Board was to be on the vessel to see that the fishing took place at such spots as were proper for the scientific ends in view. The Fishery Board Officer had no other function whatever. He could not interfere with the navigation in any way, and if the master of the trawler thought that any particular spot pointed out for trawling by the Fishery Board officer was not safe for navigation, the master could refuse, and, in the interest of his owners, was bound to refuse, to take the vessel to the spot pointed out by the Fishery Board officer. Once the Fishery Board officer had pointed out where he wished the vessel to go, the manœuvres for taking her there were entirely in the hands of the master and crew. The master in doing his work was no doubt doing it in part to fulfil the objects of the Fishery Board, but he was also doing it for the profit of his owner, who would appropriate the balance of the catch. It was plainly a speculation for profit on the part of this trawl owner—a speculation for profit in exactly the same sense as in any ordinary case of trawling. He might bring up a large catch or a small catch or nothing at all. That is just what would happen in any ordinary trawling adventure. To say in these circumstances that the vessel had been so handed over to the Fishery Board, that the Board became the employers of the master and crew, appears to me to be out of the question. I am very well satisfied with the excellent note of the Sheriff-Substitute, and I move your Lordships to adhere.

Lord Low.—I am of the same opinion. There are two questions in the case: (1) Whether the stranding was due to the negligence of the skipper of the trawler? and (2) Whether the skipper was, for the purpose of the adventure in question, truly the servant of the Fishery Board? On the first question I entirely agree with the Sheriff-Substitute. [His Lordship then discussed the evidence relating to the question of negligence.] With regard to the second question I have really very little to add to what your Lordship has said. No doubt Mr Burgoyne as representing the Fishery Board had right to indicate in what part of Aberdeen Bay he desired trawling operations to be carried on. But the conduct of these operations and the navigation of the vessel were entirely under the control of the skipper, as the servant of the owner, and in the owner's interest. I am therefore of opinion that the judgment of the Sheriff-Substitute was right.

Lord Ardwall.—I also agree. The main contention put forward by Mr Murray was that the defender was not liable, because at the time of the wreck the master of the trawler "Star of Hope" was not his servant, but the servant of the Fishery Board, and that accordingly (1) the defender is not answerable for him; and (2) the deceased John D. Burgoyne, having lost his life through the fault of a fellow-servant, the pursuer's claim in respect of his death is excluded. Now I think that the facts of this case do not bring it up to any of the cases in which it was held that a servant hired out to another person was so entirely under the control of that other person that the person whose general servant the servant so hired out was, was not liable for any accident which might occur through the negligence of the servant so hired out. In such cases two test questions arise: (1) For whom was the work being done at the time when the accident happened? and (2) What was the nature of the control retained over the hired-out servant by the person whose servant he generally was?

Now in regard to the work, the work in the present case was the ordinary work of a trawler, neither more nor less. Neither the defender nor anyone else got pecuniary remuneration from the Fishery Board. The owner, master and crew of the trawler were paid just like those of any other trawler out of the proceeds of the adventure. The only difference was that on this particular fishing voyage the vessel had on board an official of the Fishery Board with tubs into which he put his live fish, and that the trawl owner, instead of keeping the whole catch, was bound to hand over to the Fishery Board a certain quantity of fish of a certain kind, and in return for this he received the benefit of being allowed to fish in waters where it was in the ordinary case illegal to fish, and where the chances of success would certainly be much increased. That was quite an intelligible arrangement, but it did not convert

the trawler and its crew into a trawler and crew of the Fishery Board engaged solely or principally in their work. The leading object was trawling on behalf of the owner and others interested, and it was a mere incident of the particular voyage that the Fishery Board had a right to get a small portion of the fish.

If we compare the present case with the case of *Rourke* v. *The White Moss Colliery Company*, 1877, L.R. 2 C.P.D. 205, it is easy to see the broad distinction between the two cases. In *Rourke* the injured man was in the service of a pit sinker. While the pit sinking was going on no other work in the colliery was going on. The only work which was being carried on at the time and place when the accident happened was pit sinking and not working coal. The pit sinker was a contractor entirely independent of the colliery owners, and although they provided the plant and an engine and engineer, they gave over the whole control thereof to the pit-sinker, or in other words lent both engine and engineer to the pitsinker. It was accordingly held that the colliery owners were not liable for the injuries caused to the plaintiff by the fault of the engineer.

(2) With regard to the question as to whether at the time of the wreck the vessel was under the control of the Fishery Board or their servant the deceased John Burgoyne, the evidence is, I think, clear to the effect that the control exercised by the deceased or the Fishery Board was of a very limited description. It is proved that the deceased was entitled to direct and did direct the master as to the parts of Aberdeen Bay he should trawl over, but he had truly no control, in the real sense of that term, over the master. For instance, if the master had thought that from any cause there was risk to the vessel in going where the deceased wished him to go, he had an absolute right to refuse to go, and the whole navigation and control of the ship as to steering, speed, engines, and everything else was in the master's hands as representing the defender and responsible to him. I am therefore unable to hold that it can be said in this case, as was said in others, that the defender had parted with the control of the vessel and its master and crew to the Fishery Board or its official.

[His Lordship then dealt with the question of fault, coming to the same conclusion as the Sheriff.]—11*th December* 1907.

Counsel for Pursuer, Kennedy, K.C., A. M. Mackay; Agent, D. Hill Murray, S.S.C.—Counsel for Defender, Dean of Faculty (Campbell, K.C.), Murray; Agents, Alex. Morison & Co., W.S.

J. S. M.

FIRST DIVISION.

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Brownlee v. Brownlee.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

244. **Brownlee** *v.* **Brownlee.**

I. Donation — Donation Inter Vivos — Proof — Onus — Animus Donandi — Alleged Donation of Sum of Money Instructed by Book Entries and Receipts Without Passing of Cash — Completion of Transference of Sum of Money to Possession of Alleged Donee—In Question Between Party Pleading Donation and Executor of Donor Onus of Proving Transference and Animus Donandi Held to be on Party Pleading Donation.

II. Donation — Donation Inter Vivos — Proof—Onus—Transference of Sum of Money from A to B Instructed by Book Entries and Receipts Without Passing of Cash—Onus on Donee of Proving Transference and Animus Donandi — Circumstances in Which Held, in Question With A's Executor, that Party Pleading Donation Had Failed to Discharge Onus.

III. Deposit Receipt—Endorsation—Donation Inter Vivos—Alleged Donation inter vivos of Sum of Money Instructed Only by Evidence of Documents — Onus upon Party Pleading Donation of Proving Transference of Sum and Animus Donandi — Observation per the Lord President that Peculiarity of Deposit Receipt as a Document Instructing Donation Consists in Consideration of How Far Endorsation is Equivalent to Delivery of Sum of Money Alleged to be Donated.

In this action Mrs Brownlee, the widow and executrix of Robert Brownlee, sen., sued Robert Brownlee, jun., for the sum of £2000 which she alleged the defender was due to the deceased's estate. Her material averments were to the effect that the defender had guaranteed payment of the said sum for his sister, Catherine Brownlee, the said Catherine Brownlee being under obligation to provide the said sum as part of a family transaction by which the claims for *legitim* of another daughter of the deceased were discharged. The sum of £2000 had been paid, but the pursuer alleged that the payment had been made, not out of the funds of the said Catherine Brownlee, but out of funds properly belonging to the deceased. The pursuer accordingly pled that no payment had been made by Catherine Brownlee, and that the defender was liable for payment of the sum sued for under his guarantee.

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The facts of the case are fully set forth in the judgment of the Lord Ordinary (Salvesen), *infra*. After proof, the Lord Ordinary decerned against the defender for the sum sued for, less £50 which he held had been provided by Miss Brownlee towards implement of the guarantee.

The Lord Ordinary's opinion was in these terms :—

Lord Salvesen.—The late Robert Brownlee, senr., was thrice married. By his first marriage he had one daughter, now Mrs Barr. By his second marriage he had two children, the defender and Catherine Brownlee. During the lifetime of his second wife he contracted an intimacy with Mrs Colquhoun, the pursuer in this action, who was then a widow. After the death of his second wife he continued this intimacy with Mrs Colquhoun until 1901, when he married her. The defender and his sister were much opposed to this marriage, and it was kept a secret from them, at all events from Catherine Brownlee. Although the deceased continued on affectionate relations with his wife and regularly visited her, they did not live together, but I see no reason to doubt the pursuer's statement that he would have married her much earlier but for his fear of the defender and Miss Brownlee.

The deceased was in business for many years as a timber merchant, and was so successful, that at one time he seems to have been possessed of a fortune of over £100,000. During his lifetime he distributed his means amongst his near relatives, so that at the time of his death he was absolutely without means ; and his funeral expenses have not yet been paid by any of those who benefited by his bounty. The pursuer is his executrix and universal legatory under a holograph settlement which he executed about a year before his death.

In 1891 the deceased made over to the defender a sum of £30,000, which is admitted by him to have been in large measure a gift. There is contemporaneous evidence that the deceased intended only to lend this sum to his son ; but he did not obtain any acknowledgment of the terms upon which the money was given, and the defender refused to give any such acknowledgment, maintaining that the money had been gifted to him. Some years later Catherine Brownlee received a sum of £17,000, in respect of which she granted a full discharge of her rights of legitim. She said in evidence that she told her father at the time that, notwithstanding this discharge, she would expect him to make her further payments ; and she admits having received at least £2100 worth of shares subsequently. The pursuer also from time to time obtained sums of money from the deceased ; but there is no evidence which enables me to fix the amount. The defender and his sister seem to have entertained feelings of intense animosity towards Mrs Colquhoun, so much so that Miss Brownlee admitted in the witness-box that Mrs Colquhoun was to her like a red rag to a bull, and that she could not control either her language or her actings in her presence.

In the beginning of 1904 Mrs Barr, having heard of her father's extensive alienations of his estate, thought that it was time that she too was putting in a claim for a share. She had reason to believe, from what her father had told her, that one-third of the sum of £30,000 transferred to the defender's account had been intended as a provision for her. Her father seems to have recognised the justice of her claim, and negotiations were opened between the agents of the parties, which resulted in the deceased undertaking to pay Mrs Barr a sum of £5000. A hitch occurred in the settlement, due to the fact that the deceased's only available means at that time seem to have consisted of a sum of £3000 due to him by the limited company which had taken over his business and mills. He accordingly endeavoured to withdraw from his obligation. The defender was aware that Mrs Barr claimed that a share of the money which had been transferred by his father to him had been so transferred for her behoof, and he was accordingly interested in having a settlement effected. Some negotiations followed, and finally a meeting took place on the 23rd of February 1904, at which Mrs Barr agreed, on payment to her of £5000, to discharge her right of *legitim* and all other claims which might be competent to her against the deceased, the defender, Miss Catherine Brownlee and Mrs Colquhoun, or any of them. In order to get this settlement carried through, the defender at the same time wrote and delivered the letter of guarantee which is printed on page 7 of the record. He says that before doing so he had the authority of his sister Catherine to pay over a sum of £1718, which was standing at her credit in his books, and that he took the risk of inducing her to contribute also the balance. At the time that this arrangement was made the defender's position was that he declined to contribute any funds towards a settlement with Mrs Barr out of his own pocket, although he strongly resisted a proposed arrangement between Mrs Barr and the deceased that she should accept £3000 from him, and have her claim against the defender reserved.

Mrs Barr and her agent naturally expected that the settlement would be carried out at once, but as there was some delay in doing so, Mrs Barr served an action on the deceased for payment of the £5000. Further procedure, however, was obviated by the deceased paying, on 14th March, the sum at his credit in the books of Brownlee & Co. Ltd., amounting, with interest, to £3018, 14s. 10d. About the same date the defender signed a cheque for £1718, 8s., as his sister's contribution to a settlement, but refused to make any further payment. The balance of £262 was thereupon advanced by the pursuer in order that the settlement might be carried through, and this was accordingly done. In return for the £5000 Mrs Barr delivered a discharge in terms of the letter of 23rd February 1904.

The sum of £1718, 8s. paid by the defender's cheque is said to have consisted of a sum of £1653, 8s. 6d., and interest from 24th December 1903, which at that date stood at the credit of the deceased in the books of the defender, and bore to have been paid in cash. In the same books the exact amount is credited to Miss Brownlee on the same date, and it is to this transaction that the bulk of the evidence relates.

The pursuer's case is a perfectly simple one. She sues upon the guarantee for £2000, which she found in the repositories of the deceased. She maintains that, according to its true construction, the defender guaranteed the payment by his sister Catherine out of her own funds of the sum of £2000 towards payment of the £5000 which the deceased had agreed to pay Mrs Barr, and she says that she has now discovered that no part of that sum has been contributed by Miss Brownlee. The deceased received no obligation from Miss Brownlee to pay any sum, and accordingly the pursuer now seeks to enforce the guarantee against the defender to its full amount.

On record the defender disputes his liability to make payment of any sum, his defence being that his father wrote to him to make up the balance of £262, 17s. 3d., and that, as the result of an interview between the parties, he waived all claim under the guarantee. It is not, however, now disputed that the defender cannot rely upon this alleged verbal waiver as a discharge of his obligation, and that in any event he is liable for a sum of £281, 12s., being the difference between the £2000 guaranteed and the £1718, 8s. On the other hand, the pursuer has not endeavoured to prove that the sum of £50, which was included in that remittance, was not paid out of the proper funds of Miss Brownlee, and accordingly the sole controversy between the parties now relates to the sum of £1653 already referred to. The defender's case on record is that this sum was gifted by his father to Miss Catherine Brownlee on 24th December 1903, and that accordingly, when he remitted it on 16th March thereafter, he to that extent implemented his guarantee.

On the motion of both parties, a proof was allowed *habili modo*, and parole evidence bearing on the transaction of 24th December was led without objection. The defender's counsel, however, now pleads that the documentary evidence is all that can competently be looked at, and that that evidence instructs that there was in effect an assignment by the deceased to his daughter of this sum of £1653; that either this assignment was by way of gift or was made in trust for behoof of the grantee; that in the latter case the trust can only be established by the writ or oath of the trustee; and that the pursuer's position in this process cannot be any better than if she had brought her action against Catherine Brownlee for payment of the £1653. He protested accordingly against the view that it lay upon the defender to instruct that a donation of £1653 was made to Miss Brownlee on the occasion in question. This ingenious argument, which I hope I have correctly apprehended, was supported by a reference to the case of *Dunn*, 1898, 25 R. 461.

In order to deal with this argument it is necessary to consider what are the documents founded on. They consist, in the first place, of an account current, No. 17 of process, between the deceased and the defender. It contains an entry opposite the date 24th December "to cash £1653, 8s. 6d," which squares the account, and contains a docquet signed by the deceased in these terms, "Settled this date." There is also a simple receipt, No. 18 of process, of the same date, for the same sum. These are the only documents under the hand of the deceased, and so far as they go they instruct that the account was settled by a payment in cash. It is admitted, however, that no cash passed. The defender, however, founds upon two other documents, the first a simple receipt, bearing date 24th December 1903, in favour of Miss Brownlee, for the sum of £1653, 8s. 6d., signed by himself, and a corresponding entry to her credit in his books. These four documents, taken together, he contends, are equivalent in law to a simple assignment under the hand of the deceased in favour of Miss Catherine Brownlee. If, accordingly, an action had been brought against Miss Brownlee, she would have been entitled to have pleaded the Act of 1696, and as no document has been produced qualifying the absolute character of the assignment, the pursuer's case must necessarily have failed, unless she had chosen to refer it to the oath of the trustee.

In my opinion, this argument fails on two grounds. In the first place, I do not think that the documents are to be treated as equivalent to a formal assignation by the deceased in favour of Miss Brownlee. If such a document had been subscribed, there would have been *prima facie* evidence of the authority to transfer. Here the documents unconnected by parole evidence instruct no authority. The case of *Dunn* v. *Pratt* is differentiated because the pursuer himself supplied the link that would otherwise have been required by averring that the title to the property had, by his authority, been taken in the name of the defender. In the second place, the Trust Act can, I think, only be pleaded by the alleged trustee, and not by a third party. The defender suggests that an action for the £1653, 8s. 6d. might properly have been directed against Miss Brownlee. I cannot conceive what claim the pursuer could have had against her. On the assumption that the £1653 belonged to the deceased, it has, so far as Miss Brownlee is concerned, been paid. The action against the defender is based on his own letter of guarantee that £2000 of her money should be made available for payment of the money due to Mrs Barr.

The question, however, remains whether the £1653 was, in March 1904, the property of Miss Brownlee or of the deceased. If it was Miss Brownlee's, it can only have become so by its having been gifted to her by the deceased on the 24th of December. The *onus* of proving donation is, of course, upon the defender; but I am far from saying that the evidence of the donee and of the defender, who is mainly interested in supporting the theory of donation, might not be sufficient, corroborated as it is by the receipt under the deceased's own hand, if that evidence had satisfied me that the deceased intended to make such a donation, and fully understood that he had done so. The value of the receipt as an adminicle of evidence is, however, completely destroyed by the letter No. 85 of process and the subsequent letter, the draft of which is No. 94 of process. The first of these letters is dated 19th January 1904, less than a month after the alleged gift, and followed upon an examination of the deceased's account by him in the books kept at the office of the Limited Company. It is in these terms: "Yesterday I understood you to say that my account with Mr Robert was squared, while according to your own statement of 24th December last there was at that date a balance of £1653, 8s. 6d. in my favour. Will you kindly explain by return what became of this balance, and oblige. Yours truly, Robert Brownlee." The reply to this letter, dated 20th January (No. 94), was admittedly instructed or dictated by the defender, and is a merely formal letter that the statement had been settled "as per enclosed copy receipt." To this a reply was sent asking particulars of the alleged settlement in a perfectly civil way. The defender does not think he received a letter in these terms; but I am satisfied from the evidence of Sinclair that he did, and that it made him very angry. The letter itself was destroyed and was never answered. These two letters are, to my mind, most instructive. They shew that the deceased Robert Brownlee did not know when he wrote them that he had made a gift of the money to his daughter, and what is even more important, the defender did not venture to suggest that at the time, although in evidence he puts forward a more or less circumstantial story. If he believed that his father's memory was failing him, nothing would have been easier than for him to have reminded his father of what had taken place, and of the £1653 having been transferred to his sister's name with his authority The letter of 20th January is, to my mind, most disingenuous,

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because it relies on a receipt for payment of a sum in cash which the defender well knew had never been made.

It does not avail the defender to say, as he now does, that the two letters I have referred to were written by young Colquhoun, and that his father could not have known the contents of what he was subscribing. If that were so, it would equally apply to the receipt and docquet on the account, and would destroy their value as adminicles of evidence in support of the alleged donation. But further, I am of opinion that if there was undue influence used, it was by the defender and his sister, and not by the Colquhouns; and an incident which arose later, and which depended mainly on the evidence led for the defence, illustrates this.

The defender says he received a third letter, now destroyed, from his father asking him for payment of the balance of £262, being the amount which had been supplied by Mrs Colquhoun in order to make up the £5000. The defender was admittedly due this, and even a larger sum under the guarantee; but the receipt of the letter seems to have put him into a violent temper. He at once went off to his father, and, according to Miss Brownlee, there were high words, I should imagine entirely on the defender's side, which resulted in the defender's father, an old man of 88 or 89, apologising for having made such a demand. This matter is founded upon by the defender in order to establish a verbal waiver by his father of what is now admitted to be a good claim of debt. It could obviously not be used for such a purpose with any effect, seeing that the obligation said to be verbally waived rests upon a writing preserved by the obligee; but it throws a strong light on the defender's methods of dealing with his father, and of the dominant influence which he possessed over him.

I am not overlooking the fact that at the same time as the deceased is alleged to have made the gift of money to his daughter he also executed gratuitous transfers in her favour of certain shares, and that these have not been challenged. There is no evidence, however, in this process, such as we have in the two letters before referred to, that the deceased did not know what he was doing; and the two transactions, therefore, stand upon an entirely different footing.

With regard to the parole evidence of gift, it consists almost entirely of the evidence of the defender, but slightly corroborated by his sister, for at the interview, when the gift is said to have been made, nothing seems to have been said by the deceased; but he simply signed the documents, which were already made out for his signature, without observation. The conclusion which I draw from the evidence is that the deceased knew that the money was being transferred into his daughter's name for his behoof, but that he never intended to make her a present of it; and what Miss Brownlee is reported to have said to Mrs Barr is strong confirmation of this theory. It may have been in the defender's mind that he would be able to appropriate this sum standing in his sister's name in his books towards implement of the guarantee, and that he had previously obtained her consent to his doing so; but if, as I hold, it was really the deceased's money, this will not avail the defender. Besides, I do not believe that Miss Brownlee was the kind of person who would readily have consented to give up to the Barrs so large a sum as £1653 if she really thought it belonged to herself. On the other hand, the defender was most anxious to have a settlement with the Barrs carried through, so that he might be protected against claims at their instance with regard to the £30,000—a matter in which Miss Brownlee was not concerned.

As regards the interval of time which elapsed without any challenge by the deceased, I attach very little importance to it. At his age and in the state of health in which he was, it was very unlikely that he should wish to expose himself to further altercations with his son.

On the whole matter, the conclusion which I reach is, that the defender has failed to prove the alleged donation of £1653, 8s. 6d., and that decree falls to be pronounced against him for the sum sued for, less £50 provided by Miss Brownlee towards implement of the guarantee.

The Defender *reclaimed* and *argued*: The effect of the documentary evidence was to shew a complete transference of the sum of £1653 from the deceased to Miss Brownlee: they shewed an absolute assignation to Miss Brownlee which could only be reduced on the ground of fraud, and there was no averment of fraud. It was only when the transference was incomplete that the *onus* of proving donation emerged (*M'Farlane's Trs.* v. *Miller*, 1898, 25 R. 1201). In any case the documentary evidence here shewed a title in Miss Brownlee sufficient to displace the presumption against donation, and the *onus* lay upon the respondents to disprove donation. This *onus* had not been discharged. The cases cited by the respondents dealing with the effect of possession of an endorsed deposit receipt had no application. The Court did not allow to the endorsation of deposit receipts the effect of transferring the property of the sums of money they represent, though such was the effect of the endorsation of documents of title such as bills of exchange. This was owing to exceptional circumstances arising out of the widespread custom in Scotland of banking by deposit receipt. Assuming that the *onus* of proving donation lay upon the reclaimers, this *onus* had been discharged.

Argued for the Respondent: The documentary evidence shewed no absolute transfer. Where property was transferred by the passing of document only and not by physical transference there was always room for enquiry (*Sharp* v. *Paton*, 1883, 10 R. 1000). No presumption of donation was to be drawn from mere possession of documents such as deposit receipts (*Jamieson* v. *M'Leod*, 1880, 7 R. 1131; *Crosbie's Trs.* v. *Wright*, 1880, 7 R. 823; *Dawson* v. *M'Kenzie*, 1891, 19 R. 261, p. Lord M'Laren at p. 277). To complete the evidence of transference of the property in the £1650 to Miss Brownlee, it was necessary to prove that Mr Brownlee senior had authorised this payment and that he knew that it had been made. This had not been established.

The Court *adhered*.

The Lord President.—My Lords, the facts out of which this case arose are so clearly and fully

stated by the Lord Ordinary that it would be useless for me to repeat them. The story of the gradual absorption of old Mr Brownlee's fortune by his nearest relatives is pathetic enough, and were it adequately described would seem more like the closing scenes of the life of Père Goriot, than the history of a middle-class family in Glasgow. Sympathy, however, is an ill basis for a judgment. And even were it not so I do not think there is room for any in this case. As was naïvely said in the proof by the defender, "The old man had been ground between two millstones," and what your Lordships have to decide is to which of the two millstones this, the very last piece of grist, shall stick.

The case of the pursuer is simple enough, being based on an undisputed guarantee by the defender; and the defence is simply that the sum guaranteed, with the exception of a small sum, has been already paid by Miss Brownlee. All turns on whether the sum of £1653 really belonged to old Mr Brownlee or to Miss Brownlee. That sum of £1653 admittedly first appears as a sum of money due by the defender to his father, old Mr Brownlee. Appearing in the defender's books as a credit entry in an account between the deceased and him, it is squared by a debit entry to cash of the same amount. Admittedly no cash passed. But at the same time a receipt was granted by old Mr Brownlee, and in the defender's books in an account with his sister a credit entry of the same amount is made to her; and eventually it is this sum which is paid away for the payment secured by the guarantee. In these circumstances the Lord Ordinary, treating the case as one of donation, has held that the *onus* on Miss Brownlee to prove donation has not been discharged; and that accordingly the £1653 being the property of old Mr Brownlee, no payment was made by Miss Brownlee of that sum, and the obligation in the guarantee becomes prestible.

Before your Lordships, however, the Dean of Faculty strenuously urged that there was here no necessity to prove donation because the transaction between old Mr Brownlee and Miss Brownlee was a completed one; and that the *onus* of proving donation only arose when there was no completed transference, but where the *titulus transferendi* was a document of ambiguous import, such as, for instance, an endorsed deposit-receipt; indeed, he went so far as to urge that the law on deposit-receipts formed a kind of special chapter, which could not be applied to other subjects. In my opinion, this position is unsound. I do not think there is any difference in principle between the cases of donation where the subject of the donation is money exigible as against the bank with which it is deposited in virtue of a deposit-receipt, and cases where the subject is something else. The only peculiarities of deposit-receipts consist in the consideration of how far endorsation of the deposit-receipt is equivalent to delivery of the money alleged to be donated.

The rule seems to me this. When a person is asked to give up something, be it land, corporeal moveables, or money, which he has reduced into possession, he can assume the defensive, and put the claimant to shew his title. But if in answer to the claimant he is willing or forced to admit that the something only came into his possession by donation from a person whom the claimant, whether by special or universal title, represents, then the *onus* is put upon him to prove the *animus donandi*, as well as the delivery of the thing. No doubt the fact of delivery may be evidence of the *animus donandi*:—its strength as evidence will vary with the circumstances. But none the less the *animus donandi* is a separate question, and must be proved as well as the delivery. I think this proposition is amply borne out by many cases. In particular, I would refer to the remarks of Lord Young, in *Milne* v. *Grant's Exrs.*, 1884, 11 R. 889, at p. 890. His Lordship there expresses himself thus: "Gift *inter vivos*—I quite agree that a gift of any amount of money or of any article of property may be completely made and well established by parole evidence. But it must be made. The expression of an intention to give anything—a piece of plate, or a horse—is nothing of itself; it will impose no legal obligation. But if the donation is once made, if the donee gets the money, if the donor hands the money or gift out of his own possession into that of the donee, then that he has so handed it over with the intention of bestowing it in gift is always capable of being proved by parole. But it must be handed over. The party giving must dispossess himself, put it entirely beyond his own control and his own use—and put it in possession of the party to whom he gives it. There has been a marvellous amount of difficulty manifested in the opinion of some of the decisions upon this, to me, very obvious matter. I ventured to suggest in the course of the argument that the typical case of a gift was of bread or meat or money given to a beggar—the amount is of no consequence to the legal principle. Upon considering the evidence whether it was a donation or not the beggar would easily be able to prove that a shilling was given to him; another kind of beggar would be able to prove a gift of £5. He would probably have difficulty in proving by parole alone a gift of a piece of plate, because people would not believe him that a piece of gold plate had been given to him. But the gift of a piece of gold plate is quite capable of being proved by parole. Indeed, many people who have received presents of gold plate would have no other way of proving the gift. They do not take a written deed from the donor in order that they may keep the gift."

Now in all these instances, Lord Young,

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assuming that delivery is perfected, still seeks for the proving of the gift, and says it may be proved by parole. But if the other argument was correct, the gift would be perfected by delivery, and it would be for the opposing party to cut it down. And accordingly we find many cases in which that enquiry is prosecuted, even when the delivery was quite complete, and with varying results according as the *animus donandi* was held proved or not. In the negative may be taken the case of *Sharp* v. *Paton*, 1883, 10 R. p. 1000. I refer in that case to what was said by my brother Lord M'Laren, who was the Lord Ordinary in the case, and also by Lord President Inglis. The Lord Ordinary says (p. 1004): "The property of the deposited money may be separated from the title in two ways, by the owner taking a receipt for the deposit in the name of another person, or where the receipt is in the owner's name, by the owner giving the receipt endorsed in blank to such other person, and thereby enabling him to uplift the money or get it transferred to an account in his own name. In the former case there is an actual transfer of the money into the possession of the person named in the receipt." In *Sharp's* case there had been actual transference of the money. His Lordship goes on:—"It is money at his credit in the books of the bank in a deposit account standing in his name, and the possession of the bank is his possession. In such a case evidence of intention is all that is necessary to complete the proof of donation, because the form of a transfer has been accomplished by the act of the depositor, and the agreement of the bank to accept payment into an account opened in the name of the donee." And in the same way the Lord President says (p. 1006): "The question is whether we here have such a case"—that is, where strong and unimpeachable evidence has been brought forward—"and in reference to that the Lord Ordinary makes an important distinction between the two ways in which a deposit-receipt may be transferred; in the one case by the owner taking a receipt for the deposit in the name of another person, and certainly that would be a fact going a long way to overcome the presumption against donation, and would leave nothing to be proved but the intention to make the gift." I need scarcely point out that both of these learned Lords do not think that mere transference is enough.

In the affirmative there is the case of *Thomson's Exr.* v. *Thomson*, 1882, 9 R. 911, where again the transference was complete, and where, notwithstanding, it was found necessary to go into the question of whether the intention had been made out. To the same effect is the *dictum* of Lord President Robertson in the case of *Dawson* v. *Mackenzie*, 1891, 19 R. 261 at p. 272; where he says this: "In all previous cases of this kind there has been at least some act of the deceased donor which is admitted or proved by real evidence to have taken place, and which goes so far towards donation. The money is invested in name of the donee, or the deposit-receipt is endorsed in his favour under the hand of the donor," pointing out clearly again that even transference at the instance of the donor himself is not sufficient without other proof. The defenders relied on the *dictum* of Lord Adam in *Macfarlane's Trs.* v. *Miller*, 1898, 25 R. 1201. That was a case where there was a question both upon donation *inter vivos* and donation *mortis causa*. The donation *inter vivos* had been perfected by the endorsation of a deposit-receipt which was followed up by transference of the money to the account of the donee; and the *dictum* of Lord Adam on which the defenders relied on was this. His Lordship, speaking of these deposit-receipts, says, p. 1208: "This case differs from the preceding in respect that it is not a *donatio mortis causa*, but a present donation *inter vivos*. Mrs Miller's title to these deposit-receipts appears to me to be complete." Upon that *dictum* of Lord Adam the defenders argued that it was complete simply because transference was completely made. But if the case is more narrowly looked at, I think it will be found that his Lordship does not mean that, but means that it is complete, taking the evidence as it stands as a whole. On looking back to the Lord Ordinary's judgment, which was being reviewed, the Lord Ordinary treats the matter just in the way in which I have urged that it should be treated, and says this, p. 1203: "In the case of the defender Mrs Miller, the alleged donations were not *mortis causa*, but *inter vivos*—they consisted of deposit-receipts of the National Bank which were handed to Mrs Miller, and re-deposited in her own name"—that is to say, the money was re-deposited in her own name—"accordingly the transfer of title was completed absolutely in the lifetime of Mrs Macfarlane. As to the *animus donandi* I see no reason to doubt the evidence of Mrs Miller herself, though I did not hear her examined." I think when Lord Adam says that it is made out it is quite evident he means that it is made out upon the evidence as a whole, and that in that case there was what their Lordships thought was satisfactory evidence of the *animus donandi*.

I am therefore of opinion that the Lord Ordinary was right in treating the case as one in which donation had to be proved. As to the *onus* there is the well-known *dictum* of Lord President Inglis in *Sharp* v. *Paton*, 1883, 10 R. 1000 at p. 1006, approved by Lord President Robertson in *Dawson* v. *Mackenzie*, 1891, 19 R. 261 at p. 271, that "There is a strong presumption against donation, and it requires very strong and unimpeachable evidence to overcome it." On the facts, tested by that criterion, I agree with the Lord Ordinary, and have nothing to add to what he has said.

Lords M'Laren and *Kinnear* concurred.

Lord Pearson.—The letter of guarantee on which this action is founded was granted by the defender to his father, with reference to a claim by his half-sister Mrs Barr for a sum of £5000 in discharge of her claim for legitim. It appears that the deceased was unwilling to contribute more than £3000; and it was arranged that Mrs Barr's half-sister Catherine should furnish the balance of £2000, and that a letter should be granted by the defender guaranteeing payment to his father by Catherine of that balance. The guarantee was duly signed and delivered by the defender, and was found in the father's repositories at his death. The sum of £5000 was paid over to Mrs Barr, who granted a discharge on 23rd February 1904.

It clearly appears from the evidence that this balance of £2000, though ostensibly paid out of a credit standing in name of Catherine, was, to the extent of £1653 and interest, paid out of monies which originally belonged to the father, and which in the December previous had existed in the form of a debt due by the defender to his father on account. Admittedly this was a liquid debt, presently due, and bearing interest in favour of the father; and by a series of book entries, no one of which represented the passing of cash or of securities, the defender so arranged matters that the credit, which was originally in favour of his father, found its way into another account in favour of Catherine. Thus the payment by Catherine towards the £5000 which was required for the settlement with Mrs Barr, was really made out of money or credit which had belonged to the father; and if that be the true view, the guarantee by the defender which was found in the repositories of the deceased remains unfulfilled, and the pursuer is entitled to insist for implement of it.

It is said that the documents themselves are conclusive in favour of the defender. I cannot assent to that view. There are here no documents of title properly so called; and it appears to me that the documents which do exist urgently demand explanation. The real defence here is donation; or, as it is put in Answer 4 for the defender, "that on 24th December 1903 Robert Brownlee, senior, made a gift to his daughter Catherine of a sum of £1653, 8s. 6d., which was lying in the hands of the defender at interest." It is said that this money, originally the father's, was gifted by him to his daughter in order to enable her to make the contribution towards the settlement of Mrs Barr's claim; and that the defender's letter of guarantee was thereby rendered unnecessary, and was practically discharged. In such a case I have no doubt of the competency of a proof of the facts and circumstances, in order to determine the question of donation. But it lies upon the defender to make good his position, and I think he has entirely failed to do so. On the question of the intention to make a gift the statements of the alleged donor and the alleged donee would in general be the best evidence. In this case we have only secondary evidence as to the intention of Mr Brownlee, the alleged donor, and so far as it goes it is adverse to the argument on intention. As to Catherine Brownlee, the alleged donee, her evidence conveys the impression that she knew nothing about it, except what she was told by her brother. Then as to the documents on which the defender relies, these are, to my mind, highly unsatisfactory. They include an exchange of receipts, which gives an appearance of formality to the transaction. But the exchange of receipts in such circumstances, where no monies or securities pass, may import any one of several things. There is not enough, in my opinion, to instruct the donation alleged; and whether the documents are regarded in themselves, or in the light of the parole evidence, I think the defender's case fails.

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Lord M'Laren.—I concur also with the judgment of Lord Pearson.—29*th November* 1907.

Counsel for Pursuer and Respondent, Hunter, K.C., Morison, K.C., Graham Robertson; Agents, Dove, Lockhart & Smart, S.S.C.—Counsel for Defender and Reclaimer, Dean of Faculty (*Campbell, K.C.*), *Graham Stewart, K.C., More; Agents, Davidson & Syme, W.S.* W. A. R.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

245. Aberdeen Steam Trawling and Fishing Company Limited *v.* Gill

Workmen's Compensation Act 1906 (6 Edw. VII. cap. 58), sect. 7 (2)—Member of Crew of Fishing Vessel Remunerated by Share of Profits—Mate of Trawler Remunerated by Share of Artificial Balance Struck by Deducting Certain Expenses from Whole Proceeds of Catch but Without Deducting Wages of Crew, etc.—Circumstances Where Held Mate of Trawler Remunerated by a Share of Profits or Gross Earnings and Not Entitled to Compensation.

Stated Case under Workmen's Compensation Act.

This was an appeal by way of Stated Case from a decision of the Sheriff-Substitute (Young) in the Sheriff Court at Aberdeen in an action under the Workmen's Compensation Act 1906 (6 Edw. VII. cap. 58), at the instance of William Henry Gill, trawl fisherman, Aberdeen, against the Aberdeen Steam Trawling and Fishing Co. Ltd.

The Sheriff-Substitute awarded compensation, and at the request of the Company stated a case.

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Aberdeen Steam Trawling and Fishing Co. Ltd. v. Gill.

The case stated, *inter alia*:—

The respondent is a trawl fisherman in Aberdeen, and has served as such in the employment of the appellants, intermittently, for some years. The appellants are trawl owners in Aberdeen, and are owners of the steam trawler "Strathmartin," A 899, belonging to the port of Aberdeen, in which the respondent has served as mate or first fisherman from 7th August 1907 to the date of the accident after mentioned. . . .

In the end of the year 1905 a dispute arose between the trawl owners in Aberdeen and the crews of the fishing vessels as to the rate of remuneration of the latter, and the matters in dispute were referred to the Aberdeen Conciliation Board by the Aberdeen Steam Fishing Vessels Owners Association, Limited, representing the owners, and the Port of Hull Fishermen's Protective Society and other bodies, representing the men. On 7th December 1905 the Board issued an award fixing and determining the remuneration to be paid to crews for two years, from and after 25th October 1905, to be as per the schedule annexed to the said award. The terms of the award are as follows:—

"The Aberdeen Conciliation Board hereby fix and determine that the rates and remuneration to be paid by owners to crews (including all hands) of steam trawl fishing boats, sailing from the Port of Aberdeen, for two years next ensuing after the 25th day of October 1905, are to be according to the schedule and bonus table hereto subjoined.

SCHEDULE.

"All fish (excluding livers and roes, which shall be a perquisite of the crews) shall be sold. From the gross price realised there shall be deducted: salesmen's commission at the rate of five per cent.; discount to the fish buyers at the rate of 2d. per £ on said gross price; one penny for every box used for the fish landed; the cost of all labour handling the fish till they are taken over by the buyers; all ice and coals required for the trip on which the fish were caught; all harbour, market, and water dues, the cost of watching, dan outfit, baskets, and stores. The net balance shall be divided into 14 shares, whereof:—

"The master shall be paid one and three-eighths of such shares.

"The first fisherman shall be paid one and one-eighth of such shares. . . .

"The deck hands shall be paid 5s. per day, and in addition be paid a bonus in terms of the annexed Table." . . .

Immediately after the issuing of this award, there was printed and circulated a notice giving effect to the findings of the award.

The notice also provided:

WAGES IN PORT.

When any vessel is in port cleaning boilers or under repair, and the attendance of the crew, or any of them, is required, the scale of wages shall be as follows:—

Master	6s. per day.
Engineer	6s. " "
First fisherman . . .	5s. " "
. . . . .	

The settling sheets of the "Strathmartin," from 9th August to 11th September 1907, were based on the award of the Conciliation Board, and correctly set forth the sums paid to the respondent and to the other members of the crew during the said period. The sums so paid to the respondent in respect of that period were as follows:—

For two days' harbour wages, 7th to 9th Aug.	£0	10	0
For ten days' trip ending 19th August	1	18	9
For seven days' trip ending 26th August.	2	4	3
For eight days' trip ending 3rd September	3	8	10
For eight days' trip ending 11th September	2	7	4

These sums are respectively the one and one-eighth, payable to the mate or first fisherman, of the 14 shares into which the net balance of the proceeds of the fish sold was divided, after making the deductions provided for in the said award.

On the foregoing facts I held that the respondent while in the appellants' employment as mate or first fisherman on board their trawler "Strathmartin," sustained, on 9th September 1907, personal injuries by accident arising out of, and in connection with, his employment; that in consequence of the personal injuries so sustained he was incapacitated for work, and unable to earn wages from 9th September 1907; that the amount of compensation payable under the Workmen's Compensation Act 1906 had not been ascertained by agreement between parties; that under his contract of service the respondent was not remunerated by a share or shares in the profits or the gross earnings of the working of the said trawler, but received harbour wages at five shillings a day, and for time at sea wages on a scale of which the said net balance formed the standard; that his weekly earnings during the period when he was mate or first fisherman in the appellants' employment exceeded £2 per week; that the respondent was a workman in the sense of the Workmen's Compensation Act 1906, and entitled to compensation under the Act, and that the appellants are liable to pay him compensation at the rate of £1 weekly as from 9th September 1907, and I awarded him that weekly allowance accordingly, with expenses against the appellants.

The Question of Law for the opinion of the Court was:—

Whether on a sound construction of the agreement between the appellants and the respondent, as above set forth, the respondent was at the time of the accident a member of the crew of a fishing vessel, and remunerated by a share or shares in the profits or the gross earnings of the working of such vessel, and is thereby excluded by sect. 7 (2) of the Workmen's Compensation Act 1906 from claiming compensation under said Act?

The Workmen's Compensation Act 1906, sect. 7 (2) provides:

This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel.

Argued for the Appellants: Sect. 7 (2) drew a distinction between fishermen who were paid a fixed wage and fishermen who received a share of profits. The claimant belonged to the latter

class, and was therefore excluded from the benefits of the Act.

Argued for the Respondent: The balance struck was struck for the sole purpose of fixing wages. It was not "profits," because the wages of the crew were not deducted. It was not gross earnings, because the deductions specified in the case were made. Sect. 7 (2) therefore did not apply. The case to which it truly applied was the case of a joint adventurer or partner (*Ellis* v. *Joseph Ellis & Co.* [1905], 1 K.B. 324). Here the claimant was a workman under a contract of service (Merchant Shipping Act 1894, 57 & 58 Vict. cap. 60, sect. 383).

The Court *answered* the question of law in the affirmative.

Lord Justice-Clerk.—I am clearly of opinion that the Sheriff-Substitute's decision is wrong The respondent was a first fisherman or mate on board a fishing vessel. The mode in which his remuneration was fixed was as follows. From the gross price of the fish sold after any trip the owners were entitled to deduct commission, discount, one penny for every box used for the fish, cost of ice and coals, harbour, market, and water dues, and cost of watching, dan outfit, baskets and stores, but not the wages of any of the crew. As regards the master and first fisherman, they are to receive a share of the earnings of the trip after making the deductions mentioned, the master 1⅜ths and the mate 1⅛th. The result of that is plainly this, that these two men might get nothing for a trip although they did the work. That does not look like receiving wages for their work. It was really a speculation on their part, under which they were each to get a share of a fund out of which their shares were to come if there was any such fund. It is plain that the gross earnings of the trip might not be sufficient to pay the charges which the owners are entitled to deduct before calculating the shares. In that case the master and mate would get nothing. On the other hand, if it was a splendid season and the profits earned were large, they might get a very large sum indeed. How could that be said to be wages? When stated in that simple way the case is clear. The statute provides that it "shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or gross earnings of the working of such vessel." How could the master and mate here be said not to be "remunerated by shares in the profits or the gross earnings"? It is said that under the award the wages of the crew are not deducted before calculating the amount payable to the master and mate. The only effect of that is that if the gross earnings are not more than sufficient to pay the deductions, the owners have to pay the crew out of their own pockets, and are not entitled to set the amount so paid against any future voyage.

On the whole matter I am of opinion that the Sheriff-Substitute was wrong in holding that the respondent was not remunerated by a share in the profits or the gross earnings of the trawler, and that the question should be answered in the affirmative.

Lord Low.—I am of the same opinion. The fact that the respondent got harbour wages of 5s. a day for two days has no bearing upon the question. When the accident happened the respondent was a first fisherman on board a trawler actually engaged in trawling. At that time his remuneration was determined by the award of the Aberdeen Conciliation Board. On the other hand, at the time when he was being paid harbour wages he was not engaged in trawling, and the award of the Conciliation Board did not apply. The trawler had just undergone her Board of Trade survey, and the survey having been completed, the crew were engaged preparing the fishing gear for going to sea, and it was during that time that the respondent was paid harbour wages. But after that the trawler went to sea and then the respondent's remuneration was regulated by the award of the Conciliation Board, and according to that award all that he could get was a certain share of the net balance of the gross price of the fish caught during the trip, after making certain deductions. If that is not remuneration by a share "in the profits or the gross earnings of the working" of the vessel, I do not know what is. I therefore think the Sheriff-Substitute's decision was wrong, and that the question should be answered in the affirmative.

Lord Ardwall.—I am of opinion that the question ought to be answered in the affirmative. The respondent, except when in harbour, with which time we have nothing to do in this case, was not remunerated by wages in the proper sense of the word; he was paid neither by time nor by work. His remuneration was arrived at in this way. From the gross earnings of the vessel on which he was employed, certain deductions specified in the first paragraph of the schedule quoted in the stated case were made. The gross earnings were then divided into fourteen shares, and the respondent was paid one and one-eighth of such shares, or about a twelfth share of the total gross earnings. In this state of the facts I think it clear that the respondent was remunerated by shares in the gross earnings of the working of the steam trawler "Strathmartin," on board which he was employed at the date of the accident. I cannot accept the argument that because a certain small deduction for current expenses was made from the gross earnings before dividing them into shares, these shares were not shares of the gross earnings within the meaning of the Act. It might possibly be maintained that the shares paid

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to the respondent were shares of the profits before deducting certain fixed charges, such as interest on capital, depreciation, and wages of the crew. But I think it is more appropriate to regard the respondent's remuneration as shares of the gross earnings.

On the general construction of sect. 7 (2) of the Workmen's Compensation Act 1906 I may say that in my opinion it was intended to cover by the two categories of payments there set forth all cases where the person employed was to a greater or less extent a co-adventurer or partner in the business in which he was employed.

In the present case I have no doubt that the respondent must be treated as coming under the exception enacted by sect. 7 (2) of the said Act.—14*th December* 1907.

Counsel for Appellants, Scott Dickson, K.C., Lippe; Agents, Beveridge, Sutherland & Smith, S.S.C.—Counsel for Respondent, Kennedy, K.C., Gillon; Agents, Henderson & Mackenzie, S.S.C.

J. S. M.

HOUSE OF LORDS.

(*The Lord Chancellor* (*Lord Loreburn*), *The Earl of Halsbury, Lords Macnaghten, James of Hereford, Robertson and Atkinson.*)

246. Barclay Curle & Co. Limited *v.* Sir James Laing & Sons Limited.

SALE—CONTRACT—CONSTRUCTION—PASSING OF PROPERTY—SHIP—SHIP IN COURSE OF CONSTRUCTION — PAYMENT OF PRICE BY INSTALMENTS — FIVE OUT OF SEVEN INSTALMENTS PAID—SHIP NOT DELIVERED—INTENTION OF PARTIES TO CONTRACT AS TO PASSING OF PROPERTY—SALE OF GOODS ACT 1893 (56 & 57 VICT. CAP. 71), SECTS. 17 AND 18, RULES 2 AND 5—CIRCUMSTANCES WHERE HELD PROPERTY HAD NOT PASSED.

(*Reported supra, p.* 482.)

Appeal against an Interlocutor of the First Division (*The Lord President, Lords M'Laren, Kinnear and Pearson*).

The facts of this case and the terms of the contract in question are fully set forth in the previous report.

The Respondents appealed against the interlocutor which recalled the arrestments *simpliciter*. No question was raised before the House as to the competency of the petition for recal, and the argument was directed to the question of whether the property in the ships had passed.

The Petitioners (respondents in the House) were not called upon.

The House *dismissed* the appeal with costs.

The Lord Chancellor.—It is not necessary to trouble the learned counsel for the respondents in this case, because the question is whether the property passed, and whether the parties intended by the contract that it should pass. I must say I do not know that any conclusive use can be made of a comparison with other contracts and the language that is used in regard to those other contracts in judgments. Speaking for myself I always have some misgiving when presumptions of fact—that is to say, presumptions in regard to the interpretation that is to be put upon particular words in a contract apart from their natural significance—are put forward. It may be a very useful guide to a certain degree, but after all the question is what the contract shews the parties intended to contract for. The facts referred to by Mr Clyde and Mr Smith, namely, that the ship was to be paid for by instalments, and that there was power of inspection on the part of the purchasers, may be marks or badges pointing to the property passing, but it is not conclusive, and the question still remains as to what they meant.

I think the contract was one for a completed ship, and the risk lay upon the builders until delivery, and there was no intention to make delivery or to part with the property until the vessel was completed. Under these circumstances I think the appeal ought to be dismissed.

Earl of Halsbury.—I am of the same opinion. There is no doubt that a contract might be so framed as to give the purchaser power to claim the property in those parts which, when they are put together, make the complete ship, but in each case the question must be whether or not the contract has been such, and I think this has not been so made.

I confess I follow the judgment of the learned judge in Scotland with one little exception. I think the phrase that he has used about the presumption being in favour of the builders perhaps was not sufficiently considered by him—perhaps he did not think it necessary; but if he had used a different phrase—if as a matter of proof the wood, the iron, the nails and so forth, which constituted the ship ultimately, are once the builder's and are proved to be the builder's, it does become necessary to shew that there is some contract transferring that property under the circumstances to the purchaser; and if, instead of saying there was a presumption that it belonged to the builder, and, proceeding upon the presumption, he had said that the proof was that it was the builder's property, and it became necessary to shew that the builder had divested himself of the property, and to shew that by the words of the contract it had become the property of somebody else—if he had said that, I should have entirely agreed. From the reasoning of the rest of the judgment I really do think that is what the learned judge meant. It was not a

considered judgment, I understand, and the phrase that there was a presumption that it belonged to the builder was one used in the course of the argument, and in the sense in which I have explained it I should concur with it; otherwise I should differ that there was any presumption one way or the other. The question is, What is the contract, and by that contract to whom does the property belong?

Lord Macnaghten.—I am of the same opinion.

Lord James of Hereford.—I concur.

Lord Robertson.—The question in the present appeal seems to me to be governed by the Sale of Goods Act, and by that statute to be determinable by the intention of the instrument under which the ship is built. In aid and supplement of construction the statute supplies certain rules, but these may or may not come into operation according as the contract requires it. In the present case I find the contract to require no aid or supplement from the statutory rules, for it seems to me to provide from beginning for completion of this ship by the shipbuilders with their materials, and transfers it to the purchasers only as a finished ship and at a stage not in fact yet reached. This is a simple view of the matter, but in my judgment it is the sound one. It treats the Sale of Goods Act as superseding the previous law, and if in some instance it may be found necessary to revive and reconstruct the old common law for purposes of illustration, I can only say that that occasion has not yet come.

I therefore concur in the conclusion of the Court of Session, which rests on the contract. It seems right, however, to say that this does not imply my concurrence in all that is said by way of statement of doctrine in the judgments of the learned Lords. Some of them seem open to exception, or at least criticism, but the judgments of the learned judges do not seem to have been at least minutely considered. Among matters of omission I think the fifth head of the 18th section of the Act is so directly applicable that it required perhaps more attention than it has received. But I do not require to enter on those disputable matters, as the ground of judgment which your Lordships adopt is common to us and to their Lordships of the First Division.

Lord Atkinson.—I concur.—*25th November* 1907.

Counsel for Petitioners, Scott Dickson, K.C., D. P. Fleming; Agents, H. B. & F. J. Dewar, W.S., Edinburgh; Burchells, London.—Counsel for Respondents, Clyde, K.C., F. E. Smith; Agents, Steedman, Ramage & Co., W.S., Edinburgh; Pritchard, Englefield & Co., London.

BILL CHAMBER.

(*Lord Guthrie.*)

Bill Chamber. *Lord Guthrie.*

Craig (Gorman's Factor) and Others v. The Accountant of Court.

247. Craig (Gorman's Factor) and Others *v.* The Accountant of Court.

Judicial Factor—Recal—Accounting—Factor Loco Absentis—Return of Absent Ward a Fortnight after Extract of Appointment as Factor Loco Absentis Ad Interim — Execution of Trust Deed in Favour of Factor — Administration of Estate under Trust Deed — Liability of Factor to Lodge Accounts Before Discharge.

This was a petition by James Craig, C.A., Edinburgh, Messrs A. & A. Crawford, merchants, Leith, and Mrs Agnes M'Lelland Frew or Gorman, for recal of a factory and warrant for delivery of the factor's bond of caution under the following circumstances:—

On 20th June 1906 the said James Craig was, on the petition of certain creditors and the wife of Angus Gorman, formerly licensed grocer, Edinburgh—the concurring petitioners in the present petition—appointed factor *loco absentis ad interim* to the said Angus Gorman; and found caution and extracted said appointment.

On 3rd July 1906 James Craig was appointed factor *loco absentis* to the said Angus Gorman, but this appointment was not extracted. On 5th July 1906 Angus Gorman returned home, and on the same day executed a trust deed in favour of the said James Craig. It was averred in the petition for recal that the estate of the said Angus Gorman was thereafter dealt with under the trust deed, and that the said James Craig had had no intromissions as factor foresaid with said estate.

The Accountant of Court opposed the granting of the prayer of the petition on the ground that the petitioner refused to submit his account of his intromissions with the factory estate.

The Lord Ordinary *ordained* the petitioner to lodge with the Accountant of Court an account of his intromissions as factor *loco absentis ad interim*.

Lord Guthrie.—On 20th June 1906 the petitioner was appointed factor *loco absentis ad interim* to Angus Gorman (who had carried on business previously as a licensed grocer in Edinburgh) on the petition of Gorman's wife and of certain of his creditors. The petitioner found caution, and obtained extract of his *ad interim* appointment. On 3rd July 1906 the petitioner was appointed factor *loco absentis*, but, not having found caution, this appointment did not take effect, and the petitioner's appointment as interim factor remained.

On 5th July the petitioner alleges—and it is

BILL CHAMBER. *Lord Guthrie.* — Craig (Gorman's Factor) and Others v. The Accountant of Court.

not disputed either by the original petitioners or by the petitioners' cautioner to be the fact—that Gorman returned home, and on the same date executed a trust deed in favour of the petitioner under which Gorman and the petitioner understood that Gorman's estate has since been dealt with. Expressly as factor *loco absentis*, the petitioner has had no intromissions.

On 27th October 1907 the petitioner presented the petition for recal, and in usual form his accounts were remitted to the Accountant to report. Although the factory has remained unrecalled from its commencement on 20th June 1906 until now, 10th November 1907, and although there have been intromissions by the petitioner with the estate embraced in the factory, he declines to submit his account of these intromissions to the Accountant, on the ground that they were had by him, not under the interim factory, but under the trust deed of 5th July 1906. The Accountant maintains that the petitioner having had intromissions with estate committed to his charge as an officer of Court during the subsistence of his office, must, as in a question with him and the Court, account for these intromissions in the usual way. I think the Accountant is right. The petitioner was satisfied that the person appearing on 5th July and alleging himself to be Augus Gorman was the person for whom he had been appointed factor *loco absentis*. But before he was entitled to act on this belief, and either to hand over the estate to the alleged Angus Gorman or to accept and act under a factory by him, it was necessary in a petition for recal to give the original petitioners and his own cautioner and all others interested an opportunity of stating another view. This could have been done, and recal obtained within a few days. Instead of doing so, the petitioner, naturally enough, but acting under a mistaken view of his legal position, assumed that he was entitled, at his own hand, to act as if the factory had been recalled, and to hand over the estate which he held as factor *ad interim loco absentis*, to himself as factor under the trust deed. It seems to me the case is the same as if on 5th July Gorman had called on the petitioner to hand over the estate to some other man of business whom he had appointed his factor. In such circumstances I do not doubt that the petitioner's reply would have been—and I think rightly—that he could not do so until the interim factory *loco absentis* had been recalled.

While this seems to me to have been the legal position of the petitioner, I see nothing in the circumstances to induce the Court not to insist in this case on the ordinary rule being followed. On the one hand, there is no suggestion against the perfect regularity and accuracy of the petitioner's intromissions throughout; on the other hand, no reason is given why the petition for recal should not have been presented at once, and it is not said that the petitioner will have any difficulty in lodging the accounts asked for by the Accountant. I hold that he is bound to lodge these accounts even although it be the fact that he understood and intended the intromissions therein contained to be intromissions under the trust deed, and not under the interim factory. Any other decision would encourage a looseness of practice which ought not to be allowed. The cases of *Edwards*, 1853, 15 D. 521, quoted for the petitioner, and of *Johnston* v. *Dobie*, 3rd November 1906, Session Cases 1907, p. 31, quoted for the Accountant, do not seem to me to have raised the precise question now under consideration.—*12th December* 1907.

Counsel for Petitioner, MacRobert; Agents, Crawford & Crawford, S.S.C. — Counsel for Accountant of Court, Pitman; Agent, Thomas Carmichael, S.S.C. C. H. B.

OUTER HOUSE.

(*Lord Mackenzie.*)

248. Cathcart's Trustees *v.* Cathcart.

I. PERSONAL BAR—TRUST—HELD THAT A BENEFICIARY IN LIFERENT ASSENTING TO AN INVESTMENT WAS BARRED FROM CLAIMING THE INTEREST OF A SUM PAID UP BY THE TRUSTEE TO MEET THE LOSS ON THE INVESTMENT.

II. TRUST—TRUSTEE—BREACH OF TRUST AT REQUEST OF BENEFICIARY—INDEMNIFICATION OF TRUSTEE OUT OF THE INTEREST OF THE BENEFICIARY MAKING THE REQUEST—CIRCUMSTANCES IN WHICH INDEMNIFICATION FROM THE INTEREST OF A MARRIED WOMAN WAS REFUSED—TRUSTS (SCOTLAND) AMENDMENT ACT 1891 (54 & 55 VICT. CAP. 44), SECT. 6.

(*See previous report of this case in Vol. XIV.* p. 925.)

This was an action of count, reckoning, payment, and denuding at the instance of W. P. Scott and another, the trustees on the marriage contract trust of Mr and Mrs A. T. Cathcart, against J. I. Cathcart, a brother of A. T. Cathcart, who was formerly a trustee on this trust.

Mr and Mrs A. T. Cathcart were married on 25th April 1893 in Ceylon, and the marriage-contract was executed on 21st April 1893. The purposes of the trust in the marriage contract, as to the wife's funds, were that the trustees should pay the income to Mrs Cathcart for her sole and separate use, and so that she should not have power to dispose thereof by way of anticipation, and on her death should pay the income to Mr Cathcart; and on the death of both spouses,

in trust for the children of the marriage; and failing children, in trust for Mrs Cathcart, her heirs, executors, administrators and assigns. The husband's funds were settled on the same trusts, save that if there was no issue the funds were to revert to the husband. It was also declared "that all monies liable to be invested under these presents may be invested with the consent, in writing, of" the spouses. There were no children of the marriage.

The defender and a Mr Galton were the original trustees under the contract. Mr Galton was resident in Ceylon, and on 26th November 1903 the defender resigned and the pursuers were appointed trustees by the spouses in virtue of a power reserved in the marriage contract.

The pursuers then raised the present action against the defender, and on 20th March 1907 the Lord Ordinary found that the defenders were liable to make good to the trust estate the sum of £2000 which had been lost in an investment in shares of the Kandapolla Tea Co. Ltd. (see the previous report).

Thereafter the defender lodged a Minute in which he craved the Lord Ordinary to pronounce (1) an order under sect. 6 of the Trusts (Scotland) Amendment Act 1891, ordaining the pursuers to pay the income of the trust during the life of the spouses to the defender until he was indemnified against the sum of £600 [the loss on the Kandapolla shares], and thereafter, in the event of there being no issue of the marriage, to apply the capital of the trust funds so far as necessary; and (2) an order ordaining the pursuers to pay the income of £1392, 3s. [the sum obtained on the sale of the said shares] and the said £600 to the defender until he was indemnified; and if there were no issue, to apply the capital of these sums, if necessary, to the same purpose.

The Lord Ordinary ordered that the motion should be intimated to Mr and Mrs Cathcart in order that they might sist themselves as parties to the action, if so advised. A Minute was lodged on their behalf stating that they did not propose to appear in the action.

The letter (dated 27th July 1897), in which Mr and Mrs Cathcart requested that the said investment should be made, was in the following terms:—

"Gentlemen,—We will thank you, so soon as you have received the £2000 . . . . now about to be repaid, to reinvest the same in the purchase in your names of £1000 Debenture Stock of the Kandapolla Tea Co. Ltd., and of £1000 Preference Shares of the same Company.

"Alan T. Cathcart,
Isabella G. Cathcart."

The Lord Ordinary pronounced the following interlocutor:—

"Finds that, as brought out in the State No. 483 of process, the net amount realised by the sale ordered by the interlocutor of 11th June 1907 is £1392, 3s., which has been deposited in the head office of the Royal Bank of Scotland, Edinburgh, conform to deposit receipt No. 479 of process: Grants warrant to and authorises the Accountant of Court and the said bank to pay to the pursuers the amount contained in said deposit-receipt, with interest at deposit rates from the date thereof, and that upon a certified copy of this interlocutor: Finds that the loss arising in consequence of the investment of funds belonging to the marriage-contract trust of Mr and Mrs Alan Taylor Cathcart in debenture bonds and preference shares of the Kandapolla Tea Co. Ltd. amounts, as brought out in said State No. 483 of process, to the sum of £607, 17s. of capital and £166, 13s. 6d. of income, amounting together to £774, 10s. 6d.: Decerns and ordains the defender to make payment to the pursuers of said sum of £774, 10s. 6d., with interest at five per centum per annum from 3rd July 1907: Finds and declares that in the event of the said Alan Taylor Cathcart surviving his wife and so becoming entitled to the income of the funds falling under the marriage contract, then the trustees acting under the said marriage contract shall be bound and obliged to pay, during the lifetime of the said Alan Taylor Cathcart, the income accruing upon the sum of £607, 17s. of capital to the defender, his heirs, executors and representatives whomsoever, until the defender James Taylor Cathcart shall be completely indemnified in respect of the payment by him of the said sum of £774, 10s. 6d., with interest thereon at five per cent. per annum: *Quoad ultra*, assoilzies the defender from the conclusions of the action: Finds no expenses due to or by either party, and decerns."

Lord Mackenzie. — The defender was found personally liable, by the interlocutor of 20th March 1907, to make good to the marriage-contract trust any loss arising in consequence of the investment of marriage-contract funds in debenture bonds and preference shares of the Kandapolla Tea Co. Ltd. The bonds and shares have now been realised, and the net loss of capital and income is brought out in the state No. 483 of process at £774, 10s. 6d. as at 3rd July 1907.

The defender maintains that he is only bound to repay to the trust so much of the £774, 10s. 6d. as is capital. It was stated that £166, 13s. 6d. represents outstanding interest and dividends. If this be deducted from £774, 10s. 6d. it leaves the sum of £607, 17s. representing capital. The defender maintains that he cannot be held liable to make good to the spouses any part of the annual income accrued or to accrue on the capital which he is to replace, because they are personally barred from claiming this. He founds upon the letter of 27th July 1897 printed in Cond. 10, written by the spouses to the marriage-contract

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Cathcart's Trustees v. Cathcart.

trustees asking the trustees to make the investment in the Kandapolla Tea Company. It was maintained that this letter contained a definite request, and not merely the consent of the spouses, which is by the terms of the marriage contract required to the investment of trust funds.

The defender founded upon the case of *The City of Glasgow Bank* v. *Parkhurst*, 1880, 7 R. 749, and on the passage in the Lord President's opinion at p. 754, in which it is explained that if a beneficiary knowingly and willingly assents to the commission of a breach of trust, he may be barred from making any claim against the peccant trustee. He also founded upon the case of *Raes* v. *Meek*, 1889, 16 R. (H.L.) 31, for a practical application of this doctrine. The effect of this contention of the defender would be not only to entitle him to retain so much of the £774, 10s. 6d. as represents outstanding interest and dividends, but also to have paid to him during the joint lives of the spouses the income upon the capital which he is bound to replace.

The defender, however, further maintained that this was a case where the trustee had committed a breach of trust at the instigation and request, and with the consent in writing, of a beneficiary, and that accordingly sect. 6 of the Trusts (Scotland) Amendment Act 1891 applies. If this is so, then the Court may, notwithstanding that the beneficiary is a married woman entitled for her separate use, whether she has or has not powers of disposal or alienation, make such order as shall seem just for applying all or any part of the interest of the beneficiary by way of indemnity to the trustee.

Taking first the claim under the statute, I think this could not competently be made in the present process, to which the spouses are not parties. It would involve dealing with funds which are not in Court in the present action at all. Assuming, however, that the question was raised in a competent process, I do not think this is a case in which the Court could make any order under the statute. So far as I am aware, the proper construction to be put upon sect. 6 has not been the subject of consideration in any case in Scotland. In two English cases, however, the clause in the English Act, which is in similar terms, has been construed. These are the cases of *Somerset* v. *Earl Poulett* [1894], 1 Ch. 231, and *Mara* v. *Browne* [1895], 2 Ch. 69. The view there taken was that consent to investment is one thing, consent to breach of trust is another, and that the Act was not to be construed as if the word "investment" had been used instead of "breach of trust." Therefore, in order to bring a case within the Act there must be instigation or request or consent in writing by the beneficiary to some act of omission which is itself a breach of trust, and does not merely become so by reason of want of care on the part of the trustee. This construction appears to me to be sound. Applying it to the present case, I think the facts do not entitle the defender to plead the section. The investment was of a class permitted by the marriage contract. The reason why it was a breach of trust was by reason of want of care on the part of the defender. I can find no evidence that the spouses were aware of facts which rendered what they requested by their letter of 27th July 1897 a breach of trust. The defender had the duty of determining whether the investment was a proper one or not. For these reasons I am of opinion that no order could be made under the statute.

I may further point out that under the marriage contract the income of the trust funds in question, which were contributed by the wife, is to be paid to her during her life for her sole and separate use without power of anticipation. It has always been held that in such a case it is the duty of the trustee not only to protect the married woman against others, but also against herself. The Act no doubt says that the order may be made notwithstanding that the beneficiary is a married woman entitled for her separate use, whether she has or has not powers of disposal or alienation. It must, however, be shewn that the married woman has acted for herself, and has been fully informed of the circumstances (*Sawyer* v. *Sawyer*, 28 Ch. D. 595; *Bolton* v. *Curre* [1895], 1 Ch. 544). There is nothing in Mrs A. T. Cathcart's evidence to shew that this was so in her case.

As regards the contention that the spouses should not take any benefit personally from the money which the defender has to replace, and that they are not therefore entitled to any income, whether past or future, from it, I have come to the conclusion that this is well founded as regards Mr A. T. Cathcart, but not as regards his wife. The reason why I think the wife is not barred from claiming the income (to which she is entitled during her life) is the one above stated, that the defender was there for her protection, and that it has not been shewn she acted for herself and was fully informed of the circumstances. I do not think the same consideration applies in the case of Mr A. T. Cathcart. The case which aids the defender here is not so much the one founded on of *Raes* v. *Meek*, as the English case of *Somerset* v. *Earl Poulett* (*supra, cit.*). The reason why *Raes* v. *Meek* does not seem to me so applicable is because there the spouses were trustees, here they are not. The principle upon which it was held there that they could not obtain relief was because, if there had been a violation of duty, they were as much parties to it as the defender. The importance of *Somerset's* case as regards this matter was pointed out in *Fletcher* v. *Collis* [1905], 2 Ch. 24, by Stirling, L.J., at p. 37. The result of the observations there made is to shew that where in England

a tenant for life asks a trustee to invest in a particular security, but leaves it to the trustee to make the proper enquiries, then, though an application to impound under the Act may fail, yet the tenant for life is barred by his concurrence in drawing the interest on the fund replaced by the trustee. This principle, which is just that of personal bar, should, in my opinion, be here applied in the case of Alan Taylor Cathcart. His right to draw the income does not emerge unless he survives his wife. If that event happens, then during his lifetime the income upon the capital sum replaced by the defender, £607, 17s., will be paid to him or his heirs.

I have considered the arguments submitted on the question of expenses. Although the pursuers have succeeded to a certain extent against the defender, they have caused so much unnecessary expense, by raising questions on which they were unsuccessful, that I think there should be no expenses found due to or by either party.—*23rd November* 1907.

Counsel for Pursuers, Wilson, K.C., D. Anderson; Agents, Bruce, Kerr & Burns, W.S.—Counsel for Defender, Dean of Faculty (Campbell, K.C.), Macphail; Agents, Tods, Murray & Jamieson, W.S. — Counsel for Mr and Mrs Cathcart, Haldane; Agent, J. Mullo Weir, S.S.C.

R. C. H.

OUTER HOUSE.

(*Lord Johnston.*)

249. Liquidator of R. D. Simpson Limited.

I. Company — Liquidation — Liquidator — Voluntary Winding Up Under Supervision of the Court—Duty of Liquidator Asking for Approval of Deliverance to Disclose to Court Facts Relating to a Claim Where Claim Based on Compromise—Circumstances in which Liquidator Having Failed to Do So, His Fee Reduced by Fifteen Guineas.

II. Company — Liquidation — Claim — Directors, Being Threatened with Personal Action in Addition to Claim Against Company Compromised All Claims Against Company and Themselves for £1000, Taking Assignation of Claim Against Company—Claim by Directors in Liquidation for £2000 Reduced to £1000, the Amount Paid by them in Compromise.

This was a note presented by the liquidator for authority to pay a first and final dividend, and for discharge. The facts now commented and adjudged upon, which sufficiently appear from the Lord Ordinary's Note, were brought to the notice of the Court in the report by Mr J. Scott Tait, C.A., to whom the liquidator's accounts were remitted for audit.

Outer House. *Lord Johnston.* Liquidator of R. D. Simpson Ltd.

The Lord Ordinary *held* that it was the duty of the liquidator to have brought to the notice of the Court the facts attending a claim for £2000 admitted by him, when said £2000 was a mere random sum claimed by certain directors in respect that they had settled claims against the Company and themselves for £1000 in cash. He further *reduced* said claim to £1000, and *directed* that £15, 15s. should be deducted from the liquidator's fee on account of his conduct.

Lord Johnston.—In the liquidation of R. D. Simpson Ltd. a serious question has been raised by Mr J. Scott Tait, to whom I remitted the liquidator's accounts for audit.

In the note to his report, No. 23 of process, in dealing with the deliverances pronounced by the liquidator on the claims lodged in the liquidation, Mr Tait brought specially under the notice of the Court the claim No. 82 in the liquidator's schedule of deliverances No. 12 of process.

I must say at once that Mr Tait has not gone beyond his sphere in bringing this matter to my notice, but, on the contrary, had he not done so, he would have fallen short of his duty, and would not have justified the trust which the Court places in those professional gentlemen to whom it remits liquidator's accounts for audit. The Court relies upon them for the most confidential assistance in performing the judicial duty of supervising liquidation in the interest of all concerned. On the other hand, I am compelled to characterise the conduct of the liquidator as wanting in that openness which the Court looks for from the gentlemen who occupy this important position, and as conclusively proving the necessity of the Court's supervision.

The claim and deliverance is as follows:—

"82. Professor Beare, R. B. Mathie, and Andrew Scott, Edinburgh.

"Claim lodged, £2000. Claim admitted, £2000.

"The liquidator admits this claim."

This is the whole reference which the liquidator makes to this claim. He treats it as if it were a tradesman's account for goods supplied, and gives no suggestion of the nature of the claim, or of the circumstances under which he admits it to a ranking, though he does so in every other case which is not merely a claim for a trade debt.

Having so delivered himself upon this and the other claims, the liquidator on 11th September 1907 submitted a note in the liquidation for approval of his deliverances on claims, audit of his accounts, and authority to pay dividends. For ought that appeared, or that unaided I could have known, I should have found nothing to do but approve as in ordinary course deliverances on claims unobjected to, and

OUTER HOUSE. *Lord Johnston.*

Liquidator of R. D. Simpson Ltd.

it is difficult to see how any creditor should have objected to the deliverance in question, for although intimation was ordered to the creditors, they received from the liquidator no further information, and could have had no further grounds to suspect his deliverance, than had the Court. Further, when called upon to reply to the notes issued by Mr Tait with his interim report, the liquidator stated that after careful consideration he had decided that it "was in the interest of the general body of creditors" to compromise a certain large claim at the instance of Professor Beare and Messrs Mathie and Scott at £2000, "subject to the approval of the Court to be taken in the note since lodged on 11th September 1907." I take leave to say that, having regard to the terms of the Note referred to, and with which I am now dealing, this is a most misleading statement, and I can only regard the liquidator's conduct in not openly applying to the Court for approval of the compromise, which he was making in connection with this claim, and in presenting it to the Court as a mere question of approving a deliverance, as a deliberate attempt to smuggle this matter through, without the Court being made aware of the circumstances. And I should not be doing my duty in supervision of this liquidation if I passed over the matter, without taking notice of the liquidator's conduct.

The circumstances under which the claim in question arose, appear to be these: I am not exactly informed as to what the proper business of R. D. Simpson Ltd. was, but one of their lines of business was apparantly the sale of certain labour-saving machines. Amongst other machines they were selling in 1905–6 a machine for slicing sausages and the like meat goods. This proved to be a breach of the patent of Mr Van Berkel of Rotterdam, and accordingly the respondents in 1905 were subjected to an interdict at the instance of Van Berkel and the Dutch Company which were working his patent. The suspension and interdict was resisted by R. D. Simpson Ltd., and a trial took place in this Court, in which the Van Berkel patent was upheld both by Lord Dundas in the Outer House and by the First Division on Reclaiming Note, and interdict was granted. The report of the case will be found under date November 20th, 1906 (1907 S.C. 165). The case was a difficult one to try, and the trial must have been a costly one. I can readily believe that the account of judicial expenses of the successful complainers must have been a substantial one, and that of their extra-judicial expenses made even larger. On the issue of the suspension and interdict there arose a claim of damages for infringement in addition to the claim for costs under the suspension. The former would have had to be made the subject of a new action; the latter, though not entirely liquid, was capable of being immediately made so by the complainers, by having their account of expenses audited and taking decree for the taxed amount. But instead of doing either, the successful complainers entered into negotiation with R. D. Simpson Ltd.; and their claim of damages and for expenses of the suspension process was adjusted at £1000, and steps were being taken for reducing the settlement of the claim, which had been agreed on in writing, and arranging a guarantee for payment satisfactory to the complainers. This was in December 1906 and January-February 1907. But before final adjustment of the guarantee to be given, the Company found itself obliged in March 1907 to go into voluntary liquidation, when Mr C. J. Munro, C.A., was appointed liquidator. On 19th March the liquidation was placed under supervision. Van Berkel & Co. at once intimated to Professor Beare and Messrs Mathie, Scott and Simpson, the directors of R. D. Simpson Ltd., that they held them personally liable for the damage they had sustained and the costs, judicial and extra-judicial, which they had incurred in litigating with R. D. Simpson Ltd., and on 17th April 1907 they raised an action against these gentlemen, concluding for £4250, made up of £1250 of damages for infringement of patent, and £3000 of costs alleged to have been incurred in the previous suit. The record in this action was closed, but it did not proceed further, as the defenders, or at least Professor Beare and Messrs Mathie and Scott, took up the negotiation, which had become abortive on the bankruptcy of the Company, and paid the £1000 which had been originally agreed upon to Van Berkel & Co. This payment was made in full settlement of all claim of damage competent to Van Berkel and his associates in respect of the infringement of patent, and of the expenses in the action of suspension and interdict. But on making the payment the directors took from the payees an assignation in their favour as individuals of all claims of damages and rights of action of whatever kind competent to the payees against the Company. This settlement was effected on 30th June 1907, and the directors at once proceeded to formulate a claim in the liquidation. My information is largely obtained from Mr Tait's report, as no other information has been vouchsafed me, except a copy of the open record in the action at the instance of Van Berkel & Co. against the directors. I have no certain assurance, but I think there is enough to justify the assumption, that the liquidator was approached before the claim was lodged, and that the directors ascertained what amount he was prepared to pass before lodging their claim. For their claim lodged on 23rd August 1907 is for the exact amount which the liquidator a few days afterwards admitted to a ranking.

In the circumstances which I have thus shortly narrated, and which will be found much

more fully set out in Mr Tait's report and in sundry papers in the liquidation, it must, I think, be apparent that questions of some delicacy and difficulty arise, and I should have expected any liquidator to have relieved himself of responsibility by applying to the Court on a full statement for directions as to what he should do. I should have expected him to take such an attitude that, though he might have adjusted a provisional figure with the creditors claiming, he would have come to the Court for sanction, and have given the Court all the assistance in his power in the interest of the general liquidation, while leaving the creditors claiming to fight their own battle. This, however, has not been the course taken by the liquidator, and I thought it proper to require the appearance of the directors who are the creditors claiming for their interest, and having received no assistance from the liquidator, I am now obliged to consider the merits of the claim on an entirely *ex parte* argument.

In the first place, were the directors under liability to Van Berkel & Co.? This is a question which has not been tried, but the liability has been accepted. I think that there is much doubt as to the liability. Directors are agents of their company as well as trustees. Now, if by his negligence, or even his wanton act in the line of his employment, injury is done by an agent or servant to a third party, the employer is responsible for his servant's wrong, and the servant is liable for his own wrong. They may either be sued separately, or both may be sued jointly and severally. But it is not a case of joint wrongdoers, as in the case of *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (1893), 20 R. 275, and 21 R. (H.L.) 39. The employer is responsible derivatively or vicariously only, and would certainly have relief, not merely *pro rata*, but entirely, against his agent or servant, and the agent or servant no relief against his employer. But where injury has been done to a third party, by the *bona fide* error of judgment of the servant, while the employer is no doubt liable for the act of his agent or servant in his business, I think that there is a grave doubt whether the servant is liable to the third party at all. The present is an extreme example. I am not saying too much when I say that the question whether Van Berkel's patent was valid, and the Company therefore liable in breach, was a question which the Court found to be one of intricacy and difficulty, and worthy of a solemn judgment. The result of that judgment is that it must now be accepted that the directors committed an error in judgment, though a most venial one, in not treating it if they knew of it, and they must be, I think, presumed to have known of it, as valid. But would the wrong thus committed have given Van Berkel & Co. a direct action against the directors personally? I think that this is very doubtful. But assume it to be the law that they were personally liable, I am satisfied that, there being *bona fides* and no negligence, they would have been entitled to relief, not *pro rata* merely, but entirely, from the Company. For in undertaking the office of director, I think a man only undertakes to act honestly, carefully, and to the best of his judgment, and does not warrant the Company against the results of his *bona fide* error of judgment.

The directors have elected to assume their liability, and have made terms with Van Berkel & Co. But having done so, while I agree that they are entitled to relief, I am at a loss to see how they can claim from the Company in liquidation more than they could have claimed from the Company as a going concern—that is, exactly what they have paid to Van Berkel & Co. The only measure we have of the latter's claim is the sum they were willing to accept. No doubt that sum was arrived at as a compromise, first with the Company, and afterwards with the directors, but I can see no reason to assume that it was not a just estimate of the claim; and even if I thought that Van Berkel & Co. could, by pressing their claim to the bitter end, have made more of it, in the first place I have, and the liquidator had, no other measure by which to gauge it. I have no more reason for taking it at £2000 than at £3000, or at the full sum of £4250. And in the second place, whatever it was adjusted at, whether by litigation or by compromise, that sum alone could be claimed from the Company.

Suppose that the Company had remained solvent and the directors had intervened and settled with Van Berkel & Co., could they have, in the highest view of their right of relief, claimed more from the Company than they had paid? I think not, because the fiduciary capacity of the directors would have precluded them recovering more than the sum which they were out of pocket. They could not have bought up the claim as a compromise and then have enforced it to the extreme point against their Company. I do not find that liquidation makes any difference. Liquidation does not sever the tie between directors and the Company. Their functions are only suspended, while their office is, so to speak, put in commission. If the liquidation proves unnecessary and is recalled, they resume their duties *ipso facto*, without reappointment. Pending liquidation, I do not think that they are free to buy up debts against the Company so as to state them against the Company at a higher figure, any more than they were when the Company was a joint concern under their management.

For both these reasons, then, first that the sum paid by them is the only measure of the value of the claim that the Court and the liquidator can look at, and second, that the directors are barred from putting a higher value upon it as against the Company, I think that the directors must be,

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in their own interest, content to treat their claim as one for £1000 only. For that sum they have, I think, made the Company in liquidation their debtors, and for that sum, like other creditors, they can only get a ranking.

And I see no hardship in the result. They have accepted personal liability, and this they have made the law of the situation. I am prepared to give them the benefit of holding that they were not, *correi debendi*, jointly and severally liable, but only joint obligants with a right of relief, or exactly in the position of cautioners. But unfortunately for them, they are joint obligants with a right of relief along with an insolvent principal, and they must therefore face a loss. They have, I assume, wisely minimised that loss, but there is no ground for enabling them to escape that loss, either in whole or in part, by allowing them to rank for some vaguely estimated sum, different from and higher than the sum they have actually paid. I confess I have even some doubt whether I am entitled, without further enquiry, to assume that the claim against the Company was properly estimated at £1000. I know from the papers that the extra-judicial expenses in the action of suspension and interdict bulked very largely in Van Berkel and his Company's claim, and I think that there is authority for doubting whether such extra-judicial expenses are a relevant item in a claim of damages. Here, as at other points, I should have had the liquidator's assistance. On the information I have, I think, even discounting their extra-judicial expenses, there is good ground for assuming that £1000 was a fair settlement, and I shall accept it as such.

I shall therefore reduce the claimants Professor Beare and Messrs Mathie and Scott's ranking to £1000, and I feel it my duty to direct that a deduction be made from the fee to be allowed to the liquidator, which I shall modify to fifteen guineas, to mark my estimation of his conduct and cover the expense to the liquidation which his method of dealing with this question has caused. —*4th December* 1907.

Counsel for the Liquidator, Sandeman; Agents, Paterson & Gardiner, S.S.C. R. S. B.

OUTER HOUSE.

(*Lord Mackenzie.*)

250. M'Grouther's Trustees *v.* Lord Advocate and Others.

I. TRUST — UNCERTAINTY — HELD THAT A BEQUEST "FOR RELIGIOUS OR CHARITABLE PURPOSES IN CONNECTION WITH RIO JANEIRO AS TO MY TRUSTEES MAY SEEM BEST" WAS VOID FROM UNCERTAINTY—MACINTYRE V. GRIMOND'S TRS., 1905, 7 F. (H.L.) 90, FOLLOWED.

II. SUCCESSION — LEGACY — FALSA DEMONSTRATIO—HELD THAT A LEGACY TO "THE MISSION TO THE WYNDS, GLASGOW," WAS INTENDED FOR A MISSION KNOWN AS THE "WYND CHURCH," WHICH AT ONE TIME WAS CARRIED ON IN THE WYNDS, BUT BEFORE THE TESTATOR'S DEATH HAD BEEN TRANSFERRED TO ANOTHER DISTRICT OF GLASGOW.

III. SUCCESSION—RESIDUE—CONSTRUCTION OF CLAUSE PROVIDING FOR THE ABATEMENT OF, OR ADDITION FROM ANY SURPLUS TO, PECUNIARY LEGACIES.

This was a multiplepoinding brought with reference to the estate of Miss Jane M'Grouther.

Miss M'Grouther died on 26th November 1903, leaving a trust disposition and deed of settlement and deed of appointment, dated 5th June 1890, and two codicils, dated respectively 18th June 1894 and 30th November 1898.

The bequests which fell to be construed in this action are given in the Lord Ordinary's Opinion.

Besides these bequests the said trust disposition and settlement contained the following clause (being the clause dealing with residue referred to in the Lord Ordinary's opinion):—

"But declaring with reference to the whole of the foregoing pecuniary legacies and those which may hereafter be left or bequeathed by me, that in case the residue of my said estate and the estate over which I have power of appointment should not realise a clear sum sufficient to meet the same and the said duties thereon in full, then the said legacies, including those which may be hereafter left by me, shall all suffer a proportional deduction in proportion to the amount of the deficiency: And declaring that in case the residue of my said estate and the estate over which I have power of appointment should realise a sum exceeding in amount the sum sufficient to meet in full the said pecuniary legacies, and those which may be hereafter left by me, and duties thereon foresaid, then, and in that event, the said legacies, including those which may hereafter be left by me, shall all be increased in proportion to the amount by which the said residue shall exceed the amount of the said legacies and duties."

In point of fact, the deceased's estate realised more than was required for payment of the whole legacies bequeathed by her.

Lord Mackenzie.—This is an action of multiplepoinding in reference to two bequests under the trust disposition and settlement of the late Miss Jane M'Grouther, dated 5th June 1890, with two codicils, dated respectively 18th June 1894 and 30th November 1898. She died on 26th November 1903 at the age of ninety-four.

By her settlement Miss M'Grouther conveyed to trustees her whole estate, heritable and moveable, including the funds over which she

had power of appointment under the will of her deceased brother, for the purposes therein set forth, viz.: (1) for payment of her debts, etc.; and (2) for payment of a series of legacies.

Among the legacies thus bequeathed by the deceased, there occurs the following:—"To the Mission to the Wynds, Glasgow, the sum of three hundred pounds sterling." The deceased further directed her trustees, *inter alia*, "to hold and apply the sum of one thousand pounds and the interest thereof for religious or charitable purposes in connection with Rio Janeiro as to my said trustees may seem best." As regards this latter bequest, it is clear, I think, upon the authorities, that it must be held void from uncertainty. The case of *MacIntyre* v. *Grimond's Trs.*, 1904, 6 F. 285, 7 F. (H.L.) 90, is conclusive upon this point. It was argued that there was here the adjection of a local limit, and that this distinguished the present from *Grimond's* case (see *Shaw's Trs.*, 1905, 8 F. 52). I think it is impossible, however, to construe the bequest here as confined to existing organisations within a defined area, and therefore the criticisms in Lord Moncreiff's opinion in *Grimond's* case apply here.

As regards the bequest to the Mission to the Wynds, Glasgow, the parties interested agree in admitting the correctness of the statement made in the claim for the members of the Deacons' Court of, and as representing, the congregation of the Wynd Church, in connection with the United Free Church of Scotland, Glasgow. It is stated as against these claimants that there is no mission in Glasgow known as "The Mission to the Wynds." It is therefore contended that the bequest has lapsed. The facts which are admitted are that between 1854 and 1877 there was in a district of Glasgow known as the Wynds a church known as the Wynd Mission. The deceased and her father took an active interest in this. Between 1875 and 1880 there was a migration of a large part of the population of the Wynd district, owing to the demolition of property. The Free Church Presbytery of Glasgow thereupon transferred, in the year 1877, the Wynd Church, with its minister, kirk-session, deacons' court, congregation and missionary agencies to its present site in Crown Street in the south side of Glasgow. It is stated that a large number of people displaced from the Wynds migrated to this district, which was very similar in character. The new church then erected was called the Wynd Church, and the deceased continued to take an active interest in its work, which embraced missionary work in the original locality. A letter is produced, No. 12 of process, dated 9th January 1889, which is of great importance. It was written by the deceased, and is addressed to the Rev. John Riddell, the minister of the Wynd Church, enclosing the sum of £10, with kindest and best wishes for "The Wynd Mission." This letter, it will be observed, was dated the year before her trust disposition and settlement. In a letter dated 6th September 1889, No. 13 of process, also addressed to Mr Riddell, the deceased along with her late sister sent a further sum of £5 as a contribution to the opening collection of the New Wynd Church. In the early part of 1890 the deceased called on Mr Riddell and made personal inquiries with regard to the working and success of the new Wynd Church. On 20th July 1895 she enclosed to him the sum of £2 towards a new manse.

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These facts are quite sufficient to satisfy me of the identity of the claimants. There are now no competing claimants who say they represent the original Mission to the Wynds. I am therefore of opinion that their claim should be sustained.

The question next arises, What is to become of the lapsed legacy of £1000 above referred to? It is contended, on the one hand, that its amount must go in terms of the will to increase the amount of the specific pecuniary legacies. It is contended, on the other hand, that it falls into intestacy, and it is claimed by the Crown as *ultimus hæres*. The answer to this question depends upon the construction put upon the clause which is printed in Condescendence 6. If this is to be read as a proper residue clause, then I think the amount of any specific pecuniary bequest which failed from whatever cause would fall under its operation. I am of opinion that it should be construed as a proper residue clause. The matter may be tested with reference to a pecuniary bequest to an individual. I see there is a bequest by the deceased to her coachman of £200. Suppose the coachman had predeceased the testatrix, is it to be supposed that she, in that event, contemplated that the legacy would fall into intestacy? Yet that would be one of "the said pecuniary legacies" referred to in the clause in question. In the case of this specific bequest failing owing to predecease the amount would, I think, just be residue which would go to increase the amount of the other legacies. In the same way I am of opinion the Rio Janeiro legacy of £1000 which has lapsed because it is void from uncertainty, falls in the same way to be dealt with as part of the residue of the estate and distributed in the same manner. What has lapsed is not a share of residue but a specific bequest.

I am accordingly of opinion: (1) That those representing the Wynd Church should be ranked and preferred in terms of their claim; (2) that it should be found that the bequest of £1000 for chatitable or religious purposes connected with Rio Janeiro is void from uncertainty and should be divided among those entitled to the pecuniary legacies in proportion to the amounts of their respective legacies.—12*th December* 1907.

Counsel for the Claimants, Constable, Macmillan, Cowan, Spens, Black, Findlay, A. M. Stewart; Agents, Clark & Macdonald, S.S.C., Simpson & Lawson, W.S., W. & J. Cook, W.S., Macpherson & Mackay, S.S.C., James Marchbank, S.S.C., J. Ferguson Reekie. R. C. H.

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251. *FIRST DIVISION.*

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

Mackay *v.* Rosie.

Workmen's Compensation — Workman's Option—Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 1, subsect. 2 (B) — Parties Dealing on Equal Terms — Acceptance of Payments Practically Equal in Amount to what Act Would Have Allowed — Circumstances in which Held That Workman Had Elected to Take Rights Under Act.

Reclaiming Note against an Interlocutor of Lord Johnston.

(*Reported supra, p.* 416.)

The Pursuer *reclaimed* and *argued*: The Lord Ordinary was wrong in holding that the pursuer was now barred from suing for his remedy at common law. What had to be proved against him to establish bar was that he had finally and irrevocably exercised his option in choosing compensation under the Act. This had not been proved. There was no proof of any agreement between the parties, and the receipts founded on only constituted *prima facie* evidence of election (*Little*, 1900, 2 F. 387; *Fowler*, 1903, 5 F. 394; *Valenti*, 1907, S.C. 695), and this evidence might be rebutted by other facts and circumstances of the case. Such facts and circumstances were brought out in the proof. The number of payments and of receipts were immaterial when the agreement was in dispute.

Argued for Respondent: It must be held that the workman had elected to receive compensation under the Act. The essential feature was the payment and acceptance of money (sect. 1) upon one or other footing—this was the strongest evidence of election. Evidence of the making of a claim was of minor importance. Granted that the making or unsuccessful prosecution of a claim was not a bar to an action at common law (*M'Donald* v. *Dunlop & Co.*, 1900, 7 F. 533; *Rouse* v. *Dickson* [1904], 2 K.B. 628), things had been carried further here by the making and acceptance of a series of payments. It had been held in England that such a course of payments may excuse the workman from making a claim within six months (*Wright* v. *Bagnall* [1900], 2 Q.B. 240). A claim for compensation need not be formally made (*Powell* v. *Main Colliery Co.* [1900], Ap. Cas. 366). All that it was necessary for the reclaimer to prove was that the payments had been made and accepted on the footing that they were under the Act. It was not necessary to prove in the respondent knowledge of the exclusion of another possible remedy, or of the nature of that remedy in law, or the extent of its value in money. The latter proposition resulted from the principle of *ignorantia juris*. The case of *Little* was precisely in point. In the case of *Fowler* only one receipt had been granted, but the opinion was expressed that a series of receipts would raise an inference other to that drawn in that case (per Lord Young, at p. 399). The case of *Valenti* was peculiar, and in the judgment in that case care was taken to exclude a case such as the present from the scope of its authority (per Lord Low, at p. 700).

The Court *adhered* to the interlocutor reclaimed against.

The Lord President.—My Lords, this is an action at the instance of a workman against his employers for damages at common law in respect of an injury which he received while working in their employment.

The preliminary answer is made that the workman has accepted compensation under the Workmen's Compensation Act, and that under the provisions of sect. 1, subsect. 2 (*b*), he cannot now claim at common law. The Lord Ordinary has given effect to that contention, and dismissed the action.

The facts on which this plea is based are that for a long period a sum of 18s. a week was admittedly paid to the pursuer and accepted. Parties, however, are not at one as to the footing on which these payments were made and received. The case so far differs from those of *Valenti*, 1907, S.C. 695; *Fowler*, 1903, 5 F. 394; and *Little*, 1900, 2 F. 387, which were cited to us, in that there is here no written receipt, and indeed no writing at all to which appeal can be made. I am of opinion, however, that the fact of there being no written receipt is by no means conclusive. After all, a receipt is no more than a piece of evidence, and though a receipt bearing to be in respect of sums paid under the Workmen's Compensation Act would be very difficult to get over, it is of value as an item of evidence and nothing else.

But I think the question before us is a question of fact, and fact alone. The Lord Ordinary, who saw the witnesses and considered the whole circumstances, has found that the pursuer accepted the payments as compensation under the Workmen's Compensation Act, and I am not prepared to disagree with his determination. I do not propose to say more, because I look on this case as raising solely a question of fact. I am content to say that I agree with the Lord Ordinary's view that the payments in question were made and accepted as compensation under the Act.

Lord M'Laren.—I have come to the same conclusion. I think it must be taken as matter of common knowledge among persons in the class of life of the pursuer that a claim of damages founded on fault is a claim for a single payment. It follows, I think, that when a

person having such a claim has accepted weekly payments for many weeks—unless he has taken them as charity, and there is no suggestion of that here—he may be presumed to have accepted these as payments under the Workmen's Compensation Act, the only law which creates an obligation to make compensation by means of weekly payments. Very clear evidence would be required to displace that presumption, and I fail to see anything in the evidence here antagonistic to the plain inference that follows the acceptance of weekly payments.

Lord Kinnear.—I agree with your Lordship in the chair.

Lord Pearson.—I also agree.—21*st November* 1907.

Counsel for Pursuer, A. M. Anderson, Hendry; Agent, John S. Morton, W.S.—Counsel for Defender, Solicitor-General (Ure, K.C.), Constable; Agents, Simpson & Marwick, W.S.

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FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

252. Tudor Accumulator Company Limited *v.* Scott Stirling & Company Limited.

COMPANY — LIQUIDATION — PETITION BY CREDITOR FOR COMPULSORY WINDING UP BY COURT—COMPETING PETITION BY COMPANY FOR VOLUNTARY WINDING UP UNDER SUPERVISION —CLAIM OF PETITIONING CREDITOR SETTLED AND PETITION DEPARTED FROM—APPLICATION BY ANOTHER CREDITOR TO BE SISTED AS PETITIONER TO INSIST ON PETITION FOR COMPULSORY WINDING UP GRANTED.

Note in the Liquidation of Scott Stirling & Co. Ltd.

A petition under the Companies Acts for the winding up by the Court of Scott Stirling & Co. Ltd. was presented by Hudson & Cairns Ltd., creditors of the Company. The Company subsequently passed a resolution for voluntary liquidation, and applied to the Court for a supervision order.

This Note was presented by the Tudor Accumulator Co. Ltd., also creditors of the Company, in which they set forth that an arrangement had been come to between the Company and Hudson & Cairns Ltd. under which the latter had discharged the debts due to them by the Company, and that Hudson & Cairns Ltd. did not intend to proceed in their petition. The Tudor Accumlator Co. accordingly prayed to be sisted as petitioners along with or in place of the said Hudson & Cairns Ltd., to insist in the said petition for compulsory winding up. Answers were lodged for the Company, in which they submitted, *inter alia*, that the note was not competent.

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Counsel for the Tudor Co. *argued* that the sist craved in the note was competent, and referred to the analogy of proceedings under the Bankruptcy Acts, and to the Rule of Court in England, General Rules March 1893, which provided for such a proceeding (Buckley, p. 972).

The Company did not oppose the application, which the Court *granted.*—19*th December* 1907.

Counsel for the Company, Sandeman; Agents, Deas & Co., W.S. — Counsel for the Tudor Accumulator Co., C. S. Dickson, K.C., Macmillan; Agents, Mackenzie, Innes & Logan, W.S.

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FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

253. Logan *v.* M'Rostie.

TRUST—TRUSTEE — TITLE TO SUE—TRUST DEED FOR BEHOOF OF CREDITORS IN FAVOUR OF TWO TRUSTEES WITHOUT SURVIVORSHIP CLAUSE—ACTION BY SOLE SURVIVING TRUSTEE FOR RECOVERY OF DEBT DUE TO TRUSTEE—TITLE TO SUE UPHELD—TRUSTS (SCOTLAND) ACT 1861 (24 & 25 VICT. CAP. 84), SECT. 1—TRUSTS (SCOTLAND) ACT 1867 (30 & 31 VICT. CAP. 97), SECT. 12—TRUSTS (SCOTLAND) AMENDMENT ACT 1884 (47 & 48 VICT. CAP. 63), SECTS. 1 AND 2.

Appeal from the Sheriff Court of Perthshire.

Archibald Clark, a grazier and hogg merchant, being in embarrassed circumstances, granted a trust deed for behoof of his creditors in favour of Thomas Logan, the pursuer, and of a certain Mr Davidson, both being solicitors in Perth. The terms of the trust deed, so far as involving the present decision, are summarised in the Sheriff-Substitute's note *infra*. Mr Davidson died, and the pursuer, the sole surviving trustee, with the consent and concurrence of Clark, raised this action for the recovery of certain sums alleged to be due by the defender to Clark, under a contract for the wintering of some hoggs.

The defender pleaded, *inter alia*: "No title to sue."

The Sheriff-Substitute (Sym) sustained this plea. The note to his interlocutor is in these terms:—

Archibald Clark, a grazier, whose affairs had become embarrassed, granted a trust deed on behoof of creditors to and in favour of Thomas Logan and W. S. Davidson. The deed, which is a printed form,

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intended for the appointment of a single trustee, has been in part, but only in part, altered, so as to suit the case of two trustees, and after the nomination of the two trustees it bears and "to his assignees." It is unnecessary to go over the clauses, which are in the usual form, but it may be mentioned that by a marginal addition power is given to the trustees to apply for sequestration on the grantor's estate.

Now Mr Davidson died before the institution of this action, which has been brought by Mr Logan as trustee on the trust estate with the consent and concurrence of Clark, the debtor, against a Mr M'Rostie, as being indebted to Clark for the cost of wintering certain hoggs. The plea in law under consideration raises the question whether there is survivorship under such a conveyance. It is the common practice in trusts for creditors to appoint a single trustee. Where more than one is to be appointed, the Juridical Styles suggest that the disposition is to be "to B and C, and the survivor of them, whom failing to such person or persons as shall be appointed in manner after mentioned," etc. (See also Wood's Lectures, p. 381.) But of course this is a prudent style only, and does not settle the question whether the conveyance is joint in the strict sense or whether survivorship is implied. In the case of *Dawson* v. *Stirton*, 1863, 2 M. 196, the conveyance was to and in favour of Andrew Stirton and Alexander Duncan as trustees for creditors, and one of them having died, Lord Justice-Clerk Inglis remarked with regard to the other, that "the character of surviving trustee for behoof of creditors is not created by that deed at all. The trust created is a joint trust to Duncan and Stirton, and the moment that one of them dies the trust is absolutely at an end." This opinion has been criticised, and doubt has been thrown upon it on the ground that the authorities on the subject had not been quoted to the Court, and it has been suggested that if they had been so quoted, the Lord Justice-Clerk would not have held the appointment to be strictly joint, and therefore to have fallen by the death of one. The Sheriff-Substitute has examined the authorities, referring to some which are not quoted on either side, and is of opinion that that great lawyer did not fall into any misapprehension, and that, had the authorities been quoted, he would have said that there is a distinction between the case of a trust deed *inter vivos* and the case of a trust deed of a testamentary kind in this matter. Some such differences are, of course, easily pointed out, and do not at first sight strike the mind as being important. But if the institutional writers and authorities from the time of Lord Stair, and including Erskine and Bell, as well as sundry decisions, be studied, it will be found that in a testamentary trust it has always been held that a nomination will not be regarded as simply joint unless that be expressed. That is for the reason which Lord Stair explains in the passage I. 12, 13. And on the other hand, where that reason does not exist, words which import a joint nomination are so read without it being thought necessary to import an implication of survivorship. The principle of the decisions which have held that survivorship is to be implied in testamentary trusts is well seen in the short report of the case of *Findlay*, 1855, 17 D. 1014.

The Sheriff-Substitute is therefore prepared to follow the *dictum* in the case of *Dawson* v. *Stirton*. It gives the natural legal meaning to the language employed, which imports that the trust is confided to the two persons nominated, and not to one of them alone. The theory, of course, is that the truster would not have put his affairs under the control of one of them only, but intended those acts only to be valid which were done by both. It is unnecessary, and may even be inexpedient, to seek to exhaust the reasons for this, but in illustration it may be said that it may very well be that the truster, or the creditors or some of the creditors, may have had strong reasons for stipulating that the management of the insolvent estate should rest with two persons and have the force of their decision.

It is suggested that, even if the trust have fallen by the death of one trustee, the difficulty is cured because Clark, the debtor and truster, has still the radical right in his estate, and this action is brought with his concurrence. It is thought that this does not get over the difficulty. It was shrewdly remarked by Mr Campbell that on this theory Clark ought to be the pursuer, and that he might have taken Mr Logan with him as consenter for what his consent is worth, but that it will not do to make Mr Logan as trustee for creditors the pursuer of the action (*Hislop*, 1881 8 R. (H.L.) 95).

The pursuer *appealed* to the Sheriff.

The argument to the Sheriff and also that to the Inner House appears sufficiently from the judgments which follow.

The following provisions of the Trusts Acts were referred to in argument:—

Trusts (Scotland) Act 1861, sect. 1.—All trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated shall be held to include the following provisions, unless the contrary be expressed; that is to say, power to any trustee so nominated to resign office of trustee; power to such trustee if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees; . . . .

Trusts (Scotland) Act 1867, sect. 12.—When trustees cannot be assumed under any trust deed, or when any person who is the sole trustee acting under any such trust deed has become insane, or incapable of acting by reason of physical or mental disability, the Court may, upon the application of any party having interest in the trust estate . . . . appoint a trustee or trustees under such trust deed . . . .

Trusts (Scotland) Amendment Act 1884, sect. 2.—"Trust" shall mean and include any trust constituted by any deed or other writing, or by private or local Act of Parliament, or by resolution of any corporation or public or ecclesiastical body, and the appointment of any tutor, curator or judicial factor by deed, decree or otherwise.

The Sheriff (Johnston) affirmed the Sheriff-Substitute's interlocutor.

Note.—I reach with reluctance the same conclusion as the Sheriff-Substitute upon the case at common law. The *dicta* in the case of *Dawson* v. *Stirton*, 1863, 2 M. 196, have been quoted for forty years as establishing the proposition that a nomination of trustees in a trust deed for creditors is joint, and that the appointment falls when one of the trustees fails, and I think that these *dicta* are binding in the Sheriff Court. There is force in the pursuer's contention that if the powers to assume new trustees and act by a quorum contained in sect. 1 of the Trusts Act of 1861 be read into this trust deed, this displaces the rule, because the rule being based upon presumed intention, the conferring of such powers may reasonably be held to

shift the presumption as being indicative that it was not regarded as vital that the trust should be administered by both the two trustees named and by nobody else. I doubt, however, whether it is warrantable in the Sheriff Court to treat a well-established rule of law as displaced by such an implication. Further, it is doubtful whether sect. 1 of the Act of 1861 applies to such a trust as the present. The matter has been treated as an open one by more than one commentator. It seems to stand thus—the Act of 1867 deals with trusts generally, without specifying that its application is limited to trusts where the trustees act gratuitously. In the case of *Mackenzie*, 1872, 10 M. 749, it was held (apparently with some difficulty) that the Act is so limited owing to its relationship to the Act of 1861. The Act of 1884 defines trusts for the purposes of the Trusts Acts generally, and it makes the word "trustee" to include certain officers who do not act gratuitously. It provides, further, that the Trusts Acts 1861 to 1884 are to be read as one Act. Now in the case of the *Royal Bank*, 1893, 20 R. 741, it was held that this is sufficient to get rid of the inferential limitation to gratuitous trusts in the Act of 1867 when that Act speaks of trustees and trusts without qualification. But sect. 1 of the Act of 1861 deals specifically with "trusts under which gratuitous trustees are nominated." It is not clear that reading into the Act of 1861 the definition of a trust in the Act of 1887, it becomes necessary to read the words "under which gratuitous trustees are nominated" out of the Act of 1861. The question is a narrow one which might be decided either way without obvious error.

The present case stands thus. There is a judgment of the Sheriff-Substitute, the affirmance of which enables the pursuer to take the case to the Court of Session without the expense of further procedure, and does not deprive the interest which he represents of another remedy if he does not think fit to take that course. On the other hand, a reversal of the Sheriff-Substitute's judgment infers (1) the disturbance of a hitherto recognised rule of law upon the strength of inferential deductions from statutory provisions not framed with any direct reference to that rule; (2) the decision in pursuer's favour of what has hitherto been regarded as a narrow question of statutory construction as to the intended application of the Act of 1861; (3) the probability of further procedure and a proof in the Sheriff Court which may be rendered nugatory by a decision of the Court of Session that the pursuer has no title to sue.

In these circumstances I conceive it to be my duty to affirm the Sheriff-Substitute's interlocutor, not being clearly satisfied that the result at which he has arrived is erroneous in law.

The pursuer appealed to the Court of Session.

The Court *sustained* the appeal and remitted the cause to the Sheriff Court for further procedure.

The Lord President.—I think that this case is exceedingly clear on the statute, although there is a difficult point that might arise at common law which, however, we are not called upon to decide. The facts are that a certain gentleman granted a trust deed for behoof of his creditors in which he appointed two trustees, but there was no survivorship clause in the trust deed. One of these trustees has died, and the other trustee, with the consent of the truster, now sues for a debt due to the truster. The plea taken by the defender is the plea of no title to sue, and that plea has been upheld by the Sheriff-Substitute, and affirmed, though with obvious hesitation and dislike, by the Sheriff, on the ground that where a trust for behoof of creditors is created in favour of joint trustees and one of them dies, the trust thereupon falls. At common law that situation presents a very difficult question, but I think upon the statutes it is clear. By the Act of 1861 undoubtedly a title was given to a trustee in this position, but that Act was limited by the expression in the first section to those classes of trust deeds under which gratuitous trustees were appointed. Then came the Act of 1867, and the Act of 1867 probably, in the eyes of its authors, was really meant to extend the scope of the beneficial legislation of 1861 to trusts of a wider class, but unfortunately there was a very slovenly definition clause which one cannot help thinking had not the effect which its authors wished. Among the clauses of the Act of 1867 was a certain clause 12, which provided that when any trustees cannot be assumed under any trust deed application should be made to the Court. Now, shortly after that a case was brought in this Court—the case of *Mackenzie*, 1872, 10 Macph. 749—where application was made under that section in the case of a trust where the trustees were not gratuitous. The Court there held that although the word trust in sect. 12 was unqualified in that section, yet it was qualified when you took the two statutes of 1861 and 1867 together, and that consequently the application could not be granted. The plain meaning of that was that upon the true construction of sect. 12 of the Act of 1867 you really had to read "trust" as if it repeated the qualification of "trust" given in the Act of 1861—namely, not all trusts, but only trusts such as are constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated. Then came the Act of 1884, and in the Act of 1884 there was a definition of "trust" in a much wider sense. There was a provision that all Trust Acts should be read together, and there was not repeated the bungle that had been committed in the Act of 1867. Accordingly, shortly after the Act of 1884, there came the case of the *Royal Bank*, 1893, 20 R. 741. The *Royal Bank* case exactly repeated the application which had been made in the *Mackenzie* case, but with an entirely opposite result, because the Court in that case held that the Act of 1884 succeeded in enacting what the Act of 1867 did not; in other words, the Act of 1884 by means of its general definition read back the word "trust" in the general sense, and took away the qualification of the Act of 1861. That seems to me to settle the matter,

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because if that qualification is read out, then we have the permissive provision of sect. 1 of the Act of 1861 applied, not to trusts qualified as they were qualified in that section by the words which I have read, but to trusts amplified by the larger definition of the Act of 1884. Accordingly I think that that ends the matter. I am therefore for allowing the appeal and remitting the case to proceed upon the merits.

Lord Kinnear.—I agree. I think the case of the *Royal Bank* is directly in point.

Lords M'Laren and *Pearson* concurred.—22*nd November* 1907.

Counsel for Pursuer, Morison, K.C., Macdonald; Agents, P. Morison & Son, S.S.C.—Counsel for Defender, Chree; Agents, Dove, Lockhart & Smart, S.S.C. W. A. R.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

254. Govan *v.* J. & W. M'Killop.

PROCESS—PROOF OR JURY TRIAL—REPARATION—ACTION OF DAMAGES FOR DEATH OF HUSBAND—DEATH ALLEGED TO RESULT FROM PTOMAINE POISONING CONTRACTED THROUGH FOOD SUPPLIED IN RESTAURANT—ACTION LAID ON (A) BREACH OF CONTRACT BETWEEN PURSUERS AND DEFENDERS, AND (B) FAULT OF DEFENDERS—SALE OF GOODS ACT 1893 (56 & 57 VICT. CAP. 71), SECT. 14 (1)—ISSUES APPROVED BY LORD ORDINARY—DISCRETION OF LORD ORDINARY—PROOF BEFORE ANSWER ALLOWED.

Reclaiming Note against Interlocutor of Lord Salvesen.

(*Reported supra*, p. 510.)

This was an action brought by Mrs Edith Worton or Govan, Normanhurst, Helensburgh, against J. & W. M'Killop, restaurateurs, Grosvenor Restaurant, Glasgow, for damages for the death of her husband, which the pursuer averred resulted from ptomaine poisoning, caused by his partaking of soup supplied to him in the defenders' restaurant. The averments of the pursuer and the statutory enactments referred to sufficiently appear from the previous report.

On 14th November 1907 the Lord Ordinary (Salvesen) approved of two issues for the trial of the cause. The terms of the issues are given in the previous report. For the purposes of the present report it is sufficient to state that the first issue was laid on breach of a contract for the supply of food between the pursuer's husband and the defenders, and the second was laid on the fault of the defenders.

The Defender *reclaimed* and *argued*: The contract averred was a contract between the pursuer's husband and the defenders. The only damage averred had been sustained, not by the pursuer but by her husband. The pursuer, therefore, was not entitled to sue for damages for breach of a contract to which she was not a party (*Greenhorn* v. *Addie*, 1855, 17 D. 860; *Eisten* v. *North British Railway Co.*, 1870, 8 M. 980). Further, the contract was not a contract of sale (Sale of Goods Act 1893, 56 & 57 Vict. cap. 71, sect. 1), and sect. 14 (1) of the Sale of Goods Act did not apply. The contract was truly a contract of board, where there was no implied warranty. Accordingly, the first issue, being laid solely on contract, should be disallowed. Alternatively, if the question of breach of contract were to be left open, the case was not suitable for jury trial, and a proof before answer should be allowed (*Stocks* v. *Holstein*, 1907, 15 S.L.T. 339).

Argued for Pursuer: The contract averred was a sale. There was an order for specific goods and a fixed price. There was therefore an implied warranty under sect. 14 (1) of the Sale of Goods Act (*Wallis* v. *Russell* [1902], 2 I.R. 585; *Frost* v. *Aylesbury Dairy Co. Ltd.* [1905], 1. K.B. 608). Alternatively, there was a contract for the supply of soup, and an implied warranty that the soup should be fit for consumption. The pursuer was entitled to found on the contract. The case ought to be sent to a jury. The second issue plainly raised a case appropriated to jury trial, and cases of breach of contract were suitable for jury trial where the breach resulted in personal injury or where the damage was of indefinite amount (*Willison* v. *Petherbridge*, 1893, 20 R. 976; *Johnston* v. *Hughan*, 1894, 21 R. 777). The Lord Ordinary's discretion should not be interfered with (*Edinburgh Railway Access and Property Co.* v. *John Ritchie & Co.*, 1903, 5 F. 299).

The Court *recalled* the interlocutor of the Lord Ordinary, and (*diss.* Lord Ardwall) allowed a proof before answer, and found the expenses of the appeal to be expenses in the cause.

The Lord Justice-Clerk.—This case is a very peculiar one, in respect that the pursuer, being the widow of a gentleman who is said to have died of ptomaine poisoning, sues on two grounds: first, breach of contract, in respect that the defenders being public caterers, supplied the deceased under a contract for supply of food with an article not fit for human food and thus not fulfilling the contract, and thereby caused his death by poisoning. Upon this ground, based solely on contract, she has asked and obtained from the Lord Ordinary an issue. Further, she maintains that the defenders were guilty of culpable negligence in supplying poisonous food, and she has obtained a second issue in ordinary form on the ground of fault.

A very powerful argument was addressed to the Court against the allowance of the first issue, and I confess it impressed me strongly; and if it were necessary at this stage absolutely to decide upon that part of the case by refusing or allowing an issue, I should find the obstacles to allowing such an issue to be very formidable.

But the case being very exceptional, it is a question whether it is not a case as to which the Court should exercise their discretion by allowing a proof before answer upon the whole case, and the defenders saying that they assent to that course, I am in favour of taking it. I keep quite in view the generally accepted rule that the discretion of the Lord Ordinary as to the mode of proof shall not be interfered with. But that rule is a general rule only, and is not to be pressed in the direction of absolute exclusion of the discretion of the Inner House. This seems to me to be a case where our discretion should be exercised, and I move your Lordships to recal the Lord Ordinary's interlocutor to allow a proof before answer, and to remit to the Lord Ordinary to proceed.

Lords Stormonth-Darling and *Low* concurred.

Lord Ardwall.—I have the misfortune to differ from your Lordships as to the procedure which ought to be adopted in this case.

This is an action brought by Mrs Edith Worton or Govan, widow of Alexander Govan, for damages in respect of his death, which she alleges was caused by his partaking of poisonous lobster soup supplied to him by the defenders at the Grosvenor Restaurant in Glasgow. It is not brought by her as executrix of her husband, but simply in her personal capacity as widow of the deceased.

The action is laid upon two grounds: first, contract; and second, fault or negligence, and the Lord Ordinary has allowed two issues, the first being truly an issue laid upon breach of contract and the other an issue laid upon fault.

The pursuer alleges that the supplying of soup to the deceased in return for a price was a contract for sale of a corporeal moveable within the meaning of the Sale of Goods Act 1893, and that under sect. 14 (1) of that Act the defenders must be held to have warranted the supply of soup to be fit for consumption as food, and that it not having been so they were in breach of the warranty implied by that section. Alternatively the pursuer submitted in argument, though there seems to be no foundation for it on record, that assuming the contract between the pursuer's husband and the defenders not having been one of sale, it was one of which it was an implied condition that the food supplied by the defenders should be good and wholesome food.

If it were necessary to enter on the question whether the contract alleged was a sale of goods within the meaning of the said Act or was a contract of some other description, I am of opinion that it would be necessary to have a proof on the whole facts relating to the alleged contract to enable the Court to determine whether it was or was not truly a contract for the sale of goods, and that such proof would require to be a proof before answer before a judge.

But it was pleaded for the defenders in support of their first plea in law that there are no averments on record relevant to support the action upon contract at the pursuer's instance, because it is not alleged that the pursuer is the person who entered into the contract with the defenders for the purchase of the plate of soup in question, or that she had any *jus quæsitum* in such contract, and that accordingly there is no relevant ground stated to entitle her to an issue for breach of the alleged contract.

I am of opinion that this objection to the action is well founded. It is trite law that no person is entitled to sue on a contract but one who is either a party to it or has some *jus quæsitum* under it, or has acquired right to it validly by assignation. There are two cases in which this point was recently considered by the Court—the cases of *Cameron* v. *Young*, 1907, S.C. p. 475, and *Kennedy* v. *Bruce*, 1907, S.C. 845. I may refer also to the case of *Cavalier* v. *Pope* [1906], A.C. 428, in which a wife unsuccessfully attempted to sue upon a contract entered into by her husband.

I am accordingly of opinion that so far as the action is laid upon contract the defender's first plea in law should be sustained and that the first issue granted by the Lord Ordinary should be disallowed.

I am of opinion, however, that there is a relevant averment to the effect that the death of the pursuer's husband was caused through the fault of the defenders, and that the case should be sent to trial by a jury upon that issue. I think, however, that if the case were to be sent to a jury the second issue would require amendment. It is unnecessary for me, however, to enter on this in view of the course your Lordships propose should be followed. I think this is an action well suited for the determination of a jury, and that there is no good reason for not now getting rid of a part of the case which is plainly irrelevant.—*20th December* 1907.

Counsel for Pursuer, Lord Advocate (Shaw, K.C.), Wilson, K.C., M. P. Fraser; Agents, Patrick & James, S.S.C.—Counsel for Defenders, Clyde, K.C., Macmillan, A. Crawford; Agents, Auld & Macdonald, W.S. J. S. M.

2ND DIV.

Lietke's Trustees v. Graham.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

255. Lietke's Trustees *v.* Graham.

SUCCESSION—WILL—TRUST—ADMINISTRATION—APPOINTMENT OF TRUSTEES AS TUTORS AND CURATORS TO MINOR BENEFICIARIES—DIRECTION TO HOLD, APPLY, PAY AND CONVEY TO AND FOR BEHOOF OF CHILDREN OF TESTATRIX, AND FAILING CHILDREN, FOR CONDITIONAL INSTITUTES—VESTED FEE IN CONDITIONAL INSTITUTES—CONDITIONAL INSTITUTES IN PUPILLARITY—HELD TRUSTEES NOT ENTITLED TO HOLD TRUST ESTATE DURING MINORITY OF BENEFICIARIES, AND TRUST ESTATE PAID OVER TO FATHERS OF BENEFICIARIES AS THEIR TUTORS AND ADMINISTRATORS-IN-LAW.

Special Case.

The late Mrs Margaret Bell Graham or Lietke, 34 Cranworth Street, Hillhead, Glasgow, died on 23rd July 1906, leaving a trust disposition and settlement whereby she conveyed her whole estate to trustees.

The said trustees were the first parties to the special case. The second parties were Robert Graham, lithographer in Paisley, and David Patrick Donald, engineer in Johnstone, as tutors and administrators-in-law for their respective pupil children.

The trust disposition and settlement provided:

I appoint my trustees, and the survivors and acceptors and survivor and acceptor of them (with quorum as aforesaid), to be my sole executors and executor, and also to be tutors and curators and tutor and curator to such of the beneficiaries under these presents, or any codicil thereto, as may be in pupillarity or minority at and after my decease: But these presents are granted in trust always for the ends, uses, and purposes following, viz. . . . . (*Fourth*), In the event of my husband predeceasing me, I direct my trustees to hold, apply, pay and convey the said share of my father's estate destined to me as aforesaid, and the residue of my estate, to and for behoof of and equally among the children of our marriage, and failing issue of our marriage, to and for behoof of and equally between the children of my said brother Robert Graham and the children of my said sister Ann Andrews Graham or Donald, the division being *per stirpes*: Declaring that the shares of my children shall become vested interests in their persons respectively at and only upon their attaining majority, and that if any of them shall predecease said period of vesting leaving issue, such issue shall succeed equally among them, if more than one, to the share their parent would have taken on survivance: And I direct my trustees to apply the annual income and produce of the shares of my estate falling, or prospectively falling, to my children who may be in minority, towards their upbringing, maintenance, or education respectively, or otherwise for their behoof or advantage.

The case stated:

3. The testatrix was survived by two of said trustees, viz. Robert Graham and John Abercrombie, who by minute of 3rd August 1906 appended to said settlement accepted the offices of trustee and executor conferred upon them by said settlement. They did not expressly accept the office of tutor and curator conferred upon them by said settlement, nor have they acted as such.

4. The testatrix was predeceased by her husband, and died without issue. In terms of her said settlement, the whole estate of the testatrix, including that over which she had power of disposal, falls to be divided into two shares, one share thereof going to the child of her brother the said Robert Graham, and the other share going to the children of her sister Ann Andrews Graham or Donald, wife of the said David Patrick Donald. The said Robert Graham has one child, the said Margaret Alexander Graham, aged eleven years. The said Ann Andrews Graham or Donald has two children, the said Graham Donald, aged ten years, and Andrew Patrick Donald, aged seven years.

The first parties maintained that they were bound to hold the estate until the fiars respectively attained majority. The second parties maintained that they were entitled to immediate payment of the trust estate as tutors and administrators-in-law to their respective children.

The Questions of Law were as follows:—

1. Are the first parties, having accepted the office of trustees and executors foresaid, bound to act as tutors and curators under the said trust disposition and settlement, or to administer the estate until the beneficiaries respectively attain majority?
2. In the event of the first question being answered in the negative, are the second parties entitled, as tutors and administrators-in-law for their respective children, to immediate payment of (*a*) the capital of the shares falling to their children, or (*b*) of only the income of said shares?

Argued for the First Parties: No doubt the nomination of tutors and curators was competent only if there was a continuing trust (Fraser, Parent and Child, 3rd edition, p. 240). But here the trustees were directed to hold the fund. They were therefore bound to hold until the beneficiaries attained majority (*Johnston* v. *Johnston's Trs.*, 1892, 20 R. 46, per Lord Young). The doctrine of *Miller's Trs.* v. *Miller* (1890, 18 R. 301) did not apply where the beneficiaries were in minority. It was immaterial that the trustees had not accepted office as tutors or curators (*Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68, per L. P. Inglis at p. 76). Counsel also cited *Dumbreck* v. *Stevenson*, 1861, 4 Macq. 86.

Argued for the Second Parties: There was no continuing trust. The direction to hold applied only to the children of the testatrix, not to the present beneficiaries. The appointment of tutors and curators was therefore inept (Bell's Prin., sect. 2071). It followed that the second parties were entitled to immediate payment.

The Court *answered* the first question in the negative and the second question (branch *a*) in the affirmative.

Lord Low.—The deceased Mrs Lietke by her trust disposition and settlement conveyed her whole means and estate to trustees, and further appointed them to be tutors and curators to such of the beneficiaries as might be in pupillarity or minority after her decease. The question in this case is whether any, and if so what, effect falls to be given to that appointment in the circumstances which have occurred?

In order to answer that question it is necessary to see what precisely were the provisions of the settlement.

After the usual clause for payment of debts the testatrix directed her trustees, in the second place, in the event of her husband surviving her, to hold, apply, pay and convey a certain part of her estate for behoof of her husband in liferent and for the children of the marriage, equally among them in fee; and she declared that the shares of the children were to vest only upon their attaining majority, and that if any of them should predecease the period of vesting leaving issue, such issue should succeed equally among them, if more than one, to the share their parent would have taken on survivance. Then, in the third place, she directed her trustees to pay and convey to her husband, in the event of his surviving her, the residue of her estate in absolute property.

The fourth purpose deals with the event, which happened, of the testatrix being predeceased by her husband. In that event she directed her trustees to "hold, apply, pay and convey" her whole estate to and for behoof of and equally among the children of the marriage; and she repeated, in the same terms as those which I have quoted, the declaration in regard to the vesting of the shares in her children and the right of the issue of children predeceasing the period of vesting. Further, she empowered her trustees to apply so much of the capital of the shares prospectively falling to her children who might be in minority as they might, in their sole discretion, consider necessary for their upbringing, maintenance or education, or otherwise for their behoof or advantage.

Now if the testatrix had been survived by children, there would have been ample room for the operation of the nomination of the trustees as tutors and curators, because in that case there would have been a continuing trust with large discretionary powers to be exercised for the benefit of the children. In the case therefore of there being children of the testatrix the appointment of the trustees as tutors and curators would have been quite appropriate. As it happened, however, there were no children of the marriage, and to provide for that event, and in the event (which also happened) of her husband predeceasing her, the testatrix directed her trustees "to hold, apply, pay and convey" her whole estate "to and for behoof of and equally among the children of a brother and a sister, the division being *per stirpes*." That is the sole direction in the settlement applicable to the events which have happened, nothing being said in regard to the period of vesting or payment, and no discretionary powers being conferred upon the trustees.

It is plain, and is not disputed, that according to the natural meaning of the language used the trust estate (after payment of debts) vested in the children of the brother and sister *a morte testatoris*, and that the term of payment was not postponed. These children, however, are all in pupillarity, and the question is whether the trustees can be required to pay the estate to the fathers of the children as their administrators in law, or are bound, by virtue of their appointment as tutors and curators to such beneficiaries as may be in pupillarity or minority, to hold and administer the estate until the children attain majority?

I am of opinion that the trustees are not entitled to hold the estate. It seems to me that there is no room, in the events which have happened, for the exercise of tutorial or curatorial powers by the trustees. It was argued that the appointment of the trustees to be tutors and curators implied that they should hold the estate during the minority of beneficiaries, or, in other words, that the constitution of a continuing trust should be spelt out of the appointment. I do not think that that is a sound view. In the first place, the settlement shows that when the testatrix intended that there should be a continuing trust she said so in explicit terms; and in the second place, I think that the appointment of the trustees to be tutors and curators is sufficiently satisfied by regarding it as being intended to apply only in the event of the testatrix being survived by children of the marriage.

I am therefore of opinion that the first question should be answered in the negative, and branch (*a*) of the second question in the affirmative. If that be done the remaining questions seem to be superseded.

Lord Stormonth-Darling.—I agree. There is a broad distinction between the provisions of this will in the event of the testatrix having children of her own and in the event (which happened) of her being survived only by nephews and nieces. In the latter case there is no continuing trust as there is in the case of children of her own; and the nomination of the trustees to be tutors and curators, which in terms applies to all the beneficiaries, has no significance as regards nephews and nieces, and does not invest the words "hold, apply, pay and convey" with an importance which, apart from such nomination, they would not otherwise have. It is only

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on that direction to "hold" that the first parties suggest they may have a duty to act as tutors and curators to the minor beneficiaries. They have not accepted office as tutors and curators, but they say they are willing to exercise the office of tutors and curators, if it is thought by the Court that under the will they are bound to do so. I do not think that they are under any such obligation, because they will sufficiently discharge their duty by "paying and conveying" to the natural guardians of the beneficiaries.

Lord Ardwall.—I am of the same opinion. Our decision does not affect the general law laid down in Bell's Principles, sect. 2071. This is a case of trustees who have either declined to accept or failed to act as tutors and curators to certain pupil beneficiaries. A question remains whether they are not bound to act as tutors and curators *quoad* this particular fund? If this had been a continuing trust, laying on the trustees duties stretching over a period of years, until these children attained majority, then I should have been disposed to hold that the duties of the offices of tutor and curator attached to the trustees as regards these particular funds. But there is no case of that kind here. There is no continuing trust. The funds are vested in and payable to the beneficiaries now. I am therefore of opinion that the natural guardians of the pupil beneficiaries—in this case their fathers—are entitled to payment now of the funds which are vested in these beneficiaries, and that the trustees are in safety to make such payment.

The Lord Justice-Clerk concurred.—18*th December* 1907.

Counsel for the First Parties, MacRobert; Agents, Thomson, Dickson & Shaw, W.S.—Counsel for the Second Parties, T. B. Morison, K.C., Black; Agents, Macpherson & Mackay, S.S.C.

J. S. M.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

256. Stewart *v.* M'Dougall.

Diligence—Reparation — Illegal Apprehension and Imprisonment — Relevancy—Apprehension and Imprisonment Upon Charge Following on Decree of Small Debt Court Decerning Ad Factum Præstandum and Granting Warrant for "All Lawful Execution Hereon" — Period of Imprisonment Not Specified in Decree or Charge—Action Held Irrelevant—Small Debt Act 1837 (7 Will. IV. and 1 Vict. cap. 41), sect. 13 and Sched. A, No. 7—Debtors (Scotland) Act 1880 (43 & 44 Vict. cap. 34), sect. 4—Small Debt Amendment (Scotland) Act 1889 (52 & 53 Vict. cap. 26), sects. 1 and 2 and Sched. B — Personal Diligence Act 1838 (1 & 2 Vict. cap. 114), sect. 6.

(Reported ante, Vol. XIV. p. 921.)

Reclaiming Note against an Interlocutor of Lord Dundas.

The pursuer *reclaimed.*

The facts of this case and the arguments of parties are fully set forth in the previous report.

The Court *adhered.*

The Lord President.—In this case the Lord Ordinary has given a very careful judgment, with which I entirely agree. I have very little to add except this, that it is quite clear that the provisions of the Personal Diligence Act have nothing to do with the Small Debt Acts. The Small Debt Acts form a code by themselves. When you come to consider what took place in this case it is clear that the pursuer was not left in any doubt as to the diligence to be used against him or put to any hardship, and accordingly, for the reasons which the Lord Ordinary has given, I think it is out of the question that he should be allowed to proceed in an action of damages.

Lord M'Laren.—I am of the same opinion. It is clear that the words "all lawful execution" in a case of this kind do include imprisonment, for it has been laid down by an eminent judge in expounding the Debtors Act that unless imprisonment were retained to enforce a decree *ad factum præstandum* there would be no other method of enforcing such a decree. I am therefore of opinion that the present proceedings have been quite in accordance with the Small Debt Act and the amending statutes.

Lords Kinnear and *Pearson* concurred.—13*th December* 1907.

Counsel for Pursuer, Morison, K.C., A. A. Fraser; Agent, Arthur F. Frazer, S.S.C.—Counsel for Defender, Scott Dickson, K.C., Kemp; Agents, Guild & Guild, W.S.

W. A. R.

FIRST DIVISION.

(The Lord President, Lords M'Laren, Kinnear and Pearson.)

257. Paxton and Others *v.* Brown.

Process—Instance—Action by Separate Pursuers on Separate Claims of Debt—Action by Curators for Recovery of Sums Overpaid to Ward During Minority and by Law Agent for Sums Advanced Subsequent to Majority—Action Held Incompetent—Case Continued to Allow Pursuers' Counsel to Tender Minute of Amendment.

In this action the curators and the law agent of the defender, Miss Brown, sought to recover

from her certain sums which they averred had been advanced to her in excess of those due by them in their respective capacities. The curators' claim was in respect of sums advanced to her during her minority in excess of the income of the trust funds which they administered on her behalf, the law agent's was in respect of sums advanced to her after her majority in excess of her income. The defender resisted these claims and pleaded, *inter alia*, that the action was incompetent, in respect that it was laid at the instance of separate and unconnected pursuers upon separate and independent claims of debt. The facts of the case are fully reported in the Lord Ordinary's note *infra*.

The Lord Ordinary (Johnston) *repelled* the above plea.

Lord Johnston.—The late James Brown of Tweedhill, in Berwickshire, left a settlement of a somewhat peculiar character. His estate apparently was so entirely confined to heritage, that, though he appointed certain gentlemen his executors, the only testamentary provision which he made was by creating a burden upon his heritage. His settlement is, in fact, as nearly as circumstances admitted, a proper testament. He had apparently two children—a son, James Brown, junior, and a daughter, Isabella Annie Brown, the latter at any rate, and probably both, being in pupillarity at the date of his death, which occurred on 9th November 1893. He made no testamentary provision for his son James, but left him to succeed to his heritable estate by force of law. The object of his settlement or testament was entirely to provide for his daughter Isabella, and he did so in this manner: He bequeathed to her directly the sum of £2500, payable at majority, when, he declared, "the said provision in her favour shall vest, and which sum I further hereby declare shall form a real lien and burden upon All and Whole the lands and estate of Tweedhill foresaid. . . . And I further declare that said sum shall bear interest at the rate of four per centum per annum from the date of my death during the not payment thereof." While he thus declared the bequest to be payable only on majority and to vest at that date, he also declared that the sum so to be imposed on his heritable estate should bear interest at four per centum from the date of his death. There might therefore be some question whether, notwithstanding the express declaration as to vesting, the bequest in Miss Brown's favour did not vest *a morte*. But without expressing any opinion on that point, which it is not necessary to decide, I think that the executors were soundly advised in assuming that the testator impliedly intended that the income of the bequest, with regard to which he gave no specific directions, was to be applied during her minority for Miss Brown's behoof. And it has been so applied. The only other matter which Mr Brown's settlement or testament contained is the appointment of Dr John Paxton of Norham-on-Tweed and William Crawford, sheriff clerk of Berwickshire, to be tutors and curators to the testator's son and daughter, "with power to the said tutors and curators to appoint factors for managing the whole means and estate belonging to my said children, with suitable salaries, for whom they shall not be further liable than that they are reputed responsible at the time, and generally to do every act and deed in the management of the affairs of my said children competent to tutors and curators by the law of Scotland, with this provision and declaration always—that the said tutors and curators shall be accountable for their actual intromissions only, and not jointly with one another, and that they shall not be liable for omissions nor be bound to do diligence further than they shall judge necessary," and he appointed the same gentlemen to be his sole executors. As regards the testator's son James, I am doubtful how far the testator was entitled to confer on the tutors and curators-nominate the power to appoint factors, and to limit their liability in the way he did. But as regards his daughter Isabella, as the provision which he was making was entirely gratuitous, he could competently adject to it any conditions which he pleased, and *quoad* the particular provision in her favour of £2500, she must accept the tutors and curators named, subject to the conditions of their appointment.

Dr Paxton and Mr Crawford accepted office, and appointed James Herriot, solicitor, Duns, their factor.

The history of the administration of the provision for Miss Brown is to be found in a series of accounts of charge and discharge, Nos. 9 to 17 of process, at first between the curators of Miss Brown and Mr Herriot, their factor, and afterwards between Miss Brown herself and Mr Herriot as her law agent, Nos. 9 to 15 of process being between Miss Brown's curators and Mr Herriot, and Nos. 16 and 17 between Miss Brown and Mr Herriot. But though there is this distinction made in the heading of the accounts, owing to the young lady having attained majority at 19th May 1904, the accounts are really consecutive, and carry on the balance due by Miss Brown on the curatorial account into the personal account. There were over-advances made to or on behalf of Miss Brown, both during the later period of the curatory and afterwards. These advances were out of the pocket of Mr Herriot during both periods. The curators and Mr Herriot want now to recover these advances from Miss Brown, and as their accounts and actings are disputed, it has become necessary to clear up matters in court. Had the alleged balance been the other way, the young lady would have sued her curators and Mr Herriot for accounting and payment of the balance due to her; but in the circumstances as they stand, the curators and Mr Herriot can only sue for the amount of the advances they allege, and the accounting arises on Miss Brown's counter-claim. But the action is none the less in substance, though not in form, an action of accounting. I lay stress upon this, because it appears to me materially to affect the question with which I have at present to deal.

The curators and Mr Herriot sue as joint pursuers in the same action. The instance is as follows:—Dr Paxton and Mr Crawford, as tutors and curators nominated by the settlement of the late Mr James Brown of Tweedhill to his daughter, Isabella Annie Brown, "with consent and concurrence of James Herriot, solicitor, Duns, for any interest he may have, and the said James Herriot as an individual,"—*Pursuers*; against the said Isabella Annie Brown,—*Defender*. The conclusions, however, are separate: First, to make payment to the pursuers Dr Paxton and Mr Crawford of the sum of £245, 15s., being the alleged balance in their favour on their curatorial intromissions with Miss Brown's income from her father's death in 1893 to her majority in 1904; and second, to make payment to the pursuer Mr Herriot of the sum of £204, 4s. 7d., being the alleged balance on his intromissions as law agent with the young lady's income from the Whitsunday when she attained

1st Div. majority to Whitsunday 1906, when I understand her affairs were taken out of Mr Herriot's hands.

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The defender pleads: "(1) The action is incompetent in respect that it is laid at the instance of separate and unconnected pursuers, upon separate and independent claims of debt."

I asked the defender's counsel whether the defender had any interest to press a plea which, if sustained, and assuming liability to be established, could only be the occasion of increased expense to their client? They candidly admitted, as I think must be apparent, that there was no inconvenience in taking the accounting in this form, but they indicated that the defender had a tactical reason for stating the plea, and they pressed for a judgment. This the defender is entitled to, whatever may be her reasons for stating the plea. The defender's counsel in particular referred me to the recent cases of *Killin* v. *Weir*, 1905, 7 F. 526, and *Brims & Mackay* v. *M'Neill & Sime*, 1907, 15 S.L.T. 198, and they maintained that these authorities determined that it was only competent to conjoin two or more unconnected persons as pursuers of an action where they have a joint interest in the matter libelled, or have been injured by the same act (*Orkney Feuars* v. *Stewart of Burray*, 1741, M. 11,986). The precise terms used by the Court in that case as descriptive of the two classes of cases were "had connection with one another in the matter pursued for," and "being aggrieved by the same act," and the Lord President, in disposing of the case of *Killin* v. *Weir supra*, expresses his opinion that all the cases quoted to the Court fall quite distinctly under one or other of these two categories. This may be so as a generalisation, and it was quite sufficient and appropriate for the disposal of the two cases in question, which clearly came under the above descriptions of the two classes of cases. But there are other cases to which it is not so easy to apply the above rule in its generality. In *Killin* v. *Weir supra*, four pursuers sued in one action for separate sums of damages, on the allegation that they had each been induced to purchase shares in a mining syndicate by false and fraudulent statements, made to each of them separately, at different times and places, though admittedly of a similar nature. They had neither a joint interest in the matter libelled, nor had they been aggrieved by the same act. But I think that the reason of the decision is not so much any technical rule as practical convenience. It would clearly be extremely inconvenient, as was very fully shewn by the Lord Chancellor in *Duke of Buccleuch* v. *Cowan*, 4 R. (H.L.) 14, at p. 16, to try four different cases of damages arising out of different circumstances, however much these might be related, in one action. But had the misrepresentations alleged been confined to the contents of a prospectus on which all four pursuers had relied, the inconvenience would have disappeared, and the action would, I think, have been sustained on the analogy of cases of slander, where though two persons cannot conclude jointly and severally for the same sum as damages for the same slander (*Fleshers of Dumfries*, 10th December 1816, F.C.), they may competently do so for separate sums (*Harkes* v. *Mowat*, 24 D. 701).

In *Brims & Mackay's* case, again, the pursuers, being the parties in right of a dissolved firm, and the new firm which carried on the business in succession, sued an individual and the firm which he afterwards joined for one sum, conjunctly and severally, or otherwise severally. On the *media concludendi*, into which I need not go, it was apparent that the whole sum could neither be due to both sets of pursuers nor by both sets of defenders. It is therefore at once apparent that decree could not on such a summons be competently pronounced either in favour of the pursuers or against the defenders, nor could it be competently enforced.

A consideration of these two cases leads me to the conclusion that the rule above stated in general terms is based upon two considerations: first, on the consideration of convenience; and second, on the consideration of whether the conclusion can be competently deduced from the *media concludendi*, and the decree ensuing be competently enforced. In truth, the term incompetency, strictly speaking, is hardly descriptive of all the cases in which the objection to combining pursuers or defenders may be taken. It is truly a question of convenience in some cases, and of competency only in others. If it were not so, I do *not* think that the case of the *Duke of Buccleuch, etc.* v. *Cowan, etc.*, above referred to, could have resulted in the decision which was then pronounced. The Lord Chancellor (Cairns) and the other Lords who took part in the decision rest particularly upon the question of convenience, and the Lord Chancellor even goes so far as to say that it is in part a question of the Court's discretion, and he makes a very pertinent reference to the provision for remits *ob contingentiam*. The general rule above expressed must, I think, when it comes to be applied, be read and applied in the light of the reason or principle upon which it is based.

Now here it is perfectly clear, and is indeed admitted, that it would be eminently convenient to make this consecutive accounting the subject of the same action, and that had two actions been raised, a remit *ob contingentiam*, and even a conjunction for the purpose of enquiry, would have been appropriate. In these circumstances I should hesitate to throw out the action because it had been commenced in conjunction, unless I felt myself compelled, merely on a theoretical objection. Had Miss Brown been pursuer she could competently and conveniently have called upon her curators and her law agent to account for their several consecutive intromissions in the same action, provided she had a several conclusion against them, and I do not see why it should be less convenient and less competent for them to bring about the same accounting by such an action as the present, in which they each reduce their demand to a several conclusion. The convenience and economy is manifest, and the conclusions follow competently on the *media concludendi*, and the ensuing decree can, I think, be competently pronounced and enforced.

There is an incidental point which gave me at first some trouble, though from one point of view it supports the conclusion to which I have come. In this matter Mr Herriot is the real creditor, and had I been drawing the summons, I think that I should have sued in his name against (first) Miss Brown and her curators for the period of her minority; and (second) against Miss Brown herself for the period of her majority, in which case there could have been, I think, no doubt about the convenience and competency of the action. But Mr Herriot has gone on the footing that he was the factor of the curators during Miss Brown's minority, and that he is entitled to be kept *indemnis* by them for advances which were made on their responsibility and on their account, and that they are therefore the proper parties to sue Miss Brown with a view to the adjustment of the curatorial accounts between them and her. Though I do not think that the mode of proceeding is so direct and simple as the one which

I would have adopted, it is, I think, equally consistent with the legal situation; and as the curators sue with consent and concurrence of Mr Herriot for his interest, no question can arise. The case bears to be distinguished from *Hislop* v. *MacRitchie*, 1881, 8 R. (H.L.) 95. Mr Herriot's interest throughout the whole period creates indeed such a bond between the two ostensible sets of pursuers that they cannot truly be said to be unconnected. I think that I am entitled to look at the substance of the action, and in so doing I find it one to obtain an accounting with Miss Brown for a consecutive series of intromissions which are consecutive in fact and only broken in theory by her coming of age, and the ultimate interest in which is in Mr Herriot on the one side and Miss Brown on the other. There is every convenience in trying that question of accounting in one action, and having regard to the conclusions, there is no incompetency in entertaining them, and no difficulty in giving effect to the decree which would ensue, whatever the result of the accounting may be.

I shall therefore repel the first plea in law for the defender and appoint her to lodge objections to the accounts Nos. 9 to 17 of process, which the pursuers produce and found upon.

The Defender *reclaimed* and *argued*: The rule of law was well established that separate and independent persons could not sue separate and independent claims of debt except where there was some connection between them in the matter sued for, or where they were aggrieved by the same act (Erskine, IV. 1–65; Shand's Practice, pp. 203–204; *Orkney Feuars* v. *Stewart of Burray*, 1741, M. 11,986; *Killin* v. *Weir*, 1905, 7 F. 526; *Brims & Mackay* v. *M'Neill & Sime*, 1907, 15 S.L.T. 198. The respective pursuers here were separate and unconnected, each being sole creditor in the obligation sought to be enforced. The claims of debt were also separate and unconnected both in fact and in law: that of the law agent only began at the date when that of the curators ceased; that of the law agent was founded on contract, that of the curators on their curatorial relation to their ward.

Neither did the case fall within the exception quoted. Had the actions been brought separately the defender could successfully have resisted a remit *ob contingentiam* (*Duke of Atholl* v. *Robertson*, 1869, 8 M. 304; *Cowan* v. *Duke of Buccleuch*, 1876, 4 R. (H.L.) 14).

Argued for the Respondents: The matter must be considered from the point of view of public convenience, and not from that of technical rule. There was no suggestion of inconvenience or prejudice to the defender. The case fell within the rule laid down in *Duke of Buccleuch*, *sup. cit.*, per Lord Blackburn at p. 27; the test of *contingentia* comes to be that of convenience of procedure. The pursuers here had the necessary connection to fall within the exception to the rule quoted for the defender.

The Court *recalled* the interlocutor of the Lord Ordinary.

The Lord President.—In this case the defender, Miss Brown, was, under the settlement of her father, given certain tutors and curators for the period of pupillarity and minority which ensued owing to the death of her father taking place while she was still a pupil. Her fortune consisted of heritable property only, and it became the duty of the tutors and curators to administer that property, to draw the profits therefrom, and to provide for Miss Brown's maintenance. The tutors and curators, who are the first pursuers in this action, appointed a Mr Herriot, a solicitor, to act as their factor, and they fulfilled the office of tutors and curators during the pupillarity and minority of Miss Brown, and in particular they paid over certain monies for her maintenance, and also paid certain sums to her herself. After she became major the practical management of the property remained, as it had been all along, in the hands of Mr Herriot, and from time to time he too made payments to Miss Brown.

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The Lord President.

Now the present action is brought by the tutors and curators and also by Mr Herriot, and it concludes for separate sums as due to these different pursuers. The ground of action on which the tutors and curators base their claim is that an accounting for the period from their assumption of office until the majority of Miss Brown would shew that Miss Brown is indebted to them in a certain sum, representing payments made to her during that period in excess of the income drawn from the property. The ground of Mr Herriot's claim is that during the period after she came of age he made certain payments to her in excess of the income from the property.

The defences to the two claims are also different. There is, of course, the general defence, which may be described as putting the pursuers to a strict accounting as regards the due vouching of all the payments stated. But there are also defences which are quite different. With regard to the claim of the tutors and curators she says: "You as tutors and curators had no right to advance to me more than the bare income amounted to. If you did so it was your own fault, and you cannot recover such advances as a debt due by me." As to the factor's claim that defence is not available, and the defence there put forward is that he ought to have informed her that he was making payments to her in excess of her income, and that having failed to do so he is not entitled to recover them. I do not express any opinion as to the relative cogency of these two defences; I merely point out that they are different.

A preliminary objection has been taken by the defender, and it is that, according to a well settled rule of law, two separate pursuers cannot conjoin in the same action in respect of separate and independent grounds of debt. The Lord Ordinary has repelled that plea; but I must confess that I am unable to follow the reasons which he states for that decision. He first cites the old case of the *Feuars of Orkney* (*Gray and*

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Others), M. 11,986, which laid down the law long ago that "different parties could not accumulate their actions in one libel unless they had connection with one another in the matter pursued for or had been aggrieved by the same act." Now that is a very old authority, and not only so, but it has been carried down through the books to the present day. Erskine was quoted to us as an independent authority in support of it, but I take it he was simply following as his authority the decision in the *Feuars of Orkney*, his work being written some sixty years after that decision. That rule has been carried down since then through all the authorities. Ivory and Shand give it in exactly the same words, and your Lordships had an opportunity to reiterate it quite recently in the case of *Killin* v. *Weir*, 7 F. 526. I should have thought that, if anything was settled, that was settled; but yet, says the Lord Ordinary, after referring to *Killin* v. *Weir*, and *Brims & Mackay*, 1907, S.C. 1106, "there are other cases to which it is not so easy to apply the above rule in its generality." He does not, however, quote any other cases, and the learned counsel here, who I am sure have made a careful search, have been unable to quote any to us. So, in fact, it comes to this, that there are no other cases. Therefore when the Lord Ordinary goes on to say that "the reason of the decision is not so much any technical rule as practical convenience," he takes upon himself a function that does not belong to him. Convenience is convenience, but a rule remains a rule. I think, then, that the Lord Ordinary's argument is not in accordance with the long line of authority. I only add that *The Duke of Buccleuch* v. *Cowan*, 4 R. (H.L.) 14, leaves, to my mind, the old authority untouched. There is, it is true, much talk of "convenience" in the opinions of the learned Lords in that case, but it must be borne in mind that they were English lawyers, and they begin their opinions by stating that the conjoining of pursuers in these circumstances is unknown in English practice though it does obtain in Scotland, and they then go on to examine the Scots authorities. They held in that case that it was possible for the pursuers to conjoin, for of course that case fell within the exceptions as expressed in the *Feuars of Orkney*, and where they come to use the word "convenience" is when they go forward to consider whether there was any reason arising *ab inconvenienti* to prevent the exceptions applying there, and they found that there was not. But I need hardly say that that case does not trench on the old authorities in any way.

We then come to the question put by Mr Morison—Does this case fall within the exceptions, either (first) that the pursuers are connected with one another in the matter pursued for, or (second) that they are aggrieved by the same act? Clearly they are not aggrieved by the same act—the tutors and curators' advance was one thing and Mr Herriot's was another. But are they "connected in the matter pursued for"? These are general words, and though they are not the same thing as joint interest in its legal sense, yet the idea of joint interest does throw some light on them. I think that the pursuers here are not connected at all; the only suggestion of connection is that, historically, they succeeded one another. In the course of the argument I put the example of a person being sued by his butcher and his baker. The goods in question there would, of course, be supplied for the same household, and possibly the principal witness would be the same in each case, namely, the housekeeper or house steward who had ordered the goods. But they would clearly be unconnected accounts, and I think that that example is completely analogous to the present case. I am well aware that the whole tendency of modern times is not to turn an action out of Court on a technical plea, and my whole sympathy, if I could have any sympathy, would be against turning this action out. But where there is a rule of law which has been adhered to for so long as this one has, we must be shewn some very weighty reason for not giving effect to it, and no such reason has been advanced here. It appears to me that this is nothing but a case of the parties to two separate actions seeking to enforce their claims in one summons, and therefore I am of opinion that the defender's plea must be sustained.

But the question remains, What is to be done next? I think that here the modern practice of not multiplying actions and not putting parties to unnecessary expense comes to our help. But I think the pursuers must put their pen through the name of one set of pursuers and also through one set of averments, and if that is done I think it will remain quite a good action at the instance of the remaining pursuer. The defender will not be prejudiced in any way, and the expenses of preparing and serving new actions and paying the fee fund dues will be avoided. I think, then, that Mr Morison should be given time to consider which of the pursuers he is prepared to strike out, for I think that he has that option.

Lord M'Laren.—The rule as to combining different claims in the same action is tersely and epigrammatically stated in the case of the *Orkney Feuars* v. *Stewart of Burray*, 1741, M. 11,986. The general rule there laid down is, that parties cannot accumulate their actions in one libel, and the two exceptions stated are (1) where there is some connection between the parties in the matter pursued for—which I take to mean some title or interest in common; and (2) where the parties suing are aggrieved by the same act. Here there are two unconnected pursuers, each suing for his own separate debt, and as the law agent's advances only commenced when those of the curators ended, it

cannot be said that these were concurrent accounts. Besides, if the grounds of the action are examined the questions at issue will be found to be different; for in the first case the question is whether the curators acted within the scope of their duties in making these advances, while the second seems to raise a simple question of debt—viz. a claim by a law agent for advances to his client.

I agree with your Lordship that two such claims cannot be combined in the same action, and that the opinion which the Lord Ordinary has adopted would tend to relax, and indeed to render inoperative, the rule by which we have hitherto been guided. The rule is not merely formal and arbitrary, but has this substance in it, that if an action is brought by a single pursuer, a defender may more easily come to a settlement and have the case taken out of court; while if there are several persons suing on different claims, any one of them by holding out (it may be for a just claim) may not only subject the defender to needless expense, but may prevent any settlement being come to at all.

In any view, I should be very averse to relaxing a rule which has worked well in practice, and in which, as I have indicated, there is a good deal of substance. I agree, however, that our modern practice affords a practical remedy, and that by striking out one of the two claims the action thus restricted may be made competent.

Lords Kinnear and *Pearson* concurred.

At the close of advising—

The Lord President.—I ought to have added, with regard to the old case of the *Feuars of Orkney*, M. 11,986, that if, as the Lord Ordinary says, the doctrine of convenience is to be taken as the test, you could not have had a case where convenience pointed more directly to a conjoining of the pursuers, for the subject of proof there was really one continuous course of somewhat nimious doings on the part of Stewart and his men.—18*th December* 1907.

Counsel for Pursuers and Respondents, Morison, K.C., Maitland; Agent, J. Gordon Mason, S.S.C. —*Counsel for Defender and Reclaimer, Murray, J. H. Henderson; Agents, Kelly, Paterson & Co., S.S.C.* W. A. R.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

258. Greig *v.* Christie.

2ND DIV. Greig v. Christie.

SUCCESSION—PASSIVE TITLE—VITIOUS INTROMISSION — EXECUTOR-DATIVE APPOINTED, BUT CONFIRMATION NOT TAKEN OUT—CHEQUE IN FAVOUR OF DECEASED FOUND IN HIS CASH-BOX — CHEQUE TAKEN BY EXECUTOR TO GRANTERS AND EXCHANGED FOR CHEQUE IN HIS OWN NAME — QUESTIONS WHETHER CHEQUE TRULY PROPERTY OF DECEASED OR OF EXECUTOR, AND WHETHER DECEASED HAD RIGHT TO RETAIN CHEQUE IN RESPECT OF DEBTS DUE TO HIM — ONUS OF PROOF — DECEASED ENGAGED IN FINANCIAL TRANSACTIONS RELATING TO FARM BELONGING TO EXECUTOR AND HIS SISTERS—CIRCUMSTANCES WHERE HELD (DISS. LORD STORMONTH-DARLING) THAT CHANGING CHEQUE NOT AN ACT OF VITIOUS INTROMISSION.

Appeal from the Sheriff Court of Stirling at Stirling.

This was an action to recover sums of money amounting to £57, brought by David Greig, 26 Windsor Street, Glasgow, against Alexander Christie, farmer, Bankend, near Stirling, as executor-dative of the deceased James Christie, farmer, Bankend, or otherwise as vitious intromitter with the estate of the said James Christie.

The sums sued for were sums which had been lent by the pursuer to James Christie. James Christie was an uncle of the defender, and had lived with him at the farm of Bankend. He had assisted in the management of the farm, but, in the view taken by the Court, he was not a joint tenant and had no proprietary interest in the farm or the farm stock. The defender was, along with his sisters, appointed executor-dative to James Christie, but had never taken out confirmation. A cheque for the sum of £46, 5s. 7d., drawn by Messrs Speedie Brothers, auctioneers, in favour of James Christie, was found in James Christie's cash-box. The defender took the cheque to Messrs Speedie, and obtained in place of it another cheque in his own name. It appeared that the cheque was the price of certain shorthorn bulls. The pursuer maintained that these bulls belonged to James Christie, or alternatively that James Christie was entitled to retain the cheque against debts due to him by the farm, and that the defender's action in changing the cheque was an act of vitious intromission. The defender traversed all these propositions. *Quoad ultra*, in the view taken by the Court, James Christie left no estate of any substantial value.

On 9th October 1906 the Sheriff-Substitute (Mitchell) *assoilzied* the defender.

The pursuer *appealed* to the Sheriff (Lees), who on 3rd December 1906 *adhered*.

The pursuer *appealed*.

The following authorities were cited:—For the pursuer: Ersk., III. 9, 49, 52; Bell's Prin., sect. 1921; *Wilson* v. *Taylor*, 1865, 3 M. 1060. For the defender: Partnership Act 1890 (53 & 54 Vict. cap. 39), sect. 2; *Adam* v. *Campbell*, 1854, 16 D. 964.

ND Div. The Court (*diss.* Lord Stormonth-Darling) *dismissed* the appeal.

Greig v. Christie.

The Lord Justice-Clerk.

The Lord Justice-Clerk.—The history of the connection of the late James Christie with the farm seems to have been as follows:—Up to the year 1879 he and his brother had been yearly tenants, their only writing being their entry as tenants in the estate books. James then became a tenant of another farm, Bandeath, at some distance off, and took there all that he was entitled to as his share of what was on Bankend. From this time his name disappeared from the estate books, and for some years he had no connection of any kind with Bankend. It appears that in 1885 he became bankrupt and that his brother Alexander received him again at Bankend, providing him with board and lodging, and that he attended to the finance of the farm, buying and selling and keeping the accounts. He also did some separate business on his own account in buying and selling cows, he taking the use of the Bankend grazing for short periods when he had bought cows, until he got them resold to others.

There is no evidence that when he came back he brought any stock or farm implements, and indeed being a bankrupt it is not conceivable how he could have done so; and there is not, so far as I can see, anything to shew that he at any time out of his own funds provided anything for the stocking or working of the farm of Bankend. The evidence, as I think, is quite inconsistent with his having had any right of his own in the farm or the stocking, although he again appears as joint tenant in the estate books in 1890 and as sole tenant for the last three years of his life, which it is shrewdly suggested was for voting purposes. To me it seems clear that he had nothing of his own on the farm and had no practical right in it.

In these circumstances the question arises whether the defender in this case has fallen within the character of a vitious intromitter by his having taken a cheque, drawn in favour of the deceased, and got another cheque in his own favour in lieu of it from the granter and so got from the bank the amount in the cheque. I am satisfied that the cheque, which was from stock auctioneers, was for the price of three young bulls which did not belong to the deceased, being bulls reared on the farm and not the deceased's property in any sense. The cheque was granted to him as managing the business of the farm.

In these circumstances the question which arises is one of some difficulty, and it is only after repeated consideration that I have come to be of opinion that the pursuer's plea in favour of vitious intromission must be repelled. I do not go further into the matter, as I have considered and concur in the opinions prepared by Lords Low and Ardwall. The deceased had, as I think, no right or title to the money represented by the cheque, and the burden of proof being on the party maintaining vitious intromission, I hold that the pursuer has failed to discharge the *onus*.

Lord Low.—I am of opinion, in the first place, that it is established that no part of the stock, crop, or implements upon the farm of Bankend belonged to the deceased James Christie. It was impossible to obtain exact and precise evidence upon the question, because no farm books or accounts of any description appear to have been kept, and accordingly the evidence, if taken in detail, is somewhat vague and indefinite. When read as a whole, however, it leaves no doubt in my mind that after he returned to Bankend in 1885 James Christie was merely in the position of a lodger with his brother, who assisted in the management of the farm in return for board and lodgings, and who carried on business as a cow dealer on his own account.

There is, indeed, one fact which, *prima facie*, suggests that James Christie must have had an interest in the farm, and that is that in 1890 his name was entered in the estate books as joint tenant with his brother Alexander. There is nothing, however, in the estate office to shew how or why the entry came to be made. Mr M'Laren, the present factor, only came into office in 1896, and his only source of information is the entry in the rental book. He says, however, that he always regarded Alexander as being truly the tenant, while the defender says that he understood that James's name was put in as joint tenant "to give him a vote for the laird." In these circumstances I cannot regard the entry in the rental as counterbalancing the great weight of evidence to the effect that James's position in regard to the farm was what I have stated.

The pursuer, therefore, has no claim against the defender in respect of the intromissions which the latter had with the stock and crop upon the farm.

So far the case appears to me to present no difficulty, but a delicate question arises as to whether the defender, by his intromissions with the cheque for £46, 5s. 7d., granted by Speedie Brothers in favour of the deceased, has not incurred liability for the debts of the latter, as a vitious intromitter, at all events to the amount of the cheque.

The answer to that question depends upon whether the money represented by the cheque was the property of the deceased, because if it was not his property the defender cannot have incurred a passive title, however irregular and unwarranted his intromission with the cheque may have been. Mr Erskine, in his Institutes (III. ix. 51), states the law thus: "Intromission cannot be vitious, nor consequently infer a passive title, when the subject intermeddled with

was truly not *in bonis defuncti*, no part of the estate of the deceased, or ceased to be such before the intromission."

Now a cheque is not a document of title, nor, in the general case, does it give any indication of the purpose for which, or the capacity in which, it is granted to the payee. Still, when a cheque is found in a dead man's repositories, drawn in his favour in ordinary form, I think that there is a certain presumption that the money represented by the cheque belonged to him. It seems to me, therefore, that the *onus*, in the first instance, lay upon the defender to shew that the money did not belong to the deceased. That *onus* he has, in my opinion, discharged, because it is proved that the cheque represented the price of certain cattle which formed part of the stock of Bankend, which were sold by Speedie Brothers, upon James Christie's instructions, the sale of stock being a matter which was entrusted to him. If, therefore, I am right in thinking that it is established that no part of the stock of the farm belonged to James Christie, he held the cheque not in his own right but for the defender and his mother and sisters, to whom the stock upon the farm belonged. That being so, then unless circumstances existed which would have entitled James Christie to retain the money although it was the price of cattle which did not belong to him, the defender has not, by his intromission with the cheque, incurred liability for his uncle's debts.

It was argued, however, that upon the assumption that James Christie had no interest in the farm, he was entitled to retain the cheque, in a question with the defender and his mother and sisters, because he had borrowed the sums now sued for from the pursuer for the purpose of paying the rent of the farm. I think that it may be taken to be proved that James Christie did, in fact, borrow the sums sued for, for the ostensible purpose of paying the rent and taxes, but it does not follow that that gave him right to retain the amount in the cheque. Whether he would have been entitled to do so or not would have depended upon the result of an accounting for his intromissions with the produce of the farm. He appears to have conducted all the sales, both of crops (such as hay, beans, and barley) and of cattle; and out of the proceeds he paid the rent and other necessary expenses. The farm seems always to have paid its way, and also to have afforded a livelihood for Alexander Christie and his family, and no reason is disclosed why James Christie should have required to borrow money to pay the rent. Perhaps the fact that he engaged in cattle-dealing, apparently with little success, may have had something to do with it; but however that may be, it is certainly not proved, nor do I think that it can be inferred from the evidence, that James was a creditor of the farm. It is possible that he may have been so, but as no books or accounts were kept it cannot now be ascertained how matters truly stood. That is unfortunate for the pursuer, but upon this branch of the case the *onus* of proof is on him.

I am therefore of opinion (1) that it is proved that James Christie had no right to or interest in the stock, crop or implements upon the farm; (2) that it is proved that the cheque represented the price of certain cattle to or in which James Christie had no right or interest; and (3) that it is not proved that there was any balance due to James Christie by the farm against which he would have been entitled to retain the proceeds of the cheque.

The result is that, in my judgment, the appeal should be dismissed, and the interlocutor of the Sheriff affirmed.

I should like, however, to add that even if I took a different view of the result of the evidence I should still think that the defender could not be held to have incurred liability as a vitious intromitter. The most favourable view of the evidence which could be taken for the pursuer would be that it shewed that James Christie had some interest in the farm, and some right to the stock thereon. It is plain, however, that even if so much be established by the evidence, no data are supplied by which any estimate whatever can be made of the extent of James Christie's right or interest. I suppose that if he had any right at all it must have been a *pro indiviso* right along with his brother in the stock, a right which may have been to the extent of one-half, but which may have been to some lesser extent. Assuming that to have been the position of matters I am unable to see how by carrying on the farm and thereby necessarily intromitting with the stock the defender could be regarded as a vitious intromitter. He was dealing with stock which *ex hypothese* belonged to a greater or less extent to him or those for whom he acted, and which it was necessary for some one to intromit with if the farm was to be carried on in ordinary course.

I think that very much the same view applies to the cheque. Even assuming that the cattle for the price of which the cheque was given belonged to some unknown extent to James Christie, they also belonged to the defender and his mother and sisters, whom he represented. No doubt the course which the defender adopted was irregular, but I do not think that it can be described by a more serious epithet. To whomsoever the cattle belonged they were part of the stock of the farm, and the proceeds of their sale naturally fell to be applied to farm expenses, and I can very well understand that it would have been very inconvenient, perhaps embarrassing, for the conduct of the farm if the money had been tied up indefinitely. I am indeed inclined to think that the defender had a probable title of intromission with the cheque which the institu-

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tional writers regard as sufficient to exclude the consequences of vitious intromission.

Accordingly, even upon the most favourable view for the pursuer, I think that he has mistaken his remedy. It seems to me that the appropriate course would have been for him to confirm as executor creditor and bring an action of accounting.

I need hardly say that the fact that the contrary view is held by my brother Lord Stormonth-Darling, whose opinion I had an opportunity of reading, has led me to consider the case with much anxiety; but after repeated consideration of the evidence and the authorities I have been unable to come to any other conclusion than that which I have stated.

Lord Ardwall.—The pursuer in this case seeks to recover from the defender sums of £20, £12, and £25, which he alleges were lent by him to the deceased James Christie, an uncle of the defender. The loans are proved by valid writs produced in process, and the receipt for £25 bears that that sum was received to enable the deceased James Christie to pay "rent and taxes."

The action is brought, in the first place, against the defender as executor-dative of the deceased James Christie, but although he was decerned executor he never took out confirmation, for the reason, he says, that there was no estate to confirm to; but in the second place, he is sued as a vitious intromitter with the moveable estate of the deceased James Christie. The moveable estate with which it is said vitious intromission took place was in the first place the half of the stock on the farm of Bankend; and second, in any view, a cheque drawn by Speedie & Co., auctioneers, Stirling, in favour of the said James Christie. . . .

With regard to the stock on Bankend, I think it is proved that no portion of it belonged to James Christie. [His Lordship then considered the evidence relating to the ownership of the farm stock.]

There remains, however, the question as to the cheque for £46, 5s. 7d.

It is proved that from 1902 till 1905 James Christie, who was not occupied with any regular work in the farm, and who had occasion to be frequently in the town of Stirling and up and down the country in pursuance of his cow dealing business, was entrusted with the few financial transactions which were necessary in connection with the farm of Bankend. The rent receipts for the years 1903, 1904, and the first part of 1905 are in his favour, and it is otherwise proved that he always paid these rents. On the other hand, he collected the moneys due to the farm for hay, barley, and other crops sold off the farm, and also for cattle sold, and out of these he paid the rent, wages, seed bill and other things. This was quite a natural arrangement, as he had been experienced all his life in buying and selling farm stock and crop. He and his nephew Alexander were on perfectly good terms, and it was only fair that he should render what services he could in return for his board and lodging. The two last transactions of which we know anything were the payment of the half-year's rent, amounting to £55, by James Christie on 6th February 1905, and the sale by him on 17th February 1905 of three bulls, for which Messrs Speedie Brothers sent him the cheque for £46, 5s. 7d. The deceased among other things had this cheque in his possession at the time of his death, and the pursuer in this action put the cheque with two five-pound notes and a gold watch into a cash-box and took away the key. The defender Alexander Christie opened the box with a key which lay in the house, paid the funeral expenses out of the money so far as it went, and took the cheque to Speedie & Co., and obtained from them another in his own favour; and the question comes to be, Was this treatment of the cheque vitious intromission on the part of the lefender with his deceased uncle's estate?

The *onus* is on the pursuer to shew that this cheque, or, as it may be taken to be, the money contained therein, formed part of the deceased James Christie's estate. I do not think any importance can be attached to the fact that the cheque was taken in the name of the deceased. It has been held that payment by a cheque is really payment in cash, and it perhaps simplifies matters to regard the cheque as in the same position as if instead of the cheque the deceased had received the money in bank notes and coin, and had left it lying in a parcel in his repositories. It is proved by the Sale Note 6/5 of process and the evidence of Andrew M'Dermont, cashier for Speedie Brothers, the granters of the cheque, that the sum of £46, 5s. 7d. was paid for three shorthorn bulls which it is clearly proved belonged, not to the deceased at all, but to the defender and his mother and sisters, who seem to have been interested with him in the farm stock at Bankend; and I may observe that M'Dermont's evidence also shews that the deceased's transactions in cow dealing on his own account were kept perfectly separate from the sale of bulls bred upon Bankend.

This being so, it seems necessarily to follow that the cheque or the sum of money which it represented was not part of the deceased's estate at all, inasmuch as it was the price of and a surrogatum for bulls belonging to the defender, which the deceased was bound to hand over to the defender. Accordingly we may apply to the defender's intromission with the cheque what Mr Erskine says III. ix. 51: "Intromission cannot be vitious nor consequently infer a passive title where the subject intermeddled with was not truly *in bonis defuncti*, no part of the estate of the deceased, or ceased to be such before the intromission."

It is quite true that if Messrs Speedie had not been willing to cancel the old cheque and grant a new one, it might have been necessary for the defender to take out confirmation to the cheque as to money held in trust by the deceased as agent or trustee for those to whom the bulls belonged and then to have paid the proceeds to himself, which he had quite a right to do. Indeed, even supposing that the defender had not been decerned executor to the deceased, but that the pursuer had taken out confirmation as executor creditor, I cannot doubt that the defender could have successfully vindicated the sum in question, which was never immixed with James Christie's own funds, as being money truly belonging to him, and representing part of the farm stock in which the deceased had no pecuniary interest; and the same result would have followed had sequestration been taken out of James Christie's estate, the sum being distinguishable from the rest of his estate (see *M'Adam* v. *Martin's Tr.*, 1872, 11 M. 33).

So far, then, I think it cannot be doubted that although the cheque was treated in a somewhat shorthand way by the defender, he thereby did nothing more than vindicate practically what was truly his own property as he would have been entitled to do in a more roundabout fashion in ordinary form of law. The only answer of any consequence suggested to the defender's claim upon this money is that the deceased, being entrusted with many of the financial transactions connected with the farm, might have been entitled to retain the money in question against advances which he might have made on behalf of the defender and those interested in the farm. I am of opinion that this would be a sufficient answer if the pursuer had proved—and the *onus* is upon him to do so—that at the time of James Christie's death the defender, or those interested in the farm, were due money to him on a just accounting. But so far from anything of the kind being proved, I think the evidence goes to shew that, whereas the farm easily paid its way during the lifetime of Alexander Christie, senior, James Christie had frequently difficulty in meeting debts due by the farm out of the proceeds of sales, and after his death it was found that several farm accounts were unpaid which ought to have been paid out of what he had received from the sales of crop and stock. I think this appears very clearly from the evidence of Mrs Margaret Christie; and the impression which the whole evidence leaves on my mind is that James Christie was not successful in his business of cow dealing, and that so far as can be conjectured the balance was against him and not in his favour with reference to the financial business which from time to time he performed for the defender and those interested in the Bankend farm; in other words, that moneys derived from Bankend farm frequently went to cover James Christie's losses as a dealer in cows. But it is enough for the disposal of this part of the case, first, that it is proved beyond the possibility of a doubt that the money in the cheque was the property of the defender and those interested with him in Bankend stock; and second, that the pursuer has failed to prove that at the time of his death James Christie had any claim of retention or otherwise over the said money in respect of sums due to him by the defender.

On the whole matter, I am of opinion that the pursuer has failed to prove that there has been any vitious intromission on the part of the defender with his deceased uncle's estate, and it follows that the interlocutor of the Sheriff should be affirmed and the defender found entitled to the expenses of the appeal.

Lord Stormonth-Darling.—The only relevant facts of this case seem to me to lie in small compass, though the proof ranged over the whole business relations for forty years of two brothers, Alexander and James Christie, who are both now dead, Alexander having died on 12th December 1902 and James on 7th March 1905. Alexander was married and had a family, one of whom is the defender. James never married. The two brothers were for some time joint tenants of a small farm of eighty acres, on the Polmaise estate near Stirling, at a rent of £110 a year, where their father had been tenant before them. In 1879 James became tenant of a much larger farm on the same estate, but he does not seem to have succeeded in it, and after six years the landlord took the farm off his hands. James then returned to the family home at Bankend, and after Alexander's death James was recognised by the factor as the tenant of Bankend and paid the rent regularly. The defender says James did so as manager for the family. What was the exact footing on which he stood towards his late brother's widow and children is left, as I think, to pure conjecture, just as there is no definite proof as to the precise financial relations of the brothers themselves. How your Lordships can say that there is anything like proof of what these relations were I do not myself profess to understand.

The only facts that can be said to be known with certainty are these. In 1902, and again in 1904, James borrowed money from the pursuer, who was his brother-in-law, to the amount in all of £57. For these sums of money (£20, £12, and £25) James granted receipts to the pursuer, the last dated 5th February 1904 (a little more than a year before James's fatal accident). It is in these terms:—"Received from Mr David Greig the sum of Twenty-five pounds further to enable me to pay rent and taxes, etc., and for which I am to grant a conveyance to him of my Upper Bridge Street property to secure repayment of this and any other advances that may be made in future." This document was signed through a stamp "James Christie, 5th February

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1904." It is not said that the security there mentioned was ever granted. Nor is it said that the loans were ever repaid. But as tending to corroborate the statement in the last receipt that the loans were wanted to pay rent and taxes, it is significant to find that the loans were made a few days before the half-year's rent was payable.

The pursuer being thus undoubtedly a creditor of the late James Christie at the time of his death, applied to the defender for repayment of the loans as representing his uncle. The defender denied liability, and the present action was raised on the footing that the defender represented the late James Christie as executor-dative, or otherwise as vitious intromitter with his goods, gear and effects. In the course of the proceedings it appeared that on 2nd May 1905 the defender, along with other members of the family, was appointed executor-dative *qua* one of the next of kin, but he admitted that he had not given up any inventory of the deceased's estate, nor obtained confirmation. For this the defender gave as his reason that he and his co-executors had not been able to discover any property belonging to the deceased other than some bedroom furniture of small value with which they had not intermeddled. The sole question in the action thus resolved itself into one of vitious intromission, aye or no.

For the principles on which this passive title is founded one requires to revert to the institutional writers and to decisions which do not come down later than Dunlop and the early volumes of Macpherson. Perhaps the reason is that questions of intromission without a title generally arise in the Sheriff Court, and are confined to subjects of small value.

Erskine, in his Principles (III. 9, 25), defines vitious intromission as "an unwarrantable intermeddling with the moveable estate of a person deceased without the order of law," and adds, "The bare intermeddling infers this passive title, though the thing intermeddled with should not be applied to any use by the intromitter." The subject is treated more at length in the Institutes (III. 9, 49–56), where it is said that the passive title is excluded when the thing intermeddled with was no part of the estate of the deceased, and also that the vitiosity may be purged if the intromitter gets himself confirmed executor, "as it shews a willingness in the intromitter to subject himself to account." The full penalty of vitious intromission being, as Mr Erskine remarks, "extremely severe, and introduced as a check to fraud, is excluded in every case where equity interposes for the intromitter, where, for instance, the value of the things intermeddled with is so inconsiderable as to remove all suspicion of fraud, unless there be direct evidence, or at least pregnant presumptions, to the contrary." Then he goes on to mention any probable title of intromission though imperfect in itself, such as letters o administration in England, as saving the intro mitter from the passive title. Mr Bell in hi Principles (sect. 1921) begins by stating tha "the proper mode of entry, and the only effectual check on dishonesty in intromissior with the moveable funds of a person deceased is confirmation; and wherever one having ar opportunity of intromitting does so without confirmation a universal responsibility is raised against him." Then he goes on to qualify this general statement by saying, "Any *bona fide* title of intromission, or circumstances removing the suspicion of fraud and affording a check on the intromission, will relieve against the penal consequences" (*i.e.* the incurring of universal liability).

Now, what were the actual intromissions founded on? They are of the simplest description, and stand on the evidence of the pursuer and the defender himself. The pursuer's account of it is: "I remember the death of James Christie. I was telegraphed to come and see him. I found some valuables in his cash-box. They were four single pound notes, two £5 notes, a cheque from Speedie Brothers for young shorthorn bulls sold by them and amounting to £46, 5s. 7d. There was also a gold watch. These were all put into the box, and the box locked up, and I have the key in my possession. That box still remains at Bankend in the possession of defender." The defender's account of what happened is in substance the same, with an important addition. He says: "There was a cash-box in the house. Pursuer put in it two £5 notes, a gold watch, and cheque for £46, 5s. 7d. He locked the box and took away the key. The box is still at Bankend. We opened it with a key we got in the house. I took the money out of the box to pay the funeral expenses. I produce the account for the same, amounting to £11, 13s. 9d. (No. 6/7 of process). The cheque was in payment for bulls sold at Speedie's sale. The account No. 6/2 of process is the account for them. The bulls belonged to my father. I took the cheque into Speedie's, and they gave me another cheque in my name. Mr Speedie knew to whom the bulls belonged. The watch is still at Bankend." There is some corroboration by the mother and sister of the defender, but the defender's own admission is enough. The only other witness who deals with this matter is M'Dermont, the cashier of Speedie Brothers. Speedie himself, who is referred to by the defender as "knowing to whom the bulls belonged," was not examined, and the defender is not corroborated as to Speedie's knowledge by M'Dermont, who says: "After Alexander's death in 1902 there would be grazing cattle sent in for sale from Bankend. They were entered in the name of Mr Christie—probably because we did not know who the owner was." It is fair to add that this witness depones that, while the two brothers were alive, it was

James that sent in cows, and Alexander's name that was entered in connection with the sale of shorthorn cattle, but he admits that after the death of Alexander the auctioneers knew no other name but James's to put in the catalogue, and so both the account for the lot in question and the cheque for £46, 5s. 7d. were made out in James's name. I say this as bearing on the *bona fide* belief of the defender when he possessed himself of the cheque, and got Speedies' cashier (most irregularly) to substitute a cheque in the defender's favour. This matter of the cheque is really the only element of importance in the case, for I agree with the Sheriff that the money taken out of the cash-box and spent in funeral expenses was in a totally different position and must be disregarded. Indeed the pursuer's counsel ultimately presented his case on the footing that it raised no question of universal liability, but affected the defender's intromission with the sum in the cheque alone.

Now, what is a cheque? It is defined by sect. 73 of the Bills of Exchange Act 1882 as "a bill of exchange drawn on a banker payable on demand." According to the ordinary course of mercantile dealing it is, at all events when drawn on a man's own bank, universally regarded as a cash payment. The creditor may not be legally bound to receive it, for he is not bound to be satisfied with anything but current coin of the realm; but if he takes it without objection, subject only to the condition of its being duly honoured on presentation, he is held to have been paid in cash. All this was clearly expounded by the Lord President within the last six weeks in the case of *Leggatt Brothers* v. *Moss' Empires Ltd.*, 1907, 15 S.L.T. at pp. 536, 537. Now, this cheque was sent to the late James Christie, the proper creditor of the auctioneer, on 17th February 1905, and it was received and retained by him down to the time of his death. What right, I ask, had the defender or anyone else to abstract it from the deceased man's cash-box and, with the connivance of the auctioneer, to substitute another cheque in favour of a different person? The defender may have believed, and it is even possible that he may have been right in believing, that the cheque represented the value of cattle which truly belonged to his father's representatives. But that was a question which might require a long and complicated clearing up of accounts, and could not certainly be summarily solved by the defender taking the law into his own hands. Moreover, he and the other members of his family had been parties to placing the deceased man in the position of being the proper legal representative of the farm, responsible for the rent and other outlays, and entitled to the drawings for stock and crop. The defender was the last man, therefore, who could fairly disturb an arrangement for which he was largely responsible. I think it would undo all the benefits which the law endeavours to secure by the orderly and regular administration of the estates of deceased persons, if a wholly unwarrantable and in some respects clandestine proceeding of this kind received any encouragement.

It is said that the *bona fides* of the defender ought to save the defender from penal consequences of his own acts, however irregular they may have been. Perhaps from the full penal consequences, *i.e.* of being held universally liable, but not certainly from the consequences of intromission without a title, to the extent at least of that intromission. "Every person," said Lord Cowan in *Wilson* v. *Taylor*, 1865, 3 M. 1060, "who intromits without title with the effects of a person deceased is a vitious intromitter, according to the legal acceptation of the term. He may have intromitted in perfect *bona fide*; and if so, it may be that although he is not the less a vitious intromitter, he may not suffer the penal consequences of vitious intromission. Universal liability is by no means the necessary consequence of vitious intromission, and in the present case I would be slow to sustain any claim of universal liability against the defender. But if there has been *de facto* intromission without a title with the estate of a deceased to a certain extent, it cannot, on any good ground, be contended that the good faith of the intromitter affords defence against a claim to that, or to a less extent, by a creditor of the deceased." The other judges concurred; and it appears that the case was one in which the *bona fides* of the intromitter was unusually clear, for the deceased was a woman who had borne an illegitimate child, leaving some money on deposit receipt, and the bank where it was deposited paid it, on the footing that the amount was not sufficient to warrant the expense of confirmation, on receiving a discharge from the whole of the deceased's relatives; and yet the defender was held a vitious intromitter to the extent of the money (about £90) which he had received from the bank without taking out confirmation, and responsible on that ground to a creditor of the deceased woman in a claim within that amount.

If the principles applied in *Wilson* v. *Taylor* were sound, it seems to me that they lead straight to the decision of this case in favour of the pursuer to the extent of £46, 5s. 7d. The amount of the cheque was undoubtedly part of the estate of the deceased James Christie at the time of his death. He alone had the right to cash it. What he was to do with the proceeds afterwards was for subsequent adjustment. The defender admittedly intromitted with the cheque, first by abstracting it from the repositories of the deceased, and then by exchanging it for another cheque in his own favour. This was, in my opinion, a vitious intromission, both because it was intromission without the shadow of a title, and also because there was a certain amount of clandestinity in

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it, at all events as regards the pursuer. Lastly, no amount of honest belief that the cattle were the property of himself and his family could save him from the consequences of intromission to the extent of the amount intermeddled with. I should therefore be in favour of recalling the Sheriff's interlocutor, and giving decree for £46, 5s. 7d., with expenses in both Courts.

But your Lordships are deciding otherwise. I cannot pretend to regard your decision otherwise than with regret and apprehension. It not only defeats a just claim, with which the Sheriff himself expresses "much sympathy," but it rewards with success a proceeding of the most irregular and, as I think, most reprehensible kind. If that were all, its effects might end with the case in hand. But I am apprehensive that it will encourage the belief among people who already perhaps have not too scrupulous a regard for regularity of procedure, and who certainly have unusual facilities for tampering with the moveable funds of deceased persons, that they are safe to disregard the check—"the only effectual check," as Mr Bell describes it—afforded by confirmation, and to act upon their own ideas of what they are pleased to consider equity.—20*th December* 1907.

Counsel for Pursuer, M'Lennan, K.C., Spens; Agent, George Stewart, S.S.C.—Counsel for Defender, Murray, Munro; Agents, Murray Lawson & Darling, S.S.C. J. S. M.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

259. Addison *v.* Ainslie Brown.

LEASE—AGRICULTURAL SUBJECTS—IMPLIED GRANT OF RIGHT OF ACCESS OVER PRIVATE ROAD RUNNING THROUGH SUBJECTS LET—ROAD NOT INCLUDED IN DESCRIPTION OF SUBJECTS LET—ROAD NOT WAY OF NECESSITY, BUT CONVENIENT FOR WORKING FARM—CIRCUMSTANCES WHERE HELD THAT THERE WAS AN IMPLIED GRANT OF RIGHT OF ACCESS AS AN ADJUNCT OF SUBJECTS LET.

Reclaiming Note against Interlocutor of Lord Dundas.

This was an action brought by Abram Addison, tenant of the farm and lands of Manuel Mill, Linlithgow, against Robert Ainslie Brown of Manuel, S.S.C., Edinburgh for declarator "that the pursuer, as tenant of the farm and lands of Manuel Mill . . . . has right of free ingress and egress to the fields on said farm and lands by the road shewn upon the estate plan of Manuel made by James Young & Son, and dated 1852, lying said road to the south side of fields Nos. 32 and 33, and passing between fields Nos. 34 and 36 on the north, and fields Nos. 16 and 17 on the south, and tinted pink on the plan produced herewith, and running westwards from point A on said plan, past points B, C, D, E, F, and G, till it meets the public road at point J on said plan; and that the pursuer has the right, as tenant foresaid, to the free and uninterrupted use of said road, and right of passage over the same for himself as tenant foresaid, his servants, employees, and others, and for horses, cattle, and carts used by the pursuer as tenant foresaid, and for all purposes connected with the said farm and lands." The summons also contained conclusions for interdict and for damages.

The defender admitted that the pursuer had right to the reasonable use of the road in question from the point G to the point J on said plan, but he denied the pursuer's right to use the road from the point A to the point G.

The pursuer was the tenant of the farm and lands of Manuel Mill under a lease dated 11th and 21st December 1902, entered into between George Bayley, W.S., Edinburgh, proprietor of the lands of Manuel, and the pursuer. The defender was the singular successor of the said George Bayley in the said lands.

By the said lease the said George Bayley (the first party) let to the pursuer (the second party)—

All and Whole the mills of Manuel Mill, with the dwelling-house and office houses and two cot-houses at Burnbridge, all as now let to Peter Roberts, and together also with those lands now let to him and to Thomas Binnie, and those other lands in possession of the first party, and heretofore let by him as grass parks, which whole lands hereby let consist of the fields or enclosures marked Nos. 2, 3, 10, 15, 16, 17, 20, 22, 25, 27, 29 and 34, and intervening Nos. 36, 38, 39, 40, 43 and 56, and intervening numbers on the plan of the estate of Manuel, made by James Young & Son, and dated 1852, which has been seen and examined by the second party, which lands, lying in the parish of Muiravonside and county of Stirling, are computed or conjectured to extend to 112 acres imperial or thereby, although no extent is guaranteed. . . .

The road in question (from A to G) was numbered 35 on the said plan. The lease further provided:

There is hereby reserved to the first party . . . . the right to himself and others having his permission to use all roads through said lands. . . . Should the second party desire to have additional drains in the lands hereby let, and the first party be satisfied as to the expediency thereof, he shall supply the drain tiles, and the second party shall perform the carriages and execute the drainage works at his own cost. . . . The second party binds himself and his foresaids to keep the road from the public road at the gate of the avenue to Manuel House to the mills hereby let in good repair, and leave same in that state at the termination of this lease.

Proof was allowed and led. The import of the proof sufficiently appears from the judgment of the Lord Ordinary.

On 8th January 1907 the Lord Ordinary pronounced the following interlocutor:

"Finds, declares, and decerns, in terms of the first declaratory conclusion of the summons, that the pursuer has the right, as tenant of the farm and lands under the lease libelled, to the free and uninterrupted use of the road libelled, and rights of passage over the same for himself as tenant foresaid, his servants, employees, and others, and for horses, cattle, and carts used by the pursuer as tenant foresaid, and for all purposes connected with the said farm and lands; decerns against the defender for payment to the pursuer of the sum of £30 sterling in full of the petitory (second) conclusion of the summons; finds it unnecessary to dispose of the remaining conclusions of the summons; dismisses the same accordingly, and decerns; finds the pursuer entitled to expenses with the exception of all expenses incurred by him in connection with and in consequence of the amendment allowed by interlocutor of 17th October 1906."

He added the following Note:—

Lord Dundas.—The proof allowed by my interlocutor of 6th July has now been led—at quite unnecessary length, in my opinion, upon both sides I have come, without much difficulty, to the conclusion that the pursuer is entitled to decree in terms of the principal declaratory conclusion of his summons. Parts of the evidence are instructive; but it appears to me that the decision of the case must turn upon the proper construction to be put upon the pursuer's lease—a copy of which is No. 10 of process. The lease, which is dated 11th and 21st September 1892, is framed in singular and rather puzzling terms. It lets to the pursuer (1) the mills of Manuel Mill, with water-power, etc., and the houses "all as now let to Peter Roberts"; (2) "those lands now let to him and to Thomas Binnie"; and (3) "those other lands in possession of 'the landlord' and heretofore let by him as grass parks." The lease continues thus: "Which whole lands hereby let consist of the fields or enclosures marked numbers" (specified in detail) "on the plan of the estate of Manuel made by James Young & Son, and dated eighteen hundred and fifty-two, which has been seen and examined by the 'tenant,' which lands . . . . are computed or conjectured to extend to one hundred and twelve acres imperial or thereby, although no extent is guaranteed." The estate plan is No. 16 of process; Mr Carfrae's tracing of part of it, with letters imposed, is No. 6 of process; and the relative schedule of contents, dated in 1852, is No. 15 of process. Mr Carfrae, the pursuer's first witness, explains that, as shewn in his table No. 97 of process, the arable and pasture lands actually leased to the pursuer extend to 112·065 acres, exclusive of scarcements, sites of fences, roads, water, wood, banks of burns, and all houses. There are only three roads of any material importance in the case. In the first place there is the road in dispute, marked on No. 6 of process by the letters A to J. The bulk of this road, A to G, extending to ·861 acre, is No. 35 on the plan. No. 35 is not one of the numbers specified in the pursuer's lease. The part G to H, extending to ·101 acre, seems to be included in No. 36, which is specified in the lease. The remainder of the road, H to J, extending to ·042 acre, forms part of No. 37, which is not so specified. The second road leads from the mill to the point A on the public road. It is No. 21 on the plan; extends to ·575 acre, and is not specified in the lease. The third road leads from the mill to Burnbridge by the water side. It is No. 23 on the plan; consists of ·507 and ·74 acre (total ·581 acre), and is not specified in the lease. To complete matters, I may point out that a road or way leading from the mill to the damhead or weir and sluices—which, by the lease, the pursuer is bound to keep in good order—seems to be to the extent of ·229 acre, included in No. 10, which is specified in the lease, and to the extent of ·76 acre in No. 8, which is not specified therein. If, therefore, the extent of the pursuer's leasehold were to be ascertained upon a literal construction of the words of let, it would appear that he has no access at all to his mill and steading. The defender concedes that such a construction is inadmissible, and he says that he is bound and willing to afford the pursuer such access as are "ways of necessity" for the proper working of the farm. These accesses are, in the defender's view, the two roads, from the mill to the public road, above described; and the portion J to G of the road in dispute. This attitude does not seem to me to be logical or satisfactory. I do not think that both of the roads indicated could be "ways of necessity." But it is, in my judgment, clear that the lease is open to construction in regard to the matter of access, and that it must be construed, as a whole, according to the reasonable meaning of its language. A very important clause occurs, whereby the landlord reserves, *inter alia*, "(Third) the right to himself and others having his permission to use all roads through said lands." This, I apprehend, must mean either an exclusive reservation by the landlord of all the roads or a reservation to himself in common with his tenant. The latter view is maintained by the pursuer, and is, in my judgment, the correct one. The former view I find it impossible to sustain, although no doubt the words used are susceptible of such an interpretation. The defender's counsel was constrained to admit that the reservation in the sense in which he reads it, is superfluous; but he argued that some of the other reservations in the lease—particularly that of a cottage at Causewayend—are so also. In this I think he is mistaken. The cottage is situated in fiel l No. 39, which is expressly let to the pursuer, and the reservation has therefore a distinct purpose and effect Be this, however, as it may, it would, in my opinion, approach the grotesque if one were to hold, as matter of construction, that the parties to this lease intended to stipulate that the landlord should have exclusive right to use all the roads, and the tenant should have none at all. That this is not the proper construction of the language used appears to me to be confirmed by reference to another clause in the lease, by which the tenant is taken bound to keep the ground from the mills up to the point A on the plan No. 6 of process, in good repair, and leave it in that state at the termination of his lease. This is, I think, plainly an instance in which parties contemplated that the tenant should use a road—for obligation to maintain must surely imply right to use—which is not expressly let to him, and which indeed bears on the plan a number not included amongst those which are so let. The pursuer also founded upon a clause in the lease which provides that, if the tenant should desire to have additional drains "in the lands hereby let," and the landlord should be satisfied as to the expediency of such

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drains, the latter was to supply the drain tiles, and the former to perform the carriages and execute the drainage works at his own cost. It appears in the evidence that, during the lifetime of the late Mr George Bayley, the pursuer executed a considerable drainage operation upon a part of the road now in dispute, his purpose being, as the witnesses depone, to dry the road. This was done with the knowledge and approval of Mr Bayley, who supplied the drain tiles, the pursuer bearing the cost of the carriage and the labour. I think that this episode goes some way to confirm the view that the pursuer had, according to the contemplation of the parties, right to use the road as part of the subjects of his tenancy. Upon a proper construction of the lease, therefore, it is, in my opinion, matter of plain implication that the pursuer had and has right to the reasonable use of this road, as of the others upon his farm. If this view is well founded, there is an end of the matter. I may, however, say a few words as to the evidence of possession by previous tenants. The proof does not throw much direct light upon this matter, because it appears that, between 1856 and the pursuer's entry in 1892, the fields lying along the road in dispute were never let to one and the same tenant. It is to be observed, however, that prior to 1856 Alexander Brock was tenant of the whole farm; his lease (No. 36 of process) says nothing about roads; but there is a good deal of evidence to the effect that he was in the habit of using the road in dispute, as and when it suited him to do so, in the working of the farm. After Alexander Brock there were short tenancies by Andrew Osler (lease No. 37 of process) and George Brock; and from 1861 to 1892 Peter Roberts had the Mill (leases Nos. 38 and 39 of process); but during the whole period from 1857 to 1892 the grass parks along the road in dispute were let to separate tenants. The roup rolls are contained in Nos. 25 and 26 of process. There is some evidence to the effect that Peter Roberts was at one time lessee of fields Nos. 33 and 18 of the plan, and that he used the road in dispute in connection with them. So far as it goes the evidence as to previous possession seems to support—or at all events is quite consistent with—the pursuer's understanding of his own rights under his lease. There is, I think, sufficient evidence to shew that the pursuer after his entry, and down to a period subsequent to the advent of the defender, made use of the road in dispute for various purposes and in different manners. He depones that, before he took the lease, the late Mr Bayley expressly told him that he would have the use of the road for working the farm. I have some hesitation in accepting this statement implicitly; but apart from it altogether, I consider, for the reasons which I have stated, that the pursuer had and has a right to a reasonable use of the road, and that the defender is not entitled to deprive him of it. It is satisfactory to know that the defender is not, by this decision, losing any right which he had in view in making his purchase, for he frankly states in his evidence that, before buying, the question of roads did not occur to him, and he had not considered what access the tenant had over the farm.

In the view which I take of the case, it is not necessary to decide whether or not the road between A and G on the plan is a "way of necessity" in the legal sense of these words. My impression is in the negative. I think that the pursuer and his witnesses exaggerate the importance of the road as an adjunct of the farm. But it seems to be quite clear that, with a moderate amount of putting in order, it would at certain seasons and under certain conditions be of use and advantage to the farmer. The pursuer must, therefore, have an award of damages; but the amount must, in my judgment, be a modest one. The pursuer's own claim (No. 94 of process) is, I think, a greatly exaggerated and, as regards one item of £20, an uncandid one. I consider that he will be sufficiently compensated by a sum of £30. It will be unnecessary to deal with any of the other conclusions of the summons except that for expenses. The pursuer will be found entitled to expenses, except as regards an amendment which he was allowed to make by interlocutor of 17th October, during the first day of the proof. A question was then raised, when a witness was being interrogated as to the origin and history of the road in dispute. I did not see my way to excluding absolutely *ab ante* that line of evidence, which I thought might have some bearing on the case, and I accordingly allowed the pursuer to amend his record, so as to raise distinctly what was already rather obscurely alleged as to the road's history. Unfortunately, I did not notice that the amendment when tendered, went beyond what I had intended to allow, and introduced a question of public user. That is a case so essentially different from the case made in the summons and condescendence that I would have refused a motion, if it had been made, for leave to amend the summons (see *Leny*, 1894, 21 R. 749). Some evidence of use of this road by the public found its way into the proof; and the pursuer's counsel in his speech frankly admitted that his object in leading evidence as to the history of the road was to fortify his case of public user. That, as I have indicated, is a matter absolutely outside of the action as laid, and as now decided by me. The pursuer must therefore bear all the expenses incurred by him in connection with or in consequence of the amendment.

The Defender *reclaimed* and *argued*: The road in question was not part of the subjects let. There could be no implied grant of a right of access unless it were a way of necessity. It was not enough that it was necessary for the convenient working of the farm (Ersk., II. 6, 9; *Duncan* v. *Scott*, 1876, 3 R. (H.L.) 69; *Galloway* v. *Cowden*, 1885, 12 R. 578; *Carmichael* v. *Penny*, 1874, 11 S.L.R. 634; *Cullens* v. *Cambusbarron Co-operative Society Ltd.*, 1895, 23 R. 209; *Dodd* v. *Burchall*, 1862, 31 L.J. Ex. 364; *Union Lighterage Company* v. *London Graving Dock Company* [1902], 2 Ch. 557, per Stirling, L.J., at p. 573). Here the road was not a way of necessity, because access could be had by another road. Where there were two possible roads of access the landlord was entitled to decide which should be used by the tenant (*Bolton* v. *Bolton*, 1879, L.R. 11 Ch. D. 968). In any view the road was not necessary for the convenient working of the farm and was not a suitable access. The evidence as to the road being an old public road was incompetent in the present action, and should not have been admitted (*Thomson* v. *Murdoch*, 1862, 24 D. 975).

Counsel for pursuer were not called on.

The Court *adhered*.

The Lord Justice-Clerk.—We have had a long and able argument on behalf of the reclaimer in this case, but I have come to be clearly of opinion

that he has not set before us any grounds on which we should interfere with the interlocutor of the Lord Ordinary. I have considered that interlocutor, and also the note in which the Lord Ordinary has set forth his views, more than once. I think that that note so fully expresses the justice of the case that I need add nothing to what the Lord Ordinary has said. I move your Lordships to affirm the judgment of the Lord Ordinary.

Lord Stormonth-Darling.—The pursuer here, as tenant of the farm and lands of Manuel Mill, claims right under the existing lease of the farm granted by a former proprietor in 1892 to use a road passing through the farm by a defined line shewn on a plan of the estates which is referred to in the lease. The farm is an ordinary agricultural and pasture farm, with the addition of a mill. The road is not a public one, but neither is it a private one in the sense of being one for the exclusive convenience of the proprietor. It is simply a farm road, passing through the lands let, with gates upon it, and nobody pretends that it is in very good order.

I quite admit that it is necessary for the pursuer, in order that he may succeed, to shew that his right is a contractual one, either expressly or by plain implication. But this right does not depend on the clause in the lease defining the enclosures actually let for tillage or grazing purposes. These are defined by enumerating certain numbers on the estate plan, and of course for their proper purpose they are conclusive. But that does not prevent it being otherwise shewn that there are certain adjuncts of the farm, such as accesses to and from the fields for ordinary agricultural purposes. Nor is it necessary, in my opinion, to shew that these are "ways of necessity" in the sense of their being the only possible accesses to and from the fields. It is enough, as I think, that they are, in a reasonable and obvious sense, intended for the use of the farm through which they run, and that they have been actually so used. The Lord Ordinary has decided the case in favour of the pursuer, both on a consideration of the lease and of the oral evidence. I think he is clearly right, and I should be content simply to express my concurrence in his judgment and the reasons for it.

But lest I should seem to disregard the strenuous if somewhat redundant argument of Mr Cooper on behalf of the reclaimer, I should like to say that the case of *Duncan* v. *Scott*, in 1876, 3 R. (H.L.) 69, seems to me about as unlike the present case as can be imagined. That was a case in which a tenant claimed the right to use a road which formed no part of his farm, but was, simply and obviously, the private approach to his landlord's mansion-house. All that he had to found on was a "collateral licence," as Lord Cairns expressed it, granted by a former proprietor to a former tenant, and referred it to a chance conversation between the tenant and the man who shewed him the boundaries of the farm. It was no wonder that the House of Lords held that the old permission was in no sense of the nature of a contract appurtenant to the possession of the farm.

Lord Low.—It is no doubt the case that the road in question is not expressly included in the subjects let to the pursuer, but that is equally true of every road upon the farm, including the road which forms the only access to the mill and the farmhouse and steading. That arises from the fact that the lands let are described in a somewhat unusual way. In the lease the mill and houses are first described, and then the lands are in the first place described generally as "those lands now let to Peter Roberts and to Thomas Binnie, and those other lands in possession of the first party (that is, the landlord), and heretofore let by him as grass parks." That description was evidently, and I think with reason, regarded as being too vague, and accordingly the lease proceeds, "which whole lands hereby let consist of the fields and enclosures marked numbers," and then the numbers are given, "on the plan of the estate of Manuel, made by James Young & Son, and dated 1852."

The numbers by which the various fields are marked upon the plan did not include the roads, which were also marked by distinctive numbers, and accordingly the defender is justified in saying that the roads are not among the subjects expressly let to the pursuer.

The roads, however, are mentioned in the lease. The pursuer is taken bound to keep the road leading from the public road to the mill and farmhouse in good repair, which implies that he had right to use that road. Further, the lessor reserved "the right to himself and others having his permission to use all roads through the lands." I think that that reservation plainly implies that some right to the roads through the lands had been conferred upon the tenant; otherwise there would have been no point in the proprietor reserving right to himself.

The defender, however, contended that there was only an implied right to the tenant to use such roads as were actually necessary for the possession and enjoyment of the subjects let. He admitted that the road to the mill and farmhouse was in that position, and also the portion of the road in question between the letters J and G on the plan No. 6 of process, because without the use of that portion of the road the pursuer would have no access at all to the fields marked 16, 17, 34, and 36 on the plan. It will be observed that the portion of the road between J and G is the portion furthest away from the farm steading and the natural and most direct way to which is along the other

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portion of the road. The defender, however, maintains that the pursuer is not entitled to use any part of the road except that between J and G, and that to reach that part he must take a long round by a public road by which he can enter the road at the point J.

That certainly appears to me to be *prima facie* an extravagant contention; but the defender tries to justify it on the ground that the part of the road between the steading and the portion J to G is so steep that it is impracticable for carts, whereas the public road by which the point J can be reached is comparatively level. Now there is no doubt that some parts of the road in question (which runs uphill from the steading) are so steep as to be unsuited to heavy cartage. It is, however, proved that the first part of the road, which is not very steep, forms the best way, and has been used for the purpose of carting manure to the field No. 32 on the plan, and that the remainder of the road is quite suitable for such purposes as moving stock, or taking horses to lands which are being ploughed. Further, I see no reason why the road should not be used for leading corn crops home to the steading, it being downhill all the way.

This therefore seems to me to be a clear case of implied grant, because the road in question runs right through the farm and is plainly of the nature of a service road, and it is also, in my judgment, required for convenient and comfortable enjoyment of the farm.

I have therefore no doubt that the judgment of the Lord Ordinary was right.

Lord Ardwall.—My Lords, I agree. The documents founded on by both parties here consist of the lease No. 10 of process, a Plan No. 6 of process, and a schedule relative thereto. There are several roads on this farm, all of them treated in the same way as the road specially in question in this action; they are excluded from the fields let by the lease, and they are scheduled under the head of "Roads" in the schedule relative to the plan which was shewn to the pursuer when he took the farm. The defender's argument amounts to this: that the pursuer is not entitled to the use of a single road upon the farm, and might be interdicted from using any one of them, unless he is prepared to shew that the road he proposes to use is what Mr Cooper calls a "road of necessity." This contention is, in my opinion, almost too ridiculous for serious consideration, but it has been so completely demolished by the Lord Ordinary in his opinion that I content myself with adopting that opinion so far as this point is concerned.

The reason of this particular road not being included in the portions of ground let to the pursuer may very possibly have been that the landlord desired to make it clear that the road was not in whole or in part to be ploughed up when the tenant came in the ordinary rotation of crops to plough up any of the fields through or alongside of which the road passes; or the whole roads may have been omitted from the lands let in the tenant's interest so as not to impose upon him the duty of keeping them up without special stipulation; and a special stipulation was inserted in the lease binding the pursuer to maintain one of these roads.

My opinion as to roads on a farm is that if a tenant takes a farm through or alongside of which he sees roads laid down on the landlord's property, he is entitled to assume as an implied term of his contract of tenancy that he shall be entitled to use all existing roads unless it be specially stipulated that he shall not do so, and that was not done here, as the Lord Ordinary has very clearly shewn in his examination of the terms of the lease.—20*th December* 1907.

Counsel for Pursuer: M'Clure, K.C., Mercer; Agents, Cunningham & Lawson, Solicitors.—Counsel for Defender, Lord Advocate (Shaw, K.C.), Cooper, K.C., Welsh; Agent, Party.

J. S. M.

OUTER HOUSE.

(*Lord Salvesen.*)

260. Gillespie *v.* Riddell.

I. Entail—Lease—Sheep Farm—Stipulation Inter Naturalia—Obligation by Heir of Entail in Possession to Take Over Sheep Stock at Termination of Lease—Question Whether Obligation Binding on Succeeding Heir—Proof—Averments as to Nature of Obligation Held Relevant.

II. Succession — Liability for Testator's Debts—Subsidiary Liability of Special Legatee—Competency of Declarator Against Special Legatee When General Representatives of Testator Domiciled Abroad Have Not Been Discussed.

The following statement, as taken from the Opinion of the Lord Ordinary, sufficiently sets forth the circumstances giving rise to this action, the material averments and contentions of the parties.

"The pursuer in this case is the tenant in possession of the farm of Ardery, under a lease entered into between him and Sir Rodney Stuart Riddell. The duration of the lease was fifteen years from Whitsunday 1903, with an option to either party to terminate the lease at the end of the fifth or tenth year thereafter, on twelve months' notice. The farm of Ardery is part of the entailed estate of Sunart, in the county of Argyll, to which the defender succeeded on 2nd January 1907 as heiress of entail on the death of her brother Sir Rodney. Shortly after her

succession her agents gave notice terminating the lease at Whitsunday 1908; and the pursuer does not deny that the lease will come to an end as at that date.

"When the pursuer entered upon the farm he was required to take over the sheep stock from the outgoing tenant as valued by arbiters, and the total price he paid for it amounted to £1319, 1s. 11d. The lease contains a clause with regard to the delivery of stock at its termination, which is quoted in Cond. 2. It takes the tenant bound to deliver to the landlord or incoming tenant, as far as possible, not more than the same number of sheep of the same classes as he received at his entry; and the proprietor agreed that the pursuer should receive the same prices as he paid on his entry for the stock so delivered. The defender's agents, soon after she succeeded to the entailed estate, intimated to the pursuer that she repudiated any obligation to take over the sheep stock; and the leading conclusion of the action deals with this matter. The pursuer seeks declarator that the obligation undertaken by Sir Rodney Stuart Riddell is binding on the defender as heiress of entail in possession of the said lands in succession to him. This declarator proceeds on the assumption of the defender surviving the term of Whitsunday 1908, when the obligation, if there be one, becomes prestable. But it is obviously convenient that the question of law should be decided before the actual arrival of the term, so that parties may be able to make arrangements for the disposal of the sheep stock; and although the defender pleads that some of the other conclusions [*i.e.* the third and fourth conclusions as set forth *infra*] are premature and fall to be dismissed, there is no corresponding plea with regard to the first two conclusions. The argument for the defender was accordingly substantially directed, on this point, to the second, fourth, and fifth pleas in law. These pleas raise the general question whether an obligation by an heir of entail in possession of a sheep farm to take over the sheep stock at the termination of a lease to which he is a party, is binding on the succeeding heirs of entail.

"Before considering the law it is necessary to advert to the averments which the pursuer makes and of which he asks a proof. He says that an obligation binding the tenant to deliver the sheep stock at the termination of the lease, and a corresponding obligation on the landlord to pay for the stock at a fixed or valued rate, is, and has from time immemorial, been a universal condition of sheep-farm leases in the north and west of Scotland, and is founded on the considerations (1) that sheep stock in that part of the country requires to be acclimatised to a particular farm or district; and (2) that sheep stock habituated to a certain holding does not wander beyond the boundaries, and this enables march-fences to be dispensed with. For these reasons the condition is one entirely in the interest of the estate and of the succeeding proprietors, who would find their holdings practically unlettable if the stock were dis-plenished at the termination of each lease. Without this condition the farm could never have been let in terms of the deed of entail for 'the highest rent that could be got from a good and responsible tenant.' The term of entry and the ish of the lease were also fixed in accordance with the condition that the stock was to remain on the ground, as it is impossible to remove sheep from such a farm at the term of Whitsunday, when lambs are too young to travel, or to realise sheep stock at that term except at a ruinous loss. He further avers that the leases on the estate of Sunart, including those granted by the entailer, have always contained a similar condition. These averments are denied by the defender, who further maintains that they are irrelevant. She admits that the obligation would have been prestable against Sir Rodney Riddell if he had survived the termination of the lease, and might also possibly be binding on his executors, but maintains that it cannot affect an heiress of entail 'who takes the estate by singular title and is not liable for the personal contracts of predecessors; and she says that the obligation to take over the sheep stock is merely a personal contract, and not the less so because it occurs in a lease of heritable subjects."

The Lord Ordinary *sustained* the first plea in law for the defender, and dismissed the third and fourth conclusions of the action; *quoad ultra*, *repelled* the second plea in law for the defender, and allowed a proof.

Lord Salvesen [after narrating the facts as set forth above].—It is singular that this question has not hitherto been made the subject of direct decision; and I think it may be assumed in the pursuer's favour that heirs of entail in possession have not hitherto disputed the binding character of similar obligations though undertaken in leases granted by their predecessors. In some cases, perhaps, they might have no interest to do so; but in others, especially during the last thirty or forty years, when such obligations are supposed to have become specially onerous, owing to an alleged practice of valuators to overvalue sheep stock, in a question with a landlord it cannot but have been to the interest of heirs of entail in possession to repudiate such obligations if they thought that they could do so successfully; and if the pursuer's averment as to the custom of inserting similar clauses in leases of sheep farms is to be accepted, such cases must have been very numerous.

I was referred to various authorities, from which I think it appears to be indisputable that a lease granted by an heir of entail as an act of ordinary administration, is binding on a succeeding heir if it has been made real by possession before the succession opened. Now I think if the pursuer's

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averments are established, that the lease in question was an act of ordinary administration in connection with such a subject as a sheep farm. On the same assumption the obligation which is objected to must, in the general case, be one which it is to the interest of an heir of entail in possession that he should be able to grant, whether he happen to survive the termination of the lease in which it occurs or not. It may be presumed that the rent payable by the tenant depends, at least in part, on the landlord undertaking this obligation, and would have been less if there had been no such obligation, if, indeed, the subjects would have been lettable at all as a sheep farm for a period of five years. It may be that in certain circumstances a burden may be imposed on a succeeding heir of entail for which he receives no corresponding advantage, but that is not conclusive against the burden being one which runs with the lands. In the case of *Queensberry*, 18th February 1814, F.C., it was held lawful for an heir of entail to stipulate for forehand rents in corn farms, so as to deprive the succeeding heir of the right which might have been otherwise competent to him in preference to executors, if the legal and conventional terms had been the same; and the subsequent case of *Breadalbane* v. *Jamieson*, 1877, 4 R. 667, shews that an heir of entail may, by an act which is not in contravention of the entail, impose a burden on the succeeding heir from which the latter receives no corresponding benefit. The particular act that had this effect was the destruction of the existing mansion-house, which to the extent of its value must have diminished the value of the entailed estate, and the rebuilding of which had only been commenced when the heir of entail died.

Other burdens which might be undertaken in a lease by an heir of entail, and yet be made to affect the succeeding heir to his disadvantage, may easily be figured. In the lease in question, for instance, there is an obligation by the lessor to put the fences and gates in a proper state of repair and to reroof the old farm buildings with corrugated iron. This obligation might not have been implemented before the death of the granter, although the tenant had made his right real by entering to the farm; but I apprehend that, as an ordinary act of administration, the burden would then have fallen to be discharged by the succeeding heir, subject, possibly, to any right of relief he might have against the executors of his predecessor, if the obligation ought, in ordinary course, to have been implemented before the succession opened.

I was referred by the defender to a series of cases with regard to ameliorations, which are summarised by Lord Deas in his opinion in the case of *Breadalbane* v. *Jamieson* at p. 675. In all these it was held that an obligation by a lessor of entailed lands to pay his tenant for buildings erected by him, or meliorations made by him during the currency of the lease, was not binding upon a succeeding heir of entail who was in possession when the lease expired. These decisions rest upon the principle that an heir of entail is not bound by the personal contracts of his predecessor; and that such an obligation, although occurring in a lease, is to be treated as "extrinsic of its character as a real right, and not even essential to its objects as a contract." See Lord Deas' opinion in *M'Gillivray's Exrs.*, 1857, 19 D. 1106. I was also referred to the two recent cases of the *Earl of Galloway* v. *The Duke of Bedford*, 1902, 4 F. 851, and 1904, 6 F. 971, in which the law on this subject was fully discussed in the First Division. In the earlier of these two cases a lease of salmon and trout fishings by an heir of entail was reduced by his successor on the ground that a grant of trout fishing creates merely a personal obligation upon the granter, and does not therefore affect the lands. But in that case the principle was clearly recognised that a lease which is within the ordinary powers of administration of an heir of entail in possession, when made real by the tenant having entered on the subjects, is binding on succeeding heirs of entail. The decision, therefore, does not affect the present case, unless it be affirmed that an obligation to take over sheep stock at the end of the lease of a sheep farm is necessarily outwith the range of proper administration. Obligations of a similar kind are common in agricultural leases; *e.g.*, obligations to take over dung or straw left by the tenant at the expiry of the lease, at a valuation. It may be that a succeeding heir of entail has not the same interest to challenge the validity of such an obligation as he has in the present case; but, in principle, the two seem to be indistinguishable, and both must be treated either as personal contracts or, as I think, as part of the real right acquired by the tenant in possession under a written lease, and as such binding upon singular successors, including heirs of entail. Accordingly, I have come to the conclusion that I must repel the second plea in law for the defender, and allow the parties a proof of their averments on this head.

If the view I have expressed be sound, it is probably of small consequence how the third and fourth conclusions are dealt with, but in any event they must be disposed of. The third conclusion seeks a declarator that the whole heritable and moveable estate of the late Sir Rodney Stuart Riddell is liable for the obligation in question; and the fourth seeks a declarator that the defender, as special legatee of certain moveables [including the furniture and silver plate], is liable for the obligation to the extent of the value of the moveables she has received; or, alternatively, that she is liable *subsidiarie* and subject to the condition that the trustees and executors of the deceased shall have been first discussed. [The said trustees were domiciled

abroad, and had refused to prorogate jurisdiction in this action. The defender's first plea in law was as follows:—"The trustees and executors of Sir Rodney Riddell not being parties to the action, the defender is entitled to have the third and fourth conclusions thereof dismissed as incompetent against her." The second plea was that the pursuer's averments were irrelevant.] In my opinion the third conclusion cannot be competently dealt with in the absence of the executors and general representatives of the deceased. No judgment pronounced in this action would be *res judicata* against them, and if the obligation upon which the pursuer founds be one which cannot be enforced against the heir of entail, it follows that the deceased's trustees are the proper parties to convene in a declarator of this kind. The same observation applies to the fourth conclusion, which—as far as I know—is quite unprecedented. If the general representatives are ultimately found liable in the obligation, it follows that the defender will have to make it good to the extent of any moveable estate which she has taken by succession. But I think it would be out of the question that she should have to litigate a matter in which she is not primarily interested, and may not be interested at all, if there are sufficient funds to meet the deceased's whole obligations as well as the legacies which he bequeathed. The pursuer's proper course is to sue the trustees and executors in their own forum; and if he constitutes his claim against them and fails to recover his debt from want of funds, he may perhaps be entitled to have recourse to the defender to the extent to which she has obtained benefit from the estate, but it will be time enough to decide this when the question is raised. I shall accordingly dismiss these conclusions.—4*th December* 1907.

Counsel for Pursuer, Clyde, K.C., Constable; Agents, Macrae, Flett & Rennie, W.S.—Counsel for Defender, Hon. Wm. Watson; Agents, Hamilton, Kinnear & Beatson, W.S.

J. W. F.

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(*Lord Dundas.*)

261. Gavin's Trustees *v.* Walker's Trustees.

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I. HUSBAND AND WIFE—MARRIAGE CONTRACT—FUNDS SETTLED BY WIFE'S FATHER IN MARRIAGE CONTRACT ON WIFE IN LIFERENT WITH LIFERENT TO HUSBAND IN CASE HE SURVIVE — CONVEYANCE BY WIFE TO MARRIAGE-CONTRACT TRUSTEES OF ACQUISITA AND ACQUIRENDA — DIVORCE OF HUSBAND AND PREDECEASE OF WIFE—LIFERENT FORFEITED BY HUSBAND—HELD IN A QUESTION BETWEEN MARRIAGE-CONTRACT TRUSTEES OF PARTIES AND WIFE'S EXECUTORS, THAT FORFEITED LIFERENT FELL TO WIFE'S EXECUTRY.

II. SUCCESSION—LEGITIM—FUNDS SETTLED IN MARRIAGE CONTRACT ON WIFE IN LIFERENT WITH LIFERENT TO HUSBAND IN CASE HE SURVIVE—DIVORCE OF HUSBAND AND PREDECEASE OF WIFE—LIFERENT FORFEITED BY HUSBAND AND FALLING INTO WIFE'S EXECUTRY — CLAIM BY CHILD OF LEGITIM OUT OF FUNDS FALLING INTO WIFE'S EXECUTRY FROM LIFERENT FORFEITED BY HUSBAND—HELD (1) THAT CHILD ENTITLED TO LEGITIM OUT OF SUCH FUNDS; AND (2) THAT PROPER DIVISION OF SUCH FUNDS FOR PURPOSES OF ASCERTAINING AMOUNT OF LEGITIM WAS TRIPARTITE.

This was an action of multiplepoinding to which the parties were (1) the trustees acting under the marriage contract of Mr and Mrs Gavin, pursuers and real raisers, and also claimants; (2) the trustee acting under the trust disposition and settlement of Mrs Gavin; and (3) Mrs Georgina Gavin or Johnstone, daughter of the first parties, with consent of her husband.

The facts of the case are fully related by the Lord Ordinary.

The Lord Ordinary issued the following interlocutor:—

"Finds, upon a just construction of the documents libelled, (1) that the claimants the trustees under the antenuptial contract entered into between Mr and Mrs Gavin are entitled and bound, as such trustees, to hold the capital sum of £5000, forming part of the fund *in medio*, until the death of Mr Gavin; (2) that the claimant Mrs Gavin's testamentary trustee is entitled to be ranked and preferred to the fund *in medio*, so far as consisting of interest; (3) that the said fund, so far as consisting of interest, is subject to a valid claim at the instance of the claimant Mrs Johnstone for legitim; and (4) that, in ascertaining the amount of said claim for legitim, the division of the third fund must be tripartite and not bipartite."

Lord Dundas.—The fund *in medio* in this multiplepoinding is a sum of £5000, which the late Dr George Walker bound himself, under the marriage contract of his now deceased daughter, Mrs Mary Scott Walker or Gavin and her husband, to pay to the trustees thereunder (who are now represented by the pursuers and real raisers), together with the income and interest accrued thereon, from 14th July 1899—being the date of Mrs Gavin's death—to the date of the present action. Mr and Mrs Gavin (she being then Miss Mary Scott Walker) were married on 11th January 1866. They entered into an antenuptial marriage contract dated 8th and 10th

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January. By the said contract the bride made over to the trustees therein named her whole property, heritable and moveable, then belonging or resting owing to her, or that should pertain and be owing to her during the subsistence of the marriage (excepting, *inter alia*, the sum or sums to which she might derive right under and in virtue of the obligation by her said father, thereinafter written), for the purposes of paying the annual proceeds of the said means and estate to herself, during her lifetime; and after her death, if her husband should survive her, to her said husband during his lifetime; and on the death of the spouses, of paying or delivering over the fee or capital of the said means and estate to the child or children of the marriage, subject to a power of appointment which it is unnecessary here to refer to in detail. By the said contract, the bride's father, Dr Walker, bound himself to make payment to the trustees at the first term of Whitsunday or Martinmas after his death, of the sum of £5000 in trust for the following purposes, viz.:—"To pay the interest and produce of the said sum to the said Mary Scott Walker during all the days of her life, and after her death, in the event of her being survived by the said John Gavin, to pay the said interest or produce to him during all the days of his life; and on the death of the survivor of the said spouses, the said trustees are hereby directed to pay over one-half of the capital of the said sum to the child or children of the said marriage, subject to the power in favour of the said intended spouses afterwritten of appointment and division among the said children and their issue and of substituting an annuity; . . . to pay over the other half of the capital of the said sum of £5000 on the death of the survivor of the said spouses, to whomsoever the said Mary Scott Walker may appoint. . . ."

One child was born of the marriage—a daughter—who is now Mrs Johnstone, and is, along with her husband and their marriage-contract trustees, a party to the case. The marriage was dissolved on 14th March 1885, by decree of divorce in an action by Mrs Gavin against her husband, upon the ground of his desertion. Mrs Gavin died, as already mentioned, on 14th July 1899. Mr Gavin is still alive. Mrs Gavin left a trust disposition and settlement and codicils by which she disponed her whole estate to trustees, of whom the claimant Mr C. C. Nisbet is now the sole survivor. By her settlement, Mrs Gavin, in exercise of the power of apportionment contained in her marriage contract with regard to the said sum of £5000, directed and appointed that the one-half thereof, which is by said marriage contract to be paid, on the death of the survivor of Mr Gavin and herself, to the child or children of the marriage, should be laid out in the purchase of an annuity to or for behoof of her daughter Mrs Johnstone; and with regard to the other half of the £5000, which is directed to be paid, upon the death of the survivor of Mr Gavin and herself, to whomsoever she might appoint, Mrs Gavin directed the same to be paid to her trustees for behoof of her mother, Mrs Walker, for her liferent use allenarly; and after that lady's death (which occurred on 15th September 1900), to be divided and paid over to and among a variety of charitable and other institutions, and certain persons named in the settlement.

In 1901 a special case was brought in the Court of Session for the decision of various questions in regard to the funds settled by Mrs Gavin and her father respectively in her marriage contract, other than the one-half of the said sum of £5000 directed to be paid to whomsoever she might appoint, as to which one-half no question was at that time raised. The case is reported 1901, 4 F. 278, affirmed 1903, 5 F. (H.L.) 24. The parties to the case were (1) the present pursuers and real raisers; (2) Mrs Johnstone's marriage-contract trustees; (3) the trustees under Mrs Gavin's settlement; and (4) Mrs Gavin. The result of the decision, briefly put, was (1) that, even if the fund had vested in Mrs Johnstone, she was not entitled to payment of it until the death of her father; and (2) that the liferent forfeited by him fell to her mother's executors.

To complete the history of the matter, it should be explained that Dr Walker died on 28th September 1866, leaving a trust disposition and settlement and codicils, and survived by his daughter Mrs Gavin and by a son George. The terms of the settlement are summarised in Art. 10 of the Condescendence annexed to the summons; and are more fully set forth in the report of a special case which was submitted to the Court for its judgment upon the construction of the settlement (*Walker's Trs.*, 1870, 8 M. 870). The Court found that the son's share did not vest in him at and prior to his decease, and was not conveyed by a trust settlement which he had left, but that the same devolved upon Mrs Gavin under her father's trust settlement; and that the said devolved share was carried to the trustees under her marriage contract by force of the general conveyance of her estate therein contained.

In this state of the facts, competing claims are made to the fund *in medio*. I think there is little doubt that the capital of the £5000 must remain, as it is at present, in the hands of the marriage-contract trustees. During the life of Mr Gavin this has, I apprehend, been so decided by the House of Lords (5 F. (H.L.) 24), in regard to one-half of the said sum; and I see no sufficient ground for arriving at a different conclusion in regard to the other half. The words "on the death of the survivor of the said spouses" appear to me plainly to govern both branches of the clause in the marriage contract; and the reasoning which led to the decision upon the one-half is, in my judgment, equally applicable

to both. I did not, indeed, gather that any argument was seriously pressed to the contrary of this view.

But the delicacy of the case arises in regard to the proper disposal of the fund in so far as it consists of income accruing since Mrs Gavin's death. It is claimed, on the one hand, by the marriage-contract trustees, and, on the other hand, by Mrs Gavin's testamentary trustee. By the decision in the House of Lords to which I have referred, the liferent forfeited by Mrs Gavin was held to fall to Mrs Gavin's executry. It was argued to me on the part of the marriage-contract trustees that their claim in a question with the executor is not in any way precluded by this judgment. In this I think they are right, for the plain reason that the question now arising does not appear to have been raised in that case, or to have been under the consideration of the Court or the House of Lords. . . .

I think that, even if the House of Lords had had before them the argument submitted to me on behalf of the marriage-contract trustees, they would still have preferred the claim of the executor or testamentary trustee. For the basis of the judgment seems to be that, Mr Gavin's liferent being in effect struck out of the instrument, what is taken from the husband must enure to the wife, and there is a resulting trust in her favour. In other words, the marriage-contract trustees hold this liferent right for Mrs Gavin, and the only question is whether it does or does not fall within her conveyance to them of *acquisita* and *acquirenda*. In my opinion it does not. What she conveyed to them was (*a*) what belonged to her at the time of the marriage, which this liferent certainly did not; and (*b*) what should "pertain and be owing to her during the subsistence of the marriage"—which, again, seems clearly to exclude this liferent, because it came to her, not during the subsistence but by the dissolution of the marriage. Even if the effect of the forfeiture was, as was argued to me, to increase the estate of Dr Walker after his daughter's death by the amount of the liferent forfeited by Mr Gavin, the result would not, in my judgment, be different. For the daughter, as has been explained, was the only person who had any interest in the residue of her father's estate; and the right to the forfeited liferent being thus in her, plainly fell to her testamentary trustee, unless the marriage-contract trustees could shew that it was included in the terms of her conveyance to them, which, for the reasons already stated, I think it was not.

If these views be sound, one must next consider a claim put forward on behalf of Mrs Johnstone to a share in this portion of the fund in name of legitim, which is disputed by Mrs Gavin's testamentary trustee. In my opinion the claim is well founded. If I am right in holding that the forfeited liferent falls within the executry estate of Mrs Gavin, I find it difficult to see why it should not be subject to legitim. It was urged that the forfeited liferent, being *ipsa natura* income and not capital, and income accruing only after Mrs Gavin's death, must be excluded from the legitim fund. I was referred to the well-known case of *M'Murray*, 1852, 14 D. 1048; but it does not seem to me to help the argument. It was there decided that children are not entitled, in claiming their legitim, to a share of the profits arising after their father's death from his business which had been lawfully carried on by his trustees. The demand for legitim was not made for a number of years after the father's death, owing to the minority of the children. But when it was made, the estate in which the legitim fund was included was clearly that of the father as at his death, and not as it stood—whether enlarged or diminished by the actings of the trustees—at the date of the claim. The Lord President (M'Neill) thus summed the matter up (at p. 1053): "I think their [the trustees'] employment of the fund was justified and warranted by the deed. It was not the legitim which was employed. The legitim was a debt to be paid when claimed, the debt being a certain share of the estate as at the father's death. Does it differ from any other debt or legal obligation? I think not; and therefore do not think the profits can be said to be part of the legitim, or that the trustees are accountable to the children for them." I was further referred to cases under the Thellusson Act, which were said to support by way of analogy the contention that this money was indelibly stamped with the character of income, and could never be regarded as an aliquot part of the capital of Mrs Gavin's moveable estate (*Logan's Trs.*, 1896, 23 R. 848; *Campbell's Trs.*, 1891, 18 R. 992). I have studied the cases, but I have not been able to extract from them any useful guidance by way of analogy or otherwise upon the point under consideration. Counsel for Mrs Johnstone, on the other hand, drew my attention to two decisions, *Muirhead*, 1867, 6 M. 95, and *Pringle's Trs.*, 1872, 10 M. 621, which are cases dealing with the ascertainment of legal rights, and do, I think, throw light on the present question. In *Muirhead*, a husband who died in 1865 had two policies of insurance on his own life, dated respectively in 1835 and 1839. It was held that the sums contained in these policies formed part of his executry estate subject to *jus relictæ*. The Lord President (Inglis), after pointing out that the obligation under the policies was necessarily not one to pay to Mr Muirhead himself, proceeds thus (p. 98): "But although the obligation never could be implemented to Mr Muirhead himself, if it be an obligation to pay to his executors, because they are his executors, it seems impossible to resist the conclusion that the sums in these policies form part of the

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executry estate; and, if so, *cadit quæstio*, because the executry estate is just the fund to be divided, and of which one-third falls to the widow by virtue of her *jus relictæ*. If this money did not form part of the executry, I do not know what is to become of it; it is part of the succession; it is not heritable, but moveable; and, as nobody can take it but as succeeding to the deceased, it must be included in the free executry estate. But, if so, is it to be excluded from the operation of that rule of law by which the moveable succession in intestacy is divisible into three equal parts? That would be very strange and anomalous, because, if the widow is not entitled to any part of it, I presume that the children are as little entitled to a share, and the result would be that the whole amount would go to increase the dead's part." This case seems to show at least that money may form part of an executry estate and be subject to *jus relictæ* or legitim, although it was not, and could not be, paid to the deceased during his life, but only to his executors. *Pringle's* case followed a few years later. There, a husband predeceased his wife, upon whose life he had effected two policies of insurance. It was held, in a question with children claiming legitim, that the policies formed part of his moveable estate at the date of his death, and, in calculating the amount of legitim, were to be valued at their actuarial value, that is, at their real value in the market. It is to be observed that here (differing from the facts in *Muirhead*) the policies were current at the death of the husband and father; and this distinction was commented on by the learned judges; but they decided—to use the words of the Lord President (Inglis) at p. 624—"on very much the same grounds on which we decided the case of *Muirhead*." His Lordship added: "I take leave to say that that was a very well-considered case, and it is one from the principles of which I see no reason to depart." I have studied this question as well as I can with the aid of the cases cited; and I confess that I see no good answer to Mrs Johnstone's demand for legitim. The forfeited liferent must, I think, be considered as part of Mrs Gavin's executry estate. I do not see how otherwise it could be dealt with. If this is so, I do not understand why it should not be subject to legitim.

The next and last question for decision then arises. It is whether the division of these funds in ascertaining the amount of legitim should be bipartite or tripartite. My opinion is in favour of the latter of these alternatives. In support of the contrary view, I was referred to the following authorities:—Ersk. Inst., III. ix. 20; Bank. Inst., III. viii. 15; *Nisbet*, 1726, M. 8181; *Borthwick*, 1685, *ibid.*; *Jervey*, 1762, M. 8170; *Johnston*, Hume 290. But these authorities appear to deal with the renunciation by a wife of her *jus relictæ*, by acceptance of a special provision in satisfaction of it, which may result in a bipartite division of the husband's executry estate, between the legitim fund, on the one hand, and the dead's part, on the other. The old case of *Hamilton*, 1561, M. 8178, to which I was also referred, and which depended upon forisfamiliation, would not, I apprehend, be now good law; but, if it were, it would merely be a case where the children's claims were satisfied or lawfully excluded, which would naturally result in a bipartite division. The answer to the argument in favour of such a division appears to me to be found in the principles explained by the House of Lords, though not laid down for the first time, in the special case already referred to, of which this multiplepoinding is the sequel. The statutory forfeiture by Mr Gavin of his liferent, as a consequence of his divorce, enures to the benefit of his wife and of no one else. It is quite a different case from that of the exclusion or voluntary discharge of rights in consideration of some substituted provision. The effect of Mr Gavin's forfeiture was, in my judgment, equivalent to an assignation by him of his lost interests in favour of his wife.

The parties desired that I should, at this stage, do no more than embody my opinion upon the points argued, in the form of findings; and this course I shall accordingly adopt.—10*th December* 1907.

Counsel for Pursuers and Real Raisers and Claimants Mr and Mrs Gavin's Marriage-Contract Trustees, Macfarlane, K.C., Inglis; Agents, Tawse & Bonar, W.S.—Counsel for Claimant Mrs Gavin's Testamentary Trustee, Blackburn, K.C., Hon. W. Watson; Agents, Tawse & Bonar, W.S.—Counsel for Mrs Johnstone and Others, Hunter, K.C., Chree; Agents, Alex. Morison & Co., W.S. A. M.

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(*Lord Mackenzie.*)

262. Duncanson *v.* Anderson.

Process—Summons—Amendment—Action for Payment of a Sum Part of Which was Not Due at the Date of the Action—Amendment Increasing the Sum Sued For—Act of Sederunt, 20th March 1907, sect. 2 (f)—Crear v. Morrison, 1882, 9 R. 890, Distinguished.

In this action T. & R. Duncanson sued George Anderson for payment of the sum of £580.

The pursuers averred that they were proprietors of a plot of ground, and that the defender had agreed to take over one feu of the said plot and become responsible for the erection of a tenement on that feu. They further averred that a mason and contractor, Elphin-

stone Forrest, performed the mason work for the said tenement, and that the sum sued for was due to Forrest by the defender for that work. The pursuers paid Forrest this sum and obtained from him an assignation, in virtue of which they sued the defender.

The defender, after the case had been heard, added this plea to the record: "In any event the action is premature and incompetent, the sum sued for not having been due when the action was raised."

The facts, so far as bearing on this plea, are set forth in the Lord Ordinary's opinion.

Lord Mackenzie [after stating the facts].—A difficulty has, however, arisen in consequence of a point taken by the defender for the first time in his amendment on 14th November 1907. The point is that, under the agreement founded on, the sum of £580 sued for was not due at the raising of the action, one half being payable by bill at three months. Article fourth of the agreement provides for payment of instalments as the same shall be fixed by the architect, one half in cash and the other half by bill at three months. The certificates founded on are dated 7th March and 6th April, and the action was raised on 11th April 1907.

The defender founds on the case of *Crear* v. *Morrison*, 1882, 9 R. 890, which decides that it is incompetent to raise action or use diligence upon a debt not yet due. I am accordingly of opinion that as regards one half of the sum of £580 sued for the action was premature. It was argued that if this was so the whole action was bad, and *Crear* was founded upon in support of this proposition. In that action, however, what was sued upon was a running account for £47, 15s. 7d. commencing 16th February and ending 28th November 1881. The bargain between the pursuer and defender was that four months' credit was to be given on a running account. An action was brought on the 1st February 1882, and this was dismissed. The defender here maintained that there were in *Crear's* case items in the account to the extent of £5, 5s. 7d. in respect of which the four months' credit had expired when the action was raised. These, according to his argument, were due when the action was brought, and yet the Court did not grant decree for their amount; in the same way it was contended that the present action should not be held good *quoad* the one half of the £580 which was payable in cash, and therefore due when the action was brought. In the case of *Crear*, however, what was produced and sued on was a running account. As the Lord President points out, there were a great many dates in it, but that did not rob it of the character of a running account. The pursuer had agreed to allow the defender four months' credit on a running account. The account there could not be split up. That, however, does not appear to me to be an authority which supports the defender's contention in the present case, that the action may not be insisted in as regards one half of the sum sued for, which under the agreement it was stipulated should be paid in cash.

The next question is, What is to become of the action as regards the one half of the £580 which was not due when the action was brought? The result of *Crear's* case would be that to the extent of one half of the sum sued for the action should be dismissed as premature. The pursuer, however, maintained that under the Act of Sederunt of 20th March 1907, sect. 2, subsect. (*f*), he should be allowed leave to amend, to the effect of reinstating the one half of the sum sued for which since the action was raised has become due. The terms of the material portion of sect. 2 (*f*) are these:—"It shall be competent for the pursuer, at any time before final judgment, to amend the conclusions of the summons or other writ to the effect of increasing the sum for which he sues, or subjecting any other additional funds or property to the adjudication of the Court."

Now, suppose in the present case the pursuers had originally brought their action for only £290, the one half of the £580 which was then due, could they under this subsection competently have added a conclusion for the other £290 when it fell due? I think they could. The liability for these two sums depends on the same contracts and upon exactly the same considerations; if the defender is found liable to pay the one half he must be found liable (in some process) to pay the other half, because the issue involved in the case is whether he is liable to pay the whole. I should be slow to take any course in this case which would encourage the idea that a creditor can sue for a debt before it is due. The circumstances, however, are peculiar. The objection was not stated by the defender until after the case had been heard and was at avizandum, and after considerable expense had been incurred. If it had been stated in the original defences, the result might have been different. If no part of the sum sued for had been due when the action was raised, I do not think the course of procedure indicated as after mentioned could have been allowed.

I think, in the circumstances of this case, the defender should be allowed to place himself (if so advised) in the same position as if the other one half of the £580 had not originally been included in the action. This may be done by a minute of restriction. If a motion is thereafter made for leave to amend, by adding the other one half, which is now due, I should be prepared to grant it, and to hear parties on the question of expenses.—12*th December* 1907.

Counsel for Pursuers, MacRobert; Agent, R. D. Ker, W.S.—Counsel for Defender, Munro; Agents, Donaldson & Nisbet, S.S.C.

R. C. H.

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Allan's Executor v. Union Bank of Scotland.

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263. Allan's Executor *v.* Union Bank of Scotland.

I. DILIGENCE—ARRESTMENT ON DEPENDENCE—BANK—HELD THAT AN ARRESTMENT IN THE HANDS OF A PARTY, THE AGENT OF A BANK, WAS EFFECTUAL TO ATTACH A SUM ON DEPOSIT-RECEIPT WITH THE BANK—GRAHAM V. MACFARLANE & CO., 1869, 7 M. 640, DISTINGUISHED.

II. DILIGENCE—ARRESTMENT—BREACH OF—HELD THAT PAYMENT BY A BANK TO A OF A SUM ON DEPOSIT-RECEIPT IN NAME OF A AND B, "PAYABLE TO EITHER OR SURVIVOR," WAS NOT A BREACH OF AN ARRESTMENT OF ALL SUMS DUE OR BELONGING TO B—DOUBLE DISTRESS—BAD FAITH.

In June 1903 the now deceased Miss Catherine Allan raised an action in the Sheriff Court of Orkney against Mrs Elizabeth Allan or Nicholson and her husband, to recover the sum of £116, which had been deposited with the National Bank in name of Miss Allan and Mrs Nicholson, and payable to either or survivor. This deposit-receipt, as the pursuer averred, was on 18th April 1901 presented by Mrs Nicholson to the branch bank at St Margaret's Hope of the defenders, who issued a new deposit-receipt for £126, 13s. 7d. in name of Mrs Nicholson and her daughter Catherine Allan Nicholson, payable to either or the survivor. Arrestments on the dependence of the action were used in June 1903 in the hands of the defenders' agent at St Margaret's Hope in the terms given in the Lord Ordinary's Opinion.

On 25th January 1905 the Sheriff (Wilson) found that Mrs Nicholson was liable to account to Miss Allan for the said sum of £116.

Miss Allan having died, the pursuer, her executor, now sued the defenders for payment of the sum of £126, 13s. 7d. He averred that the defenders had paid this sum in breach of the arrestment to Mrs Nicholson or her daughter; that this was done after the proof in the foresaid action was led; and that the defenders' agent at St Margaret's Hope had been examined as a witness in the case, and that the defenders acted in bad faith in making the payment. The defenders averred that the payment was made in good faith and in the ordinary course of business on presentation of the receipt duly endorsed by Miss Nicholson.

The defenders pleaded, *inter alia*:

"4. The said arrestment being inept and ineffectual to arrest any funds in the defenders' hands, the defenders should be assoilzied.

"5. In any event, the said arrestment being ineffectual to arrest money due to Mrs or Miss Catherine Nicholson, the defenders should be assoilzied.

"6. The defenders having paid the said sum as in duty bound under their contract on the endorsation of Miss Nicholson, are entitled to absolvitor."

Lord Mackenzie.—The first question in this case is whether the arrestments set out in Cond. 4 are effectual to attach any funds in the defenders' hands.

The defenders found on the case of *Graham* v. *Macfarlane & Co.*, 1869, 7 M. 640, as an authority in favour of their argument that the arrestments are inept. The arrestment was used on the dependence of an action at the instance of Miss Allan against Mrs Nicholson, by which there was "lawfully fenced and arrested in the hands of Alexander Campbell, agent at St Margaret's Hope for the Union Bank of Scotland Ltd., the sum of £120 sterling, more or less, due and addebted by said Union Bank of Scotland Ltd. to the said Mrs Elizabeth Allan or Nicholson."

The question to be considered (as stated by the Lord President in *Graham*) is, whether this can be read as an arrestment in the hands of Alexander Campbell in his representative capacity as agent of the bank, and as such holding *de facto* funds belonging to the bank at St Margaret's Hope, the office which issued the deposit-receipt in question. I think it can and should be so read. The terms of the arrestment in *Graham's* case were different. There the schedule of arrestment bore that the arrestments were used "in the hands of you, Messrs H. & A. M'Ewan, agents of the Union Bank of Scotland at Lochgilphead, the sum of £200, less or more, due or addebted by you to the said Duncan Graham, defender." There was there nothing to shew that the arrestment was not simply in the hands of the firm of H. & A. M'Ewan.

The next question is whether the defenders have, in breach of the arrestment, paid away money attached by it. The pursuer alleges that they have paid away, in breach of the arrestment, the contents of a deposit-receipt £126, 13s. 7d. issued by their branch at St Margaret's Hope, in name of Mrs Nicholson and her daughter Catherine Allan Nicholson, "payable to either or survivor." There is no dispute that the deposit-receipt in question was not endorsed by, or paid to, Mrs Nicholson. It was endorsed by, and paid to, her daughter Catherine Allan Nicholson. The pursuer's case is that the bank should have refused to pay to the daughter, after the arrestments had been used to attach the sum of £120 more or less, due and addebted by the bank to her mother. The argument was that the bank, when called on to pay by the daughter, should have treated the case as one of double distress and have raised a multiplepoinding. The bank's answer is the case of *Anderson* v. *North of*

Scotland Bank Ltd., 1901, 4 F. 49. The deposit-receipt there was in favour of A and B, "payable to either or the survivor of them." B sued the bank with concurrence of A. The bank averred that the money truly belonged to A, and pleaded that they were entitled to retain it in security of a debt due to them by A. This was held irrelevant, because the bank was bound in respect of the express terms of their deposit-receipt to make payment to A. The bank had given an unequivocal document binding them to pay to two people or either of them. Either was in a position to present the receipt to the bank and demand payment. If that is so I am unable to see in the present case why the fact that the bank were interpelled by arrestment from paying to one, should furnish them with any answer to a demand for payment by the other. If they had no answer to a demand for payment made by Miss Nicholson, it follows that they were perfectly entitled to pay to her. There would only have been double distress had the competing claims been by the arresting creditor and Mrs Nicholson.

There are averments that the defenders acted in bad faith in paying over the contents of the deposit-receipt, founded on statements that the bank's agent knew the whole circumstances of the case. These do not seem to me to be relevant. Whatever his knowledge was he could not refuse to pay to the bank's creditor who produced the document of debt duly endorsed. No arrestment had been used to interpel the bank from paying to the creditor who did present the deposit-receipt. They had no concern with the property of the money, and for this reason the case is different from *Matthew* v. *Fawns*, 1842, 4 D. 1242, cited for the pursuer.

I am therefore of opinion that the sixth plea in law for the defenders should be sustained, and that they should be assoilzied, with expenses.—21*st December* 1907.

Counsel for Pursuer, Sandeman; Agent, W. B. Rainnie, S.S.C.—Counsel for Defenders, Pitman; Agents, J. & F. Anderson, W.S. R. C. H.

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(*Lord Guthrie.*)

264. The American Mortgage Company of Scotland Limited *v.* Sidway and Another.

DILIGENCE—ARRESTMENT—ARRESTMENT TO FOUND JURISDICTION—SUBJECTS ARRESTABLE—SHARES IN LIMITED COMPANY.

(*Reported ante, Vol. XIV. pp.* 521, 924.)

The question in this case, at this stage, was whether the pursuers, a limited company having their registered office in Edinburgh, had founded jurisdiction against the defenders, both residing in the United States of America, by the arrestment of certain shares belonging to the defenders in the Missouri Land and Live Stock Co. Ltd., having its registered office in Edinburgh. The arguments and authorities on the point fully appear in the Lord Ordinary's Opinion.

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The American Mortgage Company of Scotland Ltd. v. Sidway and Another.

The Lord Ordinary *held* that the arrestment of the shares in question had founded jurisdiction against the defenders.

Lord Guthrie.—The pursuers allege that they have founded jurisdiction against the defenders, residents in the United States, by the arrestment of certain shares belonging to the defenders in the Missouri Land and Live Stock Co. Ltd., which has its registered office in Edinburgh. The defenders are admitted to have been proprietors of these shares on 21st March 1903, the date of the alleged arrestment. But the defenders maintain that, by the law of Scotland, shares in limited joint stock companies are not arrestable, and therefore there is no warrant for proceeding against them in Scotland. At the date of arrestment, although dividend appears to have been earned, no sum was actually payable to the defenders either in the shape of dividend or return of capital.

The general rule is thus enunciated by Lord Deas in *Lindsay* v. *London and North-Western Railway Co.*, 1860, 22 D. 571, at page 596: "All moveable and heritable property in Scotland is attachable in one way or other. We have poinding to attach what is in a man's own own possession; arrestment to attach personal estate in the hands of another; and adjudication to attach heritable property and various other things which cannot be attached by either of the two former diligences." In the case of ordinary partnerships it is not disputed that, while the assets of the Company are not arrestable for debt due by one of the partners, the share of that partner in any balance of the assets belonging to him is arrestable. See Ersk., III. iii. 24; II. Bell's Commentaries 508, note 3, and 536 (I. 3); *Parnell* v. *Walter*, 1889, 16 R. 917, per Lord Kinnear, pp. 924–5; *Cassells* v. *Stewart*, 1879, 6 R. 936, 8 R. (H.L.) 1, per Lord Gifford, 6 R. 956.

But the defenders deny that the rule regulating ordinary partnerships applies to shares in limited joint stock companies. They found on the principle enunciated in many English cases, such as that of *In re George Newman*, 1895, 1 Chan. 674, per Lord Justice Lindley at p. 685: "An incorporated company's assets are its property, and are not the property of the shareholders for the time being." From this they argue that no debt was due by the Missouri Land Co. Ltd. to the defenders at the date of the arrestment, and therefore their shares in that Company could not be arrestable. This seems to me to involve a confusion of ideas. As

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Mr Bell put it (II. Com., p. 71): "It is the obligation to account which is the proper subject of attachment." That obligation exists here as between the defenders and the Missouri Company, and I see no reason if the obligation is, as it seems to be, a present obligation, of more than nominal value, not alimentary and not specially appropriated, why it should not form the subject of a valid arrestment, even although an accounting might be required to ascertain its value. The method of making it forthcoming is illustrated by the form of summons in Mr Graham Stewart's Law of Diligence, p. 847, and the interlocutor in the undefended case of the Mallina Gold Company.

I think the question is decided by the case of *Lindsay* v. *The London and North-Western Railway Co.*, 1860, 22 D. 571, in the First Division, and by the case of *Sinclair* v. *Staples*, 1860, 22 D. 600, in the Second Division. No doubt in *Lindsay's* case, as the defenders pointed out, there were dividends payable on the shares and also other moveable property, which would of themselves, apart from the shares, have formed sufficient ground for the arrestment; but each of the First Division judges—the Lord President M'Neill, Lord Ivory, Lord Curriehill, and Lord Deas—expressly affirms the arrestability of shares in a joint stock company. In *Sinclair's* case, where only shares were involved, the defenders argued that the debate turned on whether the proper diligence was arrestment or adjudication rather than on the question of whether either was competent. This is true; but the pursuers in that case maintained that arrestment was not a diligence applicable to a species of moveable property like shares in a joint stock company, and this argument was negatived by the Second Division.

The defenders contended that these cases were not applicable: first, because they were decided with regard to shares in companies under the Joint Stock Companies Act 1856, and the Missouri Land and Live Stock Co. Ltd. was established under the Companies Act 1862; and, second, because the Missouri Company is a limited company. In regard to the first point, I was not referred to any differences between the two Acts which would affect the question now under consideration. The second disappears, when it is observed that the shares of the Company concerned in *Sinclair's* case were limited in liability.

It appears to me to be sufficient warrant for arrestment in this case that there are here shares in a joint stock company, of present ostensible value, belonging to the defenders, whose interest in them is not alimentary and not specially appropriated, which shares give the defenders a substantial interest in the Company and its assets, and can be turned at any time into money.

The defenders also contended that it had not been proved that the shares possessed any value. The proof does not contain any direct statement on this point, but I think I am bound to assume that shares in a Company which is regularly paying large dividends, and in which there have been periodical returns of capital to the shareholders, must possess substantial pecuniary value. —26*th December* 1907.

Counsel for Pursuers, Lorimer, K.C., Horne; Agents, J. K. & W. P. Lindsay, W.S. — Counsel for Defenders, Morison, K.C., Hon. William Watson; Agents, Webster, Will & Co., S.S.C. C. H. B.

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265. Home Drummond and Others v. Pepper and Others.

FISHINGS—SALMON—DRIFT OR HANG NETS IN RIVER OR ESTUARY—INTERDICT—ONUS OF PROOF — CIRCUMSTANCES IN WHICH ONUS THROWN ON RESPONDENTS TO PROVE THAT THEY WERE FISHING BY NET AND COBLE OR OTHER LAWFUL MEANS.

Lieutenant-Colonel Home Drummond and others, who were proprietors of salmon fishings on the river Forth, sought to interdict James Pepper, Alexander Ross, Hutchison Wells and others from "fishing for salmon, or fish of the salmon kind, in any part of the river or estuary of the Forth, with the nets known as drift nets or hang nets, and from placing or setting nets of that description in any part of the said river or estuary." The respondents did not deny that fishing by drift or hang nets was illegal as decided by the House of Lords in the case of *Duke of Atholl* v. *Glover Incorporation of Perth* (1900, 2 F. (H.L.) 57; 8 S.L.T. p. 77), but denied that they were, in fact, fishing by that method on the occasions condescended on in the statement of facts for the complainers, and averred that they were using "the method of fishing ordinarily known as net and coble." The complainers maintained that the respondents had adopted devices to simulate net and coble fishing in order to deceive the water bailiffs, while in fact they were fishing on the principle of drift or hang nets. The Lord Ordinary held that the circumstances disclosed, viz. the season of the year, the state of the tide at the time, and the nature of the locality in which the respondents were fishing, shifted the *onus* to them to prove that they were in fact fishing by "net and coble," "sweep net," or other lawful means. He held that they had failed to discharge that *onus*, and therefore granted interdict against them in terms of the note. The facts which he held to be proved are fully set forth in the Lord Ordinary's Opinion.

Lord Guthrie.—On 24th July 1907 the respondents Ross and Wells were net fishing for salmon in the Tulliallan fishings, on the river Forth, below Alloa, under a license from James Thomson, the lessee of the fishings. The question in this case is whether they were sweep-net fishing, which is legal, or drift-net (otherwise called hang-net) fishing, decided by the House of Lords in 1900 to be illegal in the case of the *Duke of Atholl* v. *Glover Incorporation of Perth* 2 F. (H.L.) 57, overruling the case of *Masters of Allan Mortification* v. *Bernard Thomson*, 1879, 7 R. 221 (river Forth fishings), and the subsequent case of *Earl of Wemyss* v. *Earl of Zetland*, 1890, 18 R. 126 (river Tay fishings).

This question may be considered under two heads: First, Was the net used by Ross and Wells, in material and construction, a sweep net or a drift net? and second, Were they using the net on the occasion in question as a sweep net, or as a drift net?

Before discussing these questions it is necessary to consider the nature of the fishing ground. Before 1900, only drift-net fishing was practised in this part of the Forth, sweep-net fishing having been found impracticable, in the sense of being unworkable to profit. It is common ground that the ordinary sweep net, such as No. 12 of process, cannot be worked at this part of the river for the purposes of the respondents, who are fishermen for profit, not for sport; the ground is too muddy and the river is too wide; and other forms of net such as the circular net called the "Prospector," spoken to by Bernard Thomson, have been abandoned as indefensible in law. Ordinary sweep-net fishing is not in use much below South Alloa Inch, about five miles higher up the Forth.

But it is said by the respondents that they have been able to lighten the material and alter the construction of the ordinary sweep net so as to adapt it for the Tulliallan fishings at the place in question. In these circumstances, the *onus* shifts from the complainers to the respondents almost at the outset of the case.

I. Material and Construction.—The material of No. 23, a flax net, said by the respondents to be the net in use on 24th July, is much lighter than the material of No. 12, a cotton or hemp net, produced by the complainers as a specimen of an ordinary sweep net, although not so light as No. 13, produced by the complainers as a specimen of an ordinary drift net. The result of the evidence is that the material of No. 23 is too light for efficient sweep-net fishing, because, during the process of enclosing characteristic of that method of fishing, a heavy strain is put upon the net both by the weight and by the struggles of the fish, while on the other hand the material of No. 23 is well fitted for drift-net fishing, either to catch the fish by hanging them by their gills or teeth, or to take them by entanglement.

As to the construction of the net, an attempt was made to provide the net with three of the features ordinarily distinguishing a sweep net from a drift net, namely, a bag, a staff and bridle, and a tow-rope. The bag is very little deeper than the net, and seems to have been added to the net, not for the purpose of fitting it for the uses of a sweep net, but as a blind. The respondent Ross asserts that "there is no difference between the bag in the net which we have produced and the bag in an ordinary sweep net." But none of the witnesses, not even the respondents' witness Bernard Thomson, from whom the bag was borrowed the day before by the respondents, ever heard of so small a bag in connection with a sweep net. It is too small for a sweep net, without being so large as materially to interfere with the use of the net as a drift net. I refer particularly to the evidence of the complainers' witness, Mr David Robb, of the Tay Salmon Fishery Co. Ltd. The bridle-and-staff apparatus also is abnormally small, and the tow-rope is abnormally light. There was no heavy bottom rope such as is invariably found in sweep nets, and the method of attachment of the net to the top and bottom ropes was that usually associated with drift nets.

II. Use.—The evidence here is contradictory as to, first, whether Ross and Wells had with them two boys or one; second, whether the boy or boys, walking along the muddy shore, had a continuous hold of the tow-rope until Wells got hold of it, or whether the rope was dropped by the boy or boys and allowed to float down with the net until Wells picked it up; third, whether Wells and Ross made a sweep with the net for the purpose of enclosing and landing on the shore any fish that might be in it, or whether the sweep that is spoken to by them was not a pretence when they saw Macrae and the others approaching in their boat from the "Dart," not in the course and for the purpose of sweep-net fishing, but to simulate legal fishing, and to hoodwink or at all events evade the bailiffs; and fourth, whether the fish in the net were dead or alive when taken out of the net.

In view, first, of the time of the year, July, one of the two months most suitable for drift-net fishing, on account of the number of fish, and because, owing to the warmth, the fish swim higher in the water; second, the state of the tide, just the period when the current is not strong enough to swing round a drift net and put it out of fishing order, the "ideal time for hang-net fishing," as the complainers' witness, Beattie, calls it; third, the nature of the locality, specially as spoken to by the complainers' witness, Mr David Bentley Murray; fourth, the material and construction of the net; and, fifth, the small amount of able-bodied strength employed,—I think the *onus* is on the respondents to prove that they were, in this particular season of the year and state of the tide, specially suitable for drift as distinguished from sweep-net fishing, in

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this place unsuited for sweep-net fishing, and with this net, the material and construction of which both pointed to drift nets, using the net as a sweep net, and not as a drift net. This *onus* I think they have failed to discharge.

I accept the situation of the respondents' net at different periods, as shown on the chart produced, No. 11 of process, which, if correct, is inconsistent, especially in the zigzag lines, with the immediate sweep which takes place when the fish are caught by enclosure. I accept also the complainers' version of the time occupied by the respondents between paying out the net (a method, by the way, which is necessary in drift-line fishing owing to the lightness of the nets, and is not usual with the heavier sweep nets, which drop from the stern of the boat without assistance) and taking it into their boat, which in any view considerably exceeds the time occupied in sweep-net fishing. In view of the evidence of Macewan, Struth, and James Henderson, I believe that both the boys Wells and Henderson were present, although the complainers' witnesses, whose attention was chiefly directed to the net and the men, say that there was only one. What the boys were doing on the shore is more doubtful. But whether on this occasion they continued to retain hold of the tow-rope or not till Wells came up, it was evident, from the ages, ten and twelve, of the boys, and from their appearance, that they were not fit to withstand the considerable outward strain that is liable to be put by a tide or river current on the tow-rope in sweep-net fishing, even before the net is begun to be hauled ashore. The evidence as to the condition of the two grilse and the sea trout taken, when first handled by the respondents, is also conflicting, but it is admitted that none of them were in the bag of the net where fish are usually found in sweep-net fishing.

On the whole matter I think the burden of proof has been shifted on to the respondents, and that they have failed to establish the defence contained in their answers.—1*st January* 1908.

Counsel for Complainers, Blackburn, K.C., Murray; Agents, Dundas & Wilson, C.S.—Counsel for Respondents, Orr Deas, Findlay; Agents, Hossack & Hamilton, W.S. A. S. P.

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(*Lord Mackenzie.*)

266. Brown's Trustees *v.* Ferguson's Trustees.

PROCESS—PRINTING—HELD THAT WHERE A CASE WAS TRANSMITTED FROM THE SHERIFF COURT UNDER SECT. 9 OF THE SHERIFF COURTS ACT 1877, THE PETITIONER MUST PRINT.

Sect. 8 of the Sheriff Courts (Scotland) Act 1877 (40 & 41 Vict. cap. 50) provides for the extension of the Sheriff's jurisdiction to certain questions of heritable right or title, etc.

Sect. 9 thereof enacts: —"In regard to every action brought under the preceding section in the Sheriff Court, the following provisions shall have effect; that is to say, (1) If a defender shall, at any time before an interlocutor closing the record is pronounced in the action, or within six days after such an interlocutor shall have been pronounced, lodge a note in the process in the following or similar terms; that is to say, 'The defender prays that the process may be transmitted to the Court of Session,

[Signed by the Defender or his law agent]'

[Date]

it shall be the duty of the sheriff clerk forthwith to transmit the process to the Keeper of the Rolls of the First Division of the Court of Session, who shall, under the directions of the Lord President of the Court, mark on the petition the Division and the Lord Ordinary before whom it shall depend, and shall transmit the process to the depute-clerk officiating at the bar of such Lord Ordinary; and the process having been so transmitted shall thereafter proceed before the Court of Session as nearly as may be as if it had been raised in that Court."

The petitioners, Ferguson's trustees, presented a petition in the Sheriff Court at Glasgow craving interdict against the respondents, Brown's trustees, selling, under a power of sale contained in a bond and disposition in their favour, certain lands in which the petitioners were vested.

The respondents had the case transmitted to the Court of Session under sect. 9 of the Sheriff Courts (Scotland) Act 1877.

The petitioners moved the Lord Ordinary to ordain the respondent to print, and argued that, as the respondent was responsible for the case being brought to the Court of Session, he was in the same position as a party appealing for jury trial, and was bound, as in that case, to print.

The Respondents *argued*: That as sect. 9 provided that the case should proceed as if it had originally been brought in the Court of Session, the usual rule, namely, that the pursuer was bound to print, applied.

Lord Mackenzie.—Seeing that sect. 9 (1) of the Sheriff Courts Act of 1877 provides that after the process has been transmitted it "shall thereafter proceed before the Court of Session as nearly as may be as if it had been raised in that Court," I am unable to see any reason for departing from the usual practice; and therefore I am of opinion that it is the pursuer's duty to print the record.—21*st December* 1907.

Counsel for Petitioner, M. P. Fraser; Agents, Oliphant & Murray, W.S.—Counsel for Respondent, A. R. Brown; Agent, James Rutherfurd.

R. C. H.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Pearson.)

267. Fleming *v.* Gemmill and Others.

I. RIVER—POLLUTION—TITLE TO SUE—POLLUTION OF STREAM USED FOR FEEDING CATTLE — ACTION OF INTERDICT AND DAMAGES AT INSTANCE OF FARM TENANTS —HELD THAT TENANTS WERE NOT BOUND TO PROVE A NUISANCE BUT HAD TITLE TO SUE AS BEING ASSIGNEES OF LANDLORD'S RIGHT IN SO FAR AS NECESSARY FOR THEIR PROTECTION IN THE SUBJECTS LET.

II. RIVER—POLLUTION—LIABILITY OF LANDLORD FOR POLLUTION BY TENANT — DRAINAGE FROM MINERS' HOUSES—HELD LANDLORDS WERE LIABLE FOR POLLUTION BY SEWAGE IN RESPECT THE SYSTEM OF DRAINAGE AMOUNTED TO AN OPUS MANUFACTUM FROM WHICH POLLUTION MIGHT BE APPREHENDED.

III. REPARATION—DAMAGES—CONJUNCT AND SEVERAL LIABILITY — WHERE SEVERAL DEFENDERS ALL MATERIALLY CONTRIBUTED TO POLLUTION OF STREAM, EACH HELD CONJUNCTLY AND SEVERALLY LIABLE FOR WHOLE DAMAGE.

IV. PROCESS — DECREE — COMPETENCY—CONJUNCT AND SEVERAL LIABILITY—ACTION OF DAMAGES—CONCLUSION FOR DAMAGES AGAINST SIX DEFENDERS JOINTLY AND SEVERALLY — DECREE AGAINST THREE DEFENDERS CONJUNCTLY AND SEVERALLY HELD COMPETENT.

Appeal from the Sheriff Court of Lanarkshire at Hamilton.

This was an appeal from a decision of the Sheriff-Substitute at Hamilton (A. S. D. Thomson) in an action at the instance of three persons, who were tenants of a farm called South Netherburn Farm, against six defenders, four of whom were coalmasters, one a bricklayer, and the other a grocer. The prayer of the petition was (first) to ordain each of the defenders to abstain from causing to fall or flow, or knowingly permitting to fall or flow, or to be carried from their collieries, works, houses or offices, and others attached to the same into the Netherburn burn at any point in the course of said burn on the pursuers' farm or at any portion of its course prior to entering on the lands of said farm, any poisonous, noxious or polluting liquid whereby the water of the said burn was rendered unfit for the use of man or beast; and (second) to grant decree against the defenders, ordering them jointly and severally to pay damages to the pursuers.

The pursuers averred that the Netherburn burn was the only natural source for obtaining water for the supply of the cattle on their farm, that the defenders had permitted the effluent from coal-washing operations at their collieries and sewage from houses owned by them to flow into the burn, whereby the water was rendered unfit for watering cattle; that some of their cattle had died in consequence thereof, while the supply of milk from the stock was materially diminished and the stock had been decreased in value.

The Sheriff-Substitute found in fact that illness was caused to the pursuers' cattle by drinking water from the Netherburn burn which was contaminated with sewage; that all the defenders, except James Nimmo & Co., The United Collieries Ltd., and William Cooper, contributed to the pollution of the Netherburn burn with sewage; and found in law that the defenders other than the three mentioned were liable in damage to the pursuers for the loss sustained by them, and ordained the defenders James Gemmill, William Barr & Sons, and Charles Surgeoner, in terms of the prayer of the petition, and decerned against them conjunctly and severally for a sum in name of damages.

The circumstances were set forth in the note to the Sheriff-Substitute's interlocutor as follows:—

I think it is proved that the Netherburn was polluted with sewage; that the pursuers' cattle suffered in consequence; and that all the defenders contributed to the pollution except The United Collieries Ltd., James Nimmo & Co. Ltd., and William Cooper.

That the burn was polluted with sewage to some extent is clearly proved. The various analyses demonstrate this, and many witnesses as well for the defenders as for the pursuers speak to it as the result of their own observation.

That the burn above the properties of the defenders is pure, or comparatively so, is not disputed seriously. Some attempt was made to shew that manure and top-dressing of the fields might account for it, but the evidence was feeble and the parties did not press it. Some attempts were made to shew that houses just south of Surgeoner's contributed more than Surgeoner's and Barr & Sons' houses, but as to this again the evidence was not strong, and I imagine that the pursuers would have called these parties as defenders if they had thought they had a stronger case against them than against those lower down the stream whom they have convened. Mr Duncan C. Barr's evidence makes it clear that the pollution becomes more and more marked as you follow the stream from Surgeoner's property past Barr & Sons' and Gemmill's properties to the bridge, the inference of course being that the defenders, or some of them, are adding pollution to it in its course.

That the pursuers' cattle suffered from drinking the polluted water is, in my opinion, proved. I think the deaths of two heifers and a cow must be attributed to this cause, but not the death of the third heifer, which seems to have died of lead poisoning. I think also that the supply of milk was diminished, and that some of the cattle were in poor condition from drinking polluted water.

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It was strongly contended that it is a mere superstition to hold that sewage-polluted water affects the health of cattle, but I cannot, on the evidence before me, accept this contention. It certainly has not been invented to serve the purpose of the present case, because defenders have produced a pamphlet shewing that before this case arose, the view which they contend for had the support of eminent writers on veterinary subjects. It seems to be the case that cattle do not suffer from typhoid fever, and that they can drink, without any specific disease resulting, water which would be highly dangerous to human beings; but the fact is spoken to by too many witnesses of standing to be disregarded, that sewage-polluted water does irritate the bowels and lower the tone of cattle, even although it does not set up any specific disease. I think this was the case on pursuers' farm. Severe sickness was so prevalent amongst their cattle that the inference of some common cause was irresistible, and in the absence of any other explanation, the conclusion seemed inevitable that the burn water was the cause.

The next question is, Who are responsible for the pollution? The condition of the pursuers' dungstead and tanks will not solve the question. They are no better than they should be, but the blame hardly rests there. I think all the defenders, save those specially excepted above, are proved to have contributed.

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As regards William Barr & Sons, the analyses of Dr Tatlock and Dr Clark seem to bear heavily against them, and there is considerable evidence that in some way or other sewage from their property does find its way into the burn.

As regards Charles Surgeoner, there is quite a large body of evidence to shew that the sewage from his southernmost houses, at all events, finds its way into the burn. The same may be said of James Gemmill. He has certainly cleared himself so far as regards his colliery, but there is abundant evidence that, so far as regards his property adjoining the burn, he is the chief offender, and pollutes the burn more than any one else. It is somewhat puzzling that this should be the case, because, like Barr & Sons, he proves that his houses have only earth closets, and that he has provided a septic tank of a kind, yet the fact remains that sewage is discharged from his pipe into the burn, and apparently in considerable quantity.

A question of law remains whether I can award the pursuers damages against the defenders who have polluted the stream, in view of the fact that the other defenders must be assoilzied, and that the pursuers' conclusions are for a joint and several decree against all the defenders. The point of law thus involved will have to be settled some day; at present it is, I think, open to question. There have been opinions both ways in the Supreme Court, and the result here would be so hard to the pursuers if I were to refuse them damages against the parties proved to be at fault, after a very long proof, that I am disposed to give them decree. I have the authority of Lord Moncreiff in *Robinson* v. *Reid's Trs.*, 2 F. 928, in support of this course. See also *Douglas* v. *Hogarth*, 4 F. 148, and *Baird's Trs.* v. *Leechman*, 10 S.L.T. 515.

The remaining question is as to the amount of damages which should be awarded to the pursuers. For the two heifers and a cow which died I award £10, £11 and £14, or £35 in all. The third heifer probably died of lead poisoning. For deficiency in milk I award £30. . . . For depreciation in the value of the cattle a large sum is claimed. . . . I think I may allow £50 on this head. These three sums of £35, £30 and £50 amount to £115, for which I pronounce decree.

The defenders Gemmill, Barr & Sons, and Surgeoner appealed to the Court of Session.

A preliminary objection was taken by the appellants to the competency of the Sheriff-Substitute's interlocutor. They *argued* that as the prayer of the petition concluded for damages against six defenders jointly and severally, a conjunct and several decree against three of those defenders only was not competent; that to found such a decree the words used in the prayer, "jointly and severally," were not sufficient without the addition of the words "and severally," "or severally or one or more of them," or words to a similar effect. They referred to the following cases:—*Robinson* v. *Reid's Trs.*, 1900, 2 F. 928; *Douglas* v. *Hogarth*, 1901, 4 F. 148; *Baird's Trs.* v. *Leechman and Others*, 1903, 10 S.L.T. 515; *Mackersay* v. *Davis & Sons*, 1895, 22 R. 368; *Wallace* v. *Braid and Others*, 1898, 6 S.L.T. 118; *Cook* v. *Barnton Hotel Co.*, 1900, 2 F. 1011; *Caughie* v. *Robertson and Others*, 1897, 25 R. 1.

The Respondents *argued* that the decree was competent, and referred to *Leslie's Trs.* v. *Lumsden and Others*, 1851, 14 D. 213, and *Braidwoods* v. *Bonnington Co.*, 1866, 2 S.L.R. 152.

The Court *repelled* the objection.

The Lord President.—In this case a farmer, the land in whose occupation bounds a certain stream, raised an action in the Sheriff Court against six persons who, he alleged, polluted the stream, and the prayer of the petition was to ordain each of the defenders to abstain from causing a flow from their collieries or works or offices of noxious matters of various sorts, and "(second) to grant a decree against the above-named defenders, ordaining them, jointly and severally, to pay to the pursuer" certain sums of money which the pursuer alleges were the value of cattle which he lost through their being poisoned by the deleterious ingredients of the stream which they had drunk. There was a long proof on the matter, and the Sheriff-Substitute eventually found that the pollution had been caused by three of the defenders and not by the other three; and accordingly he pronounced an interlocutor in terms of the prayer against each of the three defenders, ordaining them to abstain, and granting decree jointly and severally against them for certain sums of money, being the sums at which he assessed the damage. An appeal was taken against that by the three persons found liable, but before going into the question of the merits the point was raised by their counsel that the decree given by the Sheriff was wrong, because it was impossible for the Sheriff to grant such a decree upon the prayer of the

petition, in respect that the petition having asked for a decree for payment against six defenders, jointly and severally, it was impossible to grant decree jointly and severally against only three of the defenders.

Perhaps at this time of day it is curious that the point is not perfectly settled, but counsel were unable to bring to our notice any authority deciding the matter, though there are many *obiter dicta* on one side and on the other. In that state of matters one must take up the matter on principle, and on principle I confess I do not think there is really much in the argument for the appellants. I can quite understand that for precaution's sake the common form of prayer has been more ample than the form in this case; that is to say, I think the common form of prayer or conclusion in a summons has been to find the defenders liable "jointly and severally, or severally," or in some cases where special caution is taken such words may be added as these—"or as their several liability may be determined in the course of the process to follow hereon." But while that is so, I do not doubt that under a prayer or a conclusion asking for a joint and several decree, it is quite possible to give decree in any form that joint and several liability admits of. As to what joint and several liability really means there can be no doubt. Mr Bell in his Principles, for instance, in sect. 56 says quite clearly that joint and several obligation means that "each is liable for the whole or for a share," and there is a passage to the same effect in the Commentaries. It would seem to me an absurd result that if in a prayer or conclusion you echo the words of obligation, you could not get all that the law says the obligation truly means, and upon that very short ground I put my judgment. But I have also discovered an old case which without settling the point seems to me to shew that that is the same view as was held in old times. The case is that of *Hay* v. *Elphinston*, January 11, 1763, M. 14658. What happened, as narrated in the report, was this: "James Hay brought an action against Charles Elphinston and John Gray, and also against James Hamilton of Hutchison, concluding for damages and expenses on account of their having wrongfully adjudged him to serve as a soldier during the subsistence of the Press Acts in the years 1757 and 1758.

"The Court, by interlocutor of the 6th of August 1762, found the whole defenders conjunctly and severally liable in £200 of damage and expenses.

"The defenders having reclaimed by joint petition, which came to be moved upon the last day of the session, it was refused as to Mr Elphinston and Mr Gray; but as some of the judges seemed to be of opinion that Mr Hamilton was not equally guilty, the pursuer, in order to be free of any further litigation, agreed at the bar to pass from that gentleman; upon which he was assoilzied.

"The pursuer having extracted the decreet, and charged Mr Elphinston and Mr Gray with horning, a bill of suspension was offered in their name; in which, besides repeating the argument pleaded for them in the original cause, they further insisted: That, in respect of the pursuer's passing from the other defender, Mr Hamilton, they could only be liable in two-thirds of the sum charged for."

In that they were found to be wrong, and the inference to be drawn from the procedure in the action seems to me to be this. At that time reclaiming petitions were dealt with upon their own merits, and it was not necessary, as it is now according to our practice, to recal the interlocutor reclaimed against—at least in part—before proceeding to vary it. An interlocutor used to be pronounced which gave effect to the alteration desired by the Court without disturbing the original judgment, and that was what was done here: the reclaiming petition was refused as to Mr Elphinston and Mr Gray, and, upon counsel at the Bar passing from Mr Hamilton, that gentleman was assoilzied. But the old decree was left alone, and I think it is quite clear that the decree which the pursuer extracted was the original decree in which the three defenders were found jointly and severally liable; that is to say, he went upon the old decree, and he charged Elphinston and Gray alone. That does not settle the point in the present action, but it shews, I think, that if the doctrine urged on the other side had been right, there would have been open a defence which obviously was not considered open—namely, that a decree against three defenders jointly and severally could never be a good basis for a charge against two defenders jointly and severally where the third defender had in the meantime been assoilzied. Accordingly I have no doubt that the Sheriff here is right in so far as regards the question of the competency of the decree.

Lord M'Laren.—When an action is brought against several persons without the addition of words descriptive of the nature of their liability, then I take it that even if one of them should be assoilzied, or if the pursuer should pass from his action against him, the instance would still be good against the defenders who remained, the only question being whether they were liable jointly or severally. In the case I am putting, I think the better opinion is that they would only be liable jointly unless words denoting several liability were added. But then in order to avoid such a result, under which the pursuer would lose a part of his claim, the law authorises the use of the words "jointly and severally." These seem to me to cover the whole ground. The word "severally" implies that against whatever number of defenders a man proceeds, each is liable for the whole sum sued for, and the

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word "jointly" or "conjunctly" secures to those against whom the decree is made operative the right of rateable relief against the persons who have not paid. This, as I have said, seems to me to cover the whole ground. I am unable to see that the addition of the words "and severally," or the words "or severally," to the description in which "severally" is already contained, can have any meaning at all, and it seems to me that the suggested addition is mere surplusage. I think that the conclusion as it stands is rightly framed, and that under such a conclusion it is perfectly competent to pronounce a decree in the terms pronounced by the Sheriff.

Lord Pearson.—The defenders here, six in number, were sued for payment of three separate sums of money, which they were to be ordained jointly and severally to pay to the pursuers to make good certain damage sustained by them. Three of the defenders have been assoilzied, and the remaining defenders now take the objection that no decree can pass against them for want of the words "or severally, or one or more of them," or some similar words in the conclusion of the summons. The expression "jointly and severally" was originally part of the language of obligations, and imported a reserved right, on the part of the creditor of two or more persons in a divisible obligation, to hold them bound, either each for his own share or each for the whole. The question as to the effect of using the expression in the pecuniary conclusion of a summons seems not to have been definitely settled in practice. Perhaps it would be more apt to use the expression "jointly or severally" in a summons. But I see no reason why the expression here used should not be regarded as sufficient to warrant the Court in pronouncing decree against all, or against each, or against one or more even in different shares, according to the view which the Court takes of the liabilities of the various defenders on the merits; and this, even although one or more of the defenders may be assoilzied.—*6th December* 1907.

The case was afterwards heard on the merits.

Argued for Appellants: (1) A tenant had no title to sue an action of interdict for pollution of a stream unless he could shew that it amounted to a nuisance at common law. An action for mere pollution was competent to a proprietor alone. A tenant had simply the right of user of the stream for the purposes of his farm; the right to sue an action for pollution merely was for an infringement of a common law right which belonged to the proprietor (*Armistead* v. *Bowerman*, 1888, 15 R. 814). Gemmill and the pursuers derived right from the same landlord, and it might be that he was doing no more than he was authorised to do by his landlord. (2) The pollution here was admittedly caused by an improper use of the drainage system provided by the defenders on the part of their tenants. In such circumstances the defenders could not be held liable, unless the use was authorised by the leases. The houses must be destined to cause pollution before the landlords could be liable (*Duke of Buccleuch* v. *Cowan*, 1866, 5 M. 214, at 216 per L.J.C. Inglis; *Hamilton* v. *Dunn*, 1838, 3 S. and M'L. 356 at 379, per L.C. Cottenham; *Weston* v. *Tailors of Potterrow*, 1839, 1 D. 1218; *Devlin* v. *Jeffray's Trs.*, 1902, 5 F. 130). But if the landlord was liable in an action of interdict on account of the acts of his tenant, he was not so liable in an action of damages. The case of the *Caledonian Railway Co.* v. *Baird & Co.* 1876, 3 R. 839, was a case where a village had been established beside a stream and a system of drainage had been provided which was unsuited to the locality, and the proper use of the system caused pollution. Here the proper use caused no pollution, but only the improper use. Where the landlord had no reason to anticipate a misuse of his property he was not liable. [The Lord President referred to *Rich* v. *Basterfield*, 1847, 16 L.J. C.P. 273, 4 C.B. 783; *Harris* v. *James*, 1876, 45 L.J. Q.B. 545.] There was a distinction between interdict and damages in this matter, because interdict might be granted in respect of a reasonable anticipation of injury, but damages must be for something in the past. (3) In claiming damages against the defenders jointly and severally the pursuers undertook the *onus* of shewing that they, and they only, contributed to the pollution. Further, they could only recover from each the damages caused by his pollution. The joint and several liability in *Smith* v. *O'Reilly* (1800, Hume's Dec. 605) was on the ground of combination or concert for a common purpose. It was so stated by Lord Watson in *Palmer* v. *Wick and Pulteneytown Steam Shipping Co. Ltd.*, 1894, 21 R. (H.L.) 39 at 44. Mere contribution could not make one liable in damages for the whole wrong. A person was liable only for his own act except where there was concert (*Duke of Atholl* v. *Dalgleish*, 1822, 1 S. 511 (n. e. 472); Bell, Prin., sect. 550; Stair, I. 9, 5). (4) In any event interdict should not be pronounced *de plano*. The defenders should have an opportunity of submitting a scheme.

Argued for Respondents: (1) A tenant had a title to sue such an action as this. *Ex adverso* of the pursuers' lands there was a stream in which they had a patrimonial interest, which they were entitled to protect. They had the right of the landlord assigned to them by implication for this purpose. The right of the tenant was recognised in *Collins* v. *Hamilton*, 1837, 15 S. 895. (2) *Caledonian Railway Co.* v. *Baird & Co.* (*cit.*) settled the liability of the landlord in an action such as this. The matter of the construction of the premises was the

essential thing here as in that case. Every one was, of course, liable for his own acts, but in addition the person injured was entitled to take the most effectual method by way of interdict to stop the injurious acts (*Dunn* v. *Hamilton*, 1837, 15 S. 853 at 872 per L. Pres.). The effluent of several houses owing to their construction reached the stream together, and it was therefore impossible for the pursuers to say which of the tenants committed the pollution. A landlord was liable in respect of the ownership of property the use of which led to injury, if he ought to have seen that that would be the probable result and did not prevent it. Of course he was not liable merely *ex dominio*, but this admission had clear limitations (*Weston* v. *Tailors of Potterrow*, *cit.*, per Lord Medwyn at 1226 and L.J.C. Boyle at 1230). Apart from contribution to injury and negligence he was not liable. The only difference between interdict and damages was a difference in the proof required. (3) The conjunct and several liability of joint wrongdoers was settled by the case of *Smith* v. *O'Reilly* (*cit.*).

The Court *recalled* the interlocutor of the Sheriff-Substitute, *found* in fact (1) that the pursuers, who were tenants of the farm of South Netherburn, kept a stock of cattle on said farm and watered their cattle from the Netherburn burn; (2) that all the defenders except James Nimmo & Co., The United Collieries Ltd., and William Cooper, contributed to the pollution of the Netherburn burn with sewage; (3) that as the result of the pollution of the Netherburn burn, which was the natural water supply of the pursuers' cattle, the milk supply of the pursuers' cows was diminished and eight or ten of the pursuers' cattle fell off in condition; *found* in law that in these circumstances the defenders (other than the three above excepted) were liable in damages to the pursuers, and *assessed* the damages at £80; therefore *decerned* and *ordained* the defenders, James Gemmill, William Barr & Sons, and Charles Surgeoner, all conjunctly and severally, to make payment of said sum; and *continued* the cause that the said defenders last above mentioned might submit to the Court a scheme for the avoidance of pollution of said burn.

The Lord President.—My Lords, in this case questions have been raised both of fact and law. The case is a long one and there is a great deal of evidence, which I do not propose to analyse, because upon the result of it I come to the same conclusion as the judge of first instance. I think it is proved that this stream is polluted, and that there is a material contribution from each of the three defenders Gemmill, Barr, and Surgeoner. But I propose to say a word or two upon the questions of law that were raised in a very anxious and good argument at the bar. First, the defenders raised the question of the title of the pursuers. They said that even admitting that there was pollution which rendered the stream less pure than it was before, and of which a proprietor could have complained, the right of a tenant was somewhat less; that a tenant could not complain of the mere deterioration of the quality of the water, but must raise the question to something equivalent to nuisance; and that the pursuers' case has fallen short of the proof which was necessary for that. I do not think there is any difference in the quality of the title, if I may use such an expression, of the proprietor and of the tenant in this matter. It seems to me that the tenant is the assignee of the landlord's title, by the mere force of the lease, to every extent that it is necessary to give it to him for his protection in the lease, and inasmuch as the subjects let include a stream, one of the natural uses of which is to water cattle at it, it seems to me that the tenant has every right which the landlord had to maintain the purity of the stream. In other words, he is the assignee of the landlord's title in so far as it is necessary for his own protection in the subjects let.

The second point is this: Those persons who are attacked, that is to say the defenders, are landlords but not occupiers. They are proprietors of different blocks of houses from which the pollution comes; and it was very strenuously argued that they were not liable because the wrong, if wrong there was, had been done by the action of their tenants and not by their action. In other words, that the filth which found its way into the stream was not anything for which they were directly responsible. In particular it was pointed out that they had taken proper precautions in the planning out of their houses to arrange that filthy matter should not get into the stream, by the establishment of dry closets which, of course, have no drains communicating with the stream. The state of facts, however, is that while there were these dry closets, there was also a liquid system of drains to which access was got by open syvers and jawboxes in front of the various cottages. This liquid system was run through a sort of cesspool, and then was irrigated upon the land which was upon the banks of the stream. Now upon this matter also there is a good deal of authority, and the difficulty in each case, I think, is to settle into which of the two categories the case is to fall. I take cases as representing the extremity, so to speak, on one side and on the other. As the one extreme I take the position of Lord Melville in the case of the *Duke of Buccleuch* v. *Cowan*, 23rd Feb. 1866, 4 M. 475. As the other extreme I take the case of the *Caledonian Railway Co.* v. *Baird & Co.*, 14th June 1876, 3 R. 839. Now in Lord Melville's case the *species facti* was this: Lord Melville, as proprietor of Melville Castle, joined along with the Duke of Buccleuch, who was proprietor of Dalkeith Palace, and Sir James Drummond, the

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proprietor of Hawthornden, in order to object to the pollution of the Esk by the paper manufacturers. Lord Melville himself had a property which he let as a mill. Against Lord Melville it was urged that he could not object because he himself—if there was pollution from the mill—was the author of it in respect that he was the proprietor. Lord Justice-Clerk Inglis laid it down that that depended on the terms of the lease, and that if Lord Melville had not by the terms of his lease in any way shewn that he gave his tenants right to pollute, then the pollution was their act, and not his act. The case, on the other hand, of the *Caledonian Railway Co.* v. *Baird & Co.* was a case where the Caledonian Railway Company, who had private rights in a canal, objected to the pollution of the water by the inhabitants of a mining village which belonged to Messrs Baird. The Messrs Baird had, as here, made provision for a system of dry closets, but none the less the pollution found its way into the canal, and the Court held that the Messrs Baird could be interdicted because they were responsible for what was happening. It is true that in that case the Messrs Baird seem to have assumed responsibility for what their tenants were doing, and further, that these miners were tenants at will—that is to say, their tenancy depended upon their being employed, and they were all on terms of contract which permitted of their being turned out on the shortest notice. But none the less in that case the law was pretty clearly laid down that if a landlord erects his premises in such a way that what may be called the natural result will be pollution, he will be liable, although in one sense he is not the person who personally contributes to the pollution. The truth is, it would be a very unfortunate result if it were otherwise, because if you had, in one sense, to catch the actual offenders, you would have to proceed to interdict every man, woman, and child living in the place. On the other hand, it is quite clear that where the pollution is due to the ultroneous act of the tenant and is not a thing which the landlord could foresee, then the landlord cannot be liable. In the case of *Baird* that very point was put by Lord Gifford, who observed that the landlord could not have been held answerable if the miner had run out of his cottage at night with refuse and thrown it into the stream.

When I come to apply the law to the facts in this case, the view I take of it is this: Although no doubt there was this provision of earth closets, there still was an *opus manufactum*, namely, the drain, by which impurities, put in at the syvers and jawboxes, would sooner or later find their way to the stream: and it would be childish not to suppose, from the known habits of such persons as the tenants of these cottages, that pollution would ensue. It is clear that, apart from the grosser form of sewage, there are many forms of sewage, which certainly cause pollution, and which may find their way into the stream by means of a drain which is open as a receptacle for any slops that may be put into it. Therefore, as this *opus manufactum* exists, I think the landlord must be responsible for what happens in consequence of it.

Then there comes the question of what is to be done. The tenant, I think, is entitled to interdict, but, on the other hand, it has been your Lordships' invariable custom in cases of this sort never to grant interdict *de plano* as has been done in this case. Therefore, I think the defenders here ought to have an opportunity themselves of submitting some scheme which may remedy the pollution complained of.

But there is another question in this case—the question of damage. The tenants here sue for damage to their cows, which ensued in respect of the effect on their health of the pollution, and that damage is divided into three heads. Three cows, that is, two heifers and a cow, died; there was a deficiency in milk in the whole herd, and there was a deterioration in the value of the herd of cattle themselves. The learned Sheriff-Substitute has granted for these three matters sums of £35, £30 and £50. Upon that also a legal question was raised—namely, as to whether there was conjunct and several liability in respect of the pollution for such damage. It seems to me that there is. As soon as you find that there is a material contribution, then, I think, each person is, so to speak, *versans in illicito*, and he acts at the risk of being found jointly and severally liable along with other persons for the damage that may ensue.

But there remains the question of damage. Upon the second and third heads I think damage is proved—that is to say, I cannot doubt that these cattle were damaged by drinking bad water. There has been a good deal of somewhat startling evidence in this case as to the effect on the cattle of the water; but I cannot say that I think the evidence, although startling, is very satisfactory; and no wonder, as it is mostly brought out by reading an article of a well-known authority and then asking the witnesses if they agree with it. It seems to me that the article fails in this respect, that it does not exhaust the whole possibilities of the case. I do not think it helps the matter to shew that you cannot have a specific disease without the bacteria or the microbe of that specific disease. That does not end the matter, because it does not exclude the possibility of the general health of any animal being reduced by the drinking of impure water; and although the Court is bound, as far as it can, to follow the course of scientific knowledge, and not to act upon antiquated notions, it does not seem to me that in this case we have yet had it proved that sewage is as good as pure water for cows.

Therefore, upon the two latter heads I entertain no doubt. Of course on this matter of

damage—it is a rough thing at best—I should not be disposed to alter the decision which the Sheriff-Substitute has come to. But upon the question of whether the cows that actually died, died of the sewage pollution, I think there is difficulty; and the conclusion that I have arrived at on that matter is that there must be a verdict of not proven. There is the unfortunate fact that in the only cow on which an autopsy was made the stomach disclosed lead. The symptoms of lead poisoning are perfectly consistent with the symptoms which were observed in the cows that died, and there is also the fact that the pursuers have not been able to exclude other sources of possible poisoning—namely, the Glasgow refuse which was upon the field, and which, containing paint pots, might supply the ingredients for lead poisoning. I think the case there has been left in an undetermined condition. Therefore I am for disallowing the first sum which is sued for, upon the ground that the pursuers have not satisfactorily shewn that the death of the cattle was due to this cause. Upon the whole matter, I am for disallowing the first sum, decerning for the other two sums, and recalling the Sheriff's interlocutor so far as it interdicts, in order that the defenders may have an opportunity of submitting a scheme to somebody to be named by the Court, as is usual in these cases, before interdict should be pronounced against them.

Lord M'Laren.—I concur.

Lord Pearson.—I also concur.—*20th December* 1907.

Counsel for Pursuers and Respondents, Wilson, K.C., Moncrieff; Agents, Simpson & Marwick, W.S. — *Counsel for Defenders and Appellants, Hunter, K.C., Constable, Macmillan, Hon. W. Watson; Agents, Millar, Robson & M'Lean, W.S.* F. A. U.

FIRST DIVISION.

(*Lords M'Laren, Kinnear and Pearson.*)

268. Morrisson *v.* Robertson.

CONTRACT — SALE — ESSENTIAL ERROR — GOODS OBTAINED BY A FROM B ON FALSE REPRESENTATION BY A LEADING B TO BELIEVE THAT A WAS THE SON OF A PERSON OF CREDIT —SUBSEQUENT SALE OF GOODS BY A TO PURCHASER IN BONA FIDE—B HELD ENTITLED TO RECOVER GOODS OR THEIR VALUE FROM PURCHASER.

Appeal from the Sheriff Court at Stirling.

In this case Morrisson, a dairyman at Kirkcaldy, sued Robertson, a dairyman at Cambusbarron, for the delivery of two cows and, failing delivery, for a sum representing their value. The facts as narrated on record and as established by proof were as follows:—In January 1906 the pursuer took the cows in question to the auction mart of Messrs Oliver & Sons in Edinburgh, with the intention of selling them. Whilst there a man, who subsequently proved to be one Alexander Telford, falsely represented to the pursuer that he wanted to purchase the cows on behalf of his father, "Mr Wilson, Westrigg, Bonnyrigg." The pursuer had previously sold several cows through Messrs Oliver to James Wilson, a dairyman at Bonnyrigg, whom the pursuer knew to be of credit, but with whom he had no further acquaintance. In the belief that he was dealing with this James Wilson the pursuer sold the two cows to Telford for the price of £34, 12s. The pursuer did not receive payment of the price. Telford sold the cows to the defender, who admittedly purchased *bona fide* and for a fair price. Telford was subsequently convicted of the theft of the cows.

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The parties' material pleas were as follows:—

For the Pursuer:

1. The two cows in question having been obtained by the said Alexander Telford from the pursuer either by theft or under essential error, or both, he is entitled to delivery thereof as craved.

For the Defender:

1. The averments of the pursuer are insufficient to support the conclusions of his action.
2. The two cows in question having been obtained by the man Wilson or Telford by a voidable title, and his title not having been voided at the time of the sale, and the defender having bought the cows in good faith and without notice of the seller's defective title, the pursuer has no claim for delivery thereof.

The Sheriff-Substitute (Mitchell), having heard parties on the defender's preliminary plea, *repelled* that plea so far as it bore upon the pursuer's case of essential error, and allowed a proof.

Note.—This discussion on the sufficiency or relevancy of pursuer's averments, which was full and instructive, raises difficult questions.

Two cows of pursuer's, it is alleged, passed on 31st January 1906, ostensibly by way of sale, into the hands of a man Telford, on his representation that he was Wilson junior, son of a certain dairyman known to pursuer, and on 2nd February, by sale, from his hands into defender's. Pursuer has received no price or value for his cows, and Telford was, it is alleged, on 6th March convicted of the theft, *inter alia*, of these cows. The first question is whether pursuer's condescendence is relevant in statement and good in law to support—if proved—his leading claim of recovery of the cows.

At the debate pursuer contended, and defender admitted, that if the cows were stolen by Telford pursuer is entitled to recover them from defender even as a *bona fide* purchaser. Pursuer also maintained that if he was under essential error, he has the same right. Defender denies that error in the circumstances stated could have the result claimed. He further avers that the error arose through pursuer's

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own negligence and fault, but this matter was not before me at this stage. Pursuer does not directly aver *mala fides* on the part of the defender; and I rather understood he did not urge his denial of *bona fides*.

I agree with defender in his Answer 6, that pursuer's statements may support an averment of (fraud or) essential error. The question here, then, is one of law, and after consideration I think the case of essential error presented by pursuer, if proved, would justify his claim for delivery against the defender—a result which, admittedly, would not arise if pursuer's case were one of mere fraud.

No doubt the error is stated to have been induced by Telford's false story (Cond. 2–5), but pursuer (Cond. 6) goes on to aver that he would not have agreed to sell then unless he thought he was selling to Wilson, that there was therefore no sale and no property passed, and that this was essential error or theft.

It seems clear that error with regard to the identity of a supposed purchaser is error in substantials, prevents consent, and negatives a supposed contract (Bell's Prin., sect. 11; I. Com. 313; *Stewart* v. *Kennedy*, 17 R. (H.L.), 25); and the precise question here appears to be whether fraud inducing such error makes it cease to be such error and to have such effects. Recent cases in Scotland are, apparently, awanting; and no very distinct authority from the institutional writers was referred to. Professor G. J. Bell, who was quoted on both sides, distinguishes essential error and fraud, and he does not consistently make it clear that the presence of fraud takes such error out of the category of essential error, with the results of such error as to third parties. In England there appears to be a succession of cases where essential error made void a supposed sale, induced by fraudulent misrepresentations, to the effect of declaring that there was no sale, and of giving recovery to the original seller out of the hands of an innocent purchaser (Benjamin on Sales, 5th ed., p. 462, also p. 459), and I do not see that there is a difference in principle in this point, which makes these cases inapplicable. Most of these cases are founded on in a note in Lord M'Laren's edition of Bell's Commentaries (Vol. I. p. 261); *Kingsford* v. *Murray*, 26 L.J. Ex. 83; *Higgins* v. *Burton*, 26 L.J. Ex. 342; *Hardman* v. *Booth*, 32 L.J. Ex. 105; see also *Cundy* v. *Lindsay*, 3 App. Cas. 459; and the doctrine of that note sets forth the view that in the absence of *consensus in idem placitum* produced by fraud, there is essential error, with no contract, no transfer, and no title to retransfer, and, specifically, there is no such title in the person of a fraudulent buyer who has induced the belief in a seller, as the inductive cause for sale, that he is selling to some one else.

In the same Answer (6) defender says that pursuer's statements do not support an averment of theft. I am at present rather inclined to think they do not—that the case presented is one, not of taking away but of getting away. But allowing proof on the question of essential error, I reserve this question at this stage, any proof taken practically covering both points.

Defender's second plea, founded on the Sale of Goods Act, sect. 23, was not expressly before me at the debate, and I do not expressly deal with it here.

After proof the Sheriff-Substitute found that in the sale in question the pursuer was in essential error, induced by the false representations of Telford; that Telford had no title to sell and did not effectually sell the cows to the defender; and ordained the defender to deliver the cows to the pursuer.

Note.—I do not find it necessary to add much by way of note to my judgment of 16th November 1906.

Essential error is a doctrine of Scots law, applicable I think to the facts of this case, and for similar facts the English decisions seem to arrive at the same conclusion on the ground of no contract of sale, the cases cited coming apparently under the corresponding rule or principle of mutual assent (Benjamin on Sales, fifth edition, pp. 92, 93, and 98). The recent Scots case *Bryce* v. *Ehrmann*, 7 F. 5, referred to and distinguished in *Weiner* v. *Gill* and v. *Smith*, 1906, L.R. K.B. Div. 575, does not seem to go at all on different lines from those above referred to. I find, then, that pursuer has proved this part of the case which I found relevant on 16th November.

It was argued on the proof for defender that there could be no case of essential error here with regard to identity of the purchaser, as there was a person actually present to whom the cows were actually delivered; and it was even urged that it did not matter to the pursuer to whom he sold. But identity and credit are inseparable in reality and are in effect so treated in the cases cited; and it is admitted that Alexander Telford had no credit or means. The postponement of payment arranged for and the method of it seems to me specially to connect the identity and the credit of this purchaser. Opinions in one or two of the English cases raise other subtleties, which, however, I think do not affect the application of the decisions to the present case.

Defender's other argument is that pursuer is barred through his negligence in the matter. But, assuming that defender was not negligent himself, I think, on a fair estimate of the circumstances of a sale of cattle, the pursuer was not wanting in ordinary prudence in believing and acting on Telford's story.

Defender admits on record (Ans. 5) that cows similar to the description given by the pursuer are in his possession; and in the proof at the close of pursuer's evidence it was admitted and noted that the cows purchased by the defender from Telford were the two cows purchased by Telford from the pursuer.

The defender appealed to the Sheriff (Lees), who recalled the Sheriff-Substitute's interlocutor and assoilzied the defenders.

Note.—I regret I cannot concur in the judgment of the learned Sheriff-Substitute.

It is plain the pursuer has no case against the defender merely in respect of Telford's fraud. The pursuer was willing to sell, and possession of the cows was got by Telford with his consent. This put Telford in a position to sell over again: and the defender acquired in good faith and for a full price before the pursuer took any steps to interpel a sale. It is not doubtful on the authorities that in such circumstances no right arises to the pursuer against the defender in respect solely of Telford's fraud.

But then it is said the pursuer was under essential error in selling to Telford. What was that error? Not as to Westrigg. The alleged error was in supposing that the Wilson mentioned by Telford was a dairyman with whom the pursuer occasionally

dealt. But this error was not induced by Telford. It was the pursuer's own hastiness that caused the error. According to the pursuer's contention, his remedy would have been equally good even if his purchaser had been a son of a Mr Wilson of Westrigg, provided he was not a son of the dairyman.

I have looked at the cases mentioned by the learned Sheriff-Substitute, but I am not satisfied that they rule the point. Telford's misrepresentation was not the cause of the sale. The pursuer was willing to sell, and if he had got his money he could not have claimed restoration of the cows on the ground that he would sell only to the dairyman. He was in the market to sell, and it was not the sale that was induced by his rash assumption but the willingness to give credit.

But more than that—the case is not against Telford. If the pursuer's claim is good against the defender it is good against any sub-purchaser, however remote, and all because of his causeless assumption that he was selling to the dairyman's son. The same rule would require to apply to any other sale. Take the case of the Stock Exchange. If a holder of stocks seeking a purchaser sold to a man Smith who he causelessly assumed was a partner in a certain firm, it would surely be extravagant to hold that after the stocks had changed hands, it may be a dozen times, and the value had risen, the original seller could claim return of the stocks from a remote sub-purchaser, merely on the ground of the mistake he had made in regard to the identity of the person who gave the name of Smith. The business of life could not be carried on subject to such a rule. And who is to know whether the mistake might not be a mere afterthought? This would leave far too much to the seller.

Then, too, credit might have to be given for the price paid by the sub-purchaser. But if the price was always a full one at the time of each sale, where would there be a difference for which to decern? The injured but credulous seller could only get decree, failing return, for the difference between the present value of the thing sold and the price paid by the sub-purchaser. Here, seemingly, there would be none. It would be *damnum absque injuria*.

On the whole case I think the defender is entitled to absolvitor.

The Pursuer *appealed* and *argued*: The effect of Telford's false representations was to induce in the pursuer essential error, and accordingly any contract between him and Telford was void *ab initio*. There being no contract with Telford, the latter obtained no possessory title to the cows, and he could not give a good title to a purchaser from him in *bona fide* (*Hardman* v. *Booth*, 1863, 32 L.J. Ex. 105; *Cundy* v. *Lindsay*, 1878, 3 App. Cas. 459).

Argued for the Respondent: (1) There had been a personal sale to Telford which gave him a possessory title sufficient to protect a purchaser from him in *bona fide* (Sale of Goods Act, 1893, sect. 25, 2). The fact that the contract with Telford had been induced by his fraud was not enough to prevent Telford from conferring a good title on a third party. (2) The pursuer had put Telford in possession in circumstances which barred him from claiming in this action.

The Court *pronounced* the following interlocutor:

"Recal the interlocutors of the Sheriff-Substitute and of the Sheriff, dated 8th January 1907 and 8th March 1907 respectively: Find in fact (1) that on 31st January 1906 Alexander Telford falsely and fraudulently represented to the pursuer and appellant that he was the son of Mr Wilson, Bonnyrigg, that he had authority from Mr Wilson to purchase two cows; (2) that the appellant, who knew Mr Wilson of Bonnyrigg to be a farmer and in good credit, was deceived by said representation, and agreed to sell two cows to Mr Wilson on the usual credit, and delivered the cows to Telford; (3) that the respondent, on 2nd February following, purchased the said cows from Telford in good faith and without notice of the appellant's right, and paid the price demanded by Telford: Find in law (1) that the appellant did not sell the two cows to Telford, or to Wilson of Bonnyrigg; that the cows were not delivered to Telford upon a contract of sale, but notwithstanding such delivery continued to be the appellant's property; (2) that the appellant was imposed upon, and is not chargeable with negligence in delivering the cows to Telford as the supposed agent of Wilson; and (3) that the respondent having obtained the two cows from a person who had no title either of property or possession thereto, is under obligation to restore the cows to their true owner the appellant, or to account to the appellant for their value as at the date when he acquired them; and remit the cause to the Sheriff-Substitute to dispose thereof in conformity with this finding, and decern: Find the appellant entitled to expenses," etc.

Lord M'Laren.—In this action the pursuer, Robert Morrisson, who is a dairyman, sues for the delivery of two cows which he says are his property, but which, having been obtained from him by fraud, have actually passed into the possession of the defender by what is not disputed to be a *bona fide* purchase. The case which the pursuer makes on record is of this nature. He says that he had taken the cows to market for sale, but there were no offerers at his price: and then he says that shortly after the cows had been withdrawn from the sale ring, a man who afterwards turned out to be Alexander Telford, of no fixed residence, came up to the pursuer and falsely represented that he wanted to purchase two cows on behalf of his father, Mr Wilson, Westrigg, Bonnyrigg. The pursuer says that he had already sold cows to James Wilson, a dairyman at Bonnyrigg, although he was not very well acquainted with him. But he knew that he was a dairyman at Bonnyrigg, as when he purchased cows through the sale ring in the Edinburgh auction marts his name was always given as "Wilson, dairyman, Bonnyrigg"; and the pursuer believed that the Mr

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Wilson, Westrigg, Bonnyrigg, whom the said Alexander Telford falsely represented as his father, was the said James Wilson, who is a person of good credit. Then he says that he did not know Alexander Telford at all, but he was induced by the said false representations to believe, and did believe, that this Telford was the son of the said James Wilson, and that he had the authority of the said James Wilson to purchase cows on his behalf. These are the pursuer's averments. I do not think it necessary to go into the evidence, but it may suffice to say that the pursuer's averments are completely proved. He was induced by the fraudulent representations of Telford, which I have just read, to part with two of his cows upon credit. I think that these facts were not seriously disputed, and on the other hand it was not disputed that the defender had purchased the cows for value which he paid without suspicion that they had been improperly obtained.

Now in these circumstances the question arises whether the pursuer can recover the cows as his property, or whether they have by their transmission to a purchaser for value been irrevocably taken out of the pursuer's possession. This appears to me to be just one of those questions which a lawyer who is willing to think for himself could have no difficulty in solving, even if he had not precedents to guide him. If there had been a contract of sale, then, although the pursuer might have had an action of damages against the person who obtained the goods by fraud, or might have had an action for reducing the sale, yet if in the meantime the property of the cows had passed by lawful subsale to a third person, then the right of that third person, the analogue of the defender in the present case, would be indefeasible. Having acquired the property by purchase from someone who had a lawful title, he would have had a good defence to an action of this nature. But then the case of the pursuer is that there was here no contract of sale. If Telford, the man who committed the fraud, had by false representations as to his own character and credit obtained the cows from the pursuer on credit, then I think that would have been the case of a sale which, although liable to reduction, would stand good until reduced. But then that was not at all the nature of the case. The pursuer never sold his cows to Telford. He believed that he was selling the cows to a man Wilson at Bonnyrigg, whom he knew to be a person of reasonably good credit, and to whom he was content to give credit for the payment of the price. This belief that he was selling the cows to Wilson was induced by the fraudulent statement of Telford that he was Wilson's son. It is perfectly plain that in such circumstances there was no contract between Telford and the pursuer, because Telford did not propose to buy the cows for himself, and because the pursuer would not have sold them on credit to a man of whom he had no knowledge. Neither was there any sale of the cows by the pursuer to Mr Wilson, Bonnyrigg. Wilson knew nothing about them, and never authorised the purchase: the whole story was an invention. There being no sale either to Wilson or to Telford, and there being no other party concerned in the business in hand, it follows that there was no contract of sale at all, and there being no contract of sale the pursuer remained the undivested owner of his cows, although he had parted with their custody to Telford in consequence of these false representations.

So much being premised, then I think it follows that as Telford had no right to the cows he could not give a good title to the defender even under a contract for an onerous consideration. He had no better title to sell the cows to any third person than he would have had if he had gone into the pursuer's byre and stolen the cows. This seems to me to be perfectly clear upon a consideration of known principles, but it is satisfactory that in the judgment which we are to give according to the law of Scotland, we are confirmed by a decision of the English Court of Exchequer, in circumstances which are in all respects parallel to those in the present case—I mean the case of *Higgons* v. *Burton*, 1857, 26 L.J. Ex. 342. There never were at any time, as I think, such differences in the law of sale in the two parts of Great Britain as would have affected the present question; but under the Sale of Goods Act these differences have been reduced to the vanishing point, and I can have no difficulty in holding that a decision given by an English Court in a case of this kind is an authority which is entitled to the greatest weight, and which, if sound, would be directly applicable to the same state of circumstances arising in Scotland. Therefore, both on principle and on authority, I think that the pursuer has established his case, and is entitled to a decree for the vindication of his property.

Lord Kinnear.—I agree with your Lordship. I think the principle upon which the case must be decided is so well established that it requires little explanation; but since we are differing from the learned Sheriff-Depute it may be well to refer shortly to the authorities which appear to me to be conclusive. Probably the most apposite is the judgment of the House of Lords in *Cundy* v. *Lindsay*, 1878, L.R. 3 A.C. 459; and the first observation with which Lord Chancellor Cairns begins his opinion is certainly directly applicable, viz. that it is always a disagreeable duty "to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall; and that in discharging that duty we can do no more than apply, rigorously, the settled and well-

known rules of law." Then his Lordship proceeds to lay down rules which according to his judgment must determine the question whether a purchaser in good faith and for value has or has not acquired a title to property which he has purchased from a seller to whom the property did not belong. He states in the first place a distinction with reference to a purchase in market overt, which has never been recognised by the law of Scotland, and which we may therefore dismiss. But the other rules which he lays down are all common to the law of both countries. His Lordship says: "By the law of our country the purchaser of a chattel"—or, as we should say, corporeal moveable—"takes the chattel as a general rule subject to what may turn out to be certain infirmities in the title. . . . If it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract—that is to say, a contract which has purported to pass the property—to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced." This last rule is one example of a general principle which has governed the decision of many cases of a different kind, of which *Oakes* v. *Turquand*, 1867, L.R. 2 H.L. 325, in the liquidation of Overend & Gurney, is a familiar instance. The principle is that a contract obtained by fraud is not void but voidable; and since it follows that it is valid until it is rescinded, the recision may come too late if in the meantime third persons have acquired rights in good faith and for value. But then, on the other hand, if such third persons have acquired their title through a person who himself did not acquire the goods by virtue of any contract with the true owner, or to whom they were not intentionally transferred by the true owner upon any title, then the purchaser can obtain no better title than the person from whom he acquired, who *ex hypothesi* had no title at all. The doctrine is established by a great mass of authority, and I agree with your Lordship in thinking that the case of *Higgons* v. *Burton*, and other cases which were referred to in the course of the argument, such as the case of *Hardman* v. *Booth*, 1863, 32 L.J. Ex. 105, decided in England, are very valuable authorities which we may well follow. But the truth is, we do not require to go beyond our own Books for authority for a doctrine which is stated distinctly by our institutional writers, and which has been followed in the decisions of this Court from a very early date. It is stated with great precision by Lord Stair, who takes exactly the distinction which Lord Cairns takes in *Cundy* v. *Lindsay*, between a title obtained by virtue of a contract which may be set aside as fraudulent, and possession which is supported by no contract at all. Thus he says, Ins. 4, 40, 21: "In moveables, purchasers are not quarrellable upon the fraud of their authors, if they did purchase for an onerous equivalent cause. The reason is because moveables must have a current course of traffic, and the buyer is not to consider how the seller purchased, unless it were by theft or violence, which the law accounts as *labes reales*, following the subject to all successors." There is the distinction quite clearly put; and it is stated with equal precision by Mr Bell (Prin. sect. 527), who gives in his illustrations a series of decisions beginning so far back as 1629 with the case of *The Bishop of Caithness*, in which the doctrine has been applied by this Court.

Therefore, I think that Mr Morton in his able argument put his case on exactly the right ground when he said that there was no contract between his client and Telford, the fraudulent person. He said that if Telford had obtained the cattle by fraudulent contract he should have had nothing to say, but that there was no contract at all with Telford; and upon the facts I agree with your Lordship that that is an exactly accurate statement. If a man obtains goods by pretending to be somebody else, or by pretending that he is an agent for somebody who has, in fact, given him no authority, there is no contract between the owner of the goods and him: there is no consensus which can support a contract. The owner, in this case the pursuer, does not contract with the fraudulent person who obtains the goods, because he never meant to contract with him. He thinks he is contracting with an agent for a different person altogether. He does not contract with the person with whom he in fact supposes that he is making a contract, because that person knows nothing about it, and never intended to make an agreement; therefore there is no agreement at all. I think the fallacy of the reasoning of the learned Sheriff-Depute becomes quite apparent when one considers that, in order to make a contract of sale, you must have a certain seller and a certain buyer. The learned Sheriff says that the pursuer was willing to sell, and was in the market to sell; but then a general desire to sell to someone is not a contract to sell to any particular person, and it is as clear as evidence can make it

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that the pursuer never intended to sell to Telford. He knew nothing about him, he never thought of him, and never intended to deal with him. Therefore there was no consensus which could lead to any agreement. For these reasons I entirely agree with your Lordship that the pursuer is entitled to recover his cattle if they are still extant. If the defender is not in a position to deliver either or both of the cattle, the question will arise as to the pursuer's remedy for the value, which has not been disposed of by the Sheriff-Substitute. In the meantime I agree with the decision which your Lordship proposes.

Lord Pearson.—I agree so far with the learned Sheriff that the pursuer has no case merely in respect of Telford's fraud, or merely in respect that he sold the cattle to Telford under essential error. But I think the real question here arises at a prior stage. The Sheriff's view is, that there was here a contract; and if there was, then he is probably right in his view of the law. I am unable to find that the proof establishes any contract to which the pursuer was a party. Telford did not represent himself as being principal, but as an agent. The pursuer was entirely deceived, both as to the identity and also as to the intention of the person with whom he supposed he was contracting, and intended to contract, and in that essential part of a contract there was no *consensus in idem* and therefore no sale. I think that the case falls within the principle of the English cases of *Higgons* and *Cundy*; and that the delivery to Telford gave him no such title of possession as would enable him in law to transfer the property of the cattle to another.—19*th December* 1907.

Counsel for Pursuer and Appellant, Morton; Agent, William Brotherston, W.S.—Counsel for Defender and Respondent, Wark; Agents, Macpherson & Mackay, S.S.C. W. A. R.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Low.*)

269. Anderson's Trustees *v.* James Donaldson & Company Limited.

Expenses—Company — Liquidation—Companies Act 1862 (25 & 26 Vict. cap. 89), sect. 87—Petition for Leave to Proceed With Action Against Company — Leave to Proceed Granted, and Petitioners Found Entitled to Expenses—Expenses Incurred Prior to Appearance of Liquidator of Company to Oppose Petition Disallowed by Auditor—Objection to Auditor's Report Sustained.

(*Reported supra, p.* 409.)

Note of Objections to Auditor's Report.

On 1st June 1907 an order was pronounced by the Court for winding up James Donaldson & Co. Ltd., Leith. On or about 12th July 1907 the trustees of the late James Anderson, manufacturing chemist, Edinburgh, presented a note to the Lord Ordinary in the liquidation, in terms of sect. 87 of the Companies Act 1862 (25 & 26 Vict. cap. 89), praying for leave to proceed with an action of sequestration for feu-duty which they had raised against James Donaldson & Co. in the Sheriff Court at Edinburgh. They craved expenses in the event of the Company or the liquidator appearing and opposing the petition. Answers were lodged for the Company and the liquidator.

After sundry procedure the Lords of the Second Division, on 26th October 1907, granted the prayer of the note, and found the petitioners entitled to "expenses."

On taxation the Auditor disallowed, *inter alia*, all items incurred prior to the date of lodging answers.

The petitioners presented a note of objections to the Auditor's report. They objected, *inter alia*, to the disallowance of the said items.

The following authorities were cited: *County of London Electric Lighting Co. Ltd.* v. *Pattisons Ltd. and Liquidators*, 1900, 7 S.L.T. p. 408; *M'Leod* v. *Leslie*, 1865, 3 M. 840.

The Court *sustained* the objection to the Auditor's report.

The Lord Justice-Clerk.—I think that the first objection should be sustained. Whatever may be the merits of the question as to whether expenses should be given as between the successful and the unsuccessful parties to the case only from the time when the opposition began, that question should have been settled at the time when the motion for expenses was made. Any other rule would be productive of the greatest inconvenience. It is out of the question that the matter should be decided by the Auditor on statements made by a party, and should then come up here on a note of objections to his report. The Court having found the petitioners entitled to expenses, it seems to me that "expenses" means "expenses in the cause," unless there is something in the interlocutor to shew that some expenses which would otherwise be legitimate are excluded. The liquidator does not need to appear unless he chooses. But if he chooses to appear and take up the case, he takes up the whole case, including a possible liability for expenses already incurred. Here the liquidator saw fit to appear, and I can see no ground for writing off expenses merely because they happen to have been incurred before he appeared. If he loses his case his liability is just that of an ordinary litigant.

Lords Stormonth-Darling and *Low* concurred. —8*th January* 1908.

Counsel for Petitioners, C. H. Brown; Agents, W. & T. P. Manuel, W.S.—Counsel for Respondents, Constable; Agents, Davidson & Syme, W.S. J. S. M.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

270. Robertson *v.* Jarvie.

I. CONTRACT—BUILDING CONTRACT—ARCHITECT'S CERTIFICATE—ADDITIONAL WORK—CLAIM BY CONTRACTOR, BASED ON ARCHITECT'S CERTIFICATE, FOR ADDITIONAL WORK NOT INCLUDED IN ESTIMATE — CLAIM RESISTED ON GROUND THAT ADDITIONAL WORK NOT AUTHORISED BY DEFENDER—COUNTER-CLAIM BY DEFENDER IN RESPECT THAT WORK DISCONFORM TO CONTRACT—CIRCUMSTANCES IN WHICH PROOF RESTRICTED TO QUESTION WHETHER ARCHITECT HAD ORDERED AND AUTHORISED ADDITIONAL WORK.

II. PRINCIPAL AND AGENT — ARCHITECT — BUILDING CONTRACT—OBSERVATION PER LORD M'LAREN THAT ARCHITECT ACTING WITHIN SCOPE OF HIS EMPLOYMENT IS AGENT OF PROPRIETOR, AND ORDER GIVEN TO TRADESMAN BY ARCHITECT SO ACTING EQUIVALENT TO ORDER OF PROPRIETOR.

Appeal from the Sheriff Court of Ayrshire.

In this action a joiner sought to recover a certain sum alleged to be due to him as the balance of instalments payable under a contract with the defender for the execution by the pursuer of the joiner work upon a tenement of houses. The contract in question was constituted by tender and acceptance of which the essential terms were as follows :—

I.—Excerpt from Estimate of the carpenter, &c. Works of Tenement at Grangemouth, with Note containing Conditions subjoined thereto.

Tenement at Grangemouth.

Estimate of the Carpenter, Joiner, Glazier and Ironmongery Works of Tenements proposed to be erected at East End for Mr James Jarvie.

James Robertson,
Architect, Grangemouth.

(Then follows detailed schedule of work, quantities and rates as supplied by architect, and the detailed prices filled in by pursuer and respondent, the total of said prices amounting to £432, 12s. 5d.)

Note.— . . . . The work to be done in a sufficient and tradesmanlike manner to the entire satisfaction of the proprietor or architect, who will be at liberty to make alterations and to increase, lessen or omit any part of the work they may think proper, the value of which to be ascertained by measurement when finished, and charged at the schedule rates or others corresponding thereto and in proportion to slump sum in letter of offer.

The work to be at contractor's risk from commencement until finished and taken off his hands by the architect or proprietor, who will not be responsible for any delay or damage to work caused by any of the tradesmen connected with contract.

Tender.

Grange Burn Road,
15th April 1905.

Mr James Jarvie.

Sir,—I hereby offer to execute the carpenter, joiner, glazier and ironmongery works of tenement you propose to erect at Grangemouth, agreeably to plans thereof, to the extent of and as described in the annexed schedule measurement, for the slump sum of four hundred and thirty-two pounds 12s. Your acceptance of this offer will be binding on—Your obedient servant,

John Robertson.

£432, 12s.

Grangemouth, 20th April 1905.

Mr John Robertson, Joiner.

Dear Sir,—I am instructed by Mr James Jarvie to accept your offer for carpenter, joiner, &c. works of tenement, East End, here, amounting to four hundred and thirty-two pounds twelve shillings (£432, 12s.) sterling.—Your truly,

James Robertson.

P.S.—You might meet me on the ground at two o'clock to-morrow (Friday) afternoon.

The pursuer's main averment was in the following terms :—

Cond. 2. The pursuer contracted with the defender to execute for the defender the joiner work of a tenement of houses at East End, Grangemouth, in accordance with plans and specifications and schedule of measurements, at an estimated sum of £432, 12s. The work was duly executed conform to contract, but additional work had to be done. Payments to the extent of £390 were made in the course of the work by the defender to pursuer. The whole work amounted to £473, 15s. 3d. The defender's architect, Mr James Robertson, Charing Cross, Grangemouth, was satisfied that the whole work was duly executed, and made a measurement and granted the pursuer a certificate for the balance due to him, viz., £83, 15s. 3d., conform to measurement and certificate herewith produced. The defender paid pursuer £42, 12s. on account thereof, which, with the said previous payments, made a total payment of £432, 12s., being the original amount of said contract.

The certificate above referred to was in these terms :—

£83, 15s. 3d.

Grangemouth, 24th November 1905.

James Jarvie, Esq.—Tenement, East End, Grangemouth.

I hereby certify that Mr John N. Robertson is entitled to a payment of eighty-three pounds 15s. 3d. stg. to account of his contract for joiner work, being the fourth and final instalment on that contract.

James Robertson,
Architect.

To Andrew Hunter, Esq., Solicitor, Falkirk.

Formerly certified, . .	£390	0	0
Above instalment, . . .	83	15	3
	£473	15	3

The defender's main contention was as follows :—

It was definitely understood and arranged, and it is admitted in the architect's letter to defender's agent, dated 12th December 1905, that said sum

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of £432, 12s. was to cover everything, and that no extras were to be charged against the defender. The sum sued for represents extras and additional work which were not authorised by the defender. The architect's final measurement and certificate produced were unauthorised, and are not accurate. The method of measurement adopted therein is not proper, and in some instances the quantities are overstated. The items in the jobbing accounts included therein are covered by the original contract, while other items, for instance the fee for re-measuring the work, are not proper charges against the defender. The offer and acceptance produced constitute an entire contract, and the architect had no express or implied power to order extras or to sanction work disconform to contract. The accuracy of the certificate granted by the architect is not admitted.

The defender also averred that the work was in several respects (enumerated in the pleadings) disconform to contract. His statement and the answer of the pursuer thereto are in the following terms:—

STAT. 3. The specification provides, *inter alia*, that the work shall be done in a tradesmanlike manner, and to the satisfaction of the proprietor (the defender). The work, however, has not been so executed, and the defender has all along declined to accept it as conform to contract. As regards pursuer's answer, reference is made to the previous statement (No. 2). On the occasion of defender's visit referred to, no inspection was made by defender, nor did he express his satisfaction as averred. *Quoad ultra*, pursuer's statements in answer are denied, so far as inconsistent with defender's averments.

Ans. 3. Denied. The specification provides that the work is to be completed to the satisfaction of the proprietor or architect. The architect is satisfied, and has granted a certificate for payment. The defender was not, as far as pursuer is aware, ever on the contract during its execution, and the pursuer received no instructions from defender at any time, all communications in connection with the contract being made to or by the architect. The architect was also the inspector on the contract, and made regular daily visits to it, and he, as representing defender, had every opportunity of objecting to what is now alleged to be defective work. After pursuer's work was completed, and while the painter work was going on, defender came to the tenement and inspected same, along with the architect, in presence of pursuer and Mr John Cochrane, painter, and there and then expressed to pursuer his satisfaction with the work done by pursuer.

The parties' pleas were:—

For the Pursuer:

1. The defences are irrelevant.
2. The pursuer having executed the work detailed in the said measurement, and the defender's architect having certified the amount sued for to be due to the pursuer, the pursuer is entitled to decree as craved, with expenses.

For the Defender:

1. The action is incompetent.
2. The action is irrelevant.
3. The defender having paid pursuer the slump sum specified in the contract, defender is entitled to absolvitor, with expenses.
4. Defender's architect having no power to order extras or to certify work disconform to contract, and the extras for which payment is now claimed having been executed without defender's authority and against the express arrangement between the parties, defender is not liable therefor.
5. The work executed by pursuer being disconform to contract, the action should be dismissed, with expenses.
6. *Et separatim*, the work executed by pursuer being disconform to contract, defender is entitled to a deduction from the contract price, sufficient to complete the work in exact compliance with the contract, and the amount sued for being insufficient for this purpose, defender should be assoilzied, with expenses.

The Sheriff-Substitute (Mackenzie) pronounced the following interlocutor:

Repels the first, second, and third pleas for the defender, and repels the first plea in law for the pursuer in so far as the defences relate to the disconformity to contract of the extra work performed by the pursuer, and to that extent allows to both parties a proof of their respective averments in so far as not admitted; *quoad ultra*, sustains said plea. . . .

Note.—In this case a contractor sues for the sum of £41, 3s. 3d., being the balance of a sum of £83, 15s. 3d. certified to be due to him by the defender's architect on his contract for the erection of a tenement of houses. The sum sued for is in excess of the sum contained in the pursuer's offer.

On the preliminary pleas there are two main questions in dispute: First, Does the contract between the parties provide for extra work being ordered and performed; and secondly, Is the architect's certificate of satisfaction sufficient in the circumstances to render incompetent an inquiry into the alleged deficiences in the pursuer's carrying out of the contract work?

On the first question I think there can be very little doubt. The contract is contained in the documents Nos. 12 and 13 of process. No. 12 consists of a detailed estimate containing quantities and rates, followed by a number of written conditions, and completed by an offer in the shape of a letter to the defender, which is accepted by No. 13, written by the defender's architect.

It is argued by the defender that the contract is contained only in these two letters, and that the conditions form no part of it. I cannot take this view. In the letter of offer the pursuer undertakes to do the work "agreeably to plans thereof to the extent of and as described in the annexed schedule of measurement for the slump sum of £432, 12s." The schedule is thus expressly "annexed" as a part of the offer, and it cannot be argued that the conditions form no part of the schedule, as some of them contain detailed directions as to the material and workmanship.

But if this be so, it follows that these conditions must all be taken as qualifying the offer. Now one of the conditions clearly provides for extras or omissions from the work being ordered by the proprietor or his architect, and that these will be valued at schedule rates. The defender seeks to set up another and a different agreement as to "extras." But he cannot do so by parole evidence (*Kilpatrick* v. *Allanshaw Coal Company*, 8 R. 327), and his averments on this head are therefore irrelevant. In this way the

argument that the sum in dispute is not due as being for extras falls to the ground.

But there is another question which must be decided before a proof is allowed. The defender takes many objections to the work as carried out by the pursuer. In so far as these apply to the original contract, the defender appears to be barred by his own action, in paying the full sum thereunder, from now pleading bad workmanship or deficiencies. But beyond this, it appears to me that the defender is not precluded from proving his allegations. It is true that a clause such as exists here, "the work to be done in a sufficient and tradesmanlike manner to the entire satisfaction of the proprietor or architect," has been found to constitute a reference binding on the parties, and on which the architect's findings must exclude all other proof (*Chapman* v. *The Edinburgh Prison Board*, 1844, 6 D. 1288). But it appears to me that there may be questions outside of this reference. If some of the express stipulations of the contract have been contravened, as would appear to be the contention of the defender in the fourth article of his statement of facts, it would seem to raise a question not of the sufficiency or tradesman-like character of the work, but whether work such as is described comes under the contract at all. The architect's certificate is not final as regards anything outside the contract; and although in one sense the extras in this case are within the contract in the sense of justifying their having been ordered by the architect, his certificate would not appear to cover any work in these which the defender can shew not to be in accordance with the rates and conditions contained in the schedule (*Ramsay & Son* v. *Brand*, 25 R. 1212).

To this extent I think the defences are relevant, and I allow a proof.

On appeal the Sheriff (Brand) *adhered* to the interlocutor appealed against.

The defender *appealed* to the Court of Session, and *argued* that the case was irrelevant in respect that there was no averment that the pursuer had the authority of the defender or of the architect for the additional work condescended on.

The pursuer was allowed to amend his averments by the addition to the statement first above quoted of the words "Such additions and alterations were all ordered and authorised by the architect as such, and as acting for the defender." The defender added a denial of this statement.

Argued for Appellant: According to the terms of the contract the architect's certificate was not final either as regards the additional work or as regards the work alleged to be disconform to contract. The appellant was entitled to proof of his averments on both these points. Even assuming the architect's certificate to be conclusive as regards work stipulated for in the contract, there was still room for enquiry as to work alleged to be a departure from the contract (*Ramsay & Son* v. *Brand*, 1898, 25 R. 1212).

Argued for Respondent: The certificate granted by the architect was equivalent to a certificate that the work had been completed according to contract, and the appellant was not entitled to go behind that certificate unless fraud or its equivalent were averred (*Goodyear* v. *Weymouth Corporation*, 1865, 35 L.J. C.P. 12; *Ayr Road Trustees*, 1883, 11 R. 326, per L.P. Inglis at p. 342; *Muldoon* v. *Pringle*, 1882, 9 R. 915). The terms of the contract here constituted a valid reference to the architect, and brought the case within the rule of *Goodyear* (*Chapman* v. *Edinburgh Prison Board*, 1844, 6 D. 1288; *Harvey* v. *Lawrence*, 1857, 15 L.T. 571).

The Court *recalled* the interlocutor appealed against, allowed a proof to the pursuer of the statement added in the Inner House to Cond. 2, and of the statement contained in Ans. 3 to the defender's statement of facts, to the effect that "The pursuer received no instructions from the defender at any time, all communications in connection with the contract being made to or by the architect. The architect was also the inspector on the contract, and made regular daily visits to it, and he, as representing the defender, had every opportunity of objecting to what is now alleged to be defective work," and to the defender of the statement added in the Inner House in answer to Cond. 2, viz., "Denied that the said additions and alterations were all ordered or authorised by the architect," and remitted the case to the Sheriff for further procedure.

The Lord President.—My Lords, in this case the sum at stake is a very small and trivial one, but the pleadings have managed to raise a question of some delicacy as to how the case should be disposed of. The pursuer is a joiner, and he offered for the carpenter work of a house which was being put up for the defender, the defender's architect being Mr James Robertson. The contract is contained in an offer and acceptance. Schedules of offer had been sent out in the ordinary way, and the pursuer on 15th April wrote this letter:—"I hereby offer to execute the carpenter, joiner, glazier and ironmongery works of tenement you propose to erect at Grangemouth, agreeably to plans thereof, to the extent of and as described in the annexed schedule measurement, for the slump sum of four hundred and thirty-two pounds 12s. Your acceptance of this offer will be binding on—Your obedient servant, John Robertson." To that an acceptance was sent in these terms:—"I am instructed by Mr James Jarvie" (that is, the defender) "to accept your offer for carpenter, joiner, etc. works of tenement, East End, here, amounting to four hundred and thirty-two pounds twelve shillings sterling.—Yours truly, James Robertson" (namely, the architect). Upon that offer and acceptance, the work was done. The architect, it seems, gave certificates from time to time as the work proceeded, and a certain amount of money was paid; but in the end of the day the architect measured the work, and gave a note of his measurement, which ran thus:—"To amount of estimate £432, 12s. Additions—£59, 8s., making altogether £492. Deductions £18, 4s. 9d., bringing out a grand

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total of £473, 15s. 3d." £390 had already been paid, by interim payments, and accordingly the architect afterwards issued a final certificate in these terms:—"I hereby certify that Mr John N. Robertson is entitled to a payment of eighty-three pounds 15s. 3d. stg. to account of his contract for joiner work, being the fourth and final instalment on that contract." There is annexed to that a note of how the £83, 15s. 3d. is brought out, namely — Formerly certified, £390; above instalment, £83, 15s. 3d., making a total of £473, 15s. 3d., which is exactly the grand total which I read to your Lordships a moment ago as brought out by the measurement. The defender paid up £42, 12s.—the theory of the £42, 12s. being that that, added to the £390 already paid, made up the slump sum of £432, 12s.—and refused to pay any more. Therefore, of course, this action is really for the difference between £83, 15s. 3d. and £42, 12s., or, in other words, for the sum of £41, 3s. 3d.

Now the acceptance which I read to your Lordships by its terms introduced the conditions contained in the schedule issued upon which the contract was made. Like an ordinary schedule, this schedule gives details of the works, quantities and rates, and gives certain prices and states the particular way in which the work should be done, and then goes on as follows:—"The work to be done in a sufficient and tradesmanlike manner to the entire satisfaction of the proprietor or architect, who will be at liberty to make alterations and to increase, lessen or omit any part of the work they may think proper, the value of which to be ascertained by measurement when finished, and charged at the schedule rates or others corresponding thereto and in proportion to slump sum in letter of offer." My Lords, that is a common enough stipulation, and the effect of it is not doubtful; it is that it enables the proprietor, or his architect acting for him, to make alterations upon the work to be done, and if he makes alterations then the extras are to be charged for at the same rates as the schedule; and it also provides for measurement.

Now, my Lords, the position taken up by the two parties in this action is as follows. The pursuer says that inasmuch as he has got the certificate of the architect in the terms which I have already read, which shews that the architect was satisfied and had measured the work, he needs no more, and that he is entitled to decree *de plano*, because he says it is a fair inference that the architect ordered the extras and is satisfied, or he would not have given a certificate. The defender, on the other hand, says that he is entitled to open up the whole matter; and with the view of opening up the whole matter he puts in a set of averments in which he says that in various ways the work has not been conform to contract, and he gives a whole list of different defects which he says are in the woodwork, and he asks for a proof at large. These averments are made with the view of shewing that he has not got his money's worth, and that must be taken as a counter-claim to the sum otherwise due. He also denies that these extras had ever been ordered by the architect, and he denies that the architect had any power to order them.

What the learned Sheriff-Substitute has done is that he has repelled certain pleas for both parties. He has repelled the plea for the pursuer that the defences are irrelevant, which is a plea that is sometimes put in but which I do not think is ever really necessary, and he has repelled the first three pleas for the defender, which are pleas of incompetency and irrelevancy, and a plea that the defender having paid the pursuer the slump sum specified in the contract, the defender is entitled to absolvitor. But then he has allowed a proof to a limited extent, that is to say, he has allowed a proof of disconformity to contract of the extras. I am unable to think that that is quite the way in which the case should be disposed of.

I think one or two things are clear. In the first place, upon the contract I think it is clear enough that the architect, having been put forward by the proprietor as acting for him, is entitled to be the judge of whether the work is executed in a satisfactory manner or not. It would have been possible, I think, for the defender, who has got his house built, to have said to the pursuer, "I won't take such and such a piece of work, because it does not satisfy my architect"; and, on the other hand, I think it follows equally upon the other side that, as to the quality of the work, if the defender allows his architect, as he naturally would, really to represent him in this matter, and be the medium of communication between him and the tradesmen, and if the architect is satisfied with the work that is put in, the defender cannot turn round and say: "I am going to have another opinion about this, and I will get somebody else and put him in the witness-box to say that this work has not been executed in a satisfactory manner." That is the first point that I think is clear. The second point that is clear is that, so far as the extras were concerned, there was a perfect right in the defender, or the architect acting for him, to order the extras, and if the extras were ordered it is quite clear they must be paid for; that is to say, the slump sum for the work could not cover everything. On the other hand, it is equally clear that the precise sum that was to be paid depended upon the measurement and the application of that measurement to the schedule of prices in the schedule. There is no actual provision that the measurement should be done by any particular person, and I apprehend that the matter being intact, or being so to speak a clean slate, it would have been quite in the power of either party to say: "I won't accept the measurement of the architect as such, but I want a measurement by an independent person." But I think it is equally clear that if the archi-

tect at the time was allowed by both parties to measure the work, they cannot afterwards turn round and complain of his measurement, and say that the measurement must be done by somebody else; at least they cannot do it unless they urge something exceedingly specific against the architect's measurement, or accuse him of fraud or of committing some specific blunder which could be expressed in so many words. But mere general allegations that the measurement is not correct I do not think will do.

There is one other point upon this schedule that I should refer to, and it is that there is no arbitration clause to anyone. Now, what I have said about the contract already seems to me to dispose of all the various preliminary pleas, so to speak, of the two parties. First of all, as against the defender, the view that I take prevents him having any right to go into the question of disconformity to contract, if it is true that the architect has measured, and if it is true that the architect, all through the contract, was put forward by the proprietor as the person who was managing for him in this matter, and if it is true that the architect ordered the alterations. On the other hand, the view that I take equally disposes of the contention of the pursuer that he need do nothing more than simply produce the architect's certificate. The pursuer's counsel laid very great stress upon the case of *Goodyear* v. *Weymouth Corporation*, 1865, 35 L.J. C.P. 12, in an English Court, which no doubt is an authority of a Court of great weight. But there is a very vital distinction between *Goodyear's* case and this, and it consists in this, that in the contract in *Goodyear* there were two stipulations, neither of which is here. In the first place, there was a positive stipulation that the architect should be the sole judge of the value of any extras, and that nobody else was to be the judge upon that matter; and second, there was an absolute arbitration clause to the architect. Accordingly the Court there held, upon very obvious principles, that when the architect had given a certificate there was an end of the matter, because, of course, it would have been really mere surplusage if, when you had got a certificate from the man to say that the work had been done, of the value of which under the contract he was to be the sole judge, you should go through the form of having an arbitration in order to refer the point to that very man. Accordingly they gave decree *de plano*. Here there is no arbitration clause. There is not even any provision for giving any certificate. It is not a contract where the money is to be paid upon a certificate. I do not mean to say that the giving of this certificate was not perfectly natural and right, because it was a proper thing to do in order to certiorate the client that he could now pay the money to the tradesmen. It was absolutely natural, but still it is not a contractual right.

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Now the result of all this, I think, comes to be this. I think there must be proof, and proof of a very limited character. I think the only matters in this record that are relevant to be sent to probation are first of all the statement—I am sorry I cannot put it in neater form: really the pleadings are responsible for that, and not I—the statement, which was put in by way of amendment in Cond. 2, "that the additions and alterations were all ordered and authorised by the architect as such and as acting for the defender"; that statement, taken along with the statement of the same person in his Answer 3 to the defender's statement of facts in which he says that "The pursuer received no instructions from the defender at any time, all communications in connection with the contract being made to or by the architect. The architect was also the inspector on the contract, and made regular daily visits to it, and he, as representing the defender, had every opportunity of objecting to what is now alleged to be defective work." And upon the other side merely the denial of the statement which I read out of Cond. 2—namely, "Denied that the said additions and alterations were all ordered or authorised by the architect." The sentence which follows is not relevant to go to probation: "The architect had no power under the contract at his own hand to order or authorise the same," because that is a statement of fact which contradicts my view of the contract. I think there is nothing else that is relevant to go to proof. Therefore I propose to remit the case to the Sheriff-Substitute with instructions to him to order proof upon this limited matter, my view being that it is proved that the architect was put forward by the proprietor to represent him in this contract, and if the architect says, as indeed I suppose he must say, that he did authorise these additions, for which he afterwards granted a certificate, there can be no enquiry as to whether these things were disconform to contract or not, the architect being the proper judge of such matters.

Lord M'Laren.—I concur with your Lordship that there must be a proof in this case. I think the defender has only obtained a technical success, because upon a mere formal proof that the work has been done upon the architect's instructions I think the pursuer will establish his case. I may, however, make one or two remarks upon the legal questions which were argued to us, not that I think they raise any question of difficulty. I should be unwilling to suppose that there was any doubt about the nature of an architect's duties and his relation to the proprietor who employs him. I think there can be no doubt that within the scope of his employment an architect is the proprietor's agent, and if the building contract provides that the work is to be done to the satisfaction of the architect, then any order within the scope of the contract which

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the architect may give is a sufficient authority to the tradesman to execute the work, because he is entitled to take the order of the agent as equivalent to the order of the principal. Of course there might be a different question if the order given by the architect was so opposed to the terms of the contract that the tradesman was not entitled to assume that he had authority; but where, as in this case, the contract itself contemplates variations upon the specification, then such variations when ordered by the architect, if they fairly fall within the scope of the contract, are just as binding upon the principal as if they had been ordered by himself.

Then, again, I must say that it is perfectly hopeless to contend that when an estimate proceeds upon a schedule of prices the sum named in the estimate can ever be conclusive as between the parties. The purpose of stating prices in the schedule and providing for measurement is that when these prices are applied to the measurement the arithmetical result obtained is the measure of the sum due, although it may be to some extent in excess of the sum that was estimated. The estimated sum is only, as its name imports, the best opinion of the architect or tradesman given at the time as to what the work is likely to cost when the scheduled prices are applied to the measurement. Now, it is sometimes prescribed in a building contract that the payments shall be made upon the architect's certificate. If there had been such a clause in this case I think, in agreement with your Lordship, that it would not have been possible to dispute the architect's certificate upon any of the trivial grounds which are set forth in this record. But then that has not been done, and although it may have been right from a mercantile and business point of view that the architect should give a certificate, and while one might even say that a reasonable man would probably have paid upon the certificate, yet it is not legally binding; and I think it is the right of the defender to call upon the architect to prove in the witness-box what he would have put into the certificate. I am far from saying that I should hold this to be in every case conclusive. That depends upon circumstances. There might be works certified by the architect which in the judgment of any impartial person were altogether outside the scope of the contract, and which the architect had no authority to order. But such cases can be dealt with as they arise. In the present case I agree with the conclusion to which your Lordship has come.

Lord Kinnear.—I am of the same opinion.—13*th December* 1907.

Counsel for Appellant, Young; Agent, D. C. Oliver, Solicitor.—Counsel for Respondent, Hunter, K.C., Mair; Agents, Macpherson & Mackay, S.S.C. W. A. R.

SHERIFF COURT.

(Sheriff-Substitute Grant and Sheriff Wilson, K.C., at Inverness.)

271. Shaw's Trustees *v.* The Provost, Magistrates, and Councillors of Inverness.

Burgh—Burgh Police Act 1892 (55 & 56 Vict. cap. 55), sect. 141—General Police Act 1862 (25 & 26 Vict. cap. 101), sect. 155—Construction of Foot-Pavement—Relevancy of Objection—Held that a Resolution under the General Police Act 1862, sect. 155, to maintain Footways within the Burgh and for that purpose to Levy a Special Assessment on Owners, Did Not Preclude the Police Commissioners of the Burgh from Calling upon Owners to form a Concrete Pavement in Front of their Properties, in Terms of the Burgh Police Act 1892, sect. 141.

On 25th May 1907 the Town Council of Inverness served an order on the trustees of the late Mr Charles Shaw, W.S., as owners of Thornhill House, Culduthel Road, in the burgh of Inverness, requiring them, in terms of the Burgh Police (Scotland) Act 1892, sect. 141, to cause the footway in Culduthel Road in front of their property to be made and to be well and sufficiently paved in manner specified in the order. Against this order the appellants, in terms of sect. 339 of the said Burgh Police Act, brought this appeal in the Sheriff Court of Inverness-shire at Inverness, and stated the following objections: (1) That the appellants had already made a footway, the maintenance whereof had been taken over by the burgh many years ago, and the construction and form whereof had never been objected to; and, further, that the footway had been altered and widened by the burgh without consulting the appellants; (2) that sect. 141 of the Act of 1892 does not empower the Town Council to order a new footpath where there is one already, of which the Town Council have undertaken the repair and upholding; (3) that a concrete pavement would be unsuitable; (4) that it would prevent carriages from being driven up to the appellants' house; (5) that the pavement to be so formed by the appellants at their expense would be used by the occupiers of houses on both sides of the road; and (6) that the notice was not served in pursuance of any resolution of the Town Council. The Sheriff-Substitute (Grant), by interlocutor dated 24th October 1907, repelled the first, second, and fifth objections, on the ground that they were irrelevant or wanting in specification; and in respect that the sixth objection had been departed from, continued the cause for further procedure.

He added the following Note:—"The further

procedure that I suggest for the consideration of the third objection that I have held to be relevant is that a remit be made to a burgh engineer of an independent burgh, that he should enquire into the facts condescended on and report to me."—24*th October* 1907.

The appellants appealed to the Sheriff (Wilson, K.C.). The argument appears sufficiently from the Sheriff's note *infra*.

The Sheriff, by interlocutor dated 29th November 1907, refused the appeal, affirmed the said interlocutor in so far as it repelled as irrelevant the first, second, and fifth objections stated by the appellants to the Town Council's order dated 25th May 1907; *quoad ultra*, recalled the said interlocutor, and as regards the remaining objections to the said order, found that the third and fourth objections were irrelevant and that the sixth objection had been departed from by the appellants. He therefore repelled the said objections, refused the appeal, and confirmed the said order.

He added the following note :—

Note.—Before dealing with the merits, I must refer to the question of the competency of this appeal, which has been taken against the interlocutor of the Sheriff-Substitute, of date 24th October 1907. The right of appeal from Sheriff-Substitute to Sheriff is regulated by sect. 339 of the Burgh Police Act 1892, and as I read that section an appeal is allowed only against "the judgment" of the Sheriff-Substitute determining the subject-matter of the cause by confirming, quashing, varying, or redressing the order, resolution, deliverance, or act complained of.

Now, in the present case, *prima facie* there has been no appealable judgment, for the interlocutor of the Sheriff-Substitute, while it bears to repel three out of the five subsisting objections, does not dispose of the remaining two objections, and as regards them continues the case for further procedure. But the respondents, although in their answers to the appellants' reclaiming petition they suggest that there is serious doubt as to the competency of the appeal, express their willingness that the case should be dealt with on its merits. Further, I am of opinion that the two objections which the Sheriff-Substitute did not dispose of are not competent or relevant objections. In that state of the pleadings I think that I may treat the proceedings as being competently before me, and it appears to me to be convenient and reasonable that I should deal with the appeal on that footing.

The appellants, who are owners of lands abutting on Culduthel Road, Inverness, were in May 1907 served with a notice by the Town Council, under sect. 141 of the Police Act of 1892, requiring them to cause the footway before their property to be made and paved with concrete. Against this order the appellants, in June 1907, appealed to the Sheriff, stating six objections.

[After enumerating the objections given *supra*, the Sheriff continued.] At the debate before the Sheriff-Substitute the appellants gave up the sixth objection, and on 24th October 1907 the Sheriff-Substitute repelled the first, second, and fifth objections as irrelevant, and continued the case for further procedure. It was at this stage that the present appeal to me was taken.

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In the reclaiming petition lodged on 9th November 1907 in support of the appeal the appellants explain that they are now in a position to make their averments more specific than they were when the case was before the Sheriff-Substitute, and, *inter alia*, they crave leave to amend their pleadings. The most specific information, however, only amounts to this, viz. (*a*) that by minute of 28th August 1882 the Police Commissioners resolved to undertake the maintenance and repair in future of footways (other than footways of private streets) within the burgh, in terms of sect. 155 of the Police Act of 1862, and to levy a special paving assessment on owners for that purpose in terms of sect. 101 of that statute; and (*b*) that on 7th February 1898 the Town Council instructed the burgh surveyor to include in next year's estimates the cost of kerbing the footway in Culduthel Road.

I am of opinion that the case for the appellants, as averred in their original appeal, is wholly irrelevant—that is to say, I not only agree with the Sheriff-Substitute in holding three of the five contested objections to be irrelevant, but I think that the other two objections are also irrelevant. I am further of opinion that the additional information disclosed in the reclaiming petition, assuming it to be added to and form part of the grounds of appeal, would not make the appellants' case relevant. I will now explain briefly the reasons on which these opinions are based, and, in doing so, it will be convenient to deal with the appellants' five objections under two general heads, viz. :—(*a*) The objections Nos. 1 and 2, to the effect that the Town Council have no power to make any order on the appellants under sect. 141 of the Act of 1892; and (*b*) the objections Nos. 3, 4, and 5, to the effect that the kind of pavement ordered to be formed is unsuitable on various grounds.

(*a*) The chief ground on which the appellants rely in support of their contention that the order complained of is wholly *ultra vires* has reference to the resolution passed by the Police Commissioners in 1892 under sect. 155 of the Act of 1862. Now, in my opinion that resolution had, and has, no real bearing on the question of the appellants' liability to make and pave the footway.

Confining attention in the first place to the Act of 1862, it appears to me that under that Act the two obligations, (*a*) to construct pavements, and (*b*) to maintain and repair pavements, are clearly distinguished. Thus sect. 149 of the Act provides (*a*) that owners shall at their own expense, when required by the Commissioners,

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cause their footways to be made and paved; and (*b*) further provides that owners shall thereafter repair and uphold such footways. It is only the repairing and upholding which sect. 155 deals with, and for which by sect. 101 the Commissioners are empowered to levy a general assessment. I find no provision in the Act of 1862 entitling the Police Commissioners themselves to construct or make and pave footways and to levy assessment for the expense of such construction.

In short, so far as the 1862 Act is concerned, a resolution under sect. 155, while it would relieve owners of the expense of repairing the footways, would not relieve these owners from liability when required by the Commissioners to construct pavements. But the Act of 1862 having been repealed by the Act of 1892, it becomes necessary to consider the effect of this later Act, and on this point considerable light is thrown by the Court of Session cases, viz., *The Police Commissioners of Govan* v. *Airth*, 1896, 24 R. 41, and *Cowan* v. *The Police Commissioners of Ardrossan*, 1898, 1 F. 223. In the *Govan* case an owner who in 1878 had made and paved his footways under notice given to him in terms of sect. 149 of the Act of 1862, was held liable to be called on in 1894, under sect. 141 of the Act of 1892, to make and pave the same footway. In the words of Lord President Robertson: "The scheme of the statute [of 1892] is . . . . to repeal the former statutes and (in the matter in hand) to authorise Commissioners in absolute terms to order certain things without any qualification by way of reference to what has been ordered or done before."

Cowan's case—the second of the two cases above cited—decided that a resolution by the Commissioners of a burgh under sect. 142 of the Act of 1892, to undertake the maintenance and repair of all the footways in the burgh, did not preclude the Commissioners in subsequent years from requiring an owner to cause the footway before his property to be paved. Lord Adam pointed out that the construction of sufficient foot pavements would naturally be a gradual process—"as streets extended new foot pavements would become necessary where none had existed before, and where mere footpaths had formerly been sufficient for the traffic, it might be desirable that they should be converted into foot pavements." In *Cowan's* case, as I have stated, the resolution to undertake the maintenance and repair of footways was passed under the 1892 Act, whereas in the present case the corresponding resolution was passed under the 1862 Act. But I see no ground for holding that there is any difference in meaning or effect between a resolution passed under sect. 142 of the 1892 Act and a resolution passed under sect. 156 of the Act of 1862. In either case, it seems to me, the resolution must be regarded as referring only to the maintenance and repair, not to the construction of footways, and must also be regarded as consistent with the right of the Commissioners subsequently to require that the footways shall be made and paved by the owners of the adjacent property. I may also refer to the Sheriff Court case, *Lindsay* v. *Coatbridge Town Council*, 1901, 17 S.L. Review, p. 148, in which Sheriff Berry (following the principle of *Cowan's* case) held that neither a resolution by the burgh to undertake the maintenance and repair of footways under sect. 142 of the Act of 1892, nor a lapse of six years since the date of the resolution, barred the Town Council from proceeding under sect. 141 to require reconstruction.

The appellants, however, in addition to the resolution, also found in their first objection on the fact which they aver, that the footway in question has been altered and widened by the burgh authorities without consulting the appellants. This general averment has been made more specific in the reclaiming petition by reference to excerpts from minutes of the burgh authorities, shewing that the Town Council resolved "to put proper kerbing and widen the footway of Culduthel Road where required." The operations referred to, however, seem to me to be consistent with the Town Council having undertaken merely the maintenance and repair of the footway, and to be in no way inconsistent with their right subsequently to require the appellants to make and pave the footway. By sect. 17, subsect. 5, of the Burgh Police Act of 1903, a town council is now empowered to require an owner at his own expense to provide a footway fronting his property with kerb, and it is declared that notwithstanding anything done under this power the town council shall be entitled at any time thereafter to call on the owner to make and pave the footway. I think that this statutory provision illustrates the distinction between such an operation as kerbing and the complete construction of a pavement which is contemplated in sect. 141 of the Act of 1892, and which is required by the order now under consideration.

The appellants, in support of their first two objections, rely on two Sheriff Court decisions, viz. *Lorimer* v. *The Commissioners of Dumfries*, 1897, 14 S.L. Review, p. 177, and *Castlebank Mills* v. *The Commissioners of Dumfries*, 1901, 17 S.L. Review, p. 195. In my opinion, however, the grounds of decision in both these cases, in so far as they are applicable to the questions raised in this case, are inconsistent with the decisions and grounds of judgment in the Supreme Court cases of *Govan* and *Cowan* to which I have referred. I have therefore come to the conclusion that the appellants' first and second objections are irrelevant and untenable.

(*b*) With regard to the remaining objections, they seem to me to relate to matters of ordinary municipal administration, which, unless special circumstances are averred, ought to be left to

the discretion of the burgh authorities; and I find nothing in the averments of the appellants which in my opinion would justify interference with the respondents in the exercise of their statutory powers. I refer on this point to *Small & Co.* v. *The Dundee Commissioners*, 1884, 12 R. 123, as illustrating the burden which lies on those who, as regards such practical questions as those raised by the objections, claim to have the discretion and judgment of the town council superseded by the Court.—29*th November* 1907.

Agent for the Appellants, Duncan Shaw, W.S. —Agent for the Town Council, H. C. Boyd, of James Ross & Boyd, Solicitors. A. J. L. L.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Low and Ardwall.)

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I. PROPERTY—SALE OF HERITAGE—RENT—ASSIGNATION OF RENTS—TITLES TO LAND CONSOLIDATION (SCOTLAND) ACT 1868 (31 & 32 VICT. CAP. 101), SECT. 8, AND SCHED. B, NO. 1—PASTORAL FARMS—BACKHAND RENTS—HELD RENT OF PASTORAL FARMS LEGALLY DUE AT WHITSUNDAY FOLLOWING ENTRY BUT CONVENTIONALLY PAYABLE AT FOLLOWING MARTINMAS, CARRIED TO BUYER BY ASSIGNATION OF RENTS IN DISPOSITION IN ORDINARY FORM.

II. PROPERTY—SALE OF HERITAGE—PASTORAL FARMS—BACKHAND RENTS—SALE WITH ENTRY AT CANDLEMAS 1905—MINUTE OF SALE CONTAINING AGREEMENT THAT RENTS, RATES AND TAXES FOR HALF-YEAR FROM MARTINMAS 1904 TO WHITSUNDAY 1905 SHOULD BE APPORTIONED BETWEEN BUYER AND SELLER—DISPOSITION CONTAINING CLAUSE OF ASSIGNATION OF RENTS IN ORDINARY FORM — HELD AGREEMENT NOT SUPERSEDED BY DISPOSITION, AND THAT HALF-YEAR'S RENT LEGALLY DUE AT MARTINMAS 1904 AND CONVENTIONALLY PAYABLE AT WHITSUNDAY 1905 FELL TO BE APPORTIONED BETWEEN BUYER AND SELLER.

(Reported ante, Vol. XIV. p. 747.)

Reclaiming Note against an Interlocutor of Lord Dundas.

The facts of the case and the statutory enactments referred to are sufficiently set forth in the previous report.

The defender pleaded, *inter alia*:

"2. The date of entry to the said subjects being 2nd February 1905, the defender is entitled to retain the whole of the rents of the pastoral farms, legally due at Whitsunday 1905 but conventionally payable at Martinmas 1905.

"3. In respect of the agreement between the parties for apportionment of the rents for the possession of said lands for the half year from Martinmas 1904 to Whitsunday 1905, the defender is entitled to retain a proportion of the rents of the pastoral farms, legally due at Martinmas 1904 but conventionally payable at Whitsunday 1905, corresponding to the period from 2nd February to Whitsunday 1905."

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On 17th January 1907 the Lord Ordinary decerned against the defender for the sum sued for, subject to adjustment of figures.

The Defender *reclaimed* and *argued*: (1) Under the assignation of rents in the disposition, the defender was entitled to all rents which were legally due in respect of possession had subsequent to his entry in February 1905 (Titles to Land Consolidation (Scotland) Act 1868, 31 & 32 Vict. cap. 101, sect. 8, Schedule B, No. 1; *Campbell* v. *Campbell*, 1849, 11 D. 1426). In the case of pastoral farms where the entry was at Whitsunday, the first half-year's rent was legally due at entry, and payment thereof entitled the tenant to retain possession only until the following Martinmas — a further payment at Martinmas being necessary to entitle him to remain until the following Whitsunday. The term of possession was from Whitsunday to Whitsunday, not from the Martinmas preceding the tenant's entry to the following Martinmas (*Kerr* v. *Turnbull*, 1760, 5 Brown's Sup. 876; *Hunter* v. *Stewart*, 1857, 20 D. 60). In the case of pastoral farms, therefore, rent was legally due in advance (Kames' Elucidations, p. 67). *Mackenzie's Trs.* v. *Somerville* (1900, 2 F. 1278) was distinguishable. It followed that the half-year's rent legally due at Whitsunday 1905 but payable at Martinmas 1905 was due in respect of possession from Whitsunday to Martinmas 1905, and belonged to the defender. (2) The half-year's rent legally due at Martinmas 1904 and payable at Whitsunday 1905 fell to be apportioned between the pursuer and the defender. No doubt the defender had no assignation to any part of that rent; strictly speaking, he was not entitled even to collect it from the tenants. But under the minute of sale the pursuer was bound to account to the defender for one-half of the rent legally due at Martinmas 1904 (*Hunter* v. *Stewart*, *cit.*). In this matter the minute of sale was not superseded by the disposition. By the minute of sale the pursuer undertook two obligations: (1) An obligation to grant a disposition of the lands, with an assignation to the rents legally due at or subsequent to Whitsunday 1905; and (2) an obligation to account for one-half of the rents legally due at Martinmas 1904. The disposition superseded the minute *quoad* the first obligation but not *quoad* the second, which was in the same position as if it had been a contract to deliver moveables (*Jamieson* v. *Welsh*, 1900, 3 F. 176).

Argued for Pursuer: No doubt in the case

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of pastoral farms the first half-year's rent was legally due at entry. But it did not follow that pastoral rents were payable in advance. Rent was due in respect of crop and year. The whole crop was gathered in the summer months, and possession during the winter months was thrown in as an unimportant accessory. Accordingly, a tenant entering at Whitsunday, who was entitled to the grass crop he found on the ground at entry, was to be regarded as having been constructively in possession from the term of Martinmas preceding his entry, and the payment due at entry was due in respect of that half-year (*Campbell* v. *Campbell*, *cit.*, per Lord Wood; *Somerville's Trs.* v. *Mackenzie*, *cit.*, per Lords Adam, Kinnear and Kyllachy). Pastoral rents, therefore, were not due in advance, but in respect of the half-year preceding payment. It followed that the rent legally due at Martinmas 1904 and payable at Whitsunday 1905 was due in respect of possession from Whitsunday to Martinmas 1904, and belonged to the pursuer, while the rent legally due at Whitsunday 1905 and payable at Martinmas 1905 fell to be apportioned. The minute of sale did not enlarge the defender's right, but merely provided for the apportionment of the rent payable at Martinmas 1905. But, further, the minute was superseded by the disposition. *Jamieson* v. *Welsh* (*cit.*) was distinguishable. There the missives contained a separate contract for the delivery of moveable subjects—a matter with which the disposition did not deal. Here the disposition did deal with the apportionment of rent, and its terms were conclusive.

The Court *recalled* the interlocutor of the Lord Ordinary and sustained the second and third pleas in law for the defender.

Lord Low.—The pursuer sold the estate of Glendaruel to the defender with entry at 2nd February 1905. The farms upon the estate are all pastoral, the term of entry under the leases being Whitsunday, and the first half-year's rent being payable at Martinmas thereafter and the second half at the succeeding Whitsunday. In this action the pursuer claims that he has right to the half-year's rent conventionally payable at Whitsunday 1905 but legally payable at Martinmas 1904; and he also claims the proportion corresponding to the period from Martinmas 1904 to 2nd February 1905 of the half-year's rent conventionally payable at Martinmas 1905 but legally payable at Whitsunday 1905.

The defender, upon the other hand, maintains that he is entitled under the assignation of rents in the disposition in his favour to the half-year's rent conventionally payable at Martinmas 1905 but legally payable at Whitsunday of that year, and that he is also entitled, under a special contract made between him and the pursuer, to the portion of the half-year's rents conventionally payable at Whitsunday 1905 but legally payable at Martinmas 1904, corresponding to the period from the date of his entry (2nd February 1905) to Whitsunday 1905.

I am of opinion that the defender's claim to the half-year's rent legally payable at Whitsunday 1905 is well founded, and that the pursuer is entitled to no part of that half-year's rent.

It is settled that when a proprietor dies between Whitsunday and Martinmas his executor is entitled to the half-year's rent legally payable at the term of Whitsunday before his death, and that if he dies between Martinmas and Whitsunday the executor is entitled to the half-year's rent legally payable at Martinmas. The same rule applies in the case of seller and purchaser, and accordingly, apart from the special contract which I shall consider presently, the pursuer is entitled to the half-year's rents conventionally payable at Whitsunday 1905. The defender does not dispute that that is the case.

The pursuer, however, also claims a proportion of the half-year's rent legally due at Whitsunday 1905, which is conventionally postponed until Martinmas 1905. That claim is founded upon the clause in the disposition assigning the rents. The clause is in the form—"and I assign the rents"—provided by the Titles to Land Consolidation (Scotland) Act 1868, which declares that the clause shall "be held to import an assignation to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms."

In order to test the pursuer's claim I shall assume that the question arises in regard to the rent of a farm which had been let to a tenant under a lease with entry at Whitsunday 1904. The first half-year's rent would be legally payable at Whitsunday 1904, and the second half-year's rent at Martinmas 1904. The pursuer is admittedly (apart from special contract) entitled to these two half-years' rent, but his claim is that he is, in addition, entitled to a proportion of a third half-year's rent which he says is payable in respect of the possession of the farm from Martinmas 1904 to Whitsunday 1905. That looks very like a claim for three half-years' rent in respect of one year's possession of the farm. The pursuer's counsel, however, explained that the claim is based upon the ground that the first half-year's rent legally payable at Whitsunday 1904 (the term of entry) is truly for possession for the half-year from Martinmas 1903 to Whitsunday 1904. I confess that that is, to me, an entirely novel idea. Plainly a tenant in a farm does not in fact pay rent in respect of possession of the farm prior to his term of entry, because not only has he no possession and no right to possess until the term of entry, but up to that date the farm is in the possession of the outgoing tenant. Further, rent is properly payable for possession. I take it that rent, from a legal point of view, is the consideration which the tenant pays, in money or money's worth, for the possession and use of

the subject of the lease, and that definition is as applicable to a farm as to any other subject. Again, whether rents are payable backhand, or forehand, or at the legal terms, a farm is always let at a yearly rent, and the tenant, at one time or another, pays rent for every year and half year during which he possesses the farm.

It seems to me that the idea that, by what must be a legal fiction, a tenant entering a grass farm at Whitsunday is to be regarded as paying the half-year's rent which is legally due at that term, in respect of possession of the farm for the preceding half-year, arises out of the fact that, for the sole purpose of regulating the division of rents between the heir and the executor of a deceased proprietor, or between the fiar and the executor of a deceased liferenter, a somewhat artificial rule has been adopted in which regard is had not to possession but to crop.

For that purpose all farms were regarded as being either wholly corn farms (as they used to be called) or wholly grass farms. In the case of corn farms, entry was always at Martinmas (or, as it was sometimes expressed, "the separation of the crop"), because the outgoing tenant was then presumed to have ingathered his crop, and the incoming tenant required to get possession of the lands for the purpose of preparing them for the next crop. It was considered that a tenant could not be required to pay any rent until he had sown a crop, and accordingly the legal term of payment of the first half-year's rent was held to be the term of Whitsunday following the term of entry, when the incoming tenant was presumed to have completed the sowing of his crop, and the legal term of payment of the second half-year's rent was held to be the succeeding term of Martinmas when the tenant was presumed to have reaped the crop. The rule applied even although entry to the houses and grass lands was (in conformity with the almost universal custom) at the term of Whitsunday preceding the entry to the corn lands, because, as I have said, the corn lands alone were regarded. No doubt the result, in such a case, was that at the beginning of the lease the tenant had partial possession for six months for which he paid no rent at the time, but that was put right at the end of the lease, and in a succession of leases the landlord received a half-year's rent for every half-year of possession.

In this case of grass farms, the entry to which is by custom at Whitsunday, Mr Bell in his treatise upon leases points out that if the principle is that the full year's rent should not be payable until the crop has been reaped, then in grass farms the second half-year's rent should not be payable until the term of Whitsunday twelve months after entry, "because" (I quote the learned author's words) "the tenant is constantly during the whole period enjoying the benefit of the crop." The more logical course therefore would have been to hold that the first half-year's rent in a grass farm was legally payable at Martinmas six months, and the second half-year's rent at Whitsunday twelve months after entry. But, says Mr Bell, the Court have held otherwise, because "the practice of the country has so fixed the point."

I may add that my impression from a study of the old cases is that the legal terms in grass farms were originally fixed at the Whitsunday of entry and the following Martinmas, because the position of the tenant at his entry and at the following term of Martinmas respectively, was supposed to be analogous to the position of a tenant in a corn farm at the term of Whitsunday after his entry and at the following term of Martinmas respectively. The tenant of a grass farm at his entry finds upon the land a growing crop of grass, which was regarded as being analogous to a completely sown corn crop, and by the term of Martinmas he has obtained the benefit of the summer pasturage, from which his profit is chiefly derived, and therefore his position at that term was regarded as being analogous to the position of the tenant of a corn farm who at the term of Martinmas had reaped his corn crop.

But however that may be, there was this advantage in the legal terms of payment adopted in the case of grass farms, that one rule was fixed for all cases, the rule being that if the landlord survived Whitsunday one-half of the rent applicable to the crop of the year in which he died belonged to his executor, and if he survived Martinmas the whole rent applicable to that crop belonged to his executor.

The rule is nowhere more clearly stated than in the report in Brown Supplement (Vol. V. p. 876) of the case of *Kerr* v. *Turnbull*. In that case a tenant entered to a grass farm at Whitsunday, and by the lease the rent was payable one-half at the following Martinmas and the remaining half at the succeeding Whitsunday. The landlord died after Martinmas, and it was held that his executor was entitled to the half-year's rent payable under the lease at the following Whitsunday.

In a note to the report, the reporter (Monboddo) states the ground of judgment thus: "The simple rule in this case, and which will apply equally to corn and grass farms, is the crop, without attending to the division of the year which is arbitrary as to its commencement. According to this rule, the crop, whether of grass or corn, belongs to that year in which it grows and is reaped, and the rent of that crop is divided betwixt the heir and executor by the legal terms of the Whitsunday when the crop was sown and of Martinmas when it is reaped, so that, without enquiring about years at all, it is sufficient to consider whether the rent for that crop be still in the tenant's hands, or if it be uplifted by the defunct."

Now that statement of the law shews in the first place that, for the purpose of apportioning

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rents between heir and executor, every crop is assumed to be grown and reaped within the calendar year, or, to put it more definitely, the crop, whether corn or grass, is assumed to have been reaped by Martinmas in each calendar year. Therefore, for the purpose foresaid, it is unnecessary to consider what may be called the farm year—that is to say, the twelve months from and after the term of entry, for possession during which the first year's rent is in fact paid. Let me give a practical illustration. The tenant of a corn farm enters upon full possession of the farm at Martinmas 1904; but his first corn crop is grown and reaped entirely in 1905. Therefore, in a question between heir and executor the possession which he has had during 1904 is disregarded, and the whole rent is dealt with as being payable for the crop of 1905. Again, the tenant of a grass farm enters at Whitsunday 1904, and his first crop, which is growing when he enters the farm, is assumed to have been wholly reaped at Martinmas in that year; therefore, in a question between heir and executor, the rent is dealt with as being wholly payable for the crop of 1904, and the possession which the tenant has in 1905 is disregarded. It therefore seems to me that the rule for apportioning rents between heir and executor and the like is an arbitrary rule, fixed for that purpose alone, and has no application when the question is for what possession of the farm is a particular payment of a half-year's rent made.

That, however, is the question raised under the assignation of rents in the disposition. I have already quoted the statutory declaration of the meaning of the clause assigning the rents, and it will be observed, in the first place, that the rents assigned are only rents "to become due," and therefore the assignation does not include the rents legally due at Martinmas 1904, because these rents had become due prior to the term of the entry of the defender. In the second place, the rents assigned are rents to become due "for the possession following the term of entry," namely, 2nd February 1905. The first rent answering to that description appears to me to be the half-year's rent legally payable at Whitsunday 1905, because in the case which I have been supposing of the tenant entering under a new lease at Whitsunday 1904, he would have already paid one year's rent, and he would have been in actual possession of the farm for one year and no more.

Certain *dicta* in the recent case of *Mackenzie's Trs.* v. *Somerville*, 2 F. 1278, were quoted as supporting the view that the half-year's rent legally payable at Whitsunday 1905 was truly for possession of the farm from the preceding Martinmas. The main question in *Mackenzie's* case was whether certain farms upon the estate of Portmore which had been sold with entry at Martinmas 1897 were arable or pastoral. It was held that they were pastoral, and that accordingly rents legally due at Martinmas 1897 but conventionally payable at Whitsunday 1898 were not carried to the purchaser by the assignation of rents in the disposition.

The judgment, therefore (it being held that the farms were pastoral), was merely an application of the well-established rule upon which I have already commented; and it is to be observed that the purchaser's entry being at the term of Martinmas there was no question in regard to the rents of a divided term.

The pursuer founds upon certain *dicta* of Lord Kyllachy, who was Lord Ordinary, and of Lords Adam and Kinnear. Lord Kyllachy said: "The rents in question which were conventionally payable at Whitsunday 1898, were legally due at Martinmas 1897, and were so due as being the second half of the rent payable for the grass crop of 1897. To put it otherwise, they were legally due for the possession from Whitsunday to Martinmas 1897; the possession during the winter and spring 1897-98 being thrown in as an unimportant accessory."

Now the first of these sentences is an accurate statement of the rule that in questions between heir and executor, or seller and purchaser, the rent is to be regarded as payable for the year in which the crop is assumed to be reaped. In the second sentence I think that Lord Kyllachy evidently had in view the theory or hypothesis upon which the rule is founded in the case of grass farms, namely, that the whole of the grass crop has been reaped, in the sense that the tenant has received the whole benefit of it, by Martinmas. But however that may be, Lord Kyllachy does not say that the rent which is legally payable one-half at Whitsunday and one-half at Martinmas is not paid for possession from Martinmas to the following Whitsunday. What he says is that the possession from Martinmas to Whitsunday is "thrown in"; that is to say, possession for the latter period is thrown into and therefore is included in and forms part of the possession for which the rent is paid. If that be so, then it is obviously immaterial that the possession between Martinmas and Whitsunday is of little value to the tenant, because the rent stipulated is always the rent for the year, and it is only payable in two equal portions because it is the inveterate custom to do so.

Certain expressions used by the learned judges in the Inner House were also founded on. Thus Lord Adam, referring to the half-year's rents conventionally due at Whitsunday 1898 but legally due at Martinmas 1897, said: "These rents were the rents legally due for the possession of the crop of 1897." The phrase, "for the *possession* of the crop," is unusual, but I think that his Lordship's meaning would have been the same, only more accurately expressed, if he had said "for the crop of 1897," leaving out the word "possession." That, I think, is clear from the next sentence, in which his Lordship

says: "The rent is due for the year in which the crop, whether agricultural or sheep, is raised." That is, in my opinion, a correct statement of the rule of law applicable to the kind of question which was under consideration.

In the same case Lord Kinnear said: "The rent in question, although collected by the defender, was rent derived from possession prior to his term of entry as purchaser, although it was payable at a term after that entry. It humbly appears to me that that was not a correct statement of the legal situation. His Lordship was dealing with the effect of the clause assigning the rents as interpreted by the statute, and it seems to me that the true ground for holding that the rent in question was not assigned to the purchaser by the statutory clause was, in the words of the statute, that it was not rent "*to become* due for the possession following the term of entry." I think that that was what Lord Kinnear was referring to; but there being no question between the parties as to rent due for a divided term, his Lordship did not pay so much attention to the form of the expression which he used as he would otherwise have done.

I have commented upon the *dicta* (which are no more than *dicta*) in *Mackenzie's* case at so great length, because they constitute the only thing in the way of authority which the pursuer's counsel was able to cite for the proposition which is the foundation of his claim, namely, that a tenant who enters to a grass farm at Whitsunday and then becomes legally liable for a half-year's rent, is to be regarded as being so liable in respect of constructive possession for the half-year preceding his entry. I do not think that the *dicta* in *Mackenzie's* case support that view, and I have already given my reasons for holding that it is a proposition which is contrary both to fact and principle.

I am therefore of opinion that the half-year's rents legally payable at Whitsunday 1905 were assigned to the defender, and that the pursuer is entitled to no part thereof.

I now come to the defender's claim for a portion of the rents legally due at Martinmas 1904. The defender admits that he has no right to any part of these rents at common law or under the assignation of rents in the disposition, but he says that he is entitled to a share of the rents proportionate to the period from 2nd February to Whitsunday 1905 in respect of an agreement entered into between him and the pursuer. That agreement is contained in the eighth article of a formal minute of sale executed by the parties in July and August 1904.

The article is in the following terms: "The second party (the defender) shall have right to the rents and duties of the said lands, and shall be liable in payment of the feu-duties and public burdens for the possession following the said term of entry, the first party having right to the rents and duties of the said lands, and being liable in payment of the feu-duties and public burdens for the possession prior to the said term of entry, and that notwithstanding that payment of the rent for the possession prior to the term of entry may be conventionally postponed to a date subsequent to that term. The rents, rates, and taxes for the possession of said lands for the half-year from Martinmas 1904 to Whitsunday 1905 shall be apportioned between the first and second parties."

It was maintained for the pursuer that that article was superseded by the disposition and cannot be founded upon or enforced. The only part of the disposition which could be regarded as superseding the article in the agreement is the clause assigning the rents; and if it could be shewn that the agreement is inconsistent with the effect attributed by the statute to the clause assigning the rents, I should without hesitation hold that the agreement was superseded by the disposition in so far, at all events, as it is inconsistent with, or modifies the effect of, the clause assigning the rents.

Now I would observe, in the first place, that the agreement does not deal only with rents, which alone are the subject of the assignation in the disposition, but with public burdens. The agreement is that the pursuer shall be liable for the public burdens for the possession prior to the term of entry, and that the defender shall be liable for the public burdens for the possession following the term of entry. It was not contended that that part of the agreement was affected by the disposition, and I understand that, as regards public burdens, the agreement has actually been carried out. If that be the case, it puts the pursuer in a somewhat awkward position, because, plainly, the defender undertook to pay the public burdens applicable to the period subsequent to his entry only upon the condition that he should have right to the rents applicable to the same period. The two things appear to me to be inseparable, and therefore I do not see how the pursuer can insist upon the defender paying a share of the public burdens and deny him an equivalent share of the rents.

That consideration, however, appears to me not to arise, because I am of opinion that the agreement is quite consistent with the disposition; that is to say, implement of the agreement would not prevent full effect being given to the assignation of rents in the disposition.

The only question which arises under the clause assigning the rents is what rents are thereby carried to the purchaser. I have already expressed the opinion that the half-year's rents legally payable at Whitsunday 1905 were carried to the defender, and that the pursuer had no right to any portion of these half-years' rents. Of course the inference is that the rents legally payable at Martinmas 1904 belonged wholly to the pursuer. And there is no doubt that that

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Lord Low.

was the case, because if the pursuer had died at the date of the defender's entry and the competition had been between his heir and executor, plainly the rents legally payable at Martinmas 1904 would have gone to the executor, because they would have been *in bonis* of the pursuer at his death. If, therefore, the rents referred to in the agreement were the rents legally payable at Martinmas 1904, the parties were bargaining about money which at the date contemplated, namely, the defender's entry to the lands, would have vested in the pursuer, and would, if he had then died, have been *in bonis* of him. If, therefore, the agreement was in regard to the Martinmas rents, it is not superseded or affected by the disposition, because it deals with moveable estate with which the disposition had nothing to do.

The question, therefore, is, are the rents referred to in the agreement those legally payable at Martinmas 1904? The answer seems to me to depend upon the question which I have already so fully discussed, namely, whether the rents legally due at Martinmas 1904 and conventionally payable at Whitsunday 1905, were or were not for possession of the farms between these two terms. As I have already answered the latter question in the affirmative, it follows that the rents referred to in the agreement are those legally payable at Martinmas 1904, and accordingly the defender is, in my judgment, entitled to have these rents divided between him and the pursuer in terms of the agreement.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled, and that the second and third pleas in law for the defender should be sustained.

The Lord Justice-Clerk and *Lord Ardwall* concurred.—10*th January* 1908.

Counsel for Pursuer, Scott Dickson, K.C., Pitman; Agents, J. & F. Anderson, W.S.—Counsel for Defender, Dean of Faculty (Campbell, K.C.), Brodie Innes; Agents, Mitchell & Baxter, W.S. J. S. M.

OUTER HOUSE.

(*Lord Guthrie.*)

273. Hunter.

Process—Citation—Petition—Execution of Citation — Form Partly Printed — Citation Approved by Lord Ordinary.

This was a petition for new trustees in which the execution of citation, in place of being written on a copy of the petition along with a certified copy of the interlocutor ordering intimation and service, was on a separate paper partly written and partly printed. The Clerk of Court took objection to this form, and brought it under the notice of the Lord Ordinary.

The Lord Ordinary held that it was no valid objection to the execution of citation that it was partly printed and annexed to the petition by gumming.—*7th January* 1908.

Counsel for Petitioner, D. Anderson; Agents, W. & J. Cook, W.S. A. S. P.

OUTER HOUSE.

(*Lord Salvesen.*)

274. Glass *v.* Glass's Trustees and Another.

Husband and Wife — Marriage — Constitution—Per Verba de Præsenti—Proof —Circumstances where Woman Held Entitled to Decree of Declarator of Marriage.

The Opinion of the Lord Ordinary sufficiently reports this case.

Lord Salvesen. — The pursuer in this case claims to be the widow of the deceased Robert Glass, whose trustees are the leading defenders. She was not regularly married to the deceased; and she has brought this action, after his death, in order to obtain a declarator that at and prior to his death the pursuer and he were married persons, and that she is entitled to all the rights and privileges competent to a lawful wife. The action was defended by the trustees, and also by one of the next of kin of Robert Glass; but in the course of the proof an arrangement was arrived at between them and the pursuer, under which they agreed not to contest the case further, on the footing that, if pursuer obtained declarator in terms of her conclusions, she should accept a specified sum in full settlement of her claims of *jus relictæ* and *terce*. This settlement, however, does not relieve me of the responsibility of deciding whether the pursuer has proved facts, circumstances and qualifications relevant to infer marriage between her and Robert Glass.

The circumstances, of the case are unusual. The pursuer was born in 1857; and as her parents were persons in humble life, she had early to make her own living. She remained at school until she was thirteen, after which she took employment for a short time in Aberdeen, where her parents lived. She then went successively to Montrose and Arbroath as a domestic servant; and in 1874 she came to Edinburgh with the object of obtaining a situation in a shop. She knew one family in Edinburgh, by whom she was introduced to the deceased Robert Glass. Having found it hopeless to obtain a situation such as she wanted, she accepted an offer by Glass to be a servant in his house in South St James' Street, Edinburgh.

Robert Glass had been previously married, but his first wife had died childless on 30th June 1874. He was then a man of about forty-four years of age—and kept two houses of ill-fame, one in High Street, and the other at South St James' Street, where he himself lived. He was assisted in the management of the latter house by a Mrs Roche, who also acted as a general servant; and she was living in the house when the pursuer entered his service about October 1874. There were several bedrooms in the house, which were used for immoral purposes; and it was part of the pursuer's duty to keep the house, including these bedrooms, in order. According to her evidence she did not know at the time when she accepted the situation offered to her by Glass how he earned his livelihood; but I have no doubt she became aware within a short time thereafter. After a couple of months Mrs Roche was dismissed, and Glass and the pursuer became the only regular occupants of the house. She says that Glass commenced to shew her attentions, and on various occasions sought to enter her bedroom, but that she resisted his overtures until on one occasion in December 1874 he asked her to marry him. She agreed to do so; and he thereupon took a Bible, opened it, and swore upon it that he took her to be his wife, and she also swore that she took him to be her husband. In reliance on this ceremony constituting marriage, the pursuer thereafter cohabited with Glass.

The only evidence of the interchange of consent is that of the pursuer herself, and I do not think that, *per se*, her evidence is sufficient to instruct that a binding contract of marriage was then entered into. What followed, however, is important. The pursuer received a wedding ring, which she wore for many years afterwards, and which was seen by other witnesses in the case; and for about fifteen years continuously she continued to live with Glass on the footing of being his wife. She was introduced to Glass's friends as Mrs Glass; and at an early date she informed her own relatives of her marriage. Numerous witnesses have been examined who speak to their being introduced by Glass to the pursuer as his wife, and who say that all along they treated her as such; and in the case of those who stayed at one or other of the houses in which Glass resided, that she took her place as the head of the household. This evidence is supported by a whole series of letters, beginning in 1877 and extending down to 1889, in which Glass addressed her as "My dear wife," and signed himself "your affect. husband, R. Glass." These letters were written to the pursuer either when she was at Aberdeen visiting her own relatives, or when Glass was absent from home in connection with his business as a bookmaker. The tone of the letters is just what one would expect from a person in Glass's position writing to his wife.

What is even more significant is that within a short period of the commencement of their cohabitation Robert Glass was in the habit of speaking and writing to the pursuer's relatives on the footing that they had become his own—which is consistent only with the view that he regarded himself as married to the pursuer. In June 1878, for instance, he writes to the pursuer's sister, addressing her as "My dear sister," and signing himself "your affect. brother, R. Glass." In these letters Glass speaks of pursuer's parents as "mother" and "father," and they shew that he was on affectionate terms with the whole family. As the Davidsons were in poor circumstances, Glass from time to time made them presents of money; and, according to the evidence of the members of the family who were examined, they never for a moment suspected from anything he said that he was otherwise than the pursuer's lawful husband.

It is only just to the pursuer to say that, although her relations with Glass commenced so inauspiciously, she seems to have disapproved of the business in which he was engaged, and very soon induced him to give up receiving visitors at the house which they occupied in South St James' Street. The other house continued to be used as a brothel until 1880, and was regularly visited by the police; and the pursuer has produced a record of the various police visits paid to the house, in all of which she is described as the wife of the occupier. There is only a single instance of her using her maiden name. That was in connection with her apprehension in connection with a theft which had been committed by one or more prostitutes in the house in High Street, and she explains that she gave her maiden name by request of Glass. No discredit appears to attach to the pursuer in connection with this incident. On the contrary, it was she who gave information to the police of the stolen money having been concealed in her house; and as the result of a prosecution the accused woman pleaded guilty. In 1880 the business in High Street was also given up, Glass having by this time devoted his attention to the more lucrative and less disreputable business of bookmaking. The pursuer says that she was mainly instrumental in inducing Glass to give up the house in High Street; and the evidence is to the effect that under her influence a great improvement was effected in his personal appearance, as well as in the cleanliness and comfort of the house which he occupied with the pursuer.

The facts which I have narrated appear amply sufficient, according to the authorities, to prove that a mutual agreement to marry had been entered into by the pursuer and Robert Glass. It has frequently been pointed out that "marriage, according to the law of Scotland, is not constituted by the mere fact of cohabitation with the assumption of the character of husband and wife and repute to that effect. The proper doctrine is

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that the consent by which marriage is constituted, in the law of Scotland, may be proved by such cohabitation and repute" (per Lord Moncreiff in *Lapsley*, 1855, 8 D. 61). In this case the proof is unusually strong, if regard be paid only to the period from 1874 to 1889. During all that time the parties cohabited as man and wife, and corresponded on that footing; and, so far as the evidence goes, there was absolutely no divided repute. Cases no doubt occur where people, having agreed to have illicit intercourse, pass themselves off as married persons for some ulterior object; as, for instance, to secure a suitable house, or to have social intercourse with respectable neighbours who would decline to associate with them on other terms. But this is not a case of that kind at all. There was, so far as I can see, no adequate motive why Glass should have assumed the relation of husband to the pursuer, unless he had previously agreed to accept of her as his wife; and accordingly, if this action had been brought in 1889, I do not see that the pursuer could possibly have failed in obtaining the declarator which she now seeks.

What difficulty there is in the case results from the events which took place in 1889. It appears that for some time the parties had been living unhappily together—mainly because of Robert Glass's conduct with other women, and partly because the pursuer had been taking drink, a habit which with all his faults Glass was not addicted to. Accordingly, Glass instructed his own law agent to draw up a minute of agreement which provided for the parties living separately. This minute of agreement is signed by the pursuer in her maiden name; and its terms are such as to imply an acknowledgment by her that she and Glass had never been married persons—although it provided for her receiving a weekly payment of 25s. so long as she "remained unmarried and led a chaste and honourable life." The pursuer had no separate advice in regard to this document, and says that she was only imperfectly acquainted with its contents. I am not disposed to accept the latter statement, as she admittedly received a duplicate of the minute of agreement, and had thus ample opportunities of considering its terms. But I think it is very likely that she did not then know that she had a legal right to obtain a declarator of marriage against Glass, and that she accepted the provision in ignorance of her legal rights. It is a somewhat curious fact that even after this deed was executed Glass wrote to the pursuer more than one letter in which he continued to address her as Mrs Glass, and in which he shews himself anxious that she should return to him. It is obvious, however, that even if the deed had been executed in full knowledge of the legal rights of parties, it could have no effect in dissolving a marriage which had already been constituted, as nothing but a decree of Court can terminate even a marriage that has been irregularly entered into. The same observation applies to the settlement which the pursuer made some years later, after Glass had stopped her allowance because of a suspicion which I am satisfied was unfounded—that she had misconducted herself with another man. The pursuer employed an advocate in Aberdeen to take proceedings against Glass; but unfortunately she did not inform him of the letters which she had received during her cohabitation with Glass, and which evidenced the relation upon which she was living with him. Mr Butchart accordingly seems to have assumed that the minute of agreement contained a correct narrative of the facts, and, on this assumption, to have advised the pursuer to settle her claims for a slump sum which Glass was willing to pay her. When the money she then received—and in respect of which she on 19th August 1895 discharged all claims competent to her under the agreement—became exhausted, the pursuer consulted a Mr Scott, solicitor in Aberdeen, and handed to him the letters on which so much reliance is placed in the present case. Mr Scott then wrote a letter in which he maintained, on her behalf, the position that she was a married woman, and entitled to be alimented by her husband. But, unfortunately for the pursuer, Scott became bankrupt and shortly afterwards died, and her claim was not prosecuted, partly because the evidence on which she relied remained in his hands, and partly from lack of funds. From 1896 onwards the pursuer has supported herself in various situations without making any claim against Glass.

The above circumstances might have been of great importance if the evidence as to a marriage having been entered into had been less clear and definite. As matters stand, however, I am quite satisfied that they are not sufficient to prevent the pursuer's right to have her marriage now declared. As, however, parties informed me that in the event of my being of opinion that the pursuer was entitled to the declarator which she seeks, various deeds will require to be executed to carry out the settlement already referred to, I shall not meantime sign a formal interlocutor embodying the result at which I have arrived.—20*th December* 1907.

Counsel for Pursuer, A. M. Anderson, M. P. Fraser; Agent, J. Knox Crawford, S.S.C.—Counsel for Defenders Glass's Trustees, Dickson, K.C., Gunn; Agents, C. B. Hogg & Son, Solicitors.—Counsel for Defender Next of Kin, Wilton; Agent, C. Garrow, Solicitor.

J. W. F.

OUTER HOUSE.

(*Lord Guthrie.*)

275. Stevenson (Clerk of the Peace) *v.* The Lord Provost and Magistrates of Dundee.

Local Government—Licensing—Clerk of the Peace—Fees—Liability of Magistrates—Licensing (Scotland) Act 1903 (3 Edw. VII. cap. 35)—Table of Fees—Table Under Act of Sederunt, 7th July 1904, is Inclusive of All Business under Licensing Act 1903—Table Under Act of Sederunt, 24th November 1905, Applies to Judicial Business but Not to Licensing under Act of 1903.

This was an action by the "Clerk to the Justices of the Peace within the County of the City of Dundee" against the Lord Provost and Magistrates of that City for an account amounting to £271, 8s 1d. The account consisted of outlays incurred by the pursuer and fees alleged to be due to him as Clerk of the Peace for work done between 1st November 1905 and 1st November 1906.

The items of the account were claimed under the authority of sect. 8 (4) of the Licensing (Scotland) Act 1903, which provides: ". . . It shall be the duty of the Town Council of such Royal or Parliamentary Burgh to defray any necessary expenses in respect of proceedings of the Licensing Court or Court of Appeal . . . . " and an Act of Sederunt of 24th November 1905. That Act of Sederunt is passed under sect. 27 (3) of the Licensing (Scotland) Act 1903, which authorises regulation of the fees payable to the Clerk of the Peace by Act of Sederunt " . . . . for anything done under this Act or otherwise," and the preamble is as follows :—

"The Lords of Council and Session, considering that by the Licensing (Scotland) Act 1903, 3 Edward 7th (cap. 25, sect. 27, subsect. 3), it is provided that 'It shall be lawful for the Court of Session, on the application of the Lord Advocate, from time to time, by Act of Sederunt, to prescribe a table or tables of fees payable to a Sheriff-Clerk or Town-Clerk for anything done under this Act, and of fees payable to a Clerk of the Peace for anything done under this Act, or otherwise; and any table so prescribed shall have full force and effect notwithstanding any general or special provision contained in this or any other Act; and thereafter no such clerk as aforesaid shall demand or receive any greater or additional fee or remuneration for anything so done than is authorised in such table.' And considering that an application has been made to the said Lords by the Lord Advocate in terms of said Act; and considering that on 7th July 1904 an Act of Sederunt was enacted by the said Lords intituled 'Act of Sederunt for regulating the fees payable under the Licensing (Scotland) Act 1903 to Sheriff-Clerks, Town-Clerks, and Clerks of the Peace,' which prescribed, *inter alia*, that the Clerks of the Peace were entitled to charge certain fees for work done under the said Act; and further, considering it is expedient to prescribe, in terms of said Act, a table of fees for work done by the Clerks of the Peace otherwise than under said Act; therefore the said Lords do enact and declare that from and after the date hereof in addition to the fees prescribed in the said Act of Sederunt applicable to the said Clerks of the Peace, the Clerks of the Peace shall be entitled to charge the fees specified in the table annexed hereto until the same shall be altered in terms of law. Provided always that nothing herein contained shall affect any arrangement or agreement between a Clerk of the Peace holding office at the date hereof and a County Council or Town Council of a County of a City whereby the said Clerk of the Peace is paid a salary or higher fees in lieu of the fees prescribed in Part II. of the table annexed hereto."

The table of fees annexed to the Act of Sederunt is divided into two parts: I. Fees for business done under various special statutes other than the Licensing (Scotland) Act 1903. II. Fees payable for " general business."

The defenders disputed their liability for the account, in the first place on the ground that the pursuer had contracted impliedly to do the work of Clerk of the Peace at a fixed salary of £26, 5s. per annum, which were the terms enjoyed by his predecessors in office.

They did not, however, press this defence, but maintained that Part II. of the table of fees in the Act of Sederunt of 24th November 1905 had no reference to judicial business of any kind, or to any licensing business, and that all fees payable to the Clerk for the latter were ruled by an Act of Sederunt of 7th July 1904, and were payable by parties applying to him in his official capacity. The same applied to fees payable under Part I. of the table of fees, and the only fees for which the defenders could be held liable were those chargeable under Part II. for non-judicial business and excluding all licensing business.

The Lord Ordinary *held* that the "general business" referred to in Part II. of the table of fees did not exclude judicial business, but that all business under the Licensing (Scotland) Act 1903 was excluded. He therefore held that the pursuer was entitled to charge fees against the defenders for their judicial business other than applications for liquor licenses under the Act of 1903, and also for general business connected with licensing if not done under that Act, but with the exception in both cases of items in Part II., Head 2, of the table of fees under the Act of Sederunt of 24th November 1905, viz. attendance at meetings of quarter sessions or special general

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sessions, or meetings of committees for dispatching administrative business (£1, 10s. 6d.). This the Lord Ordinary held could not refer to meetings for judicial business.

The Lord Ordinary therefore, with these findings, remitted to the Auditor of the Court of Session to tax and report.

Lord Guthrie.—It is admitted that the pursuer's account must be remitted for audit, and I propose to send it to the Auditor of the Court of Session for audit and report. Apart from matter of audit, however, certain questions have been argued before me, on which it is proper that findings should now be pronounced. These questions are of general importance.

The pursuer avers in Cond. 4: "The amount of the account is £271, 8s. 1d., and the various items thereof are chargeable against the defenders either under Part II. of the Act of Sederunt of 1905, or under sect. 8, subsect. (4), of the Licensing Act 1903." The defenders admit liability for any items in the account chargeable under Part II. of the Act of Sederunt of 1905; they deny liability for any charges made by the pursuer in connection with his actings under or in consequence of the Licensing (Scotland) Act 1903. They say that the only charges exigible under that Act are those specified in the Act of Sederunt of 7th July 1904, following on that statute, which admittedly fall to be paid by individuals directly concerned in the working of the Act, and not by the employers of the Clerks of the Peace.

The first question, then, is: 1. Is the pursuer entitled to make any charges against the defenders under the Licensing (Scotland) Act 1903, other than the charges, if any, specified in Part II. of the Act of Sederunt of 24th November 1905?

Under sect. 8 (4) of the Licensing (Scotland) Act of 1903 it is provided that "it shall be the duty of the Town Council of such Royal or Parliamentary Burgh to provide accommodation for such meetings" (of the Licensing Court), "and otherwise defray any necessary expenses in connection with proceedings of the Licensing Court or Court of Appeal; and save as otherwise already chargeable against any burgh rate, to charge the same against the burgh general or police assessment."

Under sect. 27 (3) of the same Licensing (Scotland) Act 1903 provision is made for the passing of Acts of Sederunt. The terms of that subsection require attention, and will be quoted later.

In accordance with the provision just mentioned two Acts of Sederunt were passed, the first dated 7th July 1904, and the second 24th November 1905. The authority for and the scope of these Acts of Sederunt is thus stated in the preamble to the Act of Sederunt of 24th November 1905. [His Lordship then read the preamble to the latter Act, which is quoted above.]

The result is, in my opinion, that these two Acts of Sederunt, in the absence of any such "arrangement or agreement" as is referred to in the preamble of the 1905 Act of Sederunt, contain an exhaustive and inclusive enumeration of the pursuer's whole emoluments as Clerk to the Justices of Peace for the County of the City of Dundee, whether payable by applicants or by employers. The Court has treated the words "or otherwise" in the Licensing Act of 1903 as meant to include "fees for work done by the Clerks of the Peace otherwise than under said Act," and I see no reason to doubt that these fees, partly payable by applicants and partly by employers, were meant to be exhaustive, it being open, I presume, to public authorities and Clerks of the Peace to compound for all fees payable by the former for an annual salary.

2. Is the pursuer, under all or any of the heads of Part II. of the Act of Sederunt of 1905, entitled to charge (*a*) for judicial general business, or (*b*) for general business under the Licensing (Scotland) Act 1903, or (*c*) for licensing general business other than under the said Act?

Part II. is headed "Fees payable to the Clerks of Peace by the County Councils, or the Town Councils of Counties of Cities, for General Business."

It is said by the defenders that "general business" is synonymous with *administrative* or *ministerial* business, and excludes judicial business. This seems an impossible reading, in view of subsection 1, "Framing Circulars calling meetings of Quarter Sessions," etc. Quarter Sessions act judicially as well as ministerially. See, for example, *Muckersie*, 1874, 2 R. (J.C.) 12. I read "general" business as in contrast to the special matters dealt with under Part I., which are naturally paid for by the persons immediately concerned.

Then the defenders maintain that no charges in connection with liquor licences can be made by the pursuer against them under Part II. of the 1905 Act of Sederunt. I think the defenders are right. The Act of Sederunt of 1904 seems to me designed to contain an exhaustive enumeration of the charges under the consolidating Act of 1903, the table of fees in the subsequent Act of Sederunt of 1905 being, in the words of the preamble to that Act, "For work done by the Clerks of the Peace otherwise than under said Act."

But there is one of the heads of Part II. which requires separate consideration—Head 2—which runs as follows:—"2. Attendance at any meeting of Quarter Sessions, or Special General Sessions, or any meeting of Committee of the Justices when met for the purpose of despatching administrative business, except the disposal of applications for licences, £1, 10s. 6d."

Under Head 2 it appears to me that meetings for judicial business cannot fairly be included; and further, that the word "licences" must be read with reference to the preamble of the Act and the general heading immediately following the preamble, as well as with reference to the limited use of the word licence in Part I. of the Act, and therefore must include liquor licences.

It is said that the word "administrative" is not identical with ministerial, but is meant to include judicial. This appears to me to be contrary to the ordinary use, both popular and technical, of the word. As to the word "licences," that is as appropriate to an application for permission to deal in drink as to sell any other controlled commodity, and whatever may have been the intention of the framers of the table appended to the Act, I see no reason to restrict its generality.

The question remains whether under the words "Committees of Justices" in Head 1 can be brought Justice of Peace, Small Debt and Criminal Courts. These words must receive some meaning. There does not appear to be any statutory power in Justices to act by Committees. The words are difficult of construction, but, on the whole, it appears to me that the Act of Sederunt must be read in reference to the well-known practice of justices of the peace to arrange for a rota of their members to attend the different civil and criminal courts held throughout the year. These are *de facto*, although not *de jure*, committees.

The result is that I shall find (1) that the pursuer is not entitled to make any charges against the defenders for work done under the Licensing Act of 1903; (2) that he is entitled to charge the defenders for general business done in connection with their Justice of Peace, Small Debt and Criminal Courts, other than items falling under Head 2 of Part II. of the Act of Sederunt of 1905; (3) that he is entitled to charge the defenders for general business done in connection with licensing, other than licensing under the Licensing (Scotland) Act 1903, with the exception of items falling under Head 2 of Part II. of the Act of Sederunt of 1905.

With these findings, I shall remit to the Auditor of the Court of Session for audit and report.—30*th December* 1907.

Counsel for Pursuer, Graham Stewart, K.C., Constable; Agents, T. F. Weir & Robertson, S.S.C. — Counsel for Defender, Clyde, K.C., Macmillan; Agents, Morton, Smart, Macdonald & Prosser, W.S. A. S. P.

OUTER HOUSE.

(*Lord Guthrie.*)

276. Burn Murdoch's Trustees *v.* Thomson's Trustees.

EXPENSES—ABANDONMENT—ACTION ABANDONED BEFORE RECORD CLOSED — DEFENDER FOUND ENTITLED TO EXPENSES OF COMMISSION ALREADY TAKEN AND EXECUTED BY HIM.

OUTER HOUSE. *Lord Guthrie.*

Burn Murdoch's Trustees v. Thomson's Trustees.

This was a declarator of right of way, in which the defenders, before the closing of the record, but after lodging defences, obtained a commission to take the evidence of aged witnesses whose testimony was important, if not essential to the defence. After this evidence had been taken, and without closing the record, the pursuers abandoned their case by minute of abandonment. They admitted that they were liable to the defender in expenses, but took objection to paying the expense of the defenders' commission, which they said was unnecessarily hurried. Had they been able to precognosce these witnesses before the commission was granted, they would have abandoned their case and the commission would have been unnecessary (*Napier* v. *Campbell*, 1843, 5 D. 858; *Maclaine* v. *Cooper*, 1846, 8 D. 429). They therefore asked the Lord Ordinary, in remitting the defenders' account of expenses to the Auditor for taxation, to make a finding that the defenders were not entitled to the expenses of the commission. The defenders claimed that they were entitled to the expenses of the commission. They were entitled to preserve the evidence of these aged witnesses, which might have been lost at any moment by death. The cases referred to were cases of witnesses who afterwards appeared at the trial. Even in such a case the Court had complete discretion to award the expenses if there was reasonable apprehension that the evidence would not be available at the trial (*Couper* v. *Cullen*, 1874, 1 R. 1101).

The Lord Ordinary *held* that it was perfectly proper to take the evidence, and that the expense was therefore properly incurred. He therefore, in respect of the minute of abandonment, ordained the defenders to lodge an account of their expenses, and remitted, in the usual form, to the Auditor to tax and report. —*7th January* 1908.

Counsel for Pursuers, Murray; Agents, Davidson & Syme, W.S.—Counsel for Defenders, Macmillan; Agents, Hope, Todd & Kirk, W.S.

A. S. P.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

277. Logan's Executors *v.* M'Lennan and Others.

I. SUCCESSION—INTESTATE SUCCESSION—COLLATION — COLLATION INTER HEREDES — HEIRS PORTIONERS—INTESTATE SURVIVED BY (A) SON OF ONE SISTER, AND (B) SON AND DAUGHTER OF ANOTHER SISTER—HELD HEIR IN HERITAGE ENTITLED TO

2nd Div.

Logan's Executors v. M'Lennan and Others.

Share in Moveable Estate Only on Condition of Collating Heritage.

II. Expenses—Special Case—Question of Intestate Succession—Circumstances Where Unsuccessful Party to Special Case Found Liable in Expenses.

Special Case.

This was a special case presented for the purpose of settling questions which had arisen with reference to the estate of the late John Logan. The executors of John Logan were the first parties to the special case.

The case stated:—

1. Mr John Logan, solicitor and town clerk, Wishaw, died . . . . on 24th June 1906. He . . . . died unmarried and intestate.

2. Mr Logan was, at his death, possessed of both heritable and moveable estate, the heritable estate being worth about £4000, and the moveable about £10,000.

3. Mr Logan was predeceased by both his father and his mother. He never had a brother, but he had two sisters both older than he was. Both of the deceased's sisters predeceased him leaving issue. The second party, Andrew M'Lennan, is the only child of the deceased's older sister, and the third party is one of two children of the deceased's younger sister, the only other child being . . . . John Logan Smith.

The second party contends that he is entitled (1), as representing his mother, to one-half of the deceased's heritable estate; and also (2) as one of the next of kin of the said John Logan, to one-third of his moveable estate without collating the said share of heritage. The third party contends that the second party has no claim to any share of the moveable estate unless he collates therewith his said share of heritage.

The Questions of Law were as follows:—

1. Is the second party entitled to one-half of the heritable estate, and one-third of the moveable estate?
2. Must he collate his share of heritage as a condition of receiving a share of the moveable estate?

Argued for the Second Party: Collation was the price which the heir in heritage had to pay for the right to share in the moveable estate. In the case of a single heir the moveable estate was not part of his *portio legitima*, and if he wished to share in the moveable estate he must purchase the right. The *portio legitima* of heirs portioners included the moveable as well as the heritable estate, and therefore they did not require to purchase, and the doctrine of collation did not apply to them (Ersk., III. 9, 3; II. Bank. p. 385). The children of sisters were heirs portioners (Stair, III. 5, 11). *Balfour* v. *Scott* (1787, M. 2379) was distinguishable. The heir in heritage there succeeded under a destination which called the eldest heir portioner to the exclusion of the others. The persons with whom she was called on to collate were persons with whom the heritage had never been divided. The expressions in Bell (Prin., sect. 1911) and in *Anstruther* v. *Anstruther*, 1836, 14 S. 272 at p. 282, applied only to the class of case of which *Balfour* v. *Scott* (*cit.*) was an example. In *Turner* v. *Cooper* (1869, 8 M. 222) the point now taken was not argued, and the case should be reconsidered. Counsel also referred to *Gilmour* v. *Gilmour*, 13th December 1809, F.C.

Counsel for the third party were not called on.

The Court *answered* the first question in the negative, and the second question in the affirmative.

Lord Ardwall.—My Lords, we had a very able and ingenious argument from Mr Hamilton in this case on behalf of the second party; but having considered all that he has submitted to us, I do not think that the questions here put are difficult of solution. On the contrary, I think, both on principle and authority, it is clear that we must answer the first question in the negative, and the second question in the affirmative.

Mr John Logan, who was a solicitor and town clerk of Wishaw, died intestate on 24th June 1906, and at the date of his death his heirs in heritage were his nephews, Andrew M'Lennan, the second party to this case, and John Logan Smith, and his next of kin were these two nephews and his niece, who is the third party in this case, daughter of Mrs Smith.

Now, in that position of matters, I think it is clear that the ordinary rule of collation must apply—namely, that although the heritage of a person who has died intestate goes to his heir, and the moveables to his next of kin, the heir, if he is one of the next of kin, may throw the heritage to which he succeeds as heir into the common stock, and insist upon receiving an equal share of the composite estate, comprising both heritage and moveables; but if he does not choose to collate, he has no right to take any part of the moveable estate. That is the undoubted rule where there is only one heir, and I am unable to see how, in principle, it matters in the very least that, instead of there being only one heir in heritage, there are two or more persons who are entitled to that character, and, as such, entitled to take shares of the heritage of a deceased person.

Mr Hamilton's argument was founded on the position of the mothers of the second and third parties, his contention being that as they—had they survived their brother, the intestate—would have been entitled to share equally both the heritage and the moveables, their descendants *per stirpes* were in a similar position as regarded heritage, and that consequently the rule above referred to did not apply. I cannot accept this argument. The reason why the rule does not apply, and never can apply, to the case of heirs portioners who are also next of kin, is because they are all heirs in heritage and are also the only heirs in moveables, and there is no

person with whom they can collate. They possess the characters of heirs at law and next of kin in their own persons. Therefore there is no room for the application of the law of collation at all. But a different state of matters exists in the present case, for while two of the next of kin are the intestate's heirs in heritage, they are not his only next of kin, because the third party also possesses that character. Accordingly, if the second party desires to share the moveable estate of the deceased with the next of kin, he must, in conformity with the said rule, collate his share of the heritage.

The question raised in this case is, I think, decided by authority. In the first place, there is the case of *Anstruther*, 14 Shaw, p. 282, where in the course of a long opinion of high authority, delivered as it was by the Lord President and Lords Balgray, Gillies, Mackenzie, Corehouse, and Fullerton, certain propositions were laid down with regard to the persons who were entitled or bound to collate; and the third and fourth propositions were these: "3. In the case of heirs portioners being themselves exclusively next of kin, there cannot be collation, for they are all heirs, and all executors. 4. Heirs portioners being in the same degree of kindred with others not heirs portioners, the former, claiming a share of the moveables, are bound to collate with the latter." Now it seems to me that this fourth proposition applies directly to the present case.

But the matter does not rest there; for in the case of *Turner* v. *Cooper and Others*, reported in 8 Macpherson, p. 222, Lord President Inglis says this—it was a case under the Moveable Succession Act 1855—"If the statute does not apply to the case, it seems to me that all the difficulty raised by this special case is removed. In that event the common law says quite unmistakeably that the heirs in heritage, whether the heir be a single heir, or whether they be heirs portioners, cannot take a share of the moveable estate along with the other next of kin without collating the heritage. I do not think it is suggested that that rule does not apply equally to heirs portioners, as to a single heir; and here we have Mrs Turner, Mr Robert Couper, and Mr Thomas Macdonald, taking as the three heirs portioners of the intestate, and not offering to collate. The consequence is, I think, we must answer the first question in the negative." The first question put in that case was whether Mrs Turner, although one of the three heirs portioners, and taking a third of the heritable estate, was also entitled, as one of the next of kin, to a share of the residue of the moveable estate?

It appears to me that the above opinion precisely covers the case we have here. But Mr Hamilton, with some ingenuity, tried to get round it by saying that, while it was not suggested in that case that the rule does not apply equally to heirs portioners as to a single heir, it is suggested by him now for the decision of the Court. But I think the phraseology of the Lord President's opinion goes to shew that not only was the suggestion not made, but that he would have been very much surprised if it had been made. At all events, I think that the decision is a distinct authority for the proposition that whether there is only a single heir in heritage or whether there are heirs portioners, the rule applies that they can only share in the moveable estate of a deceased intestate on the condition of collation in every case where there are other persons possessing the character of next of kin.

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The Lord Justice-Clerk and *Lord Low* concurred.

Counsel for the third party moved for expenses against the second party. He stated that the second party had refused to agree to a proposal that the whole expenses should come out of the estate.

Counsel for the second party did not admit the statement, and moved that the whole expenses should come out of the estate.

The Court *found* the third party entitled to expenses against the second party. — 14*th January* 1908.

Counsel for the First Parties, Fenton; Agent, D. Hill Murray, S.S.C.—Counsel for the Second Party, Hamilton; Agents, Morton, Smart, Macdonald & Prosser, W.S.—Counsel for the Third Party, Kennedy, K.C., M. P. Fraser; Agent, D. Hill Murray, S.S.C. J. S. M.

OUTER HOUSE.

(*Lord Dundas.*)

278. Crawford's Trustees *v.* United Free Church of Scotland.

SUCCESSION — MUTUAL SETTLEMENT — REVOCATION—SETTLEMENT BY HUSBAND AFTER WIFE'S DEATH BEARING TO REVOKE MUTUAL SETTLEMENT—CIRCUMSTANCES IN WHICH HELD THAT PROVISIONS OF MUTUAL SETTLEMENT PACTIONAL AND IRREVOCABLE.

This was an action of multiplepoinding to which the parties were (1) the trustees acting under the trust disposition and settlement of the deceased Rev. Matthew Crawford, dated 9th December 1902, with relative codicil dated 25th May 1904, and also under the mutual trust disposition and settlement of the said Matthew Crawford and his wife, pursuers and real raisers; (2) Miss Janet Crawford Black and Elizabeth Bennet Black, claimants; and (3) the Rev. Charles M'Crie and others, as representing the United Free Church of Scotland, claimants.

The facts of the case appear from the Lord Ordinary's Opinion.

Outer House. *Lord Dundas.*

Crawford's Trustees v. United Free Church of Scotland.

The Lord Ordinary issued the following interlocutor:—"Finds that upon a sound construction of the trust disposition and settlement executed by the deceased Rev. Matthew Crawford and Mrs Janet Crawford, dated 22nd August 1894, Mr Crawford had no power, after his wife's death, gratuitously to revoke or alter the provisions contained in said trust disposition and settlement, and that the trust disposition and settlement dated 9th December 1902 is inept and ineffectual. . . . ."

Lord Dundas.—The question raised in this multiplepoinding is whether or not the now deceased Rev. Matthew Crawford had power to revoke in whole or in part a trust disposition and settlement executed by him and his wife, who predeceased him, dated 22nd August 1894, and with relative codicil dated 15th October 1896, recorded in the Sheriff Court Books of Lanarkshire 20th January 1897. Mrs Crawford died on 4th December 1896. Mr Crawford died on 17th February 1905. He left a trust disposition and settlement, dated 9th December 1902, and relative codicil, dated 25th May 1904. By the said settlement, Mr Crawford professed to "revoke and recal all previous settlements made by me, including the mutual settlement made by me and my late wife Janet Drife or Crawford."

By the said mutual settlement, the spouses, "for the purpose of settling our affairs and providing for the disposal of our means and estate after our decease," assigned, disponed, and conveyed to and in favour of the survivor of them all and sundry the whole means and estate, heritable and moveable, real and personal, of whatever nature or denomination or wheresoever situated which should belong and be owing and indebted to them respectively at the time of their death; "and on the death of the longest liver of us, we dispone, convey and make over all and sundry the whole means and estate of which we may die possessed" to trustees named. The trust purposes, after provision for payment of debts and expenses, were (second), that the trustees should hold and apply the whole free residue and remainder of the said estate, and should pay the free income and revenue therefrom to Mrs Black, therein designed, to be expended by her towards the education and upbringing of her daughters, Janet and Elizabeth, until they respectively attained the age of twenty-one years; (third), on the youngest of said children attaining majority, Mr and Mrs Crawford directed their trustees to divide the fee or capital of their said means and estate equally among the said children of Mrs Black, share and share alike, the lawful issue of a predeceasing child being entitled to take their parent's share; (fourth), in the event of the death of said children before the period of division, the trustees were directed to pay the free income and produce of said means and estate to Mrs Black, and upon her death to pay the residue of the trusters' said means and estate to the treasurer for the time being of the United Presbyterian Church of Scotland for behoof of objects specifically described. The following clause occurs later: "And we reserve our respective liferents of the means and estate above conveyed, with power to alter, innovate, or revoke these presents at pleasure." By the said codicil, dated 15th October 1896, the said spouses, "in terms of the powers reserved to us in the foregoing settlement," cancelled the appointment of one of their trustees, and named another in his stead, and made certain specific bequests of moveables.

By his said trust disposition and settlement, dated in 1902, Mr Crawford assigned and disponed to trustees (who are the same gentlemen as the trustees surviving and acting under the settlement of 1894) the whole means and estate of whatever kind which should belong and be indebted and owing to him at the time of his death, for the purposes therein set forth. By the third purpose, the trustees were directed to hold for behoof of the said Janet and Elizabeth Black the sum of £800, which should be paid to them in equal portions on the youngest of them attaining majority; and by the fourth purpose, the trustees were directed to pay over the whole residue and remainder of the testator's estate to the treasurer for the time being of the United Free Church of Scotland, to be devoted to objects described in the settlement. As already stated, the testator further revoked and recalled all previous settlements made by him, including the said mutual settlement. By the said codicil, dated 25th May 1904, Mr Crawford revoked and recalled the provisions in his settlement of 1902 in favour of Janet and Elizabeth Black, and in lieu thereof directed his trustees to hold for behoof of these ladies the sum of £150 each.

The question in the present competition arises between the Misses Black, on the one hand, and the official representatives of the United Free Church, on the other hand. It appears that Mrs Black, the mother of Janet and Elizabeth Black, was the only niece of Mrs Crawford, and her sole next of kin and heir in heritage. The net estate, as at Mr Crawford's death, is stated to amount to over £2100. The claimants are not at one as to how much of this sum represents the estate of Mrs Crawford at her death. For the Misses Black it is maintained that Mrs Crawford's estate amounted to £1196, 12s. 3d.; and this sum appears in the confirmation of her executors, No. 14 of process. The United Free Church, on the other hand, maintain that only £200 or thereby of the said sum truly belonged to Mrs Crawford; that the greater part of the items entered in the said confirmation "was money which belonged to her husband, and was invested by him in her name";

and that "this money, in any view, constituted a *donatio inter virum et uxorem*, and was impliedly revoked by Mr Crawford's said settlement." I am not satisfied that these averments are sufficiently specific to be remitted to probation; but for reasons which I shall presently state I do not think that I require to determine that question.

The cardinal matter, in a case of this kind, is to arrive at the intention of the parties, as it may be ascertained upon a just construction of the language of the instrument under consideration. Where there is a mutual settlement, under which each party gives and receives onerous consideration, the deed usually becomes irrevocable after the death of the predeceasor. And, though the survivor may be fiar, and in a position to dispose of the estate *inter vivos*, it may yet be the result of the settlement that what he leaves at his death goes, as matter of contract, to the beneficiaries mutually named therein. One must always have regard to the language and presumed intention of the deed as a whole; and it is important to notice, *inter alia*, what the parties say as to this matter of revocation. Upon consideration of the trust disposition executed by Mr and Mrs Crawford, I am of opinion that the surviving husband had no power to revoke or alter its provisions, as, by his own later settlement, he professed to do. The terms of the instrument of 1894 are, to my mind, clearly pactional and contractual. The estates of the spouses are massed and given to the survivor of them; and on his or her death, to trustees for purposes designed by them both. The parties reserve "power to alter, innovate, or revoke these presents at pleasure." I read these words, in conjunction with the language of the deed as a whole, as importing a power of joint revocation. It was argued that the words just quoted are immediately preceded by a reservation of "our respective liferents of the means and estate hereby conveyed"; and that the word "respective" must be used to import a power to the survivor to revoke the settlement. I cannot accept the suggested construction. The reservation of the liferents appears to be a not uncommon clause of style, and I suppose was introduced as such; but the introduction of the word "respective" is not, in my opinion, strong enough *per se* to overcome the presumption that a provision stipulated in the settlement by the predeceasing spouse on behalf of her relatives is not revocable after her death by the husband, who had the use and enjoyment of the massed estate during his survivorship. Nor do I think that, even assuming (as was argued to me on behalf of the Church) that the wife's estate amounted only to £200 or thereby, the character of the settlement, as a mutual and onerous one, would be impaired or destroyed. I observe that in the case of *Wood*, 1823, 2 S. 549, the wife's separated estate was only £100, while the joint estate at the date of her predecease amounted to £1650—more than sixteen times the value of her original estate. Yet her husband, having survived her and remarried, was not permitted by the Court to defeat (by a postnuptial marriage contract) the rights of his first wife's successors under the mutual settlement. In *Corrance's Trs.*, 1903, 5 F. 777, a husband was held not entitled to revoke, by *mortis causa* deed, provisions made in a prior mutual settlement between him and his wife, who had predeceased him, although it appears from the report that she had no separate estate of her own. In the present case there is no need to push the doctrine of mutual consideration so far; for Mrs Crawford's estate amounted, even at the lowest estimate, to the not unsubstantial sum of £200. The position of Mr Crawford, after his wife's death, was, I take it, that he could use and consume, during his lifetime, the capital of the joint estate; but that, in so far as extant at his death, it was subject to the trust purposes of the mutual settlement, which were not liable to defeat by any *mortis causa* disposition on his part.

I was favoured at the discussion in the Procedure Roll with a copious reference to authorities. Some of these require, I think, a certain amount of notice. The case of *Davidson's Trs.*, 1870, 8 M. 807, was strongly relied upon by counsel for the Church; but it does not, in my judgment, support his argument. There was there a mutual settlement by spouses, conferring upon the survivor right to possess and inherit all the property that might belong to them at the death of the predeceaser; and providing that, on the death of the survivor, the residue of all that was left should go to the daughter of the wife by a former marriage and her daughter. These ladies survived the husband, but predeceased the wife. The rubric bears that it was held that the provision in their favour was a mere substitution, which was effectually defeated by a testament executed by the widow; and it was questioned by the Court whether their death in her lifetime did not of itself evacuate the substitution. It may be noted that there was, in that case, no machinery by way of a trust, as there is in the present case. But it is, I think, enough to observe that the true *ratio decidendi* (or at all events, a sufficient one) seems to be that particularly expressed by Lord Deas (p. 810) when he says: "If it appears that the burden or condition sought to be enforced against the survivor was stipulated for by the predeceaser himself, either absolutely or in the event of survivance, that will generally be a case for giving effect to the burden or condition. But here there is no such mutuality. The only burden or condition stipulated for is one which must be presumed to have been stipulated for by the wife in favour of certain of her own relations, and which it would be unreasonable to suppose she meant to be compulsory on her-

Outer House. *Lord Dundas.* — Crawford's Trustees v. United Free Church of Scotland.

self, if she was the survivor, so that she could bequeath nothing, even to her own relations, with the exception of the two named in the mutual will. The question is really one of intention, and I cannot hold that such was the intention of the parties. I give no opinion as to what might have been the result had the husband been the survivor." I think the case of *Craich's Trs.*, 1870, 8 M. 898, more nearly resembles the present than that of *Davidson*. *Wood's* case (already referred to—which was quoted with approval, but distinguished in *Davidson's* case) and *Corrance's Trs.* (above cited) are also cases where the joint estate was given to the survivor, as here. In *Corrance's Trs.* I observe that the Lord Ordinary (Kyllachy) said (at p. 781) in his judgment, which was adhered to by the Second Division: "The important consideration, I think, is that these provisions conferred benefits (benefits defeasible no doubt by *inter vivos* deed, but yet otherwise, if I am right, indefeasible), not upon the wife herself, but upon third parties who are her relatives, and I see no sufficient grounds, nor do I think there is any authority, for extending the doctrine of the revocability of donations between spouses to provisions of that description. The cases of *Kidd* v. *Kidd*, 2 M. 227, and *Kerr*, 11 M. 780, seem to me to be sufficient to support this conclusion." I may also notice *Gentles*, 1826, 4 S. 749, a case of post-nuptial marriage contract, referred to by Lord Deas in *Davidson* (*sup. cit.*), as useful and instructive. It may be proper to subjoin a note of other cases cited during the discussion, though I do not think it necessary to refer specially to any of them: *Hogg*, 1863, 1 M. 647; *Lang*, 1867, 5 M. 789; *Melville*, 1879, 6 R. 1286; *Beattie's Tr.*, 1884, 11 R. 846; *Nicoll's Exr.*, 1887, 14 R. 384; *Kyd* (*Kay's Tr.*), 1892, 19 R. 1071; *Robertson*, 1900, 2 F. 1097; *Denholm's Trs.*, 1907, S.C. 61, and later 29th Nov. 1907, 15 S.L.T., 589; *Denyssen*, 1872, L.P. 4 Priv. Co. 236; *Dufaur*, 1769, 1 Dick. 219.

For the reasons which I have now stated, I think that Mr Crawford had no power, after his wife's death, to revoke the mutual settlement, and that the claim for the United Free Church is ill-founded and ought to be repelled. But, while I agree generally with the argument presented by counsel for the Misses Black, I do not see my way to sustaining their claim "to be ranked and preferred to the whole fund *in medio*." The ladies are stated to be 19 and 17 years of age respectively. Under the mutual settlement it appears that they have no right to claim any part of the capital estate until the younger of them has attained majority. Till that event the trustees are directed, as already mentioned, to pay the free income and revenue to Mrs Black, to be expended by her towards the education and upbringing of her daughters. I understand that Mrs Black is not at present in a position to attend to such matters; but that fact cannot, in my judgment, warrant a present payment of the capital to her daughters, before any part of it is, by the terms of the settlement, payable to, or indeed vested in them. It appears to me that the correct procedure, if my opinion upon the merits of the case is well founded, would be that the trustees under the mutual settlement should lodge a claim to hold and administer the whole fund for the purposes of their trust. This has, I think, been the usual and proper practice in such cases, at all events since the decision in *Hall's Trs.*, 1892, 19 R. 567.

I propose at this stage to pronounce findings embodying the opinion which I have expressed, and to grant leave to reclaim.—19*th December* 1907.

Counsel for Pursuers and Real Raisers and for Claimants Janet Crawford Black and Elizabeth Bennet Black, Kennedy, K.C., W. Thomson; Agents, Balfour & Manson, S.S.C.—Counsel for Claimants Rev. Charles M'Crie and Others, The Lord Advocate (Shaw, K.C.), Clyde, K.C., Dunbar; Agents, Miller, Robson & M'Lean, W.S.

A. M.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Low and Ardwall.)

279. Conolly *v.* North British Railway Company.

Expenses — Jury Trial — Verdict in Favour of Pursuer Set Aside as Contrary to Evidence — New Trial Resulting in Verdict for Pursuer—Second Verdict Not Set Aside — Pursuer Found Entitled to Expenses, Except Expenses of First Trial—Held Pursuer Not Entitled to Expenses of Opposing Rule which Resulted in First Verdict Being Set Aside.

Note of Objections to Auditor's Report.

Thomas Conolly, labourer, Springburn, Glasgow, brought an action of damages for personal injury against the North British Railway Company.

Issues were adjusted, and on 21st July 1906 the jury returned a verdict in favour of the pursuer, and assessed the damages at £160.

On the motion of the defenders the Court allowed a new trial, on the ground that the verdict was contrary to the evidence.

On 30th May 1907 the jury returned a verdict for the pursuer, and assessed the damages at £75.

The defenders having obtained a rule on the pursuer to shew cause why the verdict should not be set aside, the Court on 20th December 1907 refused the rule; of consent applied the verdict; and found the pursuer "entitled to expenses, except the expenses of the first trial."

On taxation, the Auditor allowed the pursuer the expenses of opposing the rule which resulted in the verdict in the first trial being set aside.

The defenders presented a note of objections to the Auditor's report, in which they objected to the allowance of these expenses.

The defenders cited *Earl of Fife* v. *Duff*, 1827, 5 S. 524, N.E. 492.

The Court *sustained* the objection.

The Lord Justice-Clerk.—My Lords, I think these expenses (except, of course, the expenses which Mr Dickson has given up in connection with procognitions) should not be allowed. These are expenses connected with the first trial, and although the word trial expresses generally the idea of going to a verdict, and getting the verdict of a jury, we all know that a verdict has no weight whatever except in so far as it is applied by the Court, the Court having power, if they see fit, not to apply it on certain grounds, they having a discretion to judge whether the jury have gone so far wrong in their verdict, either in fact or law, that a new trial ought to be granted on the ground that the verdict was either contrary to evidence or contrary to law. I take that to be a part of the proceedings of the first trial; and until that has been done, nothing effective has been done in the original trial at all. To say that these expenses, which resulted in the pursuer being compelled to enter upon a new trial, are expenses connected with the new trial, seems to me to be out of the question. They are expenses connected with the trial in which the verdict was bad and had to be set aside, and the party is not allowed the expenses of that trial; and my own opinion, apart from authority, would be that he is not entitled to the expenses of getting that abortive trial set aside. But I hold that this view is strongly confirmed by the case quoted to us of the *Earl of Fife* v. *Duff*.

Lord Low.—I have great doubts in this case, but I think it seems to have been decided in the *Earl of Fife* v. *Duff* that the expenses of discussing a rule for a new trial are part of the expenses of the trial to which it relates. That being so, I do not think it would be expedient to disturb a decision upon a question of this sort pronounced so long ago. Therefore I agree in the result which your Lordship proposes.

Lord Ardwall.—I have no doubt about this matter. I am of opinion that the expenses connected with the setting aside of the verdict in the first trial which has been allowed to the pursuer by the Auditor, were really part of the expenses of the first trial. The proceedings in connection with the first trial never came to anything; the verdict was set aside, and a new trial was granted. When the Court finds a party entitled or not entitled to certain expenses, that is not necessarily confined to the expenses of the specific piece of procedure mentioned in the finding, but includes expenses properly connected with such piece of procedure. When the Court says a party is to be entitled to the expenses of the first trial or is not to be entitled to the expenses of the first trial, these expenses consist not merely of the expenses of the proceedings before the judge at the trial, but of everything properly connected with the first trial, including the expenses of the discussion in this Court in obtaining a new trial. That view is entirely in consonance with what was decided in the case of the *Earl of Fife*, 5 S. 492, which has been quoted to us. That was a very clear case of this point coming up for decision, because there were in that case two jury trials which, in consequence of the judgment of the House of Lords, were held to be absolutely useless; and one of the parties got expenses of these trials, but no other expenses. Therefore it is a direct decision as to what falls and what does not fall within the expenses of a particular jury trial. On these grounds I am clearly of opinion that the judgment proposed by your Lordships is the right one.—15*th January* 1908.

Counsel for Pursuer, Orr, K.C., Lippe; Agents, St Clair Swanson & Manson, W.S.—Counsel for Defenders, Scott Dickson, K.C., Grierson; Agent, James Watson, S.S.C. J. S. M.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Low and Ardwall.)

280. M'Callum *v.* North British Railway Company.

Reparation — Negligence — Railway — Crowd on Platform — Pursuer Injured Through Rush of Crowd — Absence of Officials — Crowd Attempting to Enter Train a Considerable Time Before Starting Time — Circumstances Where Held Railway Company Not Proved to be in Fault.

Appeal from the Sheriff Court of the Lothians and Peebles at Edinburgh.

This was an action of damages for personal injury brought by Mrs Isabella Yates or M'Callum, wife of Alexander M'Callum, miner, Broxburn, against the North British Railway Company in the Sheriff Court at Edinburgh.

The facts of the case were found as follows by the Sheriff-Substitute (whose interlocutor was affirmed by the Court).

Finds in fact—(1) That on 1st September 1906 the pursuer, her husband, and three children left Broxburn in the afternoon to proceed to Edinburgh, where they did some shopping; that in the evening they

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proceeded to the Waverley Station in order to return to Broxburn by the train leaving Edinburgh at 8.38 p.m.; that on arrival at the gate at the end of the platform their tickets were checked by an official stationed there. (2) That the platform, No, 12, from which the Broxburn train started, is a wooden platform, with a concrete margin of 2 feet 9 inches in breadth, and is capable of holding about 2000 persons; that there is a dock on each side for trains, and the Broxburn train was in the dock on the left-hand side of the platform. (3) That on entering the platform and proceeding to the train, the pursuer and her husband found all the third-class carriages filled, but they were told to go in front as more carriages were to be added on. (4) That pursuer went to the front, and waited at the point of the platform where the incoming carriages would likely be stopped; that at this place there was a hoist for goods which contracted the space for passengers. (5) That there were a few passengers already waiting for the carriages, but the arrival of more increased the crowd to about 200 persons; the crowd was orderly, consisting mainly of working people who had been in town shopping with their families. (6) That the pursuer, who had a child in her arms, stood on the wooden part of the platform, within the concrete margin; she was in front of the crowd with no one between her and the place to which the carriages were to be shunted; the platform at this part was well lighted with four powerful electric lamps. (7) That when the carriages were being shunted into the dock, the crowd pressed forward; the pursuer did not attempt to get into the train, but was forced up against the carriages by the pressure from behind, and was thrown down and received severe bruises about the legs and right thigh. (8) That the Company provided two men to check the tickets, two inspectors, porters and policeman, who were sufficient to regulate any crowd that was on the platform at the time. (9) That there was no neglect of any duty cast on the railway company under these circumstances, and the damage that the pursuer sustained was due to the heedlessness of the crowd, and not in consequence of any negligence on the part of the defenders.

On 22nd March 1907 the Sheriff-Substitute (Gardner Millar) *assoilzied* the defenders.

He added the following note:

Note.—There was a little difficulty in connection with the proof in this case, as the railway company did not receive immediate notice of the accident, and their servants were not informed of the accident until some time after the date on which it is said to have occurred, with the result that it was with some difficulty that they could recal the precise circumstances in connection with the departure of the train upon this occasion. [The Sheriff-Substitute narrated the facts to the effect set forth in the findings in fact, *supra.*]

In these circumstances the pursuer alleges three grounds of liability as against the railway company—(*First*) That the platform was overcrowded; (*Second*) that it was insufficiently lighted; and (*Third*) that there were no officials present to regulate the crowd, and that if there had been, an accident would not have happened.

With regard to the first ground of action I think it is proved that, taking the space where the pursuer was standing with her husband, there was room, taking both sides of the platform and allowing 5 feet for each person, for 500 persons to stand, and taking the whole of the platform from end to end there was standing room for nearly 2000 persons. In these circumstances I think it impossible to say that the platform was overcrowded when there were only 200, or at most 230, persons there. Accordingly the first ground of action seems to me not to be proven.

With regard to the question of lighting, although several of the pursuer's witnesses speak about this part of the platform being dark on the night in question, I think it is clearly proven, from the evidence of George Porteous and Charles Wallick, that the platform was lighted in the ordinary manner on the night in question. They speak not only from their recollection but from reports which are entered in their books, and if anything had gone wrong upon that night they were bound to know from these entries. Now it is admitted that the lamps in the neighbourhood of the hoist are powerful lamps, and if they are burning, the platform is exceedingly well lit. In my view, therefore, the second ground of action must be held to be disproved.

The third ground, and more difficult one, is that the pursuer avers that there were no railway officials present at the time. Undoubtedly, at the gate there were two officials to check the tickets, and, in their immediate neighbourhood, several railway policemen, whose duty it was to regulate any crowd. On the platform there was the guard of the train, and in the neighbourhood there were two inspectors, Ogg and Mein, and also a foreman porter and policeman, whose duty it was to patrol the platform. None of these officials seem to me to recollect the occasion in question very clearly, but I think that is accounted for by the fact that a considerable time elapsed before this matter was brought to their notice, and on the occasion in question there does not seem to have been anything to call their attention to the circumstances, either in the demeanour or size of the crowd or by their observing any accident at this place. The crowd admittedly was of quiet respectable working people, who had been in town doing shopping and were returning in the evening. It is not averred that there was any brawling, or fighting, or riotous conduct of any kind. At the same time I think it proved that no one, when the carriages were shunted into the station, called out to the crowd to stand back, but I can scarcely think that, taking a crowd of that kind, the railway officials were bound to assume that their conduct would be anything but quiet and orderly. If a crowd of that character suddenly presses forward and an accident results, I do not think that the railway company can be held liable merely because there was no official present to call upon the crowd to stand back. Moreover, the pursuer's evidence is to the effect that even if there had been a call to stand back, the pressure upon those next the carriages was such as to make it impossible for them to obey the call.

In these circumstances the law applicable to the case rests upon negligence being proved on the part of the railway company. They certainly do not insure passengers who enter their premises against accident, and in the event of any accident occurring, before they can be held liable the pursuer must prove that there had been a neglect of a duty cast upon them under the circumstances, and that that neglect was the cause of the accident which had occurred. The cases I was referred to, so far as the Scotch Courts are concerned, were: (first) the case of *M'Gregor* v. *Glasgow District Subway Company*, 1901, 3 F. 1131. That was the case of an intending passenger

from a station of the Glasgow District Subway, who had been injured through being caught between the station platform and an incoming train. He averred that the trains of the company consisted of two carriages, each with a single entrance door, that only persons holding tickets were admitted to the platform, that on the day in question, owing to a breakdown, the trains were running at intervals of fifteen minutes instead of the advertised time of three minutes, with the result that a larger number of intending passengers than usual came to the station before the train arrived, that on the train entering the station, and while it was still in motion, the crowd concentrated at the point where one of the entrance doors would come to a stop, with the result that the pursuer was pressed against the moving train, and being caught between it and the platform received the injuries on account of which he sued. The pursuer there appealed for jury trial from the Sheriff Court, and parties were heard upon the relevancy, and the Court, with great difficulty, held the action relevant. Lord Young said: "I think that it is impossible to say that within the averments here the pursuer could not establish a case of fault against the defenders." Lord Trayner said: "I have great doubt as to the relevancy of the pursuer's averments, but I do not dissent." Lord Moncreiff says: "I say no more than that I think the pursuer is entitled to an issue," and the Lord Justice-Clerk: "I have had great doubt, but I cannot say that the pursuer's averments are irrelevant." Now that case seems to me to be much stronger than the present one, and if the Court there had so much doubt, I think their judgment tells against the pursuer's case here. The second case, that of *Fraser* v. *Caledonian Railway Company*, 1902, 5 F. 41, was an action of damages for personal injury against a railway company. The pursuer averred that the defenders were in fault in respect that they knowingly, and without taking any steps to prevent it, permitted a greater crowd of passengers, of whom the pursuer was one, to congregate in a station than its platforms could accommodate, and had failed to provide a sufficient staff of servants to cope with the crowd, and that in consequence, by the pressure of the crowd, the pursuer had been carried along and hurled from the platform on to the railroad and injured. The Lord Justice-Clerk says: "The pursuer avers that the servants of the company allowed the station to become so overcrowded as to be dangerous, and took no steps to prevent danger from this cause. The averments are certainly somewhat meagre, but I have come to be of opinion that the case cannot be satisfactorily decided without the facts being first ascertained." Lord Trayner says: "I think, under the pursuer's averments, she may be able to establish fault against the defenders, involving liability, and I cannot say, especially looking to the state of the authorities on the subject, that the case as presented is one that cannot be made the subject of enquiry." These are the only reported Scotch cases to which I was referred, but there is an unreported case which was decided by the First Division, on Saturday, 5th July 1902. I was supplied with copies of the judgment in that case, from which it appears that the pursuer was one of a company of 930 young men, who went down to the station in order to proceed to a football match, and that there were on the platform seven railway servants to regulate this large crowd, and as the result of the crowd at the station he was pressed up against the train and was injured. The jury had found the defenders liable and had assessed the damages at £50, but the Court, on a motion for a new trial on the ground that there was no evidence to support the verdict, granted the new trial unanimously.

The cases to which I was referred in England were—(1st) *Hogan* v. *South-Eastern Railway Company*, 1873, 28 L.T. 271. In this case the female plaintiff was one of a crowd of passengers assembled at the defendants' railway station. The crowd, caused by special excursion traffic, of which the defendants had previous notice, had been allowed to enter the station and to disperse over the platform at will. No precautions were taken to regulate its movements. On the approach of a train the plaintiff was, through pressure caused by the swaying of the crowd, thrust off the platform and hurt. Baron Martin, who presided at the trial, non-suited the plaintiff, on the ground that there was no evidence of negligence on the part of the defendants. On appeal, the Court of Appeal recalled the judgment and held that the case should have been allowed to go to the jury. It was decided that the question of negligence or no negligence was one for the jury, and not for the presiding judge. But in deciding the case, Mr Justice Keating at page 273 says: "I quite agree that it would be monstrous to expect the company to guard against the pressure of an inconsiderate crowd, and that if the accident did arise from the natural impulse of the crowd, then the defendants cannot be held liable, but it was for the jury to judge of the character of the crowd"; and Mr Justice Grove, who went mainly on the ground that there had been an unlocked gate with no attendant at it to prevent the influx of passengers, says: "I am far from saying that the jury ought to have found for the plaintiff; the only question for us is whether they might have done so." The other cases in England do not raise the question directly. *Sturges* v. *Great Western Railway Company*, 1892, 56 J.P. 278, was the case of a passenger in a crowd tripping over a box containing signal levers, which projected about two inches above the level of the platform, and the Court held there that, although L. C. J. Coleridge directed a non-suit, nevertheless the question of negligence ought to have been left to the jury. The case of *Welfare* v. *London and Brighton Railway Company*, 1869, L.R. 4 Q.B. 693, was a case of a man being injured by the fall of a plank and a piece of zinc from the roof of the station. There the judge non-suited the plaintiff, and the Court of Appeal held that there was no evidence to go to the jury. The case of the *Metropolitan Railway Company* v. *Jackson*, 1877, 3 App. Cas. 193, was the case of a man whose thumb was crushed by the door of a carriage being hastily slammed to by a porter as the plaintiff had risen to protest against the influx of passengers after the carriage was crowded. The judgment mainly goes upon the question whether the question of negligence is to be left to the jury, or whether there is a duty upon the judge to decide whether, in the circumstances, the proof showed negligence at all, but in the course of his judgment, Lord Blackburn says: "My Lords, in all cases of damages for a personal injury against railway companies, the plaintiff has to prove, first, that there was, on the part of the defendants, a neglect of that duty cast upon them under the circumstances; and second, that the damage he has sustained was the consequence of that neglect of duty. A third question, whether the plaintiff is himself to blame, comes more properly by way of defence." The case of *Shepherd* v. *Midland Railway Company*, 1872, 25 L.T. 879, was the case of ice an

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inch thick allowed to remain upon a platform, with the result that a passenger stepping upon it slipped and fell, and was severely injured, and the Court held there that the defendants were guilty of actionable negligence in allowing the ice to remain upon the platform.

There is a case in Ireland, *Cannon* v. *Midland Great Western Railway (Ireland) Company* 1879, 6 L.R. (Irish) 199. That was the case of a harvester pushed off a platform by a sudden inrush of people on the platform already filled by a disorderly crowd. The railway company were found not liable, and it was there decided that a railway company is not bound to provide a staff sufficient to cope with the force and violence of a lawless crowd rushing through a station.

Looking at all these judgments, it seems to me that no sufficient case has been made out against the present defenders. It can scarcely be said, because there was not an official to call out "stand back," when the carriages were shunted into the platform, to a group of persons who were all orderly and quiet at the time, that therefore they are guilty of such negligence as to make them liable for the sudden rush of the crowd towards the carriages. In the whole circumstances, therefore, I am of opinion that the defenders are entitled to be assoilzied, with expenses.

The pursuer *appealed*.

The following authorities were cited:—*Macgregor* v. *Glasgow District Subway Co.*, 1901, 3 F. 1131; *Fraser* v. *Caledonian Railway Co.*, 1902, 5 F. 41; *Scott's Trs.* v. *Moss*, 1889, 17 R. 32; *Hogan* v. *South-Eastern Railway Co.*, 1873, 28 L.T. 271.

The Court *dismissed* the appeal.

The Lord Justice-Clerk.—My Lords, I do not think that any sufficient ground has been shewn for interfering with the Sheriff-Substitute's interlocutor here. It is quite certain that it is the duty of the railway company to provide as best it can, and in a reasonable way, for the safety of persons assembled on the platform and wishing to get into a train. It is quite certain also that in fulfilling that duty in a reasonable sense they cannot always be able to control the crowd on the platform. They cannot always, in a large and busy station, be at every spot where a number of people may congregate. Something must be left in these circumstances to the reasonable discretion of the people who are going to get into the train. I am sorrry to say that very often that reasonable and moderate discretion is not exercised. Particularly it is not exercised by men: if it were exercised by men there would be no difficulty with women at all. Of course it is very natural that people who have been in Edinburgh all day on an excursion, and who desire to catch the 8.38 train back, should be anxious, and take precautions not to be left behind. A practised traveller would have no difficulty about that, because he would insist on being provided with a seat. Still, it is a natural impulse, which is not sufficiently resisted by some people, to rush at the train if they think there is a crowd who will be able to get in in front of them. Here it is alleged that there was a crowd of two hundred people on the platform. I cannot say that I think that was a great or a dangerous crowd; nor can I say that at the time it was assembled there, which was a very considerable time before the train was to start, it was the absolute duty of the railway company necessarily to find officials to be at that train. These officials were probably just as much wanted at that moment at some other train which had to start earlier. If they were engaged at their ordinary work in examining trains which were leaving, or just about to leave, the station, they could not possibly give the attention which they might have given on an ordinary occasion, to a train which was only being made up and was not to start for some time; the two things would have to be worked out to the best of their ability. But it does not seem to me that this train was neglected. The train was a train of six carriages waiting for passengers, and according to practice, the day being a Saturday, three carriages from a train arriving about eight o'clock were put on to the front of the train, because on Saturdays there would be more people to be carried than on ordinary week-days. When these three carriages were put on that was simply making up the train to what it was to be when it came to start some twenty minutes afterwards. Apparently there was a rush made for the train when the three carriages were put on, and this lady seems to have been run up against a carriage and was to some extent injured. I am unable to say that I can find in this evidence proof that the railway company were at fault in not having prevented that. I think the Sheriff-Substitute has considered the case with great care, and has given a very moderate and ample statement of the case. Upon the whole matter I do not see that we would be justified in holding that he was wrong in the decision to which he came, and I think his judgment ought to be affirmed.

Lord Low.—I am of the same opinion. I do not think that fault is proved on the part of the defenders. It seems to me that this was no unusual occasion, and they had no reason to anticipate that there would be any great crowd or any unusual danger to passengers; and it is perfectly plain that there was the ordinary and usual number of officials to look after the safety of passengers connected with this particular train. The accident which the pursuer sustained seems to have been a pure accident for which the defenders are in no way responsible.

Lord Ardwall.—I agree. The question is whether fault has been proved against the railway company. It appears to me that it is plain upon the evidence that the cause of the accident was the heedlessness and selfishness of the crowd of people, or of individuals composing that crowd, who made a rush for the three

empty carriages which were in course of being added to the Bathgate train on the night in question. There was no necessity for such a rush at the time, nor was it to be expected, for some twenty minutes had to elapse before the train was timed to start; and as no complaint was made at the time it is impossible for the railway company to prove by their inspectors where they were at the particular moment of the accident. I agree with the Sheriff that it is proved that there was a sufficient staff for all ordinary purposes. Further, it is, I think, proved that the railway company did not allow an unreasonable number of people to get on to this platform; they had taken the very proper precaution of allowing nobody to go on to it except through the gates, where persons were stationed to check the tickets and to prevent too many people getting on to the platform. I accordingly hold that the pursuer has failed to prove that the accident complained of was due to the fault of the defenders.—14*th January* 1908.

Counsel for Pursuer, Trotter; Agents, Bryson & Grant, S.S.C.—Counsel for Defenders, Scott Dickson, K.C., Grierson; Agent, James Watson, S.S.C. J. S. M.

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281. **Page** *v.* **Sherratt.**

CONTRACT—PENALTY OR LIQUIDATE DAMAGES—DENTIST'S ASSISTANT—AGREEMENT NOT TO SET UP IN SAME TOWN AS PRINCIPAL—FIXED SUM FOR "INDEMNITY"—RESTRAINT OF TRADE.

The pursuer was a dentist in Edinburgh, and engaged the defender as his assistant at a fixed salary of £4 per week, with certain commissions in addition. The contract between the parties was embodied in a minute of agreement containing the following clause: "Should the second party (defender) at any time thereafter start business as a dental surgeon in Edinburgh, he shall be bound to pay the first party (pursuer) an indemnity of £250." The defender remained in the pursuer's service for more than four years, and then proceeded to set up as a dentist in a street in Edinburgh close to that in which the pursuer did business.

The pursuer brought this action to recover the £250 "indemnity" agreed upon in the contract. The defender denied liability (1) because the contract was contrary to public policy, being in restraint of trade and therefore unenforceable (*Nordenfeldt* v. *Maxim Nordenfeldt Ltd.*, 1894, L.R. A.C. 535); (2) because the sum sued for was of the nature of a penalty and therefore irrecoverable, except in so far as the pursuer could prove actual damage from defender's actings (*Craig* v. *M'Beath*, 1863, 1 M. 1020; *Forrest* v. *Barr & Henderson*, 1869, 8 M. 187; *Robertson* v. *Driver's Trs.*, 1881, 8 R. 555; *Wallis* v. *Smith*, 1882, 21 Ch. Div. 243). The defender further argued that if the sum of £250 was due by him to the pursuer under the contract he was entitled to set off against it a sum due to him by the pursuer under the same contract in name of commissions. The defender had raised a counter-action against the pursuer for payment of the said commissions, and therefore claimed to retain the sum, if any, due by him to the pursuer in his own hands until the sum due to him in the counter-action was determined.

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The pursuer maintained that the stipulation in the contract barring the defender from practising in Edinburgh was reasonable and enforceable (*Ballachulish Slate Quarries Ltd.* v. *Grant*, 1903, 5 F. 1105, 11 S.L.T. 149). The sum sued for was not of the nature of a penalty but was "liquidate damages," and enforceable as such, or the contract was one to pay a sum certain on the occurrence of an uncertain event which had happened, and was therefore enforceable (*Commercial Bank of Scotland* v. *Beal*, 1890, 18 R. 80). The defender's claim to commissions was illiquid and therefore could not be set off against pursuer's claim for liquidate damage (*Ross* v. *Ross*, 1895, 22 R. 461).

The Lord Ordinary *held* that the sum sued for was not a penalty but "liquidate damages," and therefore recoverable. He did not hold that the defender was entitled to retain, but gave decree for the sum sued for, subject to deduction of the amount admitted to be due by him to the defender in the counter-action and lodged in Court by the pursuer.

Lord Guthrie.—The defender maintains that the stipulation founded on by the pursuer for payment of "an indemnity of £250 sterling" is in the nature of a penalty, and cannot be recovered, so far as exceeding the damage arising from the defender's actings, which damage the defender avers does not exceed £100. The pursuer claims the indemnity as liquidate damages. If that is the true nature of the indemnity, then the pursuer is entitled to decree, because it is admitted that the contingency in which the indemnity was to become payable has occurred, and it is not alleged that the amount of the indemnity is unconscionable.

The question is one of intention. I am of opinion that the circumstances and the terms of the stipulation sufficiently shew that the parties intended the sum named in Article 3 of the agreement between them to be liquidate damages and not penalty. I proceed upon (first) the term "indemnity," which I take as equivalent to a sum of damages; (second), the reasonableness of a rough and ready sum being fixed, looking to the impossibility of estimating exactly the loss, direct and indirect; and (third), the moderate

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amount, £250, not much more than one year of the pursuer's salary at £4 a week.

On the assumption that the sum named is truly of the nature of penalty, the defender invited me to express an opinion, so far as the facts are before me, of the probable loss to the pursuer, on the assumption that the defender is a capable operator and personally acceptable to the patients, and keeping in view the defender's lengthened and close connection with the pursuer and his patients. In this view the sum of £250 appears to me a moderate calculation of what the pursuer, continuing to practise in Hope Street, Edinburgh, will probably lose by the defender setting up in Castle Terrace, Edinburgh.

I therefore grant decree as craved, under deduction of the sum of £104, 7s. 9d. deposited by the pursuer in the action against him at the instance of the defender. That is to say, I grant decree in this action for £145, 12s. 3d., with expenses.—27*th December* 1907.

Counsel for Pursuer, Morison, K.C., Munro; Agents, Kirk Mackie & Elliot, S.S.C.—Counsel for Defender, Constable; Agent, J. W. S. Wilson. A. S. P.

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282. Wolfe (Imperial Credit Bank) *v.* Green.

PROCESS — PROOF — LEADING — MONEYLENDERS ACT 1900 (63 & 64 VICT. CAP. 51), SECT. 1—EXCESSIVE INTEREST — ACTION BY MONEYLENDER TO RECOVER DEBT AND INTEREST —DEFENDER ORDAINED TO LEAD.

This was an action by a moneylender for a sum of £67 contained in a promissory note. The defender admitted that he had signed the promissory note, but explained that it included interest at the rate of 40 per cent. on the original loan. He therefore asked the Court to reopen the transaction as being "harsh and unconscionable" within the meaning of the Moneylenders Act 1900.

The pursuer moved that the defender should be ordained to lead in the proof, as the *onus* lay upon him to shew that the interest charged was excessive, and the transaction harsh and unconscionable.

The defender maintained that the interest being shewn to be at the rate of 40 per cent. was *prima facie* excessive, and it therefore rested with the pursuer to shew cause why it should not be modified.

The Lord Ordinary *ordained* the defender to lead in the proof.

Lord Guthrie.—I think that both on the ground of convenience and upon the terms of the Act the defender should lead in this proof. Sect. 1 of the Moneylenders Act 1900 provides that where " . . . . *there is evidence which satisfies the Court* that the interest charged in respect of the sum lent is excessive or . . . . and that . . . . the transaction is harsh and unconscionable, ... the Court may reopen the transaction. . . . ." The Act thus lays the *onus* on the defender of shewing that the transaction should be opened up, and he must therefore lead in the proof. There will be no drawback or hardship to him in this course being followed.—14*th January* 1908.

Counsel for Pursuer, Craig; Agents, M. J. Brown, Son & Co., S.S.C.—Counsel for Defender, Forbes; Agents, P. Gardiner Gillespie & Gillespie, S.S.C. A. S. P.

OUTER HOUSE.

(*Lord Guthrie.*)

283. Juner *v.* Juner.

HUSBAND AND WIFE—DIVORCE—EXPENSES —CASE SENT TO PROCEDURE ROLL ON PURSUER'S MOTION — INTERIM AWARD OF EXPENSES TO DEFENDER (WIFE).

This was an action of divorce in which the defender, the wife, admitted adultery but pleaded *lenocinium*. The pursuer moved the Lord Ordinary to send the case to the Procedure Roll in order to discuss the relevancy of certain averments by the defender. The defender asked for interim aliment and an interim award of expenses in order to meet the pursuer in the Procedure Roll, founding on the case of *Johnston* v. *Johnston* (1903, 5 F. 336, 10 S.L.T. 559), where an award was made to meet Inner House expenses. The pursuer maintained that interim expenses could only be granted in order to cover outlays incurred at a proof and should not be granted until the proof was ordered (*Mitchell* v. *Mitchell*, 1893, 1 S.L.T. 141). Aliment should be refused, because the defender was living with the co-defender. This was, however, denied by defender's counsel at the Bar.

The Lord Ordinary *granted* aliment and an interim award of expenses.

Lord Guthrie.—I think that in this case the ordinary rule should be followed, and that the defender must be put in funds to meet the pursuer's attack. The defence is founded upon the plea of *lenocinium*, and had the case gone straight to proof, the defender would have got an award of expenses as a matter of course. But the case has been sent to the Procedure Roll on the pursuer's motion in order to debate the relevancy of the defender's averments. The defender being thus taken to the Procedure Roll by the pursuer, cannot thereby be deprived of her right to get an interim award of expenses.

It is a case for a small award, and I shall grant £7. With regard to aliment, the defender says she has left the co-defender, and the pursuer does not deny the fact. There must be an award of interim aliment, which I grant at the rate of 10s. per week.—14*th January* 1908.

Counsel for Pursuer, Craig; Agents, M. J. Brown, Son & Co., S.S.C.— *Counsel for Defender, Skinner; Agents, Weir & Macgregor, S.S.C.*

A. S. P.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

284. Copland's Executor *v.* Milne and Others.

I. SUCCESSION — WILL — CONSTRUCTION — "COUSINS"—DIRECTION THAT WHOLE ESTATE TO BE DIVIDED EQUALLY AMONG COUSINS ON MOTHER'S SIDE—TESTATOR SURVIVED BY FIRST COUSINS, FIRST COUSINS ONCE REMOVED, AND FIRST COUSINS TWICE REMOVED—HELD FIRST COUSINS ENTITLED TO WHOLE ESTATE.

II. SUCESSION—WILL—QUESTION WHETHER HERRITAGE CARRIED BY WILL—TITLES TO LAND CONSOLIDATION (SCOTLAND) ACT 1868 (31 & 32 VICT. CAP. 101), SECT. 20—WILL CONTAINING APPOINTMENT OF EXECUTORS, BUT NO WORDS OF CONVEYANCE—DIRECTION THAT WHOLE ESTATE BE REALISED AND DIVIDED AMONG BENEFICIARIES ON DEATH OF LIFERENTER—TERMS OF WILL, WHICH HELD TO INCLUDE HERITABLE ESTATE.

Special Case.

The late Thomas Milne Copland died on 16th October 1905. He left a holograph will dated 13th April 1904, the material clauses of which were as follows:

26 Castlenau Mansions,
Barnes, Surrey, 13th April 1904.

I Thomas Milne Copland residing at above address hereby appoint as my executors my Brother in Law Joseph Calder, Farmer, Seaton of Usan, Montrose. . . . After paying all debts due by me at the time of my death I hereby instruct my Executors to divide the income of the balance half yearly between my sister Margaret Copland or Calder wife of the said Joseph Calder, and my brother John Copland residing at Scotston of Usan, Montrose. On the death of either my sister or brother the whole income to be paid to the survivor and on the death of the survivor the whole income to be paid to the said Joseph Calder during his life if he shall survive my sister and brother, and on his death or on the death of the survivor of my sister and brother if my said brother in law be dead, I wish my whole estate realised and equally divided between my cousins on my mother's side who shall be alive at the time of my death. . . .

The executors were the first parties to the case. The testator was survived by eight full first cousins on the mother's side, who were the second parties to the case, by thirteen first cousins once removed, who were the third parties, and six first cousins twice removed, who were the fourth parties, to the case. The fifth party was the heir at law of the testator.

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In addition to moveable estate amounting to about £3300 the testator had a personal right to a share (valued at under £100) of a small heritable property, a cottage in the parish of St Cyrus, Kincardineshire.

The following Questions of Law were, *inter alia*, stated:

1. Are the second parties alone entitled to the fee of the testator's moveable estate?
5. Are the terms of the testator's will *habile* to convey his heritage? Or,
6. Is the fifth party, as the testator's heir *ab intestato*, entitled to the heritable estate?

The second parties contended that the word cousins included only full first cousins, and that the will was *habile* to carry heritage. Accordingly they maintained that the first and fifth question should be answered in the affirmative, and the sixth question in the negative.

The third and fourth parties contended that the word cousins included more remote relations than full first cousins, and that the will was *habile* to convey heritage. Accordingly they maintained that the first question should be answered in the negative, the fifth in the affirmative, and the sixth in the negative.

The fifth party contended that the will was not *habile* to convey heritage. Accordingly he maintained that the fifth question should be answered in the negative, and the sixth in the affirmative.

The following authorities were cited:—On the question as to the meaning of the word cousins: By the second parties, *Drylie's Factor* v. *Robertson*, 1882, 9 R. 1178; *Stoddart* v. *Nelson*, 1855, 6 De G., M. and G. 68; *Stevenson* v. *Abingdon*, 1862, 31 Beav. 305; *Burdey* v. *Burdey*, 1863, 9 Jurist (N.S.) 96, 6 L.T. 573; *Thompson* v. *Robinson*, 1859, 27 Beav. 486; *In re Blower's Trust*, 1871, L.R. 6 Ch. 351; by the third and fourth parties, Williams on Executors, p. 864; *Caldecott* v. *Harrison*, 1840, 9 Sim 457. On the question whether the heritable property was conveyed by the will; By the second, third and fourth parties, Titles to Land Consolidation (Scotland) Act 1868 (31 & 32 Vict. cap. 101), sect. 20; Executors Act, 1900 (63 & 64 Vict. cap. 55), sect. 2; *Aim's Tr.* v. *Aim*, 1880, 8 R. 294; *M'Leod's Tr.* v. *M'Luckie*, 1883, 10 R. 1056; by the fifth party, *Urquhart* v. *Dewar*, 1879, 6 R. 1026; *Grant* v. *Morren*, 1893, 20 R. 404; *Bell* v. *Bell*, 1906, 14 S.L.T. 244.

The Court *answered* the first and fifth questions in the affirmative, and the sixth question in the negative.

2nd Div.

Copland's Executor v. Milne and Others.

The Lord Justice-Clerk.

The Lord Justice-Clerk.—The first question raised in this case is as to the sense in which the testator used the word "cousins" in his will. Did he by "cousins on my mother's side" mean first cousins only? *i.e.* children of brothers or sisters of his mother, or did he also mean to include under the term everyone in any of the degrees of relationship to which the term is sometimes applied? *e.g.* first cousins once or twice removed, or second cousins. I have no doubt whatever that by "cousins" he meant only first cousins. That is the primary and normal use of the word, and the one in which it must be presumed a testator used it, if in fact he had first cousins, and if there is nothing else in his settlement to indicate that he meant to use it in a wider and looser sense. Such a wider use will generally be improbable, for in many cases, as here, the effect would be to multiply the number of recipients of the testator's bounty to a more or less indefinite extent.

The second question is whether the one-third share (valued at £100) of a small cottage in the parish of St Cyrus, Kincardineshire, is carried by the will. I have no doubt whatever that it is. One has only to read the will as a whole to see that the testator intended to deal with his whole estate. When he comes to the provision which deals with the ultimate division of the capital he uses the term "my whole estate," which I think is equivalent to my whole estate heritable and moveable, and he further directs the estate to be "realised," which seems to me a suitable enough word to describe the turning into money of his share of the cottage. If that was the testator's intention it ends the matter, for there is no doubt that the will is *habile* to carry heritage.

Lord Low.—I am of the same opinion. In the English cases which were quoted to us by Mr Munro it was held that when the word cousins is used in a will or deed it must be construed as meaning first cousins, unless there is something in the context to show that it is used in a different sense. These authorities seem to me to be practically conclusive of the present question, because there is no difference between the law of England and the law of Scotland in this matter, and the cases are of high authority, the leading case having been decided by so eminent a judge as Lord Cranworth.

Without authority I should have come to the same conclusion, not only because I think that the primary meaning of the word cousins is limited to first cousins, but because I think there are circumstances here which make it most improbable that the testator used the word to denote more remote relations than cousins-german.

The settlement was executed in April 1904. The testator died in October 1905. At his death he had eight first cousins alive. If first cousins alone are included, each beneficiary will receive a very substantial benefit. He had also no fewer than thirteen first cousins once removed and six first cousins twice removed, that is, nineteen cousins more remote than first cousins, so that, if all these cousins were included, this small estate would be divided among twenty-seven persons, making the benefit to each almost inappreciable. Again, the estate was to be realised and divided equally among the cousins. That is very intelligible if they are all in the same degree of relationship, but it is not so apposite where relations of different degrees are included. Therefore I have no doubt that the construction which I think to be sound in principle is also the construction which carries out the intention of the testator.

In the special case a question is stated as to whether the division is to be *per capita* or *per stirpes*. There can be no doubt that the division must be *per capita*, and indeed the contrary was not maintained.

On the question as to whether the heritable estate is included there is more room for difference of opinion. The question is one of intention, because the words of the will are quite sufficient to carry heritage, if it was intended that heritage should be carried. The will is very simple. The income of the whole estate is to be divided between the brother and the sister of the testator, and failing them, is to be paid to his brother-in-law, and on the termination of the liferents the whole estate is to be realised and divided. There can be no question that the testator intended to dispose of the whole estate which belonged to him at his death. There was no reason why this small heritable estate should be left out. The only circumstance which militates against that view is that the testator appointed the first parties executors but not trustees. There is some force in that consideration, but not, I think, enough to overcome the plain indications of intention to which I have alluded.

Lord Ardwall.—This case raises a question of some interest, because it is the first case in which the term "cousins" has come up for construction in the Courts of Scotland. But there have been quoted to us decisions in the Courts of England which I regard as founded on a correct view of the construction of the term. In conformity with these decisions, I am of opinion that the word "cousins," when occurring in a testamentary writing, ought to be held to signify "first cousins," unless there is something in the context of the deed or in the circumstances of the case to shew that it was intended to designate more remote relatives. The principle of construing the term cousins by reference to the context of the deed is obvious enough. The principle of construction by reference to the circumstances of the case may be illustrated by the case of a testator who has no first cousins but

only more remote cousins, making bequests to his "cousins," when it would properly be held that he meant to designate cousins of such a degree as were actually in existence at the date of the deed. In the present case, as pointed out by my brother Lord Low, it would be out of the question to hold that the testator, who had eight first cousins, intended to divide his small estate among the whole body of his cousins of all degrees of relationship to the number of twenty-seven, with the result that the more remote relatives, by reason of their numbers, would carry off the bulk of the estate.

I accordingly am of opinion that *prima facie* the word "cousins" must be held to mean "first cousins," and that in the deed presently under consideration there is nothing to displace that meaning.

On the second question I have felt some difficulty, not because the will is not *habile* to convey heritage, but because I have difficulty in holding that heritable estate was in the contemplation of the testator when he made his will. The difficulty arises because executors only and not trustees are appointed, and because there are no words of conveyance of heritage. But I think it is settled that, if a testator's intention is plain, it must receive effect, notwithstanding technical difficulties. As to intention, when the testator says "I wish my whole estate to be realised and equally divided," I think that the Court are entitled to hold that by the words "my whole estate" the testator meant his whole estate heritable and moveable. That being so, when he directs that his whole estate shall be realised and divided, I think that may be viewed as a direct injunction to realise the whole estate without exception. The fact that the will contains a direction to realise, differentiates the present case from the case of *Bell* (1906, 14 S.L.T. p. 224), where there was no direction to realise and the trustees had no powers of sale. Here there is a direction to realise, which applies to the testator's "whole" estate. I think therefore, though with some hesitation, that the will may he held to dispose of the share of the insignificant heritable subject to which the testator had a personal right.—16*th January* 1908.

Counsel for First and Second Parties, Munro; Agents, Mackintosh & Boyd, W.S.—Counsel for Third and Fourth Parties, Chree; Agent, Harry H. Macbean, W.S.—Counsel for Fifth Party, Taylor Cameron; Agents, Roxburgh & Henderson, W.S.

J. S. M.

OUTER HOUSE.

(*Lord Mackenzie.*)

Outer House. *Lord Mackenzie.*

Nicklas v. The New Popular Café Co. Ltd.

285. Nicklas *v.* The New Popular Café Company Limited.

I. Slander—Vicarious Slander—Master and Servant—Libel by Servant of Company—Circumstances Where Held that the Managress of a Restaurant in the Service of a Restaurant Company Was Not Acting Within the Scope of her Employment in Slandering an Employee so as to Render the Company Liable in Damages—Question Whether a Master can be Held Liable for a Verbal Slander Uttered by his Servant.

II. Slander — Vicarious Slander — Law Agent—Held That a Client Would Not Be Liable for a Slander Uttered, Without Instructions, by his Law Agent.

III. Slander — Relevancy — Innuendo — Statements Which Were Held Not Capable of Bearing an Innuendo of Theft.

This was an action of damages for slander at the instance of Charles Gustave Nicklas, chef, against the New Popular Café Company Limited.

One of the slanderous statements on which the action was brought was alleged to have been uttered by Mrs Broughton, the manageress of the defenders' restaurant. The facts with reference to this part of the case are given in the Lord Ordinary's Opinion.

The other slanderous statements were alleged to have been made by the defenders' law agents in a correspondence between them and the pursuer's law agent. The pursuer averred that the defenders' agents on 5th November 1907 wrote his agent as follows (Cond. 7): "Regarding the wages due to Mr Nicklas, it now appears that on his departure he removed from the café several knives, and probably a silver skewer belonging to the manageress, which he had no right to do. In these circumstances, we do not intend to pay the wages due to him until these are returned." The pursuer further averred that his agent having written to the defenders' agents that the articles removed from the café belonged to the pursuer, the defenders' agents on 8th November replied as follows (Cond. 9): "We duly received your letter of 6th inst. With reference to the articles detailed in the note annexed to your letter, we have no means of definitely saying that any of these articles are not Mr Nicklas' property. At the same time, the facts are as we have stated, namely, that a number of french knives and a silver skewer belonging to the manageress were seen in the kitchen before Mr

Outer House. *Lord Mackenzie.* Nicklas v. The New Popular Café Co. Ltd.

Nicklas left, and since his departure they are not to be found anywhere. Surely the presumption is obvious. . . . Under the circumstances, we must ask, before paying any wages to Nicklas, that he either returns or satisfactorily accounts for the disappearance of the said french knives and the silver skewer belonging to the manageress." The pursuer also averred that on 13th November the defenders' agents wrote to his agent (Cond. 10) that his dismissal "was due to his own fault; and his conduct in the café, at all events during the end of his employment, was such as to justify grave suspicions." In Cond. 12 it was averred that these statements "were intended to charge, and did charge, the pursuer with stealing several knives and a silver skewer from the defenders' café."

In the first of the proposed issues the question put was whether the words alleged to have been used by the manageress were uttered by her, and these were innuendoed as meaning that the pursuer was a thief and sold dripping belonging to the defenders and dishonestly appropriated the proceeds.

In the second of the proposed issues the question put was whether the defenders by their law agents wrote the letters of 5th, 8th and 13th November 1907, and whether the said letters falsely and calumniously represented that the pursuer stole several knives from the defenders' café.

The Lord Ordinary *dismissed* the action with expenses.

Lord Mackenzie.—The question raised under the first issue proposed is whether the defenders are liable for a verbal slander, alleged to have been uttered by their manageress, acting within the scope of her employment and for the benefit of the defenders.

The pursuer was head chef in the defenders' café, the manageress being a Mrs Broughton. The pursuer sets out that he was under obligation to account for the proceeds of dripping sold, and that he duly did so; that on 25th October 1907 the manageress insisted that there must be fat, although she was aware it had been used for certain purposes in the café; that the underchef informed her there was none, as it had all been used for cooking; and that she then uttered the slander complained of to the underchef. The averment is: "She thereupon told him that he knew perfectly well where the fat was, and that the chef (meaning the pursuer) and he were in league together to dispose of it without her knowledge, and that she had never had to do with thieves before." The pursuer avers: "In making said statements, Mrs Broughton intended to charge, and did charge, the pursuer with being a thief, and with having sold dripping belonging to the defenders and dishonestly appropriated the proceeds, and they were so understood by those who heard them. Mrs Broughton was manageress of the defenders' café, and had full control over the pursuer and the other servants employed there, and in making said statements she was acting within the scope of her authority as manageress of the defenders and for their benefit. The said false charge was made recklessly and without any enquiry. She did not even ask the pursuer as to the dripping, or communicate with him regarding the matter at all."

It was maintained by the defenders, in the first place, that the words used were not slanderous. I am not able to take this view. In my opinion the expressions alleged to have been used will bear the innuendo put upon them.

It was next maintained that the defenders could not be made liable for verbal slander uttered by their servant. There has been no case in which an issue has been allowed in such circumstances, and I should certainly be slow to grant one. The law upon the matter appears to stand thus at present: In the *Citizens Life Assurance Co.* v. *Brown* [1904], A.C. 423, it was held (by the Privy Council) that a Corporation may be liable for a libel written by their servant in the course of his employment, though without authority express or implied. The principle is laid down by Willes, J., in *Barwick* v. *English Joint Stock Bank*, 1867, L.R. 2 Ex. 259, at p. 265: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."

The principle was applied in the case of *Ellis* v. *National Free Labour Association*, 1905, 7 F. 629, to the case of written slander. In *Agnew* v. *British Legal Life Assurance Co.*, 1906, 8 F. 422, the question came up whether the same principle would be applied when the slander was not written, but spoken. The Lord Ordinary (Ardwall) expressed an opinion adverse to allowing such an issue except in special circumstances, and disallowed the issue, because no such circumstances were set forth. The First Division refused the issue, on the ground there was no slander. It was indicated that the questions raised by the Lord Ordinary in regard to the particular issue in question were of great difficulty. The Lord President pointed out that in the *Citizens Life Assurance* case what was complained of was a circular letter written on behalf of the Company, which was *prima facie* a Company act, while in *Agnew's* case it was a casual expression uttered, with a certain amount of heat and wrath, in the course of a call by the insurance agent on his sub-agent. Lord M'Laren expressed doubts whether the principle of the *Citizens Life Assurance* case should be safely extended to cases of verbal slander. Opinions adverse to the liability of a master for verbal slander uttered by a servant were expressed by Lord Kincairney in

Eprile v. *Caledonian Railway Co.*, 1898, 6 S.L.T. p. 65, and by Lord Young in *Cameron* v. *Yeats*, 1899, 1 F. 456. It does not seem to me necessary for the disposal of the present case to say that an employer can never be liable for a verbal slander uttered by a servant within the scope of his employment and for the employer's benefit. Even if the principle of the *Citizens Life Assurance* case could be extended so as to apply to verbal slander in certain cases, I think it is plain it could not cover such a case as the present. Adverting again to the opinion of Mr Justice Willis in *Barwick*, it is there pointed out that the reason why it is no answer to say that the master has not authorised the particular act complained of, is because he has put his agent in his place to do "that class of acts," and therefore must be answerable for the manner in which the agent has conducted himself. This was the reason why the *Citizens Life Assurance* were liable for the libel written by their superintendent. In the present case I cannot see how it can be said that the manageress was acting within the scope of her authority in using the language complained of. It was contended by the pursuer's counsel that this is a question for the jury and not for the Court. I do not think so. The pursuer is bound to set forth a *prima facie* case, which he has not done here. If this issue were allowed, it seems to me that in any establishment where the housekeeper has charge of the servants, then if she called the cook a thief, the master might be made liable in damages. There are several cases in which the principle enunciated in *Barwick*, and applied to libel in the *Citizens Assurance* case, has been given effect to. The latest is *Mackenzie* v. *Cluny Hill Hydropathic Co. Ltd.*, 1907, 15 S.L.T. 518. None of them warrant such a conclusion as this.

I am of opinion the first issue should be disallowed.

The second issue is founded upon statements, alleged to be slanderous, contained in letters written by the defenders' law agents. As regards this issue I think, in the first place, that it would have been necessary, in order to make a relevant case, for the pursuer to have averred that the client instructed the agents to make the statements complained of (*Crawford* v. *Adams*, 1900, 2 F. 987). I do not think that the law agent is in the same position as the secretary or other servant of the Company. There is no such averment, and for this reason the averments on which the second issue is based are irrelevant.

Further, I am of opinion that the letters complained of, set out in Conds. 7 and 9, are not in themselves slanderous, and that they will not bear the innuendo set out in Cond. 12. The only reasonable construction to be put upon them is that the agents were charging the pursuer with having removed from the café, along with things which did belong to him, other things which did not. They refused to pay him his wages till he returned or satisfactorily accounted for the disappearance of them. The agents may have been quite wrong in supposing they could retain the pursuer's wages as against the articles in question, but I can find no charge of dishonesty in the letters. The letter set out in Cond. 10 does not appear to me to bear on this matter.

I am accordingly of opinion that the second issue should be disallowed also.

In the view I take it is unnecessary to go into the further questions argued as to whether either of the alleged slanders were privileged, and, if so, whether there is a sufficient averment of malice.

The action will be dismissed, with expenses.—18*th January* 1908.

Counsel for Pursuer, G. Watt, K.C., Morton; Agent, J. N. Rae, S.S.C.—Counsel for Defenders, Hunter, K.C., Dykes; Agents, Chalmers & Hunter, W.S.

R. C. H.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Ardwall.*)

286. Campbell *v.* Muir.

FISHING — SALMON FISHINGS — MEDIUM FILUM — OPPOSITE RIPARIAN PROPRIETORS EACH HAVING RIGHT OF SALMON FISHING EX ADVERSO OF THEIR LANDS—OBSERVATIONS PER THE LORD PRESIDENT AS TO PRINCIPLES ON WHICH THE COURT WILL REGULATE SUCH COMPETING RIGHTS—DICTUM OF LORD COWAN IN EARL OF ZETLAND v. TENANT, 1873, 11 M. 469, APPROVED.

Appeal from the Sheriff Court of Argyllshire at Oban.

This was an action of interdict at the instance of Mrs Campbell of Dunstaffnage, proprietrix of certain lands situated upon the north bank of the river Awe and of the salmon fishings *ex adverso* of the said lands, against Mr Esdaile Campbell Muir, the opposite riparian proprietor of the *solum* and salmon fishing *ex adverso* thereof. The pursuer prayed the Court—

To interdict the defender and all others acting for him, or under his instructions, from trespassing or encroaching upon the fishing rights of the pursuer *ex adverso* of her lands and estate of Inverawe, and particularly that portion thereof situated in the Pass of Brander on the south-east of property there belonging to the Most Honourable Gavin, Marquess of Breadalbane, K.G., or otherwise from interfering with or annoying or molesting Sir Robert Usher, Baronet, of 37 Drumsheugh Gardens, Edinburgh, the present tenant of said fishings under the pursuer, in the exercise of his rights as such tenant; and to grant interim interdict.

1st Div.

Campbell v. Muir.

The pursuer's material averment was:

Cond. 3. On 6th August 1906, between the hours of eleven o'clock forenoon and twelve o'clock noon, while the said Sir Robert Usher was exercising his legal rights under said lease of fishing in the portion of said river let to him by the pursuer, the defender approached him in a small boat which he anchored almost in mid-stream and proceeded to cast his line in the direction of that of the said Sir Robert Usher, and at same time to address him in an offensive manner, with the result that the said Sir Robert Usher was by the illegal actions and conduct of the defender compelled to desist from the exercise of his legal right of fishing in said river.

The defender answered:

Ans. 3. Admitted that on 6th August 1906, between the hours stated, the said Sir Robert Usher was fishing from the bank at a point on the pursuer's said lands alleged by her to be situated on the river Awe and that the defender at a point lower down the river was fishing from a small boat anchored off his said lands of Ballimore and Ballibeg, and on his own side of the water. At this point the river is about fifty yards broad. The defender was fishing over the whole breadth of the river, as he and the pursuer and their respective tenants have been in use to do.

It was admitted that the river was about fifty yards broad at the point in question.

The parties' pleas were:—

For the Pursuer:

1. The defender having encroached on the pursuer's fishing rights in said river, and by his illegal actions prevented the pursuer's tenant from exercising his legal rights therein, the pursuer is entitled to interdict as craved, with expenses.

For the Defender:

2. The defender not having trespassed or encroached on the pursuer's fishing rights in the water of Awe, the action should be dismissed with expenses.

3. The defender being the owner of fishings in the water of Awe (up to the *medium filum* thereof) *ex adverso* of his lands, has a legal right to fish up to the *medium filum* at the place libelled, and is entitled to absolvitor with expenses.

The Sheriff-Substitute (MacLachlan) granted interim interdict. The defender appealed to the Sheriff-Principal, and lodged a reclaiming petition. The Sheriff-Principal (M'Clure) *dismissed* the appeal.

Note.—The claim of the appellant to fish beyond the *medium filum* of a wide river, such as the river Awe is at the place in question, is *prima facie* untenable (*Milne* v. *Smith*, 13 D. 112), and I have no hesitation in continuing the interim interdict. I note the subsidiary contention of the appellant that the river Awe does not take being until a point is reached some fifty yards seaward from the place where he spoiled the fishing of the respondent's tenant on 6th inst. The appellant may succeed in establishing this difficult proposition by proof, but, as a matter of interim regulation, the interdict pronounced by the Sheriff-Substitute does not go beyond the requirements of this case.

After proof the Sheriff-Substitute pronounced the following interlocutor:

Oban, 4th April 1907.—The Sheriff-Substitute having heard parties' procurators, and considered the closed record, with the proof, productions, and whole process, finds that the principal pursuer is proprietrix of the estate of Inverawe, and also of, *inter alia*, the salmon and other fishings in the river Awe *ex adverso* of that portion of her estate in the Pass of Brander, known as the lands of Branrie, which she had let, *inter alia*, to Sir Robert Usher, Baronet, of 37 Drumsheugh Gardens, Edinburgh, for the period from 1st July to 30th September 1906, both inclusive. Finds that on 6th August 1906, while the said Sir Robert Usher was fishing from the bank at a part of said river called the Brander Pool, let to him aforesaid, the defender approached in a boat which he had moored in mid-stream, or nearly so, and allowed to float down the river by lengthening or letting out the mooring rope, and when he came opposite to the place where the said Sir Robert Usher was fishing, interfered with him in such a manner as to make it impossible for him at the time to continue fishing there. Finds that the defender is proprietor of fishings on said river on the opposite side from those belonging to the principal pursuer, but that his actions on the occasion above mentioned were illegal and unwarrantable, and an encroachment on her rights of fishing as above mentioned. Therefore continues the interim interdict formerly granted, and declares the same perpetual.

Note.—This action between Mrs Campbell of Inverawe and Esdaile Campbell Muir of Inistrynich and Larach Bhain, two proprietors whose lands extend along the two opposite banks of the river Awe, and who have as pertinents of their lands the right of fishing in said river, arose out of the above mentioned incident of 6th August 1906, described in the evidence of Sir Robert Usher, and of Walter Macgregor, Mrs Campbell's gamekeeper, when Sir Robert, who was exercising his right of fishing as Mrs Campbell's tenant, was so rudely interfered with by the defender, whose conduct I am unable to justify on any ground. He maintains that there was an arrangement or understanding between the proprietors of the fishings on the river Awe that they could fish over the whole breadth of it, but there is no proof of such an arrangement; and if he had such a right, either by law or agreement, it must be limited by the condition that he did not act *in æmulationem vicini* (Stewart on the Right of Fishing, 2nd ed., p. 143). The Brander Pool, where the occurrence took place, is about 146 yards long and about 60 yards wide, and there was quite sufficient room there for more than one fisherman to enjoy the sport without interfering with one another; and when the defender saw Mrs Campbell's tenant fishing there he could easily have kept away from him, but his behaviour in interfering with him in this manner was not only ungentlemanly, as characterised by the witness Macgregor, but also illegal, and I have no hesitation in continuing the interim interdict, in so far as it prevents the defender from interfering with or molesting the pursuer or any of her tenants who may be fishing from her side of the river. If they cannot fish at the same time the only course would be to have some arrangement made, either by mutual agreement or by some competent authority, binding them to fish on separate days—a most inconvenient course, and surely unnecessary in a river the size of the Awe. The prayer of the petition, however, goes

further, as it seeks an interdict against trespassing or encroaching upon the fishing rights of the pursuer *ex adverso* of her lands, and this involves my defining what these rights are—a question of heritable right of doubtful competency in this Court, as there is no evidence of the exact value of the subject-matter; but I am relieved from any questions of this kind from the admissions of the parties themselves. Mrs Campbell, for instance, says, "I understand I have only the right to fish to the middle of the river on my own side," and the defender in his Pleas (No. 3), says that he, "Being the owner of fishings in the water of Awe (up to the *medium filum* thereof) *ex adverso* of his lands, has a legal right to fish up to the *medium filum* at the place libelled." They have both, therefore, equal rights of fishing in the river Awe, and as a general rule the rights of each extend only to the middle of the river, but there may be some places where the river is so narrow or the water at times so low that the restriction to one-half the breadth would amount to a denial of the right of fishing altogether, and at these places it would be necessary that the right of fishing over the whole breadth be conceded, and there need not be much difficulty in making some regulations that would prevent fishers on either bank from interfering with each other; but at the part in dispute, where the river is sixty yards wide, there is no such necessity, and I think the law laid down in the case of *Milne* v. *Smith*, 23rd November 1850, 13 D. 112, cited by the Sheriff-Principal in his interlocutor of 27th August last, may be applied, so that each fisher may be restricted to his own half of the river. By fishing I would understand casting the line over the water, so that one is fishing wherever his line reaches, and I am unable to agree with the defender's contention, which I gather from his pleadings, that he has a right to fish over the whole surface of the river, and cast his line right to the other side provided he keeps himself to his own side, and fishes either standing on the bank or one of the platforms or jetties placed there for the convenience of anglers, or wading in the water, or, as in the present case, from a boat. As it would be almost impossible to mark down the exact line beyond which one may not cast, it may frequently happen that a good fisher would make his cast reach beyond the middle of the stream, but in that case I must hold that it is not done by any legal right, but only permitted by sufferance and the good-neighbourly feeling that ought to subsist between neighbouring proprietors, and I think there should be no reasonable objection, except that it might incommode someone fishing on the opposite side of the river, and I also think the defender is not likely ever to find himself restricted in his casting so long as he refrains from interfering with others who may have as good a right of fishing as he has himself. This right of fishing in the river Awe adds very much to the letting value of such an estate as Inverawe, but would be of little use if the owner were unable to guarantee her tenant against interference or molestation, and it is for this purpose that interdict is sought. I may observe that there is now no doubt as to the Brander Pool, the place in dispute, being part of the river Awe. This is admitted in the pleadings, and it is in evidence that the river, as distinct from the loch, begins at a place called Rudha-na-ha, about 100 or 120 yards further up than the Brander Pool

The Defender *appealed* to the First Division, and *argued*: The defender was acting within his rights in fishing in the manner complained of. His right of fishing was not limited by the *medium filum* of the stream; it was an absolute right of fishing in the stream, subject only to the right of another heritor to fish there also. Should either party desire further definition of the limits of their respective rights, the proper procedure was by way of application to the Court. The right of salmon fishing was an incorporeal right and quite independent of the lands from which it was exercised, whose boundary was the *medium filum* (*Ashburton* v. *M'Kenzie*, 1829, 7 S. 849; *Earl of Zetland* v. *Tenant*, 1873, 11 M. 469; *Somerville* v. *Smith*, 1859, 22 D. 79; *Arthur* v. *Aird*, 1907, S.C. 1170; *Earl of Grey* v. *City of Perth*, 1750, M. 12, 792; *Milne* v. *Smith*, 1850, 13 D. 112). The pursuer was not entitled to proceed by way of interdict. A single act of interference would not justify such an application. Further, the interdict craved was not sufficiently specific in its terms (*Cathcart* v. *Sloss*, 1864, 3 M. 76; *Cairns* v. *Lee*, 1892, 20 R. 6).

Argued for the Respondent: (1) The respondent was entitled to interdict, as the appellant had interfered with the respondent's tenant and prevented the exercise by him of his and of the respondent's legal rights. Whatever were the legal right of the appellant, he was not entitled to exercise it *in æmulationem vicini*. (2) The appellant had no right to cast his fly beyond the *medium filum* unless the narrowness of the stream made it impossible for him to exercise his right of fishing otherwise, and it was here admitted that such conditions did not exist here (*Earl of Zetland, cit.*, per Lord Cowan at p. 474; *Milne, cit.*, per Lord Medwyn at p. 121; Stewart on Fishings, sects. 142–143).

At the bar the respondent's counsel departed from the claim for interdict.

The Court *recalled* the interdict, and, *quoad ultra*, affirmed the findings of the Sheriff, and found the pursuer entitled to expenses.

The Lord President.—The view of the situation here taken by the Sheriff-Substitute seems to me to have been perfectly correct, and I have nothing to add to what he says in his note and what he expresses in his findings, where he pronounces findings as to the actual facts which happened. In that view it is perhaps unnecessary to say anything more. But as the case has been so carefully argued, and the question of the right of fishing beyond the *medium filum* has been raised, I should perhaps say something on the law of the subject. I do not think I can add anything to what was said by Lord Cowan in the case of the *Earl of Zetland*, in 11 Macpherson at p. 474, taken along with the comments thereon made by Lord Neaves at a subsequent period of the judgments. Lord Cowan says: "A good deal has been said about the *medium filum* of the stream. If there had been no possession at

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all and we came to consider how the different competing rights of heritors on the banks of the river, having each a right of salmon fishing *ex adverso* of their lands, were to be regulated, then indeed I think the Court have recognised the clear principles on which the right of fishings must be carried on. If the stream is broad enough to allow of a clear sweep of the nets without crossing the *medium filum*, each riparian proprietor must so exercise his right as to keep within the *medium filum* of the stream. But then, again, a different state of matters arises where the stream is not sufficiently broad to admit of this. The Court in such cases has found that some arrangement must be made for an alternate sweep of the nets from the different sides. In the case, however, where immemorial possession has been enjoyed, I cannot think that ascertainment of the *medium filum* is of any avail in determining such rights of fishing."

He is dealing there with fishing by means of net and cobble, but the same principles, I apprehend, apply equally to rod fishing. Now I agree with that exposition of the law. After all, a right of salmon fishing has nothing whatever to do with the *medium filum*, but it must be defined as to the place for its local exercise. When that is defined by immemorial practice the matter is settled thereby, but rights of fishing are not necessarily so defined, and it is by no means impossible, even at this day, to figure a case where there will be no such definition. Take, for example, the case of the Tummel. If the Falls of Tummel were blown up and salmon were thereby enabled to get to the upper reaches of the river, the Crown might, saving any fishing rights existing in the barony of Athole, grant rights of salmon fishing in the upper waters of the Tummel to the *ex adverso* riparian proprietors. If this were so, and the question of the limits of their rights were raised, I apprehend that they would fall to be determined on the principles laid down by Lord Cowan. In the particular portion of the Tummel to which I have referred the stream is so narrow that the method of regulation would have to be by the adoption of fishing on alternate days, or something of that sort.

But coming back to the facts of this case, the findings of the Sheriff shew no immemorial practice of exercising a right of fishing by means of anchoring a boat in the river and fishing from it in the way the defender here has done. I think it is also shewn that a perfectly reasonable way to exercise the rights of fishing here would be that each proprietor should remain on his own bank of the river. It may be that a good caster, such as Mr Muir seems to consider himself, might be able to cast across the river so that his fly would get beyond the *medium filum*. That is certainly a different thing from starting out in a boat and anchoring in the middle of the stream and then proceeding to fish over to the opposite bank. I come to the result embodied in the findings, that the defender was on the particular occasion acting *in æmulationem vicini* against his neighbour's right, and that that was a just ground for complaint.

Now, when the parties came into Court, I think the whole case might have taken a perfectly different turn if the defender had chosen to act up to the situation and had frankly said, "I agree I did what I see I ought not to have done, but this is not a case for interdict." I think the case would not have gone on if he had said so. There might have been a matter of expenses for bringing the process up to that early stage. He does not take that position, but the case goes to proof and the defender says he is absolutely entitled to do what he did, and so *sibi imputet* if he finds himself cast in the expenses. The interdict, I agree, cannot stand, because it was an interim interdict made perpetual in terms of an alternative conclusion, and that is sufficient to condemn it at once. At the same time I do not think there would be any difficulty in framing an interdict appropriate to the action out of the prayer. We have been relieved from that by the concession which has been made by Mr Fleming, that he does not press for the continuation of the interdict. I am for recalling the interdict, and, *quoad ultra*, affirming the findings of the Sheriff, and finding the pursuer entitled to expenses.

Lord Kinnear.—I agree, both upon the general law and upon the particular question which is raised in this case.

Lord Ardwall.—I concur.—10*th January* 1908.

Counsel for Pursuer, Fleming, K.C., Maitland; Agents, Murray, Beith & Murray, W.S.—Counsel for Defender, Johnston, K.C., Constable; Agents, Macrae, Flett & Rennie, W.S. W. A. R.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

287. Havery *v.* Brownlee.

PARENT AND CHILD—ILLEGITIMATE CHILD—AFFILIATION AND ALIMENT—ADMISSION BY DEFENDER OF INTERCOURSE WITH PURSUER SUBSEQUENT TO ALLEGED DATE OF CONCEPTION—EVIDENCE ON A CONSIDERATION OF WHICH HELD PATERNITY NOT ESTABLISHED.

Appeal from the Sheriff Court of Roxburgh, Berwick and Selkirk at Selkirk.

Mary Wilhelmina Havery, dressmaker, Galashiels, brought an action of affiliation and aliment against Robert Brownlee, dyer, Galashiels,

in the Sheriff Court of Roxburgh, Berwick and Selkirk at Selkirk.

The pursuer averred, *inter alia*, that the pursuer's and defender's families had long been on terms of intimacy, that about the month of February 1906 the defender began to pay particular attention to the pursuer, that he had sexual intercourse with her in the last week in March or the first week in April 1906, in a stove-house in Paton Street, Galashiels, belonging to the defender's father, and also on the road leading from Melrose to Selkirk near Abbotsford, and on Galahill, Galashiels, in the months of April, May and June 1906. The pursuer further averred that on 29th December 1906 she gave birth to a child of which defender was the father.

The defender denied the pursuer's averments under admission that he had connection with the pursuer on 26th May 1906 in the Melrose Road near Abbotsford.

Proof was allowed and led. The nature of the evidence sufficiently appears from the judgments of the Sheriff-Substitute and of the Lord Justice-Clerk.

On 29th April 1907 the Sheriff-Substitute (Smith) *decerned* against the defender in terms of the prayer of the petition.

He issued the following note:

Note.—The defender admits connection about two months subsequent to what would be presumably the date of conception. With such an admission proof of opportunity at a time which would account for paternity has been generally regarded as sufficient corroboration of the woman's evidence that connection actually took place. The nature of the opportunity and the whole circumstances must, of course, be taken into account. In this case, these, in my opinion, are such as to establish the pursuer's case.

I see no reason to doubt the evidence of the pursuer's sister, who impressed me as being a reliable witness. Her evidence is quite enough, along with the unchallenged facts, to shew opportunity of a special kind. The exact day when the pursuer and defender were alone in the stove-house is not fixed, but I think it established that it was not earlier than the beginning of March, and most probably nearer the end than the beginning. If connection took place in March at all it would be sufficiently within the time recognised by our Courts as the possible period of gestation. The testimony of the Haverys that they dried their clothes in the stove-house until April is not really contradicted by anyone but the defender. The Brownlees speak merely from hearsay, and from their own actings. The witness Seton, who undertook that duty for them, apparently knew nothing about the Haverys using the place at all. It would not readily occur to one that the weather would change so decidedly in March as to put it out of the question that reasonable people would continue to prefer to dry their clothes in the stove-house rather than in the open air. The Brownlees might quite well elect to make a change while other people might not.

There is no substance in the suggestion that the stove-house was a place where connection would have been impossible or even improbable. It might indeed have been an awkward place in which to commit a rape, but there is nothing said by the pursuer to indicate that her resistance was of a determined character.

The defender's account of his relations with the pursuer is not a convincing one. He was clearly on very friendly terms with the pursuer, helping her and her sister regularly with their weekly washing, yet, according to him, from the end of February to the 26th of May he never spoke to her except possibly in the most casual way, until the day he had connection with her.

There is no attempt to account for this renewal of friendship, and no circumstances adduced to explain how she was led to yield herself up to him so suddenly. But the case against the defender does not stop there; his conduct after the pursuer told him of her condition is not reasonably explicable, except in the view that he then accepted responsibility. He would have it believed that from the first he only accepted at most a conditional responsibility. He even goes the length of saying that he repudiated it altogether when first charged with it by the pursuer. Although he knew he had had connection with her four months previously, he says he told her he could not be the father. That must have meant that he then believed she was too far gone in pregnancy for the connection of 26th May to account for her condition. He indeed says that was his belief, and, although the pursuer told him she had been going with no other man who could have been the father, he was so satisfied that his belief was well founded, that he urged her to see a doctor for the purpose of ascertaining how far gone she was. Why he should expect her to help to prove her own statements false it is not easy to imagine, but the most extraordinary thing is that, notwithstanding his suspicions, and his anxiety to have them confirmed, he never mentioned them even to his own parents when he was tackled about the paternity. He says himself he has no doubt he led his father to believe he was the father of the child. This appears to me to be quite incredible. His whole conduct, up to the day he returned from his visit to Eskbank, is incompatible with the idea that he had any such doubts as he now says he had. His evidence strikes me as being just an attempt to make statements of what occurred at the time which will square with his present defence. I think he has only succeeded in shewing that his testimony is not worthy of credence. The pursuer's story, on the other hand, appears to me to be quite credible and consistent all through.

Regarding the interviews between the Haverys and the Brownlees, when the pursuer's condition was made known to them, I do not think it necessary to say much. Allowing for such minor discrepancies as to the terms of conversations as are not unusual between perfectly honest witnesses, I do not find any material conflict, and, taking it in the most favourable light for the defender, it does not help him.

The attempt to prove familiarities between Wintrup and the pursuer has admittedly completely failed.

The defender *appealed*.

The following authority was cited: *M'Donald* v. *Glass*, 1883, 11 R. 57.

The Court *recalled* the interlocutor of the Sheriff-Substitute and *assoilzied* the defender.

The Lord Justice-Clerk.—These cases are very trying, I must say, but I cannot see that in deciding them we are entitled to go contrary to the rules of evidence, under which it is necessary

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that the pursuer should have some reasonable and substantial corroboration of her evidence before she can be successful. No doubt, in many of these cases the defender in his conscience must know that a decision in his favour would be a wrong decision. With that we have nothing to do. Our business is to do justice by applying the rules of evidence to the evidence before us. In this particular case I look in vain for any reasonable and substantial corroboration of the evidence of the pursuer. It is true that the defender admits that he had connection with the pursuer about two months after the date on which she founds. That is a kind of admission which cuts both ways. In this case I think that it is rather in favour of the defender that he makes such an admission, because it is plain that the pursuer never could have proved the act of connection which the defender admits, and the admission also goes to explain what took place between the families when the matter of the defender's marriage to the pursuer was mooted. I quite agree that, where a defender admits an act of connection before the date on which the pursuer founds, she requires very little corroboration to bring home to him the act which she alleges. It is different when the admission refers to a date after the date on which the pursuer founds. In that case she requires to bring forward substantial corroboration of her evidence, and this, I think, the pursuer here has failed to do. There is no evidence of any previous familiarities between the parties, and I have difficulty in holding that the stovehouse in which the pursuer alleges the act of connection took place was a suspected place. Mr Brown founded on evidence to the effect that in September the pursuer told her sister about the connection which she alleges in the previous March. I think that that is not competent evidence, for it is evidence as to a statement made, as I gather it was made, outwith the presence of the defender, and later by several months than the date of the alleged occurrence. After what had happened between them, the defender, when he was told of the pursuer's condition, was at first not prepared to deny the paternity, and was willing to marry her. It was only on ascertaining that she was so far advanced in pregnancy that he repudiated the idea of marrying her, and denied the fact of paternity. On the whole matter, I think that there is not any sufficient corroboration of the pursuer's story, and consequently that she has failed to prove her case.

Lord Low.—I am of the same opinion.

Lord Ardwall.—I am also of the same opinion. —15*th January* 1908.

Counsel for Pursuer, Scott Brown; Agent, S. F. Sutherland, S.S.C.—Counsel for Defender, M'Lennan, K.C., Ingram; Agent, J. Ferguson Reekie, Solicitor. J. S. M.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Low and Ardwall.)

288. Fife Coal Company Limited *v.* Lindsay.

WORKMEN'S COMPENSATION ACT 1897 (60 & 61 VICT. CAP. 37), SECT. 1 (3), FIRST SCHEDULE, SECTS. 1 (B), 2 AND 12, SECOND SCHEDULE, SECTS. 8 AND 14 (B)—AGREEMENT BETWEEN EMPLOYER AND WORKMAN FIXING WEEKLY PAYMENT DULY RECORDED — CHARGE UPON AGREEMENT—SUSPENSION OF CHARGE—AVERMENT OF LATER AGREEMENT REDUCING AMOUNT OF COMPENSATION—AVERMENT THAT WEEKLY SUM CHARGED FOR PLUS SUM WHICH RESPONDENT ABLE TO EARN EXCEEDED AMOUNT OF AVERAGE WEEKLY EARNINGS PRIOR TO ACCIDENT—SUSPENSION HELD INCOMPETENT.

(Reported ante, Vol. XIV. p. 752.)

Reclaiming Note against an Interlocutor of Lord Dundas.

The facts of the case and the arguments of the parties sufficiently appear from the previous report.

The complainers *reclaimed.*

The following authorities were cited: *Beath & Keay* v. *Ness*, 1903, 6 F. 168; *Nimmo & Co. Ltd.* v. *Fisher*, 1907, S.C. 890; *Fife Coal Co. Ltd.* v. *Davidson*, 1907, S.C. 90; *Hughes* v. *Thistle Chemical Co.*, 1907, S.C. 607; *Colville & Sons Ltd.* v. *Tigue*, 1905, 8 F. 179; *Blake* v. *Midland Railway Co.* [1904], 1 K.B. 503; *Field* v. *Longden & Sons* [1902], 1 K.B. 47; *Binning* v. *Easton & Sons*, 1906, 8 F. 407; *Cammick* v. *Glasgow Iron and Steel Co. Ltd.*, 1901, 4 F. 198; *Dunlop* v. *Rankin & Blackmore*, 1901, 4 F. 203; *Powell* v. *Main Colliery Co. Ltd.* [1900], A.C. 366; Dickson on Evidence, sect. 627.

The Court *adhered.*

The Lord Justice-Clerk.—I concur with the view at which the Lord Ordinary has arrived in this case. There was a recorded agreement entered into between the complainers and the respondent by which his compensation was fixed at 15s. 11d., and it is for that sum that the complainers have received a charge. Their ground of suspension is that the charger agreed at various times to accept, and did accept, a less amount, and this is not disputed. But the only recorded agreement is that for 15s. 11d., and the charger alleges that he is again totally incapacitated, and therefore unfitted to enforce the recorded agreement until it is either varied by the recording of another agreement, or by a decision in the tribunal appointed for varying or recording a payment fixed under the Statute.

The complainers seek to prove facts in regard

to the alleged subsequent agreements, and the present condition of the charger. I am of opinion that the Lord Ordinary has rightly refused to allow such proof. The Act contemplates that such matters shall be disposed of in a summary manner by the statutory tribunal, and when an agreement has been recorded, variation of that agreement is not to be sought in a suspension in the Supreme Court, but in an application under the Act (Schedule II. sect. 8). If the complainers had grounds for rendering nugatory the power to charge on the recorded agreement, they should have taken the simple steps offered to them by the Act, by which, if they were right on the facts, they could have barred the charge of which they now complain. They were plainly the "party interested" in terms of the Schedule.

I am, therefore, for adhering to the Lord Ordinary's interlocutor.

Lord Low.—I have found the question raised in this unfortunate litigation to be attended with some difficulty, but in the end I have come to the conclusion that the judgment of the Lord Ordinary is right.

On 4th February 1904 the respondent, while in the employment of the complainers, sustained a fracture of the right ankle, and the compensation payable to him was fixed by agreement at 15s. 11d. per week, being the statutory maximum. A memorandum of the agreement was duly recorded in July 1905. In September 1905 the respondent had sufficiently recovered to be able to do light work. He appears to have been very willing to do any work which he was capable of performing, and the complainers seem to have been equally willing to give him work according to his capacity. The respondent was accordingly regularly employed by the complainers and earned considerable wages between 26th September and 9th December 1905. During that period the respondent agreed to accept and the complainers agreed to pay, and did pay to him, in name of compensation, one-half of his nett loss—that is to say, one-half of the difference between the amount which he was then earning and the amount which he was earning at the time of the accident. Calculated upon that basis the compensation paid to the respondent was 7s. 9d. per week from 26th September to 21st October 1905, and 5s. per week from the latter date until 9th December 1905.

Towards the end of December a difference arose between the respondent (who was represented by his law-agent) and the complainers in regard to the amount of compensation to which the former was entitled. The complainers at first proposed to reduce the amount to 4s. 7d. per week, but they ultimately offered to continue the amount which had been paid up to 9th December, namely, 5s. per week. The respondent, however, although he still intimated his willingness to accept one-half of his nett loss, refused these offers—at first upon the ground that he was not able to work continuously even at light employment, and subsequently (in January 1906) upon the ground that the condition of his ankle had again totally incapacitated him. Both of these statements appear to have been supported by medical certificates which the respondent sent to the complainers.

In these circumstances, as the parties could not come to an agreement, the respondent, in March 1906, charged the complainers upon the registered agreement to make payment to him of 15s. 11d. per week from 10th January 1906, that being the date at which he alleges that he again became totally incapacitated.

The complainers seek to have the charge suspended, in the first place, upon the ground that the original agreement—that which was registered—was superseded by the agreements under which the respondent agreed to accept, and did accept, compensation at a reduced rate between 26th September and 9th December 1905. I am of opinion that that ground of suspension cannot be sustained. It is true that during that period the respondent agreed to accept, and did accept, a reduced amount of compensation proportionate to the wages which he was then earning, but there is nothing in such an agreement to imply, nor is there anything in the correspondence to suggest, that the respondent ever agreed that in the event of his again becoming totally incapacitated, or of his incapacity increasing, he should not be entitled to full compensation or to a larger amount than he had been receiving between September and December 1905, as the case might be.

The complainers further argued that as the respondent had only right to claim the maximum amount of compensation, if and so long as he was totally incapacitated, the suspension could not be disposed of without enquiry into the facts, seeing that they (the complainers) denied that the respondent had again become totally incapacitated. They also maintained that enquiry was competent because the respondent having chosen to appeal to the common law by giving a charge upon the decree implied in the registered agreement, could not object to any defence which the complainers might have to his claim, whether under the statute or otherwise, being dealt with in a suspension—that being the appropriate common law remedy when a charge for payment is given. I am of opinion that that view cannot be sustained. The Act makes it plain that such questions as are raised in this case (namely, in regard to the amount or duration of compensation) must be settled by arbitration under the statute, and not by way of action in the Courts of Law. The complainers had a remedy open to them under the statute, because when in the end of 1905 or the beginning of 1906 it became apparent that the amount to be paid to the respondent could

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not be settled by agreement, they might have applied for review of the weekly payments. The complainers argued that it was for the respondent to make such an application if he was not satisfied with their offer to continue payment at the rate which he had accepted between the 21st of October and the 9th of December 1905. I think that it would have been quite competent for the respondent to institute proceedings under this Act, but I do not think that he was bound to do so. He was, in my opinion, entitled to take his stand upon the recorded agreement, which, for the reasons which I have given, I cannot regard as having been superseded.

No doubt the result of refusing the suspension will, I imagine, almost certainly be that the complainers will be compelled to pay to the respondent a great deal more than the amount which, if everything had been done in terms of the statute, he would have been entitled to demand. But that is a result which, I am afraid, the Court is powerless to prevent, because the question is not one of common law or of equity, but of statutory enactments. The statute has armed the respondent with a decree against the complainers for payment to him of a certain amount weekly, and the complainers have not adopted the statutory procedure by which their liability to pay that amount might have been ended or restricted. I therefore agree with your Lordship that the interlocutor of the Lord Ordinary must be affirmed.

Lord Ardwall.—The complainers in this case ask that a charge following upon a memorandum duly registered in the Sheriff Court at Dunfermline under the provisions of sect. 8 of the second schedule of the Workmen's Compensation Act 1897 should be suspended. Such a memorandum is declared by the same section, taken along with the interpretation clause, 14 (*a*) of the same schedule, to be enforceable as a Sheriff Court decree. There is nothing incompetent in raising such a suspension, and a suspension of a charge on a registered memorandum was granted in the case of *Nimmo & Co.* v. *Fisher*, 1907, S.C. 890. But such a suspension ought not readily to be entertained, and to justify its being granted, it ought to be shewn that without such suspension the complainer would suffer some manifest injustice; and further, that the end to be attained by such suspension could not be attained by proceedings under the said Act.

The facts in the present case are as follows: On 4th February 1904 the respondent, while in the course of his employment, met with an accident and claimed compensation. The parties agreed that the amount should be 15s. 11d. a week, which was the statutory maximum, and that amount was paid from 18th February 1904 till 26th September 1905. A memorandum of this agreement was recorded in terms of the Act in the Special Register of the Sheriff Court of Fife at Dunfermline. The complainers aver that the respondent having partially recovered and returned to work, the parties, on 23rd October 1905, by agreement varied the weekly payment to 7s. 9d. per week as from 26th September 1905, and that this agreement superseded the recorded agreement, and was acted on by the parties for the period between 26th September 1905 and 21st October. They further say that another agreement to vary was entered into on 6th November 1905, whereby the compensation was fixed at 5s. a week as from 21st October, and that this latest agreement was acted on for the period between 21st October and 9th December 1905. At that date the complainers proposed to reduce the compensation to 4s. 7d. a week, but the respondent declined to agree to this, and on 10th January 1906 he left their employment and intimated that he was totally incapacitated for any work whatever.

The complainers admit liability to pay compensation at the rate of 5s. a week from the 21st October 1905 till that rate shall be varied by agreement or review in terms of the Act. The respondent has charged them for payment at the rate of 15s. 11d. a week from and after 10th January 1906, in terms of the only registered agreement. The respondent took no steps of any kind between the cessation of payments on 9th December 1905 and the date of the charge on 8th March 1906. Accordingly, the complainers had plenty of time, if they so desired, either to record their alleged new agreement or to apply to the Sheriff for a variation of the rate of compensation set forth in the only recorded agreement. It cannot, therefore, be said that this suspension is rendered necessary by reason of any hurried action on the part of the respondent. The two grounds on which suspension is asked are, first, that the respondent had entered into an agreement in November 1905 to accept 5s. a week of compensation; and, second, that on 10th January 1906 he was not suffering from such incapacity as to entitle him to receive 15s. 11d. a week, being the amount fixed by the registered memorandum of agreement. The complainers' counsel asks for a proof of these two grounds. I entirely agree with what the Lord Ordinary says in his opinion, "that to allow a proof in this Court upon either of these heads would be to run plainly counter to the policy of the Workmen's Compensation Act 1897, which aims at providing summary and inexpensive methods of enquiry where parties do not agree on matters of fact." This being so, the next question is whether the complainers might have had the enquiries made and the remedies they seek granted by taking steps under the said Act. I have no doubt that they could.

In the first place, in respect that they alleged that there was a new agreement, they might have applied to have the memorandum of that agree-

ment registered, and if that had been done it would then have lain upon the respondent, if he wished an increase of weekly compensation, to have applied to the Sheriff. If, on the other hand, the respondent had succeeded in convincing the sheriff-clerk or Sheriff that there was really no such agreement, or if the sheriff-clerk or Sheriff took the course suggested by Lord Salvesen in the case of *Hughes*, 1907, S.C. 607, and declined to order the memorandum to be recorded in respect that there was a *bona fide* dispute between the parties, then the course would have been clearly open to the complainers to apply for a diminution of the weekly payments under sect. 12 of Schedule I of the Act, which the Sheriff would have then heard and would have decided the question in terms of the Act. At one point in the course of the argument for the complainers the crux of the case seemed to be this, Which of the two parties —the respondent or the complainers—ought to have applied to the Sheriff in the circumstances which existed at 10th January 1906? It seems to me that the complainers were the proper parties to apply, because if the respondent had taken up the position (which he has now taken up) that he had entered into no new agreement in October or November 1905, the way was open to them at once to apply to the Sheriff for review of the compensation payable under the only recorded agreement.

I accordingly arrive at the conclusion that there was no good reason for the complainers adopting the method they have done to have the rate of compensation settled, and I think it would be intolerable in the administration of the Workmen's Compensation Act if it were to be held competent, by merely raising a suspension, to have such questions determined in the Court of Session instead of by the proceedings prescribed by the Act.

I may add that it appears to me from the correspondence which is produced and printed by the complainers, and which may be read along with the record, that there was not at any time an agreement in the proper sense of the word for a reduction of the compensation from 15s. 11d. What happened was, that the complainers provided work in the way of wood cutting for the respondent, whose true occupation was that of a miner, that he worked at cutting wood and in fact did everything he could to earn his wages, and that the arrangement was come to between the respondent and the complainers that as his wages rose his compensation should diminish to the effect of giving him 50 per cent. of the difference between the wage he was receiving from time to time and the amount of his former wages. The whole matter was accordingly left in a state of uncertainty, varying from time to time according as the respondent might be able for more or less work and earn more or less wages. This case differs entirely from the cases of *Beath*, 1903, 6 F. 168, and *Nimmo* v. *Fisher*, 1907, S.C. 890, in both of which the workman endeavoured to go back over a past period and to obtain more compensation than he could possibly be entitled to, on a sound construction of the Act, had the ordinary proceedings under the Act been adopted. In the present case all that the respondent gave a charge for was compensation at the rate fixed by the agreement from the time when the parties fell out, and if that was in the circumstances too high it was a very simple matter for the complainers to have gone before the Sheriff, as I have already explained, and got the rate varied, but this they failed to do.

On these grounds I think the note ought to be refused.—17*th January* 1908.

Counsel for Complainers, Hunter, K.C. Horne; Agents, W. & J. Burness, W.S.—Counsel for Respondent, G. Watt, K.C., Wilton; Agent, D. R. Tullo, S.S.C. J. S. M.

2ND D
Fife Coa
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SECOND DIVISION.

(The Lord Justice-Clerk, Lords Low and Ardwall.)

289. William Baird & Company Limited *v.* M'Whinnie.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 1 (3), First Schedule, sects. 1 (b), 2 and 12, and Second Schedule, sects. 8 and 14 (b)—Duly Recorded Agreement Between Employer and Workman Fixing Weekly Payments — Workman Returning to Work With Same Employers But Earning Less Wages Than Prior to Accident — Charge by Workman on Recorded Agreement for Cumulo Amount of Weekly Payment Applicable to Period of Employment — Suspension of Charge — Offer by Employers to Pay Difference Between Wages Earned During Period of Employment and Wages Earned Prior to Accident — Charge Suspended.

Reclaiming Note against an Interlocutor of Lord Mackenzie.

This was a note of suspension of a charge brought by William Baird & Co. Ltd., 168 West George Street, Glasgow, against John M'Whinnie, Charles Street, Kilsyth.

The following narrative is taken from the judgment of the Lord Ordinary:

The respondent is a miner who met with an accident to his eye on 29th March 1906 while in the employment of the complainers. He claimed compensation under the Workmen's Compensation Act, 1897, in respect of his total incapacity for work. On 12th April 1906 the parties agreed that the weekly amount of compensation, in respect of the respondent's

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total incapacity, was 14s. 5d. The respondent's average weekly earnings in the complainers' employment were 28s. 9⅜d. The sum of 14s. 5d. was the maximum rate under the statute for total incapacity.

The respondent was paid 14s. 5d. a week of compensation from 12th April to 29th May 1906. On 29th May he returned to work at a wage of 18s. 4d. a week, which he continued to earn till 12th July 1906. During this period he was paid 5s. 3d. a week as partial compensation. On 13th July 1906 he again became totally incapacitated, and his total incapacity continued till 13th September 1906. On 21st July 1906 an agreement was entered into between the parties, under which the respondent was again paid compensation at the maximum rate of 14s. 5d. a week. A memorandum of the agreement of 21st July 1906 was recorded in the terms of the Act. The agreement, which is produced, does not refer to the respondent's total incapacity, but in Answer 5 he admits that he received the payment of 14s. 5d. a week from 13th July to 13th September 1906, in respect of his total incapacity. On 13th September 1906 the respondent returned to work with the complainers. He continued to work from that date till 6th May 1907 at wages which averaged 23s. 2d. a week.

On 6th May 1907 the respondent charged the complainers on the memorandum of the agreement of 21st July 1906, to pay to him £35, 5s. 6d., being forty-two weeks' compensation at 14s. 5d. a week, from 21st July 1906 to 6th May 1907, under deduction of £6, 9s. 9d., being the amount received by him between 13th July and 13th September 1906. If the complainers pay the sum charged for, the respondent would receive, in respect of the period between 13th September 1906 and 6th May 1907, a sum considerably exceeding (the complainers say about 9s. a week) his average weekly earnings prior to the accident.

The complainers maintain that the respondent is only entitled to compensation from 13th September 1906 to 6th May 1907 at the rate of the full difference between the average of his actual weekly earnings during that period and the average of his weekly earnings prior to the accident. This, for the period between 13th September 1906 and 6th May 1907, amounts to £9, 10s. 3d., which complainers tender in the present suspension of the charge.

On 5th November 1907 the Lord Ordinary suspended the charge.

He issued the following note.

Lord Mackenzie [after stating the facts *ut supra*].—The complainers argued that the present case was ruled by the principles laid down in *Beath & Keay* v. *Ness*, 6 F. 168, followed in *Nimmo & Co. Ltd.* v. *Fisher*, 1907, S.C. 890, and I am of opinion that this argument is well founded. The respondent maintained that this was not so because, under the Workmen's Compensation Act, Schedule I, sect. (1) (*b*), compensation at the rate of 14s. 5d. a week might be awarded in respect not only of total, but also of partial incapacity. He accordingly maintained that an application must be made to have the agreement reviewed. I am unable, looking to what I consider to have been decided by these cases, to hold that the respondent can found upon the agreement of 21st July 1906 so as to enable him to recover a sum in excess of his average weekly earnings prior to the date of the accident. In the present case, either the respondent got wages on the implied agreement between him and the complainers that compensation at the rate of 14s. 5d. per week, the amount which had been fixed in respect of his total incapacity, was no longer due or claimable, because the total incapacity in respect of which this sum of compensation was due had ceased, and therefore the right to get, or obligation to pay, compensation at that rate had come to an end, or the payment of wages at the average rate of 23s. 2d. a week was, in the first place, to be held to the extent of 14s. 5d. of that sum as payment of the compensation, and the balance as the remuneration given for such service as the respondent, in his partially disabled condition, was able to render. In *Nimmo's* case the complainers tendered a sum which represented the full difference between the respondent's average earnings prior to the accident and his actual earnings for the period in question. The Court, in respect of his refusal to accept this offer, sustained the reasons of suspension, and suspended the charge *simpliciter*.

Accordingly, I am of opinion, in the present case, that there should be a finding that the compensation due to the respondent was payable only during his total incapacity; and further, in respect of his refusal to accept the complainers' offer of £9, 10s. 3d., that the reasons of suspension should be sustained and the charge suspended *simpliciter*, the complainers being found entitled to expenses.

The respondent *reclaimed*.

The following authorities were cited: *Beath & Keay* v. *Ness*, 1903, 6 F. 168; *Nimmo & Co. Ltd.* v. *Fisher*, 1907, S.C. 890; *Geary* v. *William Dixon Ltd.*, 1902, 4 F. 1143; *Parker* v. *William Dixon Ltd.*, 1902, 4 F. 1147; *Clelland* v. *Singer Manufacturing Co.*, 1905, 7 F. 975; *Williams* v. *The Ocean Coal Co. Ltd.*, 1907, 23 T.L.R. 584; *Irons* v. *Davis & Timmins Ltd.* [1899], 2 Q.B. 330.

The Court *adhered*.

The Lord Justice-Clerk.—The case of the respondent involves the somewhat startling proposition, that a workman who has been injured can be entitled under the Workmen's Compensation Act to receive compensation from his employer at a time when he is earning the full wages he received at the time of the accident—in other words, that he may be made better off pecuniarily from having had an accident than he could have been if no accident had happened, although it is the intention of the statute that the fullest pecuniary benefit he can take by it is one-half of his earnings.

Here the respondent was paid, after the

accident, 14s. 5d. a week, which was the full amount he could properly demand under the Act. When he came back to work he earned 18s. 4d. a week, and received 5s. 3d. of compensation. He again became incapacitated and, by agreement, he again received full compensation, the agreement being recorded. Later he returned to work, and got 23s. 2d. a week.

He now proposes to charge the complainers for a sum of £35, 5s. 6d. If this sum were paid to him, then it is not disputed that he will have been paid in wages and compensation, for a period from 13th September 1906 till May 1907, a weekly sum much in excess of his full average wages prior to the accident.

I agree with the Lord Ordinary in holding that the contention of the charger cannot be given effect to. It seems on the face of it to be contrary to reason and justice, and I also agree in thinking that the authority of the cases of *Beath & Keay* and *Nimmo & Co.* v. *Fisher* is conclusive against his contention.

I am, therefore, of opinion that the Court must hold that the right to compensation could only subsist while the injured workman was incapacitated from earning wages up to the amount of his previous weekly earnings, and that as he has refused to accept compensation offered him which would give him his just right under the statute, the judgment suspending the charge should be adhered to.

Lord Low concurred.

Lord Ardwall.—I am of opinion that the Lord Ordinary's interlocutor is right, and ought to be affirmed.

I concur with the Lord Ordinary that the present case is ruled by the principles laid down in *Beath & Keay* v. *Ness*, 1903, 6 F. 168, and followed in *Nimmo & Co.* v. *Fisher*, 1907, S.C. 890.

In the present case, as in these cases, the respondent endeavours, by making use of the machinery of the Workmen's Compensation Act, aided by certain judicial decisions and *dicta* of not unquestionable authority, to obtain for the period between 13th September 1906 and 6th May 1907, payment of a sum per week which, added to his wages, would bring up his weekly emoluments to a sum considerably exceeding his average weekly earnings prior to the accident. In short, he is endeavouring, under cover of the machinery of the Act, to obtain, not compensation for his injury, but something considerably over and above the largest amount of compensation to which the general provisions of the Act entitle him. It is quite clear that this is contrary to the main purpose and object of the Act, and that accordingly the Court is entitled to interfere for the purpose of preventing an injustice to the complainers, and an abuse of the machinery of the Act.

In my opinion the Lord Ordinary has taken the proper course in suspending the charge *simpliciter*.

This case presents a complete contrast to that which immediately preceded it in to-day's roll. I think it unnecessary to go into more detail, as I think the whole case has been admirably dealt with by the Lord Ordinary in his opinion, with which I concur.—17*th January* 1908.

Counsel for Complainers, Horne, Strain; Agents, W. & J. Burness, W.S.—Counsel for Respondent, Munro, A. M. Mackay; Agents, St Clair Swanson & Manson, W.S. J. S. M.

2ND DIV.
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Lord Ardwall.

OUTER HOUSE.

(*Lord Dundas.*)

290. Wilsons' Trustees *v.* Brown's Executors.

PROPERTY—REAL BURDEN—CONSTITUTION—DISPOSITION OF MILL BY A TO B—OBLIGATION ON A AND HER "FORESAIDS" TO MAINTAIN MILL DAM—NO ANTECEDENT TO FORESAIDS—SUBSEQUENT DISPOSITION BY A TO C OF LANDS ON WHICH DAM SITUATED—HELD, AFTER A'S DEATH, THAT OBLIGATION TO MAINTAIN DAM TRANSMITTED AGAINST A'S PERSONAL REPRESENTATIVES AND WAS NOT A REAL BURDEN ON SOLUM OF DAM.

In this case the trustees acting under the mutual trust disposition and settlement of Mr and Mrs Wilson, dated 1st March 1894, sued the executors nominated by, and acting under, the trust disposition and settlement of Miss Martha Brown of Lanfine and Waterhaughs, in the county of Ayr, dated 25th April 1890. The action concluded, *inter alia*, for declarator that the defenders, as executors foresaid, were bound to uphold and maintain in time coming the dam situated on the river Irvine at the Townhead of Newmilns, erected and used for the purpose of diverting water from the said river into the lade adjoining, for the supply of all and whole the Old Wool Mill at Townhead, Newmilns.

The facts of the case appear from the Lord Ordinary's Opinion.

The Lord Ordinary repelled, *inter alia*, the fifth plea in law for the defenders, and *granted* decree in terms of the declaratory conclusion of the summons.

Lord Dundas.—By disposition dated 3rd February 1880, and duly recorded in the Register of Sasines, the now deceased Miss Martha Brown, therein designed "of Lanfine and Waterhaughs in the county of Ayr, heritable proprietrix of the lands and others hereinafter disponed," in consideration of £500 paid to her by the now deceased James Wilson (whose

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trustees are the pursuers of this action), disponed to him and his heirs and assignees whomsoever, but always with and under the declarations and conditions thereinafter mentioned, *inter alia*, (Third) All and Whole the old wool mill at Townhead, Newmilns, with the ground upon which it was built, all as delineated and coloured red on the plan annexed to said disposition; "With right to the said James Wilson to use the water in the lade adjoining for the supply of the said mill; but declaring that he and his foresaids shall be bound to keep the said lade and sluices in good repair at their own cost and expense in all time coming; I and my foresaids being bound to uphold and maintain the dam in time coming as hitherto." The main question is whether or not the defenders, who are called as Miss Brown's executors, acting under her trust disposition and settlement and codicils, are bound, as such, in virtue of the clause just quoted, to uphold and maintain the said dam in time coming. The dam is situated on the river Irvine, at a considerable distance from the lands disponed by the deed which I have referred to. The defenders' first and principal answer is a denial of all liability. They explain (Ans. 4) that the import of the contract between the parties to the disposition was "that Miss Brown or her estate should be liable to uphold and maintain the dam only so long as she or her representatives, legal or testamentary, owned the lands abutting on or adjacent to the dam." They further state (Ans. 5) that Miss Brown had, before her death, sold her lands of Lanfine and Waterhaughs so far as lying on the north side of the river, and that the defenders, after her death, sold the remainder of said lands to Mr T. M. Mackinnon; that their conveyance to him embraced one-half of the *solum* of the said dam; that it bore to be under burden of all existing servitudes affecting the subjects disponed, however constituted, and whether shewn by the searches or not; and that "no portion of the lands contiguous either to the mill or to the dam now belongs to the defenders, and they have no right of access to said dam." The defenders plead, *inter alia*: "5. In respect that the defenders and their author have disponed all lands abutting on or adjacent to said dam to *bona fide* purchasers, and are not interesteed in any land in any way connected with said dam, the defenders, on a sound construction of the disposition dated 3rd February 1880, are entitled to decree of absolvitor." The defenders' counsel, while entirely disclaiming any argument based upon servitude—*quia servitus in faciendo consistere nequit*—maintained that the obligation to maintain the dam in all time was a real burden or condition which ran with and affected the lands now owned by Mr Mackinnon, or part thereof; and that they, as representing Miss Brown, were quit of any liability for maintenance, in respect of their conveyance to that gentleman. Mr Mackinnon is no party to this case; but I must consider the defenders' argument, as in a question between them and the pursuers. I am of opinion that the argument fails entirely. The peculiarity of the case is that the alleged burden or condition is not one imposed upon the disponee, or upon the lands conveyed to him, but upon the disponer and her "foresaids." It may be noted that this word has no antecedent in the disposition. But the defenders' counsel maintained that it must be held to signify Miss Brown's successor in her then remaining lands, or some part of them. Now, it is well established that "to constitute a real burden or condition. . . . which is effectual against singular successors, words must be used in the conveyance which clearly express or plainly imply that the subject itself is to be affected" (*Tailors of Aberdeen*, 1840, 1 Rob. App. 296, 306). What, then, are the subjects which are here said to be affected by the real burden or condition? I apprehend that the crispest answer for the defender to that question would be, "the *solum* of the dam." But I cannot find in the disposition any words which clearly express or plainly imply this. It seems plain that Miss Brown's designation as proprietrix of Lanfine and Waterhaughs imports *per se* no such implication. It is further to be observed that at the date of the disposition Miss Brown was owner of only one-half of the *solum* of the dam, the other one-half having been disponed by her at some earlier date to a third party. The defenders must, therefore, as it appears to me, if they are to make good the contention with which I am now dealing, establish that Miss Brown's undertaking "to uphold and maintain the dam in time coming as hitherto" constitutes a real burden or condition, binding upon her and her singular successors, as owners of one-half of the *solum* of the dam, for the maintenance of the whole dam for all time. This would, in my judgment, be an extravagant construction of the language of the disposition, and one which the Court must decline to put upon it. I do not leave out of account (what was pressed upon my attention) that in the leading case to which I have referred it was laid down that "if the condition is one usually attaching to the lands in a feudal or burgage holding,—in particular, if it has a *tractus futuri temporis*, or is of a continuous nature, which cannot be performed and so extinguished by one act of the disponee or his heir, words less clear and specific will suffice to create it than when the burden appears to be of a personal nature; for example, the payment of a sum of money once for all in terms of a family settlement" (1 Rob. App. at p. 308). But, assuming in the defenders' favour that the upkeep of this dam falls within the class of conditions contemplated by the quotation, I think their argument is no whit advanced; for the plain reason that there are in this disposition no words which can, in

my judgment, be held, upon any feasible construction, to imply that the *solum* of the dam, or part of it, or any land abutting on or adjacent to it, were intended to be made, or were made, subject to the real condition of perpetual upkeep of the dam. For these reasons I am unable to hold that the defenders got quit of the obligation undertaken by Miss Brown by force of their conveyance to Mr Mackinnon; and I think that, as now representing her, they are bound to implement it. . . .—20*th December* 1907.

Counsel for Pursuers, Hunter, K.C., Munro; Agents, Cuthbert & Marchbank, S.S.C.—Counsel for Defenders, Craigie, K.C., Grainger Stewart; Agents, A. & A. Campbell, W.S. A. M.

HIGH COURT OF JUSTICIARY.

(*The Lord Justice-General, The Lord Justice-Clerk, Lords M'Laren, Kinnear, Stormonth-Darling, Low, Pearson, and Ardwall.*)

291. Graham *v.* Hart.

Justiciary Cases—Bribery—Prevention of Corruption Act 1906 (6 Edw. VII. cap. 34), sect. 1—"Agent"—Held that a Police Constable was the Agent of the Chief Constable in the Sense of the Act.

Stated Case.

This was an appeal by stated case from a decision of the Sheriff-Substitute of Lanarkshire at Glasgow (Fyfe) convicting the appellant of an offence against sect. 1 of the Prevention of Corruption Act 1906. The complaint was in the following terms:—

"That on 10th April 1907, in Main Street, Maryhill, Glasgow, while Albert Carson, Police Constable in the Maryhill district of the Glasgow Police, was, in the execution of his duty, acting for his employer, J. V. Stevenson, Chief Constable, Glasgow, to prevent or detect the commission of, and to obtain evidence in regard to, offences against the Street Betting Act 1906, and, in particular, was engaged watching the actings of John Graham, 207 Main Street aforesaid, who was suspected of committing offences against said Act; Mary Graham, 207 Main Street aforesaid, mother of the said John Graham, did corruptly give £2, 5s. of money to the said Albert Carson as an inducement, or reward or bribe, to neglect his duty, and to forbear from watching the said John Graham as aforesaid, and to ignore or suppress any evidence which he might obtain or have obtained against him, and to refrain from reporting the same to his employer, contrary to the Prevention of Corruption Act 1906, sect. 1, whereby the said Mary Graham is liable to imprisonment with or without hard labour for a term not exceeding four months, or to a fine not exceeding £50, or to both such imprisonment and such fine. May it therefore please your Lordship to grant warrant to cite the said Mary Graham to appear before you, to answer to this complaint, and thereafter to convict her of the offence charged, and to adjudge her to suffer the penalties provided by said Acts."

The stated case set forth the facts as follows:—

At the first calling of this case on 4th May 1907, the agent for the appellant objected to the relevancy of the complaint in respect that the complaint did not set forth facts and circumstances from which an offence within the meaning of the statute libelled could be inferred; that, in particular, the relation of principal and agent does not subsist between the Chief Constable of Glasgow and the Police Constable referred to.

I repelled said objection, and the appellant thereupon pleaded not guilty.

The diet was adjourned till 22nd May 1907.

At the hearing of the case on said last-mentioned date the facts which were admitted or proved were:—

1. That the authority vested with the appointment of a Chief Constable for the city of Glasgow is a committee of Magistrates of the city, together with the Sheriff of Lanarkshire, and the cost of maintaining the police force, including the Chief Constable's salary, is defrayed partly out of money raised from police rates and partly by Government grant.

2. That this body met on 2nd April 1902 to appoint a Chief Constable in room of Mr John Boyd resigned.

3. That at that meeting, Mr James Verdier Stevenson was, as the minute of meeting bears, appointed Chief Constable, "the said James Verdier Stevenson to hold office during the pleasure of the Magistrates' Committee and the Sheriff of Lanarkshire, subject to the provisions of the Glasgow Police Acts, 1866 to 1901, and the Police (Scotland) Act 1890."

4. That the Chief Constable receives payment of his salary from the Police Treasurer of the Glasgow Corporation.

5. That the Chief Constable has power which he exercises without consultation with any one to appoint constables to hold office during his pleasure, and has power also to dismiss constables without consulting anyone.

6. That the wages of constables are entered in a pay sheet which is certified by the Chief Constable.

7. That the actual disbursement for said wages is then made by the said Police Treasurer.

8. That Albert Carson is a Glasgow constable appointed by the Chief Constable who preceded Mr Stevenson, and he is paid in the manner described.

9. That when a constable has been appointed by the Chief Constable he, before entering upon duty, makes and signs before a Magistrate a declaration that he "will faithfully and without fear or favour discharge the office of Police Constable of the City of Glasgow, and will obey all lawful orders by the Lord Provost and Magistrates and the officers placed over me, and will attend to all rules and regulations of the force."

10. That Constable Albert Carson had duly made and subscribed this declaration on 9th September 1901.

11. That the Chief Constable is assisted in the discharge of his duties by various subordinate officers, including district superintendents, inspectors and constables.

12. That it is not the practice for the Chief Constable to give direct instructions to the constables (who number over 1500), but instructions as to their duty are conveyed to the men through the district superintendents or inspectors.

13. That on 10th April 1907 Constable Carson was attached to the Maryhill police district of the city.

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Graham v. Hart.

14. That on that particular day he did not receive any specific instruction from any one as to the duty he was on that day to discharge.

15. That shortly before that day, however, he had received instructions through the district inspector to watch for possible betting offences in the district, and, in particular, to observe the movements of a family named Graham, who reside in the district, and who were suspected by the police of conducting illegal betting transactions.

16. That one of the members of this family is named John Graham.

17. That shortly before 10th April Constable Carson had made a report to the Maryhill district inspector in regard to this John Graham.

18. That on said 10th April Constable Carson and another constable were on plain clothes duty in Bridge Street, Maryhill, when they met and had some slight conversation with John Graham.

19. That later in the evening, as they passed over a railway bridge, the appellant, Mrs Mary Graham (who is the mother of John Graham), was standing on the bridge.

20. That she waved the constables to come over to her, and on their doing so she said, "Are you fireproof?"

21. That she then put two sovereigns and five shillings of silver into Carson's hand, remarking, "That is one for each of you and something to get a drink to save you from breaking it. John would have given it to you, but he was frightened."

22. That she then walked away.

23. That Constable Carson regarded this as an attempt to bribe him to refrain from observing the movements of John Graham or reporting upon them.

24. That Constable Carson took the money to the Police Office and reported the incident.

I held in law, in respect the Chief Constable is entrusted with the duty of detecting crime and exercises his office through the district constables, that Constable Carson, being on 10th April engaged on police duty, was "acting for" the Chief Constable, and therefore, in the sense of the Prevention of Corruption Act 1906, was an agent.

In respect of the evidence adduced I convicted the appellant of the contravention charged and imposed a penalty of £10, and in default of payment thereof, within fourteen days from said date, I adjudged her to be imprisoned for the period of ten days from the date of her imprisonment.

The questions of law for the opinion of the Court were:—

1. Was Constable Albert Carson, on 10th April 1907, an agent in the sense of the Prevention of Corruption Act 1906?
2. Do the facts support the conviction?

Sect. 1 of the Prevention of Corruption Act 1906 provides, *inter alia*, as follows:—

I. (1) . . . . If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do or for having after the passing of this Act done or forborne to do any act in relation to his principal's affairs or business or for shewing or forbearing to shew favour or disfavour to any person in relation to his principal's affairs or business . . . . he shall be guilty of a misdemeanour and shall be liable on conviction on indictment to imprisonment with or without hard labour for a term not exceeding two years or to a fine not exceeding five hundred pounds or to both such imprisonment and such fine, or on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months or to a fine not exceeding fifty pounds or to both such imprisonment and such fine.

(2) For the purposes of this Act the expression "consideration" includes valuable consideration of any kind; the expression "agent" includes any person employed by or acting for another; and the expression "principal" includes an employer.

(3) A person serving under the Crown or under any corporation or any municipal, borough, county or district council, or any board of guardians is an agent within the meaning of this Act.

Argued for Appellant: The Act did not apply to this type of offence. It was intended to apply to cases where at common law an indictment could not be brought for bribery, viz. in the case of matters occurring in private life. An indictment in the case of bribery affecting the administration of justice could always be brought at common law, and that was the appropriate method of prosecuting for such a crime as was averred here, not under this statute (Hume, I. 408; *H.M. Advocate* v. *Dick*, 1901, 3 F. (J.) 59, per Lord Young at 64). Such a case as this might also be dealt with under the Public Bodies Corrupt Practices Act 1889 (52 & 53 Vict. cap. 69), sect. 1 (2). That was the only Act under which bribery of a police constable could be indicted. He did not come within the persons to whom the present statute was applicable. The words "principal" and "agent" in the Act must be read according to their ordinary meanings, except in so far as these were expressly modified or extended by the interpretation clause. The words "employed by" referred to paid agents; the words "acting for" brought within the Act a gratuitous agent or mandatory. What had led to the passing of the Act was corruption in mercantile dealings, and it was intended to apply to corruption in such dealings, not to the class of matters referred to in this complaint. The Crown and corporations were included because they were the greatest mercantile bodies in the country. The Sheriff-Substitute had read the words "acting for" in sub-section (2) as equivalent to "under the orders of." A police constable was no doubt under the orders of the chief constable; but he no more "acted for" him than an under-servant "acted for" a manager who was placed over him. Both "acted for" their common employer, and for him alone. What the Act presumed was that the agent should be acting in the business or affairs of his employer. The words "principal's affairs or business" implied mercantile dealings. It was service in the way of transactions which was referred to. But the business of the police constable was not that of the chief constable, but that of the community. The words required that the affairs should be such as the principal was personally interested in. The business of

the Crown meant the private, not the public, business engaged in. Similarly the business of the corporation meant its trading affairs or the business of management, not the general interests of the community at large. In truth a police constable had no true "principal" in the sense of the Act. It had been decided that he was not the servant of a superintendent of police (*Bain* v. *Burnet*, 1857, 19 D. 405, per Lord Neaves at 407), or the police commissioners of a burgh (*Young* v. *Magistrates of Glasgow*, 1891, 18 R. 825), or the standing joint committee of a county (*Girdwood* v. *Standing Joint Committee of the County of Midlothian*, 1894, 22 R. 11, per Lord Kincairney at 13). Counsel referred to the Glasgow Police Act 1866 (29 & 30 Vict. cap. cclvxxiii.), sect. 71 (as to the appointment and dismissal of the Chief Constable by the magistrates' committee and Sheriff), sect. 74 (as to the appointment of constables by the Chief Constable), sect. 77 (as to suspension and dismissal of constables by the Chief Constable), sect. 78 (as to dismissal of superior officers by the magistrates), sect. 83 (as to the duties of Chief Constables and constables with reference to the prevention and detection of offences and the preservation of order). A constable might be drafted into a district where the Chief Constable had no duty or jurisdiction. It could not be said powers were delegated by the Chief Constable, because, in such a case, the Chief Constable had no powers which he could delegate. Delegation of powers, which was essential to the relation between principal and agent, was therefore out of the question as between a Chief Constable and the constables over whom he was placed. Counsel offered no separate argument on the second question of law.

Argued for Respondent: The fact that the present offence could be prosecuted at common law did not go any length to shew that the complaint was irrelevant under this statute. It was rather a reason for giving effect to this Act according to its expression. The passing of this Act might be advisable, if not absolutely necessary; because there had been no prosecution for two centuries for bribing a public officer not to do his duty. It was at least doubtful if this offence could be prosecuted under the Public Bodies Corrupt Practices Act 1889. But if it could, that again was no answer to a prosecution under this Act. There was nothing in the Act to indicate that it was intended to be confined in its scope to mercantile agencies. Counsel founded particularly on sections Nos. 5, 9, 12 and 15 of the stated case as shewing that the constable was acting for the Chief Constable. The Chief Constable had powers of appointment and dismissal and of issuing orders which the constable was bound to obey. It was no straining of words to speak of the Chief Constable and constable as employer and employee. It was not necessary in this case to decide whether the relation of master and servant existed between the Chief Constable and constables under him; the relation of principal and agent did exist. The business of the Chief Constable was to do the very things which the constable was doing (Glasgow Police Act 1866, sect. 83). In doing the work of prevention and detection of penal offences he was assisted by his subordinates, to whom he delegated part of the duties. Such subordinates were then his agents. An agent might yet be a principal to a sub-agent; so it was no answer to say that the Chief Constable was the agent of the community. The affairs might be those of the agent as well as those of the principal; and they were none the less the affairs of the Chief Constable because they were also the interests of the community. The words "employed by" in subsect. (2) of sect. 1 were used in the sense of "engaged by." The word "appoint" in sect. 74 of the Glasgow Police Act 1866 was used as equivalent to "employ"; and sect. 87, which required constables to obey the orders of the Chief Constable, used the words "acting under" the Chief Constable in the sense of "employed by." As to a constable not being the servant of the Chief Constable, there was not unanimity in the decisions; and the view taken of the relation under the old Glasgow Police Act (6 & 7 Vict. cap. xcix.) was consistent with the opposite view (*Melvin* v. *Wilson*, 1847, 9 D. 1129, per Lord Jeffrey at 1136–7). And there were other indications of opinion inconsistent with the appellant's contention (*Young* v. *Magistrates of Glasgow*, *supra*, per Lord Adam at 829; *Brown* v. *Magistrates of Edinburgh*, 1907, S.C. 256, per Lord M'Laren at 266). In *Brown* v. *Magistrates of Edinburgh*, *supra*, there was nothing to indicate that the Court did not consider this as an ordinary contract of service. The second question was one of fact.

The Court *answered* the first question in the case in the affirmative, and *dismissed* the appeal.

Lord Stormonth-Darling [read by the Lord Justice-General].—The facts of this case, as stated by the Sheriff-Substitute, are that Albert Carson, a police constable in Glasgow, was on 10th April 1907 engaged in the execution of his duty in Main Street, Maryhill, and in particular was watching the actings of a certain John Graham, who was suspected of committing offences under the Street Betting Act 1906, when John Graham's mother accosted Carson, and put two sovereigns and five shillings into his hand, making at the same time a remark which referred to her son John, and which led the constable to conclude that the act was an attempt to bribe him to refrain from observing the movements of John Graham, or reporting upon them. The constable accordingly took the money to the police office, and reported the incident.

High Court of Justiciary

Graham v. Hart.

Lord Stormonth-Darling.

A complaint was then brought against Mary Graham in which the constable was described as "acting for his employer J. V. Stevenson, Chief Constable, Glasgow," and the accused was charged with a contravention of the Prevention of Corruption Act 1906, section 1. An objection to the relevancy was taken on her behalf, to the effect that "the relation of principal and agent does not subsist between the Chief Constable of Glasgow and the police constable referred to." The Sheriff-Substitute repelled the objection, and after an adjournment of the diet to 22nd May, the trial proceeded. The result was that the learned Sheriff convicted the accused of the contravention charged, and imposed a penalty of £10. The Sheriff narrates the facts, and tells us that he held in law "in respect the Chief Constable is entrusted with the duty of detecting crime, and exercises his office through the district constables, that Constable Carson, being on 10th April engaged on police duty, was acting for the Chief Constable, and therefore, in the sense of the Prevention of Corruption Act 1906, was an agent." The only question of law which the Sheriff propounds for our opinion (the second question being merely on the facts) is this: "Was Constable Albert Carson, on 10th April 1907, an agent in the sense of the Prevention of Corruption Act 1906?"

I have no hesitation in answering that question in the affirmative, which is only another way of saying that I think the learned Sheriff was right in his finding in law.

It seems to me very little to the purpose to point to the native vigour of the common law of Scotland, and say that an offence such as that of which the Sheriff has convicted Mary Graham would have been cognisable at common law. So it would (see Hume, I. 408). But if a statute which is entitled "An Act for the *better* prevention of corruption" covers the case, why should it not be brought into use? Equally little to the purpose is it to say that this Act was mainly intended to prevent commercial corruption by striking at secret commissions in private life. If this Act was intended to be so limited, it would have been expressly restricted to such cases, instead of which subsection 3 of section 1 conclusively shews that the Act was intended to strike at persons serving under the Crown or under any Corporation or local Board. This it does by sweeping in all such persons under the generic name of agent, just as "agent" is defined in the immediately preceding paragraph as "any person employed by or acting for another," and "principal" is defined as including an "employer." At all points, therefore, these definitions seem to me to meet the case in hand. Mr Stevenson, the Chief Constable, was rightly described in the complaint as Carson's employer, for the holder of the office of Chief Constable appointed him under section 74 of the Glasgow Police Act 1866, and had, under section 77 of the same Act, the absolute power of suspending or dismissing him. Similarly Carson answers the description of a person "employed by or acting for" Mr Stevenson, because the work which he was doing at the time when the offence was committed was work which by section 83 of the same Act was made part of the "duty of the Chief Constable and of the Superintendents, Lieutenants, and Constables acting under or appointed by him." When we are in the region of definition, I should like to say that the reference in section 1 of the statute when it deals with a bribe given or offered to an agent as being "in relation to his principal's affairs or business" does not seem to me to create any difficulty, for this bribe *was* offered to the constable as an inducement or reward for forbearing to do an act in relation to the Chief Constable's affairs or business, *i.e.* forbearing to do a duty which was equally the Chief Constable's and his own.

I may add that if the Act of 1906 covers the case I think it quite idle to argue that another Act—the Public Bodies Corrupt Practices Act 1889—might also be made to cover the case. Perhaps it might. But why should the fact of there being two or more statutes applicable to the offence, disable the public prosecutor from making his election under which of them he is to bring a prosecution, any more than the existence of a rule of the common law to which he might resort if he chose? I may also add that I am quite at a loss to see what bearing decisions in the civil court as to the liability of public officials for the wrongous acts of constables can have on the construction of a statute dealing with a criminal offence.

The Lord Justice-General.—I concur in that opinion.

The Lord Justice-Clerk.—The contention of the appellant in this case as stated at the bar is based upon the view that the words of the statute, "affairs or business," must relate to mercantile affairs, and cannot be applied to employment for state or municipal duties, in which no question of business in the ordinary sense is involved. I am quite unable to accept any such view of the statute for the prevention of corruption which was passed in 1906. That view is completely excluded by the 3rd subsection of section 1, by which it is provided that "a person serving under the Crown, or under any corporation, or any municipal, borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act."

A police constable is therefore plainly in the position of a person to whom the Act may apply, and the sole question here, therefore, is whether the complaint correctly describes the agency. Is the police constable correctly described as being

the agent of the Chief Constable, under whom he was serving at the time? Now the position of the Chief Constable is this, that he has delegated to him the power and duty of selecting and appointing all constables, that he has power to suspend or dismiss all ordinary constables, such as the constable whom it was attempted to bribe in this case, that the magistrates cannot interfere with him as regards engagement or suspension or dismissal, and that he, being entrusted with the police duties falling on the municipal authority, and having engaged constables to carry out his duties of keeping order and dealing with crime, is in the active exercise of these powers, through them. The constable in doing his duties on his beat is doing so because he is employed to do so by the Chief Constable, and is responsible to him to do these duties faithfully, and to resist all attempts to seduce him into doing things contrary to his duty. I cannot doubt that the magistrate was entitled to hold, on the facts which he found proved, that in law the constable was "acting for the Chief Constable, and therefore, in the sense of the Prevention of Corruption Act 1906, was an agent."

I agree entirely with the opinion of Lord Stormonth-Darling, and do not think it necessary to say more.

Lord M'Laren.—I agree in Lord Stormonth-Darling's opinion.

Lord Kinnear.—I agree in the opinions which have been delivered.

Lord Low.—I am in the same position.

Lord Ardwall.—I also agree in Lord Stormonth-Darling's opinion.

It was intimated that *Lord Pearson*, who was present at the hearing but absent at the advising, concurred in the opinion of Lord Stormonth-Darling.—17*th January* 1908.

Counsel for Appellant, Crabb Watt, K.C., R. S. Brown; Agent, E. Rolland M'Nab, S.S.C.—Counsel for Respondent, The Lord Advocate (Shaw, K.C.), Solicitor-General (Ure, K.C.), A. M. Anderson, A.-D.; Agent, W. S. Haldane, W.S., Crown Agent. F. A. U.

OUTER HOUSE.

(*Lord Johnston.*)

292. M'Creadie *v.* Thomson.

REPARATION — DAMAGES — WRONGOUS IMPRISONMENT BY MAGISTRATE — SENTENCE OF IMPRISONMENT WITHOUT OPTION OF FINE UPON COMPLAINT WHEN FINE ALONE COMPETENT—BURGH POLICE (SCOTLAND) ACT 1892 (55 & 56 VICT. CAP. 55), SECTS. 380 (10), 487, 501 (B)—MEASURE OF DAMAGES FOR IMPRISONMENT OF HABITUAL OFFENDER.

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(*Reported ante, Vol. XIV. p.* 968; *and supra, p.* 216.)

The facts of the case sufficiently appear from the previous reports and the Lord Ordinary's note. After a proof the Lord Ordinary *assessed* the damages at £22, 17s. 2d., and *restricted* the pursuer's expenses to one-third taxed expenses since the date of the return of the process to the Outer House.

Lord Johnston.—It falls to me now to dispose of this case on the merits, it having been determined on reclaiming note to the Second Division, affirming my previous judgment, that action lay against the defender, the pursuer's averment that in his capacity as magistrate he had acted *ultra vires* in pronouncing sentence upon her being relevant, that he was not protected by privilege, and that it was not necessary to establish malice.

At the outset I would desire to express the utmost sympathy for the defender. He had only two days before been elected chief magistrate of the burgh of Wishaw, and had taken his seat on the Bench for the first time, when the pursuer was brought before him. It is apparent that he was actuated by the most honourable desire to do his duty in the position in which he had been placed, and he has been the accidental victim of an irregular practice of his predecessors, and I think of the carelessness of the Court officials. But, notwithstanding, he committed a mistake which led to the unjustifiable imprisonment of the pursuer, and to her lying in prison for twelve of the fourteen days of her sentence before she was liberated. The only question which I have now to decide is, I think, whether the surrounding circumstances form a defence to the claim which would otherwise subsist for wrongous imprisonment.

The circumstances of the case are, that on Saturday night 10th November 1906, about 8.30 p.m., the pursuer, in a state of intoxication, was being led home by her husband through Cambusnethan Street, Wishaw, her husband having had drink also, but not being so intoxicated as the pursuer. The pursuer, though a married woman, is of the prostitute class; she had had some words with a man unknown, who had accosted and was following her, and she was yelling at the top of her voice, cursing and swearing and shouting at him most obscene remarks. The party were being followed by a large crowd, when the police took her in custody, and sent her husband home. She remained in custody till Monday morning the 12th November, when she was brought up before the defender, charged with a contravention of sect. 380 (10) of the Burgh Police Act.

That subsection provides that every person

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who "commits a nuisance or uses any obscene, abusive, or indecent language to the annoyance of any person" shall be liable to a penalty of 40s. But by sects. 487 and 501 of the same Act it is provided that a magistrate may sentence any person found liable in a pecuniary penalty to imprisonment until the same is paid, the period of imprisonment corresponding to the fine of 40s. being limited to one month. In the case in question, therefore, the primary penalty was necessarily a fine, and imprisonment could only be awarded failing payment and during the non-payment.

The judicial establishment of the Burgh Police Court at Wishaw was at the date of the Court in question a Magistrate or Magistrates on the Bench, the Town-Clerk, who is also Clerk of Court, sitting with the Magistrates as a *quasi* assessor, his Depute sitting as acting Clerk of Court, the Public Prosecutor or Burgh Procurator-Fiscal, and the Inspector of Police acting as sort of Police Clerk. There had for many years prior to the occasion in question existed a most improper practice in the Burgh Court at Wishaw, that complaints were read out to the accused, not by the Clerk of Court, but by the Inspector of Police or Police Clerk, and a further practice, which I believe is more or less common elsewhere owing to press of business, but not any more really defensible, that this official only reads the manuscript detail of the charge, and not the conclusion indicating the statutory offence and resulting penalty. It is to this practice that the defender's mistake was primarily attributable. But unfortunately the Town-Clerk and Magistrates' Assessor was himself new to the office, having only been appointed six weeks before, and this being only his second Court, and he, when he heard the sentence pronounced, failed in his duty to keep the Magistrate right. Further, the then Procurator-Fiscal (for he has since retired), on whom in a secondary degree lay the same duty, depones that he did not hear the sentence, he being somewhat deaf, and so equally failed in his duty, and did not draw the Magistrate's attention to the mistake he was making.

It must, moreover, be admitted that there was considerable justification for the Magistrate's belief, that he was dealing with a common law charge of breach of the peace, which he explains led him to the mistake which he made. In the first place, the *species facti* as set forth in the complaint No. 42 of process, and still more as disclosed in the more detailed police information No. 41 of process, would have justified a charge of breach of the peace, quite as much as the actual charge of using obscene language, so much so that the police clerk, when filling in the scroll charge book, entered the case at first as one of breach of the peace, and only altered it to one of using obscene language in contravention of the statute, when he came to fill in the detention book and make up his police information. At the same time, the true nature of the charge would have at once appeared had the Magistrate himself read the complaint, or the whole of the police information. I should say that the police clerk gave a very proper and intelligible reason for changing the nature of the charge, but unfortunately he introduced into the police information a further quite intelligible but misleading statement which tended largely to confirm the Magistrate's mistake. At the close of the information he added, "This woman was convicted and fined 10s. a week ago for a similar offence in Main Street, Wishaw," and noted in red ink under the name of the accused, "Wishaw Court, B. of P., 1st November 1906, 10s. 6d. or 7 days," thus bringing breach of the peace prominently before the reader.

So standing matters, the complaint was, along with a dozen others, laid before the Magistrate in the Magistrate's private room, before the sitting of the Court, in ordinary course, for his signature to the warrant for apprehension, and when the case was called, and the complaint, so far as read, was read, the accused pled guilty, and the defender, in respect of her judicial confession, sentenced her to fourteen days' imprisonment. The plea and the sentence were filled in by the Depute Clerk of Court, who also failed to draw the Magistrate's attention to the mistake, and at the close of the Court and before leaving the Bench the defender signed both plea and sentence, along with a bunch of others comprising the Court work of the day, and finally filled in the sentence in the Magistrates' Court-book. According to usage this book was ready prepared for him with the name of the accused, the character of the offence stated as "Con. Pol. Act," but the Procurator-Fiscal merely read out to him the sentences, and in this case the defender simply inserted in the proper column "fourteen days," without taking further notice of the entry. The purpose of this book is a record of the Court business, but in particular a check on the Procurator-Fiscal in collecting fines.

On the same day, 12th November, the pursuer was taken to Duke Street Prison, Glasgow, to serve her period of fourteen days' imprisonment, without objection by her or on her behalf. On the following Monday, 19th November, the pursuer's husband, knowing nothing of the error which had been committed, which is not at all surprising, as neither he nor she could be expected to know the details of the Burgh Police Act, called on Mr Cameron, law agent, Motherwell, with a view to trying to get his wife out of prison. He gave Mr Cameron no clue to the illegality of the sentence, of which he was quite unaware, but Mr Cameron undertook to make enquiry and see what he could do. He first obtained a copy of the local newspaper of Wednesday, 14th November, No. 51 of process,

from which he found that the pursuer had been charged with using indecent language, had pleaded guilty, and had been sentenced to fourteen days' imprisonment. And on looking up the statute he saw that there was reason to suspect that an irregularity had been committed. Accordingly, on the 22nd or 23rd of November, he went to Wishaw, having, I think, again seen pursuer's husband, obtained a perusal of the complaint and brought to the knowledge of the officials that a mistake had been committed, when it was arranged, with the sanction of the defender, that a letter should be written by the Town Clerk, as Clerk of Court, to the prison officials at Glasgow, requesting that the pursuer might be liberated. In reply the prison authorities intimated that they were powerless to act without a Bill of Suspension and Liberation, and accordingly Mr Cameron was obliged to instruct his Edinburgh correspondent, Mr Robertson, S.S.C., and such Bill was presented accordingly. Interim liberation was granted, and the pursuer was liberated *ad interim* on Saturday, 24th November, two days before the expiry of her sentence, and in due course, there being no opposition, the Bill of Suspension was passed, with seven guineas of modified expenses.

I am bound to say that there is no foundation at all for the imputation, I think unfortunately made, that Mr Cameron was intervening at his own hand and in order to make business. He acted on employment, and acted properly and successfully. But I cannot equally approve the preposterous action of damages for £1000, even though subsequently restricted to £250, raised in the name of the woman M'Creadie. Nevertheless, while her character as an habitual offender, and the circumstances in which on the occasion in question she was brought before the Court may affect the question of damages, she is entitled to have her liberty protected, and the defender's action must be regarded irrespective of these considerations.

I understand it to be laid down by the Second Division of the Court (15 S.L.T. 215), following Lord Pitmilly in, I think, the case of *Strachan* v. *Stoddart* (1828), 7 S. 4, that when a person is taken into custody on a grossly illegal and irregular warrant, he is entitled to claim damages from the judge, if an inferior judge, pronouncing it, and that it is no answer for the judge to say that it was pronounced in error. The Court, however, guard themselves, also following Lord Pitmilly, from being supposed to determine that any *culpa levissima* would warrant damages against such judge. I find it, however, very difficult to draw the distinction. It has been said by judges of the highest authority that gross negligence is just negligence with a vituperative adjective added, and I think that it may equally well be said that *culpa levissima* is just *culpa* with an apologetic adjective added. It is true that in the present case, from an extrinsic point of view, the defender's error was of the most venial description, for, as I have pointed out, he was the victim of the irregular practice of his predecessors and of the negligence of others. But in my opinion his error must be judged of *per se*, and if it imports *culpa* there is no question of degree. So judging of it I cannot but regard the pronouncing a sentence of imprisonment, for which there was no legal warrant, as an illegality and irregularity, which amounts to *culpa*, and involves liability to make reparation, where the illegal sentence has been followed by imprisonment, and has, therefore, resulted in illegal interference with the liberty of the subject.

It remains, therefore, to determine the amount of damages to which the pursuer is entitled. I cannot help regretting that some small tender was not made. But the defender has thought proper to maintain the defences, which have already been disposed of in the procedure roll, and finally, and probably with reason, to clear himself of the imputation of oppression, to go to proof on the merits, and I must therefore proceed to assess damages.

That with such a personal record, the pursuer should be entitled to substantial damages for her twelve days' incarceration is out of the question, and I think I do her ample justice in giving her 5s. a day, or £3, for the personal indignity and discomfort of her compulsory confinement, and I think that I ought to add the amount of the expenses (agreed on to save taxation at £19, 17s. 2d.) involved in obtaining her liberation over and above the modified sum of £7, 7s. allowed by the High Court of Justiciary. It was contended that it was against principle and practice to give as damages or part of damages the extra-judicial costs of any proceedings not recovered in those proceedings (*Laing* v. *Watson* (1791), 3 Pat. App. 219; *M'Dowall* v. *Stewart* (1871), 10 Macp. 193; *Cockburn* v. *Edwards* (1881), L.R. 18 Ch. D. 449). It is true that the Court exercises a greater supervision over the expenses of litigation, and that the amount of expenses are taxed under the Court's direction, on the footing that only the necessaries of litigation are to be charged against the opposite party, and its luxuries disallowed. But I cannot think that I should apply that principle in a case which was not one of proper litigation. The pursuer here could not have effected the liberation to which she was entitled, without the assistance of the agent, to whom her husband appealed, and his Edinburgh correspondent. It is notorious that the modified allowance in use to be given in suspensions and appeals in the High Court of Justiciary is not based on any taxation. And I cannot think that there would be any propriety in leaving the pursuer to pay such a substantial part of the expense of correcting, so far as was possible, the defender's mistake, or, as in this case, in leaving her without the means of satisfying her

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just demands. I shall therefore give decree in the pursuer's favour for a total sum of £22, 17s. 2d., and she must have expenses of process; but as I consider the action should not have been countenanced, I think that these should be modified. Including the Inner House expenses already awarded, I think that she should have expenses in full to the date when the case returned to the Outer House, but that the expense since that date should be modified to one-third the taxed amount.—13*th December* 1907.

Counsel for Pursuer, G. Watt, K.C., Ingram; Agent, Henry Robertson, S.S.C.—Counsel for Defender, Morrison, K.C., Murray; Agents, Macpherson & Mackay, S.S.C. R. S. B.

OUTER HOUSE.

(*Lord Salvesen.*)

293. The Campbeltown and Glasgow Steam Packet Joint Stock Company Limited *v.* William Denny & Brothers.

Shipping Law—Collision—Duty where Risk of Collision—Departure from Collision Regulations—Reverse Speed—Construction of Rule to Reverse Speed as Applied to Turbine Steamers—Regulations for Preventing Collisions at Sea, Articles 18, 19, 21, and 23—Merchant Shipping Act 1894 (57 & 58 Vict. cap. 60), sect. 418.

The pursuers, as owners of the s.s. "Kintyre," raised this action for £10,000 damages for the loss of their vessel through a collision with the "Maori," a new steamer built by the defenders.

The opinion of the Lord Ordinary sufficiently reports the case:—

Lord Salvesen.—The collision which has given rise to this action occurred on 18th September 1907, a little to the south-west of Wemyss Point, in the Firth of Clyde. It took place in broad daylight, when the weather was clear and the sea smooth, so that there can be no doubt that it was the result of negligence on the part of those in charge of one or other or both of the vessels which collided.

The way the collision happened was as follows:—The "Maori," a new steamer built by the defenders, was in course of having her speed trials on the forenoon of the day in question, and for that purpose had proceeded down the Clyde to run the measured mile at the place eastward of the Skelmorlie buoy which has been appropriated for that purpose. She is a turbine steamer of the most modern type, and furnished with five engines and three propellers. The centre engine is driven by steam at high pressure supplied from the main steam pipe, and the other two engines, on the starboard and port sides respectively, are low-pressure engines, which utilise the steam after it has performed its function in the centre engine. She develops her highest speed of 20½ knots per hour when the three engines are working ahead. When it is desired to reverse, steam is shut off from the centre engine and diverted to each of two engines situated on the port and starboard sides respectively, and connected with the side propellers. The centre engine cannot be reversed; but if it is desired to reverse either of the side propellers, the centre engine must be stopped when all three engines are used.

On the day in question the "Maori" was manned by a crew of riggers and engineers supplied from the defenders' shipbuilding yard. Most of the riggers had been at sea at some period of their lives, and they were under the command of a pilot named Jackson, who was for many years connected with the Allan Line, and, after retiring from the sea, had obtained a license to pilot vessels on the Clyde. He was the person regularly employed by the defenders to take command of their vessels when undergoing their speed trials, and he had successfully performed his duty as such in connection with about twenty-four steamers of the turbine type built by them. He was thus a person of competent skill, with special experience of running the measured mile with turbine steamers, and it is doubtful whether any other pilot could have been got with the same experience of this new type of vessel.

Shortly before the collision the "Maori" had run the mile first southwards and then northwards, at a speed of about 15½ knots through the water. The tide was ebbing, and her actual speed against the tide did not exceed 14 knots. After completing the double run Jackson's intention was to bring the "Maori" round in a circle, so as to resume the run on the measured mile at a gradually increasing speed. In order to bring the vessel round for the second pair of runs it was necessary for her to take a sweep outwards into the channel so that she might complete the circle without requiring to slacken speed; and Jackson says that he had landmarks by which he was accustomed to steer in order to enable him to navigate the vessel in the way desired. His practice was to set a course from the north end of the measured mile to a point on the opposite shore in the neighbourhood of the curling pond marked on the charts. As soon as he had proceeded on this course to get a view of Ardgowan House, he had reached a point in the channel sufficiently far from the east shore to enable him to bring his vessel round on a hard-a-port helm, without the risk of approaching the land too closely.

At the time when he reached this point, Jackson observed the pursuers' steamer "Kintyre," a screw steamer of much smaller size, approaching from the northward, at a distance of from three-quarters of a mile to a mile. The "Kintyre" had set her course from a point about half a mile

off the Cloch Lighthouse, so as to pass the Skelmorlie buoy a short distance on the west side. The "Kintyre" was proceeding at full speed, and, with the ebb tide in her favour, was passing over the ground at the rate of about 14 knots an hour. It is common ground that, at the distance of from three-quarters of a mile to a mile, while the "Maori" had the "Kintyre" on her starboard bow, and the "Kintyre" had the "Maori" on her port bow, one short blast was sounded from the "Maori's" whistle, indicating that she was directing her course to starboard; and I hold it proved that, at the same time, the helm of the "Maori" was put hard a-port. At that moment it was the duty of those in charge of the "Maori," under article 19 of the Regulations for preventing collision at sea, to get out of the way of the "Kintyre"; and it was the duty of the "Kintyre," under article 21, to keep her course and speed, unless the circumstances were such as to make departure from the rule necessary.

[Said articles are in the following terms :—

Article 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Article 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.]

The case for the "Kintyre" is that, when the "Maori's" first whistle was sounded, she was on the point of crossing ahead of the "Kintyre's" course, and that there was not sufficient time then for the "Maori" to clear the other vessel. The "Kintyre" accordingly replied to the signal by two short blasts, indicating that she was directing her course to port, and immediately starboarded her helm. The "Maori" replied by a single blast; and the "Kintyre" repeated her former signal, and continued on her starboard helm. They then continued to approach each other on converging curves, with the result that, within two and a half minutes of the first signal having been given, they collided —the "Maori's" stem striking the "Kintyre" at an acute angle on the starboard quarter, and cutting into her a considerable distance. The vessels remained together for a little while—sufficient to enable the crew of the "Kintyre," with the exception of the master and engineer, to climb on board the "Maori." The vessels then separated—the "Kintyre" proceeding in a southerly direction for two or three hundred yards, until she sank. The master of the "Kintyre" was picked up by a boat belonging to another steamer, but, unfortunately, the engineer was drowned. The position of the wreck of the "Kintyre" is now marked upon the charts, so that there is practically no doubt as to the place where the collision happened.

The only facts in controversy are (1st) whether the "Kintyre" sounded a single blast immediately after the single blast of the "Maori," and (2nd) whether the "Maori" actually crossed the "Kintyre's" original course. The crew of the "Kintyre" all swear that no such blast was sounded from their vessel, and they are corroborated in this by a number of outside witnesses. On the other hand, the pilot, the steersman, and another rigger on board the "Maori" say that they distinctly heard a single blast before the two blasts were sounded; and Mr Ward, one of the partners of the defenders who was beside the pilot, says that he saw the steam rising from the "Kintyre," indicating that her whistle had been blown, although, owing to the noise made by the "Maori's" whistle, he did not hear any sound. In my opinion it is not proved that the "Kintyre" did sound this signal, but the evidence of those on board the "Maori" may be explained by the expectation which they naturally entertained that the "Kintyre" would answer their signal of one short blast by also signalling that she was directing her course to starboard; and it is possible that before the two blasts admittedly given were sounded, some steam may have been emitted without producing any actual sound. In my opinion, however, it is entirely immaterial whether such a blast were sounded or not, because there is no suggestion that any different course would have been taken by the "Maori"; and the double blast was admittedly given within a few seconds thereafter.

As regards the second point, I am satisfied that the "Maori" did not in fact cross the course on which the "Kintyre" was proceeding. The belief that she did so on the part of the pursuers' witnesses is easily explained by the fact that whenever they altered the course of the "Kintyre" to port, and the helm took effect, the "Maori" would get upon the starboard side of the "Kintyre." Much reliance has been placed by the pursuers on the evidence of a man Carsewell, who was in command of a ketch which was then proceeding up the Clyde a little to the northward, and who says that the "Maori" came between his vessel and the Skelmorlie buoy. As to whether the "Maori" was actually across a line drawn from the Cloch Lighthouse to a point a little west of the Skelmorlie buoy is, however, not established by his evidence, unless it be assumed that the ketch was approximately on the same line as that upon which the "Kintyre" had passed. If, as I believe, the ketch was considerably inshore of the "Kintyre's" course, the "Maori" would obstruct the view of the Skelmorlie buoy to Carsewell's eye without actually having crossed to the westward of it.

These being the facts, it is plain that the master of the "Kintyre" was in breach of Article 21, under which it was his duty to keep his course and speed. He was, therefore, in fault

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unless it can be shewn that the manœuvre of the "Maori" was commenced when the vessels were so close that, if the "Kintyre" had kept her course and speed, a collision would have been inevitable. In my opinion this has not been proved. On the contrary, I think there was ample time and room for the "Maori" to go round on her hard-a-port helm, and to have passed the "Kintyre" port to port at a safe distance if the "Kintyre" had simply kept her course. Even if the vessels had been approaching each other end on, or nearly end on, it would have taken at least a minute and a half or two minutes before they would have come into contact; and with three-quarters of a mile and that space of time in which to clear each other, I see no room to doubt that the "Maori" would have successfully executed the manœuvre which she intended. Whenever the "Kintyre," however, also directed her course to port, and continued—as she did—at full speed, she took the very surest means of preventing the "Maori" from keeping clear of her.

It was strongly urged by the pursuers that the fact that the "Kintyre" ported her helm was a piece of real evidence, indicating that the two vessels had already approached dangerously near, as otherwise the act of the master of the "Kintyre" was that of a madman. I am not much moved by this argument, because it too frequently happens that, at a critical moment, people in command of ships do lose their heads; and it may also be that those in charge of the "Kintyre" thought that there might be a risk in crossing ahead of a City Liner which was astern of her and a little on the starboard side. Be this as it may, I am quite satisfied that the master of the "Kintyre" committed a grave error of judgment when he took upon himself to disregard the rule, instead of relying on the "Maori" taking the necessary steps to keep clear of him. If he really thought that the vessels had approached dangerously near, his proper course was to have stopped and reversed his engines; instead of which he proceeded at full speed until the moment when the collision occurred.

It does not follow, however, that the "Maori" may not also be to blame for the collision; and the pursuers' counsel contended that, at all events, whenever the second signal of the "Kintyre" had been sounded, it ought to have been plain to Jackson that there was imminent risk of collision; and that it was his duty to have at once reversed the engines. What Jackson did was to order the starboard engine to be reversed, which involved the stopping of the centre engine, leaving the port engine to continue working ahead. He justifies this manœuvre on the ground that he would thereby bring his vessel round more smartly on the port helm, while at the same time greatly reducing her speed; and, in my opinion, this was the most seamanlike thing to do in the emergency which was created by the "Kintyre." Jackson was not bound to anticipate that the "Kintyre" would continue going full speed ahead, and if, even at that time, the "Kintyre" had reversed her engines, I think the collision might have been avoided. On the other hand, if the alternative suggestion of the pursuer had been adopted, the "Maori" would have gone on a flatter curve, and would in all probability have struck the "Kintyre" earlier, and at a broader angle, and that whether the "Kintyre" continued at full speed, or, as might reasonably have been expected, had stopped and reversed when a collision appeared to be imminent. The mode in which the vessels admittedly came together shews that a comparatively short space of time—probably less than a quarter of a minute—would have been sufficient to have brought the "Maori" round so as to entirely avoid the curve that the "Kintyre" was making. I do not think the exact speed at which the "Maori" was going, at the time of the collision, is really of much importance on this question of fault. Two witnesses say that the starboard engine had been reversed for a minute and a half before the collision; a third, that it had been going astern for half a minute only. If the latter be the true view, I think it obvious that the "Maori" must have been going a good deal faster than five knots an hour. In these questions of time, however, it is difficult for observers to make any reliable estimate. My own belief, from what admittedly took place prior to the orders being given to the engineers, is that the "Maori's" starboard engine cannot have been going astern for as much as a minute, and, if so, she must have had considerable way on at the moment of impact.

Even on this footing the "Maori" might be held to blame, if it were clear that she had infringed Art. 23, which is in these terms: "Every steam vessel, which is directed by these rules to keep out of the way of another vessel, shall, on approaching her, if necessary slacken her speed or stop and reverse." The peculiarity of this case is that the "Maori" did both slacken her speed, and did reverse in the sense that she reversed her starboard propeller; but, undoubtedly, she did not "reverse" in the full sense of that word by reversing her port propellor as well.

This is the first case as far as I know in which Art. 23 has had to be applied to a turbine steamer; but such a steamer does not essentially differ from vessels with twin screws which were capable of revolving in opposite directions which have long been in use. I think, therefore, that the word "reverse" must be taken to refer to the whole engines of the vessel which are capable of being reversed. On the other hand, the fact that a steamer is furnished with engines which are capable of moving in opposite directions is one which may be of the greatest materiality, as applied to the circumstances preceding a collision,

for it provides her with the means of altering her course much more rapidly than where any one propeller has to be relied upon.

Art. 23, which is said to have been infringed by the "Maori," has been made the subject of construction in the recent case of *Windram* v. *Robertson*, 1905, 7 F. 665. According to that decision the rule is not imperative, but, if it applies, the person who is charged with infringing it requires "to shew, not only that he did what he thought was best, but what every seaman would think was best, for the purpose of avoiding a collision," and this involves that the *onus* is upon him. In the case of *Windram* there was no doubt as to the applicability of the rule, because it is the duty of every steam vessel to keep out of the way of a sailing ship. But the duty of a steamer to keep out of the way of another depends, according to Art. 18, upon whether she has the other vessel on her starboard bow.

[Rule 18 is as follows:—

When two steam vessels are meeting end on, or nearly end on, so as to avoid risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.]

Now, before there could be any question of the rule applying, it was the "Kintyre" and and not the "Maori" which was in this position; for her action in porting her helm whenever it took effect brought the "Maori" on her starboard bow. And it was the "Kintyre" accordingly whose duty it was to keep out of the way of the "Maori" when the relative positions of the vessels had thus altered. Even if it were otherwise, I think the defenders here have satisfied the *onus* that was put upon them. Although the pursuers examined an expert, they did not put a single question to him on this subject; and it may therefore be assumed that he would not have supported the very definite case made on record. On the other hand, the expert examined for the defenders was clearly of opinion that the master of the "Maori" adopted the best means, in the circumstances, of preventing or minimising the risks of collision, and I think I am entitled to accept his uncontradicted testimony on this point. I shall accordingly pronounce a finding to the effect that the "Kintyre" was alone to blame for the collision. In ordinary course I should have followed this up by assoilzieing the defenders; but as parties have agreed by minute to any damages due to the "Maori" being assessed in the present proceedings, after the question of fault has been finally determined, I shall do nothing further.—18*th December* 1907.

Counsel for Pursuers, Dickson, K.C., Horne; Agents, Webster, Will & Co., S.S.C.—Counsel for Defenders, Clyde, K.C., Spens; Agents, J. & J. Ross, W.S. J. W. F.

OUTER HOUSE.

(*Lord Johnston.*)

Outer House. *Lord Johnston.*

Macduff v. Spence's Trustees.

294. Macduff *v.* Spence's Trustees.

Succession — Trust — Uncertainty — Direction to Trustees to Apply Interest of Residue "or so much of Said Interest . . . . as They May Deem Expedient" to Local Charitable Purposes Held Void from Uncertainty.

The facts of the case and the contentions of parties sufficiently appear from the Lord Ordinary's Note.

The Lord Ordinary *held* the bequest void from uncertainty.

Lord Johnston.—By her settlement, dated 11th May 1906, the late Miss Caroline Jane Spence, of 32 Albyn Place, Aberdeen, as regards the residue of her estate, appointed her trustees "to hold, settle and secure the same in their own names, and to apply the interest or annual proceeds thereof, *or so much of said interest or annual proceeds thereof as they may deem expedient*, towards such charitable purposes within the city or county of Aberdeen as my trustees shall think fit, full discretionary power being hereby conferred on my trustees as to the selection of the said charitable purposes above referred to, and I appoint that the capital of the residue of my said estates shall be called 'Miss Caroline Jane Spence's Fund.'"

It is admitted that, but for the words which I have underlined, this would be a good bequest for behoof of such Aberdeen and Aberdeenshire charities as the trustees of the testatrix might select. But it is maintained that the introduction of these words vitiates the bequest by creating uncertainty, not in the object, but in the subject of the bequest. It is with regret that I come to the conclusion that this contention must prevail.

The trustees, in answer to my question what did the words underlined import, gave three alleged possible explanations.

First. A direction to the trustees to apply the whole income in charity, but with a discretion to distribute among different charities.

Second. A direction to the trustees to apply the whole income in charity, but with a discretion as to distributing the whole income within the year of its accruing, anything left over being merely carried forward into the next year.

Third. A direction to apply the whole or such part of the income as they deemed expedient in charity, their discretion to be exercised within the year, and such part as they did not so apply falling into intestacy.

The only one of these suggested constructions which I think it is really necessary to consider

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is the first, and I would gladly give effect to it if I thought the words used would bear it. But I cannot do so without substituting for the actual words used certain perfectly different words, having a meaning which the words used can by no natural construction bear. I am practically asked to read the words "or so much of said interest or annual proceeds thereof as they may deem expedient" as equivalent to "in such proportions as they may deem expedient." In the first place, it is impossible in this manner to get rid of the disjunctive "or," which makes it clear that the testator had in mind two different and alternative subjects of the bequest, viz., the interest or annual proceeds of her residue, and so much of said interest or annual proceeds as the trustees might deem expedient. And in the second place, even if that initial difficulty could be got rid of, it would, I think, be impossible, in the collocation in which they occur, to paraphrase the words used in the manner suggested.

If, then, the words must bear their natural meaning in the collocation in which they are found, it follows that the testator has given a discretion to her trustees not merely, as she expressly states, "as to the selection of the said charitable purposes above referred to," but as to what part of her estate shall be given in charity, and what part shall fall into intestacy or remain with the heir and executor, for the pursuer happens to fill both positions. Such discretion I do not think that the testatrix could legally and competently confer upon her trustees.

There can be no doubt of the law that, in order to disinherit either heir or executor, the testator must by his settlement substitute somebody else, whether a person or a class of persons, to take the beneficial interest in his estate (*M'Caig* v. *University of Glasgow*, 1907, S.C. 231). There is here no question as to the certainty of the class of person or objects meant to be benefited, for it has been accepted since the case of *Crichton* v. *Grierson*, 1828, 3 W. & S. 329, that the term "charitable purposes" was sufficiently descriptive of a particular class of objects. The real import of that judgment is that a description which is not in itself really "particular" shall, out of favour to charity, be deemed to be "particular," and that has been the law of Scotland since its date. But then, in the present case, what portion of the residue, or income of residue, is given to this particular purpose? That the testatrix has not defined, but has left to her trustees. They may give all, or some, or none. That is an invocation of the *alienum arbitrium* which the law does not countenance. It has gone no further in that direction than to say that where the truster defines particular objects, he may leave it to the discretion of others to distribute his estate among those objects (*Hill* v. *Burns*, 1826, 2 W. & S. 80).

It will not support such a bequest that the trustees may apply the whole income to charity. The question is not whether the trustees may so apply it, but whether they are bound so to apply it. *Morice* v. *Bishop of Durham*, 1804, 9 Ves. 399. How can it be maintained that so far as they choose to apply the income in charity the bequest is good, and only so far as they fail so to apply it the income falls into intestacy. If that argument were good, *pari ratione*, the bequests in *Blair* v. *Duncan* (1901), 4 F. (H.L.) 1, *Grimond*, (1905), 7 Fr. (H.L.) 90, and similar cases must have been sustained instead of being found invalid.

As I think that the testatrix has left it in the discretion of her trustees how far her heir and executrix was to be disinherited, and as I think that she could not competently leave such discretion to her trustees, I am brought to the conclusion that this bequest is void.

In these cases there is always an appeal to the principle of the benignant interpretation of charitable bequests. I had to consider the extent to which that principle has ever actually been carried in the recent case of *Hay's Trustees* v. *Baillie*, 15 S.L.T. 494. I find that it has led to fixing that "charitable" is a sufficiently particular definition of a purpose to receive effect, *Crichton* v. *Grierson*, *supra*, and to the acceptance as sufficient of a very sketchy description of the actual charitable purpose contemplated, leaving to the Court to fill in the details, as in the *Morgan Hospital* case (1857), 19 D. 918, 3 Macq. 134. But I cannot find that it has been successfully applied to any other or wider extent or effect, and certainly not for the justification of the substitution for words actually used, of words having a totally different meaning, in order to give effect to the indication of a general charitable intention.

I shall therefore grant decree in terms of the first conclusion of the summons, and I think that the expenses of the case so far should come out of the estate. *Quoad ultra*, I shall continue the case, and grant leave to reclaim.—18*th December* 1907.

Counsel for Pursuer, Dickson, K.C., Hon. W. Watson; Agents, Traquair, Dickson & MacLaren, W.S. — Counsel for Defenders, Cullen, K.C., Sandeman; Agents, Morton, Smart, Macdonald & Prosser, W.S. R. S. B.

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295. Lord Kelvin and Others *v.* Whyte, Thomson & Company.

PATENT—ACTION FOR INFRINGEMENT—VALIDITY OF PATENT—FIRST AND TRUE INVENTOR—ANTICIPATION—CLAIMS—SUBSIDIARY CLAIM—INVENTION HELD TO BE TOO BROADLY CLAIMED.

This was an action of suspension and interdict brought by Lord Kelvin, F. W. Clark, and Kelvin & James White Ltd., against Whyte, Thomson &

Co. in respect of an alleged infringement of a patent.

The Opinion of the Lord Ordinary sufficiently reports this case.

The Lord Ordinary *refused* the prayer of the note, with expenses.

Lord Salvesen.—This is an action for infringement of a patent granted to the complainers for "improvements in the mariners' compass," and is directed against a firm of nautical instrument makers in Glasgow. Interdict is resisted on the ground that the patent is invalid, and also separately that there has been no infringement.

A grant of letters patent was applied for on 10th October 1902, when a provisional specification was lodged, and on 10th July following a complete specification was deposited, and was accepted on 1st October. In the application the complainer Clark, who is a director of the limited company and foreman in the wood department of their business, is stated to be the first and true inventor of the invention for which the letters patent were sought; and it is a somewhat curious fact that although this application was founded on by the respondents, the complainers up to the morning of the proof persisted in a statement that Lord Kelvin and Mr Clark were the first and true inventors. An amendment, however, was then made, which brought the complainers' position on record into harmony with the application.

The respondents' first ground of challenge is that Mr Clark was not the first and true inventor; but that James Spiers, who in 1901 and 1902 was foreman engineer in the scientific instrument department of Kelvin and James White Limited, devised the arrangement afterwards patented by the complainers. That is a question of fact on which both parties have led evidence, which I shall now proceed to consider.

The leading witness examined for the complainers was Mr Clark himself. His evidence is to the effect that he had been associated with Lord Kelvin in previous experiments with a view to improvements in compass suspensions; that he continued these experiments, and that as the result he invented the appliance which was afterwards patented; that the details were worked out by workmen in the service of the complainers, and that Spiers did the principal metal work, but entirely under his instructions. In cross-examination, when asked when he first instructed Spiers to do anything in connection with this new suspension, he answered, "I am not going to hold myself to dates, but as near as I can recollect it was in the beginning of 1902. I do not remember just what my instructions would be, because the whole thing went through a development. I tried one thing and another, and in different ways. (Q.) Is your evidence that you cannot state what bit of instructions you gave to Mr Spiers about the matter? (A.) No, I cannot give the instructions; the thing worked up and developed slowly in exactly the same way as any other work of that kind was done at the place." In further cross-examination he admits that Mr Spiers made numerous suggestions; but he affirms positively that it was he himself who suggested all the features of the device afterwards patented. Mr Clark is so far corroborated by the witnesses Kean, Potter, Linton, and Baird, all of whom were in the service of the complainers' firm at the time, and who say that they knew that Clark was engaged upon the experiments in question, and understood that he had invented the patent, and never heard of any claim being made by Mr Spiers to be the sole or the joint inventor until after the present action had been raised.

On the other hand, Spiers, for the respondents, deponed that he had had long experience of the work of manufacturing Lord Kelvin's compass bowls; that in 1899, after a conversation with Clark about the plunger suspension, the patent for which belonged to the complainers but had not long to run, Clark suggested that it would be a good thing if a new suspension could be devised, and that Spiers from that time onwards devoted a good deal of attention to this problem, and that the idea of using horizontal springs under tension was suggested to his mind by his having seen them applied to six-inch compasses for torpedo boats. He discussed the various ideas which occurred to him with Mr Clark, and they tried experiments together; and the ultimate invention was the result of their joint discussions and experiments. He says further, that when he heard that the patent had been taken out in the name of Clark, he spoke to him on the subject, and was informed that he was personally to get no benefit from the invention; and that it was necessary that the patent should be taken out in the name of a member of the firm as well as of the firm. Mr Spiers is corroborated on the point that about the time of the invention he complained that his name was not included in the patent by Mr Ferguson, who was manager of the electrical department of the complainers' business, and who also says that Spiers was a great deal engaged about 1902 with experiments in connection with nautical instruments.

I am not prepared to hold that this evidence is sufficient to rebut the presumption which exists in favour of the person who makes the application for and obtains a grant of letters patent in his own name. The *onus* of proof is admittedly on the respondents; and in order to satisfy that *onus* I must reject the evidence of Mr Clark and accept that of Mr Spiers. I cannot say that the evidence of Mr Clark was altogether satisfactory, as I would have expected the inventor to have been able to give some indication of how the ideas embodied in his invention came to be gradually evolved. At the

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same time, it may be that in the patent for a new combination of existing mechanical contrivances the patented appliance may merely be the result of a series of experiments without there being any connected train of thought leading up to the invention; and I have come without difficulty to the conclusion that the respondents' evidence is not sufficient to displace that of the complainers, strengthened as it is by the legal presumption I have referred to. This is all the more the case when the alleged joint inventor is never known to have made any complaint to his employers on the subject of his name being omitted from the patent; or even so far as appears to have mentioned the matter except in a casual conversation to a friend.

The second ground of attack is disconformity between the complete and provisional specifications. In the provisional specification the method of obtaining the improved suspension is thus described: "We take four spiral springs of the necessary strength for the weight of the compass bowl and form them into two sets by connecting each pair by a diamond-shaped piece of brass; the outer ends of the springs are attached to bolts which pass through the flanges of the brackets. By drawing the bolts through the flanges and screwing the nuts against the outer sides of the bracket flanges we get the necessary strain on the springs." In an earlier passage in the same provisional specification the patentees state that they attain the equal cushion-like resistance at which they aim by the lateral or torsional motion of tightened springs.

The form of compass suspension thus disclosed consists of two pairs of spiral springs in tension, the ends of which pass through holes in a diamond-shaped piece of brass, from the lower point of which is suspended a V-shaped hanger to carry the knife edge of the gimbal ring. The brackets in which the springs are fixed form the sides of a hood fixed on the binnacle flange, which serves the purpose of protecting the brackets from the weather.

By the time the final specification was lodged the inventors had developed their invention and had added links between the ends of the springs and the diamond-shaped piece of brass; and they also proposed to suspend the V-shaped hanger from the centre of the diamond-shaped piece of metal by one or more links. Accordingly when they come to describe in general terms how the object aimed at is effected, they say, "We attain this all-round equal cushion-like resistance by the lateral or torsional motion of tightened links and springs." Further, in both claims spiral springs and links arranged in pairs are referred to as part of the combination.

The evidence with regard to the practical effect of this variation in the mechanism is not entirely harmonious, but on the whole I prefer that adduced by the complainers. Their leading expert, Mr Dugald Clerk, while admitting that the insertion of links constitutes an improvement on the original mechanism, has no doubt that a suspension made according to the provisional specification would answer the purpose, and he thinks the addition of the links must be treated as a legitimate development of the invention for which the provisional specification was obtained, having in view the purpose of such a specification, which is merely to disclose generally the nature of the invention. I agree with this view. It has been held that a patentee who before filing his complete specification discovers an improvement on the mode which he has described in the provisional specification of carrying it into effect, is not merely entitled but bound to give the public in his complete specification the benefit of what he has so discovered (*Woodward*, per Cotton, L.J., 1887, 4 R.P.C. 175), and the same view was taken by Mr Justice Field in the case of *Crampton*, 1888, 5 R.P.C. 397. The only case that I was referred to by the respondents' counsel (that of the *Castner Kellner Alkali Co. Ltd.*, 1900, 17 R.P.C. 593) appears to me to differ entirely on the facts. That was one of the few cases in which disconformity between the provisional and complete specifications has been held fatal to the validity of the patent; but the ground of judgment was that what was disclosed in the provisional as part of the invention was the use of a stationary mercury cathode, whereas in the final specification the invention for which protection was claimed was one which involved the use of a revolving mercury cathode. That was held by the House of Lords to be an invention not merely different from but "in its leading features at variance with the invention described in the provisional specification." In my opinion, that case has no application to the facts of the present. All the features of the invention as disclosed in the provisional specification are retained in the final, with the addition of a simple mechanical contrivance, the use of which merely constitutes an improvement.

The respondents further plead want of patentable subject-matter, on the ground of prior use, anticipation, lack of invention on the part of the grantees, and lack of utility. It will be convenient to consider these various heads of objection together.

Prior to the date of the letters patent in question there had been numerous devices for suspending the compass bowl so as to prevent movements of the ship from being communicated to the card. The problem became one of increasing difficulty as the speed of steam vessels increased and new methods of propulsion were causing a different class of vibratory movement which required to be provided against. The only devices, however, which have any bearing on the question of prior use and anticipation are conveniently collected in the sheet of drawings

prepared by Mr Fitzpatrick; and in my opinion, Nos. 2, 3, 6 and 7 of these are alone of importance. In all these four forms of suspension spiral springs were used, although in the case of the James White Standard suspension the main support of the compass bowl was a vertical spiral spring, or in some cases a viscous fluid placed in an outer bowl, on which the inner compass bowl containing the card was supported. At the same time the spiral springs arranged in pairs round the James White Standard Suspension Compass to a certain extent supported the compass bowl, although their main function was to resist lateral movement. In both this form and that patented by Castle (No. 3) the spiral springs were under tension; and this form of suspension as actually used in practice is up to a certain point identical with the form patented by the complainers. The leading difference is that the tightened spiral springs in Castle's mechanism were connected by a piece of wire rope, to the centre of which was rigidly fixed the gimbal ring; whereas in the complainers' form the spiral springs are attached to the diamond-shaped piece of metal, from the lower end of which is freely suspended the carrier of the gimbal ring. In Dobbie's suspension (No. 6) the difference is that the spiral springs are not under tension and are vertical, so that they act as elastic beams. In the Hezzaneth (No. 7) the spiral springs used, although placed horizontally and attached to a shaped piece of metal performing practically the same function as in the complainers' invention, the springs were not under tension. Practically, therefore, all that the patentees here did was to combine the free suspension used by Dobbie with the spiral springs under tension employed for the same purpose by Castle. No one, however, had previously thought of combining these two; and as many minds were being directed towards the improvement of compass suspensions, I think it must be held that the new combination was not an obvious one, but involved a sufficient amount of invention to make it good subject-matter of a patent. Another way of putting the same thing is, that if spiral springs under tension had been substituted for the vertical springs used in Dobbie's, the result would just have been the complainers' patent. But the simplicity of an invention is no argument against its merit, for it is very often the most simple things that are the least obvious, although after they have been discovered it is matter of surprise that they had not been hit upon earlier. Further, it is not to be left out of view that, according to the evidence both of Clark and Spiers, the patented mechanism was not discovered until after there had been a long series of experiments by persons who were fully acquainted with the state of the art at the time.

An invention, however, which is ingenious and novel may, nevertheless, fail on the ground of want of utility; and the respondents have accordingly led a large body of evidence to the effect that the complainers' suspension is no better than, and in some respects is worse than, the suspensions previously in use. They say that Lord Kelvin's apparatus, which came to be known as the "Grummet Ring," and which was at one time protected by a patent long since expired, is much superior to the new invention of Mr Clark; that the latter has given rise to frequent complaints by those who used it, and has had to be modified so as to make it fit for use at all, and that, in point of fact, all the compasses now made by the complainers' firm, and professing to be made under the letters patent in question, are fitted with an additional gimbal ring not referred to in the specification at all, and which is said to be necessary in order that the patented device may be usefully employed on vessels of high speed. In my opinion, it is not necessary that I should decide, even if I were competent to do so, whether the grummet ring suspension or the complainers' latest is the most satisfactory. It is enough if the new suspension affords a useful choice to persons who require compasses (*Welsbach Company*, 1900, 17 R.C.P. 252). On this point the evidence seems to me to be quite conclusive. In the first place, a very large number of compasses made with the patented suspension have been sold. According to Mr Francis Clark's evidence, from two to three hundred were manufactured in 1904 and 1905, and with few exceptions these have all given satisfaction to the users. It is true that too much reliance cannot in this case be placed on the evidence derived from sales, because it is probable that any patent compass suspension associated with the name of Lord Kelvin would take the market. But several witnesses of practical experience testified that they preferred the complainers' patent suspension to all others, including the grummet ring; and the defects which were discovered, especially in relation to certain steamers belonging to the Peninsular and Oriental Company, may be explained on the footing of the idiosyncrasies of these vessels in the matter of vibration. This is borne out by the fact that the complaints were confined to vessels of a special type known as the "M" class. The circumstance that the additional gimbal ring, which was at first devised to obviate the movement of the compass card on board these vessels, is now used in connection with all the compasses manufactured by the complainers under the letters patent libelled, is explained by the fact that it is cheaper to adhere to one particular form of manufacture; and also, I think, because it was found that the suspension was rather more free than was desirable. I therefore repel the challenge of the patent on want of utility, a plea which was only put on record at a late stage.

It remains to consider whether the patent is invalid on account of (1) ambiguity in the

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specification and claims, and (2) failure to distinguish between what is old and what is claimed as new. I confess that on the latter head I have not experienced any difficulty, so far as the specification itself is concerned. But a serious difficulty does undoubtedly emerge when one is asked to construe the claims, and especially the second claim. It is matter of statutory enactment that a specification must end with a claim (sect. 5, subsect. 5, of the Patent Act 1883). This claim must contain a distinct statement of the invention; and I apprehend, if the claim is ambiguous or falls to be construed in a wider sense than the invention described warrants and so as to include prior inventions, the patent cannot stand.

As regards the first claim little need be said, because it is a claim for all the elements which make up the new combination. The spiral springs and links arranged in pairs and under tension; the hood which serves the double purpose of brackets to which the springs are fixed and of sheltering the contrivance, and the diamond-shaped piece of metal with its V-shaped hanger attached through the intermediary of links. This combination, although all its parts are old with the exception of the hood, which of itself would not I think have justified the grant of letters patent, was, as I have already held, a new, ingenious and useful combination, and therefore proper subject-matter of a grant.

The second claim, however, is in a different position. It may be assumed that the patentees intended to claim something more than was embraced in the first claim, with the view, no doubt, of more effectually protecting themselves against infringement. That is quite a legitimate thing to do; and I think that I am bound to construe the second claim benevolently, so as, if possible, to support the patent. It is at once obvious, however, that the claim is exceedingly ill-drawn. A description of the results obtained by means of the mechanism is introduced into the claim, although these are already fully explained in the specifications, both provisional and complete. Such a description is quite out of place in the claim. Omitting this, and reading the words at the end (which can have no relation to the description) as applying to the first sentence of the claim, I find that what the patentee claims is "the fixing of the suspension springs and links in a line parallel to the top of the compass bowl by such a method that the recoil of the springs is at right angles to the vertical motion of the compass bowl substantially as and for the purpose hereinbefore described and illustrated on the accompanying sheet of drawings." These latter words, I think, must be taken to refer only to the particular mechanism referred to in this claim, namely, the suspension springs and links, for there is no warrant for selecting one of the elements of the combination described in the first claim in preference to the others; and if all were held to be included, claim 2 would just be a repetition in very badly chosen language of claim 1. If I am right in this, then I think that upon the evidence led by the complainers themselves their claim is too wide. I do not attach much importance to the fact that the recoil of the springs is never at right angles to the vertical motion of the compass bowl (although the claim distinctly states that it will be at right angles), because I think it is legitimate, as Mr Dugald Clerk does, to read in the word "practically" as qualifying "at right angles." But even so, the language of the claim applies exactly to the prior invention of Castle. The fair result of Mr Clerk's cross-examination is that the first sentence of the second claim does not differentiate the invention from that of Castle, and is broad enough to include it. If the claim had been for a combination of the use of spiral springs under tension with the free suspension obtained by the diamond-shaped piece of metal with its links and hanger, I should have thought that that would have been a good claim. But I cannot see how that combination can be extracted from the language used by the patentee in his second claim. It may be worth while noticing, in addition, that whereas in the first claim the patentee claims the "suspending" of the compass bowl, in the second claim, for some inscrutable reason, he claims "the fixing of the suspension spring and links," although there is absolutely nothing novel in the method of fixing. Curiously enough, there is no mention of the springs being under tension at all, although that is insisted in in the first claim and may conceivably be read in from the general reference to the description in the specification. In this latter connection it is not unimportant to notice that the Hezzaneth suspension also exactly answers the description in the second claim if the element of the springs being under tension is left out of account, for the attachment there to the shaped piece of metal is a link attachment, although there are no intermediary links such as those described in the complainers' specification. I feel myself accordingly driven to the conclusion that the complainers' patent is invalid as it stands, although it may well be that it may be validated by a disclaimer or other amendment.

In this view it is unnecessary to consider whether, assuming that the patent were valid, the respondents' mechanism would constitute an infringement. As to this I am disposed to agree with Professor Hudson Beare that there is just as much ingenuity displayed by the respondents in inventing their form of suspension as was displayed by Mr Clark in inventing the complainers'. That, however, is not a consideration that is by any means conclusive. The microphone invented by Professor Hughes had not been thought of by Edison when he invented the

telephone; and yet it was held that an application of Professor Hughes' discovery to a telephone transmitter was nevertheless an infringement of the Edison patent. If I could have read the patent here as claiming a method of suspension consisting of the use of spiral springs under tension combined with free suspension, I might have reached the conclusion that the respondents' appliance constituted an infringement; but that again would have depended on the exact language used. I fully accept the evidence for the respondents that the springs they use are arranged radially, and must be so arranged in order to comply with their invention; and that being so arranged there is interaction amongst the springs, which has a tendency to take up the vibration of the ship and prevent its being transmitted to the compass card. Nevertheless, for practical purposes each group of springs may be treated as equivalent to one spring; and so treated, the recoil of the springs may be described as practically at right angles to the vertical motion of the compass bowl. If therefore the complainers could have claimed their patent as a pioneer patent, the respondents might have come within its scope as having used what were practically mechanical equivalents for the devices described by the patentee. But no such claim could possibly be made; and I think it is only fair that a patentee who claims protection for what is merely a new arrangement of old mechanical devices should be compelled as a condition of that protection to state in unambiguous terms what it is exactly that he claims, so that other manufacturers or inventors may avoid infringement.—19*th December* 1907.

Counsel for Complainers, Scott Dickson, K.C., Sandeman; Agents, Davidson & Syme, W.S.—Counsel for Respondents, Clyde, K.C., J. R. Christie; Agent, John Dobie, S.S.C.

J. W. F.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

296. Robertson *v.* Johnston.

Process — Printing — Failure to Lodge Prints—Action Dismissed in Terms of Act of Sederunt 2nd November 1872, sect. 5—Circumstances in which Interlocutor Dismissing Action was Recalled.

Reclaiming Note against an Interlocutor of Lord Dundas.

The Act of Sederunt 2nd November 1872 provides as follows:

1. [In certain circumstances] . . . . the Lord Ordinary shall pronounce an interlocutor dismissing the action and finding neither party entitled to expenses, and the said interlocutor shall not be recalled by the Lord Ordinary of consent, but may be recalled only on reclaiming note to the Inner House, upon such conditions as to expenses or otherwise as may be imposed by the Court or by the Lord Ordinary under remit.

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. . . . . .

5. Within four days from the date of the interlocutor closing the record, the agent for the pursuer, or for the party appointed to print the record, shall lodge with the clerk to the process two printed copies of the record as finally adjusted and closed . . . . ; and failing the said agent lodging such copies within the prescribed period, the clerk shall record such failure by a note on the interlocutor sheet . . . . ; and failing the two copies of the printed record being lodged as aforesaid, the cause shall be deleted from the debate or procedure roll, as the case may be, and shall be restored to the roll only on motion made to the Lord Ordinary by any party to the cause lodging the said two printed copies as aforesaid: Provided that if none of the parties to the cause move the Lord Ordinary to restore the same to the roll and lodge the two printed copies as aforesaid within twenty-one days of the date of the interlocutor closing the record, the Lord Ordinary shall pronounce an interlocutor dismissing the action, and finding neither party entitled to expenses, which shall not be recalled by the Lord Ordinary of consent, but may be recalled only in the manner and on the conditions foresaid.

On 20th November 1907 the Lord Ordinary (Lord Salvesen) closed the record in this action (which was of an ordinary petitory nature), and appointed the cause to be put to the Procedure Roll. The cause was thereafter transferred to Lord Dundas. On 9th December the Clerk of Court noted on the interlocutor sheet "Prints not lodged in terms of Act of Sederunt 2nd November 1872, and cause deleted from Procedure Roll." On 18th December the Lord Ordinary (Lord Dundas) pronounced the following interlocutor: "The Lord Ordinary, in respect that the parties have failed to comply with the provisions of section 5 of the Act of Sederunt of 2nd November 1872, dismisses the action; finds neither party entitled to expenses."

The pursuer *reclaimed*, and on the case being put out in the Single Bills, *moved* the Court to recal the said interlocutor and to remit to the Lord Ordinary to proceed in the action.

A correspondence between the parties' agents was produced and founded on, which shewed that the question of settlement was mooted on or about the day that the record was closed, but that nothing more was done in this matter. On 28th November the pursuer's agent sent to the defender's agent a proof print of the closed record asking that it might be returned with amendments in order that the rules of Court might be complied with. This request was repeated on 3rd, 7th, 11th and 18th December, but no amendments were sent. Prints of the closed record were tendered on 19th December, but were refused by the Clerk of Court.

Argued for the Reclaimer: The failure to lodge prints was not due to any gross carelessness on

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the part of the pursuer, and the case was one where the Court should grant the motion. The payment of the expenses of the reclaiming note would be sufficient penalty on the pursuer for his breach of the Act of Sederunt (*Glen* v. *Thomson*, 1901, 4 F. 154; *Donald* v. *Irvine*, 1904, 6 F. 612; *Boyd, Gilmour & Co.* v. *Glasgow and South-Western Railway Co.*, 1888, 16 R. 104; *Dickson* v. *Orr*, 1884, 12 R. 345).

The defender did not oppose the motion.

The Court *recalled* the Lord Ordinary's interlocutor, and *found* no expenses due to or by either party.—*8th January* 1908.

Counsel for Pursuer, Forbes; Agent, Robert Broatch, Solicitor.—Counsel for Defender, Munro; Agents, Galbraith-Stewart & Reid, S.S.C.

W. A. R.

FIRST DIVISION.

(*The Lord President, Lords Kinnear and Ardwall.*)

297. Forrest's Trustees *v.* Merry & Cuninghame.

MINES AND MINERALS—AGREEMENT—CONSTRUCTION—LEASE OF MINERALS — MINERAL TENANTS ENTITLED UNDER LEASE TO SINK PITS FOR WINNING COAL FROM LANDS OTHER THAN THOSE OF LESSOR ON PAYMENT OF WAYLEAVE —AGREEMENT BINDING TENANTS TO RESTRICT OUTPUT FROM FIELDS OTHER THAN THOSE OF LESSOR TO FIXED QUANTITY AND TO PAY ADDITIONAL SUMS ON COAL WON IN EXCESS OF SAID QUANTITY—CIRCUMSTANCES IN WHICH TENANTS WERE HELD ENTITLED TO EXCEED LIMIT ON PAYMENT OF SUMS STIPULATED.

Reclaiming Note against an Interlocutor of Lord Salvesen.

In this action the trustees of the late John Clark Forrest of Auchinraith sought (1) declarator that Messrs Merry & Cuninghame, the mutual tenants in certain lands belonging to the trustees through which the tenants had the right of winning coal from the lands of neighbouring proprietors, were not entitled to win from said neighbouring lands more than a certain quantity of coal annually; and (2) interdict against the defenders from so winning more than the said quantity.

The facts of the case appear fully from the Opinion of the Lord Ordinary (Salvesen), which was in these terms:—

Lord Salvesen.—The late John Clark Forrest was proprietor of the estate of Auchinraith, a property which contains valuable seams of coal. It adjoins certain small properties called Birdfield, Springwell, part of Auchinraith and Aitkenfin; and since 1872 the coal in these adjoining lands along with the coal in Auchinraith has been let to the same tenants and wrought by pits in the lands of Auchinraith. The pursuers are the trustees of Mr Forrest, and now own the estate of Auchinraith; and the defenders are a limited company, who are the successors of the original tenants of the mineral field.

On 4th January 1889 Mr Forrest granted a lease of the coal in his lands of Auchinraith to the defenders' author for thirty-one years from the term of Whitsunday 1888, for payment of a fixed rent of £2000 per annum, or lordships in the lessors' option. By this lease Mr Forrest conferred power on the tenants to sink pits for the purpose of working not merely the coal in the lands let by him but also any coal in the adjoining lands. The consideration for this privilege was the payment to Mr Forrest of a wayleave of a penny per 22½ cwts. provided for under a previous agreement, which was referred to and adopted in the lease. About the same time that this lease was entered into, leases were granted or existing leases modified and confirmed by the proprietors of the adjoining lands; and it is a fair inference that the whole of these deeds were the outcome of a general agreement between the various proprietors and the mineral tenants.

Under the lease of 4th January 1889 it was provided that lordships, which Mr Forrest was entitled in his option to exact instead of the fixed rent, were to be paid to him according to a sliding scale, and that the wayleave of one penny per ton should be paid directly by the mineral tenants. The other proprietors also stipulated for a fixed rent, or in their option a lordship or a fixed sum of sevenpence per ton of 22½ cwts. The sliding scale appears to have been very favourable to Mr Forrest, for it provided that he should be entitled to payment of two-fifteenths of the average yearly selling price of the coal, in the event of that exceeding the lordship of 6¾d. per ton of 20 cwts. Whenever accordingly the selling price of coal at the pithead exceeded 4s. 6d. or 5s. a ton, it was the tenants' interest after they had taken sufficient coal from the lands of Auchinraith to pay the fixed rent, rather to work out the coal beneath the adjoining lands than to increase their output from the minerals of Auchinraith.

Of even date with the lease the parties entered into a minute of agreement; and it is upon the construction of a clause in that deed that the main controversy turns. The clause is quoted at length in Condescendence 4, and by it the defenders' authors "undertook and bound themselves that from and after the term of Whitsunday 1893 they will work the coal in the adjoining properties only to such an extent as to enable them to pay to the several proprietors thereof such sums of lordship as will amount to but not exceed the fixed rent agreed to by their existing leases to be paid to such proprietors respectively." Had the clause stopped there, there would have been no room for doubt, as the language is not open to two interpretations. There follows, however, a declaration in these terms: "If in any year during the currency of this lease the sums payable to such proprietors shall exceed the said fixed rent, then and in that event the second parties shall be bound, as they hereby agree and bind themselves and their foresaids, to pay to the first party and his foresaids (that is, the pursuers) the sum of one penny per ton on every ton of coal worked from the lands of such adjoining proprietors in excess of the quantities necessary to make up or equal the said fixed rents payable to them as above mentioned."

The defenders contend that this clause read as a whole gives them the right to work out the coals in the adjoining lands as fast as they choose on payment

of one penny per ton on all coal from such lands in excess of the quantities required to make up the fixed rents; and they referred to various cases in which prohibitions with somewhat similar qualifications had been so construed: *Woodward* v. *Gyles*, 1690, 2 Vernon 119; *Aylet* v. *Dodd*, 1741, 2 Atkyns 238; *Leigh* v. *Lillie*, 1860, 30 L.J. Ex. 25; while the pursuers referred to *Gold*, 1870, 8 M. 1006; *Mackenzie*, 18th June 1811, F.C., affirmed 6 Pat. 117, and *Mackenzie*, 13th December 1811, F.C. In further support of their construction of the clause, the defenders maintained that so small a sum as one penny per ton could not be treated as a penalty for violating a prohibition, and they also founded upon the clause in the same agreement quoted in Answer 4, under which a restriction as to making up a deficiency between the fixed rent and the lordships payable in respect of the coal actually worked in any given year is not to apply "while and so long as the tenants restrict their output from the said adjoining proprietors' lands, so that the lordships payable to them do not exceed the fixed rents." They further point to the admitted fact that ever since 1893 there has been an average excess of output from the adjoining lands over the amount required to meet the fixed rents and lordships of about 55,000 tons per annum; and that notwithstanding the pursuers and their author have accepted the sum of one penny per ton on this excess, although it would have been far more to their interests to have insisted on the output from their own lands being increased. Finally, they contend that the pursuers' construction of the clause if given effect to would be contrary to the good faith of the agreement made with the adjoining proprietors.

I am not much impressed with this last argument, because under the leases of the coal in the adjoining lands the defenders are not under any obligation to work the minerals so long as they pay the fixed rent. It may well be that the adjoining proprietors might have objected to being deprived of the chance of having their coals worked out more speedily, but that was a good reason why the minute of agreement should be entered into between the owners of Auchinraith and the mineral tenants alone; and if the mineral tenants are not violating any obligation which they undertook to the other proprietors, it does not seem improbable that they should have put themselves under this prohibition in a question with the pursuers. As regards the inference which is to be drawn from the actings, it must be noted that Mr Forrest, who was a party to the agreement, died on 28th August 1893, and that during his lifetime no question as to its construction could possibly have arisen. The argument would have been stronger if Mr Forrest—who no doubt had a clear view of what he was stipulating for—had consistently acted contrary to his own interests on the view of the agreement for which the defenders contend. But the fact that his trustees may either have misinterpreted the clause or not had their attention directed to it for fourteen years after his death, does not seem to me to have much bearing upon the true construction. The other points which I noted first do at first sight seem to favour the interpretation on which the defenders found; for if the prohibition of working was to be enforced one would have expected a higher penalty than a penny per ton to be exacted, even if to that be added the restriction to which I have already referred, and which in actual circumstances could have had no deterrent effect. I also recognise fully that a clause which is expressed as prohibitory may nevertheless be so qualified as to confer an option of contravening on payment of a stipulated sum; and the decisions quoted by the defenders contain illustrations of such clauses. In the end, however, the question comes to be one of construction of the particular clause; and I am of opinion that I cannot construe it as giving the mineral tenants a licence to work as much coal as they please from beneath the adjoining lands so long as they pay the stipulated one penny per ton. If that was the intention of parties, I cannot understand why there was any prohibition at all. It would have been much simpler to have said that if the tenants worked coal in the adjoining properties, etc., then they should pay one penny per ton on the excess quantities so worked. On the other hand, it is possible to find a good reason for the clause being expressed as it is, for it would not always be easy to ascertain during the currency of any particular year whether the prohibition was being contravened; and in any event it practically gave the owners of Auchinraith the option either of enforcing the prohibition or of accepting the stipulated one penny per ton, whichever they might think most to their interest.

Parties were agreed that all that I should decide at present was this question of construction, so that they might have an opportunity of getting my judgment submitted to review without any further expense being incurred. I have accordingly limited my interlocutor to a finding in terms of the above opinion.

The Lord Ordinary found—

that, on a sound construction of the Minute of Agreement, dated 4th January 1889, between John Clark Forrest and Merry & Cuninghame, referred to in the summons, the defenders are not entitled to work out the coal in the lands of Birdfield, Springwell, part of the lands called Auchinraith and Aitkenfin to any greater extent than is required to enable them to pay to the several proprietors of the said lands such sums of lordship as will amount to, but not exceed, fixed rents amounting *in cumulo* to £550 sterling per annum.

The defenders *reclaimed*.

The following authorities were referred to in the debate:—For the Reclaimers: *Woodward* v. *Gyles*, 1690, 2 Vernon 119; *Aylet* v. *Dodd*, 1741, 2 Atkyns 238; *Leigh* v. *Lillie*, 1860, 30 L.J. Ex. 25; *Rolf* v. *Paterson*, 1742, 2 Brown's Parl. Cas. 436. For the Respondents: Fry, Specific Performances, 99, 142, 146, 148, 156; *M'Kenzie* v. *Craigie*, 18th June 1811, F.C., affd. 6 Pat. 117; *M'Kenzie* v. *Gilchrist*, 13 Dec. 1811, F.C.; *Cross* v. *Muirhead*, 1813, Hume's Dec. 860; *Campbell* v. *M'Laurin*, 1814, Hume's Dec. 864; *Gold* v. *Houldsworth*, 1870, 8 M. 1006.

The Court *assoilzied* the defenders.

The Lord President.—My Lords, the Lord Ordinary has so well set forth the facts in this case that I do not think it is necessary to repeat in another form what he has already said. But I would call your Lordships' attention to two remarks made by the Lord Ordinary, with both of which I cordially agree. The first of these is: "It is a fair inference that the whole of these deeds were the outcome of a general agreement between the various proprietors and the mineral tenants." I think that is perfectly true,

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The Lord President.

and it goes a long way towards the settlement of the question with which I shall ultimately have to deal. The other remark of the Lord Ordinary is as follows: "I also recognise fully that a clause which is expressed as prohibitory may nevertheless be so qualified as to confer an option of contravening on payment of a stipulated sum." With that statement I also agree. The question is one of construction, and of construction only, of this particular clause. I do not think that other cases can be any authority in such a matter. They merely serve as illustrations. The true consideration, when the form of the clause is ambiguous, must always be this: Is the leading object of the clause to prohibit a thing from being done, or is the leading object only, either not to have the thing done, or to get a payment if it is done? The farming cases which were cited to us seem to rest on very clear principles. In farming, matters may be done which would cause an irreparable injury, and though you may covenant for damages for irreparable injury, as indeed this Court has often to award them, yet the sum received by way of penalty or damage may never adequately compensate for the injury done. In such cases you would be entitled to ask the Court, and the Court would be right in granting, interdict against the irreparable injury being done. Examples of what I refer to are the breaking up of old pasture, or the cutting down of an ancient wood.

Now we come to the clause in question. Is it more likely that it was meant to be an absolute prohibition of the coal being worked, or is it more likely that it was meant to be a stipulation that if it was worked a royalty was to be paid at a certain rate? Upon the whole I prefer the latter interpretation. The only interest that the pursuers here can qualify is that it would give an indirect lever to compel more of their coal being worked, and if prices were at a certain rate that would be greatly to their advantage under the sliding scale stipulation. So far as I can see, that is true, and I am not overlooking it; but I think it is overweighed by other considerations. In the first place, as I say, it is only an indirect lever, because it might not force Merry & Cuninghame to work the pursuers' coalfield at all. No doubt it is probable that, having spent a certain amount on the pit, they would work the coalfield, but that probability might to a large extent be upset, if I may use the expression, by a great many circumstances. In the first place, it obviously would be upset if any faults or such things arose in the pursuers' coalfield, which would make working in the pursuers' coalfield more than usually expensive. In the second place, it might be upset by the state of the market or the condition of Merry & Cuninghame's mining leases elsewhere. If they had to pay under this sliding scale, and then prices rose to a very large extent, it might be good policy for them even to sacrifice their pit expenses in this field and to work their other pits in order to get such coal as they required. All this is of course pure speculation, but at the same time it shews that this is only an indirect lever and not a true *compulsitor*.

The matter which really weighs upon my mind is this. Agreeing as I do with the Lord Ordinary that this was the outcome of a general scheme, it seems to me that the construction of the clause which is urged by the pursuers is, if I may say so, in utterly bad faith as regards the arrangement with the smaller proprietors. I cannot believe that the smaller proprietors would have entered into their agreements, which were *unico contextu* with the agreement founded on, if they had known that such a clause was to be put in force against them; and I cannot believe that Merry & Cuninghame would have assented to such an arrangement. Further, there is the phraseology of the clause itself, especially when taken along with the phraseology of the final words of clause 4, the clause which made provision for an alteration of the time for making up shorts from three years, which it had been before, to one year for the future. That clause concludes with this declaration: "Declaring, however, that this restriction shall not apply while and so long as the tenants restrict their output from the said adjoining proprietors' land." That is a most extraordinary expression to use if, as a matter of fact, the tenants have not the right, during the whole currency of the lease, to restrict their output or not as they choose. This equally applies in any year of the lease, and yet, according to the construction of the pursuers, during all the years of the lease except the first four the tenants had not an option at all to put their output above the amount of the fixed lordship. In other words, they would not be in a position to restrict their output from any action of their own. Upon the whole construction I come to the conclusion, opposite to that of the Lord Ordinary, that the meaning of the clause is that it is not to enforce prohibition, but is to fix a scale of payment if the coal is worked above a certain amount.

The result of that view is to get rid of the action, because the action is not framed for recovery of any sums as in name of wayleave, and it is not said that Merry & Cuninghame have refused to pay any such sums. Therefore I am of opinion that the proper decree here is one of absolvitor.

Lords Kinnear and *Ardwall* concurred.—*10th January* 1908.

Counsel for Pursuers, Dean of Faculty (Campbell, K.C.), Chree; Agents, Forrester & Davidson, W.S.— Counsel for Defenders, Clyde, K.C., Hunter, K.C., Murray; Agents, Menzies, Bruce-Low & Thomson, W.S. W. A. R.

OUTER HOUSE.

(*Lord Johnston.*)

293. Lord Advocate *v.* Glengarnock Iron and Steel Company Limited.

Mines and Minerals—Trespass—Lease—Lease by Crown of Minerals Under Sea to Owner of Lands and Minerals Ex Adverso—Subjects Worked as Unum Quid—Subjects Leased "All and Whole the Whole Beds and Seams of Coal"—Claim by Crown for "Wayleave" as Damages in Respect of Conveyance of Coal Won in Landward Property Over Ways in Subjects Leased—Held, on the Terms of the Lease and in the Circumstances in Which it was Entered Into, That There Had Been No Trespass.

The facts of this case and the contentions of parties sufficiently appear from the Lord Ordinary's Note.

The defenders pleaded: "4. The defenders not having trespassed upon the Crown lands as alleged, should be assoilzied.

The Lord Ordinary *sustained* the defenders' fourth plea in law, and *assoilzied* them from the conclusions of the action.

Lord Johnston.—Mr Robertson Cuninghame is the proprietor of the estate of Auchenharvie, including Seabank, which lies on the Ayrshire coast, between Saltcoats and Stevenston, and of the minerals thereunder down to low-water mark on the foreshore. In 1889 and again in 1898, the Crown as proprietor of the minerals under the sea let to Mr Cuninghame for thirty-one years from the term of Martinmas 1888 the minerals below low-water mark *ex adverso* of his property. The area so let is shewn on the plan appended to the lease of 1898, the part surrounded by a red line being that contained in the lease of 1889, and the contiguous portion, surrounded by a blue line, being that contained in the lease of 1898.

In 1893 Mr Cuninghame granted a lease to the Glengarnock Iron and Steel Company, and to John Charles Cuninghame of Craigends, the sole partner of the said firm, of the minerals in his own property, and sub-let to them the minerals which he held under the two Crown leases. They thus became, as lessees or sub-lessees, the tenants of the whole field under Mr Cuninghame's control as a combined subject. The duration of their lease was thirty-one years counting from Martinmas 1888, so as to run out with the ish of the Crown leases.

The Glengarnock Iron Company, now converted into a limited company, in working under Mr Cuninghame of Auchenharvie, have treated the field as one, and in the scheme which they have adopted for carrying forward their underground workings they have disregarded the fact that they were really working under two separate proprietors, The result is that as the whole coals won in the combined field are brought to bank by a pit on Mr Cuninghame's property, it has happened that some of the coals got above low-water mark, and therefore from Mr Cuninghame's land, pass through an angle of the mineral field belonging to the Crown, before they reach the incline by which they are brought to the pit bottom. The Crown now come forward to claim a wayleave on the coal which has been so drawn. They restrict their claim to damages calculated at the rate of 1d. per ton wayleave, which they maintain is a reasonable charge for the drawing of coal through the under-sea area in question. The amount at present claimed is £715, 10s. on 171,722 tons down to August 1905, and £94, 4s. 1d. on 22,609 tons between August 1905 and November 1906, and all further claims are reserved. The ground of action is thus set forth in Cond. 4: "By leading or drawing through the said sea area a coal other than the coal let by the said commissioners, the defenders have trespassed and are continuing to trespass upon the property of the Crown, and are liable in damages to the extent of the sum sued for," and no other ground of action is pleaded.

The action is directed entirely against the Glengarnock Iron Co. Ltd., Mr Cuninghame of Auchenharvie not being called. But the action admits of being disposed of just as if it had been directed against Mr Cuninghame himself, as the defenders can only plead his right, and are no further liable than he would have been liable.

There is thus raised between the parties a sufficiently difficult general question, which I do not think has yet occurred for determination in Scotland. But besides disputing the right of the Crown to claim a wayleave which is not matter of contract, on general principles, the defenders maintain that the present case depends on exceptional circumstances, in respect that the Crown leases were granted to Mr Cuninghame "with a view to the coal thereby let being worked along with the landward coal belonging to Mr Cuninghame lying *ex adverso*, the landward and under-sea coal being treated for all working purposes as one single or common field. This was understood and agreed to by both parties to the lease." The defenders thus, and in other passages of their answers, refer the matter to what they term an understanding or agreement between the parties with regard to common working. If by this they mean to found on a separate term or condition, modifying or controlling the contract of lease, I do not think that it is relevantly averred. But if they mean that such must be held to be an implied term of the contract from the circumstances surrounding the contracting parties, and from the

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terms of the contract itself, then I think that their defence must be considered. It will be convenient therefore to examine the grounds which the defenders have for this special defence before considering the general questions of law which the case raises.

The important circumstances surrounding the contracting parties were these: Mr Cuninghame had undoubted right to a valuable mineral field in his landward property, in which was admittedly included the foreshore *ex adverso* of his estate. Whether this field was being worked prior to 1888 I am not informed, and it is not material. It was known with reasonable certainty that the coal measures extended underneath the sea, below low-water mark. Of the coal below low-water mark the Crown were undoubtedly proprietors. The coal below low-water mark is to the dip of the coal under the foreshore and under the landward property of Mr Cuninghame. This is to be presumed as a natural fact, but it is also to be implied from the terms of the leases, and was, I think, admitted. It was also admitted in argument, and stands to reason, that the Crown coal could not be practically worked by pits sunk below low-water mark on Crown property, and must be worked, if at all, through the workings and pits in Mr Cuninghame's landward property. And it is a necessary inference from this, and from the circumstances of the locality as disclosed on the plan, including what is known as to dykes and burnt coal affecting the under-sea coal, that Mr Cuninghame of Auchinharvie or those in his right were the only tenants who could work the Crown under-sea coal to profit, and therefore the only possible tenants. I think that these are the only external circumstances which are relevant and competent to be considered in reviewing the terms of the leases themselves, and that of them no proof is required.

The first lease of 1888, which includes the area surrounded by a red line next to Saltcoats harbour, lets to Mr Cuninghame "All and Whole the whole beds and seams of coal, culm, or dross, ironstone and ore or fireclay, in or under the bed of the sea *ex adverso* of" his lands within certain boundaries, that on the north-east being the line of ordinary low-water mark as defined on the Ordnance Survey Map, and that for thirty-one years from Martinmas 1888, with right to Mr Cuninghame to put an end to the lease at the end of every third year on six months' notice. Now the first thing to be observed is that the lease is granted to Mr Cuninghame and his heirs in the lands of Auchinharvie and "to his or their assignees or sub-tenants," without the usual *delectus personarum* to the lessor, subject to the sole condition that Mr Cuninghame and his heirs should remain bound jointly and severally with the assignees and sub-tenants in implement of the obligations under the lease. At the same time, creditors and managers for creditors are excluded. Having regard to the facts that Mr Cuninghame had a mineral field of his own contiguous to that included in the lease in question, and that in the knowledge of the parties the minerals included in the lease in question could only be worked through the inclines, levels and pits in Mr Cuninghame's own property, I regard this somewhat exceptional power of freely assigning or sub-leasing as indicating that in the contemplation of the parties the working of the minerals in Mr Cuninghame's landward property and the Crown's under-sea minerals would be and remain in the same hands, and would be developed as a combined mineral field. Mr Cuninghame as lessee receives full power "to search for, work, win, raise, calcine and carry away the coal, culm or dross, ironstone and ore or fireclay hereby let, and to sink, drive, and make use of all pit shafts, mines, passages, drifts, air-courses and water-courses as well for the winning, working, getting, drawing or bringing to the surface or pithead the coal, culm, or dross, ironstone and ore or fireclay from and out of the said mines, seams and beds hereby let, as for draining and ventilating the said respective mines or seams." When it is regarded that the mineral area in question was such that it could not be practically reached by pits or shafts sunk within itself—that is, below low-water mark—it is apparent that part of this last quoted clause is matter of style, and really inapplicable to the circumstances. While it would undoubtedly be necessary both to ventilate and drain the workings under sea as a practical operation, the air-courses and water-courses must be part of a combined system for working the under-sea minerals along with those in the lessee's landward property. And it follows also, I think, of necessity that as the coals got in the under-sea area must be brought to the surface through the lessee's own landward property, the mines, passages and drifts, which either feed or are themselves the main drawing courses in the Crown's under-sea area, and those in Mr Cuninghame's landward area, must, in a reasonable working of the combined field, be laid out and carried forward on a joint plan or system.

So entirely, indeed, were the Crown dependent upon Mr Cuninghame as their sole possible lessee, that for this pretty extensive mineral field they could only stipulate a fixed rent of £10 under the 1889 lease, and an addition of £5 under the 1898 lease, though the royalties which the Crown were entitled to demand in place of this fixed rent were substantial. They were, however, in most cases much smaller than the royalties which Mr Cuninghame was able to obtain from the whole field which he let and sublet to the Glengarnock Iron Company in 1893.

Then Mr Cuninghame binds himself to make all practical exertions for working and putting out and disposing of the coal, etc., let to him, and to carry on the workings at a depth of not

less than forty fathoms beneath the bed of the sea; and during the continuance of the lease, to work the coal, etc., "hereby let, and to manage and carry on the same in a fair and orderly manner, and according to the best and most approved method of working mines and seams of the like nature in Scotland, and shall keep the same at all times thoroughly drained while being wrought so as not to hazard or endanger the drowning or firing or otherwise injuring" the coal, etc., hereby let or adjoining thereto, or the working or away carrying thereof, all to the satisfaction of the Commissioners of Woods and Forests or their inspector, "provided always that in the event of any dook-pumping machinery being overpowered by influx of water, or in the case of the machinery breaking down and water accumulating in the dook, the second party (the lessee) shall not be bound to pump out such water if the influx of water is such as cannot be overcome by reasonable means."

Now, here I have two points to observe on. First, having regard to the circumstances generally, and the relative situation of the minerals in particular, I do not think it possible to conceive that the best and most approved method of working the Crown's under-sea minerals could be adopted except as part of a comprehensive scheme for working them in conjunction with the lessee's landward minerals. Second, the dependence of the Crown workings on the lessee's landward mineral property is made conspicuously apparent by the provision with regard to a possible influx of water which could not be coped with. It was an underlying fact that that water could only be cleared by raising it through the lessor's landward property. If it overpowered the pumping machinery during the lease, the result was the closing of the under-sea workings, while at the end of the lease the Crown must have remained practically in Mr Cuninghame's hands, and if they did not succeed in renewing the lease with him, anything that remained of their field must have been left to be drowned out.

These two considerations further tend to the implication that in contemplation of the parties the whole field was to be treated as a *unum quid* in Mr Cuninghame's hands. But this is still more clearly shewn by the next passage in the lease, which provides for the leaving of barriers on certain of the boundaries of the coal let, but with the marked exception of "the north-eastern extremity, or wherever said space or area hereby let adjoins the coal or other minerals in the lands belonging to the second party (*i.e.* the lessee)."

I think the only other passage in the lease to which I need refer is the one in which the Crown has to stipulate for access for inspection purposes "to all or any of the mines or seams hereby let by any pits or shafts for the time being belonging to or worked or used by the lessee or his foresaids."

In the above I have referred solely to the lease of 1889. I find it unnecessary to refer to the supplementary lease of 1898, as it only incorporates by reference the conditions of the principal lease. Nor is anything to be gained by reference to the lease between Mr Cuninghame and the Glengarnock Iron Company, as the Crown were in no way parties to it.

I return now to the record, and particularly to Answer 3, where the method of working is explained. The defenders, working, as I have said, to the dip, have naturally extended their main haulage road or incline from the pit bottom towards the under-sea coal. The coals won from the working faces have been led by side roads to this main road for the purpose of being hauled to the pit-bottom. In the natural course of working, these side roads have not been taken on the level into the main haulage road, but are themselves minor inclines going to the dip and striking the main incline at an acute angle. Certain of these side roads commencing in the landward portion of the coal are continued through the under-sea coal and reach the main incline at a point within the under-sea area. Accordingly, the defenders state "portions of the landward coal were drawn from Auchenharvie through portions of the under-sea coal measures, and thence back through the Auchenharvie portion of the mineral field to the mine or pit. All of the said side roads here in question run continuously through the landward and under-sea coal measures, and their formation was requisite and necessary for the proper working and development of the under-sea minerals, apart from any consideration of the landward coal. This method of working, which is a proper and ordinary method of working a mineral field in such circumstances, was adopted by the defenders and their predecessors merely as being the most convenient," and they go on to say that they could have arranged otherwise had they been called upon. I do not take the latter matter into consideration at this stage. At present I am only concerned with the defenders' statement of the method of working adopted, and the pursuer's admission "that the minerals were worked according to the method stated."

In his argument the learned Solicitor-General pointedly rejected the idea that he could rest his claim upon recompense. He based his claim entirely on an invasion of a right of property, and admitted that if he did not succeed on that ground, the Crown's action must fail. I am not altogether so clear as the learned counsel that his case could not be based on the doctrine of recompense. For when the agreement between the Crown and Mr Cuninghame is considered, it must, I think, be admitted that the Crown would have got a larger rent and royalties had the inclines and roads through their coal been opened up prior to the lease, and that the Crown therefore paid in the diminished rent and royal-

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ties for the actual opening of them up. It was open therefore, I think, to the Crown to contend that if Mr Cuninghame occupied and used these inclines and roads for purposes of his own, outside the lease, he was occupying and using what had cost the Crown outlay, and was liable to the Crown in recompense accordingly. But as the counsel for the Crown did not think proper to maintain this probably somewhat far-fetched contention, and as I think that the case falls to be disposed of adversely to the Crown on other grounds, I do not consider the question further.

The main contest between the parties was on the application to Scotland of the English doctrine of trespass, and damages, as for trespass, measured by a wayleave. I think that there is very great difficulty in applying the English law on this subject to Scotland: first, because the law of trespass is not quite the same in the two countries; and, second, because the English decisions do not make very definite the principle on which they reach the result that a wayleave should be paid as damages in such a case as the Crown postulates.

In England an action of damages lies for trespass even when no damage is done, though the damages found due may be nominal. In Scotland an action of damages for trespass can only relevantly be laid when actual damage is specified. As no damage has been done by the actings of the defenders complained of, it is difficult to see how in England anything but nominal damages could be reached in the present case, and it is more difficult still to see how in Scotland a relevant action could be raised.

But a series of English decisions have been founded on which, carrying into effect the view that no man can be allowed to take benefit by his own wrong, have reached the conclusion that trespass in the circumstances postulated by the Crown must be paid for by way of wayleave. This is doubtless just; but I confess that the English judges appear to me to be somewhat hard put to it to reconcile the result with any definite principle.

The rule was first adopted by Parke, B., at the trial before him of *Martin* v. *Porter* (1839), 5 M. & W. 351, but the point was not referred to when the case came before the Court of Exchequer. The rule was accepted by Lord Hatherley, Lord Chancellor, in *Jegon* v. *Vivian* (1871), L.R. 6 Ch. App. 742, and in *Phillips* v. *Homfray* (1871), in the same volume, p. 770. But the judgments do not assist in reaching the matter of principle. In the former case there could be no claim for wayleave during the lease, as the use of the roads in the seams let for drawing other coals was given by the lease. The claim only arose after the lease came to an end, and Lord Hatherley ordered "an enquiry of what ought to be paid by way of wayleave for the passage of the coal through the mines since this" termination of the lease, but gave no reasons. In the latter case (p. 780) he says: "I at first felt some doubt as to compensation for wayleave; but on further consideration I think that on principle it ought to be given, whether the cases have as yet gone that length or not. . . . This Court has now the power to grant compensation in respect of a continuously accruing damage *de die in diem*, arising from a continuous trespass underground, which can only be stopped by injunction restraining any further conveyance of coal through the respondent's property. These damages cannot be better assessed than by an enquiry into what is fit and proper to be paid for wayleave for the coals carried through the property." But even this does not assist to reach the point of principle.

For that reference must be made to *Whitwham* v. *Westminster Brymbo Coal and Coke Co.*, L.R. [1896], 1 Ch. 894 and 2 Ch. 538, where the principle of "the wayleave cases" was adopted and applied to the unauthorised occupation of land for a bing for mineral refuse. The learned judges had much difficulty in overcoming their prepossession that in a case of trespass upon land one must "consider what the plaintiff has lost, not what the defendant has made out of it"; but they reached the conclusion that something must be paid in name of damages on the principle that "a trespasser shall not be allowed to make use of another person's land without in some way compensating that other person for that use." You are not to take an account of the profits derived by him. It is in fact a matter of indifference whether he has made profit at all. But when the trespass consists of using a way over the plaintiff's land, a convenient way of assessing the damages may be by an enquiry as to wayleave. But even "if you can do nothing better, then by rule of thumb the trespasser must be charged for the use of the land" (per Rigby, L.J., at p. 543). Reference may also be made to Lord Hatherley's judgment in *Livingstone* v. *Rawyards Coal Co.* (1880), 7 R. (H.L.) 1. This is the only case in Scotland where apparently the question has been touched on. See also the Lord Ordinary's (Craighill's) judgment, 6 R. at p. 924. Now I cannot say that the judgment in *Whitwham's* case aids my point in reducing the question to one of principle, and in finding an answer in principle to the initial difficulty which all the judges who took part in the decision appear to have felt. After renewed consideration of the case I have come to think that the difficulty may be more apparent than real. I think that the term trespass has a wider meaning in England than in Scotland, and that what the English judges were groping after in their wayleave cases was just the doctrine at the bottom of the old Scottish law of "violent profits," which is as old as Stair (II. 9. 44), and probably much older.

I should, therefore, but for two further considerations, have been prepared to sustain as

relevant the Crown's case, on the footing that the circumstances assumed amount to something more than trespass, though in England that expression may cover them, and that the English doctrine of damages by way of wayleave in such a case is really merely a development of the Scottish law of "violent profits."

But I think it has been overlooked that what is let here is not a mere privilege of taking coals, but "All and Whole the whole beds and seams of coal," etc., in or under the bed of the sea *ex adverso* of the lands belonging to Mr Cuninghame. What does that import? If there had been a disposition of the lands, with a reservation in similar terms, what remained with the disponer would have been, not the mere privilege of working and winning the coal, of reducing it to what in England is termed a chattel, and removing it in its chattel state. What would have been reserved would have been the stratum of terrestrial space occupied by the coal, with right to remove the coal, but also to use the space for such purposes as the holder of the reserved right chose, and, *e.g.*, for transmitting minerals from other lands to other lands belonging to him or in his occupation (*Duke of Hamilton* v. *Graham* (1869), 7 M. 976, and (1871), 9 M. (H.L.) 98; *Ramsay* v. *Blair* (1875), 3 R. 25 and (H.L.) 41); see also the English case of *Proud* v. *Bates* (1868), L.J. 34 Ch. 406. I think that the same judgment must have been given had the mineral seam been given out in feu and so separated from the property, instead of being reserved when the property itself was given out in feu. And if so in the case of feu, I think that the same result must follow in the case of a lease, but limited to the period of the lease. For this reason I cannot give effect to the Crown contention.

But in addition to this ground of judgment, which I prefer, as it is general and independent of circumstances, I think that the special circumstances of the present case which I examined at the outset imply that the parties contemplated a working of the minerals in Mr Cuninghame's own property, along with those in his Crown leasehold, as one field, and bar the Crown from maintaining the claim they now put forward. The only reason why I do not rest positively upon this ground of judgment is the doubt whether I have not too much presumed the facts in my desire to save the parties from the expense of an extensive proof.

I shall therefore sustain the fourth plea in law for the defenders, and assoilzie them from the conclusions of the action, with expenses.—*8th January* 1908.

Counsel for Pursuer, Solicitor-General (Ure, K.C.), Pitman; Agent, Thomas Carmichael, S.S.C.—Counsel for Defenders, Clyde, K.C., C. D. Murray; Agents, Forrester & Davidson, W.S.

R. S. B.

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299. M'Lachlan's Trustees *v.* Harvey and Others.

SUCCESSION—SETTLEMENT—DESTINATION—CONSTRUCTION—DESTINATION TO "MY SPOUSE AND MY HEIRS AND ASSIGNEES"—HELD TO IMPORT A DISPOSITION TO WIFE ALONE.

This was an action of multiplepoinding to which the parties were (1) the testamentary trustees of Mrs M'Lachlan, widow of Donald M'Lachlan, venetian blind manufacturer, Glasgow, pursuers and real raisers, and also as claimants; (2) Mrs Harvey and others; (3) Donald M'Kinnon and others. The second and third parties presented rival claims to the fund *in medio* as representatives of the heir of the said Donald M'Lachlan.

The fund *in medio* consisted of one-half of the residue of the estate of the said deceased Donald M'Lachlan, in so far as the same was recovered by the said Mrs M'Lachlan as his executrix, after deduction of duties, legacies and expense of administration, etc.

The will of the said deceased Donald M'Lachlan, which was partly written and partly printed, was as follows. The italicised parts were written.

I, *Donald M'Lachlan Venetian Blind Manufacturer* residing in *Twenty-two Clarendon Street New City Road Glasgow*, (*a*) being desirous of settling the succession to my Means and Estate so as to prevent disputes after my decease, Do Therefore Give, Grant, Assign, Dispone, Devise, Legate and Bequeath to and in favour of *Margaret Scotland or M'Lachlan my spouse* residing in *Twenty-two Clarendon Street Glasgow* (*b*) and *my* (*c*) heirs and assignees, heritably and irredeemably, All and Sundry lands and tenements, heritages, goods, gear, debts, and sums of money, and in general the whole estate heritable and moveable, real and personal, which shall be belonging and owing to me at my decease, together with the whole rents, interests, dividends, profits, and produce thereof; and the writings, title deeds, vouchers, and instructions thereof: and I hereby Nominate and Appoint the said *Margaret Scotland or M'Lachlan my spouse* to be my sole Executor and universal intromitter with my moveable means and estate: But these presents are granted and shall be accepted by the said *Margaret Scotland or M'Lachlan my spouse* and the foresaid lands and other heritages hereby conveyed are disponed with and under the burden of the payment of my whole just and

(*a*) Insert between the commas the full name, occupation, and residence of disponer.

(*b*) Insert full name, occupation, and residence of disponee.

(*c*) "His" or "her" as the case may be.

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lawful debts, and sickbed and funeral charges, and of the payment of the following legacies, viz. (*d*) *none*. . . .

The circumstances in which the case arose are narrated by the Lord Ordinary.

The Lord Ordinary *ranked* and *preferred* the claimants Mrs M'Lachlan's testamentary trustees to the whole fund *in medio*.

Lord Dundas.—The late Donald M'Lachlan, venetian blind maker in Glasgow, died on 27th April 1902. He left a testamentary document, dated 4th June 1877, by which he gave, granted, assigned, disponed, devised, legated, and bequeathed to and in favour of Mrs Margaret Scotland or M'Lachlan, his spouse, and his heirs and assignees, all and sundry the whole estate, heritable and moveable, real and personal, which should be belonging and owing to him at his decease; and appointed his said spouse to be his sole executor and universal intromitter with his moveable means and estate. Mrs M'Lachlan survived her husband, obtained confirmation as his executrix, and had transferred to her own name the whole estate left by him. She died on 3rd January 1906, leaving a trust disposition and settlement and codicil, dated respectively 19th February and 21st April 1903, whereby she assigned and disponed to trustees named (of whom the pursuers and real raisers of this action are the survivors acting and accepting), the whole means and estate of every description which should belong to her at the time of her decease, including therein all means and estate over which she should have the power of disposal.

The fund *in medio* in this multiplepoinding is "one half-part or share of the estate and effects which belonged to the said deceased Donald M'Lachlan, so far as the same was recovered by the said Mrs Margaret Scotland or M'Lachlan, as executrix of the late Donald M'Lachlan, and is now in the possession of Mrs M'Lachlan's trustees." The claimants in the competition are (1) Mrs M'Lachlan's trustees, who claim to retain the whole fund *in medio*, to be held and administered by them in trust for the purposes mentioned in her said trust disposition and settlement; and (2) various persons who claim to represent Mr M'Lachlan's heir.

In my opinion, the first-mentioned claim ought to be sustained, and the other claims repelled. The case is not, in my judgment, attended with any serious doubt or difficulty. The question depends upon the proper construction to be put upon Mr M'Lachlan's testamentary document. The document appears upon its face to be a printed form of general style, filled in in writing by an accountant in Glasgow, whose aid Mr M'Lachlan seems to have invoked, instead of having recourse to a law agent, or filling it up himself. I have not seen the document itself, which is recorded in the Books of Council and Session; but at my request I have been furnished with a duplicate of it, which shews its contents as printed and written respectively. The name and designation of the testator's spouse are, of course, filled in in writing. The immediately succeeding words, "and heirs and assignees," form part of the printed matter; and the word "my" has been introduced by the writer, to fill up a space left blank in the printed style for the pronoun—"his" or "her," as the case might be—which should appropriately relate to the heirs and assignees of the disponee, and not of the testator. It is difficult to avoid the inference that the latter had no thought of conjoining his own heirs, or anyone else, with his wife in the general disposition of his estate; and that the friendly accountant made a mistake in putting in the word "my"—instead of "her"—from a conscientious desire to fill up blank spaces, without a sufficiently clear apprehension of the purpose and intention with which this particular space had been left blank in the printed form. If this inference is correct, there would seem to be an end of all dispute in the case; for a disposition of the estate to Mrs M'Lachlan and her heirs and assignees would, beyond all doubt, confer upon that lady a full fee and right of disposal thereof. But however this may be, I find it impossible to hold, as matter of construction and intention, that Mr M'Lachlan's testamentary document imports a joint and equal disposition of his estate to and between his wife, on the one hand, and his heirs and assignees on the other. The introduction of the word "assignees" appears to me to be absolutely meaningless in such a connection. Again, if the testator intended his "heirs" only to be joint disponees along with his wife, it would have been easy for him to say so in plain language. But he did not do this; and the fact that by the subsequent clause (which is part of the printed matter) he throws the whole burden of the payment of debts and legacies upon his wife alone lends strong support to the view that he intended her to be his sole disponee. I heard some argument and citation of authority with regard to the use of the word "and," in relation to its import as a substitution, or a conditional institution, of heirs and assignees. I do not think that any such point arises in the present case. The question, in my judgment, is whether there is a general disposition to Mrs M'Lachlan alone, or a joint disposition to her and her husband's heirs and assignees; and for the reasons stated I think the disposition was to the wife alone. I am therefore of opinion that Mrs M'Lachlan's trustees are entitled to be ranked and preferred to the whole fund *in medio*, in terms of their administrative claim,

(*d*) If no legacies are to be given write the word 'none" and draw the pen down through the blank space in the form of a cross, thus ×.

and that the competing claims must be repelled. —11*th January* 1908.

Counsel for Pursuers and Real Raisers and Claimants Mrs M'Lachlan's Trustees, Hunter, K.C., Mercer; Agents, Gray & Handyside, S.S.C.—Counsel for Mrs Harvey, Craigie, K.C., Ingram; Agents, Langlands & Mackay, W.S.—Counsel for Donald M'Kinnon and Others, Craigie, K.C., Fenton; Agent, Arthur W. Russell, W.S.

A. M.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

300. Duff's Trustees *v.* Garland's Executor.

Succession—Trust Disposition and Settlement — Vesting — Survivorship Clause—Direction to Trustees to Realise Heritable Subject on Death of Liferentrix, to Divide the Free Proceeds Among Nephews and Nieces Named, and Failing any of them Without Issue, to the Survivors — Niece Predeceasing Liferentrix Leaving Child Who Also Predeceased Liferentrix—Held Vesting Suspended Until Death of Liferentrix.

Special Case.

Thomas Garland, shipowner, Dundee, died on 25th December 1878, leaving a trust disposition and settlement whereby he conveyed to trustees, *inter alia*, the heritable property belonging to him and situated in Blackness Terrace, Dundee.

The sixth purpose of the settlement was in the following terms:

"*In the sixth place*, My said trustees shall as soon as convenient after my death convey the foresaid property belonging to me at Blackness Terrace being the subjects secondly before disponed to and in favour of the said Miss Mary Garland my sister in liferent for her liferent use allenarly during all the days of her life after my death; And after the death of the said Miss Mary Garland I direct my said trustees to sell and dispose of the foresaid subjects at Blackness Terrace in one lot, and to divide the free proceeds thereof equally among my said nephews and nieces, Thomas Garland, Joseph Garland, Christian Garland, Agnes Garland, Elizabeth Garland, and Ann Garland; and failing any of them without issue to the survivors and survivor of them equally, if more than one."

The testator was survived by the liferentrix, Miss Mary Garland, who died on 10th January 1885. He was also survived by all the beneficiaries mentioned in the sixth purpose of the settlement. All the beneficiaries survived the liferentrix except Mrs Elizabeth Garland or Leighton. She died on 20th September 1879, leaving a child, Eliza Robina Garland, who also predeceased the liferentrix.

The executor-dative of Eliza Robina Garland was the third party to the special case. The first, second, fourth, fifth and sixth parties were the persons now in right of the shares of the beneficiaries mentioned in the sixth purpose of the settlement other than Mrs Leighton.

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The following Question of Law was stated:

Had the said Elizabeth Garland, afterwards Mrs Elizabeth Garland or Leighton, a vested right to one-sixth share *pro indiviso* of said property situated at Blackness Terrace, Dundee, as at her death? Or

Was vesting postponed till the date of the death of the liferentrix of said property, the said Mary Garland?

Argued for the first, second, fourth, fifth and sixth parties: A survivorship clause was presumed to suspend the vesting until the date of distribution (*Young* v. *Robertson*, 1862, 4 Macq. 314; *Bryson's Trs.* v. *Clark*, 1880, 8 R. 142; *Forbes* v. *M'Condach's Trs.*, 1890, 18 R. 230). There was nothing to take the present case out of the ordinary rule. The phrase "without issue" might mean either without having had issue or without leaving issue (*Cunningham* v. *Cunningham*, 1889, 17 R. 218; *Hendry's Trs.* v. *Hendry*, 1872, 10 M. 432). In the present case it meant without leaving issue who should survive the liferentrix.

Argued for the third party: The primary meaning of the phrase "without issue" was without having had issue (*Carleton* v. *Thomson*, 1867, 5 M.H.L. 151; *Steel's Trs.* v. *Steedman*, 1902, 5 F. 239). The destination over, therefore, only took effect in the event of the institute dying without having had issue. It followed that vesting took place *a morte* subject to defeasance in the event of the institute predeceasing the liferentrix without having had issue.

The Court *answered* the first alternative of the question of law in the negative, and the second alternative in the affirmative.

The Lord Justice-Clerk.—I cannot say that I think the interpretation of this deed presents any serious difficulty. It is very plain, on the face of it, that the gift here is a gift to certain people on a certain event, that event being the death of the liferentrix; and the gift takes the form of a direction to trustees after the death of the liferentrix to sell and dispose of the subjects and to divide the proceeds among certain persons named, who are the testator's nephews and nieces, "and failing any of them without issue to the survivors and survivor of them." I take that to mean that if any one of the nephews and nieces named dies, his or her share is to go to the survivors unless he or she has issue. The question here is as to a share destined to a niece who died before the liferentrix. She had a child, but that child also died before the liferentrix. I think that share must go to the survivors; and in these circumstances the first alternative of the question should be answered in the negative, and the second alternative in the affirmative.

Lord Stormonth-Darling.—I agree with your Lordship in the chair. The ordinary rule is that a clause of survivorship such as you find here is referable to the date of distribution, which is fixed as the death of the liferentrix; and I think that the real meaning of this clause in the settlement substituting issue for a parent, was simply to give expression by the testator to what would otherwise have been an implication of law under the *conditio si sine liberis decesserit*, for the issue could only take what had already vested in the parent.

Lord Low.—I agree. It is to be observed that the only gift which is given to the nephews and nieces is contained in the direction to the trustees at the death of the liferentrix to realise the subjects liferented and divide the proceeds thereof among her nephews and nieces. That being so, I think it is plain that the survivorship clause applies to the period of division and payment and to no other. Now the only difficulty arises from the fact that the survivorship clause is expressed in this way: "Failing any of them without issue to the survivors of survivor of them." The expression "without issue" can be construed either as "without ever having had issue" or "without leaving issue." Which of these two constructions is to be adopted depends on the context. It seems to me that here it means "without leaving issue," the time to which the words apply being the termination of the liferent and the period of division. If at that period a nephew or a niece has died without leaving any child then alive to represent him or her, his or her share passes to the survivors. Accordingly Elizabeth and her child having both predeceased the liferentrix nothing vested in either of them.

Lord Ardwall.—My Lords, I am of the same opinion. In the sixth purpose of the trust disposition and deed of settlement of Mrs Duff there is no gift of the fee of the property at Blackness Terrace or the proceeds thereof till after the death of the liferentrix, Miss Mary Garland, because the only words of gift are contained in a direction to the trustees after that event to sell and dispose of the said property, and to divide the free proceeds thereof among certain named beneficiaries. Accordingly, until after the death of the liferentrix there was no gift made, and indeed there was no fund to divide, and therefore, in my opinion, it cannot be held that there was any vesting of the shares of that fund in any of the beneficiaries (see *Bryson's Trs.* v. *Clarke*, 1880, 8 R. 142). I think it is equally clear that the survivorship clause refers to the same period, namely, the death of the liferentrix (see *Young* v. *Robertson*, 1862, 4 Macq. 318). Now the survivorship clause comes to this, that the share of any of the nephews or nieces who predecease the liferentrix is to accresce to the survivors, and the only event in which accretion is not to take place is the event of any nephew or niece leaving issue alive who should survive to take the share of the parent. Mrs Leighton had a child, but that child died before the liferentrix, and therefore no share fell to either mother or child; and the whole proceeds of the said subjects now fall to be divided in terms of the directions of the deed among the nephews and nieces of the truster who survived the liferentrix. —23*rd January* 1908.

Counsel for the First, Second, Fourth, Fifth and Sixth Parties, Ingram; Agents, Galloway, Davidson & Mann, S.S.C. — Counsel for the Third Party, D. Anderson; Agents, Morton, Smart, Macdonald & Prosser, W.S. J. S. M.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

301. Aitken Campbell & Company Limited *v.* Boullen & Gatenby.

I. Sale—Sale of Goods Act 1893 (56 & 57 Vict. cap. 71), sect. 30 (3)—Right of Buyer Where Goods Conform to Contract Are Delivered Mixed with Goods of Different Description to Retain Goods Conform to Contract and to Reject Remainder—Goods Conform to Contract Delivered Along With Goods Disconform to Contract by Reason of Inferior Quality—Circumstances where Held That Buyer Was Not Entitled to Accept Goods Conform to Contract and to Reject Remainder.

II. Sale—Sale of Goods Act 1893 (56 & 57 Vict. cap. 71), sect. 11 (2)—Right of Buyer to Reject Goods Disconform to Contract or to Retain Goods and Claim Damages — Election — Goods Conform to Contract Delivered Along With Goods Disconform to Contract—Attempt by Buyer to Reject Goods Disconform to Contract and to Keep Remainder—Partial Rejection Held Invalid—Seller Not Prejudiced by Attempted Partial Rejection—Held That Buyer Was Not Barred From Retaining Whole Goods and Claiming Damages in Respect of Goods Disconform to Contract.

Appeal from the Sheriff Court of Lanarkshire at Glasgow.

In April 1905 Messrs Aitken Campbell & Co. Ltd., 99 Glassford Street, Glasgow, bought 133 pieces (18,729 yards) of maroon twill from Messrs

Boullen & Gatenby, 70 St James' Street, Manchester, at the price of one penny per yard.

The sale was a sale by sample, and was concluded by certain letters and telegrams passing between the parties. The maroon twill was described in the invoice as "slightly soft."

On or about 22nd May 1905 Aitken Campbell & Co. paid the net price of the goods (£76, 1s. 9d.)

On or about 20th June 1905 Aitken Campbell & Co. made an examination of the goods and found that 64 out of the 133 pieces were disconform to contract. They intimated the disconformity to Boullen & Gatenby, returned the defective goods to them at Manchester, and claimed repayment of the price. Boullen & Gatenby refused to repay the price, or to accept delivery of the rejected goods.

Aitken Campbell & Co. then brought the present action against Boullen & Gatenby. They sued for the sum of £50, 19s., on the footing that they were entitled to reject the goods so far as disconform to contract and to keep the remainder, or alternatively for the sum of £25, 16s. on the footing that they were not entitled to reject the goods which were disconform to contract, but that they were entitled to retain the whole goods and claim damages in respect of the 64 pieces being disconform to contract.

Proof was allowed and led. The pursuers led evidence to shew that the goods rejected were "tender goods," that tender goods were recognised in the trade as a separate class of goods, and that they were usually sold by the pound instead of by the yard. The evidence on this subject is discussed in the judgment of Lord Ardwall.

The Sale of Goods Act 1893 (56 & 57 Vict. cap. 71) provides:

> Sect. 11 (2). In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.
>
> Sect. 30 (3). Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

On 14th May 1906 the Sheriff-Substitute (Mitchell) found in law (1) that there was no valid rejection of the goods, and (2) that although the attempted partial rejection was invalid, the pursuers could not claim to retain all the goods and sue for damages, and *assoilzied* the defenders.

The pursuers appealed to the Sheriff (Guthrie). On 6th December 1906 the Sheriff found in law that the pursuers were entitled to reject the defective pieces and to retain those that were conform to sample. On 24th January 1907 the Sheriff *decerned* against the defenders for the sum of £45 under the first alternative prayer of the petition.

The Defenders *appealed* and *argued*: (1) At common law, in the event of goods not being conform to contract, the buyer's only remedy was to return the goods (*Couston, Thomson & Co.* v. *Chapman*, 1872, 10 M. (H.L.) 74, per Lord Chancellor Hatherley and Lord Chelmsford). The Sale of Goods Act, sect. 11 (2), gave the buyer two alternative remedies: (1) a right to reject, (2) a right to retain and claim damages, but it gave no right of partial rejection (*Electric Construction Co. Ltd.* v. *Hurry & Young*, 1897, 24 R. 312; *Lupton & Co.* v. *Schulze & Co.*, 1900, 2 F. 1118; *Croom & Arthur* v. *Stewart & Co.*, 1905, 7 F. 563). Under sect. 30 (3) the buyer had a right of partial rejection where goods conform to contract were mixed with goods of a description not included in the contract. That meant goods which were different in kind from those contracted for, not merely goods of defective quality (*Levy* v. *Green*, 1857, 8 E. and B. 575; *Nicholson* v. *Bradfield Union*, 1866, L.R. 1 Q.B. 620). *Jaffé* v. *Ritchie* (1860, 23 D. 242) was distinguishable, because the whole goods delivered were rejected. On the evidence, the goods in the present case were defective only in quality, and sect. 30 (3) did not apply. The pursuers therefore had no right of partial rejection, and the course adopted by them was incompetent. (2) The pursuers were bound to elect between their two remedies. They could reject or they could retain and claim damages, they could affirm or disaffirm the contract; but if they elected to disaffirm they could not turn round and affirm. Here they had elected to disaffirm the contract by sending back part of the goods. It followed that they were barred from claiming damages (*Electric Construction Co. Ltd.* v. *Hurry & Young, cit.*; *Lupton & Co.* v. *Schulze & Co., cit.*; *Croom & Arthur* v. *Stewart & Co., cit.*).

Argued for Pursuers: (1) The goods contracted for were described as "slightly soft." The goods rejected were "tender goods." It was proved that tender goods were a separate class of goods well known to the trade. The goods supplied were thus different in kind from those contracted for, and on the defenders' own shewing, sect. 30 (3) applied. But, further, the words "of a different description not included in the contract" meant simply "disconform to contract" (*Jaffé* v. *Ritchie, cit.*), and sect. 30 (3) applied even although the only defect was bad quality. It followed that the pursuers were entitled to keep the goods which were conform to contract and reject the rest. (2) But if that remedy were not open, then the pursuers were entitled to claim damages. No doubt they were bound to elect their remedy, and if they elected to reject they could not turn round and claim damages (*Electric Construction Co. Ltd.* v. *Hurry & Young, cit.*; *Lupton & Co.* v. *Schulze & Co., cit.*; *Croom & Arthur* v. *Stewart & Co., cit.*).

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But here, if partial rejection were incompetent, there was no election of remedy, and the pursuers were not barred. Where rejection was incompetent an attempted rejection would not bar the claim of damages (*Paton & Sons* v. *Payne & Co.*, 1897, 35 S.L.R. 112). The cases cited by the defenders were distinguishable. In the *Electric Construction Co. Ltd.* (*cit.*) and *Croom & Arthur* (*cit.*) there was an election to reject. In *Lupton & Co.* v. *Schulze & Co.* (*cit.*) the buyer attempted to reject the goods and also to retain them in security of a claim of damages.

The Court *recalled* the interlocutors of the Sheriff-Substitute and of the Sheriff, *found* in law that, although the attempted partial rejection was invalid, the pursuers were entitled to retain all the goods and sue for damages, the defenders not having been prejudiced by the attempted partial rejection, and *decerned* against the defenders for an agreed sum of £26, 18s. 3d.

Lord Low.—I am of opinion that this is not a case to which sect. 30 (3) of the Sale of Goods Act 1893 applies. That enactment deals with the case of a seller delivering to a buyer "the goods he contracted to sell mixed with goods of a different description not included in the contract." I think that the word "description" is there plainly used to denote the kind of goods contracted for, and that the right of partial rejection conferred upon the buyer applies only to cases where goods of the kind contracted for are mixed with goods of a different kind, and not to cases where all the goods are of the kind contracted for, but part of them is not of such good quality as the seller was bound to supply. Here the goods contracted for were "maroon twills" and the goods delivered were "maroon twills," but 64 out of 133 pieces were not of such good quality as the samples which formed the basis of the contract. I am accordingly of opinion that the pursuers were not entitled to reject the 64 pieces and to retain the remaining 69, and that therefore the interlocutor of the learned Sheriff must be recalled.

The next question is whether the pursuers are barred by having attempted to reject the 64 pieces from retaining the whole goods and claiming damages on the ground that the defenders have failed to perform a material part of the contract? What happened was that the pursuers actually returned the 64 pieces to the defenders, but the latter sent them back, and they are now in the possession of the pursuers, awaiting the issue of the present action. It is not said that as regards the pursuers' claim for damages the defenders have been in any way prejudiced by the attempt to reject the 64 pieces, but the defenders maintain, and the Sheriff-Substitute has given effect to the contention, that the pursuers having elected to follow one course cannot now be allowed to adopt another. The authority mainly relied upon is *The Electric Construction Company* v. *Hurry & Young*, 1897, 24 R. 312. The pursuers in that case had supplied a dynamo to the defenders which was disconform to contract. The defenders intimated to the pursuer that they rejected the dynamo, but nevertheless they continued to use it for several months. The pursuers then brought an action for the contract price, in answer to which the defenders maintained that they were entitled to retain the machine, and set off this claim of damages against the price. It was held by a majority that the defenders having elected to reject, were not entitled to fall back upon the alternative of retaining the machine and claiming damages.

I am of opinion that that judgment has no application to the present case. The ground of judgment was that the statute having specified two courses either of which the buyer might adopt, he was bound to make up his mind which of the two he would follow, and could not be allowed first to intimate to the seller that he was to take one course, and then, when he found it to be more to his advantage to do so, to adopt the other course. But that was not what happened in this case. No doubt the pursuers adopted a course which they could not insist upon taking as a matter of right. The defenders might have consented to the course proposed, but they refused to do so, and they were quite entitled to refuse. I can find nothing, however, in that position of matters to debar the pursuers from afterwards adopting either of the courses open to them under the statute, provided that their attempt to reject part of the goods had not put the defenders in a worse position than they would have been in if the pursuers had at first elected to proceed in conformity with the statute. As I have already indicated, nothing of that sort is suggested.

Suppose that when the defenders refused to take back the 64 pieces the pursuers had at once also returned the remaining 69 pieces, and intimated that they repudiated the contract and rejected the whole goods, I cannot imagine any ground upon which it could have been held that they were not entitled to follow that course. But I think that it is equally plain that they were entitled to say to the defenders: "If you will not take back the goods which are disconform to sample, we shall keep them, along with the goods which are conform to sample, but we shall claim damages in respect that you have failed to perform a material part of the contract."

I am therefore of opinion that the Sheriff-Substitute was wrong in finding that "although the partial rejection was invalid, the pursuers cannot now claim to retain all the goods and sue for damages."

It appears that the pursuers paid the contract price of the goods before they discovered that part of them was not conform to contract, and accordingly their claim is for repayment of the

amount of the loss which they have sustained in respect of part of the goods not being conform to sample. I understand that the parties have adjusted the amount of the loss at £26, 18s. 3d., and accordingly I am of opinion that decree should be pronounced for that sum.

Lord Ardwall.—In April 1905 the defenders sold to the pursuers by sample 133 pieces of maroon twills, and delivered them to the pursuers on 6th May following. On 22nd May the pursuers paid to the defenders £76, 1s. 9d. as the price of the goods. On 20th June following, the pursuers, having made a complete examination of the goods, discovered that certain pieces were not conform to sample, and they intimated a rejection of these pieces to the defenders, and returned to them 69 pieces as disconform to sample. At the same time they intimated to the defenders their acceptance of the balance of the goods. The defenders refused to agree to the attempted partial rejection, and have never accepted re-delivery or otherwise acquiesced in the said rejection. The pursuers, under agreement, have now in their hands the rejected goods and also those that they all along kept as being conform to sample.

In these circumstances the present action is raised for payment of £50, 19s., being the price of the rejected goods, or alternatively the sum of £25, 16s., being the loss and damage sustained by the pursuers on the footing of their retaining the whole goods.

The Sheriff-Substitute held that the pursuers were not entitled to reject part of the goods, and that having attempted to reject part of the goods they are barred from now keeping the whole of the goods and claiming damages. He accordingly assoilzied the defenders. The Sheriff recalled this interlocutor, on the ground that the pursuers were entitled to reject part of the goods in virtue of the provisions of section 30 (3) of the Sale of Goods Act 1893. He accordingly has given decree for £36, 12s. 3d., being the price of the defective pieces which were rejected, and a further sum of £8, 7s. 9d. in name of damages.

I propose to deal first with the question whether the provisions of section 30 (3) of the said Act apply to the circumstances of the present case. That section is in the following terms: "Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest."

In the present case what was sold was maroon twills equal to samples sent, and it is proved that 64 or otherwise 69 of the 133 pieces sent were not equal to sample in respect that they were more "tender," as it is called, than the samples. "Tenderness" in goods of this kind, it is explained, is an extreme degree of softness or weakness in the goods, and there is some evidence to the effect that when goods of this description are of such quality as to merit the epithet "tender," it is usual to sell them by the pound and not by the yard; and on the strength of this practice of the trade it is maintained for the pursuers that "tender" goods are goods of a description different from those which were conform to the sample within the meaning of the word "description" as used in the Act. I confess I cannot accept this contention. I am of opinion that the whole of the goods sent in fulfilment of the order were goods of the same "description," namely, maroon twills, and that their conformity or disconformity to sample fell to be determined by the varying degrees of strength on the one hand and softness or "tenderness" on the other; and from the proof I think it sufficiently appears that the gradation in the texture of the goods varied greatly, and I do not think that at any point in the variation from strong to "tender" goods it could be predicated that goods at any one part of the scale were of a different "description" from the goods immediately next to them, either on the side of strength or of "tenderness."

I accordingly do not think that the subsection in question applies, because I do not think it can be said that any part of the goods delivered was mixed with goods of a different description. I am of opinion that the word "description" implies a difference of kind, not merely of quality, and the cases which were cited as illustrations of cases to which the section might apply were all cases where there was a difference of kind and not merely of quality in the goods.

In the case of *Levy* v. *Green*, 1857, 8 E. and B. 575, crockery of a different pattern and consisting of different articles from those ordered was sent in a crate containing the articles which had been ordered. In *Nicholson* v. *Bradfield Union*, 1866, L.R., 1 Q.B. 620, in a contract for the sale of coal the sellers put in a lot of coal from a different colliery from that ordered, which got mixed with the first delivery; and in the case of *Jaffé* v. *Ritchie*, 1860, 23 D. 242, a seller of yarns which were described as "flax yarns," delivered several spindles containing yarns composed of a mixture of flax and jute, and it was there held that this did not answer to the description of "flax yarns," and that accordingly they were properly rejected. But no case was cited in which a mere difference in quality was held sufficient to divide goods into goods of different "descriptions."

For these reasons I am of opinion that the said subsection does not apply, and that the interlocutors of the Sheriff, which proceed upon the application of that subsection, must be recalled.

The next question for consideration is whether the pursuers, having rejected part of the goods

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sent, are now barred from retaining that part along with the goods which they had not rejected and claiming damages in respect of defective fulfilment of the contract. I confess I have found this to be a question of some difficulty. The cases of *The Electric Construction Company* v. *Hurry & Young*, 1897, 24 R. 312, and *Croom & Arthur* v. *Stewart & Co.*, 1905, 7 F. 563, were cited as authorities for the proposition that after intimating to a seller rejection of goods as disconform to contract a buyer is not entitled to fall back on the alternative remedy provided by the Sale of Goods Act of retaining the goods and claiming damages for the seller's failure to perform a material part of the contract. I may notice in passing that, taking these two cases together, the above proposition as one of universal application was questioned in the first case by Lords Kinnear and Low, and in the second by Lord Kyllachy, and it is possible that in some other circumstances it may deserve reconsideration. But accepting the views of the majority in each of the cases as absolutely sound, I am of opinion that the present case is capable of being differentiated from them. In both these cases the whole of the subject sold was rejected, and in both of them the question was complicated by the buyers, after intimating rejection of machines, continuing to use them for considerable periods of time. Now, in the present case the pursuers did not reject the whole of the subject of the sale, nor did they, by keeping possession of the rejected portion, in any way prejudice, so far as that portion was concerned, the interests of the sellers. They were accordingly not in the position of having elected to take one of the remedies provided by the Act, and therefore by implication to have departed from the other. What they did was to adopt neither the one alternative nor the other, but to make a partial rejection which they were not entitled to make, and which they did make in a mistaken view of their own rights in the matter. In other words, they attempted to do what they were not entitled to do either under the Act or at common law. But the fact of their having made this mistake does not involve them in the dilemma in which the Court considered the sellers had placed themselves in the two cases above referred to, and I am of opinion that nothing else has occurred to bar them from now adopting the alternative remedy provided by section 11, subsection 2, of the said Act by retaining the whole goods and claiming damages for breach of contract.

On these grounds I think the Sheriff-Substitute's interlocutor of 14th May 1906, with the exception of its findings in fact, ought to be recalled and decree given for the alternative sum of £26, 18s. 3d. claimed by the pursuers.

The Lord Justice-Clerk.—My Lords, I concur with your Lordships in holding that section 30 (3) of the Sale of Goods Act does not apply to this case, and that on the grounds so clearly stated by Lord Low. I am therefore of opinion that the interlocutor of the Sheriff must be recalled. Further, I agree with the opinion expressed by both your Lordships that in the circumstances of this case the purchaser of the goods has the right still, retaining the whole of the goods, to claim damages for the disconformity of a portion of the goods to the quality shewn by the sample upon which the purchase was made. The case of the *Electric Company*, which was founded on at the debate, was one of an entirely different character from the present. The sale in that case was of a specific article—a machine for developing and transmitting energy by electrical transmutation. The party in that case did not return the machine. They intimated that they rejected, but kept the machine and used it for months. The decision in that case, which seems somewhat doubtful as regards its soundness, has no bearing on this case, which is one in which the disconformity is of some part of the goods being of inferior quality. The sellers suffered no damage by the course which was taken, which was a mistaken course under the Act. The Sheriff-Substitute, on the authority of the *Electric Company* case, held that the buyer was barred from now claiming damages for that part of the goods which were not conform to sample. I concur with your Lordships in holding that the goods were of one "description" in the sense of the Act, and that the section refers to a difference of kind and not of quality—such as in the crockery case, where different articles were sent among those which had been ordered. The case of jute yarn and flax yarn was similar. I therefore agree with the course proposed by Lord Low.—*24th January* 1908.

Counsel for Pursuers, Hunter, K.C., C. H. Brown; Agents, Smith & Watt, W.S.—Counsel for Defenders, Murray, Mair; Agents, Macpherson & Mackay, S.S.C. J. S. M.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling and Low.)

302. Thomson's Trustees *v.* Allan and Others.

SUCCESSION — TRUST DISPOSITION AND SETTLEMENT—CONDITIO SI INSTITUTUS SINE LIBERIS DECESSERIT—DIRECTION TO TRUSTEES ON DEATH OF LIFERENTRIX TO PAY SUM LIFERENTED TO HER CHILDREN, AND FAILING CHILDREN TO A, B, AND C, NEPHEWS AND NIECE OF TESTATOR — RESIDUE CLAUSE IN FAVOUR OF NEPHEWS AND NIECES INCLUDING A, B, AND C—RESIDUE CLAUSE ALREADY HELD TO BE FAMILY PROVISION TO WHICH CONDITIO

Applicable—Held that Conditio Did Not Apply to Legacy in Favour of B.

(*Reported ante, Vol. XIV. p.* 809.)

Reclaiming Note against Interlocutor of Lord Johnston.

Sequel to Case of Allan *v.* Thomson's Trustees, 1893, 20 R. 733.

The late Mrs Christina Steven or Thomson, Montrose, died in 1882, leaving a trust disposition and settlement whereby she conveyed her whole estate to trustees.

By the sixth purpose of the trust disposition and settlement the testatrix, after providing a liferent of the sum of £2500 to her niece, Christina Black, directed her trustees as follows:—

"And I further direct my said trustees to pay over, on the death of the said Christina Black, the said principal sum of £2500 to any child or children of the said Christina Black, equally among them on their attaining majority . . . .; and failing such child or children, or failing their reaching majority, I direct my said trustees to realise and pay over the said sum of £2500 as follows, viz.: To my said nephew George Black the sum of £1000; to my said niece Jane Black the sum of £750; and to my said nephew Charles Boswell Black the sum of £750; declaring that if the succession thereto shall open to my said nephews and niece, the sums falling to them shall be held to have vested in them at the time of my death; and declaring also that if the said Christina Black shall predecease me, the said sum of £2500 shall form part of the residue of my means and estate."

Miss Christina Black, the liferentrix, died unmarried in 1905. Jane Black (Mrs Allan) had predeceased the testator, leaving a son, Stephen Strachan Allan.

Questions having arisen as to the disposal of the sum of £750 destined to Mrs Allan, the present action of multiplepoinding and exoneration was brought by the trustees. In a previous action arising out of questions relating to the same trust disposition and settlement (*Allan* v. *Thomson's Trs.*, 1893, 20 R. 733) it was held that the residue clause was of the nature of a family provision to which the *conditio si sine liberis* applied. In this action claims were lodged by (1) Stephen Strachan Allan, and (2) the residuary legatees.

On 5th February 1907 the Lord Ordinary (Johnston) *repelled* the claim of Stephen Strachan Allan and *sustained* the claim of the residuary legatees.

Stephen Strachan Allan *reclaimed* and *argued*: The testator here was an aunt of the beneficiaries, and it was *res judicata* that the settlement was a family settlement (see *Allan* v. *Thomson's Trs.*, 1893, 20 R. 733). The presumption therefore was that the *conditio* applied. There was nothing in the sixth purpose to rebut that presumption. It was not enough that the beneficiaries were conditional institutes. The doubt on this point expressed in the case of *Carter's Trs.* v. *Carter* (1892, 19 R. 408) was only a doubt, and was inconsistent with the cases of *Rougheads* v. *Rannie* (1794, M. 6403); *Grant's Trs.* v. *Grant*, (1862, 24 D. 1211); and *Taylor* v. *Taylor* (1884, 11 R. 423), the facts that the beneficiaries were called nominatim and that their shares were of unequal amount were not fatal (*Bryce's Tr.* v. *Hoffman*, 1878, 5 R. 722). The fact that only two out of three families of nephews and nieces were favoured was unimportant, because there was another provision in the settlement in favour of the third family (*M'Gown's Trs.* v. *Robertson*, 1869, 8 M. 356; *Bogie's Trs.* v. *Christie*, 1882, 9 R. 453). The provision that the fund should fall into residue in the event of the liferentrix predeceasing the testator suggested that it was not to fall into residue in any other event. It had already been held that the *conditio* applied to the provision of residue (*Allan* v. *Thomson's Trs.*, *cit.*). It was not to be supposed that the testator intended that the children of beneficiaries should take their parents' share of residue, which amounted to about £200, and should be excluded from the share of a special provision amounting to about £750.

Argued for the respondents the residuary legatees: The gift now in question was not a family provision but a legacy in favour of selected individuals to which the *conditio* did not apply (*Douglas' Exrs.* v. *Scott*, 1869, 7 M. 504, per Lord Justice-Clerk). The gift of residue had already been held to be a family provision (*Allan* v. *Thomson's Trs.*, *cit.*), and where a will contained one gift of a family nature the presumption was that other gifts in favour of the same persons were intended to be personal to the beneficiaries. The facts that the beneficiaries were only conditional institutes (*Carter's Trs.* v. *Carter*, *cit.*), and that the gift was contingent on the liferentrix surviving the testator, were also unfavourable to the application of the *conditio*.

The Court *adhered*, and *found* the reclaimer liable in the expenses of the reclaiming note.

The Lord Justice-Clerk.—My Lords, I am very clearly of opinion that the judgment of the Lord Ordinary in this case is right and ought to be affirmed. The testament in this case was considered in a former case by this Division of the Court, and it was decided that a bequest under it of a share of residue fell under the *conditio si sine*, but it was also held that a specific legacy of £250, being a personal bequest for an individual, described specifically as a "memento of me," was not of the nature of a family provision, to which the doctrine could be held to apply.

My Lords, in my opinion it would be inconsistent with that judgment if the claim were sustained that the sums bequeathed to certain individuals by a destination over, which by the original

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disposal went to other people altogether, were to be held to be family provisions. The sum in dispute here was not a share given to a legatee of a fund to be equally shared by the other members of a family. It was a specific sum directed to be paid to an individual person. The bequest had all the characteristics of an ordinary legacy as distinguished from the disposal of the residue, which was expressly ordered to be divided among a class.

There is here no ground for presuming that the testator had failed to notice the possible contingency of the person instituted leaving children, and in the absence of such ground there is no reason for bringing in the *conditio* and applying it to the gift. Here the testator, having considered the possibility of a sum of £2500 not being taken by those whom it was intended primarily to favour, gave specific directions that it was to be dealt with by paying specific sums of varying amount to individuals named, a mode of disposal in marked contrast to a family provision to a class of persons.

On these grounds I would move your lordships to adhere to the interlocutor of the Lord Ordinary.

I may add that I have had an opportunity of considering the opinion prepared by Lord Stormonth-Darling, which goes more fully into the facts of the case, and in which I entirely concur.

Lord Stormonth-Darling.—The fund *in medio* in this multiplepoinding consists of the balance of residue, so far as undistributed by the surviving and acting trustee, of the estate of the late Mrs Christina Stephen or Thomson, widow of Mr Charles Duirs Thomson, solicitor in Montrose. The testatrix died in 1882, predeceased by her said husband, and leaving no family. She was survived by three sets of nephews and nieces. The claimant Mr Stephen Allan is the only child of one of those nieces, Mrs Jane Black or Allan, who was named three times in the settlement of the testatrix: (1) under the fourth purpose, for a money legacy (£250); (2) under the destination over in the sixth purpose, by which, in the event of the liferentrix of a sum of £2500 dying without issue, or of such issue failing to attain majority, the trustees were directed to pay over the said sum of £2500 in certain defined proportions among members of the Black family, including £750 to the claimant's mother, Jane Black; and (3) under the eighth or residue clause of the settlement, by which the trustees were directed to divide the free residue equally among certain persons by name, these being a brother-in-law and the whole nephews and nieces of the testatrix who were in fact alive at her death.

Now, this will has already been the subject of judicial determination. In 1892 the father and administrator-in-law of the present claimant, Mr Allan, brought an action against the trustees, by which he claimed on behalf of his son, who was then a pupil, that the son was entitled, under the *conditio si sine liberis decesserit*, to payment both of the legacy of £250 left to Mrs Allan under the fourth purpose of the settlement and also of the estimated amount of her share of the residue. The case was decided by this Division of the Court on 30th May 1893, with the result that the *conditio* was held to apply to the bequest of a share of residue, and was held not to apply to the legacy of £250. The distinction thus drawn proceeded on the footing, as explained in the opinion of your Lordship in the chair, that the specific legacy in the fourth purpose was a personal bequest of a sum of money for the legatee's own use, as shewn especially by the description of all the bequests in that purpose as "mementos of me," but that the bequest of a share of residue being to all the nephews and nieces alive at the death of the testatrix was, on the other hand, of the nature of a family provision, to which the *conditio* applied.

In the present case the claimant Mr Allan raises again the question of the application of the *conditio*, although this time it has reference to the sum of £750 conditionally destined to the claimant's mother, Mrs Jane Black or Allan, as the sum set free by the death in 1905 without issue of the liferentrix, Miss Christina Black. By the interlocutor under review the Lord Ordinary has decided in effect that, looking to the whole tenor of Mrs Thomson's deed, it is impossible to regard the destination-over to the three members of the Black family, including the £750 to the claimant's mother, as a family provision, and therefore that it has lapsed by her predecease of the testatrix and fallen into residue. Accordingly, he has repelled the first or alternative branch of Mr Allan's claim; he has sustained the second branch; and he has ranked and preferred the claim of the other residuary legatees. In this mode of dealing with the claims I am clearly of opinion that the Lord Ordinary is right.

The former judgment of this Division may not be in terms a decision of this very question, but I am of opinion that it necessarily covers it. For it involves the determination of whether the particular provision founded on is a family provision or not, *i.e.* whether the testatrix, by the terms of her settlement—for that, according to the case of *Bogie's Trs.* v. *Christie*, 1882, 9 R. 453, is the only mode in which a testatrix can assume the parental character—has placed herself *in loco parentis* towards this particular claimant. She has done so undoubtedly as regards the bequest of residue, and the claimant will get the benefit of what was left by that provision to the late Mrs Allan. But what is there to shew that the destination over to her of a certain proportion of the sum of £2500 primarily intended for

another family altogether (if they had come into existence) was intended as a family provision for the Black family? The unequal division of that sum among the three members of the Black family named has much more the appearance of a division inspired by personal favour than the assumption of the parental character. But, apart from that circumstance, I think that the case of *Greig* v. *Malcolm*, 1835, 13 S. 607, which rests on the high authority of Lord Corehouse, shews that the *conditio* proceeds entirely on the presumption that the testator has overlooked or forgotten the contingency of the institute having children, and that where this cannot be said of the settlement in question, the reason for the application of the *conditio* disappears. Now here the clause of residue, as judicially construed, does provide for the claimant taking the share destined to his mother, and I do not think that he can claim more.

Lord Low concurred.—24*th January* 1908.

Counsel for Reclaimer, Cullen, K.C., A. M. Mackay; Agents, Mackintosh & Boyd, W.S.— Counsel for Respondents, Chree, Duncan Millar; Agents, Jack & Bryson, S.S.C. J. S. M.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

303. Smith *v.* Harvie.

Bankruptcy — Notour Bankruptcy — Cessio — Constitution of Notour Bankruptcy by Insolvency Concurring with Expired Charge Upon Decree for Expenses in Sheriff Court—Debtors (Scotland) Act 1880 (43 & 44 Vict. cap. 34), sects. 4 and 6—Small Debt (Scotland) Act 1835 (5 & 6 Will. IV. cap. 70), sects. 1–5—Held That Notour Bankruptcy Was Constituted, the Provisions of Debtors (Scotland) Act 1880 Not Being Limited to Cases in which Imprisonment for Debt is Rendered Incompetent for First Time by Its Provisions—Black v. Watson, 1881, 9 R. 167, Commented On.

Appeal from the Sheriff Court of Ayrshire at Kilmarnock.

This was a petition for cessio, in which the pursuer averred that the defender was notour bankrupt in virtue of an expired charge upon an extract decree of the Sheriff Court at Kilmarnock for payment of the sum of £40, 3s. of modified expenses. The pursuer averred that the defender was also her debtor in the principal sums of £12 and £32 decerned for in the said extract decree, and in other sums.

On 5th August 1907 the Sheriff-Substitute (Mackenzie) *found* that there was *prima facie* evidence of notour bankruptcy and ordered service, advertisement, etc., of the petition. The Sheriff-Substitute's note was in the following terms:— 1st Div. Smith v. Harvie.

Note.—It is argued on behalf of the debtor that he is not notour bankrupt, in respect that the debt which he was charged to pay was one for expenses in an action at the instance of the petitioner. This argument is founded on the provisions of the 6th section of the Debtors Act 1880, which provides the mode of constituting notour bankruptcy "in any case in which, under the provisions of this Act, imprisonment is rendered incompetent." It is said that this section, under which the petitioner has proceeded to charge, is not applicable in respect that liability for imprisonment in the present circumstances did not exist before the Act of 1880, having been already removed by the Act 5 & 6 Will. IV., cap. 70, sects. 1–5. That Act (now repealed, but in force in 1880) provides that imprisonment shall not be competent in respect of debts less in amount than £8, 6s. 8d., "exclusive of interest and expenses." The present petitioner has only charged on a sum of £40 of expenses in the previous action, and it is therefore held that there is here no principal sum at all on which the charge has expired, but only a sum of expenses; that such a debt did not carry liability for imprisonment before 1880; and that consequently it was not one of those cases in which imprisonment was rendered incompetent by the Act of that year.

I am not satisfied that this argument is a good one. The sum on which the charge proceeded is £40. That consists, no doubt, of expenses decerned for in another action, but it is none the less a debt due by the defender. I do not know of any principle which would prevent the petitioner from doing diligence in respect of that sum as a substantive debt. He has, indeed, a warrant for "all lawful execution," and has to this extent put it in force. If that sum be above £8, 6s. 8d., I do not see how the provisions of the older Act can help the debtor. If the Act of 1880 had not been passed, I apprehend that the debtor here would have been liable to imprisonment for non-payment of this sum of £40. The decree for it might have been issued in the name of an agent, and I do not see that, in that event, the remedy of imprisonment, at his instance, could have been avoided.

If this be so, the Act of 1880 applies, and the charge having expired, I am of opinion that there is *prima facie* evidence of notour bankruptcy.

I have not been referred to any reported decision on this question, but I may observe that the competency of proceeding to apply for cessio on a decree for expenses alone seems not to have been questioned on the grounds here stated in the case of the *Magistrates of Falkirk* v. *Lundie*, 1892, 8 S. L. Review 272, in the Sheriff Court of Stirlingshire.

On 2nd September the Sheriff-Substitute made an order for *cessio*. The defender appealed to the Sheriff (Brand), who, on 9th November, *dismissed* the appeal.

The defender appealed to the Court of Session and *argued*: The defender was charged for payment of expenses, not for payment of a principal sum. The Small Debt (Scotland) Act 1835 abolished imprisonment for a civil debt not exceeding £8, 6s. 8d. exclusive of interest and

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expenses. If the charge had been for under £8, 6s. 8d. and for £40 of expenses imprisonment would not have been competent after that Act, as the charge would only have been looked upon as one for under £8, 6s. 8d. The charge in this case shewing no principal debt was no better than if it had been for under £8, 6s. 8d. Accordingly this was a case in which imprisonment was not rendered incompetent by the Debtors Act 1880 and to which the provisions of that Act did not apply (*Black* v. *Watson*, 1881, 9 R. 167).

Counsel for the pursuer was not called upon.

The Court *dismissed* the appeal.

The Lord President.—The point which we have to decide is a very short one, namely, whether there was here good evidence of notour bankruptcy on which a petition for cessio might be granted.

Now the evidence of notour bankruptcy on which the petition was granted was an expired charge for a sum of £40, 3s. of modified expenses, which expenses the defender was charged to pay under an extract decree *in foro*. On comparing the decree with the execution of charge one sees that the sum of £40, 3s. of modified expenses are the modified expenses contained in the decree.

The point raised by the appellant is that the provisions of the 6th section of the Debtors Act 1880 (43 & 44 Vict. cap. 34) do not apply. The heading of that section is "New Mode of constituting Notour Bankruptcy," and the section says: "In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by expiry of the days of charge without payment, or, where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made." And then the section proceeds: "Nothing in this section contained shall affect the provisions of sect. 7 of the Bankruptcy (Scotland) Act 1856 (19 & 20 Vict. c. 79)."

The appellant says that the section I have just read is not applicable, because this is not a case in which imprisonment was rendered incompetent, inasmuch as imprisonment was already incompetent at the date of the Act. In other words, he seeks to put a gloss on the expression "*rendered incompetent*" to the effect that it really means "*rendered for the first time incompetent.*" I do not think the appellant has any right to put such a gloss on these words. There were other ways of constituting notour bankruptcy than imprisonment, and the case of *Black* v. *Watson*, 1881, 9 R. 167, cited by the appellant, really points to that, though Mr Lippe's argument at first sight is supported by the form of expression used by the Lord President in his opinion in that case, that the 6th section of the Act of 1880 provides, not for cases in which previous to that Act imprisonment was incompetent, but for cases in which imprisonment was rendered incompetent by force of the provisions of that Act itself. That form of expression, however, really went, I think, beyond the requirements of the case. The point really decided by the case was that the grounds of constituting notour bankruptcy detailed in the Act of 1856 stand on their own basis apart from the Act of 1880. But when imprisonment for debt was abolished practically *in toto*, it became necessary to provide a new method of constituting notour bankruptcy in those cases in which under the old law imprisonment was required, but it was not necessary to interfere with the other methods of constituting notour bankruptcy, which still stand. Accordingly I do not think the appellant has any right to put on the words of the 6th section the gloss he proposes. The Act applies to all cases in which by its provisions imprisonment is incompetent. The matter can be very well tested by supposing that the respondent had attempted to imprison the appellant. I think in that case he would at once have been met by the Act of 1880.

Apart from that, however, it is necessary that, for the argument of the appellant, he could have been met by the Act of 5 & 6 Will. IV. cap. 70 also, which provides that imprisonment shall not be competent in respect of debts less in amount than £8, 6s. 8d., exclusive of interest and expenses. That is, it says that such debts shall not be swollen by interest and expenses. Now the objection here is that the sum charged for consists solely of expenses. But if we look at the decree here we see that the principal sums decerned for were each of them greater than £8, 6s. 8d. It is no answer for the appellant to say that you can only find that out by looking at the decree. It is for the person objecting to the notour bankruptcy to shew that it was wrongly constituted, on the ground that the principal sum to which the expenses related was a sum less in amount than £8, 6s. 8d. He cannot shew that here, and I am therefore of opinion that on both grounds the appellant has failed.

Lord M'Laren.—It is not surprising that the Bankruptcy Act of 1856 does not make provision for rendering a person notour bankrupt under a decree for expenses of a small debt action, for sequestration under that statute could only proceed on the application of a creditor whose debt amounted to not less than £50, or in the case of more than one creditor to £70 or £100 as the case might be, and it was not to be expected that the expenses of a small debt action would amount to such a sum. Accordingly, when imprisonment for debt was abolished

by the Debtors Act of 1880—except in the case of alimentary debts and debts due to the Crown—it became necessary to have some mode of constituting notour bankruptcy in cases where under the older law diligence by imprisonment was competent.

Now the appellant contends that the provisions of the 6th section of the Debtors Act regarding the constitution of notour bankruptcy in such cases do not apply, inasmuch as imprisonment was not, in the present circumstances, rendered incompetent by that enactment. I do not think it is a good objection to the applicability of the Debtors Act to say that it did not for the first time render imprisonment incompetent in cases where at the date of the Act it was already incompetent under the prior Act of 1835. The two Acts are to be read concurrently.

I also agree with your Lordship in thinking that no legal question really arises here, for if you suspend a charge or bring an action to enforce payment of a debt we are always entitled to look at the grounds on which the decree is founded. Doing so here, one sees that the two principal sums in the decree are each of them greater than £8, 6s. 8d., viz. £12 and £35, and it has not been shewn that the sum of £40, 3s. of modified expenses is a sum of the nature described in the Act of 5 & 6 Will. IV. c. 70.

Lord Kinnear.—I am entirely of the same opinion. The Debtors Act of 1880 provides that, with certain exceptions, "no person shall, after the commencement of this Act, be apprehended or imprisoned on account of any civil debt." There is no question that the appellant is entitled to the benefit of that general enactment. Then it goes on to say, in sect. 6, that where, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by certain modes of procedure which do not involve imprisonment. I think that provision applies to cases where a debtor might have escaped imprisonment even although the Act of 1880 had not been passed. The intention was to provide a new method for creating notour bankruptcy in place of the method by imprisonment which the Act had abolished; and if the debt is one which under the provisions of the Act cannot be enforced by imprisonment, the condition for bringing about notour bankruptcy in a different way will attach although the debtor may be protected from imprisonment by an earlier statute as well as by the Act of 1856.

I am not satisfied, however, that the appellant's construction of the Act of 1835 (5 & 6 Will IV. cap. 70) is correct. What is there provided for is that imprisonment shall not be competent in respect of debts less in amount than £8, 6s. 8d., "exclusive of interest and expenses." Now, that is not a general enactment that no person is to be imprisoned for a debt consisting merely of interest or expenses. What the statute enacts is that there is to be no imprisonment for any lesser sum than £8, 6s. 8d., and that debts of a smaller amount shall not be brought up to the statutory limit by adding interest or expenses to the principal. If the debt amounted to more than that sum, I see nothing to prevent the creditor recovering it, including interest and expenses, in any way known to the law at that time. I am not satisfied, therefore, that the charge in question for £40, 3s. is within the scope of the Act 5 & 6 Will IV. cap. 70. But that is merely an academical question, for whether the debtor would have been protected by that statute or not, it is certain that he is protected by the Act of 1880; and if that Act prevents his being imprisoned for the debt in question, it follows that he cannot be made notour bankrupt by such imprisonment.—18*th January* 1908.

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Counsel for Pursuer, Lippe; Agents, Laing & Motherwell, W.S.—Counsel for Defender, D. P. Fleming; Agents, Gardiner & Macfie, S.S.C. W. A. R.

OUTER HOUSE.

(*Lord Salvesen.*)

304. Cuthill *v.* North British Railway Company and Another.

Reparation — Negligence — Railway — Passenger—Duty of Railway Officials to Passengers—Ticket Collector Unable to Arouse Passenger—Right to Remove Passenger from Carriage Without Ticket Being Produced or Collected — Running Down of Passenger at Station Where He was Taken Out of Train—Station—Dangerous Condition — Exit from Island Platform — Liability of Railway Company—Relevancy.

This was an action of damages at the instance of John Cuthill for the death of his son. The action was brought against the North British Railway Company and the Caledonian Railway Company as joint owners and users of the line of railway known as the Dundee and Arbroath Joint Railway.

The following statement of the circumstances giving rise to the action is taken from the Opinion of the Lord Ordinary:—

"This is an action of damages by a father in respect of the death of his son. The defenders plead that the action is irrelevant.

"The facts averred by the pursuer are briefly as follows. On 28th November 1906 George Cuthill took a ticket from Dundee to Arbroath, and travelled by the 6.5 p.m. train due to arrive at 6.45 p.m. The train was one which stopped

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at all the stations, including Elliot Junction, where tickets are checked or collected, Arbroath being the terminus of the railway.

"When the train arrived at Elliot Junction the deceased was fast asleep, and a porter—James Edwards — who entered the carriage for the purpose of collecting his ticket, failed to waken him. James M'Gregor—the guard of the train—next proceeded to try and get the deceased's ticket and partially roused him, but while he was still only half awake and in a dazed condition, M'Gregor—without demanding or waiting for or insisting on his ticket being produced—turned him out of the carriage on to the platform, being under the impression that the dazed and stupid condition of the deceased was due to his being in a state of intoxication. M'Gregor assisted the deceased for a short distance along the platform in the direction of the east end, and he and the porter then left in order to join the train; and the deceased was left alone on the platform.

"The platform is an island one, connected by an overhead bridge to the platform on the north side of the railway line. At the east end, however, the platform slopes gently down to the level of the rails, and a roadway of about the same breadth as the platform is continued on the level for about thirty or forty yards to a level-crossing. The deceased, instead of going by the footbridge, proceeded down this slope; and when about fifteen yards west of the level crossing was suddenly caught or drawn in by a passing train from the north and received such injuries that he died."

The pursuer's averments of fault were as follows:—

The death of the said George Cuthill was caused through the fault and culpable negligence of the defenders or of their employees, for whom they are responsible, and, in particular, of the said James M'Gregor. By virtue of the contract constituted by the issue of said ticket, the defenders undertook towards the deceased the duty of using every reasonable care and precaution for his safety on his journey from Dundee to Arbroath, and this duty they culpably and negligently failed to perform. The defenders had no right to turn any person out of a train in which they had accepted him as a passenger without satisfying themselves that he had ceased to have right to be there. It was the duty of the defenders' officials at Elliot Junction, before attempting to turn the deceased out of the train in which he was a passenger, to have ascertained his destination by demanding and insisting on exhibition of his ticket. This duty they entirely failed to perform. The production of his ticket was not insisted on, and sufficient means were not taken to ascertain if he had one or what was his destination, but he was, as above stated, culpably and wrongfully, and in breach of the duty undertaken by the defenders under the said contract of carriage, turned out of the carriage on to the platform at Elliot Junction. The officials had no reason to suppose that Elliot Junction was his destination, and no information to this effect was given to them. The deceased's ticket from Dundee to Arbroath, and also his bicycle ticket, were found in the ticket pocket of his coat after his death. The former had been checked at Dundee or some other station on the line. Had the officials at Elliot Junction performed their duty by insisting on production of his ticket from the deceased, they would at once have ascertained that he was in the proper train, and was entitled to proceed to Arbroath. They would necessarily have ascertained this if they had followed in the case of the deceased the course adopted by them with respect to the other passengers in the train, whose tickets were all checked or collected on the occasion in question at Elliot Junction. They, however, through culpable negligence, departed from the usual course in dealing with the deceased. Further, it was M'Gregor's duty, in the circumstances, after having turned deceased out of the train, to have placed him in a position of safety, or to have handed him over to another official. Further, the defenders' station at Elliot Junction is badly constructed, and is unsafe and dangerous for passengers alighting at night. In particular, there is no adequate means of enabling such passengers to find the authorised mode of exit, and no precautions exist for warning persons against taking the course followed by the deceased of proceeding straight along the platform towards the level-crossing. In the absence of such precautions the said course was that which in the circumstances naturally appeared to the deceased to be a recognised mode of exit from the station. Said course was rendered dangerous by the proximity of the rails at the part where the platform sloped down to the level of the rails, and by the tendency of passing trains to catch or draw in a person walking on said part of the platform. The deceased was caught or drawn in by a passing train in this way. The danger was aggravated by the imperfect lighting of the station. The conduct of the defenders' officials in turning the deceased out of the train into such a station without giving him full and accurate instructions for his guidance, and in leaving him alone on the platform when they regarded him as being intoxicated, was an act of gross and culpable negligence on their part, committed in breach of the undertaking entered into with the deceased when he purchased his ticket. Had the deceased been allowed to proceed to his destination—Arbroath—his death would not have occurred.

The following authorities were referred to in the argument on the relevancy of the action: *Bridges* v. *North of London Railway Co.*, 1874, L.R. 7 E. & I. Ap. 213; *Foy* v. *Brighton Railway Co.*, 1865, 18 C.B. (N.S.) 225; *Cockle* v. *L. and S.E. Railway Co.*, 1872, L.R. 7 C.P. 321; *Rennie* v. *North of Scotland Railway Co.*, 1905, 12 S.L.T. 667; *M'Cormack* v. *Caledonian Railway Co.*, 1904, 6 F. 362; *Potter* v. *N.B. Railway Co.*, 1873, 11 M. 664; *Butter* v. *Manchester Railway Co.*, 1888, 21 Q.B.D. 207; *Aitken* v. *N.B. Railway Co.*, 1891, 18 R. at p. 838; *M'Keever* v. *Caledonian Railway Co.*, 1900, 2 F. 1085 (on safety of exit).

The Lord Ordinary *disallowed* the issue proposed by the pursuer, and *assoilzied* the defenders.

Lord Salvesen [after narrating the facts as quoted above]. The fault averred against the defenders is, in the first instance, based on the action of

James M'Gregor in turning the deceased out of the train without ascertaining his destination. It is said that M'Gregor ought to have insisted on the production of the deceased's ticket before allowing the train to be started; and if so, of course the ticket, which was in the ticket-pocket of the man's coat, would have shewn that his destination was Arbroath, and he would never have been taken out at Elliot Junction. On the pursuer's statement I am not satisfied that M'Gregor committed any breach of duty. George Cuthill was admittedly in a dazed and stupid condition even after he had been roused by two of the defenders' employees successively; and it is pretty clear that the fact that he had had some beer and whisky in Perth and Dundee prior to entering the train must have contributed to his condition at the time, although it may have been mainly due to his having been up all the previous night. At all events, there is no suggestion that M'Gregor might not quite reasonably form the impression that the deceased's condition was due to intoxication. Now, under these circumstances, the duty of a ticket collector is a somewhat delicate one. He can obviously not proceed to search the man's pockets in order to ascertain whether he has a ticket on his person; and unless the ticket is produced or the passenger explains what his destination is, he cannot tell whether he has already passed or reached his destination, or has not completed his journey. It is the duty of the passenger to exhibit his ticket when the ticket collector demands it; and one can scarcely lay down any absolute rule that in the case of a person appearing to be intoxicated efforts are to be continued for a given length of time to rouse him and to get him to exhibit his ticket at the cost of delaying the train. The failure of the deceased to exhibit his ticket was due to his own condition at the time; and although that condition may have been innocently caused, that merely goes to shew that it was his misfortune and not his fault that caused his failure to comply with the regulations. Even, however, if I were of opinion that the pursuer had relevantly averred that his son was wrongfully removed from the carriage, I do not think that that would have advanced the pursuer's case, for this was not the proximate cause of the accident which afterwards occurred.

The next ground of fault is that it was M'Gregor's duty to have placed the deceased in a position of safety, or to have handed him over to another official. In the case of *M'Cormack*, 6 F. 362, it was held that a railway company is not liable in damages for failing to see an intoxicated person safely off the platform at which he arrives. It was said that that case was distinguishable from the present in respect that there the passenger had arrived at his destination, but I cannot see how that *per se* can make any difference in principle. The pursuer argued that if the deceased man had been brought to Arbroath, with which he was acquainted, he would no doubt have readily found his way off the station platform to a place of safety. It might have proved so in the present case, but for all M'Gregor knew the deceased might equally have been a stranger to Arbroath, or might have been familiar with Elliot Junction and not with Arbroath Station. If there is no obligation on the part of a railway company to see to the safety of a drunk man, who was quite prostrate and helpless when he was assisted on to the platform, the duty can be no higher in the case of one who, although averred to have been in a dazed and stupid condition, was evidently quite able to walk a considerable distance before he met with the accident.

The defenders are also charged with fault in respect it is said that the station at Elliot Junction is badly constructed, and is unsafe and dangerous for passengers arriving at night; in particular, that there is no adequate means of enabling such passengers to find the authorised mode of exit; and no precautions exist for warning persons against taking the course followed by the deceased. In the absence of such directions it is said that this course was one which in the circumstances would naturally appear to the deceased to be the recognised mode of exit from the station. I think it very likely that all these things may be predicated of a person in the dazed and stupid condition which the pursuer's son appears to have been in. But on this part of the case I must treat him as being able to take care of himself; and on this assumption I see no ground for imputing blame to the defenders. It appears from Cond. 6 that the platform proper was alone lighted with oil lamps and that there were no lamps on the sloping portion which led down to the rails. Such a sloping portion is a very common feature of most railway platforms, and is presumed to be for the convenience of the railway servants and not for use by the public. Any person who goes down such a platform in the dark without invitation does so, in my opinion, at his own risk. He ought to know that in going down to the level of the rails and placing himself so close to them as to enable a passing train to catch him he was exposing himself to great danger; and he cannot justly blame the Company, who had provided a safe means of getting off the platform which he could easily have found out if he had exercised reasonable care. There is no averment that any other person had ever made the same mistake as the deceased man; and I cannot think that any sober person would have imagined that he was on the right road out of the railway station when he found himself walking in the dark in close proximity to the railway line. It is said that there were no notices posted up indicating the exit; but a man who is not in a condition to see and appreciate the use of an overhead footbridge

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Cuthill v. North British Railway Company and Another.

would scarcely pay any attention to a notice board. I have accordingly reached the conclusion that the pursuer's averments do not disclose a case of actionable negligence against the defenders, and that they fall to be assoilzied.—*7th January* 1908.

Counsel for Pursuer, M'Lennan, K.C., J. W. Forbes; Agent, Alex. Ross, S.S.C.—Counsel for Defenders, Cooper, K.C., G. G. Grierson; Agent, James Watson, S.S.C. J. W. F.

OUTER HOUSE.

(*Lord Salvesen.*)

305. The Clan Steam Trawling Company Limited and Others *v.* The Aberdeen Steam Trawling and Fishing Company Limited.

SHIPPING LAW—SALVAGE—REMUNERATION—VESSELS INSURED IN SAME COMPANY—OBLIGATION IN POLICY ON ALL VESSELS INSURED TO ASSIST EACH OTHER WHEN REQUIRED—EXCLUSION OF CLAIM FOR REMUNERATION FOR SALVAGE—HELD THAT CLAIM NOT EXCLUDED BY PRE-EXISTING OBLIGATION IN INSURANCE POLICY.

The Opinion of the Lord Ordinary sufficiently reports this case.

In addition to the authorities mentioned in the Lord Ordinary's Note the following were referred to: Kennedy on Civil Salvage, pages 20, 28 and 84; *The "Davaar,"* 1907, 15 S.L.T. 29; Bell's Principles, sect. 444; James on Salvage, p. 29; *The "Collier,"* 1866, L.R. 1 A. & E. 83.

Lord Salvesen.—The pursuers in this action are the owners, officers and crew of the steam trawler "Clan Grant"; and they seek to recover a sum of £500 in respect of salvage services rendered to the defenders' vessel "Strathclyde." It is not disputed that the facts averred disclose a relevant case for compensation as for salvage services; and the defenders on record state that they are willing to pay reasonable compensation to the officers and crew of the "Clan Grant." They plead, however, [in their first plea in law], that the owners' claim is excluded, because they were under a pre-existing obligation to render the services in question to the "Strathclyde"; and it was this matter alone which was the subject of discussion in the Procedure Roll.

The pre-existing obligation in question is derived from the rules of The Aberdeen Mutual Steamship and Trawlers Insurance Company, with which Company both the "Clan Grant" and the "Strathclyde" were insured. By Art. 3 of the Articles of Association—(No. 13 of process)—"Every person who insures, on behalf of himself or any other person, any ship . . . . in pursuance of the regulations hereinafter contained shall, as from the date of the commencement of such insurance, be deemed to have become a member of the Company"; and by Art. 9, "The classes into which the members are divided, and the rights and obligations of the members of each class, shall be further defined by rules; and every member shall be deemed to accept and agree to be bound by the rules for the time being in force relating to the class of which he is a member." Art. 30 of the rules in question is apparently binding upon all members belonging to class 1 and class 2, and is in the following terms: "Every ship insured in this Company shall give assistance to any steamer broken down, or in distress, which is insured either in this Company, or in The Total Loss Mutual Steam Insurance Company (Sunderland), or The United Kingdom Steam Tug and Trawlers Insurance and Indemnity Association (Shields), or any other association with which an agreement has or may be entered into." Appealing to this rule the defenders say that the owners of the "Clan Grant" were under a general obligation to render salvage services to any vessel in distress insured in the same Company; and that the claim for salvage services, as distinguished from a claim for actual loss incurred in rendering the services, is accordingly barred.

The authority relied on in support of this proposition was a decision of Lord Stowell in the case of the "*Zephyr*," 1827, 2 Hagg. 43; and undoubtedly if the rubric is to be read as laying down an absolute rule on the subject apart from the special circumstances in which the question arose, it supports the defenders' contention. In that case two vessels had agreed to sail as consorts, and to render each other mutual assistance. In the course of the voyage one of the vessels rendered certain services to the other by standing by for several days; but these services were held in fact, as I read the decision, not to be such as would found a salvage claim. This was obviously a sufficient ground for dismissing the action. But the learned judge prefaced his judgment with some observations, in which he indicated that the claim would in any event have been barred by the mutual agreement to which I have referred. The case, however, was a very special one, and does not, in my opinion, support the general proposition that, where the owners of two vessels have agreed to give assistance to each other, if broken down or in distress, no claim for remuneration, as for salvage, can ever arise. In the case of the "*Zephyr*" it must be held to have been implied in the agreement that such services as were actually rendered were to be mutually given by the vessels concerned without remuneration; and it is material to a proper understanding of the case that the Court held that the services which were the subject of the action were not salvage services at all.

The defenders also referred to the case of the

"*Harriot*," 1842, 1 W. Rob. 439; the "*Marie Jane*," 1850, 14 Jur. 857; and the "*Sappho*," 1871, L.R. 3 P.C. 690. In the last of these cases it was decided that when salvage services are performed by one ship to another belonging to the same owners, the master and crew of the salving ship are entitled to salvage remuneration, although no claim will lie at the instance of the owners. The decision, therefore, does not touch the present case; and it does not appear to me that the observations made by Lord Justice Mellish, in delivering the judgment of the Court, have any bearing upon the question at issue here. Nor does there appear to me to be any analogy between the case of seamen who render services connected with the saving of their own ship and the case of shipowners who are not otherwise connected than that both their vessels are insured in the same Company, rendering services to each other's vessels. In my opinion, therefore, there is no law to the effect that a pre-existing obligation constituted by an agreement between two shipowners to render salvage services to each other's ship operates in all cases as a bar to a claim for compensation. Such an agreement really does not add very much to the moral obligation which every ship is under to give assistance, where possible, to another ship that is in distress.

I do not affirm that shipowners may not, by agreement, bar themselves from any claim for salvage remuneration in respect of services rendered to each other's property. Such an agreement might conceivably be objected to as being contrary to public policy. But assuming its validity, I think it must be clear from the agreement that the rendering of assistance to a vessel in distress shall not found a claim for remuneration. The right to obtain salvage remuneration is one very much favoured in the law; and, therefore, cannot be excluded unless by express words, or by very clear implication from the language used. Rule 30 contains no express exclusion of such a claim; and it does not appear to me that there is any implication at all that it should be excluded. If the question had arisen with a vessel belonging to The Total Loss Mutual Steamship Insurance Company of Sunderland, I find from the rules of that association (Rule 92) that compensation would have been claimable, although the amount would require to be fixed by the committees of the associations in which the vessels were insured, and not by the ordinary tribunals of the country. The defenders here say that they are willing to pay the owners of the "Clan Grant" any outlay they have incurred, or any damage they have sustained in connection with the services rendered, and that it has been the practice of the insurance company to meet such claims. If their argument, however, is good for anything, I think they must maintain that even such a claim is barred by Rule 30. It is possible to read into Rule 30 an implication that no compensation shall be allowed for assistance given in terms of that rule; but I cannot understand on what principle compensation should be limited to those cases where loss or outlay has been incurred in rendering services. A similar question was mooted, although not decided, in the case of the "*Margery*" [1902], P. 157; but it was not necessary to arrive at any decision on the point now at issue, because the owners of the salving vessel were not parties to the suit, but were content with the award of compensation which the Committee of the Sunderland Association had made in their favour. Without, therefore, expressing any opinion as to the validity of a bargain between the members of a mutual assurance company that their vessels should give mutual assistance on the footing of not being remunerated for their services, however meritorious, I reach the conclusion that the present claim is not barred because there is nothing in the agreement to exclude the right of the salvor to receive the remuneration for his services which the law gives him. I shall therefore repel the first plea in law for the defenders, and allow parties a proof of their respective averments.—*8th January* 1908.

Counsel for Pursuers, Hunter, K.C., D. Anderson; Agents, Davidson & MacNaughton, S.S.C.—Counsel for Defenders, Dickson, K.C., Lippe; Agents, Beveridge, Sutherland & Smith, S.S.C.

J. W. F.

Outer House. *Lord Salvesen.*

The Clan Steam Trawling Co. Ltd. and Others v. The Aberdeen Steam Trawling and Fishing Co. Ltd.

OUTER HOUSE.

(*Lord Salvesen.*)

306. Hogarth & Sons *v.* The Leith Cotton-seed Oil Company.

Shipping Law—Carriage of Goods—Discharge of Cargo—Bill of Lading Providing for Delivery "From the Ship's Tackles"—Discharge by Shipowner of Cargo Unweighed Into Shed—Liability for Landing and Shed Charges and Extra Cost of Weighing of Cargo — Averment of Custom of Port as to Mode of Discharge—Proof of Custom Allowed.

The pursuers were owners of the s.s. "Baron Fairlie," and they sued the defenders for payment of freight and charges due in respect of the carriage and delivery of a certain cargo to the defenders. The following statement of the facts is taken from the Opinion of the Lord Ordinary:

"The pursuers are managing owners of the 'Baron Fairlie'; and the question relates to certain charges which were incurred in connection with the discharge of a cargo which she loaded at Bombay and delivered at Leith on 5th February 1907. The cargo consisted of 52,424 bags

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of cotton-seed; 18,280 bags of bone-meal, and 727 bags of Kurdee cake. There were various receivers — the defenders being amongst the largest. Twenty-seven bills of lading, covering the three commodities above mentioned, were granted by the master; and there were nineteen different marks applicable to the goods.

"The bills of lading contained a clause that the goods were to be delivered 'from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid Port of Leith'; and the defenders say that on the arrival of the vessel they requested the pursuers to deliver their goods to them from the ship's tackles, but that the pursuers declined to do so, and insisted on landing the whole cargo unweighed into shed. The pursuers substantially admit this averment, explaining that it is 'the custom of all ships discharging at the Port of Leith mixed or general cargoes with a variety of distinguishing marks to a number of receivers to land the cargo into shed; and thereafter to assort the several parcels according to the various marks'; and they say that the method of discharging actually adopted — which was the only feasible and practicable method in the circumstances—was in accordance with this custom. They say, further, that the additional charges so incurred fall to be borne by the consignees according to the custom of the Port of Leith. They ask for a proof of these averments."

The defenders pleaded, *inter alia*:

"1. The pursuers' averments as to the custom of the Port of Leith being irrelevant, the same should not be remitted to probation."

The Lord Ordinary *repelled* this plea in law, and allowed a proof.

Lord Salvesen [after narrating the facts as quoted above].—The defenders do not admit the custom; but contend that, if it exists, it is not binding upon them, on the ground that it is inconsistent with the bills of lading under which they took delivery. In particular, they refer to the clause with reference to delivery from the ship's tackles.

Had the question here raised been new, I think it would have been by no means an easy one; but I cannot distinguish the facts of the present case from those which occurred in *Marzetti* v. *Smith*, 1884, 49 L.T. (N.S.) 580. The decision of the Court of Appeal is one of high authority, because of the eminence of the judges who took part in it; and it has never been questioned in England during the comparatively long period that has since elapsed. Even, therefore, if I saw occasion to differ from the reasoning of the learned judges, I should be very slow to disregard the decision, as I was asked by the defenders' counsel to do. As matters stand, I see no reason whatever for questioning the soundness of the decision; and, if so, it practically settles the present case in favour of the pursuers. It was there held that in the case of a mixed cargo, carried under bills of lading with a clause as to delivery identical with the one with which I am dealing, the shipowner was not bound to discharge the cargo, as the consignees requested him, direct into lighters; but was entitled, at their expense, to have it put upon the quay and assorted there. It was suggested that the charges, for which the consignees were held liable in *Marzetti's* case, were the charges of the Dock Company in whose sheds the goods were landed, while the charges that are here sought to be recovered are those incurred by the ship in landing and assorting the goods. As the Dock Company, however, undertook the landing of the goods in *Marzetti's* case, I think the services for which they charged were substantially the same—at all events in part—as those for which the pursuers now claim to be reimbursed. The case, at all events, settles that the obligation to deliver from the ship's tackles is not inconsistent with the right of the shipowner—where a local custom to that effect exists—to land and shed the goods so that they may be assorted with more leisure than is compatible with the rapid discharge of a ship carrying a mixed cargo, and at present I must assume that the pursuers are in a position to prove the custom averred.

A separate point was raised with regard to the expense incurred to the consignees in weighing the cargo. According to the sample bills of lading produced, the freight was payable in Leith on net weight delivered; and, apart from custom, the cost of weighing would probably have fallen upon the ship. This was so decided in the case of *Coulthurst* v. *Sweet*, 1860, L.R. 1 C.P. 649. Willes, J., in giving his opinion, said: "In the absence of any custom to govern the matter, the person who wants to ascertain the quantity must incur the trouble and expense of weighing. It is by no means an uncommon thing to have goods weighed on board, but I never heard of the merchant being called upon to pay for it." The shipowner there had attempted to prove a custom under which the consignee was bound to pay for the expense of weighing, but the jury negatived the existence of any such custom. In the present case the point does not, in my opinion, really arise. The defenders do not claim from the pursuers the ordinary expense of weighing the cargo on board ship, but only the extra expense of weighing caused by the ship's landing the cargo instead of delivering it from the ship's tackles. The liability for this extra expense seems to me to depend on exactly the same considerations as the liability for the landing and shed charges with which I have already dealt. I shall accordingly repel the first plea in law for the defenders, and allow parties a proof of their averments.—*8th January* 1908.

Counsel for Pursuers, Solicitor-General (Ure,

K.C.), Horne; Agents, Boyd, Jameson & Young, W.S.—Counsel for Defenders, Dickson, K.C., Macmillan; Agents, Beveridge, Sutherland & Smith, S.S.C. J. W. F.

SHERIFF COURT.

(Sheriff-Substitute Hay Shennan, at Dunfermline.)

307. Cousland *v.* The Magistrates and Councillors of the Burgh of Kinghorn.

Reparation — Damages — Trespass—Liability of Proprietors of Golf Course for Damage Caused by Trespass on Adjoining Lands by Persons Playing on Course—Natural and Probable Result—Relevancy—Scot's Trustees v. Moss, 1889, 17 R. 32, Followed.

The pursuer in this case was tenant of land near Kinghorn known as Kilcruick Land, extending to about fourteen acres. The defenders were the proprietors of a golf course known as the "Kinghorn Golf Course," which adjoined Kilcruick land on the south, west, and north, and over which the members of two golf clubs possessed the privilege of being allowed to play on payment of a small sum for each member. Any member of the public was also entitled to play on the course on payment of a small charge. Between the golf course and Kilcruick land a march fence had been erected, consisting of iron standards 4 feet high with six ordinary fencing wires, and not barbed wire, thereon, the bottom wire being 6 inches from the ground, the other wires being about 7, 7¼, 8, 8½, and 9¼ inches respectively apart. The pursuer averred that this fence was not a suitable obstruction between the golf course and Kilcruick land, so as to prevent golf balls being driven thereon by parties playing on the former; that it was quite insufficient to prevent persons going across it on to Kilcruick land to recover golf balls driven thereon; that it should have been constructed much higher at several places and wire netting put thereon; or some other suitable means to prevent golf balls getting over it or through it on to Kilcruick land should have been adopted by the defenders to prevent persons playing golf on said golf course going into pursuer's fields in search of golf balls and destroying his crops; that the defenders were in fault in not putting up wire netting on the whole fence, or taking some reasonable precaution to prevent damage being done to the pursuer's crops. The pursuer, after narrating the position of various teeing grounds, for the purpose of shewing the great likelihood of golf balls falling into the pursuer's fields, averred specific instances where the golfers, or the greater proportion of them, who were playing on said golf course, had accidentally driven balls on to said lands, and had gone over the march fence to recover them, with the result that pursuer's wheat, tares, turnips, etc., were trampled down, and rendered entirely useless. The defenders should or ought to have foreseen that, from the position of the teeing grounds, greens, and holes placed on said golf course, near to said march fence, a very large number of golf balls would fall on to Kilcruick land, and that in such an event it was natural that the persons to whom such golf balls belonged and their companions should go over into pursuer's fields to search for them, and thereby cause damage to the pursuer's crops. It was also averred that the probability of such damage was actually brought to the notice of the defenders on various occasions. The defenders pleaded that the pursuer's averments were irrelevant. The argument appears sufficiently from the Sheriff-Substitute's note.

The Sheriff-Substitute (Hay Shennan), by interlocutor dated 30th December 1907, repelled said plea and allowed a proof.

He added the following note:—

Note.—Put shortly, the pursuer's case is that the defenders used land abutting on his farm for the purpose of a golf course; that they have so laid out the course that players are apt to drive balls into pursuer's land; that players persist in coming in search of these balls into his fields, and destroy his crops; that defenders, though warned of the probability of this, failed to take precautions either by effective fencing or by altering the course so as to prevent such damage; and that accordingly the defenders are liable to make good this damage which was the natural and probable result of their actings. The pursuer bases his case in law on the decision in *Scot's Trs.* v. *Moss*, 6 Nov. 1889, 17 R. 32.

The defenders plead that this is not a relevant claim of damages. In the first place they plead that there is no relevant averment of any act of negligence or breach of duty on their part. Now, it is to be observed that the defenders' use of the ground is not the ordinary agricultural use which a neighbour must expect and accept. The defenders here invite all and sundry to come, under certain conditions, to it for the recreation of golf, and they are bound to consider their duty in these unusual circumstances under the brocard *sic utere tuo ut alienum non lædas.* They are bound, in the first place, to endeavour to lay out the green so that balls are unlikely to be driven into pursuer's land. If, in spite of such endeavours, such a risk is created, they are bound to do all in their power to prevent players trespassing on pursuer's land in search of balls. In my opinion the pursuer has relevantly averred that the defenders have failed in these two duties, after they had been fully warned of the probable consequence of such failure. I think the pursuer has brought his

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case within the principle of the decision in *Scot's Trs.* v. *Moss.*

"But then," say the defenders, "we cannot be held liable for the use which players make of the golf course. They are our tenants, and are themselves responsible for their actings. We forbid them to trespass on your land, and we can do no more" Articles 5, 6 and 7 of pursuer's Condescendence do not disclose a case of tenancy. The defenders charge two clubs so much a year for the privilege of allowing their members to play, and they also permit individuals to play by the day or week or otherwise in return for certain payments. But the defenders retain the exclusive management of the course and appoint, pay and control a greenkeeper and two assistants for this purpose. This is quite a different case from that of landlord and tenant, where the tenant obtains exclusive possession. Here the defenders themselves are the occupants, just in the same way as the lessee of a theatre.

It is argued further, on the authority of the case of *Stirling Crawford* v. *Clyde Navigation Trs.*, 22nd January 1881, 8 R. 826, that the pursuer's proper remedy is not against the defenders, but against the individuals who trespass on his land. In that case, however, I think the real ground of judgment was that the pursuer's object in the action was to prevent the public from using an alleged right of way, and that this question could not be tried with the Clyde Trust, who were not asserting a right of way, but were merely ferrying over the individuals who asserted that right. Here the pursuer sets forth, in Condescendence 12, reasons as cogent as those averred in *Scot's Trs.* v. *Moss*, for not proceeding against the actual wrongdoers.

The defenders also complain that the pursuer gives no specification of the names of the trespassers or the dates of the trespass. For such a case as the pursuer sets forth I do not think this minute specification can reasonably be demanded.

The plea of contributory negligence cannot, I think, be satisfactorily dealt with at this stage. Pursuer's averments do not disclose enough to found such a plea.—30*th December* 1907.

Agent for Pursuer, James Thomson, Solicitor, Kirkcaldy.—Agent for Defenders, James Inglis, Solicitor, Kirkcaldy. A. J. L. L.

HIGH COURT OF JUSTICIARY.

(*Lords M'Laren, Kinnear and Pearson.*)

308. Gordon *v.* Shaw.

Justiciary Cases—Fishing—Trawling—Sea Fisheries Acts—Herring Fishery (Scotland) Acts — Sea Fisheries (Scotland) Amendment Act 1885 (48 & 49 Vict. cap. 70)—Herring Fishery (Scotland) Act 1889 (52 & 53 Vict. cap. 23), sect. 7 (1)—Herring Fishery (Scotland) Act Amendment Act 1890 (53 & 54 Vict. cap. 10)—Sea Fisheries Regulation (Scotland) Act 1895 (58 & 59 Vict. cap. 42), sect. 10 (4), (5)—Bye-laws Nos. 10 and 14 of the Fishery Board for Scotland—Held that a Member of the Crew of a Vessel Trawling in Prohibited Waters Was Liable to Conviction Under the Sea Fisheries (Scotland) Act 1895 Although He Was Not in a Position of Authority for the Purpose of Directing the Navigation, Management, or Fishing Operations of the Vessel.

Stated Case.

This was an appeal by stated case from a decision of the Sheriff-Substitute at Elgin (Webster) finding a charge against the respondent under the Sea Fisheries Acts and the Herring Fishery (Scotland) Acts not proven.

The stated case was as follows:—

This is a cause at the instance of the appellant against the respondent, charging the respondent with having contravened the Sea Fisheries Acts and the Herring Fishery (Scotland) Acts, in so far as he the respondent did, on (Saturday) 23rd March 1907, at a part of the Moray Firth thirteen and one-third miles or thereby south-east by south a half south from Port Gower, Sutherlandshire, and within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire, he being at the time a deck hand on board of the steam trawler "Zenobia," S.R. 11 of Stavanger, Norway, and not in the service or possessing the written authority of the Fishery Board of Scotland, use or assist in using an otter trawl for taking sea fish, contrary to bye-law number ten, made by the Fishery Board for Scotland under the powers conferred on the said Board by the Sea Fisheries (Scotland) Amendment Act 1885, The Herring Fishery (Scotland) Act 1889 (particularly section 7 (1) thereof), and the Herring Fishery (Scotland) Act Amendment Act 1890, dated said bye-law at Edinburgh on 27th September 1892, confirmed by Her late Majesty's Secretary for Scotland on 22nd November 1892, and published in the Edinburgh Gazette on 25th November 1892, as amended by bye-law number fourteen, made by the said Fishery Board for Scotland under the powers conferred on the said Board by the Herring Fishery (Scotland) Act 1889, section 7 (1), dated said bye-law at Edinburgh on 17th April 1896, confirmed by Her late Majesty's Secretary for Scotland on 6th August 1896, and published in the Edinburgh Gazette on 18th August 1896.

The cause was tried in the Elgin Sheriff Court before Sheriff-Substitute James Gray Webster on 11th July 1907.

It was proved that the said steam trawler "Zenobia" was on the date libelled engaged in trawling with an otter trawl for taking sea fish at the place mentioned in the complaint. It was further proved that the respondent was on that occasion not in a position of authority for the purpose of directing the navigation, management, or fishing operations of the "Zenobia." It was also proved that he did not direct, nor did he assist in directing, such navigation, management, or fishing operations. It was further proved that he occupied a subordinate position as a

member of the crew of the "Zenobia," and as such member of the crew, acting under orders of his superior officers, he assisted in the trawling operation proved. It was not proved that he knew or must of necessity have known of the position of the said vessel on the occasion specified. The charge against the respondent was found not proven.

The Question of Law for the opinion of the Court was:—

Whether, on finding the facts stated proved, the Sheriff-Substitute was justified in finding the charge against the respondent not proven?

Argued for the Appellant: If the complaint was relevant—and that was admitted—the Sheriff-Substitute was bound to convict, because, on the facts stated in the case, all the counts were proved. The grounds of the Sheriff-Substitute's decision were not stated, nor were questions put to the Court with reference to these grounds. But they were presumably (1) that the accused was in a subordinate position and not in charge of the vessel; and (2) that he did not know that the vessel was at the time within the prohibited area. As to the first of these, the being in a subordinate position was no defence unless the accused was acting under the compulsion of his superior. The mere plea of subjection was no defence. That was the rule both in Scotland and England (Hume on Crimes, I. 47, 50, 53; Alison's Criminal Law, I. 672; Bell's Notes to Hume 7, 8; *H.M. Advocate* v. *Woods*, 1839, 2 Swin. 323; *H.M. Advocate* v. *Boyd*, 1842, 1 Broun 7; *H.M. Advocate* v. *Henderson & Lawson*, 1842, 1 Broun 360; Fraser, Master and Servant, 305; Russell on Crimes, I. 146). And this was a rule equally applicable to common law crimes and statutory offences. In particular, the rule was not modified by the Fisheries Statutes. In the earliest statutes the penalty was limited to the master (Sea Fisheries Act 1868 (31 & 32 Vict. cap. 45), sect. 63; Sea Fisheries Act 1883 (46 & 47 Vict. cap. 21), sect. 20 (1)); but the later Acts made the offence a general one, applicable to every person (Sea Fisheries (Scotland) Amendment Act 1885 (48 & 49 Vict. cap. 70), sect. 4; Herring Fishery (Scotland) Act 1889 (52 & 53 Vict. cap. 23), sects. 6, 7; Herring Fishery (Scotland) Act Amendment Act 1890 (53 & 54 Vict. cap. 10), sect. 3). And in particular that was so in the case of the Sea Fisheries Regulation (Scotland) Act 1895 (58 & 59 Vict. cap. 42), sects. 10 (4), (5), under which the present prosecution was brought. Accordingly the Fishery Board, in promulgating their bye-laws, had distinguished between offences for which the master was alone liable and those for which every person was liable. Bye-laws made in 1886 and April 1887 applied only to the master, while the bye-law of July 1890 applied to every person. As to the accused's knowledge of the *locus* in which the vessel was at the time, that must be presumed in the absence of any finding to the contrary. It was for the accused to rebut that presumption (Macdonald on Crimes, p. 1). *Mens rea* was libelled by implication, and the accused had offered no proof that he was not aware that an offence was being committed. If ignorance was a defence he ought to have pleaded it and proved it. But mere ignorance was not a defence to the charge, although it might be a good plea in mitigation of penalty. Neither the statute nor the bye-laws required that the act should be committed "knowingly." The findings of the Sheriff-Substitute no doubt did not include a statement that the accused contravened the statute "knowingly," but that was unnecessary. It would have been irrelevant to find that he did know he was within the prohibited area. Ignorance that he was committing an offence was no answer by a person charged with it (*The King* v. *Marsh*, 1824, 2 B. & C. 717; *The Queen* v. *Bishop*, 1880, 5 Q.B.D. 259; *Reg.* v. *Prince*, 1875, L.R. 2 C.C.R. 154). Bye-law No. 10 had already been before this Court in *Wilson* v. *Rust*, 1896, 2 Adam 114, and *Mortensen* v. *Peters*, 1906, 5 Adam 121.

Argued for Respondent: It was no part of the respondent's case to say that the complaint was irrelevant, or that this was an offence for which he could in no circumstances be convicted, and which only the master of the vessel could commit. It was similar to the offence of smuggling, which might be committed by a master of a vessel or by any person; and the cases in which the penalty was confined to the master were distinguished in the statutes from those in which any person was liable (Customs Consolidation Act 1876 (39 & 40 Vict. cap. 36), sects. 172, 179; Customs and Inland Revenue Act 1881 (44 & 45 Vict. cap. 12), sect. 12). But it was necessary for the appellant to shew that, on the findings stated by the Sheriff-Substitute, he was bound to convict, and that no inference was possible but one of guilt. The vital points of the findings were (1) that the accused was not in authority, but was acting under the orders of a superior; and (2) that there was no finding as to the state of the accused's knowledge. From the statements in the case the Sheriff-Substitute was entitled to infer that the accused could not help acting as he had done (*Rothwell* v. *Hutchison*, 1886, 13 R. 463). The Sheriff-Substitute was entitled to take all the circumstances into consideration, such as that this took place in the Moray Firth when a ship was often within the prohibited area when out of sight of land, and that a member of the crew could not be expected to know the position of the vessel every time the trawl was shot. It was not enough, in order to secure a conviction, to shew that the vessel was within the prohibited area. The offence libelled was "using or assisting to use," and that, presumably, was the offence of the master. The

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charge here was really of being art and part with the master. If that was so the prosecutor ought to shew that the accused and the master were acting together with unity of purpose. That was not done, and the Sheriff-Substitute was therefore entitled to find the charge not proven. This was the first case of a prosecution for a contravention of these bye-laws brought against anyone except a master or a dummy seaman who was really the master of a vessel, and the decision of the Sheriff-Substitute was right. *The King* v. *Marsh, cit. supra*, really shewed that ignorance would have been an excuse if it had been proved. As to *The Queen* v. *Bishop, cit. supra*, it was very easy to say whether the person was a lunatic or not, and therefore it was natural to make a person who kept lunatics responsible, for he must have been held to have known. *Reg.* v. *Prince, cit. supra*, was a case of *malum in se*, not *malum prohibitum*, and knowledge was presumable in the one case while it was not in the other.

The Court *answered* the question in this case in the negative, and *sustained* the appeal.

Lord M'Laren.—This is an appeal on a stated case from a judgment of the Sheriff-Substitute at Elgin in a complaint under the Fisheries Act, charging the defender with a contravention of a bye-law of the Fishery Board for Scotland duly made and confirmed, whereby the defender is on conviction liable, in terms of the Sea Fisheries Regulation (Scotland) Act 1895, sect. 10, to a fine not exceeding one hundred pounds, or imprisonment for a period not exceeding sixty days.

The Sheriff-Substitute found the case against the defender not proven, and the Procurator-Fiscal has appealed from this sentence to the Court.

The facts are very clearly and succinctly stated in the case, and all the facts found being essential, it is only necessary that I should read the paragraph in which these are set out.

"It was proved that the said steam trawler 'Zenobia' was on the date libelled engaged in trawling with an otter trawl for taking sea fish at the place mentioned in the complaint. It was further proved that the respondent was on that occasion not in a position of authority for the purpose of directing the navigation, management, or fishing operations of the 'Zenobia.' It was also proved that he did not direct, nor did he assist in directing, such navigation, management, or fishing operations. It was further proved that he occupied a subordinate position as a member of the crew of the 'Zenobia,' and as such member of the crew, acting under orders of his superior officers, he assisted in the trawling operation proved. It was not proved that he knew or must of necessity have known of the position of the said vessel on the occasion specified."

It was not seriously disputed that a seaman, or fisherman serving as a seaman on board a fishing-vessel, would be liable to conviction if he were proved to have assisted in the operation of trawling within a prohibited area, knowing that the vessel was within the locality in which trawling was illegal.

But on behalf of the defender and respondent it was contended that such knowledge could not be imputed to an ordinary seaman, who has not the means of determining the ship's position at sea, and who would not in the ordinary conduct of the business of navigating the ship be informed by the master as to the ship's position. As a matter of impression I think it is very likely that an ordinary seaman, when out of sight of land, would not know the exact position of the ship, and in this case it is found not proved that he knew, or must of necessity have known, what was the ship's position.

On the other hand, the respondent, although entitled to be a witness in his own case, did not come forward to excuse himself by professing ignorance of the ship's position.

While, in the case of a charge of crime under the common law, guilty knowledge or guilty intention is of the essence of the crime, yet there are many cases where such knowledge or intent is presumed from the facts in the absence of a special defence.

In the case of a breach of a statutory regulation, it is not a universal rule that intention to contravene the statute must be established. That may depend on the policy of the statute, and also on the language of the statute. If the enactment is in form an absolute prohibition against doing a certain thing, it seems to me that in general the prosecutor may be held to have established his case if he proves the commission of the prohibited act by the person accused, unless the accused is able to satisfy the Court that in the special circumstances of the case he is excusable.

In this case there are four statutes dealing with contravention of trawling regulations; but it is only necessary to refer particularly to the latest of these, the Sea Fisheries Regulation Act 1895, sect. 10, subsect. (4), being the Act which prescribes the penalties for infringement of these regulations. Now the enactment begins with the words, "Any person who uses any such method of fishing in contravention of any such bye-law, shall be liable, on conviction," to the fine or period of imprisonment there prescribed. This is in the nature of a universal prohibition, and there is not a suggestion in the words of the statute that knowledge of the locality is necessary to constitute the offence. If it were necessary to a conviction that the prosecutor should prove knowledge on the part of the contravener that he was fishing in prohibited waters, it would be very difficult to get a conviction against any one, and I cannot see that there is any hardship in the case, because it is the duty of those who

engage in the fishing industry to inform themselves, and to take care that they do not fish where they are not entitled to fish. In the case of the master of a trawling vessel this is clear enough, and it may be that the ends of justice would be satisfied if the penalty were only enforceable against the master.

But evidently that was not the opinion of the Legislature, because the penalty for contravention is directed against all persons who shall use such method of fishing in contravention of a bye-law of the Fishery Board. I am accordingly of opinion that the respondent was not entitled to a judgment of not proven on the facts stated. I need hardly add that where a person in the position of the respondent comes forward, and is able to satisfy the Sheriff that he was excusably ignorant of the position of the fishing vessel, or that he acted under compulsion, and after protest, his case will always receive indulgent consideration; but if he says nothing, and fishing within the prohibited area is proved against him, I think that the judge or magistrate has no discretion, and that a conviction must necessarily follow.

Lord Kinnear.—I come to the same conclusion. The question put to us in this special case is not very happily stated, because it appears on the face of it to be a question of fact, but when it is read in connection with the statement of facts given by the learned Sheriff, there is no real difficulty in ascertaining what is the point of law which it is intended to submit for our decision. I do not read over again the statement of facts which Lord M'Laren has already read, but I observe upon it that it is clear that the Sheriff held it to be proved that the respondent had done the very thing which is described by the words of the statute as constituting an offence to be punished. He used an otter trawl for taking sea-fish within the prohibited area. But the learned Sheriff follows his recital of what was proved by saying that it was not proved that the respondent knew, or must of necessity have known, of the position of the said vessel on the occasion specified, and then he asks as matter of law whether, on finding the facts stated to be proved, the Sheriff-Substitute was justified in finding the charge not proven. Now, if on the evidence adduced before him the learned Sheriff had said that he had found as matter of fact that the charge was not proved, this Court could not have reviewed his judgment. But I think he makes it quite clear that the judgment he pronounced was not a mere verdict on matter of fact—because he considered this question to be a question of law—and that he proceeded upon a rule of law which he supposed to be binding on him, and in respect of that rule of law he held that the offence was not proved. The question is, What is disclosed in the case as the rule of law which the learned Sheriff accepted? In the statement of the facts there are no considerations tending to establish any defence except the finding that the respondent was not in a position of authority for the purpose of directing navigation or the management of the fishing operations of the ship, and that it was proved that he did not in fact direct or assist in directing the said navigation or management of fishing operations. It is not, I think, suggested, and I do not think the learned Sheriff intended to decide, that the mere fact of the respondent being a deck hand and not a master mariner exempted him from the operation of the clause, and that could hardly have been maintained because, as Lord M'Laren has pointed out, the statute or byelaw which has statutory effect provides that every person, without any exception whatever, who is found doing a certain act shall be guilty of an offence. But when you take these findings in combination with what the Sheriff said was not proved, viz., that the man knew or must of necessity have known, the position of the vessel, I think the question of law, which is meant to be raised, becomes clear enough. The direction which I think the learned Sheriff must have given to himself is that as matter of law it is not enough for the prosecutor to prove the acts which constitute the offence unless he goes on, in the absence of evidence for the alleged offender, to prove by affirmative evidence that the accused knew in fact that he was doing the thing prohibited, that is, that he knew in fact that he was within the protected area. The appellant's counsel maintained that this was wrong upon two distinct grounds. In the first place, it was maintained by the learned Solicitor-General that, inasmuch as the enactment prohibits a certain thing being done without using the word "knowingly" or any equivalent word, it is not necessary that knowledge should be proved, because the offence is committed when the act is done, however ignorant the alleged offender may be of the act which constitutes the offence, or however innocent of any unlawful intention; and that is based upon what is said to be a general rule that, in the construction of statutes and statutory offences, if the word "knowingly" is not used, evidence of ignorance affords no defence. I do not think it necessary for the purpose of this decision to express any definite opinion upon that question, and therefore I shall only say that, as at present advised, I cannot myself assent to it. It was supported by no authority from our own books. The English cases upon which the learned Solicitor-General relied, with the exception of one, namely, *The King* v. *Marsh*, 1824, 2 Barn. and Cress. 717, to which I shall afterwards refer, appear to me altogether inapplicable because they were constructions of particular statutes passed for a very different purpose, and expressed in very

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different terms from that which we are considering. But I do not think it necessary to say more as to the existence in our law of any general absolute rule of the kind stated by the Solicitor-General, because I think the second point taken by the appellant is well founded. The prosecutor having proved that a thing was done which the statute in express terms prohibited, and done by the accused on a particular occasion, the respondent chose to leave the case just where the prosecutor had left it, and it is now maintained on his behalf that he was rightly acquitted, because the prosecutor failed to prove that he knew in fact what the position of the vessel was at the time. I assume, for the purpose of considering that question, that it may be a good defence that the accused was ignorant of the position of the ship—excusably ignorant of the position of the ship. But it does not follow that the prosecutor can be required to do more than prove the existence of the facts which the statute describes as constituting the offence. The prosecutor has done all that could be required of him when he has proved the facts, and it lies upon the respondent to rebut the inference of guilt which arises upon these facts, if he can, by a proof of innocent ignorance, or of any other lawful excuse. The contention on the other side really puts it on the prosecutor to prove a negative, because the position of the case when the prosecutor has closed his proof is really this, that the facts constituting the offence as defined in the statute having been proved or admitted, the accused can still maintain his plea of not guilty on the ground that what he did—which, after all, was *malum prohibitum* and not *malum in se*—was done with lawful excuse. I am assuming, for the purpose of the argument, that innocent ignorance is a lawful excuse. But then it lies on him to prove that, not upon the prosecutor to disprove it by anticipation, which I apprehend in most cases would be impossible for him to do. On the case as stated, it appears that the question, whether in fact the accused had a lawful excuse, was not decided by the Sheriff, and it cannot be decided by us, because no such question is stated in the case. The Sheriff finds certain facts, which may possibly be regarded as items of evidence, tending to shew that the respondent was not really aware of the position of the ship; but although they tend in that direction, if we were deciding this as a question of fact, I should still say they do not go very far, because it may well be that a sailor, knowing his ground, may have perfectly good reasons for knowing that he is still within the Moray Firth, although he is not directing the navigation of the vessel, and is not capable of taking observations for the purpose of defining it. He may know where he sailed from. He may know how long a time has elapsed since he left the land, or he may even be in sight of land. The question whether or not he knew where his ship was, must always be a question of fact; and the circumstances may vary so indefinitely that it is quite impossible to lay down, as I think the learned Sheriff did, that the particular circumstances of this case are of themselves sufficient to prove or disprove that question. It may be, again, that although a man may not have known exactly where his ship was, he may have had good reason to believe that its master had set out upon an expedition for trawling within the prohibited area; and if so, a man who takes his chance of being found within the imaginary line that divides the prohibited area from the open area of the ocean, might be precluded from maintaining innocent ignorance. But, then, I think that all that relates to a question of fact, which is not before us, although I have referred to the difficulty of proving the facts. I do not desire to express any real opinion as upon fact at all. I think the learned Sheriff has not done so. What he has done is to say, as matter of law, that the prosecutor has failed to prove what it is incumbent upon him to prove, viz. the absence of a particular defence which might have been brought forward by a man who was acting in innocent ignorance of the facts. I think that is an unsound view of the law. I think the prosecutor has done all that was required of him when he has proved his facts, and that it then lies upon the offender, if he has a defence, to bring it forward. I referred in passing to the case of *The King* v. *Marsh*, 1824, 2 Barn. and Cress. 717. I return to it only for the purpose of saying that, while I think the decisions of the English Criminal Courts must always be used in this Court with very considerable diffidence, I have read the whole series of decisions cited to us by the Solicitor-General as carefully as I can, and I think it satisfactory to find that the decision proposed by your Lordship, in which I agree, is entirely in accordance with the law stated by the learned judges in the case of *The King* v. *Marsh*. That is a case in which there was an information and conviction against a carrier for having game in his possession, contrary to the statute, 5 Anne, cap. 14, sect. 2, which declares "that any carrier having game in his possession is guilty of an offence, unless it be sent by a qualified person." The only facts proved were that the defendant was a carrier, and that he had game in his waggon on the road. The conviction was appealed on the ground that there was no evidence that the defender knew of the presence of the game in his waggon or that the person who sent it was not a qualified person. The learned judges held that there was a sufficient *prima facie* case, and that it was not rebutted by sufficient proof on the part of the defender of the ignorance suggested on his behalf. I think the judgments quite plainly imply that if the defendant could have satisfied the jury of his ignorance there

would have been a good defence, although the word "knowingly" was not in the statute; and it followed that in the view of the learned judges the effect of the word "knowingly" being introduced into such an Act of Parliament might be to alter the burden of proof, but not to alter any ordinary rule of law that enables a man to plead ignorance as a lawful excuse. It had been shown that game was in his possession as a carrier; it lay upon him to rebut that evidence; and, as he had not done so, the conviction was sustained. I think the present respondent stands exactly in the same position, not having endeavoured to rebut the inference from the facts.

Lord M'Laren intimated that *Lord Pearson*, who was present at the hearing but absent at the advising, concurred.—17*th January* 1908.

Counsel for Appellant, Solicitor-General (Ure, K.C.), A. M. Anderson, A.-D., J. Harvey; Agent, W. S. Haldane, W.S., Crown Agent.—Counsel for Respondent, Macmillan; Agents, Alex. Morison & Co., W.S.

F. A. U.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

309. Gilmour *v.* Craig.

I. REPARATION — WRONGOUS USE OF DILIGENCE — SEQUESTRATION — TENDER OF PAYMENT OF RENT BY CHEQUE BY TENANT—CHEQUE RETURNED BY LANDLORD — SAME CHEQUE TENDERED BY TENANT'S AGENT ON AFTERNOON OF TERM DAY—IMMEDIATE SEQUESTRATION —ISSUE ALLOWED.

II. LANDLORD AND TENANT—RENT—PAYMENT —OPINION (PER LORD SALVESEN) THAT RENT WAS NOT IN ARREAR IF NOT PAID BY NOON ON TERM DAY BUT MIGHT BE DULY PAID AT ANY TIME ON THAT DAY.

Reclaiming Note against an Interlocutor of Lord Salvesen.

This was an action of damages for wrongful sequestration in circumstances which were set out in the condescendence as follows:—

COND. 1. The pursuer is a grocer and wine merchant in Hamilton, and carries on his business in a shop belonging to the defender, of which he is the tenant on a twelve years' lease from Whitsunday 1904. . . The rent of the shop and store is £70 per annum, from which falls to be deducted by agreement with the defender an annual sum of £30 for the cost of altering part of the premises. The nett rent is thus £40 per annum, payable half-yearly at Whitsunday and Martinmas in equal moieties. . . .

COND. 2. On 11th November 1907, when a half-year's rent of £20 was due by the pursuer, the defender sent his shopman, John Barr, to the pursuer at 24 Cadzow Street. . . . The said John Barr asked pursuer for the rent. . . . 1st Dr Gilmour Craig.

COND. 3. . . . The pursuer, about 2.30 p.m. on said 11th November, sent his foreman, John MacLachlan, to the defender with a cheque on the Clydesdale Bank, Hamilton, for £20, the full half-year's rent, which the defender, although knowing that said cheque would be duly honoured, maliciously declined to accept, and John MacLachlan returned with it to the pursuer. . . . On the defender's refusal to accept his cheque, the pursuer, about 2.50 p.m., sent the cheque in a letter to his law agents, requesting them to deal with the matter.

COND. 4. The pursuer's law agents accordingly sent the following letter, along with the cheque for £20 in favour of the defender, by hand to the defender, to whom it was delivered about 3.15 p.m.:—

"Hamilton, 11th November 1907.

"Mr W. G. Craig,
"County Hotel.

"Dear Sir,—Our client, Mr Thomas H. Gilmour, has instructed us to send you the enclosed cheque for £20 in settlement of the half-year's rent due at this term. Please send us receipt.

"We are to explain that the same is made under reservation of Mr Gilmour's claims against you for—(1) fee as witness on your behalf at the Lands Valuation Court—he claims £1, 1s., and application for payment was made to your agents, but they have taken no notice—and (2) price of goods damaged by water from the roof of the saloon, of which you had due notice, and have failed to attend to the repair. We will send detailed claim within the next few days.—Yours truly,

"KEITH & PATRICK."

COND. 5. The defender on the same day, and while said cheque was in his possession, wrongously, maliciously, and without any reason, hastily caused to be prepared and presented to the Sheriff of Lanarkshire at Hamilton a summons of sequestration for rent under the Debts Recovery Act 1867, and obtained the usual warrant to inventory, appraise, and sequestrate the pursuer's goods in the premises, which was executed by a sheriff's officer within the pursuer's premises at 4.10 p.m. . . .

The defender pleaded that the action was irrelevant, and should be dismissed.

The Lord Ordinary *allowed* an issue in the usual form.

Lord Salvesen.—This is an action of damages for alleged wrongful sequestration. The material facts as averred by the pursuer are, that on 11th November 1907 when a half-year's rent of £20 was due by him to the defender he sent his foreman to the defender about 2.30 with a cheque on the Clydesdale Bank, Hamilton, for £20, which the defender declined to accept; that at 3.15 p.m. his agent again sent the cheque to the defender along with the letter quoted in Condescendence 4, and that the defender, while the cheque was still in his possession, caused to be prepared and presented a summons for sequestration for rent under the Debts Recovery Act 1867 on which he obtained the usual warrant to inventory and sequestrate the pursuer's goods in his premises, and that this warrant was executed at 4.10 p.m. About 4.40 p.m. the defender called on the pursuer's law agent with the letter before referred to and said the cheque was of no use to him, and on being asked to

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cash the cheque and withdraw the summons he declined to do so or to receive the £20 due in cash except on the condition of the pursuer paying the expenses of the summons of sequestration. The cheque itself was only returned on the following day by the defender's law agents.

The main ground of action is that the pursuer was not in arrear of his rent until the expiry of the 11th of November, and that accordingly the warrant for sequestration, obtained on the representation that he had refused or delayed to pay the rent due on that day, was wrongful. The defender, on the other hand, maintained that the rent ought at all events to have been paid by 12 noon on the 11th November, and that on the pursuer's failure to pay by that hour the defender was within his rights in causing the diligence in question to be executed.

The defender's counsel did not quote any direct authority to the effect that a tenant who delays to pay his rent after 12 noon on the term day is in arrear. He supported his proposition, however, by two arguments which at all events reflect credit on his ingenuity. In the first place, he founded on the Removal Terms (Scotland) Act of 1886, sect. 4, which enacts that "where the term for a tenant's entry to or removal from a house shall be one or other of the terms of Whitsunday or Martinmas, the tenant shall, in the absence of express stipulation to the contrary, enter to or remove from the said house at noon on the 28th day of May if the term be Whitsunday, or at noon on the 28th day of November if the term be Martinmas." The bearing of this enactment on the question here raised is not obvious; but the defender's counsel maintained that as the legal and conventional terms are theoretically the same, it must now be held that payment of the rent must be made by 12 noon on the 11th of November, just as the tenant is bound to remove by 12 noon on the 28th when his lease expires at Martinmas. I confess that I do not see why any such consequence should follow. The Removal Terms Act 1886 proceeded on the assumption that the legal and conventional terms were not the same, and left the term for payment of rent entirely unaffected. If therefore before the enactment was passed the tenant had the whole of the legal term day on which to make payment, I see no reason to infer that this enactment, which was entirely for the convenience of tenants *inter se*, should alter the relation of the tenant to his landlord.

The second argument was based on a series of decisions dealing with a chapter of the common law which in consequence of the Apportionment Act has now become of only antiquarian interest. In the case of *Lady Brunton*, 1642, M. 15,885, it was held that the executors of a liferenter who had survived to the afternoon of the term of Martinmas were entitled to the rents of heritage due on that date in preference to the heir; and in the later case of *Paterson* v. *Smith*, 1704, M. 15,902, a similar decision was pronounced in the case of a liferentrix who had died on the forenoon of Martinmas day. Both of these decisions proceeded on the maxim *dies inceptus habetur pro completo*; and they were used by the defender to shew that rent payable at Martinmas becomes due immediately after midnight of the 10th of November, or at all events by custom at noon on the 11th. These decisions are, however, in no way inconsistent with the notion that a tenant has the whole of the term day in which to make payment; as seems to have been expressly held in England in the case of *Dibble* v. *Bowater*, 1853, 2 E. and B. 564. They are also consistent with the old case of *Wright* v. *Cunningham*, 1802, M. 15,919, to which I was referred by the pursuer's counsel, in which it was held that the days Whitsunday and Martinmas respectively conclude and are comprehended in the preceding terms and are not the first days of a new period.

I am accordingly prepared to hold that payment of rent is just like any other payment falling to be made on a specified day, and as to which the debtor is not in default if payment be made at any time during the day; although, on the other hand, the debt is due in the sense of being demandable by the creditor when the day arrives. This view involves that the defender was premature in obtaining, or at all events in executing, a warrant to sequestrate the pursuer's effects; and that the execution of that warrant was wrongful. It follows that as such a warrant is obtained *periculo petentis* the defender is liable in any damages thereby caused, and that the pursuer is entitled to the issue which he proposes.

The defender *reclaimed* and *argued*: The defender was entitled to apply for sequestration if the pursuer refused to pay his rent when it was due. That was the position of matters described by the pursuer in his condescendence. He was asked for his rent when it was due; he tendered a cheque; the cheque was refused; and in place of tendering cash, which was the only good tender, he sent back by his agents the same cheque. This was tantamount to a refusal to pay.

Counsel for the pursuer were not called on.

The Court *adhered*.

The Lord President.—I do not think there is the slightest doubt this is a question for the jury. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord M'Laren.—I am of the same opinion. I think nothing can be pointed to on the record which shews that payment might not have been made in the evening of the day in question in the event of the defender having given definite information that he would not accept a cheque. In that case we do not know that the requisite cash might not have been forthcoming. If the pursuer did not have the requisite cash in his pocket he might have got it from his agent.

Lord Kinnear. — I agree. The question whether the sequestration was wrongful is very much the same as whether the defender had reasonable grounds for saying in the circumstances that payment had not been duly made. —*29th January* 1908.

Counsel for Defender and Reclaimer, Wilson, K.C., A. Moncrieff; Agents, Simpson & Marwick, W.S.—Counsel for Pursuer and Respondent, T. B. Morison, K.C., C. H. Brown; Agents, Ronald & Ritchie, S.S.C. F. A. U.

COURT OF SEVEN JUDGES.

(Second Division Cause.)

(*The Lord Justice-Clerk, and Lords M'Laren, Stormonth-Darling, Low, Pearson, Ardwall and Dundas.*)

310. Donnelly *v.* William Baird & Company Limited.

WORKMEN'S COMPENSATION ACT 1897 (60 & 61 VICT. CAP. 37), SCH. I. (12)—REFUSAL OF WORKMAN TO UNDERGO SURGICAL OPERATION—INCAPACITY DUE TO INJURED HAND—OPERATION RECOMMENDED BY THREE OUT OF FIVE DOCTORS WHO EXAMINED WORKMAN—OPERATION A SIMPLE OR MINOR OPERATION, NOT ATTENDED WITH APPRECIABLE RISK OR SERIOUS PAIN, AND LIKELY TO RESTORE TO WORKMAN USE OF INJURED HAND—FINDING BY SHERIFF THAT CONTINUED INCAPACITY FAIRLY ATTRIBUTABLE TO WANT OF OPERATION—CIRCUMSTANCES WHERE HELD (DISS. LORDS STORMONTH-DARLING AND PEARSON) THAT WORKMAN HAD DISENTITLED HIMSELF TO COMPENSATION BY REFUSAL TO UNDERGO OPERATION.

Stated Case under the Workmen's Compensation Act 1897.

This was an appeal by way of stated case from a judgment of the Sheriff-Substitute (Mitchell) at Stirling in an arbitration under the Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37).

The case stated:—

This is an arbitration under said Act, in which the Sheriff of Stirling, Dumbarton and Clackmannan at Stirling was asked to review and end or diminish a weekly payment of 7s., of which the appellant was in receipt in virtue of an agreement entered into by the appellant and the respondents on 24th May 1904.

On 9th January 1906 the then Sheriff-Substitute found that the appellant was still totally incapacitated, as the result of injuries sustained by him while in the employment of the respondents, and entitled to the weekly payment of 7s. in virtue of the agreement before mentioned. On 9th April 1907 a minute was lodged by the respondents again asking the Court to review and end or diminish the weekly payment before mentioned, and on 1st June 1907 I found "(1) that the respondent (the present appellant), on or about 28th January 1903, lost the use of his left hand, in consequence of injuries sustained by him while in the employment of the petitioners (the present respondents), and that respondent still continues to be without the use of said hand; (2) that by agreement between petitioners and respondent, entered into on or about 24th May 1904, respondent became entitled to compensation at the rate of seven shillings weekly during incapacity, and that payment thereof has been made to him up to the present time; (3) that respondent's loss of use of his left hand was and is caused by the removal from said hand of the third finger and of the top of the thumb, the existence of pain in the palm at or near the knuckle from which said finger was removed, and the curvature into the palm and permanent fixing in that position of the second finger; (4) that the respondent has been examined by five doctors, three of whom were asked to examine by petitioners, and that the said three doctors recommend that the crooked second finger should be removed at the knuckle, or the joint next the knuckle, and that a nodule in the palm of said hand, which they believe to be the source or centre of the pain complained of, should also be removed; (5) that said proposed operations are simple or minor operations, not attended with appreciable risk or serious pain, and operations likely to restore to respondent in large measure, or altogether, use of his said hand for the purpose of his former work, viz., 'drawing,' that is pushing, guiding or pulling hutches in a coal pit, or for manual work of some kind in or about a pit, or elsewhere, and to enable him to earn the same wages as before the accident, or wages to some substantial amount; (6) that respondent is of good constitution and in sound general health; (7) that he has not undergone and refuses to undergo such operations; (8) that his continued incapacity to use his left hand and any continued pain in his left palm are fairly attributable to the want of such operations; (9) that in these circumstances respondent is not entitled to refuse, and ought to undergo said operations," and I continued the cause till 1st July 1907, that the respondent (now appellant) might intimate whether he was then willing to submit himself to said operations.

On 25th July 1907, I, having further considered the cause, and in respect of respondent's (now appellant's) declinature to undergo the proposed operations, found that the compensation payable to him should then end, and granted order accordingly.

The Question of Law for the opinion of the Court was:

Whether the appellant by his refusal to undergo the operations has forfeited his right to receive further compensation?

The case was heard on 22nd October 1907 before the judges of the Second Division, and was ordered to be re-heard before a Court of Seven Judges.

Argued for Appellant: The Act did not make it a condition of receiving compensation that the workman should submit to any medical or surgical treatment which the employer might propose (*Dowds* v. *John Bennie & Son*, 1902, 5 F. 268, per Lord Adam; *Rothwell* v. *Davies*, 1903, 19 T.L.R. 423). The workman was entitled to compensation if he were suffering from the effects of the accident, but not if he were suffering from his own unreasonable conduct. Here it was not found that the appellant's refusal was unreasonable; the examination was recommended only by three out of the five doctors examined; and it was not certain that it would effect a cure. The case must be taken on the footing that there was a diversity of medical opinion. In these circumstances the appellant's refusal was not unreasonable, and he was entitled to compensation. The present case was *a fortiori* of *Rothwell* v. *Davies* (*cit.*) and *Sweeney* v. *Pumpherston Oil Co. Ltd.*, 1903, 5 F. 972. *Dowds* v. *John Bennie & Son* (*cit.*) and *Anderson* v. *William Baird & Co. Ltd.*, 1903, 5 F.

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373, were distinguishable. In any view the compensation ought not to be ended, but should be reduced to the amount which would have been payable if the operation had taken place.

Argued for Respondents: No doubt surgical operations were not mentioned in the Act, but compensation was due in respect only of incapacity arising from the accident, and not in respect of incapacity resulting from the workman's unreasonable conduct. Here the operations proposed were minor operations, and were not attended with risk or serious pain. In these circumstances the refusal was unreasonable, and compensation was not due. There was no distinction in principle between a surgical operation and medical treatment. *Anderson* v. *William Baird & Co. Ltd.* (*cit.*) and *Dowds* v. *John Bennie & Son* (*cit.*) were *a fortiori* of the present. *Rothwell* v. *Davies* (*cit.*) and *Sweeney* v. *Pumpherston Oil Co. Ltd.* (*cit.*) were distinguishable. It was not competent to reduce the compensation to what would have been payable if the operation had taken place. There was no machinery whereby the amount payable could be determined. The appellant by his refusal had made it impossible to ascertain what his condition would have been (*Lochgelly Iron and Coal Co. Ltd.* v. *Sinclair*, 1907, S.C. 3).

The Court (*diss.* Lord Stormonth-Darling and Lord Pearson) *found* in answer to the question of law that the appellant by refusing to undergo the operation proposed had precluded himself from any right to receive further compensation, and *answered* the question of law in the affirmative.

The Lord Justice-Clerk.—The facts necessary for the consideration of this case are (1) that by the accident suffered by the appellant his left hand was disabled; (2) that by agreement between him and the employers the respondent received compensation at the rate of 7s. weekly; (3) that he has suffered permanent loss of the third finger and part of the thumb; (4) that he still has pain at the stump of the removed finger; (5) that his second finger is fixed in a curved position into the palm. In this state of matters the respondents requested three medical men to examine the hand, and that they and two other medical men examined the appellant. There is no statement in the case what was the opinion of these latter two medical men, the appellant not having produced their reports to the Sheriff. The three doctors employed by the respondents reported that in their opinion the second finger or part of it should be removed, and a nodule in the palm from which they believed the pain proceeded should be removed. They reported that the operations were of a simple and minor character, involving no appreciable risk or serious pain, and that what was proposed was likely to restore in large measure the use of the hand for work such as the appellant was accustomed to fulfil, or other pit manual work, enabling him to earn full or at least substantial wages, he being of sound constitution and good health.

I have thought it well in this short form to state the facts which have to be dealt with, for the question of law for decision in this case turns upon the view to be taken of them—Do they, or do they not, justify the position taken up by the appellant, which is, "I decline to submit to any operation, and demand compensation in respect that my present condition is one of disablement"?

The question whether a refusal to submit to skilled treatment for the restoration, whole or partial, of capacity for work is a reasonable or unreasonable refusal is necessarily a question of degree. For it cannot be maintained that no matter what be the severity of the operation recommended, or how great soever the risk to life or general health of the treatment may be, the workman loses right to compensation unless he brings himself to undergo the treatment and to take the risk. I think the sound view on this matter is well expressed by Lord Adam in the case of *Dowds* v. *Bennie & Son*, when he laid it down that a workman who has been incapacitated is not bound in every case to submit to any medical or surgical treatment that is proposed, under penalty, if he refuses, of forfeiture of his right to a weekly payment; *e.g.*, in the case where a serious surgical operation is proposed with more or less probability of a successful cure.

On the other hand, I hold it to be the duty of an injured workman to submit to such treatment, medical or surgical, as involves no serious risk or suffering, such an operation as a man of ordinarily manly character would undergo for his own good, in a case where no question of compensation due by another existed. In preparing this opinion, I find that I have used almost the terms which are to be found in the case of *Anderson* v. *Baird*. These two cases which I have referred to seem to me to practically rule this case. The appellant refuses to follow the course reported on by the medical men. He has brought no counter-evidence for the purpose of inducing the Sheriff to hold that the evidence led should not lead to findings in fact in accordance with that evidence; the Sheriff has found in fact in terms of that evidence, and has in consequence held in law to the same effect as was held in the cases of *Dowds* and *Anderson*. In that I am of opinion that he was right, and would therefore propose that the question in the case should be answered in the affirmative, except that I think the word "forfeited" is an unfortunate one to use. A better form would be that used in *Anderson's* case, that the appellant "is precluded from further insisting on his claim for weekly payment."

Lord M'Laren.—I cannot say that I have found this case free from difficulty, but the

difficulty is not so much in the finding a principle of decision consistent with the statutory provisions, as in applying the principle to the facts of the case before us.

There is, of course, no question of compelling the party to submit to an operation. The question is whether a party who declines to undergo what would be described by experts as a reasonable and safe operation is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and consequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment.

In order to test the principle of decision, I will suppose a more simple case. A workman whose trade requires the perfect use of both hands—a watchmaker or an instrument-maker, for example—has the misfortune to break one of the bones of a finger, and from want of immediate assistance, or it may be from neglect, the bone does not unite in the proper way. The hand is disabled, but he is advised that by breaking the bone at the old fracture and resetting it, the use of his hand will be completely restored. I am supposing a case where the operation is not attended with risk to health or unusual suffering, and where the recovery of the use of the hand is reasonably clear. If in such a case the sufferer, either from defect of moral courage, or because he is content with a disabled hand and is willing to live on the pittance which he is recovering under the Compensation Act, refuses to be operated on, I should have no difficulty in holding that his continued inability to work at his trade was the result of his refusal of remedial treatment, and that he was not entitled to further compensation.

Passing to the other extreme, it is easy to figure a case of internal injury where an operation if successful would restore the sufferer to health, but where the surgeon was bound to admit that the operation was attended with danger. In such a case it would be generally admitted that there was not only a legal, but a moral right of election on the part of the injured person; and if he preferred to remain in his disabled condition rather than incur the risk of more serious disablement or death, it could not be said that his inaction disentitled him to further compensation.

In view of the great diversity of cases raising this question, I can see no general principle except this, that if the operation is not attended with danger to life or health, or extraordinary suffering, and if according to the best medical or surgical opinion the operation offers a reasonable prospect of restoration, or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power. I think that this statement is in accordance with all the decisions that have been given in similar cases, but in whatever way the condition is defined, each case must be considered as a circumstantial case depending on the nature of the proposed operation and its probable results. I do not think that in principle any distinction can be taken between medical treatment and surgical treatment as regards the duty of the patient to co-operate with his professional advisers towards his own restoration to health and working capacity. The distinction only begins when an operation is proposed which may be attended with danger, or the results of which are not in the region of reasonable and probable success.

My difficulty in this case is that Donnelly not being a skilled workman, but a drawer of hutches in a coal-pit, I can imagine that the man might honestly believe that no operation on his hand would suffice to remove the sensitiveness to pressure that at present makes him unfit for hard work. This, however, is a point which could not be overlooked by the doctors who have been consulted as to his case, and they have given their opinion that the crooked finger and the nodule in the palm of the hand should be removed, and that the operation is likely "to restore to him in large measure, or altogether, the use of his hand for the purpose of his former work," viz. drawing hutches.

In such cases a prudent and reasonable man will be guided by medical opinion rather than by his own fears; and, without saying that the case is absolutely clear, my view is that by refusing to submit to the operation the party has disentitled himself to further payments. Any difficulty I have felt in considering the case is almost entirely removed by the consideration that nothing but good can come to this young man from the operation. Even if his hand should continue to be too tender to be useful to him in drawing hutches, it will, according to medical opinion, be greatly improved, and so the man will be in a more favourable position for doing work in some other occupation where the use of the left hand is not so necessary as in the work of a drawer.

I am therefore for affirming the Sheriff-Substitute's determination.

The Lord Justice-Clerk intimated that *Lord Low* concurred with the Lord Justice-Clerk and Lord M'Laren.

Lord Stormonth-Darling.—I concur with my brother Lord Pearson. His view, and that, as I understand, of the rest of your Lordships, is that

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the question of law which the Sheriff has formulated is not quite accurately expressed, and that the proper result of his findings would not be to "forfeit" the appellant's right to receive further compensation. But, even taking the case as fairly raising the question which probably the Sheriff intended to raise, viz. whether the workman, by his refusal to undergo the particular surgical operation recommended by the three doctors who examined him at the request of the employers, has disentitled himself from claiming further payments by way of compensation, I agree with Lord Pearson that the Sheriff's ninth finding is really a finding in law, and therefore not a finding on which the Sheriff is final. As I read the cases which were cited both in England and Scotland, I think it has never been decided, at all events in explicit terms, that a workman's refusal to undergo a surgical operation, even of a minor kind, can be visited with a practical denial of his right to further compensation.

In *Rothwell* v. *Davies*, 1903 19 Times L.R. 423, the English Court of Appeal negatived such a result. *Dowds* v. *Bennie & Son*, 1902, 5 F. 268, which was decided by the First Division, was a case where the injury was comparatively slight and the treatment proposed simple and common (principally passive movements and massage), and therefore it was treated as one where the present condition of the limb was truly due to the injured man's own fault and neglect. Yet Lord Adam, in delivering the leading judgment, said that cases might easily be figured of "a more or less serious operation" being proposed where it would be out of the question to say that the workman was bound to submit to it. Even in *Anderson's* case, 1903, 5 F. 373, refusal to undergo a "simple operation" as disentitling the workman to a continuance of substantial compensation was (*diss.* Lord Young) avoided only by allowing the matter to be kept open by awarding him a nominal sum. Lastly, in *Sweeney* (1903, 5 F. 972) refusal of the workman to undergo a surgical operation which had been recommended by the employer's doctor, as disentitling him to further compensation, was distinctly negatived in deference to a contrary opinion by a surgeon of eminence.

Therefore I think I am well founded in saying that there is not a single case in either England or Scotland laying down in explicit terms the rule for which the employer here contends, even with regard to a minor surgical operation, however probable the success of it may be. But, as Lord Pearson and I are in a minority, it is unnecessary to consider what the practical consequences would be of giving effect to our view.

Lord Pearson [read by the Lord Justice-Clerk].—I agree in the view that the question of law which the Sheriff has formulated is not accurately expressed, and that the proper result of his findings is not to "forfeit" the appellant's right to receive further compensation. But I desire to add that on the question which I think the Sheriff intended to raise, and which was fully argued to us, my opinion is entirely in favour of the appellant. I am clearly of opinion that the Sheriff's first seven findings in fact do not warrant the eighth finding, which is, that "the appellant's continued incapacity to use his left hand, and any continued pain in his left palm, are fairly attributable to the want of such operations." It appears to me that the principles laid down in the cases of *Dowds* and of *Sweeney* lead to the opposite conclusion, and that the Sheriff's ninth finding, that in these circumstances the appellant "is not entitled to refuse, and ought to undergo said operations"—which is really a finding in law—is not maintainable. I cannot hold the appellant to be unreasonable in his refusal to submit to the amputation of a finger. I admit, however, the difficulty of giving effect to this view, having regard to the terms of the eighth finding, which is a finding in fact, and is not before us for review; and which when fairly construed imports that the conduct of the appellant in refusing to submit to the operation is so unreasonable as to disentitle him to further compensation.

Lord Ardwall.—I am of opinion that the question of law submitted in this case should be answered in the affirmative, with the alteration suggested by your Lordship in the chair.

The compensation at the rate of 7s. a week which has hitherto been received by the appellant under an agreement entered into in terms of the Workmen's Compensation Act 1897, has been paid and received under the provisions contained in the first schedule of the said Act, sect. 1 (*b*), which apply to cases where "total or partial incapacity for work results from the injury." It is stated by the Sheriff-Substitute that certain simple and safe operations would remove the appellant's incapacity to work, and in the eighth finding it is stated that "the appellant's continued incapacity to use his left hand and knee, and any continued pain in his left palm, are fairly attributable to the want of such operations." Accepting this as a fact, it appears that now the appellant's incapacity for work does not result from the injury which he received in 1903, but from his refusal to submit to the said operations, and this being so, compensation is no longer payable in respect of incapacity for work resulting from an injury, and the payment thereof ought to come to an end.

But the appellant pleads that he is not bound to submit to the operations in question, and it was contended by his counsel that no person is bound to submit to an operation in such circum-

stances as the present against his will, however simple such operations may be, and that if a person in the position of the appellant chooses to take his stand on the ground that he objects to an operation on account of the pain or risk involved in it, he is the sole judge and ought not to be forced by the decision of a court of law into the alternative of either submitting to an operation or forfeiting the compensation which otherwise he is by law entitled to. This raises a question of general importance, but one which has not now to be considered for the first time.

Three cases involving this question have been already under consideration of the Court—*Dowds* v. *Bennie & Son*, 5 F. 268; *Anderson* v. *Baird & Co.*, 5 F. 373; and *Sweeney* v. *Pumpherston Oil Company*, 5 F. 972. I think the result of these decisions is that no general rule can be laid down, but that each case must be determined upon its own circumstances, the questions for consideration in each case, generally speaking, being (1) Whether the operation is a simple or a difficult one? (2) Whether it is attended with serious risk? (3) Whether if performed it will attain the end in view by diminishing or putting an end to the injured person's incapacity for work? (4) Whether it is or is not an operation involving much pain, and if it does involve much pain, whether there is serious risk to be encountered by the use of anæsthetics during the operation? and (5) What is the opinion of medical men as to the advisability of the operation?

Now in the present case the Sheriff-Substitute has found (1) the "proposed operations are simple or minor operations"; (2) that they are "not attended with appreciable risk"; (3) that they are "likely to restore to respondent in large measure or altogether use of his said hand for the performance of his former work"; (4) that the proposed operations are "not attended with . . . . serious pain," and that the respondent is of good constitution and in sound general health, from which I infer that there would be no danger to him from the use of anæsthetics; (5) that "the respondent has been examined by five doctors, that three of these doctors recommend that the operations should be performed." Nothing is said with regard to the other two doctors who examined the respondent at his own instance, and I therefore conclude that it must be taken upon the facts as stated that these doctors either did not express any opinion, or that if they did their opinion was that they could not state any objections to the operations proposed.

In these circumstances I am of opinion that the Sheriff-Substitute has come to a sound conclusion on the facts of the case that the appellant has shewn no reasonable cause why he should not undergo the operations in question, and that his refusal to do so disentitles him to a continuance of the compensation which he has hitherto received.

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Lord Dundas.

Lord Dundas.—I agree with the majority of your Lordships. The real point at issue in each case of this kind is, I apprehend, whether the workman's incapacity arises from the accident which befel him, or only from his own subsequent unreasonable conduct. If the latter is the fact, the workman must take the consequences of his conduct. I think we must assume, from what is set forth in this stated case, that there was no conflict of opinion among the medical men consulted on both sides, as to the nature or the probable effect of the proposed operations. Now, the Sheriff-Substitute has found, among other things, that these "are simple or minor operations, not attended with appreciable risk or serious pain, and operations likely to restore to respondent in large measure, or altogether, use of his said hand for the purpose of his former work," which was of a very simple nature; that the respondent "is of good constitution and in sound general health"; and that "his continued incapacity to use his left hand, and any continued pain in his left palm, are fairly attributable to the want of such operations." In this state of matters it appears to me that a reasonable man would submit to these operations, and that, as the respondent deliberately declines to do so, his conduct is unreasonable, and his compensation must be ended. I agree therefore with the conclusion at which the Sheriff-Substitute has arrived; but I agree with your Lordships in thinking that the question stated for our determination is not, as it stands, in proper form.—1*st February* 1908.

Counsel for Appellant, Hunter, K.C., Munro; Agents, St Clair Swanson & Manson, W.S.—Counsel for Respondents, Horne, Strain; Agents, W. & J. Burness, W.S. J. S. M.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

311. Fyfe's Trustees *v.* Duthie.

I. Succession — Trust Disposition and Settlement — Construction — Fee or Liferent — Direction to Trustees to Divide Residue Among Children—Direction to Trustees to Pay Income to Daughters While Unmarried and on their Marriage to Secure Revenue and Capital in Trust for Daughters and their Children — Terms of Settlement on a Construction of Which Held that Daughters Had a Right of Fee Restrictable to a Liferent in the Event of their Being Survived by Children—Tweeddale's Trustees v. Tweeddale, 1905, 8 F. 264, Followed.

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Fyfe's Trustees v. Duthie.

II. Succession — Trust Disposition and Settlement—Construction—Gift of Fee to Daughters Qualified by Direction to Pay Revenue of Provisions to Daughters While Unmarried and on their Marriage to Secure Provisions in Trust by Antenuptial Settlement on Daughters and their Children—Daughters Married at Date of Will Without Marriage Contract—Circumstances where Held That Direction to Settle on Daughters and their Issue Applied to Daughters Already Married.

Special Case.

John Fyfe, granite merchant, Aberdeen, died on 18th July 1906, leaving a trust disposition and settlement whereby he conveyed his whole estate to trustees.

The seventh purpose of the trust disposition and settlement provided:

I direct my trustees, as soon as they may find convenient, to realise and divide the residue of my estate, heritable or moveable, real or personal . . . among my children in such proportions as I shall by any writing appoint, and failing such appointment equally among them, share and share alike. . . . Declaring . . . . that the term of the vesting of the foregoing provisions of residue shall as regards daughters be on their respectively attaining majority or being married, whichever of these events shall happen first: As regards said provisions to my daughters, I hereby appoint that the capital of the same shall not be paid to them (except as aftermentioned), but that my trustees shall pay to my daughters the revenue of their respective provisions while they remain unmarried; and on their marriage my trustees shall see to it that the said provisions, both revenue and capital, be secured in trust in their own names, or in the names of other trustees by antenuptial settlement upon my daughters and their children to be born, in usual form, the husbands of my said daughters (if my said daughters shall so desire) to have a liferent only postponed to my said daughters' liferent: Further, notwithstanding what is before written, my trustees shall have power on the marriage of such daughter to pay to her, or to pay to any daughter already married, at my death, for her own absolute use, such portion (not exceeding one-tenth part) of the capital of her provision as my trustees shall think proper, which payment shall be imputed towards such daughters' provision: Subject to these general directions, the terms of such antenuptial settlement shall, as regards my said daughters' provisions, be determined by my trustees: And I declare that if any of my children predecease the term of vesting of their provisions without leaving lawful issue, the share of such predeceasing child shall accresce to those of my children who shall survive the term of vesting of their provisions, or to their issue *per stirpes*, but if such predeceasing child shall leave lawful issue, such issue shall have right to their predeceasing parent's share, and to the proportion of any share that may have accresced in manner foresaid: And I declare that my trustees shall have power to advance and pay to or expend for the aliment, education and advancement in life of any of my children, or of their issue, such portion not exceeding one-fifth of the revenue or capital of the provisions hereby made for them, as to my trustees shall seem expedient, and that even though the term of vesting of such provisions may not have arrived, such advances being imputed towards the provision of the child on whose behalf such advances shall be made.

The case stated:

3. The first parties hereto are the trustees appointed by the said trust disposition and settlement. The second parties hereto [Mrs Leslie Fyfe or Duthie, and another] are the daughters of the said deceased John Fyfe, who are married and who were married at the date of his death, and prior to the date of said trust disposition and settlement. They have both attained majority. No antenuptial settlements were made on their marriages. The third parties are the whole remaining daughters of the said deceased John Fyfe. They are unmarried and have attained majority, with the exception of Miss Irene Fyfe, who is nineteen years of age. . . . The fourth parties [who are the children of Mrs Leslie Fyfe or Duthie] are all the grandchildren of the testator, and were all born before his death. . . . The fifth parties are the whole heirs *ab intestato* of the said John Fyfe.

The case set forth the contentions of the parties as follows:—

The first parties maintain that on a sound construction of the said trust disposition and settlement they are bound (subject to the power to advance) to procure the shares of residue of the second parties settled in trust in the names of themselves or of other trustees for behoof of the second parties respectively, in liferent and otherwise in terms of the directions for the settlement of daughters' provisions contained in the seventh purpose of the trust disposition and settlement; and that as regards the shares of the testator's unmarried daughters, being the third parties hereto, they are bound to retain the capital of the provisions to the said daughters while they respectively remain unmarried, and to pay the income to the said daughters respectively, subject to the power to make advances out of capital not exceeding one-fifth in each case, and that on the marriage of each daughter they are bound to secure the said provisions by antenuptial settlement upon the daughters and their children, as provided by the said seventh purpose of the trust disposition and settlement, subject to the power to make advances not exceeding one-tenth part of the capital in each case.

The second parties maintain that they have an unqualified and indefeasible right of fee in their respective shares of residue, the subsequent directions of the testator falling to be disregarded as inapplicable, or otherwise as repugnant or ineffectual; and further, that they are entitled to present payment of the capital of their shares. Alternatively, they maintain that they are entitled to the income of their respective shares during their lives, and that the fee of their respective shares has vested in them, subject to defeasance in the case of each daughter, in the event only of her entering into a subsequent marriage, and of an antenuptial settlement being executed in manner provided by said trust disposition and settlement, and of children born of such marriage surviving her, and then only if and in so

far as rights in the fee shall have been conferred on such children by such antenuptial settlement.

The third parties maintain that they have also a vested right in their respective shares of the residue along with the second parties and that they are entitled to present payment of the capital of their shares. Alternatively, they maintain that they are entitled to the income of their respective shares during their lives, and that the fee of their respective shares has vested in them, subject to defeasance in the case of each daughter, in the event only of her marrying, and of an antenuptial settlement being executed in manner provided by said trust disposition and settlement, and of children born of such marriage surviving her, and then only if and in so far as rights in the fee shall have been conferred on such children by such antenuptial settlement.

It is maintained on behalf of the fourth parties that they have taken a vested interest in the fee of the share of residue provided to their mother, Mrs Lesley Fyfe or Duthie, and that the capital of such share will, on the death of the said Mrs Lesley Fyfe or Duthie, fall to be divided among the fourth parties along with any children that may hereafter be born to the said Mrs Lesley Fyfe or Duthie, subject to such provision, if any, in favour of the said John Duthie as may competently be made by the said Mrs Lesley Fyfe or Duthie.

It is maintained on behalf of the fifth parties that they are entitled as heirs *ab intestato* of the testator to the fee of the shares of any of the daughters who may die without leaving issue born after the testator's death.

The following Questions of Law were stated:—

1. Has an unqualified right of fee in their respective shares of residue vested in the second parties, and are they entitled to present payment of the capital of their shares? Or
2. Are the first parties bound (subject to the power to advance) to procure said shares settled in trust in the names of themselves or of other trustees for behoof of the second parties respectively, in liferent and otherwise, in terms of the truster's directions for the settlement in trust of daughters' provisions contained in the seventh purpose of his trust disposition and settlement?
3. Has an unqualified right of fee in their respective shares of residue vested in the third parties, and are they entitled to present payment of their shares? Or
4. Are the first parties bound (subject to the power to advance) to retain the shares of the third parties and to pay to them respectively only the income thereof, so long as they are respectively unmarried, and in the event of any of the third parties being hereafter married, to procure her share (subject to the power of advance), settled in trust for behoof of her in liferent, and otherwise in terms of the truster's said directions for the settlement in trust of daughters' provisions?
6. As regards the share of residue provided to Mrs Duthie, have the fourth parties (together with any children who may hereafter be born to her) a vested right of fee in said share?
8. Does the fee of the share of any daughter who may die without leaving issue, born after the testator's death, fall to the fifth parties as heirs *ab intestato* of the truster?

The arguments are sufficiently stated in the contentions of the parties. The following authorities were cited: *Tweeddale's Trs.* v. *Tweeddale*, 1905, 8 F. 264; *Chambers' Trs.* v. *Smith*, 1878, 5 R. H.L. 151.

The Court *answered* the second and fourth questions in the affirmative, and the first, third, sixth and eighth questions in the negative.

At the advising the following judgment of Lord Low was, in his absence, read by the Lord Justice-Clerk.

Lord Low.—The questions raised in this special case depend upon the construction of the residue clause in the trust disposition and settlement left by the deceased John Fyfe.

The truster's sons having elected to take certain other provisions instead of sharing in the residue, the residuary legatees are the truster's daughters, of whom there are eight. Two of these daughters, Mrs Duthie and Mrs Weber, are married. They were both married prior to the execution of the trust disposition and settlement. Mrs Duthie has five children, all of whom were born prior to the truster's death. Mrs Weber has no children.

By the seventh purpose of the trust disposition and settlement the truster directed his trustees, as soon as they might find convenient, to realise and divide the residue of his estate among his children equally, share and share alike, declaring that "the term of the vesting of the foregoing provisions of the residue shall, as regards daughters, be on their respectively attaining majority or being married, whichever of these events shall happen first."

That is a direction which amounts to an absolute gift of a share of the residue to each daughter who shall attain majority or be married. So far there is no ambiguity, but the testator proceeds to give certain further directions in regard to the way in which the trustees are to deal with the daughters' shares, which are so badly expressed as to render their construction a matter of difficulty.

All the daughters maintain that the directions are so ambiguous that it is impossible to give to them any effect whatever, while the married daughters further maintain that, at all events, the directions cannot be applied to the shares destined to them.

I think that the fact that two of the daughters were already married when the settlement was made does add to the difficulty of construction; but leaving that fact out of view in the mean-

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time, and considering the clause as if the question had arisen with daughters who were all unmarried, I do not think that there is any reasonable doubt what the testator's intention was, and I further think that that intention is sufficiently expressed by the language used.

The testator directs that the capital of the residue shall not be paid to the daughters (except to a certain small extent), but shall be held by the testamentary trustees, or by other trustees whom they are authorised to nominate, during the lifetime of the daughters. So far I do not think that there is any doubt, because the directions to that effect are not really ambiguous. There is more difficulty, however, in regard to the purposes for which the capital is to be held in trust. As regards the daughters themselves, I think that it is sufficiently clear that they are only to be entitled to payment of the income. It is expressly said that so long as a daughter remains unmarried the trustees are to pay the "revenue" of her share to her, and the right of a daughter after she is married is referred to as a "liferent."

That being so, the next question is, What becomes of the capital? I shall quote the very words of the clause upon which the answer to that question depends. After directing the trustees to pay the revenue of their shares to the daughters so long as they remain unmarried, the clause proceeds: "And on their marriage my trustees shall see to it that the said provisions, both revenue and capital, be secured in trust in their own names, or in the names of other trustees, by antenuptial settlement, upon my daughters and their children to be born, in usual form, the husbands of my said daughters (if my said daughters shall so desire) to have a liferent only postponed to my said daughters' liferent."

Now the trust which is to be set up on the marriage of a daughter is to be for the purpose of securing both revenue and capital. The revenue alone, as we have seen, is to be paid to the daughters during their lives, and therefore the securing of the capital must be primarily for the benefit of children. But it was argued that there was nothing to shew what was the precise nature of the right to the capital which was given to the children. It might be an absolute and unqualified fee, the daughters being restricted to a liferent allenarly; or it might be a right which depended upon the children surviving their mothers. The language used, it was contended, was consistent with either of these alternatives. I do not think that that contention is well founded. It seems to me that there are very sufficient grounds for holding that the right given to the children of a daughter depended upon their survivance of their mother.

In the first place, to restrict the daughters to a liferent and to give an absolute fee to their children, if and when they came into existence, would be inconsistent with and repugnant to the initial gift to the daughters. In the second place, there is no destination over of the share of a daughter who survives the period of vesting but has no children. If, however, a fee was conferred upon the daughter by the initial gift, and if the effect of the subsequent directions was merely to burden that fee with a resolutive condition in the event of the daughter being survived by children, there was no room for a destination over in the event of failure of children.

It therefore seems to me that this is a case of the kind of which *Tweeddale's Trs.*, 1905, 8 F. 264, is the most recent example, and that a fair construction of the language used is that a fee was given to the daughters, but that it was burdened with a trust for the purpose of securing to the daughters the income of their shares during their lives, and the capital to their children who should survive them. The result would be that in the event of a daughter dying without leaving children, her share would be carried by her will if she left one, and if not would pass to her heirs *ab intestato*.

For these reasons I am of opinion that, as regards unmarried daughters, the directions in question sufficiently disclose the intention of the testator, and I shall now consider the case of the daughters who were already married.

In the first place, it seems to me to be certain that the directions were intended to apply to all the daughters. They are introduced by the words: "As regards said provisions to my daughters, I hereby appoint that the capital of the same shall not be paid to them"—words which plainly include all the daughters. Then in the clause immediately following the directions in question the testator authorises his trustees to pay a certain part of the capital to his daughters. The clause is in the following terms:—"Further, notwithstanding what is before written, my trustees shall have power on the marriage of such daughter to pay to her, or to pay to any daughter already married at my death," a portion of her share not exceeding one-tenth. Now there the testator does contemplate that a daughter may be already married at his death, and obviously there would be no necessity for empowering the trustees to pay a portion of the capital to a daughter in that position unless the previous direction to the trustees to hold the capital applied to daughters already married.

But the difficulty which arises is this, that although the trustees are directed not to pay the capital of their shares to any of the daughters, the testator's instructions as to the purposes for which the shares are to be retained are, in terms, applicable only to the case of unmarried daughters. Thus the trustees are directed to pay the revenue of the shares "to my daughters while they remain unmarried"; and "on their marriage" the trustees are to secure their shares

in trust "by antenuptial settlement upon my daughters and their children to be born." Therefore, upon a literal reading of the clause, the trustees, although they would be bound to retain the share of a married daughter, would have no power, or, at all events, no express power, to pay the revenue to her, and they could not secure the share by antenuptial settlement, unless such daughter became a widow and married again, and they could in no case secure the capital to children born prior to the testator's death, because the settlement is only to be on children "to be born."

In these circumstances there is much force in the contention of the married daughters that as regards them the directions must be disregarded altogether, because assuming that the trustees are directed to hold their shares, there is no specification of the purposes for which they are to do so, and it cannot be assumed that the intention of the testator was the same as regards married and unmarried daughters.

The question is one of very considerable difficulty, but I have come to be of opinion that the directions are capable of being applied, as they were undoubtedly intended to be applicable, to the case of married as well as of unmarried daughters. I think that the instructions to the trustees as to what they are to do with the shares of the daughters (which they are unequivocally directed in all cases to retain) may be regarded, first, as expressing the testator's intention as to the purpose for which the shares were to be retained; and, secondly, as indicating what might be called the machinery for carrying that purpose into effect. Now if I am right in holding that the purpose is sufficiently clear, I do not think that the testator's intention can be defeated simply because he has indicated a method of carrying out his wishes which is not precisely applicable to every case. There is no difficulty in settling the shares of the married daughters in trust to secure payment of the revenue to them, and of the capital to their children in the event of their survivance, and that is the kind of settlement which the testator had in view, although it is not, and cannot be, precisely the form of settlement which he specified.

I am therefore of opinion that the first and third questions should be answered in the negative and the second and fourth in the affirmative, and that the sixth and eighth questions should be answered in the negative. In regard to the fifth and seventh questions, I think that we should find it unnecessary to answer them.

The Lord Justice-Clerk and *Lord Ardwall* concurred.—31*st January* 1908.

Counsel for the First and Fourth Parties, Cullen, K.C., Spens; Agents, W. & J. Cook, W.S.—*Counsel for the Second and Third Parties, Dean of Faculty (Campbell, K.C.), Murray; Agents, Skene, Edwards & Garson, W.S.*—*Counsel for the Fifth Parties, D. Anderson; Agents, W. & J. Cook, W.S.* J. S. M.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

312. **Mulvein** *v.* **Murray.**

I. Contract — Restraint of Trade — Validity—Stipulation Necessary for Reasonable Protection of Party to Contract — Contract Between Boot and Shoe Manufacturer and Commercial Traveller—Stipulation that Traveller Should Not Sell to or Canvass Any of Employer's Customers for One Year After Termination of Engagement—Held Stipulation Valid as Being Necessary for Reasonable Protection of Employer.

II. Contract — Restraint of Trade — Validity — Contract Between Boot and Shoe Manufacturer and Commercial Traveller—Severable Stipulations—Stipulation that Traveller Should Not Sell or Travel in Towns or Districts Traded In by Employer—Employer's Business Extending Over District Wider Than That in Which Employee Travelled—Circumstances Where Held Stipulation Wider Than was Necessary for Protection of Employer, and (diss. Lord Low) Wholly Invalid.

Appeal from the Sheriff Court of Lanarkshire at Glasgow.

On 3rd February 1905 George Mulvein, boot and shoe factor, Maybole, and John Murray, 1 Coral Hill, Maybole, entered into an agreement the material clauses of which were as follows:

This Minute of Agreement entered into between George Mulvein, Boot and Shoe Factor, Maybole, and John Murray, presently residing in 1 Coral Hill, Maybole, Witnesseth that the said George Mulvein hereby engages the said John Murray from the sixth day of February nineteen hundred and five, as a retail traveller, salesman, and collector in his said business of Boot and Shoe Factor . . . and this engagement shall be terminable by either party, by giving a fortnight's written notice to the other party of his intention to terminate it; and the said John Murray binds himself not to sell to, or to canvass any of the said George Mulvein's customers, or to sell or travel in any of the towns or districts traded in by the said George Mulvein for a period of twelve months from the date of the termination of this engagement.

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Mulvein v. Murray.

On 27th October 1906, John Murray, having given the requisite notice, terminated his engagement with George Mulvein and left his employment.

On or about 15th November 1906 George Mulvein brought the present action against John Murray in the Sheriff Court at Glasgow. The pursuer prayed the Court:

To interdict the defender from selling boots and shoes to or canvassing any parties who were customers of the pursuer prior to 27th October 1906, and from selling, travelling for, or trading in boots and shoes in the following districts, namely—Cambuslang, Tollcross, Parkhead, Kinning Park, Govan, Gorbals, Rutherglen Road, Tradeston, Auchenairn, Springburn, being districts traded in by the pursuer, and in particular from soliciting the following persons or their representatives for orders for boots and shoes—(Here followed a list of the names and addresses of persons who, the pursuer alleged, had been canvassed by the defender).

After sundry procedure proof was allowed and led. It appeared that the pursuer's business extended to Ayrshire, Renfrewshire, Lanarkshire, Dumbartonshire, Stirlingshire and Linlithgowshire; that the defender, while in the pursuer's employment, had travelled in the districts mentioned in the prayer of the petition; that on leaving the pursuer's employment the defender had entered the service of Andrew Lees, boot and shoe manufacturer, Ayr, as commercial traveller; and that in this capacity he had travelled in districts in which he had travelled while in the pursuer's employment, and had canvassed the persons whose names were mentioned in the prayer of the petition. These persons were customers of the pursuer at the date when the defender terminated his engagement with the pursuer.

On 8th May 1907 the Sheriff-Substitute (Fyfe) *granted* interdict as craved.

The Defender *appealed* and *argued*: (1) The agreement did not define the capacity in which the defender was to be prohibited from selling or canvassing. Accordingly it must be taken that he was prohibited only as principal and not as the agent of a third party (*Allen* v. *Taylor*, 1871, 19 W.R. 556; *Dunning* v. *Owen* [1907], 2 K.B. 237). But (2) the contract was void. Contracts in restraint of trade were valid only if they were reasonably necessary for the protection of the party in whose favour they were made (*Mitchell* v. *Reynolds*, 1711, 1 Smith L.C. 406; *Nordenfeldt* v. *Maxim Nordenfeldt Guns and Ammunition Co. Ltd.* [1894], A.C. 535). The contract here was objectionable (1) because it was not limited to the pursuer's own trade, and (2) because its limits in space could not be ascertained without going *dehors* the contract. No doubt if a contract contained two severable stipulations, one of which was *per se* valid, while the other was too wide, the valid stipulation would be enforceable. But where, as here, the only stipulation was too wide, the Court could not make a new contract for the parties by reading in a limitation (*Dumbarton Steamboat Co. Ltd.* v. *Macfarlane*, 1899, 1 F. 993; *Baker* v. *Hedgecock*, 1888, L.R., 39 Ch. D. 520). Counsel also cited *British Workman's and General Assurance Co. Ltd.* v. *Wilkinson*, 1900, 8 S.L.T. p. 67; *Woolley & Son* v. *Morrison*, 1904, 6 F. 451; *Davies* v. *Davies*, 1887, L.R., 36 Ch. D. 359; *Palmer* v. *Mallet*, 1887, L.R., 36 Ch. D. 411.

Argued for Pursuer: The contract prohibited the defender from selling and canvassing, not only on his own account, but also as an agent. (2) As to validity, the contract must be looked at from a business point of view (*William Cory & Son Ltd.* v. *Harrison* [1906], A.C. 274). It must therefore be construed as applying only to the boot and shoe business, with which alone the parties were concerned (*Dubowski & Sons* v. *Goldstein* [1896], 1 Q.B. 478). The contract must also be construed as applying to customers who were customers at the time when the defender left the pursuer's service (*Dubowski & Sons* v. *Goldstein, cit.*). The area defined was the area of pursuer's trading, and that area might be identified by parole evidence (*Meikle* v. *Meikle*, 1895, 33 S.L.R. 362; *White Tomkins & Courage* v. *Wilson*, 1907, 23 T.L.R. 469). When these circumstances were kept in view, it was plain that the contract was necessary for the reasonable protection of the pursuer, and was valid. In any view the prohibition of selling to or canvassing pursuer's customers was not too wide, and was severable from the probibition of traveling in the districts traded in by pursuer (*Nordenfeldt* v. *Maxim Nordenfeldt Guns and Ammunition Co. Ltd., cit.*). The pursuer was therefore at least entitled to interdict against this valid stipulation being infringed. *Dumbarton Steamboat Co. Ltd.* v. *Macfarlane* (*cit.*) was distinguishable. It only decided that the Court could not make a new contract for the parties. Counsel also cited *Williams & Son* v. *Fairbairn*, 1899, 1 F. 944.

The following interlocutor was pronounced:—

"Recal the said interlocutor; find that at the date of the action the defender had been canvassing the persons mentioned in the prayer of the petition, being customers of the pursuer, for orders for boots and shoes; that his doing so was in contravention of his agreement with pursuer, No. 7 of process; but as the twelve months referred to in the said agreement have long since expired, find it unnecessary to interdict the defender from selling boots and shoes to or canvassing any parties who were customers of the pursuer prior to 27th October 1906, and in particular from selling to or canvassing the persons specially named in the prayer of the petition or their representatives for orders for boots and shoes; and, *quoad ultra*, assoilzie the defender from the conclusions of the petition, and decern."

The Lord Justice-Clerk.—There is no doubt that in this case the restrictive obligation was for a time specified and in so far as it was an obligation upon the defender not to canvass customers that it is valid and must be sustained.

But the obligation not to travel in any of the towns or districts traded in by the said George Mulvein for a period of twelve months is in a different position. This is an unreasonable restraint. There is an absolute want of specification. The word "district" seems to me to be a most indefinite description of area. It leaves the application of the restriction to be made wherever it may turn out that the pursuer has been in the past doing business. What are the limits assigned to the expression "district" is nowhere made plain. I cannot but think that such a restrictive bargain should be in terms easy of interpretation and applied with definiteness to the areas intended to be protected.

When we come to look at the subject of agreement the same indefiniteness is found. By the letter of the agreement the limitation does not apply to any particular business but is absolutely general in its terms. It is said that the words must be read as limited to the particular trade in boots and shoes for which the defender was engaged. That would be to infer a limitation as regards future action merely from the designation of the defender. I cannot see that if the conditions agreed to were not bad as as being in undue restraint of trade that the defender could have resisted a general exclusion of him from trading in the prohibited place. The case of *Baker* v. *Hedgecock* seems to militate against such a view.

I am of opinion that the judgment of the Sheriff-Substitute is erroneous and ought to be recalled, and that the interdict should be limited to the sale of boots and shoes to persons who were customers of the pursuer before 27th October 1906, naming the persons stated in the prayer of the petition as being of those persons, and that no interdict going further should be granted.

Lord Low.—This case belongs to a class which has given rise to much litigation and to considerable diversity of judicial opinion, but the law applicable to such cases has been settled by the judgment of the House of Lords in *Nordenfelt* v. *Maxim Nordenfelt Gun and Ammunition Co.* [1894], A.C. 535, in which all the authorities were reviewed.

I think that the result of that judgment is that the question whether the agreement entered into between the pursuer and the defender is or is not enforceable depends upon whether, in view of the circumstances, the restraint imposed upon the defender was reasonable in the sense that it did no more than afford a fair protection to the interests of the pursuer?

In so far as the defender was taken bound not to "sell to or 'canvass'" any of the pursuer's customers for a period of twelve months from the date of the termination of the agreement, I have no doubt that the restraint was reasonable, but more difficulty arises in regard to the additional obligation which is laid upon him not "to sell or travel in any of the towns or districts traded in" by the pursuer for the same period.

A commercial traveller becomes acquainted with his employers' customers in the district allotted to him, and he gets to know the possibilities of the district in regard to the extension of the trade in which he is engaged. I therefore think that it would be reasonable for his employer to take him bound, in the event of his employment coming to an end, not to use the knowledge which he had gained for the purpose of carrying on the same trade, either on his own account or as traveller for another, within the district in which he had acted as traveller, for such a period as might be supposed to be necessary to enable his successor to become acquainted with the customers and with the district. That I take to have been the object of the agreement in question, and if the second branch of the restraining clause had been limited to the districts in which the defender travelled, I should have thought it was reasonable. It however extends to "all the towns or districts traded in" by the pursuer. That is extremely wide, because although the volume of business done by the pursuer does not appear to be very large, it extends over a wide area. He says in his evidence that his business extends to Ayrshire, Renfrewshire, Lanarkshire, Dumbartonshire, Stirlingshire, and Linlithgowshire; and he also says that he employs eight travellers. There is nothing in the evidence to shew that it was reasonably necessary for the fair protection of the pursuer's interests that the restriction placed upon the defender in regard to towns and districts should extend over so large an area.

The pursuer however only seeks to interdict the defender from selling or travelling in districts in which he was actually employed as traveller, and the question arises whether it is competent to grant an interdict so limited? The general rule is that if such an obligation is severable, that part of it which is lawful may be enforced; but if the obligation is not severable, then if it cannot be enforced to its full extent it cannot be enforced at all, because for the Court to make a severance which the parties have not made would be to re-make the contract for them.

So far as I can find, all the cases in which the obligation has been held to be severable have been cases in which the severance has been made in the contract; but, on the other hand, the cases in which the obligation has been held to be not severable have been cases in which any restriction of the generality of the obligation would be entirely arbitrary, there being no

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data upon which a definite line could be drawn. Now the peculiarity in this case is that it supplies a perfectly definite line dividing what is a reasonable and enforceable restriction from what is an unreasonable restriction which the Court will not enforce. Suppose that the restriction had been that the defender should not sell or travel either in the towns or districts in which he had been employed as a traveller, or in any towns or districts traded in by the pursuer, the effect of the restriction as a whole would have been exactly the same as that which was actually imposed, but it would have been plainly severable, and the pursuer would have been entitled to the interdict which he now craves. The reason why he would be entitled to that limited interdict would be that it was certain from the terms of the contract that the whole area covered by the restriction was composed of two ascertained and definite areas, namely, that in which the defender had travelled, and that in which he had not travelled but in which the pursuer had traded. Now if from the nature of the case it is as certain that the total area is composed of these two areas, as if that had appeared upon the face of the contract, I am unable to see any sufficient reason why the same result should not follow. In neither case would the Court be making a contract for the parties which they had not themselves made, but in both they would be holding that, to an extent which was precisely ascertained, the contract was lawful and enforceable.

I am therefore of opinion that the application of the pursuer for an interdict limited to the districts in which the defender was employed as traveller was competent: and if so, there is no question that the facts proved entitle him to decree.

There is an argument which was strongly urged on behalf of the defender, and that was that the contract was wholly bad in respect that in the restraining clause the kind of business which the defender was restricted from carrying on was not specified. I am of opinion that the argument cannot be sustained. In the agreement the pursuer is described as "Boot and Shoe Factor," and the defender is described as "a retail traveller, salesman, and collector" for the pursuer, "in his said business of Boot and Shoe Factor." The agreement therefore is between a boot and shoe factor and his traveller, and relates to the employment and to nothing else. That being so, it seems to me that the implication is plain that the selling, canvassing and travelling referred to in the restraining clause relate only to the boot and shoe trade with which alone the contract is concerned.

I am accordingly of opinion that the interlocutor under appeal should be affirmed.

Lord Ardwall.—Originally at common law all such agreements as that under consideration in the present case were void as being made in restraint of trade and contrary to public policy. To this general rule exceptions have been from time to time admitted in certain cases on the ground that the restraint imposed in these cases was reasonable and proper on a consideration of the contract between the parties.

It is a question of circumstances in each particular case whether the restraint imposed is reasonable or not, and the main point to be considered in each case is whether the restraint is or is not wider than is necessary for the reasonable protection of the party desiring to enforce it.

With regard to the agreement in question, I am of opinion that the first part of it, in which the defender "bound himself not to sell to or canvass any of the said George Mulvein's customers," is a valid provision, and is separable from what follows. But the contract also binds the defender not "to travel in any of the towns or districts traded in by the said George Mulvein for a period of twelve months from the date of the termination of this engagement." The limitation in time which is applicable to both the clauses I have quoted is quite reasonable, but I am of opinion that the latter clause I have quoted imposes an unreasonable restraint upon the defender. It is too wide and too vague; for all that appears the pursuer may have traded in every district in Scotland and England too; and I may add that the word "district" is in itself a very vague term, as it is not a known geographical division of either town or country. In short, this provision leaves the defender entirely in the dark as to what towns or districts he is precluded from selling or travelling in; and so far as its terms are concerned it might embrace the whole country should it turn out that Mulvein had traded in each district thereof, whatever that may mean. It appears that, according to his own evidence, his business extends "to Ayrshire, Renfrewshire, Lanarkshire, Dumbartonshire. Stirlingshire, and Linlithgowshire," and he adds after this enumeration, "I have a traveller who goes to Bo'ness in Linlithgow," so apparently the pursuer seems to think if a traveller of his visits one town in a county the restriction will apply to the whole of the county; but be this as it may, I am of opinion that an agreement of this sort in restraint of trade should at least be definite and distinct, and in such terms as that the person who is coming under the restraint should know what he is binding himself to refrain from doing.

It was argued for the pursuer that this second clause might be held to be valid with regard to towns or districts which the defender had himself traded in while in the pursuer's service, and invalid *quoad ultra*. I cannot assent to this argument. I think that to introduce such a limitation into the clause would really be to re-form the contract, and would be contrary to the law laid down in the case of the *Dumbarton*

Steam Boat Company v. *Macfarlane* (1899, 1 F. 993), and *Baker* (1888), L.R. 39 Ch. D. 520.

But further, I am of opinion that the second clause I have quoted is invalid inasmuch as it is a restraint against selling or travelling for any purpose in any of the towns or districts mentioned. Now I think it was wholly unnecessary for the protection of the pursuer that the defender should be prohibited from selling or travelling for any purpose whatever in these towns or districts, and was unreasonable in respect that the defender had a right to engage in any sort of business for himself, provided he did not interfere with the pursuer's class of business in such town or district.

It was pleaded for the pursuer that this clause must be held to be limited to selling boots and shoes or travelling for the purposes of the boot and shoe trade, because the pursuer is designated "boot and shoe factor" in the commencement of the agreement, and the defender is engaged as a retail salesman and collector in the said business of boot and shoe factor; but I am unable to hold that the mere designation of the pursuer, or the statement of the purpose for which the defender was to travel, modifies the absolutely general obligation on the defender not to sell or travel at all in the towns and districts indicated, and I am of opinion that under that obligation, if valid, he might have been prevented from selling or travelling in any trade whatever.

I may point out that in the case of *Baker* v. *Hedgecock* (1888, L.R. 39 Ch. D. 520), where the obligation was not to carry on any business whatever, it was held to be of no moment that in the beginning of the agreement the employer was designated as "of 61 High Holborn, Tailor," and the employee was designated "skilled foreman cutter and general superintendent," and the employer was not permitted, by limiting the agreement for the purposes of the action to an injunction against carrying on the business of a tailor, to render the agreement valid or the action good. It was accordingly there held that the agreement was void, and the injunction was refused. Applying that case to the present I am of opinion that the limited restriction in the prayer of the petition against selling, travelling, or trading in boots and shoes will not render the agreement valid so as to entitle the Court to grant the limited interdict asked; and similarly, I am of opinion that the limitation of the districts against trading in which interdict is sought will not have the effect of rendering the agreement valid to that limited extent. I regard the obligation as one and indivisible, and not separable or restrictable in part as suggested by the pursuer.

On these grounds I am of opinion that the interlocutor of the Sheriff-Substitute of 8th May 1907 ought to be recalled, and that we should find that at the date of the action the defender had been canvassing the persons mentioned in the prayer of the petition, being customers of the pursuer, for orders for boots and shoes; that his doing so was in contravention of his agreement with the pursuer, No. 7 of process; and in respect that the period of twelve months fixed by the contract has now expired, should find it unnecessary to grant interdict against the defender from selling boots and shoes to or canvassing any parties who were customers of the pursuer prior to 27th October 1906, and in particular from selling to or canvassing the persons specially named in the prayer of the petition or their representatives for orders for boots and shoes; and *quoad ultra* should assoilzie the defender.—31*st January* 1908.

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Counsel for Pursuer, MacRobert; Agents, Young & Falconer, W.S.—Counsel for Defender, Wilton; Agent, Alex. Bowie, S.S.C.

J. S. M.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

313. Crown Steamship Company Limited *v.* Leitch.

Ship—Carriage of Goods—Bill of Lading—Construction—Consignee Bound by Bill of Lading to Receive Goods from Ship's Tackles as Fast as Steamer Can Deliver, any Custom of the Port to the Contrary Notwithstanding, and Also to Pay All Charges After Being Discharged Necessary for Steamer's Quick Despatch—Failure of Consignee to Accept Delivery as Fast as Goods Discharged from Ship's Tackles—Employment by Shipowners of Extra Hands to Accelerate Unloading by Clearing Goods from Quay — Circumstances Where Held (Diss. Lord Stormonth-Darling) That Shipowners Entitled to Recover from Consignee Expense of Employing Extra Hands so far as Reasonable—Hulthen v. Stewart & Company [1903], A.C. 389, Distinguished — Opinions per Lords Low and Ardwall That Shipowners Could Not Have Sued for Demurrage.

Appeal from the Sheriff Court of Renfrew and Bute at Greenock.

This was an action brought by the Crown Steamship Co. Ltd., 175 West George Street, Glasgow, owners of the steamer "Crown of Granada," against John Leitch, sugar-broker, Greenock, to recover the sum of £40, 19s.

The following narrative of the facts of the case is taken from the judgment of Lord Low:

"The question in this case depends upon the

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construction of a clause in the bill of lading of a cargo of sugar which was brought by the pursuers' steamer 'Crown of Granada' from Barbadoes to Greenock. The clause is in the following terms: 'The goods to be received by the consignee from the ship's tackles as fast as the steamer can deliver, any custom of the port to the contrary notwithstanding, and all charges incurred after being discharged necessary for the steamer's quick despatch to be paid by the owner or consignee of the goods.'

"The circumstances in which the question arises are these. The defender was consignee of a part only, although a large part, of the sugar, but I do not think that the main question in the case (the meaning and effect of this bill of lading) is affected by that circumstance. The question would have been the same if the defender had been consignee of the whole cargo. The general custom of the Port of Greenock is for sugar to be weighed on the quay as it is put out of the ship and before it is removed into the sheds of the Harbour Trust adjoining the quay. I understand that in all cases the sugar must be put into the sheds for Customs House purposes. Sometimes the sugar is run into the sheds as it is put out of the ship, and is weighed in the sheds. That appears to be an exceptional course to follow, but it is sometimes done, and is quite lawful.

"The 'Crown of Granada' commenced to discharge at 7 o'clock on the morning of the 28th of June 1906. The pursuers had two gangs of men to discharge the cargo at each of the four main hatches, which enabled the derricks to be kept constantly at work, and the cargo to be discharged as fast as it could be delivered from the ship's tackles. The defender, on the other hand, had only one gang of men, and one weighing machine, at each hatch. The result was that the defender's men could not weigh the sugar and remove it to the sheds as fast as it was put out of the ship, and the consequence was that from time to time the quay became blocked with bags of sugar with which the defender's men were unable to deal. When that happened men in the employment of the pursuers cleared the quay by running the accumulated bags into the sheds without being weighed. If that had not been done it would have been necessary to stop the discharge when a block occurred until the defender's men were able to weigh and remove the bags which had accumulated.

"The pursuers now claim from the defender the expense which they incurred in clearing the quay when a block occurred, and the first question is whether that is a claim which they are entitled to make in terms of the clause in the bill of lading which I have quoted."

On 21st December 1906 the Sheriff-Substitute (Neish) *assoilzied* the defender.

The Pursuers *appealed* and *argued*: The pursuers were suing not for demurrage but for repayment of charges which the bill of lading provided should be borne by the defender. The defender was under an absolute obligation to receive the goods "as fast as the steamer can deliver"—*i.e.* as fast as the ship could put the cargo out on the quay (*Kruuse* v. *Drynan & Co.*, 1891, 18 R. 1110; *Maclay* v. *Spillers & Baker Ltd.*, 1901, 6 Com. Cas. 217). The words "quick despatch" referred back to the words "as fast as steamer can deliver," and did not qualify the defender's obligation. The cases of obligation to unload in a reasonable time were either cases where the ship was to be unloaded in accordance with the custom of the port (*Postlethwaite* v. *Freeland*, 1880, L.R. 5 A.C. 599; *J. & A. Wyllie* v. *Harrison & Co.*, 1885, 13 R. 92; *Castlegate Steamship Co. Ltd.* v. *Dempsey* [1892], 1 Q.B. 854; *Good & Co.* v. *Isaacs* [1892], 2 Q.B. 555; *Hulthen* v. *Stewart & Co.* [1903], A.C. 389; Carver on Carriage by Sea, sect. 614A) or cases where the contract contained no stipulation as to time (*Hick* v. *Raymond & Reid* [1893], A.C. 22). In the present case the custom of the port was expressly excluded and the obligation was absolute. Further, the defender had caused unnecessary delay by weighing the goods at the ship's side and by separating his own goods from the remainder of the cargo while still on the quay. That had caused obstruction which the pursuers were entitled to clear away at the defender's expense. It was no answer for the defender to say that he had acted reasonably, or that he had taken delivery as soon as he could in the circumstances. Even if that were so he had not accepted the goods as fast as they could be discharged from the ship's tackles. He was thus in breach of his contract with the pursuers, and was liable in the sum sued for as the extra expense caused to the pursuers by his breach.

Argued for the Defender: The words "as fast as steamer can deliver" imposed only an obligation to do what was reasonable in the circumstances (*Hulthen* v. *Stewart & Co.* (*cit.*); *Hick* v. *Raymond* (*cit.*); *Temple, Thomson & Clark* v. *Runnals*, 1901, 18 T.L.R. 18 and 822; Carver on Carriage by Sea, sect. 614A; Scrutton on Charter Parties and Bills of Lading, p. 258). Further, that was the natural meaning of the words "quick despatch" in the later clause, and it was probable that the two clauses were intended to be mutually inconsistent. The words "excluding the custom of the port" only barred the defender from founding on any special custom of the port, such as was present in the cases of *Postlethwaite* v. *Freeland* (*cit.*); *J. & A. Wyllie* v. *Harrison & Co.* (*cit.*); and *Good & Co.* v. *Isaacs* (*cit.*). The cases founded on by the pursuers were distinguishable. In *Kruuse* v. *Drynan & Co.* (*cit.*) it was held that there had been in fact unreasonable delay. In *Maclay* v. *Spillers & Baker Ltd.*

(*cit.*) there was a specific obligation to unload continuously, which had not been performed. If the defender were right in his construction of the bill of lading there was no breach of contract. It was necessary to weigh the goods on the quay in order to ascertain whether or not there was short delivery. As to the separation of the goods, it was the pursuers' duty to make separate delivery of the defender's goods (Carver on Carriage by sea, sect. 462), and any delay caused by separating them was due to the pursuers' own default. The defender therefore had acted reasonably, and the pursuers were not entitled to employ extra men at the defender's expense. In point of fact, the employment of extra men had caused confusion and had not accelerated the discharge. In any view it was proved that the work could have been done at the rate of 6d. per ton. The sum claimed by the pursuers (1s. 9d. per ton) was therefore excessive.

The Court (*diss.* Lord Stormonth-Darling) *recalled* the interlocutor of the Sheriff-Substitute, *found* that the charges sued for were to some extent necessary for the "steamer's quick despatch," *decerned* against the defender for the sum of £11, 14s., and *found* no expenses due to or by either party.

The Lord Justice-Clerk.—The pursuers claim from the defender the expense of providing labour to facilitate the discharge of a cargo of sugar from their vessel. They make this claim in respect of a clause in the bill of lading, under which the consignees were bound to take "from the ship's tackles as fast as the steamer can deliver, any custom of the port to the contrary notwithstanding." The consignees were taken bound to pay all charges necessary for the steamer's "quick despatch."

It is the fact that the defenders were only consignees of a part of the cargo, but it does not appear to me that this fact in any way affects the decision of the question in this case.

It cannot be disputed that the arrangements made by the defender did not admit of the cargo being cleared from the quay as quickly as the ship could deliver, for it is quite certain that with one set of scales opposite each hatch—which was all that the defender provided—the bags brought from the hold could not be weighed fast enough to keep the quay clear for further discharge. To prevent the blocking of the discharge, the ship provided gangs of men, who, when there was a tendency to accumulation, ran the goods back into the shed behind, so as to clear a space for the ship's tackles to lay down more cargo. Such a removal before weighing was not according to the usual practice, but it was a procedure which was sometimes followed.

The first question is, What is the meaning to be put upon the clause in the bill of lading? It is, I think, very definite and clear, and there is no ambiguity in its terms. All custom is excluded; the bargain sharply is for a delivery as fast as the ship can bring the goods forward to the ship's side. To me it appears to be vain to contend that in the words excluding the power to found on port custom the practice of weighing at the ship's side is not included. It excludes everything that can hamper the ship's speed in delivering, which undoubtedly weighing at the ship's side may do, if the weighing appliances are not sufficient to weigh as rapidly as is necessary to prevent delay at the ship's tackles, the ship delivering by her ordinary appliances, as was the case here.

The defender, however, maintains that the latter part of the clause, in which the words "quick despatch" are used, has a less extensive meaning than the words in the earlier part of the clause, and must be read to mean only a reasonable despatch according to the circumstances existing at the time. The defender seems to me to be here in a dilemma. If by "the circumstances" he means general circumstances, then I think it hopeless for him to attempt to escape from the application of the clause as one clause, to be read as one, "quick despatch" referring to the concrete phrase "as fast as the steamer can deliver." If, on the other hand, by "circumstances" he refers to port circumstances, his contention is expressly excluded by the words "custom of the port notwithstanding." As I read the second part of the clause it does nothing more than give a right to the ship, if despatch is being hindered, to claim the expense she is put to in clearing away the accumulation which is causing the hindrance, and exempt her from any claim on the part of the consignee for any unusual expense he may be put to in keeping reception of the goods in such order that the ship shall not be delayed, and forced to discharge more slowly than her appliances enabled her to do when she is free to do full work.

I do not consider it necessary to notice the argument of the defender based on the decision of the House of Lords in the case of *Hulthen* v. *Stewart*, except to say that the question in that case related to demurrage arising on the lapse of a specific number of days stipulated for discharge. This is not in any sense a case for demurrage. The sole question is whether the defender failed to give the ship the despatch stipulated for, and whether the pursuers, having taken steps to obviate the delay caused by that failure, are entitled to maintain that the cost incurred in doing so is exigible from the defender. If, as I think is the case, the only difficulty in fast delivery was the desire of the defender to weigh at the quay, he cannot, as I think, found upon that except as being a port custom, and this ground is expressly excluded by the terms of the bill of lading. I am therefore of opinion that the pursuers were entitled, when the defender failed to receive

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cargo and clear the quay as the ship's tackles delivered, to provide force to effect this themselves, at the expense of the defender, seeing that the rate of delivery was clearly notified to him, and it was pointed out to him that if he desired to weigh at the quay, extra scales would he necessary.

As regards the charge made by the pursuers, I do not think it can be held just. There is evidence that the 1s. 9d. they charge per ton is largely in excess of what such work is usually contracted for by those who provide a gang of quay work, and there is no counter evidence. The high charge was in part the result of the pursuers bringing a large gang all the way from Glasgow daily. In my opinion the pursuers' charge should be cut down to the sum represented by 6d. per ton, which comes out at £11, 14s.

Lord Low (read by *The Lord Justice-Clerk*) [after stating the facts *ut supra*].—It seems to me that, so far as the language used is concerned, there is no ambiguity in the first branch of the clause. The consignee is taken bound to receive the goods as fast as they can be delivered by the use of the ship's tackles, and that obligation is not to be limited or minimised by any custom of the port.

Upon that part of the clause I have two remarks to make. In the first place, I think that the words "any custom of the port," referred to, or at all events included, the custom of weighing the sugar on the quay before it was removed into the sheds. That is the only custom of which there is any evidence, and it is plainly a custom which materially affected the rate of discharge, because it is admitted that if, instead of weighing the sugar upon the quay, it had been at once run into the sheds, the defender would have had no difficulty in receiving the cargo as fast as the ship delivered it.

In the second place, although, in my judgment, the words which I am now considering are unambiguous, I have no doubt that they must be construed reasonably, and that the extent of the consignee's obligation may depend a good deal upon the circumstances existing in the particular case. For example, if the shipowner devised some means by which the cargo could be discharged much faster than the consignee had any reason to anticipate or be prepared for, I do not think that his failure to take delivery as fast as it was tendered would be a breach of his obligation. For reasons which I shall state presently, however, I do not think that any case of that kind has been established.

I now come to the second branch of the clause, which is much more difficult of construction than the first. I repeat the words: "All charges incurred after being discharged necessary for the steamer's quick despatch to be paid by the owner or consignee of the goods."

There is no dispute that the words "after being discharged" mean after goods have been discharged, but I think that it is also plain that they do not mean after all the goods have been discharged, because if all the goods were discharged the ship would be free, and there would be no room for incurring charges to ensure quick despatch. The clause therefore referred to something which might require to be done during the course of the discharge, and the only thing, so far as I can see, to which it could possibly refer, was just the very thing which happened, namely, a block occurring, which would have interrupted the discharge if the pursuers had not cleared it away.

There remain the words "quick despatch." The pursuers argued that these words referred back to the first part of the clause, and that the expression "for the steamer's quick despatch" was just a short way of saying "to enable the steamer to discharge the cargo as fast as she can deliver from the ship's tackles." The defender, upon the other hand contended that the words "quick despatch" must be read according to their ordinary signification, and as meaning that the ship should be discharged with reasonable speed, looking to all the circumstances.

I think that the construction for which the pursuers contend is in accordance with the intention of the clause. If it were not so, the unequivocal obligation which was laid upon the consignee by the first branch of the clause would be inoperative and ineffectual, because unless the shipowner could step in, under the second branch of the clause, and clear away an accumulation of bags which would otherwise interrupt the discharge, the consignee would incur no penalty for failing to implement his obligation to receive the goods as fast as the ship could deliver them. I further think that the expression "quick despatch" is a flexible expression which may quite well bear the interpretation which I have indicated if the context shews that that is the sense in which it was used. It is also important to remember that, in any view, the custom of the port is excluded. That was conceded by the defender's counsel. Now if the custom of the port had not been excluded, and if the stipulation had simply been that, in discharging the cargo, the steamers should get "quick despatch," I think that the defender could have successfully maintained that he was entitled to weigh the cargo on the quay, and to employ the number of men and of weighing machines which he did employ, because that was in accordance with the custom at Greenock. As the clause stands, however, the defender cannot found upon that custom—it is expressly excluded; and as I have already pointed out, he admits that if he had not weighed the sugar upon the quay, but run the bags into the sheds, he could with the same number of men have received the cargo as fast as it could be delivered from the ship's tackles. Except the custom of

weighing the sugar upon the quay, I find no circumstances which would have prevented the defender from taking, or justified him in not taking, delivery as fast as the sugar was discharged.

It is said, however, that the claim of the pursuers is contrary to a well-established principle which was finally settled by the judgment of the House of Lords in *Hulthen* v. *Stewart & Co.* [1903], A.C. 389. That principle is that if a specific number of days is fixed within which the discharge of a ship is to be accomplished, then if these days are exceeded demurrage is due whatever the actual circumstances were. If, upon the other hand, a specific number of days is not fixed, but the contract is to discharge "with all despatch" or "as fast as steamer can deliver," or expressions of that sort, the question whether demurrage is due depends upon whether the discharge has been carried out with reasonable expedition and diligence in view of whole circumstances.

If the pursuers had been claiming demurrage I agree that this case would have fallen under the latter category, because I cannot read the bill of lading as fixing a specific time for the discharge. But there is here no question of demurrage. The only question is whether under a special agreement the pursuers were entitled to do, at the defender's expense, certain work which the defender was under obligation to do himself? No doubt the object of the agreement was to prevent the steamer being detained, but that does not make the pursuers' claim one for demurrage, nor does it necessarily introduce a principle which would have been applicable if the claim had actually been for demurrage.

The difficulty in this case seems to me to be entirely one of construction. But suppose that there had been no ambiguity in the language used, and that the bill of lading had provided in the clearest terms that the consignee should receive the goods as fast as the steamer could deliver from the ship's tackles, any custom of the port to the contrary notwithstanding; that if the consignee chose to weigh the goods upon the quay he should be bound to employ a sufficient number of men and of scales to enable him to do so without interrupting or retarding the discharge; and that if he did not do so the ship should be entitled, at his expense, to do what was necessary to prevent the discharge being interrupted or retarded, by removing to the sheds without being weighed, any bags of sugar which the defender was unable to weigh as fast as they were delivered by the ship's tackles—if that had been the bargain between the parties—as I think it truly was—expressed in quite unambiguous language, I fail to see why it should not be a perfectly lawful bargain, and enforceable according to its terms.

The only ground upon which such a contract could be held to be not enforceable would be that it was not sufficiently definite. Now, in the first place I think that the obligation laid upon the consignee was sufficiently definite for the purposes of the contract, because I imagine that persons experienced in the unloading of ships would know with sufficient accuracy for practical purposes what was involved in an obligation to receive the goods as fast as they could be delivered from the ship's tackles. None of the witnesses say anything to the contrary. In the second place, however, I do not regard the obligation as being absolutely unconditional. I have already indicated circumstances which, in my opinion, would absolve the defender from the obligation to take delivery as fast as the steamer could deliver, but, in the discharge of the cargo, which actually took place, I repeat that I can find no circumstance (except the custom to weigh upon the quay, upon which the defender cannot found) which prevented him taking delivery as fast as it was tendered.

The only circumstance which might have been regarded as absolving the defender from exact fulfilment of his contract is that apparently (the evidence is by no means clear on this point) the pursuers employed an unusually large number of men to discharge the cargo; and if it had been shewn that the defender had been taken by surprise, and could not reasonably have been expected to be prepared for the discharge being made by so strong a force, that consideration might have had a material bearing upon the question of his liability. But no such defence is open to the defender, because he was given ample notice of the manner in which the pursuers were to discharge the cargo. He was told that the sugar would be delivered from "at least four derricks at the rate of not less than 40 hogsheads and 300 bags per hour at each derrick," and that he would be tendered "10 bags of sugar, in slings of 5 bags each, with each delivery of the derrick." He was further told that "if you intend to weigh the sugar as it is tendered to you, it will be necessary for you to have at least two scales to each derrick." He was also told that, failing his receiving the sugar as fast as the ship could tender it, the owner would put the sugar into the shed at his expense in terms of the bills of lading.

The defender took no objection to the rate of discharge proposed by the pursuers, nor at the time of the discharge did he take any objection to the employment by the pursuers of men to clear away accumulations of bags. Further, in the correspondence the pursuers proceeded upon the assumption that the meaning of the bills of lading was that for which they now contend, and the defender took no objection. It was not until the pursuers claimed from the defender payment of the sum now sued for that he maintained that their action was not justified by the bills of lading. In these circumstances, I think that it is somewhat difficult for the defen-

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der to maintain that the meaning of the contract is something different from that to which he assented at the time, and upon the faith of which he allowed the pursuer to act and to incur expense.

I am therefore of opinion that the pursuers were justified in acting as they did, and that they are entitled to recover from the defender the expenses reasonably incurred by them in running into the shed sugar consigned to him. The amount paid by the pursuers to their stevedore for running sugar into the sheds was £103, 14s. 7d. The pursuers have divided that amount among the various consignees in proportion to the weight of sugar run into the sheds for each of them. For the defender 468 tons were run in, and his proportion of the total cost, for which the pursuers now sue, is £40, 19s. That is at the rate of 1s. 9d. per ton, which, the defender says, is an excessive charge. In that, I think that he is right. My impression is that the pursuers, in their anxiety to secure that the discharge should not be interrupted, spared no expense. They had a very large number of men upon the quay ready to run the sugar into the sheds directly a block occurred, and the bulk of the men were brought from Glasgow, which, of course, cost more than if they had been hired in Greenock. Then, no independent evidence was led by the pursuers to shew that the charge made by them was a usual and reasonable charge. One witness, however, was adduced by the defender—Mr Harvey, secretary of the Greenock Beetroot Sugar Association—who said: "Part of our business is running in and piling up sugar discharged from steamers at the quays. Our rate therefor is 6d. per ton. I was prepared to run in the cargo in question if that had been ordered." That was the whole of Mr Harvey's evidence, and he was not cross-examined. His evidence, therefore, is not challenged, and I think that it must be held as establishing that the running in of the sugar might have been done for 6d. per ton instead of 1s. 9d. That brings out a sum of £11, 14s., for which I think that the pursuers are entitled to decree.

Lord Ardwall.—I have found this case to be one of much difficulty. If it were a question of demurrage that was here raised, it appears to me that the decision of the House of Lords in the case of *Hulthen* v. *Stewart & Co.* ([1903], A.C. 389), affirming the decision of the Court of Appeal, would have been conclusive against the pursuers. But what is here sought to be enforced is a special contract, under which I am of opinion that it was the intention of the parties that should delay occur in the removal of the goods by the consignees from the quay at the ship's side the shipowner should be entitled to employ men to run such goods into the sheds in order to give the steamer quick despatch—that is, despatch as quickly as the goods could be delivered over the ship's side. The document is very obscurely worded, and unless it had been that the parties, both in the correspondence and on record, and at the discussion on the appeal, assumed that what was pointed at in the bill of lading was charges for removing goods from the side of the quay after they had been put over the ship's side, I should have had great difficulty in construing the clause at all. I think that the proviso "any custom of the port to the contrary notwithstanding" prevents the defenders from pleading, as they might otherwise have done, that the block was caused by their endeavouring to weigh the sugar before it was put into the sheds. Therefore it must be taken that their obligation was to prevent the front of the quay from being blocked by goods, either by having two weighing machines opposite each hold to weigh the sugar as quickly as the ship could deliver it, or, failing that, to run the sugar straight into the sheds, leaving it to be weighed afterwards, which was what actually was done with a considerable portion of the cargo in question. I do not go further into detail either with regard to the construction of the bill of lading or with regard to the law applicable thereto, as I have had the advantage of reading my brother Lord Low's opinion, and agree with the views which he has expressed. The next question is whether the sum sued for was a charge "necessary for the steamer's quick despatch," for it is only such charges which, according to the bill of lading, are "to be paid by the owner or consignee of the goods." Now I think it is clearly proved that from time to time in the discharge of this steamer a block took place, and that these blocks were removed by the intervention of stevedores' men provided by the shipowners. This being so, the only remaining question is as to the amount of these charges. Now I think it clear that the shipowners here set about the business of discharging the vessel in a most extravagant manner. They did not content themselves with getting stevedores or quay porters at Greenock but brought them all the way from Glasgow, and brought them in quite unnecessary numbers. It is proved by the uncontradicted evidence of Mr Harvey, a witness for the defenders, that 6d. per ton is a sufficient allowance for running in and piling sugar from the quays into the sheds, and I think it is only that sum that should be allowed in the present case. It is said that there were 468 tons run in, and at 6d. per ton this amounts to £11, 14s.—and for this amount I think the pursuers are entitled to decree.

I think it right to add that it appears to me that the clause under discussion, which, it seems, is a new one, is not much of an improvement upon the clauses hitherto in use in bills of lading, and instead of being ultimately of any benefit to shipowners, is likely to cost them a

good deal more money than is saved, at all events if they follow the course that was adopted by the shipowners in the present case; and I must also add that although I think that, on a sound construction of the peculiar contract which the parties agreed to enter into by the bill of lading, the pursuers were entitled to intervéne so as to hasten on as they did the despatch of the vessel, yet the time saved was of comparatively small amount, and was really not worth all the trouble and expense which the shipowners put themselves to; indeed, it appears on the evidence they would have saved as much time if, instead of beginning the discharge of the vessel on the 28th, they had commenced it immediately on her arrival on the afternoon of the previous day, and been content with the usual rate of discharge of sugar cargoes at Greenock.

Lord Stormonth-Darling.—I am sorry that I cannot reach the conclusion at which your Lordships have arrived. The action is one by shipowners against the consignees of part of a cargo of sugar carried by the pursuers in a general ship to the port of Greenock. The claim is not for demurrage, but for a contractual substitute therefor. The clause in the bill of lading on which the action is laid is in these terms:—"The goods to be received by the consignee from ship's tackles as fast as the steamer can deliver, any custom of the port to the contrary notwithstanding, and all charges after being discharged necessary for the steamer's quick despatch to be paid by the owner or consignee of the goods." The pursuers say that they incurred certain charges to a stevedore from Glasgow in landing and removing cargo consequent on failure to take delivery from ship's tackles as fast as steamer could deliver it, and the proportion of these charges applicable to the defender's consignment (which consisted roughly of about two-thirds of the total cargo), the pursuers estimate, so far as handled by their men, at £40, 19s. It is plain, and was indeed admitted by the pursuers' counsel, that this estimate must, in any view, suffer considerable deductions in amount.

The Sheriff-Substitute, from whom the appeal is brought, has found that the pursuers have not proved that the sum sued for consists of "charges incurred after being discharged necessary for the steamer's quick despatch," in terms of the bill of lading, and he accordingly has assoilzied the defender, with expenses. I am of opinion that the Sheriff-Substitute's interlocutor ought to be affirmed.

The proposition which lies at the root of the pursuers' case is that the clause in the bill of lading requiring "the goods to be received by the consignee from ship's tackles as fast as the steamer can deliver, any custom of the port to the contrary notwithstanding," is practically equivalent to a clause fixing the number of days or hours during which the discharge is to be completed. It is true, they say, that a definite period of time is not prescribed, but a standard is fixed, viz. the ship's capacity for discharge when her tackles are working as fast as they can, and this standard must be perfectly well known to the shipowner, and can be ascertained by the charterer or consignee if he takes the trouble to inquire. There is nothing, therefore, they say, vague or uncertain about a clause so read, which imports a mechanical equivalent for a definite period of time, and there is no reason for attaching to it different consequences from a clause laying down in plain terms a certain number of days or hours for the discharge. Unfortunately for this argument, the point has been considered and determined the other way in a recent judgment of the House of Lords, *Hulthen* v. *Stewart & Co.* [1903], A.C. 389, affirming a decision of the Court of Appeal reported [1902] 2 K.B. 199. The claim in that case was no doubt one for demurrage, while here it is a claim for something in the nature of demurrage, and is intended to have the same deterrent effect. Demurrage being simply "the agreed-on amount of damage which is to be paid for the delay of the ship caused by a default of the charterers at either the commencement or the end of the voyage," a demurrage clause has been held elastic enough to cover damage caused in that way as being "in the nature of demurrage" (see case of *Harris*, 1885, L.R. 15 Q.B.D. 247). *Hulthen's* case, therefore, seems to me directly in point—as a case either of demurrage, or of something in the nature of demurrage. If the view had prevailed that the two clauses were practically identical (the clause, I mean, fixing a mechanical equivalent, and the clause fixing a definite period of time), the obligation in the case before us would have had to be construed as an unconditional one on the part of the consignee to take delivery within the time which could be shown to be the utmost capacity of the ship's tackles to give delivery, without regard to the actual circumstances of the case, just as if a definite time had been prescribed. But what say the noble and learned lords? After stating the opposing contentions, and explaining how the case would stand if there were no authority on the subject, Lord Macnaghten said: "It is certainly satisfatory to find that there is a series of decisions, some in this House and others of great weight both in this country and in Scotland, which leave little or no room for argument. It is, I think, established that, in order to make a charterer unconditionally liable, it is not enough to stipulate that the cargo is to be discharged 'with all despatch,' or as 'fast as steamer can deliver,' or to use expressions of that sort. In order to impose such a liability, the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished." This passage expresses the

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ground of a unanimous judgment as to the effect of a clause providing for discharge "with customary steamship despatch, as fast as the steamer can deliver," which, in substance, is just the clause here, and the words which here follow, 'any custom of the port to the contrary notwithstanding,' obviously make no difference, seeing that no peculiar or exceptional custom of the port of Greenock which could affect the matter one way or other was proved.

The case, therefore, presents itself to my mind as one in which the consignee was under no absolute and unconditional obligation to take delivery within a specified time, but in which his obligation was limited to taking delivery within a reasonable time, so as to allow of the steamer's "quick despatch," having regard to all the existing circumstances. Again, you have no expression defining the precise time when the ship was to be ready for despatch. All is left to the rather vague word "quick," which is the more remarkable as the precise date when the vessel was due to sail from Glasgow (6th July) was known as early as 23rd June. She arrived on 27th June and was berthed in the James Watt Dock, Greenock, the same afternoon. The defender was instructed to be ready to take delivery at 7 a.m. on the morning of the 28th, though why the shipowners, if they were so anxious for the utmost promptitude, should have made up their minds to sacrifice some working hours on the 27th does not very clearly appear. It rather appears from their agent's letter of 26th June that they had even then resolved to bring down a special force of stevedores from Glasgow, and they brought five gangs of sixteen men each—in all eighty men—who were largely employed in running-in the sugar into sheds without taking time to have it weighed. The Sheriff-Substitute is of opinion that this mode of working created confusion and delayed operations on the quay, which I think stands to reason. But he admits that running-in sugar into the sheds without weighing it would have saved some time, although he thinks that weighing before shedding is the more natural course, both to ascertain the freight and for customs purposes, and it was not certainly either contrary to custom or to contract, for the shipowners contemplated weighing the sugar as delivered when they wrote the letter of 26th June, in which they suggested the providing of a double set of scales at all the hatches. I cannot assent to the view that the shipowner was entitled to prescribe to the consignee either the precise rate or mode of delivery. All that he was entitled to require was that the rate should be reasonably rapid, under the sanction that, if it were not so, the shipowner might incur charges which were "necessary" for the steamer's quick despatch, and charge them against the consignee. As a matter of fact the ship was discharged at the rate actually employed in thirty-six and a half hours, which involved no great delay, and the Sheriff, who saw the witnesses, describes the kind of evidence which satisfied him that there was no unreasonable delay on the defender's part. Certainly the pursuers are not entitled to charge against the defender expenses which they intentionally incurred, unless they can shew that these expenses were "necessary for the steamer's quick despatch." Therefore I concur in the Sheriff-Substitute's negative finding as to the effect of the proof. I do not find a syllable of evidence to the effect that the vessel was prevented by any delay on the defender's part from sailing on her appointed day, or that she would have been so prevented unless the pursuers had used the extraordinary exertions which they did. How, then, can it be said that any part of these expenses were "necessarily" incurred for that purpose?

The moment you reach the conclusion that the obligation to take delivery "as fast as the steamer can deliver" is not an absolute obligation, and that all the circumstances must be taken into account in order to judge whether the defender has acted reasonably or not, I think it is impossible to lay your finger on any definite failure in fulfilling his obligation to take delivery. If shipowners are desirous to lay new liabilities on charterers or consignees, they must be prepared to express these liabilities in what Lord Macnaghten describes as "plain and unambiguous terms." I think they have failed to do so in this bill of lading, and therefore I should be for affirming the judgment appealed from.—31*st January* 1908.

Counsel for Pursuers, Horne, Spens; Agent, Hugh Patten, W.S. — Counsel for Defender, Hunter, K.C., Sandeman; Agent, W. B. Rainnie, S.S.C.

J. S. M.

OUTER HOUSE.

(*Lord Guthrie.*)

314. Mackison's Trustees *v.* The Magistrates of Dundee.

Contract — Contract of Employment—Extra Services—Burgh Surveyor and Sanitary Inspector Salaried—Work Done as Parliamentary Engineer — Circumstances Where Held Employee Had No Right to Extra Remuneration.

(*Reported ante, Vol. XIV. p.* 676.)

This was an action brought by the late William Mackison against the Magistrates of the City of Dundee. The pursuer died during the course of the proceedings, but his testamentary trustees insisted in the action after his death. The pursuer was appointed "Surveyor of Police" to the burgh of Dundee in March 1868, and "Sanitary Inspector" in July of the

same year. In this action the pursuer said that the defenders owed him (1) thirty-eight years' arrears of salary as sanitary inspector at £100 per annum; and (2) a sum amounting to £45,801 for work done by him as an engineer and architect in connection with a series of muncipal undertakings extending over the whole period of thirty-eight years, all which he alleged to be "outside the scope of the pursuer's official duties as surveyor of police and sanitary inspector." But he restricted his claim in the summons to £15,000. The Lord Ordinary (Lord Ardwall) having decided (Vol. XIV. p. 676) that it was competent to sue for a restricted sum although the pursuer gave no indication of the basis of his calculations or the proportions in which he intended to restrict the various items of his claim, proof was led on the whole history of the relationships between the parties. The defenders maintained that they had originally engaged the pursuer at a salary of £400 per annum, subsequently increased to £500, which covered all the duties performed by him. The facts proved sufficiently appear from the opinion of the Lord Ordinary, who held that the pursuer had failed to establish that the defenders had impliedly contracted to pay professional fees to him, and that all the work done came within the scope of his appointment as burgh engineer and sanitary inspector.

Lord Guthrie.—This action was instituted by the late Mr William Mackison, who was Burgh Surveyer of Police for Dundee from 1868 to 1906, and is now insisted in by his trustees. Mr Mackison died on 24th November 1906, before the proof was led. The summons concludes for a sum of £15,000. But that sum does not represent what the late pursuer estimated as the full measure of his rights. According to Condescendence 12, he was entitled to £49,601, made up of £3800 for arrears of salary as Sanitary Inspector and £45,801 for alleged extra work done in the Burgh Surveyor's department, but said not to be covered by the Burgh Surveyor's salary, this latter sum of £45,801 representing "the ordinary charges made by engineers and architects for similar work." Although maintaining legal right to the above-mentioned sum of £49,601, the late pursuer restricted his claim in the summons to £15,000, but on what basis his son, Mr J. W. Mackison, is unable to explain. Mr Carter, C.E., with whom Mr Bennett, C.E., substantially concurred, priced the claim for extra work at £19,584, which being added to arrears of sanitary inspector's salary makes a total now claimed to be legally due of £23,384, as against the above sum of £49,601, subject to a certain deduction from the claim for extra work, to be afterwards referred to.

1. Arrears of salary as Sanitary Inspector, from date of appointment on 16th July 1868 to date of summons, amounting to £3800.

The defenders admit that the late pursuer was appointed on 16th July 1868 Sanitary Inspector for the united parish of Liff and Benvie, within which the burgh of Dundee is situated; that the said appointment was never recalled; and that in some of the defenders' annual Government returns Mr Mackison was entered as one of the Sanitary Inspectors.

Prima facie, therefore, apart from amount, the late pursuer made a good claim under this head, which it lay on the defenders to displace. In my opinion they have done so. They have proved (1) that, as in a question between the Police Commissioners and Mr Mackison, his salary for the two offices of Police Surveyor and Sanitary Inspector was fixed at £400, which salary, or an increased amount, was regularly thereafter paid to him; and (2) that no work as Sanitary Inspector, separate from his work as Burgh Surveyor, was ever done by Mr Mackison, the whole separate duties having been discharged with a separate staff and separate books, in a separate office, by Mr Thomas Kinnear, who had been Inspector of Nuisances from 1867, and who was also appointed Sanitary Inspector for the same area within five months of the late pursuer's appointment, and who was regularly paid a salary therefor. The late pursuer's appointment was always treated as, and was, in fact, nominal. With the arrangements in 1868 between the Police Commissioners, the defenders' predecessors, and the Board of Supervision, under which not a separate salary, but the proportion of the late pursuer's total salary, payable in respect of his appointment as Sanitary Inspector, was fixed at £100 per annum, the late pursuer had no concern. If he ever knew of that arrangement, he must also have known that, notwithstanding thereof, only £25 was entered in the Burgh Treasurer's books annually between 1868 and 1875 under this head, reduced after 1891 to £5 annually, which nominal sum of £5 has been regularly entered in the annual returns made to the Local Government Board since 1891, as Mr Mackison's salary as Sanitary Inspector. The nominal nature of Mr Mackison's appointment is demonstrated by the fact that no claim, or hint of a claim, under this head was ever made by him until the question arose which led to his dismissal as Burgh Surveyor. The claim, if it existed, was liquid and instantly provable. There was no reason why Mr Mackison should not have insisted in it if it was a good claim. It is an afterthought, due probably not to Mr Mackison, but to his advisers.

2. Claim for alleged extra work done in the Burgh Surveyor's department, but said not to be covered by the Burgh Surveyor's salary, amounting to £45,801.

The *onus* of proving this claim seems to me to rest throughout on the pursuers. In the pursuers' favour these points are proved: First, Mr Mackison worked personally, and supervised

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his subordinates to an extent in excess of what was contemplated at the time of his appointment. During his term of office the municipal area was doubled, so was the length of the sewers, while the population was almost doubled, and the assessable rental was more than doubled. Second, from time to time, prior to 1894, he indicated to the Police Commissioners, the defenders' predecessors, or to Committees of their number, or to individual members and officials, and, subsequently to 1894, to the defenders or to Committees of their number, or to individual members and officials, the existence of a duty on the part of both bodies to remunerate him for the extra work now in question, or some of it, in addition to his salary as Burgh Surveyor. Third, both among members of the Police Commission prior to 1894, and among members of the Town Council since 1894, there has existed throughout a feeling that Mr Mackison ought to receive some extra payment in addition to his salary.

On the other hand, there are striking considerations against the pursuers' case as stated on record, which, in my opinion, they have failed to meet. In the first place, they claim for services over thirty-eight years—from 18th May 1868, when Mr Mackison was appointed Burgh Surveyor of Police for Dundee, to 19th July 1906, when his office ended—the earliest items being thus within two years of extinction by the long negative prescription. Mr Mackison was not a man of private means; his salary did not exceed £500; and the Burgh of Dundee has never been in financial difficulties. In the second place, no interest is claimed on the sum said to have been payable from time to time to Mr Mackison for services rendered beyond the duties covered by his salary as Burgh Engineer, thus resulting, if the claim now made is a good one, in a loss to his estate of at least as large a sum as that for which the defenders are said to be liable. In the third place, the capital sum claimed from the defenders has been arbitrarily restricted to £15,000 out of the £49,601 (including the arrears of sanitary inspector's salary) alleged in the summons and memorandum No. 6 of process to be due. In the fourth place, while it is alleged that Mr Mackison from time to time brought the existence of the present claim for the extra work now specified, or some of it, under the notice of the defenders and their predecessors, it is admitted that he never tabled any complete priced demand, either slump or detailed, until the present action was brought. Mr J. W. Mackison deponed: "Unless it be 1871 and 1878, Mr Mackison never made a money claim against the town for these specific works that are mentioned here." Even when the memorandum was submitted to the defenders in 1906 no prices were given. And any particular note of charges made up by Mr Mackison seems to have been on a different basis from that on which the claim is now made. For instance, his note referring to the 1878 bill (page 200 of No. 265) amounts to £721 8s.; and it is stated in the memorandum (page 11) that if the fees there charged "had been priced according to the ordinary professional scale they would have been several times the amount charged." Yet under this head Mr Carter only allows £200, after deduction of one-third for use of the office staff.

The basis of the pursuers' claim is thus stated in Cond. 8:—"In particular, the pursuer was employed by the defenders and their predecessors as their engineer in regard to the following Bills and Acts, and for the execution of the works thereby authorised, and for the other works after referred to, on the footing and agreement in every case that he was to be paid the usual professional charges, under deduction of office charges and expenses. The pursuer accepted said employment and acted as such engineer in connection with said Bills and work, and did all the work in question. No part of the said work fell within the scope of the pursuer's duties as surveyor of police or sanitary inspector." And plea 1 is as follows: "The defenders and their predecessors having employed the pursuer to act as their parliamentary engineer, and as their engineer, architect, and surveyor for the execution of the works authorised by their own special Acts of Parliament, and otherwise, on the footing and agreement that he was to be paid all as condescended on, are bound to pay the pursuer in respect of the work done and services thus rendered by him, and decree should be pronounced in terms of the conclusion of the summons, with expenses."

No case of bar is made in respect of Mr Mackison having been induced, fraudulently and otherwise, to perform the services in question on the faith that he would be remunerated for doing so apart from his salary. Had this been the basis of claim, I presume the amount would have been calculated on *quantum meruit*. But no materials have been put before me for an estimate on that basis. From beginning to end Mr Mackison never kept any details of the alleged extra work done by him.

As to the mode of estimating the pursuers' claim, it was made up by Mr Mackison and has been spoken to by his son and Mr Carter and Mr Bennett, apart from charges of supervision and maintenance, on the footing of a percentage on cost, as if Mr Mackison had been an outside engineer, subject to deduction of one-third, on account of the saving to him through the employment of the town's official staff. It may be noted that although Mr Carter and Mr Bennett proceed, like the memorandum, on a percentage on cost, the percentages are very different. For instance, Mr Mackison's

claim for £3000 on p. 22, letter D., of the memorandum is cut down by Mr Carter and Mr Bennett to £350. Again, as to the proper deduction on account of use of office staff, Messrs Carter and Bennett have only allowed one-third, but Mr J. W. Mackison says his father counted it at 40 per cent.

The pursuer's case then is (*a*) express employment by the defenders and their predecessors, to do the work in question for remuneration separate from his salary as Burgh Engineer; (*b*) such remuneration to be calculated on the same footing as if Mr Mackison had been an outside engineer; but (*c*) such remuneration, so calculated, to be subject to deduction of one-third of an outside engineer's charges, on account of Mr Mackison's use of the official staff and premises.

In my opinion, the pursuers have failed to establish (*a*), (*b*), and (*c*), or any of them. I come to this conclusion, not on a balance of evidence, but in the absence of any evidence. No attempt has been made to say when—in 1868 for all future extra work, or from time to time, or how, in writing or verbally, or partly both, or by whom, the defenders and their predecessors as corporate bodies, or by committees or by individuals representing them—any such agreement or agreements were entered into. Nor has any attempt been made to define the standard according to which the parties agreed that work should be considered ordinary or extraordinary. It appears from the evidence of Mr J. W. Mackison that his father was ultimately guided in making the distinction which is the basis of the memorandum by the views of his law agent, Mr Stewart, and other advisers. See the case of *Latham*, 1866, 4 Macph. 1084.

The pursuer's counsel stated that he did not found any part of his case of agreement on the terms of the minute dated 28th April 1868 containing his appointment; and he admitted that there was no document instructing an agreement between Mr Mackison and his employers as to extra payment for extra work, and no evidence of any meeting between Mr Mackison and his employers at which any such agreement was entered into. The letter of 27th March 1868, founded on in Cond. 2, was not addressed to Mr Mackison, or ever communicated to him. It was further admitted that the minuted instructions by the defenders to Mr Mackison for the alleged extra Parliamentary and other work did not differ substantially in their modes of expression from instructions given for ordinary work. In these circumstances it would be sufficient to hold that the pursuers have failed to prove the only case averred and pled by them on record.

But it is right that I should consider and express an opinion upon the case on which, in the end, the pursuers relied. Their contention is that in the circumstances disclosed by the evidence, written and oral, such an agreement as they have averred must be implied in law, because the work claimed for as extra was essentially different, both in kind and degree, from the work which Mr Mackison was engaged to do, and which was covered by his salary.

In the case of a servant hired for certain work, who, in addition, does other and unrelated work, it may be possible, by that circumstance alone, or by that circumstance taken along with others, to rear up an implication for separate and additional remuneration, which, I suppose, would be calculated on the basis, not as here, of ordinary professional charges, but of *quantum meruit*, for which, as I have said, there is no material. But in this case I am unable to discover any work, in the office or on the ground, Parliamentary or local, done by Mr Mackison as an engineer, an architect, or a surveyor, which had not a direct relation to his admittedly official work, and which, on his appointment, might not reasonably have been anticipated as likely to arise, although, it may be, not to the extent actually developed. See Mr Mackison's own statement, dated 13th May 1887, and headed "Statement of the Principal Work of the Burgh Engineer's Department," No. 1606 of pro. The pursuers have failed to prove what they allege on record—namely, "No part of the said work fell within the pursuer's duties as Burgh Surveyor or Sanitary Inspector," or that the work in question was "entirely outwith his duties as Surveyor of Police or Sanitary Inspector." With the exception of a part of an outfall sewer at Lochee, the whole work founded on related to ground within the area of the Burgh of Dundee, and it was all done by Mr Mackison's official staff without outside assistance. The esplanade and swimming baths had been the subject of previous discussions; and the Stobsmuir skating ponds were constructed in the time of Fulton, Mr Mackison's predecessor. The needs and prospects of Dundee were well known to Mr Mackison, who received his professional training there. The title of the general Act of 1850, under which the Burgh was administered until the incorporation or adoption of the Lindsay Act in 1871 and 1882, sufficiently shews the wide range of the legislation under which Dundee was governed at the date of Mr Mackison's appointment. It runs: "An Act to make more effectual provision for regulating the police of towns and populous places in Scotland, and for paving, draining, cleansing, lighting, and improving the same." Except in regard to hospitals and tramways, all the subsequent operations authorised and executed in Mr Mackison's time were foreshadowed, if not specifically dealt with, in the Act of 1850, and that Act, by sect. 327, authorised Parliamentary application. The Dundee Roads and Streets Act of 1865 was obtained in the time of Mr Fulton, who was Police Surveyor from 1853 to 1868. An advance from gas to electricity or from horse

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trams to electric cars did not involve either a difference in kind or an advance beyond reasonable contemplation in 1868. Mr Mackison must have known on his appointment that, sooner or later (indeed, looking to the rapid development and great prosperity of Dundee in 1868, sooner rather than later), Dundee would not be behind other towns in the very schemes of burgh extension, sanitation, removal of slum property, street widening, and provision for the recreation and health of the people which form the subject of Mr Mackison's claim. These schemes were all of them of an ordinary municipal type, not involving the social experiments in which Glasgow has so often been in advance of other towns, nor the abnormal advance of Clydebank materially, or, it is said, of Dunfermline intellectually.

But if the alleged extra work done by Mr Mackison cannot be differentiated in kind from the work admittedly covered by his salary, the pursuers found on the undoubted increase in the amount of work in Mr Mackison's department as sufficient basis for his claim. I say Mr Mackison's department, because it does not follow that Mr Mackison's own work was proportionately increased. The defenders admit Mr Mackison's knowledge and ability in all branches of his work, his ceaseless and disinterested devotion to duty, and the uniform success of everything he undertook. But they claim, I think rightly, that they cannot be called on to make extra payments because, as appears from the evidence, he was a slow worker, hyperscrupulous as to details, and unable in many minor matters to delegate his work to others.

I do not say that an implication of an agreement for separate payment may not conceivably arise from mere increase of amount of work, even in a case where the nature of the work is incapable of differentiation from that for which salary is paid. It is sufficient to say that no such question arises here. While the work immensely increased, Mr Mackison obtained not only ample additional staff for the actual execution of the work, but, in 1875, in Mr James Thomson, a qualified surveyor, civil engineer, and architect, skilled assistance of the best quality for purposes of supervision. So far as I can see, there was no part of the work which Mr Mackison might not have delegated at any time to Mr Thomson, with safety to the work itself and with satisfaction to his employers. Employers ordering additional work may either increase the salary of the same staff or may increase the staff and pay the same salary to the old employees. So far as Mr Mackison was concerned, the defenders seem to me to have taken the latter course. The Burgh Surveyor's office staff increased from 3 in 1868 to 18 in 1906. And it is clear that the staff was increased from time to time, as I think Mr Mackison was originally appointed, with a view to avoid calling in outside assistance either in connection with the ordinary or the extraordinary work of the department.

These observations are, of course, directed to the case made by the pursuers of alleged implication, from the circumstances of an agreement for separate employment, with a corresponding obligation to pay at usual professional rates. It will not avail the pursuers merely to prove, as I think they have done, that the circumstances may have warrantably led to the reasonable expectation, on Mr Mackison's part, of an increase of salary after the last increase in 1873, or of periodical honoraria. The evidence leaves on my mind a regretful impression that Mr Mackison, partly through reluctance to bring matters to an issue (bred of the consciousness that the defenders had, in Mr Thomson, a servant competent at any time to succeed him in every part of his work, ordinary and extraordinary), and partly through the vague impression of a legal claim, undefined in quality and extent, grasped the shadow and missed the substance, which he might have obtained, either in the shape of increased salary or honoraria.

Of admissions of legal liability by the defenders I can find no trace. That other officials, like Sir Thomas Thornton, or that Provost Hunter or other individual members of the Council held that Mr Mackison had a legal claim, will not avail. Nor would evidence that all the defenders as a body and all the other officials thought that Mr Mackison had an equitable claim to honoraria. As to Sir Thomas Thornton, it seems clear that he thought Mr Mackison underpaid. Indeed it is said that, in connection with the 1871 Act, Sir Thomas estimated Mr Mackison's services at £1000, while Mr Carter only estimates them at £500, which, deducting one-third for use of staff and premises, and giving credit for the £100 paid as honorarium, becomes £234. But in any case I cannot imagine that a man of business of the strenuous type of Sir Thomas Thornton, if he believed, as a lawyer, that Mr Mackison had a legal claim against the Town Council, would have been so remiss in his duty to the Council, a shifting body of employers, and to the ratepayers of Dundee, a shifting body of debtors, as to allow such a claim to run on from year to year without the question being brought to an issue, while the whole evidence, oral and documentary, was still fresh. I go further: I cannot believe that Mr Mackison ever made it plain to Sir Thomas that he (Mr Mackison) believed he had any such legal right. No one ever associated the policy of drift with Sir Thomas Thornton.

The pursuers have to prove their case, and their failure to do so is sufficient warrant for absolvitor. But it would not be right to ignore the formidable case made by the defenders.

The defenders' counter case, apart from the points already dealt with, rests on—

1. Their advertisement in 1868, No. 9 of process, and Mr Mackison's application, No. 1381 of process.

These documents, in their references to the qualifications of an architect, engineer, and surveyor, embrace all the qualifications necessary for the execution of all the work in the pursuers' claim. Yet, according to Mr J. W. Mackison, his father has claimed on the footing that any work involving an architectural design was outside his official duties, and falls to be charged as extra work, his view having been that his official duties were limited to paving, sewerage, and roads.

2. The terms of the pursuer's appointment.

Mr Mackison succeeded Mr Fulton, who did the ordinary duties of his office, and also extraordinary work connected with the Act of 1865, as well as preliminary work preparatory to the application for the Act ultimately obtained in 1871. It must be held, in absence of evidence to the contrary, that Mr Fulton neither claimed nor received any extra payment (except, possibly, by way of honorarium) in addition to his salary, which, beginning at £250, was gradually increased to £400. In these circumstances Mr Mackison was bound, if he meant to take office on a different footing from his predecessor, to have made this plain either in his appointment or in a separate document. So far from the minute of appointment making this plain, it seems to me that by it Mr Mackison put his knowledge and skill, so far as relating to all work for which his training had fitted him, and his time, at the disposal of his employers. He became bound "to devote all his services to the business of the Commissioners"; and he was appointed "during the pleasure of the Commissioners of Police, with all the powers and authorities belonging to the office of surveyor, and subject to such conditions and regulations regarding his duties and the mode of performing them as may be made and prescribed by the Commissioners from time to time." The case would have been different if he had been asked and, without any stipulation as to remuneration, had agreed to do and actually had done or assisted in doing work in another department, say that of the Town Treasurer. He could have refused to do such work; and if he had been referred to the terms of his appointment which bound him to give his whole services to the business of the Commissioners, he could have successfully maintained that the word "business" only meant work akin to that regularly done in his department, and for which he had special training—the business, in short, of an engineer, an architect, or a surveyor. But there was no part of the alleged extra work which he could have refused to do. If, however, he was of opinion that there was any part of the work in this position, he had ample opportunity to bring his view under the notice of his employers by refusing to do the work without a special antecedent arrangement for separate remuneration. No such antecedent arrangement was ever proposed by him. I may add that neither in the advertisement nor in the minute of appointment is there any reference to the three Acts of 1850, 1856, and 1865, within the scope of which it is said that Mr Mackison's official duties were confined.

3. The terms of Mr Mackison's application for an appointment in Liverpool in 1871, and the testimonials then obtained by him from the Dundee provost, bailies, and a number of chairmen of committees.

By the testimonials dated 22nd and 23rd June 1871, and in terms of his application dated 13th September 1871, Mr Mackison would necessarily lead the Liverpool Town Council to believe that he had been discharging in Dundee for his salary all the duties, both ordinary and extraordinary, falling to his department, and that he was prepared to do the same in Liverpool. Believing as I do in Mr Mackison's high sense of honour, it is facts like these which lead me to question whether, down to near the time of his dismissal, he ever believed that he had, or ever intended to make, a legal claim against the defenders.

4. The extra payments to Mr Mackison on 16th April 1872 and 10th May 1882.

If the terms of Mr Mackison's appointment left his position in regard to extraordinary work in his department uncertain, the question on the pursuers' own shewing was brought to an issue in 1872. According to the pursuers, Mr Mackison then made a claim of about £1000 for services in connection with the Dundee Police and Improvement Act of 1871, on the footing of legal right, conform to the memorandum on page 84 of No. 265 of process, although there is no evidence that that memorandum was ever communicated to the Commissioners. Assume, however, in the pursuers' favour that this communication took place, it was met by an offer on the part of the defenders' predecessors equivalent in law and in fact to a denial of any legal right on his part. A bare refusal to pay might have merely meant that the Police Commissioners did not think Mr Mackison had, in point of fact, performed any extraordinary services. But a proposal to pay honorarium, in response to an application for payment as a legal right, necessarily implied that, while he had performed what might be called in a sense extra services, and while these deserved to be recognised, he had no legal right to payment.

The question having thus sharply arisen, I cannot reconcile the acceptance by Mr Mackison of £100 in terms of Mr Farquharson's letters of 17th and 19th February 1872, on pages 88 and 89, and the receipt of 16th April 1872 on page 91, and Mr Mackison's own entry in the

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account on page 91/1 of No. 265 of process, with an adherence by him to the legal claim which he is said to have made, and with an agreement that he should be remunerated as of right for similar future services. On the contrary, I regard this transaction as involving an abandonment of any such position, if it was ever taken up, leaving it open for Mr Mackison thereafter to represent, as he unfortunately never did, that if he had been paid an honorarium in connection with the 1871 Act, he should be similarly dealt with in relation to other similar work, and, of course, for the Town Council to reply that the increases of salary in 1873 were meant to come in place of any such payments. The subsequent payment of £50 on 10th May 1882, "for special and extra professional services in connection with the construction of the Perth Road tramways," seems open to similar observations.

5. Mr Mackison's increases of salary in 1873, making his salary £500.

The first of these took place within a few months of the payment of the honorarium of 16th April 1872 in connection with the 1871 Police Act. It is at least suggestive of a recognition by the Police Commissioners that Mr Mackison was now doing more work than contemplated when his original salary was fixed at £400, and of a resolution that, instead of repeating the unsatisfactory, because uncertain, method of honoraria, it would be better to prevent all such questions by an increase of salary. That Mr Mackison's salary was not increased after 1873 was due, I am afraid, to the known existence of a vague claim on his part, undefined in amount and uncertain as to its ground.

6. The fact that in the accounts of the Police Commissioners and of the defenders, made up for the purposes of rating and borrowing and for Government returns, their total liability in connection with the various matters dealt with in the memorandum was calculated, in the knowledge of the late pursuer and without adverse comment by him, without reference to the existence of any of the claims now made.

On the whole matter I grant absolvitor, with expenses. I negative the existence of any agreement, express or implied, between the late Mr Mackison and the defenders or their predecessors, for payment to him by them or any of them for any of the alleged extra work detailed on record and in the memorandum. I have indicated my regret that Mr Mackison did not, in his own interest, bring before the defenders from time to time the large amount of extra work, both in the way of personal initiation and of supervision, entailed on him by the defenders' various schemes for the benefit of Dundee (for which with the exception of the two sums of £100 and £50, while his office staff were paid for overtime, he received no extra remuneration), with reasonable proposals for increase of salary or for honoraria. I have fully in mind the extent to which assistance was rendered to Mr Mackison from time to time, both in the way of an assistant engineer and skilled subordinates. But while I negative legal obligation on the part of the defenders, I feel strongly the difference between the claim for extra work and that made for arrears of salary as sanitary inspector, which I have held bad both in law and in equity. In a question of fair dealing between man and man there is much to be said for some parts of the claim for extra work, and I think that the defenders might well consider whether the case is not one for making a substantial allowance to the pursuers in the shape of such an honorarium, as I think it clear their predecessors would have given from time to time had the matter been put before them by Mr Mackison timeously, in a reasonably detailed form, and moderately estimated. If Mr Mackison neither found Dundee brick nor left it marble, it was in his time and not a little through his ability and devotion to duty, working as he did year after year, early and late, often after office hours, and in his short holidays, that the town was brought into its present high state of municipal efficiency.—11*th January* 1908.

Counsel for Pursuers, Scott-Dickson, K.C., Sandeman; Agents, Macpherson & Mackay, S.S.C. —Counsel for Defenders, Clyde, K.C., Macmillan; Agents, Morton, Smart, Macdonald & Prosser, W.S.

A. S. P.

OUTER HOUSE.

(*Lord Johnston.*)

315. Goodall *v.* Bilsland and Others. Cassidy *v.* Bilsland and Others. M'Lean *v.* Bilsland and Others.

Licensing Laws—Administration—Action of Reduction of Decision of Licensing Appeal Court — Jurisdiction — Appeal Court—Constitution of Appeal Court—Members of Appeal Court Sitting in Causes Where Dominus Litis is Vigilance Association to Which They Are Subscribers—Members of Court Voting Who Had Not Been Present Throughout Whole Proceedings—Appeal Not Instructed by Parties in Whose Name it is Taken—Nullity of Proceedings—Circumstances Where Decisions of Appeal Court Reduced.

These were three actions in which publicans in Glasgow who had been deprived of their licences at meetings of the Licensing Appeal Court in May 1907 sought to have the decrees of the Court reduced. The first ground of action upon which they proceeded was that the meeting of the members of the Appeal Court

which dealt with the licences in question on 7th and 8th May 1907 was not validly convened.

The Lord Ordinary *repelled* this plea after discussion in the Procedure Roll upon 20th December 1907, and *allowed* a proof before answer upon the other pleas in the case.

The pursuers pleaded, *inter alia* (the second and third pleas applying only to Cassidy), as follows:—

"2. The appeal against the renewal of pursuers' certificate not having been instructed or authorised by the parties in whose name it was presented and insisted in, there was no competent appeal before the Court, and the pursuer is therefore entitled to decree as concluded for.

"3. The said appeal having been taken and insisted in for and on behalf of the said Citizens' Vigilance Association, and certain members of and subscribers to said Association having taken part in the discussion and determination thereof, the decision of the Appeal Court should be reduced as concluded for.

"5. The said determination of the Appeal Court is inept and invalid, in respect certain members of the Court who took part therein had not been present during the proceedings, and were thus not qualified to act or vote in the matter."

The facts of the case and the contentions of parties sufficiently appear from the Lord Ordinary's Note. The Lord Ordinary *sustained* the second, third and fifth pleas of the pursuers (in Cassidy's case the second and third).

Lord Johnston.—In these cases, which are raised for setting aside, at the instance of three licence-holders in Glasgow—Goodall, Cassidy, and M'Lean—the deliverances of the Glasgow Spring Licensing Appeal Court of 1907, sustaining appeals against deliverances of the Licensing Court renewing their certificates, I have already disposed of the first ground of action, holding the Licensing Appeal Court held on 7th and 8th May 1907 to have been validly convened and constituted, and have accordingly repelled the first plea in law for each of the pursuers.

It now falls to consider the remaining grounds of action, which are threefold.

First, that the appeals against the renewals of the pursuers' certificates were not instructed or authorised by the parties in whose names they were presented and insisted in, but by or on behalf of a certain association styled the Citizens' Vigilance Association, which had no *locus standi* to be heard in the matter, and therefore that there were no competent appeals before the Court.

Second, that the appeals having been taken and insisted in for and on behalf of the said Citizens' Vigilance Association, certain members of and subscribers to that Association sat as members of the Appeal Court and took part in the determination of the appeals, which rendered the proceedings null; and,

Third, that certain members of the Appeal Court who took part in the determination of the appeals had not been present during the whole of the proceedings, and consequently that their intervention rendered the proceedings null.

The whole of these grounds of action are applicable to the cases of Goodall and M'Lean, but the first and second only are applicable to that of Cassidy. It was arranged that the case of M'Lean should be sisted to await the determination of the other two. Before these grounds of action can be considered, it is necessary to ascertain precisely the true state of facts as disclosed on the proof which has been led. As matter of convenience it was arranged that the proof in Goodall's and Cassidy's cases should be taken together. That proof, exhaustive as it necessarily had to be, has I think been somewhat unduly protracted by the anxiety of the defenders' witnesses to explain away the import of documentary evidence, and considerable discrimination is necessary in order to educe the essential facts.

The defenders are, firstly, certain of the nominal objectors and appellants—objectors in the Licensing Court and appellants in the Appeal Court; and secondly, the members of the city of Glasgow Licensing Appeal Court. The first set of defenders ostensibly defend in their own interest, but it is a question with which I may subsequently have to deal, whether these defences are really proponed in their own interest, or in that of the Citizens' Vigilance Association, or in what circumstances.

I shall for the present confine my attention entirely to the questions of fact raised on the evidence.

The Citizens' Vigilance Association came into existence in 1902, as the outcome of certain public meetings held in Glasgow in the early half of that year. The Association is not in any way a corporate body, but a mere voluntary association. Its constitution, No. 33 of process, is a very brief document. It sets forth as the objects of the Association—

(*a*) the due enforcement of existing licensing and related laws;

(*b*) the suppression of drunkenness; and

(*c*) the promotion of good government in the city.

Despite the best efforts of its officials in the witness-box, I am satisfied from a perusal of its reports, the literature of its propaganda, and the excerpts, which were taken from its minutes and those of its committees for the purpose of showing its objects, and from samples of its correspondence, that the whole *raison d'être* of the Association was, or at least long before the present question arose had become, the improvement of the licensing administration of the city of Glasgow, and by effecting a reduction of licences to work towards the reduction of intemperance in the city. I cannot find any trace

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of the third avowed object of the Association, viz the promotion of good government of the city, being prosecuted in any other direction than that of purging the Council in the interest of temperance. But I desire to say that the Association has throughout its history disclaimed the extremes of the temperance movement, and has refused to associate itself with the more extreme organisations of the temperance party. It has never advocated a total abstinence policy, but it has aimed solely at the purification of the city from the charge of being extravagantly overlicensed—a charge in justification of which it had only to refer to the statistics prepared for the licensing authority by the Justice of Peace clerk, No. 20 of process, which discloses the astounding fact that in the Broomielaw, the district in which the public-houses in question are situated, there is one licensed house to every one hundred and twenty-two inhabitants old and young, and to that end it has sought merely to compass the reduction of the temptations to drunkenness, which it conceives to be thrown in the way of the lower classes of the population to an inordinate degree by the overlicensing of the districts in which they congregate. I desire further to state that, though I shall have to criticise its methods and its actings in the present cases, I do not for a moment wish to impute to it anything but the highest motives, or by anything which I may be called on to say to detract from the good which I believe it has done and will still do. These are matters which have no part in determining my judgment. That must depend on a consideration restricted to the facts and law of the actual cases before me.

To return to the constitution. It provides for certain office-bearers to be elected annually, and for the affairs of the Association being managed by an elective board of directors, with power to appoint committees from their own number, supplemented, if expedient, from the General Committee, to deal with any business affecting the work of the Association. This General Committee was to consist of (1) the office-bearers, (2) the directors, (3) the secretary and three representatives from each Vigilance District Committee, and (4) all members of the Association who have subscribed to its funds during the preceding year. Perhaps the main feature of the Association is the District Committees. These were to consist of all the members of the Association residing in each municipal ward—district and ward being synonymous. Their duties were to be "to report any breaches of the Licensing Acts, to assist the authorities in preventing irregularities, and periodically to review the condition of the ward with regard to licensed premises; also to co-operate with the directors for the selection of suitable candidates for the Town Council, and in the promotion of good government in the city."

As regards membership it was provided that "all who approve of the objects of the Association and who are willing to assist in carrying them out may be enrolled as members. All members are invited to subscribe to the funds of the Association." It is thus made clear that subscription to the funds was not made essential to membership. But it has been strenuously maintained that subscription to the funds did not in itself constitute membership. In this, so far as concerns the question raised in this case, I cannot concur.

The Association has been in the custom of enrolling as members at its public meetings and on separate occasions sympathisers and those willing to assist, by obtaining their signatures to a form, a specimen of which is No. 93 of process. Its terms involved no obligation to subscribe or afford financial support. And a roll of members has been, with some attempts at accuracy, kept, by wards, in the ledger No. 103 of process. None of the forms signed have been retained, and there is, I think, reason to believe that the names of many persons who have never been subscribers, as well as of some at least of those who have been subscribers, have been entered on this roll, though they have never signed a membership form. I do not, however, rest my opinion that subscription to the funds of the Association constituted membership upon these details, but on the consideration that it is impossible to conceive of a subscriber to this Association who has not all the essentials of membership, who does not approve of its objects, and who is not willing to assist and does not substantially assist in carrying them out. As I think is clearly shewn by the whole documentary evidence, financial support was essentially necessary, and was, in fact, the most important assistance that could be afforded; and looking to the terms of its constitution and its mode of conducting its business, I cannot regard a subscriber as other than a member of this very loosely knit Association. On the roll of members, as stated by Mr Wedderburn in his evidence, there are still standing about 1850 names, and about 450 more have been scored out, as presumably having ceased to be members. But the total subscribers from first to last, whose names appear in the treasurer's accounts from the formation of the Association (the account for one year having at the date of Mr Wedderburn's evidence gone amissing), is only 282; and of these 282 subscribers only 168 are found among those entered on the roll of members. The importance of this matter is in its bearing upon the question of whether certain of the members of the Licensing Appeal Court were members of the Association. I hold that if they were subscribers they were essentially members, whether their names appeared on the roll of members or not. In point of fact, subscription is, to my mind, more emphatic proof of membership than enrolment. The so-called enrolment slips are not extant, and

there is nothing to prove the justification of the enrolment. In one very crucial instance—that of Mr W. F. Anderson, one of the members of the Appeal Court, who is to be found enrolled as a member in No. 10 or Exchange Ward, though his name is now deleted—Mr Anderson denies that he ever was a member or gave any justification for his enrolment, and the same may possibly be said with equal justice of others. On the other hand, as direct proof of subscription we have the receipts for subscriptions in one or two cases and the receipt counterfoils in, I understand, all cases.

After it was formed the Association immediately set itself to the work of opposing the granting of any new licences and of influencing to the utmost of its power a reduction in the number of old licences. For information as to its proceedings I rely much more confidently upon the documentary productions than upon the parole evidence of its officials and supporters. These documents are the Annual Reports of the Association from the year 1902–3 to the year 1906–7, Nos. 34 to 38 of process, its pamphlet or fly-leaf literature, of which Nos. 39 to 47 are examples, a sample of its correspondence, No. 69 of process, its treasurer's accounts, Nos. 55, 56, 105, 57 and 58, and the excerpts from its law agent's books, No. 31 of process. I cannot, except at inordinate length, refer to these items of evidence in detail, and shall content myself with a summary of the matters which I hold them to establish.

The Association at its inception appointed Mr James Stewart, writer, Glasgow, its law agent. Mr Stewart became clerk to the Justices of Peace of the county of the city of Glasgow in the spring of 1906, and before the spring Licensing Courts of that year. He was succeeded by Mr Robert Kyle, writer, Glasgow. The Association's law agent was paid by a salary; and while his appointment was general, there cannot, I think, be any question that practically his sole duty to the Association was to give his services in the Licensing Courts in opposing the granting and renewing of licences, and this duty these two gentlemen in succession appear to have performed with ability and with considerable success. But neither under the old law, nor since the Act of 1903 came into operation, could the Association, as an Association, have any *locus standi* to be heard in the Licensing Courts. It necessarily had to act through the medium of competent objectors and appellants. And these had to be found. The method of proceeding was not uniform throughout the whole period of the Association's existence, nor even with reference to any one Court sittings. It varied from time to time, and it also varied with circumstances. Excerpts from three different minute-books are produced, No. 67 of process being, I understand, from the General Minute Book of the Association, No. 65 of process from the Licensing Laws Executive Committee Minute-Book, and No. 66 of process from the minute-book of a sub-committee the precise composition and powers of which I have no means of ascertaining, nor wherein it differed from the Licensing Laws Executive Committee, with which it was co-existent.

The evidence of the Association's officials notwithstanding, I am satisfied that the course which the Association took was to select the more congested areas of the more congested wards of the city—congested in reference not merely to population, but to the numbers of existing public-houses; congestion indeed in the mouth of the Association means the existence of an excessive number of public-houses in any area compared with the population. Having fixed on the district, the committee or committees of the Association then, with the assistance of that district's Vigilance Committee, marked down the licences to be made subject of attack. And the next step was to find competent local objectors. This matter was left largely to the District Vigilance Committees, but their efforts were sometimes supplemented by the services of a paid assistant. It is, at the same time, right to say that the Association was sometimes, and probably more frequently latterly, aided by the voluntary intervention of persons locally interested, and particularly of the office-bearers of local churches. But however they were found, there is no doubt that the nominal objectors were generally obtained by canvassing in one form or another, and were rarely, if ever, people who came forward of their own accord. There was seldom anything said about the expense of lodging and supporting the objections. It was tacitly assumed that the Association undertook the whole burden and expense connected with lodging and supporting the objections. Farther, having found the objectors, the Association took absolute possession and control of their objections. The practice was to obtain a mandate from the objectors to oppose a certain licence, in favour of the Association's law agent. The law agent then lodged objections under his own hand in name of the objectors, and the nominal objectors were no further concerned or communicated with. They were not, unless in very exceptional instances, called as witnesses, and they were not, so far as I can see, consulted as to appeals! The Association's law agent, unless in a few very exceptional cases, where churches were concerned, appeared at the Licensing Court and Licensing Appeal Court, and conducted both objections and appeals nominally in name of the objectors, but really on behalf of the Association. This is my conclusion by reason of the direct evidence of the procedure in the present cases, made general in its effect, when taken in conjunction with the terms in which the law agent's reports to the Association's committee are couched, and in which the committees minute their resolutions and directions.

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But the two cases with which I am concerned were somewhat different from what I conceive to have been the usual run of things, at least in the earlier history of the Association's activity. I am not sure whether or not the operation of the 1903 Act put difficulties in the way of the Association, but I find it minuted by the Licensing Laws Executive Committee on 7th March 1907, No. 65 of process, that "Mr Kyle stated that an area had been selected, but there was difficulty in getting witnesses. . . . It was agreed to insert advertisements in the morning and evening newspapers regarding the forthcoming Licensing Court on 9th April." This may have been done before, though I find no trace of it, but at any rate there appeared in the "Glasgow Herald" of 27th and 28th March 1907 an advertisement under the heading "Glasgow Public House Licences" in the following terms:

"The Annual Licensing Court begins its sittings in the City Hall, Glasgow, on Tuesday, 9th April, at 11 a.m. The meetings of the Court are open to the public. The list of applications is advertised in the 'Daily Record and Mail' of 27th and 28th March.

"Statutory objections to any house must be lodged not later than Wednesday, 3rd April. All necessary information and guidance can be obtained by citizens willing to help from the Citizens' Vigilance Association, 21 West Nile Street."

This advertisement bore fruit in a call from Mr Ritchie, one of the missionaries of St Mark's Institutional United Free Church, upon Mr Battersby, the organising secretary of the Association, by whom he was directed to Mr Kyle. St Mark's Church has an allied church or mission in Carrick Street, in the Broomielaw Ward, nearly opposite to Cassidy's public-house. Carrick Street is a short side street running from the Broomielaw to Argyle Street. M'Alpine Street is a similar adjoining street parallel to Carrick Street, in which Goodall's public-house is situated, being indeed back to back with Cassidy's. Mr Ritchie and his fellow-workers in the mission had long been keenly anxious, in the interests of their people, for the suppression of these two public-houses; and if the accounts given of their surroundings, or their habitués, and of the scenes enacted in their proximity, are correct, no reasonable person can wonder at their anxiety, and I am perfectly satisfied of their *bona fides*. At Mr Ritchie's request Mr Kyle went the same evening and met Mr Ritchie and a few of his leading deacons and workers in the vestry of the mission, and they explained to him their view of the position of matters, and he explained to them what was necessary to be done. The result was that he arranged to send to Mr Ritchie a form of mandate, and on Mr Ritchie or his friends getting it filled up with the names of competent objectors, Mr Kyle undertook to lodge objections and conduct their case. Accordingly he at once sent down forms of mandates for, *inter alia*, both Goodall's and Cassidy's case. I am not concerned with the Association's other operations in this ward, though they were instrumental, I think, in lodging as many as eighteen objections altogether in this one ward. It is necessary to confine attention entirely to the two instances in question.

The form of mandate in Goodall's case—and Cassidy's was in precisely the same terms—was as follows:—

"W. 12, Broomielaw
R.

"Glasgow, March 1907.

(40)

"To Robert Kyle, Esq.,
"Writer,
"45 West Nile Street,
"Glasgow.

"We hereby authorise you to sign and lodge on our behalf objections to the granting of the Certificate for Licence for a public-house applied for by Alexander Goodall for premises at 68 M'Alpine Street, at the forthcoming Licensing Court of the City and Royal Burgh of Glasgow, and to appear on our behalf in support of said Objections."

These and the other mandates, which he had undertaken to get filled up, Mr Ritchie distributed among deacons or others of his workers, who, though they might not live themselves in the district, were familiar with its circumstances and acquainted with their church's people resident in it. James M'Dade took charge of the mandate referring to Goodall's licence, and R. Ferguson and W. Stevenson took charge of that referring to Cassidy's licence. Now these men, though influential members of the mission congregation, were themselves only working men, and though it was carefully explained to them that the only competent objectors were owners or occupiers of property in the neighbourhood of the licensed premises in question, I do not think that they had any very definite idea, which they could explain to others of inferior position and intelligence to themselves, what the precise purpose of the mandate was, and what was intended to follow on it. In Goodall's case M'Dade obtained the signatures of John Green, John M'Leod, John Kennedy (since dead), Isabella Hamilton, Sarah Cairnduff, George Queen, and John Birkby; while in Cassidy's case Ferguson and Stevenson obtained the signatures of Robert Henderson, James Flannagan, W. E. Callaghan, Samuel Austen, Bella Buchanan, Sarah Moore, John Fowler, David Moore, Christina Montgomery, Robert Paterson, James Wilson, John Buchanan, James M'Dade, and J. E. Dryden. Most of these people were examined, and I think that the objections of but a small minority in

each case could, on the most benevolent construction, be described as spontaneous, that an analysis of the evidence would shew that a certain section of them wanted any proper occupancy qualification, that a certain section did not understand that they were signing anything more than what I might term a petition to the Licensing Authority against either licences in general, or against the particular licence, which petition was to be presented and would have effect by its own virtue, that a certain section altogether misunderstood the import of the mandate, but that in each case there were two or three of the signatories who were genuinely anxious to see the licences in question suppressed, and were glad to have the opportunity of assisting to that end, and who had a general though indefinite understanding that something was to be done in the Licensing Court by Mr Kyle to effect what they desired. In Goodall's case I might instance John Green and John M'Leod, and in Cassidy's case J. Fowler, R. Henderson, and J. Flannagan. In the latter case even M'Dade, the emissary, does not appear to have understood what was to follow the mandates, and himself rather regarded them as of the nature of a petition to be presented to the Licensing Authority. But I have no doubt that had these, and probably others of the signatories, been approached by Mr Kyle himself or by any one having a full understanding of the situation, they would have willingly joined in going the whole length necessary with a view to obtaining a reduction of the licences in the district. I must add that as regards any expenses which might be incurred in proceeding upon these mandates, this matter does not appear to have occurred to any of the signatories at the time, and so far as they may have had any afterthought on the subject as matters progressed, they seem to have considered that it was their church which was taking the matter up, and that any expenses involved would fall upon it. They knew nothing whatever about the Citizens' Vigilance Association or Mr Kyle's relation to it.

The mandates having been signed, they were sent by Mr Ritchie to Mr Kyle, who prepared the objections No. 24 of process, which were the same in both cases. From this point Mr Kyle had no further communication whatever with the objectors. He acted in their name indeed, but entirely in his character as representing the Vigilance Association. The objections were never submitted to any of the objectors, and the third, viz., "the applicant is not a fit and proper person to hold a public-house licence," they all unanimously disclaimed. Mr Kyle paid the dues to the town clerk on the objections in the Licensing Court, and again the dues to the Justice of Peace clerk for the subsequent appeal to the Licensing Appeal Court. In preparing his evidence he precognosced no objectors, and called no objector as a witness. He prepared the evidence and led it entirely from what with one exception I must term the stock witnesses of the Association, for they appear to repeat their evidence in case after case.

The objections had no success in the Licensing Court, but that fact was not communicated by Mr Kyle to the objectors. Yet notwithstanding this and the terms of his mandate, he presented appeals No. 25 of process in the names of the respective sets of objectors to the Licensing Appeal Court, in which he stated that "the appellants are dissatisfied with the proceedings in the Licensing Court in granting the applications for renewal, and appeal therefrom to the Licensing Appeal Court." But to my mind one of the most pregnant facts in the case is, not merely that Mr Kyle took these appeals along with a great number of others without communication with or authority from his nominal clients, but the terms in which he reported to his committee his dissatisfaction with the decisions of the Licensing Courts and his determination to challenge them before the Appeal Court, and in which they approve his action.

Neither in these appeals did Mr Kyle call any of the objectors as witnesses, and his excuse that he expected them to be called by his opponent is not, I think, ingenuous. In both cases he again called his stock witnesses, who had been already repeatedly examined by him before the Appeal Court as they had been formerly before the Licensing Court, such as Mr J. P. Maclay, Mr Alexander Galbraith, Miss Flora M'Naught, and Mr William M'Ghee, with two others, in Cassidy's case, and Mr James Ritchie, the St Mark's missionary, in Goodall's case. Mr James Ritchie was the only individual called who had any connection with the objectors. Mr J. P. Maclay was one of the leading members of the Association, without whose quite munificent financial support it could hardly have carried on its work.

The appeals came on for hearing—Cassidy's on the 7th and Goodall's on the 8th May 1907, and again Mr Kyle communicated with none of the objectors.

Before touching the progress of the cases in question, it is necessary to go back on certain circumstances which had occurred at earlier sittings of the Appeal Court. That Court included among its members Bailie John Battersby, who was the salaried organising secretary of the Citizens' Vigilance Association. At a preliminary meeting of the Court on 22nd April, Bailie Battersby was one of a small committee nominated to inspect the premises and localities in connection with which appeals had been lodged, with a view to reporting to a private meeting of the members before the sitting of the Appeal Court. (See Minutes of Appeal Court, No. 13 of process, page 16.) Again, at the Appeal Court of 29th April it is minuted (page 22 of said Minutes) that the Court

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adjourned to discuss certain appeals in private, and that "on their return to Court Bailie Scott asked Bailie Battersby a series of questions as to his connection and position with the Vigilance Committee or Association, and as to his legal right to vote in the Court. The chairman ruled that these questions were not competent for the Court to consider." Notwithstanding this challenge Bailie Battersby continued to sit and vote, and the three appeals in question were sustained by a majority of one—thirteen votes to twelve. In the next appeal, that against the renewal of Mrs Masterton's certificate (page 24 of said Minute), Mr Kyle—who, I may note in passing, regularly appeared for the appellants in all the appeals—"was heard for the appellants, and Mr Campbell for the said Catherine Murray or Masterton. Before proceeding, Mr Campbell requested the clerk to note that he objected to the presence of Bailie Battersby on the bench." Before the next effective sitting, an interdict was presented against Bailie Battersby's taking further part in the proceedings in the Licensing Appeal Court, and when the Court met on 7th May, there was read by the clerk (said Minutes, page 38) a letter from Bailie Battersby in the following terms:—

"139 Rutherglen Road,
"6th May 1907.

"James Stewart, Esq.,
"Clerk to Licensing Appeal Court.

"Dear Sir,

"While maintaining my right to act as a member of the Licensing Appeal Court, I have decided, in order to facilitate the business of the Court, not to attend further the present sittings.

"I am, Yours truly,
"(signed) John Battersby."

I have mentioned these matters, not that they have a direct bearing upon the question at issue, but because they have an indirect but most important bearing upon what follows.

The Court of 7th May proceeded with the appeals, Mr Kyle appearing as usual for the appellants. The first appeal was dismissed. On the second appeal being called Mr Kyle withdrew from that and a number of his other appeals the names of certain of the appellants, who represented societies of which the magistrates were *ex officio* members, and it was then agreed to adjourn until 2 o'clock p.m. On resuming (said Minutes, page 40), Mr Kyle intimated to the Court that he withdrew the pending appeal and seventeen others—that is to say, eighteen out of the thirty-five appeals in the roll—for all of which, as representing the Vigilance Association, he was responsible. This is another, to my mind, most pregnant piece of evidence. For it betokens that Mr Kyle in doing so assumed such control of the proceedings that he could withdraw appeals without any communication with his nominal clients the objectors, and did so after some hint from the Lord Provost, the precise nature of the communication not appearing. The last appeal to be heard on that day was that against Cassidy's licence, when Mr Kyle appeared for the appellants and Mr J. M. Connell, writer, Glasgow, for Cassidy. This appeal, so far as the minutes shew, was allowed to proceed without any objection to Mr Kyle's *locus standi* to appear. On Goodall's case being next called, Mr MacQuisten, writer, Glasgow, who appeared for Goodall, took such objection (see No. 61 of process). But as the adjournment of the Court was then moved, nothing further was then done on it.

On the following morning, 8th May, the Appeal Court sat at 11, and the appeal in Goodall's case was at once called. Mr Kyle appeared for the appellants, and Mr MacQuisten for Goodall. "Before hearing agents, Mr MacQuisten intimated that he objected to the *status* of Mr Kyle as representing the appellants, in respect that he did not represent the appellants, but represented the Citizens' Vigilance Association, who were the true *dominus litis* in this appeal, and that the said Association was not entitled to appear as appellant in this appeal. The chairman, on the advice of the clerk, ruled that it was incompetent for the Court to consider the point raised by Mr MacQuisten, as Mr Kyle, *prima facie*, represented persons who were qualified to be heard as objectors under the provisions of the Licensing Act." The case accordingly proceeded, and the appeal was sustained. With reference to this episode I refer to the evidence of Bailies M'Innes Shaw, Thomas Dunlop, and Archibald Campbell. Bailie Shaw stated that all about the Association and Mr Kyle's position was public property. "I understood he was there for objectors, but I understood that the Vigilance Association had him there." "I often wondered why none of the objectors appeared at the Court." "Nothing occurred on that occasion to alter what was my understanding and belief, viz. that Mr Kyle was there prosecuting the appeals on behalf of the Vigilance Association." And Bailie Dunlop stated that he knew all about the Vigilance Association and Mr Kyle, that the chairman took the advice of the clerk of court, who ruled that the matter could not be gone into, and that the rest of the Bench acquiesced in the chairman's ruling. On the other hand, several of the members of the Appeal Court who appeared for the defence professed a surprising ignorance of the Association and its action and of Mr Kyle's connection with it. I regret to find that I have innocently committed myself on this subject by stating in my former judgment, on the objection to the constitution of the Appeal Court, that "it is common knowledge that the Association is a patriotic body, which has done most excellent work in connection with Glasgow municipal affairs." Though apparently the knowledge had

not reached members of the Glasgow Licensing Appeal Court, I was personally aware generally of the existence and objects of the Association long before this case arose, from the public press, and I had understood that what I stated was made common ground in the Procedure Roll discussion. Having regard to the history of the Association as disclosed in its own documents, and to the campaign which had been carried on by it for some years, much the same as in the spring Licensing Court of 1907, against the renewal of certificates, through the agency of its two salaried law agents, Mr Stewart and Mr Kyle, the former of whom was sitting as clerk to the Licensing Appeal Court, and the latter appearing for every set of appellants, and looking particularly to what had occurred with regard to Bailie Battersby at the earlier sittings of the last-mentioned Court, I feel the greatest difficulty in accepting that the state of information regarding the Vigilance Association and Mr Kyle of Bailies Shaw, Dunlop, and Campbell, was any different from that of the rest of the Court.

What actually happened was that Mr MacQuisten had cited the whole objectors as his witnesses. What would have been the result of examining them we cannot tell, but on Mr Kyle holding up a sheaf of mandates, without any examination of them, after a short passage between the agents, the clerk's advice was taken, the chairman gave the above ruling, and the Court acquiesced. I think, however, that there must have been some doubt thrown on Mr Kyle's position at some earlier stage of the proceedings of which I have no definite information, and that his sheaf of mandates, I understand in the form of a bound volume, had been handed up to the Bench, turned over by a few of the members, and I must assume examined by the clerk.

There remains one more episode in the proceedings of the Court which must be dealt with. It bears upon the challenge in Goodall's case of the votes of Mr Ross and Mr King, Justices of the Peace. These gentlemen are alleged to have taken their seats on the Bench after the case of Cassidy had proceeded for some time. The witnesses on this subject for the pursuer are Galloway (evidence, page 83), Watson (page 148), and Duncan (page 150), all clerks in the Justice of Peace clerk's office, Glasgow, together with, what is more important, their contemporaneous jottings Nos. 64, 61 and 62 of process respectively. Galloway notes that Mr Ross arrived during the hearing of No. 21 (that is, the appeal in Goodall's case) at 11.25, and that Mr King came in at 12.5. Now Galloway, who was depute clerk on the occasion, says that he had received special instructions from the clerk, Mr Stewart, "to keep a note of those members who arrived after the Court had commenced, and to take a note of the time when they arrived. I carried out those instructions. I took my place at the door of the Court so as to see the members of the Court immediately they came in." He then proved his jotting No. 64 of process, and stated that he handed it to Mr Stewart before the vote was taken, and the Minutes of the Court (No. 13 of process, page 48) bear, "Before proceeding to vote, the clerk called attention to the fact that two of the members (Mr R. G. Ross and John King) had entered the meeting during the hearing of this appeal." Galloway adds that the case lasted till one o'clock.

Watson's evidence is that he took his note No. 61 of process without any special instructions, but thinking it part of his duty. His jotting is rather of the nature of a note for a subsequent minute. It bears, "Wednesday 8th May. 11.5," which I understand was the hour at which business commenced; "Bench 18," presumably the number of members who took their seats at the beginning.

"Case No. 21 (Goodall).

"Mr MacQuisten took obj. to objectors (section 19).

"Mr Russell came on Bench during Mr MacQuisten's objection. Mr Stevenson came in at 11.12.

"Mr Kyle.

"Witnesses, Mr M'Lay, J.P.

"Mr Galbraith (Missionary).

"Mr Ross came in at 12.25, during ex. of Galbraith.

"James Ritchie. Miss M'Naught. (Mann, Byars & Co.).

"M'Ghee, Sanitary Officer."

In the subsequent portion of his notes dealing with the witnesses for Mr MacQuisten there is written on the margin "Mr Ross / " King | after case started." without any hour for Mr King's arrival, but the witness refers to the Roll of Justices, No. 63 of process, kept by him, where opposite to Mr King's name he has written: "12.5. Came in while case in progress."

I am not quite satisfied that the last witness, Duncan, is independent in the details to which he speaks and has noted, but he produces for what it is worth the jotting No. 62 of process, where he has noted "W. F. Russell arrived 11.9, during MacQuisten's objection to Mr Kyle. D. M. Stevenson arrived immediately after. Mr Ross arrived during the cross of Mr Galbraith by F. MacQ." There is no such definite note in the body of the jotting of Mr King's arrival, but in the lower left-hand corner there is "Ross 11.25," "Bailie King 12.5," and a reference to the clerk's statement to the Court as to these gentlemen. I should have said that there is a clock in the Court-room by which these witnesses went. Irrespective of the notes of the particular minute by the clock when these gentlemen joined the Court, there is this important concurrence in all the jottings, viz. that Mr Ross came in during the

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cross-examination of the second witness for the appellant, and that Mr King came in distinctly later; and I prefer to accept the evidence of two out of these three clerks, supported, though with doubtful effect as above noted, by the third, and founded on contemporaneous memoranda taken in the course of their duty, to the general recollection of Mr Ross and Mr King, and one or two of their colleagues. I think it is therefore proved that these gentlemen, and particularly the latter, took their seats on the Bench after a substantial part of the evidence had been led.

Before leaving the evidence, the only matter which still remains to be considered is the question upon which the second point before me depends, viz. the disqualification of certain members of the Bench by reason that they were members of the Vigilance Association. On this point the averment is: "The following members of said Court are or were then or had previously been members of and subscribers to the said Association, viz. Sir Samuel Chisholm, Bart.; D. M. Stevenson, W. E. Anderson, John King, Robert S. Allan, R. G. Ross, and James Stewart, and are so disqualified. Nevertheless these members took part in the vote against the pursuer and in favour of the said appeals being sustained." I have already referred to the roll of members of and list of subscribers to this Association. With regard to the roll of members I find that three out of the gentlemen named were at one time upon the roll of members, viz. Mr Anderson, Mr Wallace, and Mr Stewart, but that all their names had been deleted. I confess to some doubt on the subject of this deletion. I am not satisfied on the proof as to the time when that deletion was made, and I think it is most unfortunate that the ledger in which the roll was kept was not openly produced to the pursuers at the commission for the recovery of documents. I can see no reason why it was not produced or why there was any difficulty made in connection with its production, and it was ultimately compelled to be produced during the proof. But although I am not satisfied as to the somewhat remarkable fact that all these crucial names turned out to have had a pen drawn through them when that ledger came to be examined—from my point of view this did not matter, because as I have already explained, I hold that a subscriber was, at any rate for the purposes of this case, as much a member—if not more a member—of this Association as any one who was merely enrolled on the members' roll. I therefore turn to the question of subscription, and as a preliminary I must deal with the plea maintained by the learned Lord Advocate to the effect that none of the alleged subscribers had paid their subscription for the year in which the Licensing Appeal Court was held. Now I find that the Association's year runs from the last day of September until the last day of September, and that a number of subscribers were in the custom of giving their subscription at or about a definite time of year: for instance, one in July, another in August, and another in October. Where I find a gentleman a continuous subscriber for a period of years, I cannot hold him to have ceased to be a subscriber because the Association's financial year had run out and because, according to his practice, the time for his paying his subscription had not been reached. I hold such a gentleman to be a subscriber and to remain a subscriber during the current year although he might pay his subscription six or seven or eight months late according to his custom. Now Sir Samuel Chisholm was a subscriber but he had not paid any subscription since July 1905. He was therefore not a subscriber for the year 1905–6, and I cannot therefore hold him to have been a subscriber in the current year 1906–7. Mr Stevenson, on the other hand, had been a regular subscriber, and his custom was to pay his subscription in the month of August, and he paid his last subscription on August 6th, 1906. Notwithstanding that the period at which his subscription would naturally have been paid had not been reached, I hold that he did not cease to be a subscriber at the intermediate period when this Licensing Appeal Court was held, viz. in April and May 1907. Mr R. S. Allan was in the same position: May 10th, 1906, was the date of his last subscription. Sir William Bilsland's firm were in the habit of paying in or about October. They had paid in October 1906, and they were the only ones of these subscribers who paid again—in October 1907. I do not regard that latter payment; but by reason of the payment in October 1906 I hold that they were still subscribers at the date of this Court, and Sir William Bilsland being a partner—the fact that he was senior partner is not material—of that firm, I think that for the purpose of this case he must be held to be a subscriber to the Association through his firm. Mr Wallace, like Sir Samuel Chisholm, had ceased to subscribe in 1905. Mr Alexander Murray was, like Mr Allan, still a subscriber, having paid his subscription in August 1906. The others—Mr Anderson, Mr King, Mr Ross, Mr Stewart, and Mr Stevenson—had never been subscribers at all. The result is that at the date of this Court two of the members of the Court had been subscribers—Sir Samuel Chisholm and Mr Wallace—but had more than a twelvemonth before the Court sat ceased to be subscribers; that Mr Stevenson and Mr Allan had been subscribers and continued to be subscribers, and that Sir William Bilsland, through his firm, was in the same position. I count nothing of the fact that Mr Stevenson and Mr Allan ceased their subscriptions after this question arose. The question is not what in prudence they thought it right to do *post litem motam*—and I think it was right that they should do it—the question is what was the state of matters as at the date of the Court in question,

and at that date they were, in my opinion, subscribers to the Association.

The questions which remain for me to decide are these :—

First, whether the appeals against Goodall's and Cassidy's licences were not, in fact, "taken for and on behalf of the parties whose names they bear, but were prosecuted and insisted in solely by and on behalf of an association in Glasgow known as the Citizens' Vigilance Association, and at its expense."

And if so, must the decisions of the Licensing Appeal Court, which entertained the appeals, be set aside?

But before this question can be disposed of, it is necessary to determine whether the objection can be competently raised before this Court.

On that preliminary point there is considerable difficulty. But on the best consideration I can give to the authorities, I think that the objection can competently be raised and must be considered.

Though there is not now, in the 103rd section of the Licensing Act 1903, such a widely expressed limitation of review as there was under the 34th section of the previous Act of 1862, it has been held authoritatively that, while there is committed to the new Licensing Court and Licensing Appeal Court a privative jurisdiction in the matter of granting and refusing certificates for licences, their decision may yet be reviewed by this Court, if they exceed their statutory jurisdiction. But it has been explained that excess of jurisdiction in this collocation means, not excess of jurisdiction in the narrow and technical sense merely, but also the use of discretion in a manner which is not judicial, not according to reason and justice, but so as flagrantly to violate the conditions of a judicial spirit (*Walsh*, 7 F. 1009 and L.R. (1907) A.C. 45). The objection, however, in the present case partakes, I think, more of the strict and technical sense.

Sect. 19 of the Act of 1903 gives the power of objecting to the renewal of a certificate, subject to certain exceptions introduced by sect. 20, only to any person or the agent of any person owning or occupying property in the neighbourhood of the licensed premises. Notice specifying the objections must be in writing and served upon the licence-holder. These objections must be heard, and before the renewal can be refused, these objections must be proved to the satisfaction of the Court. It is true that the objector does not become properly a party to a *lis*, and that his function is rather the informing the Court of what objections there are to the licence being renewed. But notwithstanding, the whole purview of the enactment shews conclusively that it was intended to confine the right to object and to be heard in support of objections, to those locally interested, and it would be contrary to its spirit to allow outsiders to intervene indirectly where they cannot intervene directly.

I had a good deal of argument on the cases in which the question of *dominus litis* has been raised, but I confess that I do not think them to any extent applicable. These cases divide themselves into two categories—first, those in which the alleged *dominus litis* has a direct patrimonial interest, but sues or defends in the name of a person who has a title, but either no interest or only a secondary interest; and, second, those in which persons of means put up a man of straw to sue what may be called an *actio popularis*. Of the first class *Fraser* v. *Malloch* (1896), 23 R. 619; *Kerr* v. *Employers' Liability Insurance Co.* (1899), 2 F. 17; and *Stevenson* (1900), 3 F. 182, are examples, and of the latter *Jenkins'* case (1869), 7 Macph. 739. In both these classes of cases the question is simply one of rendering the true *dominus litis* liable in expenses, though in the latter the liability for expenses may be be brought home *ab ante* to the *dominus*, by making the nominal pursuers find caution for expenses. In neither class of case does the question of title to sue or defend arise. The present case has some of the elements of the *actio popularis*, and were the case a proper litigation I think that there would have been good grounds for making the nominal objectors find caution for expenses. But the matter is not a litigation, it is a question of statutory right to bring the objectors' views before the Licensing Authority, which is only in a *quasi* sense a Court, and I think that if the Licensing Authority admits objectors who have no statutory right to be heard, it exceeds its jurisdiction, and in doing so exposes its procedure to review, though not on the merits. There can be no doubt that if the Citizens' Vigilance Association had been admitted as objectors *eo nomine*, and on their objections either the Licensing Court or the Appeal Court had refused a renewal of certificate, these Courts would have gone contrary to the statute, and that review of their action would not have been excluded. One branch of *Walsh's* case (*supra*) bears on this, for proof was allowed as to whether a party claiming the right of privileged objection under the 20th section of the Act really held the position entitling him thereto; and though the Lord Chancellor does say that, in coming to an administrative conclusion on questions of licensing policy, the Licensing Court "may use their own judgment and hear whom they please," I do not understand him by the last words to indicate that that freedom may be exercised independently of the statutory limits.

It may be that there are difficulties in checking the outsider intervening through a man of straw or put-up objector. But there are two sides to this question: the earnest temperance reformer may seek to advance the cause which he has at heart, through the medium of a

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nominal objector with a title, but the owner of a tied house or rival publican may also seek to obtain a local monopoly by the same means. I do not think that either were intended to have the opportunity. And if by determination of the Licensing Authority they have received the opportunity, that Authority has, in my opinion, overstepped its jurisdiction, and, whatever the difficulty of proof may be, it is, I think, open to this Court to rectify the mistake in an appropriate process such as the present. I conclude therefore that there is no incompetency in raising in this Court the first question which I have to consider.

But that question is a matter of degree. There is no reason why a wealthy individual or a philanthropic association should not find money or skill to assist a poor and *bona fide* objector to make good his objections. It may be difficult to ascertain when the assistance goes beyond this, but if it can be truly said, adapting the words of the late Lord President in *Kerr* v. *Employers' Liability Insurance Company* (*supra*), to suit the circumstances, "Here was the nominal party ever in Court at all? His name was, but he had nothing to do with the objections or the appeal, having long ago transferred to the Association the right to support the one and prosecute the other," then I think that that point has been reached, and that it is the duty of the Licensing Court to refuse to hear the objections or entertain the appeal, and if they do not do so that their subsequent proceedings are invalidated. Further, in determining the question thus raised, the reality of the situation and not merely the form falls, I think, to be considered.

Now I am not in this case directly concerned with the proceedings in the Licensing Court. Still it is necessary to take a preliminary survey of them. There can, I think, be no doubt that the office-bearers of St Mark's Church Mission were perfectly justified in moving in the matter of these two licences. Irrespective of personal residence in the district, the trustees vested with the property of their premises, whether freehold or leasehold, had a good statutory title to object. So I should be prepared to hold that the Session or even the Deacons' Court had, as representing the mission congregation, even though the church belonged to one of the independent bodies. Nor could there be any objection to the office-bearers assisting local members of the congregation to present and support objections which they personally had, or even arranging that the objections of the general congregation should be put forward in the name of certain local and *bona fide* objectors. Further, I see no objection to the objectors, whether office-bearers or their *bona fide* nominees, accepting the assistance of such a body as the Citizens' Vigilance Association and the services of that Association's paid agent. Though the matter was gone about in a very bungling fashion, that was at the outset its true complexion. Had the Association and its agent been content to let things work themselves out on this footing, it would have been difficult to find ground of challenge of what was done. Accordingly, though in reality the complexion of the matter changed as soon as Mr Kyle got his mandate, I think it would have been difficult, if not impossible, to challenge effectually his position and his action in the Licensing Court.

But the initial complexion of the matter had, as I have said, in reality changed, and that change became most tangible the moment the Appeal Court was reached. The objections in the Licensing Court were not really those of the nominal objectors, but of the Association, who, through Mr Kyle, took absolute possession and control of the proceedings from the moment the mandate was in his hands, and in their zeal for licensing reform thought no more of the nominal objectors. In the Licensing Court this was latent; in the Appeal Court it became patent. And it is the procedure in the Appeal Court which is alone in issue, because the pursuers here are content with the decision of the Licensing Court, which in spite of Mr Kyle's objections renewed their licences. Now appeal is provided for by the 22nd section of the 1903 Act, which provides, *inter alia*, that "if any proprietor or occupier of property in the neighbourhood of such house who has objected before the Licensing Court to the granting or renewal of such certificate, shall be dissatisfied with any proceeding of any Licensing Court assembled for granting certificates as aforesaid, whether in granting or refusing or otherwise disposing of" an application for a certificate or renewal of certificate, it shall be lawful to such proprietor or occupier "to appeal therefrom to the next Court of Appeal from such Licensing Court," provided the appeal be lodged with the clerk to the Appeal Court within ten days, and that the appellant shall intimate the appeal to the opposite party and to the Licensing Court of whose proceeding he complains, and "shall find caution to abide such appeal and the expenses thereof." This appears to me to be an entirely new departure or new proceeding, and one which an agent authorised to lodge objections in the Licensing Court had no right to take without the authority of his client; yet Mr Kyle's mandate, No. 32 of process, merely authorised him to sign and lodge objections on behalf of those who signed the mandate at the forthcoming Licensing Court and to appear on their behalf in support of said objections. Did this justify Mr Kyle, without consulting them, in stating that the objectors were dissatisfied with the decision of the Licensing Court, in taking the appeal and giving the notices, and above all, in laying them under the obligation to find caution for expenses? I think not. Yet

he not only does all this without consulting his nominal clients, and without even communicating to them the result of their objections in the Licensing Court, but he arranges for caution being found for them without any one of the objectors being the least aware of what he was doing. In fact, he acted according to the reality, not as agent for the nominal objectors, but of the Association who employed him, and a glance at the minutes of their committees amply illustrates this. How, then, is the matter dealt with by the Appeal Court when Goodall's appeal is called? I quote from the Court's own Minute, No. 13 of process, page 47: "Before hearing agents Mr MacQuisten intimated that he objected to the *status* of Mr Kyle as representing the appellants in respect that he truly did not represent the appellants but represented the Citizens' Vigilance Association, who were the true *dominus litis* in this appeal, and that the said Association was not entitled to appear as appellant in this appeal." Let it be noted that the objection was not merely to want of mandate on the part of Mr Kyle, or to the informality or fictitiousness of his mandate, but was something deeper and more far-reaching. At that stage, in my opinion, Mr Kyle had indeed no mandate, and did not even nominally represent the nominal appellants. But more than this, did he represent the Citizens' Vigilance Association, who were not entitled to appear as appellants? And how is the objection disposed of? "The chairman, on the advice of the clerk, ruled that it was incompetent for the Court to consider the point raised by Mr MacQuisten, as Mr Kyle *prima facie* represented persons who were qualified to be heard as objectors under the provisions of the Licensing Act"—that is to say, the Court refused to entertain the objection. I am somewhat at a loss to understand the Court's action in this matter, for the alleged relation of the Vigilance Association to these appeals was no new matter to them. I am not prepared to take it off the hands of any of the members that they had no previous knowledge of the Vigilance Association or of its activities with reference to licensing proceedings. But even if they had no previous knowledge, they had had their attention very sharply and pertinently called to the matter at previous stages of the same appeal sittings in relation to Mr Battersby, and they had had notice of the attitude Mr MacQuisten was to take up the afternoon before. But they assumed this position: "Mr Kyle tables a bundle of mandates, *ex facie* regular; that is enough for us; we cannot competently look behind them." In that I think they were wrong. In the first place, if they had looked at the mandates they would have seen that they were not mandates authorising appeal. In the second place, if they had gone further they would have found, what the evidence in this case has disclosed, which I take it to be, as I have already said, that, through the missionary of St Mark's Church and some of his colleagues in its mission work, mandates to object had been placed in Mr Kyle's hands, some at least of the signatories of which had a title to object and *bona fide* did object, but that from the point at which they signed these mandates they had ceased to have any relation to or control over Mr Kyle's action, and that the reality of all that followed was that Mr Kyle was representing, not the nominal objectors, but the Vigilance Association, who through him found the objections, paid the fees of the Court, and found the witnesses, who were dissatisfied with the first decision, and through him took the appeal, paid the fees of Court, and found caution for the expenses of the appeal, and who again found the witnesses, who were their witnesses and not the objectors' witnesses; and that this Vigilance Association were acting in the matter as part of a large scheme for forcing the views of outsiders, sound as these views may have been, on the Licensing Authority without any statutory *locus standi* to do so. It may be that it might have been difficult in the Appeal Court to have exposed the true situation of matters. It may be that had there been a *prima facie* mandate in Mr Kyle's favour the Appeal Court might reasonably have said, and it is possible that this is what they meant by their deliverance, that in the summary procedure of a Licensing Appeal Court it was out of place to go beyond an agent's *prima facie* mandate, that the business must proceed and their decision be taken *periculo petentis*, leaving any such serious question as had been raised to be determined by a court of law. But they could not, in my opinion, shelve the question either by holding it not competent to entertain it or by, as far as they were concerned, disregarding it.

Now that it has been brought before a court of law, it is established, in my opinion, in the first place, that there was no valid appeal, because the appeal was taken by Mr Kyle without authority, but, in the second place, that, even if there had been a *prima facie* mandate, Mr Kyle in reality represented, not the nominal objectors, but the Vigilance Association, and on these grounds I think the decision which the Appeal Court proceeded to give on the merits must be set aside.

It was contended for the defenders that the objectors, or at least those who had a competent title to object, had homologated Mr Kyle's action. This is based on the idea that they had not disclaimed his appeal, though what they did not know of it is difficult to see how they could disclaim. If he had cited them as his witnesses and they had appeared with him in Court, he might have pleaded that they had put him at least in as good a position as he had been in in the Licensing Court, or even stronger. But they did not do so; they knew nothing about his appeal; they were not in Court; they were

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not cited as his witnesses; they were cited as the witnesses of his opponent, and they were prevented by Mr Kyle himself from being adduced in Court, and giving the Court any opportunity of knowing their frame of mind. It was further contended that they have homologated Mr Kyle's procedure by granting him mandates to defend the present actions of reduction. I make no comment on the manner in which this latter mandate was obtained, but I cannot find any justification in the authorities cited to me for holding that such *ex post facto* homologation can validate irregular and illegal procedure already closed.

The second question which I have to dispose of is, whether the decision of the Appeal Court was invalidated by the fact that the appeal having been truly taken and insisted in for and on behalf of the Citizens' Vigilance Association, certain members of and subscribers to said Association sat as members of the Appeal Court? I have already shewn that if membership required enrolment in the Association's roll of members, there were no members of the Appeal Court upon that roll whose names had not been deleted, and though the circumstance that they have been deleted is to my mind accompanied by the gravest suspicion, I take the case upon the footing that no members of the Court were in that sense members of the Association. On the other hand, I find that Bailie Stevenson, Mr Allan, Mr Murray, and the firm of which Lord Provost Sir William Bilsland was principal partner, were current subscribers, though Sir Samuel Chisholm and Mr Wallace had ceased for more than a twelvemonth to be such. And I hold, as I think I have already said, that in respect of the present objection, the position of subscriber to is the same as that of member of this Association. Now, even though, contrary to my opinion, Mr Kyle, by the mandates which he originally obtained, was clothed with a legal right to represent qualified objectors in the Licensing Court, and even if the difficulty of his want of mandate in the Appeal Court could be got over, it appears to me that neither of these things would alter the fact that the Citizens' Vigilance Association was the real and true objector and appellant, and by the whole history of its action was deeply committed, however laudable its motive and beneficial its action may have been, to a crusade against licences of which the episode into which I have been enquiring was a mere incident. This crusade was made possible only by the subscriptions of the gentlemen I have mentioned and others interested, and they must have known, or must be held to have known, that it was to prosecute this crusade that the moneys to which they contributed by their subscriptions were to be so applied. Was the position, therefore, of these gentlemen not substantially that of sitting in judgment in a case in which they were themselves the prosecutors?

I was referred to a great number of English authorities bearing on this subject. These appear to me to fall into three categories.

First, the class of cases, where from the interest of the member of the Court bias may be inferred. Such cases are: *Reg.* v. *Meyer*, 1875, L.R. 1 Q.B.D. 173; *Reg.* v. *Milledge*, 1879, L.R. 4 Q.B.D. 332; *Reg.* v. *Handsley*, 1881, L.R. 8 Q.B.D. 383; *Rex* v. *Justices of Sunderland*, L.R. [1901], 2 K.B. 357; *Reg.* v. *Taylor* (1898), 14 Times L.R. 185; *Rex* v. *Tempest* (1902), 18 Times L.R. 433, and they were followed by Lord Stormonth Darling in the only Scottish case quoted, viz. *Blaik* v. *Anderson*, 1900, 7 S.L.T. 299. Of these I think I may take the *Sunderland Justices* case as the leading one, and the principle it embodies is that pecuniary interest is enough to disqualify, but if the interest is not pecuniary, then the liklihood of bias in the circumstances must be substantial. The existence of bias is a question of fact for the Court, who must determine whether there was or was not under the circumstances a real likelihood that there would be a bias on the part of the member of the Court challenged. Further, it has been laid down that, assuming that bias is to be inferred in the circumstances, the mere presence of the interested party on the Bench is enough to vitiate the proceedings, whether he takes part in the vote or not (*Reg.* v. *Justices of Hertfordshire*, 1845, 6 Ad. and El. 753, and L.J. 14 Mag. Cases 73). It is indeed immaterial what part he takes in the proceedings (*Reg.* v. *Meyer*, *supra*).

Second, the class of cases in which a member of the Court is directly or indirectly a party to the prosecution, using that term for convenience in a comprehensive sense. It is said to be a principle, founded on the very essence of justice, that a person who is connected with the prosecution, using the word in such comprehensive sense, should not take part in the decision. And if an individual who assumes the position of prosecutor directly, as in *Reg.* v. *London County Council*, L.R. [1892], 1 Q.B. 190, is debarred, so also is a member of an Association which promotes and initiates such prosecution, as *Reg.* v. *Allan*, 1864, 4 B. & S. 915, and still more pertinent to the present case, *Reg.* v. *Fraser* (1893), 9 Times L.R. 613, where one out of three magistrates was a member of an Association very similar to the Vigilance Association, whose object was almost identical, though it may not have been actuated by the same breadth of view. The Association had resolved to oppose, and instructed the solicitor who did oppose, the licence, and it was of no avail to sustain the judgment that the vote of the individual magistrate challenged was not necessary for a majority, as the Bench was unanimous.

I should without hesitation follow the broad general principle of this latter class of cases, but

for the third class of cases to which I was referred. But I venture to think that these improperly and inconsistently attempt to combine the principles of decision of the first two classes, and make the question of disqualification depend upon the likelihood of bias arising, not from interest, but from the quality or degree of the relation to the prosecution. These cases are *Leason* v. *The Medical Council* (1889), L.R. 43 Ch. Div. 366; *Allinson* [1894], 1 Q.B. 750, another Medical Council case; and *Reg.* v. *Burton* [1897], 2 Q.B. 468, the Incorporated Law Society Case. It may be that these cases may be supported on the view of the remoteness of the relation between the member of the Court challenged and the prosecuting body. But if it be not so, I should respectfully adopt the dissentient view of Fry, L.J., in the case of *Leason* (*supra*), in preference to the reasoning of his colleagues, and I cannot distinguish the present case from that of *Reg.* v. *Fraser* (*supra*), following which I think that the decision of the Appeal Court in question was vitiated by the presence on the Bench of subscribers to the Citizens' Vigilance Association.

The *third* and *last* question which I have to consider is whether the decision is also vitiated by the fact that two members of the Court who took part in it had not been present during the whole progress of the case, Mr Ross having joined the Court during the cross-examination of the second witness, and Mr King at a considerably later stage. I do not find any precedent directly applicable, but I think that it is a broad general principle that, unless the absence can be regarded on the principle of *de minimis*, which it cannot be here, whoever takes part in the decision of a Court or body of men, who, if not a Court properly, are bound to act judicially, must have been present during the hearing of the case and the whole case. Further, I think that on the analogy of *Reg.* v. *The Justices of Hertfordshire* (*supra*) and *Reg.* v. *Meyer* (*supra*), it is immaterial how far the vote is affected by counting or discounting that of the member disqualified by partial absence. The only circumstances in which a decision taken part in by a disqualified member can stand that I know of, are those exemplified by *Livingstone* v. *Presbytery of Hamilton* (1849), 6 Bell's Appeals 469.

Accordingly I shall sustain the second, third, and fifth pleas for the pursuers in Goodall's case, and grant decree as craved.

The same result will follow in Cassidy's case, except that the pleas to be sustained will be the second and third only, as I think it makes no difference that objection was not taken in the Appeal Court to Mr Kyle's position as not truly representing the nominal appellants, but representing an outside body, and I shall reserve to hear parties as to expenses.—29*th January* 1908.

Counsel for Goodall and Cassidy, Dickson, K.C., Horne; for M'Lean, Munro; Agents, Alex. Morison & Co., W.S.—Counsel for Defenders Bilsland & Others, The Lord Advocate (Shaw, K.C.), W. Thomson; Agent, Norman M. Macpherson, S.S.C.—Counsel for Defenders Henderson and Others, Orr, K.C., J. D. Millar; Agents, Clark & Macdonald, S.S.C. R. S. B.

Outer House. *Lord Johnston.*

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FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

316. Malone *v.* Cayzer, Irvine & Company.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), Sch. I (1) (a)—"Where Death Results"—Injury to Eye—Insanity Consequent on Loss of Sight—Suicide—Averment that Death Due to Accident—Relevancy—Averments which were Held Relevant.

Stated Case.

In an arbitration under the Workmen's Compensation Act 1897, between Mrs Mary Ann Mullen or Malone, 401 Rutherglen Road, Glasgow, *Pursuer*, and Cayzer, Irvine & Co., shipowners, 109 Hope Street, Glasgow, *Defenders*, the pursuer made, *inter alia*, the following averments (as set forth in the stated case):

"(1) The pursuer, the said Mrs Mary Ann Mullen or Malone, is the widow of the deceased John Malone, hammerman. The respondents are shipowners, and also carry on, for the purpose of their said business, a ship-repairing shop at Finnieston Street, Glasgow.

"(2) On or about 25th May 1907, and for some months prior thereto, the said deceased John Malone was in the employment of the respondents at their said repairing shop in Finnieston Street as a hammerman. Said repairing shop is a factory within the meaning of the Workmen's Compensation Act 1897.

"(3) On said date, about 7.30 a.m., the said deceased John Malone was engaged in the course of his employment in said repairing shop cutting an iron ladder. Another of respondents' workmen was holding a chisel against said ladder and the deceased was striking the chisel with his hammer when a piece of said iron ladder flew off, penetrating his right eye.

"(4) The said deceased John Malone was taken to the Eye Infirmary, where his eye was treated and he was then sent home. About twenty years before the date of said accident the said deceased John Malone had met with an accident which caused him to lose the sight of his left eye, and when he was injured on 25th May 1907 the sight of his right eye immediately began to fail, and became gradually worse until he was rendered almost blind.

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"(5) In consequence of the said injury the said John Malone received a severe shock, and his nervous system completely broke down. Owing to the gradual loss of sight in his right eye and consequent blindness, the said John Malone's mind became affected, and he became insane, and on 20th August 1907 he committed suicide in his house at 401 Rutherglen Road.

"(6) The death of the said John Malone was due to the foresaid accident, which arose out of and in the course of his employment with the respondents in their said factory at Finnieston Street."

The defenders pleaded, *inter alia*, that the application was irrelevant. This plea the Sheriff-Substitute (Davidson) sustained, and dismissed the application with expenses.

A case for appeal was stated.

The Question of Law was:—

Whether in the circumstances set forth in the case, the application was rightly dismissed?

Argued for Appellant: The appellant was entitled to prove her averments that her husband's insanity and consequent death were due to the accident. The deceased's insanity was brought on by loss of sight. Such a form of insanity was recognised by medical science and by such leading alienists as Dr Clouston. The question at issue was whether the suicide was a *natural* result of the injury, apart from whether it was a probable consequence of it or not. That was a pure question of fact on which the appellant was entitled to a proof (*Dunham* v. *Clare*, 5th June 1902 [1902], 2 K.B. 292, per Collins, M.R., p. 296). Reference was also made to *Golder* v. *Caledonian Railway Co.*, 14th November 1902, 5 F. 123.

Argued for Respondent: The decree of the Sheriff was right. Malone's death was due to his own act. His suicide could not be regarded as the natural consequences, or even as the probable result, of the accident. It was not directly traceable to the injury, and if it were so traceable there was, in the words of Collins, M.R., a new act giving a fresh origin to the after-consequences (*Dunham, cit. supra*). The damages were too remote to justify enquiry. Suicide was not an "accident" in the sense of the Workmen's Compensation Act (*Hensey* v. *White*, 2nd December 1899 [1900], 1 Q.B. 481 (opinion of Collins, L.J.)). The primary and efficient cause of Malone's death was the diseased condition of his brain. In any event, that was *novus actus interveniens*. Reference was made by way of contrast to *Lloyd* v. *Sugg & Co.*, December 1899 [1900], 1 Q.B. 486.

The Court *answered* the question in the case in the negative; recalled the determination of the arbiter, and remitted to the Sheriff-Substitute as arbiter to allow parties a proof of their averments, and to proceed as accords.

The Lord President.—My Lords, the facts which give rise to the controversy here are certainly somewhat out of the common. It is an arbitration under the Workmen's Compensation Act, the claimant in it being the widow of a workman called Malone, who was in the employment of the respondents, Cayzer, Irvine & Co. The averments of the claimant and appellant set forth that while Malone was at his work in May a splinter of iron flew into his right eye. That of course was an ordinary accident in the course of his employment, which, had he survived, would have entitled him to make a claim for compensation in the ordinary way. It seems that he had many years before lost the sight of his other eye, and the injury was such that the sight of his remaining eye, according to the averments, immediately began to fail, and became gradually worse until he was rendered almost blind. Then, continues the claimant—I now read textually: "In consequence of said injury the said John Malone received a severe shock, and his nervous system completely broke down. Owing to the gradual loss of sight in his right eye and consequent blindness, the said John Malone's mind became affected and he became insane, and on 20th August 1907 he committed suicide in his house at 401 Rutherglen Road. The death of the said John Malone was due to the foresaid accident, which arose out of and in course of his employment with the respondents."

Now upon that statement of the facts the learned Sheriff-Substitute, before whom the case came as arbiter, dismissed the application as irrelevant. The claimant has appealed to your Lordships, and the motion before us is to send the case back to the Sheriff and tell him to allow a proof of those averments which I have read. Of course there can be no question, I take it, as to the accident having actually happened—that is to say, the splinter going into his eye; but what happened afterwards is evidently matter upon which there may be controversy.

My Lords, the expression in the statute is that the death must be the result of the injury; and really the views which I hold have been so extremely well expressed by Lord Collins, when he was Master of the Rolls, that I prefer to take what he has said rather than try to re-express them myself. The passage which I am going to cite is taken from the case of *Dunham* v. *Clare*, L.R. [1902], 2 K.B. p. 292. The state of the facts in that case was that a man was carrying some heavy pipes, one of which slipped and fell on his foot, inflicting a wound in his toe. He was put into an hospital, and a disease called phlegmonous erysipelas supervened. The evidence was that erysipelas of this description was a very unusual consequence of a wound of the kind, and that, according to the theory which at present obtains, it was

caused by the introduction somewhere or other of a germ. Lord Collins said this: "The applicant for compensation, therefore, has to shew an accident causing injury, and death or incapacity resulting from the injury. In the present case there was admittedly an accident causing injury, and the only question is whether death in fact resulted from the injury. If death in fact resulted from the injury, it is not relevant to say that death was not the natural or probable consequence thereof. The question whether death resulted from the injury resolves itself into an enquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after-consequences. In dealing with an obligation created by the Act, we are not dealing with a case of contract or tort or with a liability of a criminal nature. In the case of contract, a person who commits a breach of it is liable for the consequences which naturally follow from the breach. So, too, in cases of tort, when the question arises whether a person is liable in respect of a breach of some duty imposed upon him, he probably, and in some cases certainly, comes under a somewhat larger liability than would be the case if it were a breach of contract, but still the liability is measured by what are the reasonable and probable consequences of his breach of duty. That lets in the consideration of reasonableness. No question of reasonableness comes into the present discussion. The Act has imposed the liability irrespective of any error of judgment or negligence on the part of the employer. The only question to be considered is, Did the death or incapacity in fact result from the injury?" That exactly expresses my opinion, and if that is so I think that the Sheriff-Substitute was too quick here in dismissing this case as irrelevant upon the face of it.

My Lords, I do not think I ought to say much more, except to explain that I am very far from saying that upon the face of this pleading there is evidently made out a case, because the question is whether causation is or is not made out, and it may be a somewhat uphill matter for the claimant to prove her case. I should like to say that she will have to do something more than say simply that there was a possibility of death arising from such an injury in such a way; she must shew that it was in fact the result of the injury. I have some doubts as to whether the state of knowledge of cerebral pathology is so fixed as, in circumstances like this, to enable one to reach such a conclusion; but I do not think we could try the matter from our own ideas on such subjects. Therefore, my Lords, I am of opinion that we should remit the case to the Sheriff-Substitute and order him to allow an enquiry into the matters averred.

Lord M'Laren.—If we were to criticise the statements of facts in this case with the same strictness which we do in questions of relevancy in actions in this Court, there is a great deal, I think, to be said against the relevancy of the averments; because I cannot gather from the Sheriff-Substitute's statement anything more than this, that the man committed suicide in consequence of the depression of mind brought on by his blindness. There is no averment of insanity in the physiological sense of a result of disease of the brain, but merely that a man has committed suicide and is supposed to have done so under some insane impulse. It seems to me that in construing the Act of Parliament, and particularly the beginning of the first schedule, we must hold that when the Act prescribes as a condition of compensation that death results from the injury, what is within the contemplation of the statute is a material injury with death materially resulting from it. To explain what I mean regarding insanity—if a person, being a workman, were to receive a blow or a wound on the head which set up inflammation of the brain, and a medical expert came to the conclusion that the injury to the brain was the result of the blow on the head; and if the injury went on and left the man in an insane condition from which eventually he died, then I should not for a moment doubt that the man's death was the result of the accident. But, on the other hand, it is easy to figure cases of death resulting only from the moral effect of an accident. If, for example, a man, in consequence of the loss of his sight, took to drinking and shortened his life by intemperance, that would be a very clear case for not giving compensation; because, although in a sense his death was the result of the injury, it was not a material, but a moral result. Now in this case I am not disposed, any more than your Lordship, to construe the statement of the Sheriff-Substitute, which is merely an echo of the averments of the party, with great strictness. I think there ought to be a proof; and as the parties might wish to bring the case before us again, I hope the Sheriff-Substitute will direct his attention to the point whether this is insanity that would be proved by medical evidence of the symptoms, or whether it is anything more than just a mode of stating the supposed cause, because there must be some cause for the suicide. I agree that it is desirable to have the facts brought before us; and I notice that in the case of *Dunham*, L.R. [1902], 2 K.B. 292, which your Lordship cited, there had been an inquiry, and the judgment of the Court proceeded upon a statement of the facts proved in the case.

Lord Kinnear.—The question whether death has resulted from an accident is always a question of fact. Therefore I think it is indispensable that the arbitrator should have the facts ascertained before he decides it. I therefore

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agree that the case should go back to the learned Sheriff in order that the petitioner may have an opportunity of proving her case if she can. That being so, I think the less one says about the *prima facie* aspect of the statement of the facts probably the better; but one cannot help seeing that there may be a difficulty in connecting the accident with the alleged result by an unbroken chain of connection. The exact point where the difficulty may arise I do not know; but speaking for myself I do not think I have sufficient knowledge of the pathology of insanity to form even a provisional opinion. Therefore I think it better to say that I agree with your Lordships that the facts must be ascertained.—23*rd January* 1908.

Counsel for Pursuer (*Appellant*), *Morison, K.C., J. A. Christie; Agents, St Clair Swanson & Manson, W.S.—Counsel for Defenders* (*Respondents*), *Hunter, K.C., Horne; Agents, Anderson & Chisholm, Solicitors.* W. A. R.

COURT OF SEVEN JUDGES.

(First Division Cause.)

(*The Lord President, Lords M'Laren, Kinnear, Pearson, Stormonth-Darling, Low, and Ardwall.*)

317. Black and Others *v.* The North British Railway Company.

I. PROCESS—ISSUE—FORM OF ISSUE—ACTION OF DAMAGES FOR DEATH OF HUSBAND AND FATHER—NEGLIGENCE ADMITTED BY DEFENDERS—ISSUE IN ORDINARY FORM ALLOWED—MORTON (COOLEY'S FACTOR) v. EDINBURGH AND GLASGOW RAILWAY COMPANY, 1854, 8 D. 288, AND DOBIE v. ABERDEEN RAILWAY COMPANY, 1856, 18 D. 862, FOLLOWED.

II. REPARATION — DAMAGES — SOLATIUM — ACTION AGAINST RAILWAY COMPANY FOR DAMAGES AND SOLATIUM FOR DEATH OF HUSBAND AND FATHER IN RAILWAY ACCIDENT — LIABILITY FOR INJURIES SUSTAINED BY DECEASED ADMITTED BY DEFENDERS — HELD THAT PURSUERS ENTITLED, IN SUPPORT OF CLAIM FOR SOLATIUM, TO PROVE CIRCUMSTANCES SHEWING THAT DECEASED WAS SUBJECTED TO PAIN AND SUFFERING PRIOR TO HIS DEATH.

III. REPARATION — NEGLIGENCE — DAMAGES — SOLATIUM — ACTION AGAINST RAILWAY COMPANY FOR DAMAGES AND SOLATIUM FOR DEATH OF HUSBAND AND FATHER IN RAILWAY ACCIDENT—LIABILITY FOR INJURIES SUSTAINED BY DECEASED ADMITTED BY DEFENDERS — HELD THAT, FAULT BEING ADMITTED, PURSUERS NOT ENTITLED TO PROVE CIRCUMSTANCES OF ACCIDENT SO AS TO SHEW DEFENDERS GUILTY OF GROSS, AS OPPOSED TO ORDINARY, NEGLIGENCE.

(*Reported supra, p.* 431.)

Reclaiming Note against an Interlocutor of Lord Guthrie.

The defenders *reclaimed*. The case was ordered to be heard before a Court of Seven Judges.

Argued for Reclaimers: (1) The issue proposed for the defenders should be allowed. Fault was admitted, and therefore the only question for the jury was, How much ought the pursuers to be paid? *i.e.* What was the injury suffered? *Esto* that under the defenders' issue the *cause* of the accident might be relevantly proved, the scope of such an enquiry ought to be determined *ab ante*, otherwise "exceptions" would be taken. *Esto* that the practice since *Cooley's* case (*cit. infra*) had been to allow a pursuer to lead evidence as to the whole circumstances of the case, that rule was inapplicable here, as there was no duty on the defenders' part towards the pursuers, and therefore no *culpa quoad* them. The duty, and therefore the *culpa*, were towards the deceased. The present action was based, not on fault towards the pursuers, but (1) on their nearness of relationship to the deceased, and (2) on his liability to support them. The loss of their husband and father was the sole loss suffered by the pursuers. That being so, any *culpa* or carelessness on the defenders' part towards the deceased was not a relevant subject of enquiry. It would not be relevant, for example, for the widow to prove that the deceased was badly treated by the defenders, or that he suffered great pain owing to their neglect, or that their treatment of him caused her considerable suffering. (2) In the present circumstances there was no claim for *solatium*. The law could not, and did not, assess compensation for mere laceration of feelings. The early cases in which reparation for injury to feelings was allowed were really actions of assythment, *e.g. Black* v. *Caddell* (*cit. infra*). Neither Stair nor Erskine dealt with *solatium* as an element distinct from reparation for the injury suffered, *e.g.* Stair, I. 9, 4; I. 9, 6; I. 9, 7; Erskine, III. 1, 14 (the only mention of *solatium* there being in a footnote, viz. Note 13). The earliest use of the term, as far as counsel were aware, was in *Brown* v. *Macgregor & Others*, 26th February 1813, F.C. That, however, was an action of assythment pure and simple, so also was *Black* v. *Caddell*, 1804, M. 13,905, affd. 1812, 5 Pat. App. 567. *Solatium* as something *sui generis*, distinct both in nature and origin from assythment, was first recognised in *Greenhorn* v. *Addie*, 1855, 17 D. 860, and *Eisten* v. *North British Railway Co.*, 1870, 8 M. 980. The case of *Cooley* v. *Edinburgh and Glasgow Railway Co.*, 1845, 8 D. 288 (relied on by the pursuers) was really founded on assythment. That element,

however, was eliminated by the two subsequent cases of *Greenhorn* (*cit. supra*) and *Eisten* (*cit. supra*), and finally disappeared. No doubt *Cooley's* case had been followed in *Dobie* v. *Aberdeen Railway Co.*, 1856, 18 D. 862, and *Cunningham* v. *Duncan & Jamieson*, 1889, 16 R. 383, but in both these cases *solatium* was really used as equivalent to damages and meant nothing more. It was so used in *Dow* v. *Brown*, 1844, 6 D. 534, and *Elder* v. *Croall*, 1849, 11 D. 1040. Reference was also made to *Darling* v. *Gray & Sons*, 1892, 19 R. H.L. 31; and to *Hillcoat* v. *Glasgow and South-Western Railway Co.*, 1907, 15 S.L.T. 433. As to the practice in England, reference was made to *Blake* v. *Midland Railway Co.*, 1852, 18 A. & E. 93 (21 L.J. Q.B. 233). In assessing damages under Lord Campbell's Act (9 & 10 Vict. cap. 93) the jury were confined to the pecuniary loss sustained, and could not take into consideration mental suffering. Exemplary damages could not be awarded here, for that principle of assessment applied only to actions against wrongdoers, and not to actions against those who were only consequentially liable (Beven on Negligence, 8th ed., p. 42–3).

Argued for Respondents: (1) The Lord Ordinary was right. The degree of *culpa* was a relevant subject of enquiry. (As to its degrees reference was made to Bell's Com. I. 483, note.) The degree of negligence would affect the amount of compensation (*Auld* v. *Shairp*, 1874, 2 R. 191). That being so, the circumstances of the injury and the degree of fault fell to be laid before the jury (*M'Master* v. *The Caledonian Railway Co.*, 1885, 23 S.L.R. 181). This was a motion to vary an issue, and on a question of procedure the practice of the Court was conclusive. The respondents were entitled to prove their averments in Cond. 4. The rule in *Cooley's* case was not only sound in principle, but had become so settled in practice that it was now part of our law. (2) There were two elements for which our law gave compensation, pecuniary loss (for which damages were given) and injury to feelings (for which *solatium* was given) (*Dow*, *cit. supra*; *Horn* v. *North British Railway Co.*, 1878, 5 R. 1055). A claim for *solatium* was known to the law of Scotland, and even though founded on nothing better than usage and inveterate custom, was firmly fixed in practice. As to its history not much was really known. It was used in the Roman law as equivalent to compensation (Dig. 8. 4. 13; 26. 7. 33). It was recognised as fully known to our law in *Neilson* v. *Rodger*, 1853, 16 D. 325, and in such recent cases as *Clarke* v. *Carfin Coal Co.*, 1891, 18 R. H.L., and *Darling* (*cit. supra*). Cases of assythment proper were clearly distinct, for they involved the element of crime (Bell's Prin. 2029). The English practice was not adverse, for though Lord Campbell's Act (*cit. supra*) only allowed compensation for pecuniary loss, in actual practice the elements considered in assessing damages were the same as were considered here (*Phillips* v. *London and South-Western Railway Company*, 1879, L.R. 5 Q.B.D. 78). *A fortiori*, therefore, by our law, which allowed both elements to be considered, both ought to be remitted to proof. As to the elements involved in damages for seduction reference was made to Fraser, Husband and Wife, pp. 500, 505, 1204. It was immaterial whether the injury suffered had been caused by the defender or those for whom he was responsible. Gross negligence, if proved, would entitle the pursuers to a larger measure of damages (Beven on Negligence, 8th ed., 42–3; Sedgwick on Damages, 7th ed., I. 53, II. 330).

The Lord President.—This is an action raised by the widow and children of the deceased Mr Black against the North British Railway Company. The deceased gentleman lost his life owing to injuries received in a collision while travelling as a passenger in a train of the defenders; and the summons concludes for very considerable sums of money to each of the pursuers. The condescendence sets forth that the collision in question was caused by the gross negligence of the defenders, the specification of said negligence consisting in setting forth alleged faults of the driver of the train which ran into the train in which Mr Black was seated, and of the station-masters at two stations. The sums concluded for are said to be due to them as reparation and *solatium* for the injury done to them by the death of Mr Black through the fault of the defenders. The defenders, while not admitting the particular fault condescended on, put in the following statement: "Explained that the defenders for the purposes of the present action admit liability for the injuries sustained by Mr Black."

Technically the only question raised in the case is the form of the issue. But really the controversy between the parties goes deeper, and is concerned with the question of what are, if I may so express it, the true ingredients of the damage suffered by the pursuers; and the form of the issue is only material in so far as it lends itself to the proper or improper admission in evidence of circumstances which, according to the one view or the other, are relevant to the question of what the damage amounts to.

Viewed as upon authority I do not think we could, so far as form is concerned, go back on the case of *Morton*, 8 D. 288, followed by the case of *Dobie*, 18 D. 862. The defenders, however, have frankly stated that they wish to take the opinion of the House of Lords on the subject, and it therefore seems right that we should not send up the case without considered opinions. But besides that, there is another reason why I think it desirable that we should state our views apart from authority. Though *Morton's* case has ruled the form of the issue, I cannot say that I

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think the opinions of the majority in *Morton's* case have ruled the directions given by judges to juries. Further, I think there has been the unfortunate effect that directions in the matter have varied according to the views of individual judges. The Lord Ordinary has called attention to this by comparing what was said by Lord Shand and by Lord Adam in the case of *Cunningham*, 16 R. 383. It seems expedient, therefore, that true principles should be laid down by the Court of highest resort, and that they should then be followed in all cases.

There is no question as to the liability of the defenders to compensate for direct patrimonial loss which the widow and children have suffered by the death of the husband and father viewed as the breadwinner of the family. The question in dispute arises in considering what are the matters which it is relevant to consider in estimating what is due in name of *solatium*, and they really resolve into two points. First, are the pursuers entitled to enhanced damages if they shew that the deceased was subjected to pain and suffering before his death; second, are they entitled to enhanced damages if they shew that the negligence of the Company was gross negligence? If they are, then it is evident that the pursuers are entitled to insist on proving first, the circumstances of the collision so far as they affected Mr Black; and second, the circumstances of the collision so far as shewing the causes which led to it.

I cannot say that I have been able to find any authoritative pronouncement on what is the true definition of *solatium*. The word occurs in the Digest in two places—VIII., 4, 13 and XXVI., 7, 33—but not in a sense which is in the slightest degree technical or calculated to throw any light on the subject. In the first passage it is used for the payment which must be made if one wishes to take stones out of another man's quarry; in the second it is used as an equivalent to "solarium," which, in fact, is the word in some of the MS. There seems, therefore, little doubt that the word had not a technical origin, but was used, as was often the case, by the old Scottish lawyers as a convenient Latin tag to express what might have been expressed, but with less conciseness, in English. We were told at the Bar that the first time the word appears is in the case of *Brown* v. *M'Gregor*, 26th February 1813, F.C.—the case which may be, I think, taken as the first instance of the modern *actio injuriarum*. I quote the words of Lord President Inglis in *Eisten*, 8 Macph. 980, as contrasted with the older action of assythment. This is, however, not so. The word is used as far back as 1741 in a case of *Moodie* v. *Sir James Stuart*, reported by Monboddo, and to be found in 5 Brown's Supplement, p. 709. The report is so short and to the point as to be worth quoting: "The question here was about the quantity of an assythment, whether it contained only the expenses laid out by the relations of the defunct in the prosecution of his death, together with an aliment to those of his relations who stood in need of being alimented, and whom the defunct would have been obliged to aliment; or whether it did not likewise contain something in *solatium* to the relations for the loss they had sustained. This last the Lords found." And the word is also used by Lord Kames in his Law Tracts discussing assythment.

It seems, therefore, tolerably certain that it had its origin in the action of assythment, and probably without very much consideration found its way into the action of damages. As to the modern action I do not think I can add to what is said by Lord President Inglis in the case of *Eisten*. Originally I take it the two actions stood side by side—at least that is what I should gather from the way in which Stair treats the subject in Book I. Title 9, sects. 4, 6 and 7. And probably the change from the old to the modern practice was not very well marked. The civil action could, of course, be in the Session alone, while assythment might be in Justiciary or modified in Exchequer or by action in the Session. But Justiciary and Exchequer came to be abandoned (see Lord Deas in *Greenhorn* v. *Addie*, 17 D. at p. 862). The transition stage is, I think, well marked by comparing *Black* v. *Cadell*, M. 13,905, which seems to go on assythment alone (and is accurately reported in Morrison under the heading of assythment), with *Brown* v. *M'Gregor*, which, although professedly based on *Black* v. *Cadell*, is clearly an *actio injuriarum* and not assythment. For the test I think is not doubtful, being that laid down in *Eisten*—viz., Was the act complained of a crime? In *Black's* case conceivably the defender might have been indicted for culpable homicide, though I infer that the chances of a conviction would have been remote. In *Brown's* case it would have been impossible. The end of it all is that, I think, *solatium*, borrowed from the action of assythment, has in the *actio injuriarum* come to mean reparation for feelings—in short, all reparation which is not comprehended under the heading of actual patrimonial loss. And as such it is, I think, a legitimate ingredient to consider the laceration of the feelings of the widow and family in contemplating the pain and suffering to which the deceased was exposed before death actually supervened. This answers the first question put, in the affirmative.

Turning now to the second question, I first enquire what are the supposed grounds on which the contention for enhanced damages rests, and I find they are two. Certain judges in *Morton's* case countenanced the idea that damages are partly imposed *in pœnam*, and that consequently if the fault is gross the penalty ought to be great. I do not think this view will bear a moment's examination. Take an accident like the present, where there were over a score of

sufferers. What is to be the province of each particular jury? Are the rights of each set of pursuers to depend upon the accident whether the defenders have been already sufficiently mulcted by a former jury? The whole argument seems to me so faulty that, if it were not that it has had the sanction of very eminent men, I should have used the term absurd.

The other ground is that, where fault is great, damages ought to be what is termed "exemplary." I am bound to say I find no authority for any distinction between damages and "exemplary damages" in the law of Scotland. The very heading under which it is treated in our older books, "Reparation," excludes the idea. There is, however, a great deal of authority in the law of England. I do not feel entitled, sitting in this Court, to review the English judgments. But I will permit myself two remarks. In the first place I will take as a specimen what is said in a well-known work, Mayne on Damages:—"If, then, malice can render an innocent act wrongful, it must therefore render a wrongful act more wrongful, and therefore be provable in aggravation of damages." It seems to me that the basis of this reasoning needs to be reconsidered in the light of the House of Lords' decision in *Allan* v. *Flood*, L.R. [1898], A.C. 1. In the second place, it seems to me that malice is the foundation of the doctrine, and that its application to the present class of cases is because *culpa lata dolo æquiparatur*. If, then, malice is the foundation, it surely cannot apply to cases where the person sued is not the actual wrongdoer, but is only held liable on the ground of *respondeat superior*. In the present case there is no averment of fault of system which could be laid at the door of the directors of the railway company. The "gross negligence," as alleged, is negligence of three separate officials, as to none of whom it is said that they were improperly selected for their posts.

I should like to add that I cannot agree with the Lord Ordinary when he says: "It is, I imagine, a fact in human nature that grief may be aggravated and loss embittered by the knowledge that the slightest care on the part of those causing the injury would have prevented the accident. On the other hand, if the case is only by a technicality outside the category of inevitable accident, the situation is accepted with greater resignation and the mind sooner recovers calmness." It seems to me that this all depends on the particular mind. To many it might be as the Lord Ordinary says. But to others it might be different. They would feel more acutely such a case as, *e.g.*, when a loosened brick from a bridge happened to fall on the head of a passenger at that moment looking out of the window. At any rate I do not think there is any general consensus of feeling on which a rule for awarding increased damages could be founded.

I therefore come to the conclusion that it is not relevant to enquire whether the accident was caused by gross or by ordinary negligence—in other words, that, if the defenders admit negligence, no more proof on the subject of the cause of the accident should be allowed, as to do so would tend to confuse the jury. If this is clearly understood by the presiding judge I think the form of the issue immaterial—I mean as between the two competing forms before us. Were the slate absolutely blank I might perhaps prefer that tendered by the defenders, and the reasons for doing so are well stated in a judgment of Lord Johnston in the case of *Hillcoat*, 15 S.L.T. p. 433. But, as I have already said, I think we are bound by authority to adopt the form proposed by the pursuers; and that form will not prevent me, if I am trying the case, from giving effect to the views I have already expressed in the admission or rejection of evidence. It will be for the House of Lords to approve or disapprove of these views, and I need scarcely say I shall hold myself bound to follow what is laid down by them, whether it does or does not agree with the opinion I have just delivered.

Lord M'Laren.—I agree with your Lordship's exposition of the principles upon which damages should be assessed in this case. With reference to the form of the issue, if we were not bound by precedent I should be disposed to prefer the form suggested by the defenders—what is the damage—on this ground, that I think that in our system of sending a question for the consideration of the jury it is always an advantage if the form of the issue comes as near as possible to the actual question which the jury have to try; first, because the form of the issue itself fixes the attention of the jury upon the precise question submitted to them, and also because it may have a restraining effect in preventing the jury from taking into account any extraneous considerations which they might imagine to be covered by an issue of a more general form. But I agree with your Lordship that the practice has been in favour of the issue proposed by the pursuers, and that the advantage of altering the form would not be sufficient to outweigh the general objection to altering forms that are well established.

Lord Kinnear.—I concur.

Lord Low.—I had the advantage of considering the opinion which has been read by his Lordship in the chair, and I entirely concur.

Lord Ardwall.—I concur in the judgment delivered by the Lord President, and have little to add.

I think that the degree of negligence or fault in cases of the class presently under consideration ought not to form an element in arriving at the amount of damages. It would be considered

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wrong that any judge should direct a jury who are trying an action of damages in respect of the death of a man killed in a railway accident, to the effect that they should find small damages because the fault which led to the accident was a slight one; and I think it would be equally wrong if, on the other hand, the judge should direct the jury that because there had been gross negligence on the part of the railway company's servants the amount of damages to be awarded ought to be increased. But while this is my opinion, I do not think it necessary or expedient to change the form of issue which has been found to work well in practice since 1845.

I may be allowed to add that in the course of thirty-five years' practice at the Bar it so happened that I was engaged at first as junior and latterly as senior counsel in a large number of actions of damages for injuries or death caused by alleged fault on the part of the defenders in such actions; in the great majority of these cases I acted for the defenders, and I cannot recal any case where an admission of liability having been made on record but not in the issue, time was wasted in the leading of unnecessary evidence. The usual course in such trials where the liability was admitted was that the narrative of how the accident occurred—which I think the jury are always entitled to hear so as to enable them to know the circumstances out of which the action arose—was allowed to be taken from one or, if necessary, more witnesses, and thereafter the judge stopped all further examination on the matter. If this be recognised as the proper practice, I think the want of an admission in the issue will not lead to any unnecessary prolongation of trials or waste of time in their conduct.

Further, I cannot recal any trial where the judge, if it was suggested by the pursuer's counsel that the jury should take into consideration in fixing the amount of damage the gravity of the fault on the part of the defenders or their servants, did not direct the jury that that was not a matter for them, but that what they had to assess was simply the loss, injury and damage caused to the pursuer. It may be that the experience of others may have been less fortunate than mine, but if that has been so, and if there has hitherto been any dubiety as to the judge's duty in this matter, that will be set at rest by the judgment in this case.

Further, I may point out that it is by no means impossible that if a rule such as the defenders contend for regarding admissions being inserted in issues were adopted, it might lead to some undesirable consequences. I may illustrate this from the present case. The issue proposed by the defenders contains an ample admission of fault, but as I read their answers on record there is no such admission of fault on record, but only an admission of liability for the purposes of the present action, and I would not approve of an issue consisting of a mere admission to the effect that the defenders admitted liability for the purposes of the action, followed by the bald question of amount of damages being sent to a jury; and it is possible that if the rule as to admissions proposed by the defenders were adopted, there might be frequent disputes and discussions as to the form that the admission should take. In the next place, I think that an issue in the form proposed by the defenders might have the effect of leading to captious objections to the admissibility of evidence which might be led for the legitimate purpose of putting the jury in possession of the facts out of which the action arose, and that the time of the Court and of the jury might thereby be wasted. I prefer that the issue should be kept in the established form, and that the judge presiding at the trial should, whenever necessary, direct the jury in the manner pointed out in the opinion just delivered by the Lord President.

The Lord President intimated that *Lord Stormonth-Darling* and *Lord Pearson*, who were absent at advising, also concurred.—18*th January* 1908.

Counsel for Pursuers, Dickson, K.C., Constable; Agents, Cadell, Wilson & Morton, W.S.—Counsel for Defenders, Clyde, K.C., Grierson; Agent, James Watson, S.S.C.

W. A. R.

OUTER HOUSE.

(*Lord Salvesen.*)

318. Clark-Kennedy *v.* Clark-Kennedy.

Husband and Wife—Divorce—Citation of Defender—Failure to Serve Personally—Evidence That Defender's Address Unknown.

This was an undefended action of divorce by a wife against her husband on the ground of adultery. The defender was designed in the summons as "Arthur John Clark-Kennedy, formerly of Knock Grays, Kirkcudbright, but whose present address is to the pursuer unknown."

The summons had been served edictally on the defender.

To prove the adultery the pursuer adduced (1) one woman who deponed that the defender in 1906 occupied a bedroom with one bed in a hotel in Bury St Edmunds, along with a woman not the pursuer; (2) a waiter in another hotel in Bury St Edmunds, who deponed that the defender and a woman, not the pursuer, occupied two rooms in the hotel in the spring of 1906; (3) another witness, who spoke to two visits by the defender and the same woman to the latter hotel.

Extracts were also produced from the hotel

books corroborating the statements of these witnesses.

The managing clerk of the pursuer's agent deponed that he had great difficulty in trying to serve a summons on the defender. He had applied to the defender's solicitor for his address, which was refused; but the defender's solicitor had written a letter to the effect that his client was aware of the divorce proceedings, and that they would come before the Court shortly; and that he would not appear to defend the case.

The Lord Ordinary continued the case until the letter from the defender's agent was produced, there being only a copy in Court.

Lord Salvesen said that there seemed to be an impression that it was enough for a party to an action of divorce to come and say that the defender could not be found, and that he or she did not know where that defender was. That was not enough. Edictal citation was the merest form, and there must be evidence upon which an interlocutor could be pronounced that it was proved to the satisfaction of the Court that the person could not be found.

Later in the day the principal letter was produced in Court, and decree of divorce was granted. — 25*th January* 1908.

Counsel for Pursuer, W. J. Robertson; Agent, F. M. H. Young, W.S. J. W. F.

OUTER HOUSE.

(*Lord Guthrie.*)

319. Collumb *v.* Turners Limited.

Reparation — Relevancy — Negligence — Child Killed While Playing With Trucks in Quarry—Trucks Safely Secured if Left Alone—Trespassers or Licensees—Action Dismissed as Irrelevant.

This was an action of damages brought by a quarryman against the quarry owners on account of the death of his son, a boy of six years of age. The pursuer's house opened into the public road, which was separated from the defenders' quarry by a branch line of railway properly fenced. A wicket gate in the railway fence gave access from the public road across the railway to the quarry. Some children, including the pursuer's son, crossed the railway and were playing in the quarry. The defenders' servants had left some bogie trucks loaded with stones standing on a sloping line of rails in the quarry; the trucks were secured by "sprags," or wedges inserted between the wheels of the trucks and the rails. One of the children intentionally or by accident knocked away the sprags so that one of the trucks rolled down the slope and pursuer's child was killed. The allegation of fault was that the defenders knew that the children from the quarrymen's houses on the public road would, unless prevented, come to play in the quarry. The wicket gate in the railway fence was left open by defenders' servants, therefore the pursuer's child was a "licensee"—that is, a person not invited but suffered to come upon defenders' premises. The pursuer's child was, in these circumstances, entitled to reasonable care and foresight on the part of defenders to avoid danger. He did not deny that if left alone the trucks were quite safe, but contended that defenders, knowing that children would come there to play, were negligent in leaving the trucks in such a position as to be easily set in motion by such conduct as would naturally be expected from young children. The fact that the fault of a third party had to intervene in order that the accident should happen did not excuse the defenders, if their original negligence was the real cause of the accident.

The defenders maintained that there was no relevant statement of fault. The pursuer's child was a trespasser, the trucks were properly spragged, and the accident was directly due to the fault of the child's companions. The wicket gate in the fence belonged to the railway company, therefore the defenders could not, if they wished, lock it as suggested by pursuer. Even if the child were treated as an invited person there was no relevant averment of fault.

In addition to cases referred to in the Lord Ordinary's opinion the pursuer cited *Findlay* v. *Angus*, 1887, 14 R. 312, and *Beveridge* v. *Kinnear*, 1883, 11 R. 387; and the defenders cited *Balfour* v. *Baird & Brown*, 1857, 20 D. 238; *Stark* v. *Garland & Roger*, 1905, 13 S.L.T. 422; *Hastie* v. *Magistrates of Edinburgh*, 1906, 14 S.L.T. 208.

The Lord Ordinary *dismissed* the action as irrelevant.

Lord Guthrie.—The defenders say that, on the pursuer's own averments, the child who was killed was a trespasser, in whose favour they could have no obligation in law to take the precautions desiderated in Condescendence 3. The pursuer's counsel founded on the following averment in Condescendence 3:—"These defenders and their workmen were well aware of the fact that children were in the habit of crossing the railway line, and using defenders' ground and bogie line as a playground." He did not maintain, however, that this averment, coupled with the averment in the same condescendence that the wicket gate leading on to the siding was habitually used by the defenders' workmen and was habitually allowed to stand open, would raise a case of invitation. It is not necessary, therefore, to consider such cases as *Ross* v. *Keith*, 1888, 16 R. 86; *Prentice* v. *Assets Company*, 1889, 17 R. 484; *Johnston* v. *Stewart & Sons*, 1897, 25 R. 103, 5 S.L.T. p. 188, *Horsburgh* v.

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Sheach, 1900, 3 F. 270, 8 S.L.T. p. 321; *Devlin* v. *Jeffray's Trs.*, 1902, 5 F. 130, 10 S.L.T. p. 375; *Cummings* v. *Darngavil Coal Company*, 1903, 5 F. 513, 10 S.L.T. p. 660. I think the pursuer's averments do not raise any case of invitation. The ground where the child was killed was isolated from the road by an intervening North British Railway branch line, which line was fenced off from the road. The wicket gate alleged to have been habitually used by the defenders' workmen and alleged to have been left by them, or in their knowledge, habitually open, was in the North British Railway Company's fence. The defenders are blamed for not having had a proper lock and bolt fixed in this wicket gate. Obviously, however, they would not have been entitled to interfere in any way with the gate. But if the child was not on the spot by the defenders' invitation, the pursuer's counsel maintained that he was at least there as a "licensee"—that is, one whose habit of resort is known to the defenders and has not been objected to by them. If so, the pursuer says that the defenders were bound to have seen that the premises were in a condition of reasonable safety for such licensees. In the case of *Tolhausen* v. *Davies*, 1888, 57 L.J. (Q.B.D.) page 392, quoted by the pursuer, the law was thus laid down by Mr Justice Smith: "The owner of premises is under no liability to a licensee unless something in the nature of a trap or concealed danger exists, for the licensee must take the premises as he finds them, and there is no obligation to alter the premises for his safety or convenience. He must take them as they are for better and for worse. Where, however, misfeasance is what is complained of, it is the duty of the owner of the premises not to neglect to use ordinary care and skill towards the licensee in what the owner is doing, so that the licensee may not thereby be injured. If the owner does so neglect and the licensee is thereby injured, the owner is liable."

In my opinion the pursuer's averments disclose that his son had not only been a trespasser when crossing the North British Railway Company's branch line, but that he was on the defenders' premises as a trespasser, and I doubt whether the category of "licensee" is one recognised in Scots law. But assuming that the law of Scotland recognises the licensee as a class midway between the trespasser and the person invited, and assuming that the boy was on the spot in question not as a trespasser but as a licensee, then I am of opinion that the pursuer's averments do not come up to such a case of neglect of ordinary care and skill towards the licensee as would entitle him to an issue. It is said that the accident happened because "another boy of the same age, who was playing at the side of the said bogie, either removed a piece of wood used as a sprag from the front of one of the wheels of the said bogie, or accidentally struck the same with his foot." But it is not alleged (*a*) that anything of this kind had ever taken place before; or (*b*) that the sprag which the boy removed or loosened was unsuitable for the purpose or had not been driven home; or (*c*) that the method of spragging employed is not the usual method for securing waggons in similar circumstances. It is not denied that but for the interference of the other boy no accident would have happened. The pursuer founded on the series of cases where it has been held that the mere fact that a defender's negligence would have been harmless but for the intervention of a third party does not prevent liability attaching to the person guilty of initial negligence (see *Clark* v. *Chambers*, 1878, L.R. 3 Q.B.D. 327; *Englehart* v. *Farrant* [1897], 1 Q.B. 240; *M'Dowall* v. *Great Western Railway* [1902], 1 K.B. 618, [1903], 2 K.B. 331; *Gallagher* v. *Humphrey*, 1862, 6 Law Times N.S. 684; *Campbell* v. *Ord*, 1 R. 149; *Sullivan* v. *Creed*, 1894, 2 I.R. 317). But in all these cases the original negligence was relevantly stated. Here I see none such averred. And, further, in none of these cases was the person injured in the position of a licensee. He was either in a public place, or present by the defender's express or implied invitation.—31*st January* 1908.

Counsel for Pursuer, J. A. Christie; Agents, St Clair Swanson & Manson, W.S.—Counsel for Defenders, G. Watt, K.C., Mercer; Agents, J. & A. Hastie, Solicitors. A. S. P.

OUTER HOUSE.

(*Lord Guthrie.*)

320. Pybus *v.* Mackinnon.

Slander — Relevancy — Factor Accused of Being "Unfaithful" — "The Unjust Steward" — Innuendo of Dishonesty — Issues Allowed.

This was an action of damages brought by a factor against his employer for slander, and, *separatim*, for assault. The pursuer had the management of the defender's estate during his absence abroad. The pursuer averred that on his return the defender accosted him, the pursuer, asked him if he were an honest man, then told him he was a liar, accused him of being "unfaithful" as a factor, and likened him to "the unjust steward" in the parable; and that he also told third parties that the pursuer had been "unfaithful" to him. He also alleged that the defender had made an unprovoked assault upon him, after he had resigned his position as factor and when he was superintending the removal of his own furniture from the factor's house which he had formerly occupied. The defender did

not dispute the relevancy of the averments with regard to the assault.

The issues as adjusted by the Lord Ordinary shew the incidents founded on by the pursuer as constituting the slander complained of.

1. Whether, on or about the 29th day of April 1907, and in or about the stableyard at Lanfine, Newmilns, Ayrshire, the defender asked the pursuer whether he was an honest man, and on the pursuer answering that he was, said to the pursuer that he was a liar; whether, time and place aforesaid, the defender also asked the pursuer if he knew the story of the unjust steward, and said to the pursuer that he had been an unjust steward; and whether, time and place aforesaid, the defender also said to the pursuer that he had been unfaithful; or whether the defender did, time and place aforesaid, utter to the pursuer words of a like import and effect; and whether the said statements falsely, calumniously, and maliciously represented that the pursuer, in administering the defender's estate, had been unfaithful to his trust, and had been dishonest, to the loss, injury, and damage of the pursuer?

2. Whether, in or about the beginning of September 1907, and at Lanfine aforesaid, the defender said to Robert Gibb, farmer, Newfield, that the pursuer had been unfaithful to him, or used words of a like import and effect, of and concerning the pursuer; and whether the said statement falsely and calumniously represented that the pursuer, in administering the defender's estate, had been unfaithful to his trust, and had been dishonest, to the loss, injury and damage of the pursuer?

3. Whether, on or about the 13th day of September 1907, and in or near the factor's house at Lanfine aforesaid, the defender said to George Adams, inspector of police, Newmilns, that he had unsettled claims against the pursuer, and that the pursuer had been unfaithful to him, or used words of a like import and effect of and concerning the pursuer; and whether the said statement falsely and calumniously represented that the pursuer, in administering the defender's estate, had been unfaithful to his trust, and had been dishonest, to the loss, injury, and damage of the pursuer?

The defender argued that the word "liar" was not actionable, especially when spoken *in rixa*, as was clearly the case here. The word "unfaithful" was not in itself actionable. The incident referred to in the first issue was clearly all *in rixa*, the statements in the second and third could not reasonably bear an innuendo of dishonesty, and the pursuer was not entitled to bolster them up by a reference to the first (*Cockburn* v. *Reekie*, 1890, 17 R. 568; *Watson* v. *Duncan*, 1890, 17 R. 404; *Christie* v. *Robertson*, 1899, 1 F. 1155; *Agnew* v. *British Legal Life Insurance Co. Ltd.*, 1906, 8 F. 422; *Broomfield* v. *Greig*, 1868, 6 M. 563).

The pursuer maintained that a factor is in a position of trust, and that a charge of unfaithfulness, combined with express questioning of his honesty, was manifestly injurious to his professional reputation as a factor, and therefore actionable. He admitted that malice must be proved in the first issue, because the relation of factor and proprietor was privileged in the circumstances alleged, but that did not apply to the second and third issues. The pursuer referred to *Ritchie & Co.* v. *Sexton*, 1891, 18 R. (H.L.) 20; *Dunn* v. *Bain*, 1877, 4 R. 317.

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The Lord Ordinary allowed the issues as adjusted *supra*.

Lord Guthrie.—The defender raises no question on the last issue, that relating to the alleged assault. He objects to the other issues on the ground that the construction put by the pursuer on the words alleged to have been used is forced and unreasonable. Clearly, such an expression as "you are a liar," spoken *in rixa* is not actionable (*Watson* v. *Duncan*, 1890, 17 R. 404; and *Agnew* v. *British Legal Life Assurance Co. Ltd.*, 1906, 8 F. 422; see also *Cockburn* v. *Reekie*, 1890, 17 R. 568, and *Christie* v. *Robertson*, 1899, 1 F. 1155). But the comparison, by a landlord to his factor, of that factor to "the unjust steward," and the charge of unfaithfulness brought by a landlord against his factor, are reasonably capable of a slanderous meaning. Some might think that the actings of the unjust steward, not having been beyond his mandate, and not involving any immediate pecuniary benefit to himself, were nothing more than astute, while others might consider that these actings, resulting as they did in nothing but loss to the employer and in indirect advantage to the steward, were in breach of trust and dishonest. As to the charge of unfaithfulness, it may merely mean that the factor has been careless and neglectful, or it may mean that he has been dishonest (*Mitchell* v. *Grierson*, 1894, 21 R. 367, per L.P. Inglis, 369, middle). The pursuer innuendoes dishonesty on record. He now proposes to confine the innuendo in his issue to unfaithfulness to trust, and not to include dishonesty. I think, on the lines suggested by the Lord President in *Mitchell's* case, that dishonesty should go into the innuendo.—*1st February* 1908.

Counsel for Pursuer, G. Watt, K.C., Constable; Agents, Oliphant & Murray, W.S.—Counsel for Defender, Horne; Agents, Carmichael & Miller, W.S. A. S. P.

BILL CHAMBER.

(*Lord Guthrie.*)

321. The Bank of Scotland *v.* Youde.

BANKRUPTCY—PETITION FOR SEQUESTRATION — COMPETENCY—EXISTING ENGLISH SEQUESTRATION — PETITION REFUSED — BANKRUPTCY (SCOTLAND) ACT 1856 (19 & 20 VICT. CAP. 79), SECT. 18—BANKRUPTCY ACT 1883 [ENGLISH] (46 & 47 VICT. CAP. 52), SECT. 82 (4).

The Bank of Scotland presented this petition for sequestration of the estate of Robert Youde, who had carried on business as an advertising agent in Edinburgh and resided in Portobello,

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within one year of the date of presentation. On 20th December 1907 the Lord Ordinary made the usual order for intimation and service, and granting diligence to the petitioners "... to recover evidence of notour bankruptcy and of the other facts necessary to be established. ..."

Appearance was entered for the respondent, who was furth of Scotland at some address unknown to the petitioners. He pleaded, firstly, no jurisdiction, because no proof was produced by the petitioners that he had been resident in Scotland within forty days of the date of presentation of the petition. He was admittedly English by origin, and there was no other ground of jurisdiction averred.

Secondly, he was an undischarged bankrupt in England, and although the trustee in that bankruptcy was discharged in 1894, the bankruptcy was still alive in the hands of the official receiver by reason of sect. 82 (4) of the English Bankruptcy Act 1883 (46 & 47 Vict. cap. 52) which enacts —

> Where the trustee has not previously resigned or been removed his release shall operate as a removal of him from his office, and thereupon the official receiver shall be the trustee.

The respondent referred to the cases mentioned by the Lord Ordinary in his opinion and to sect. 18 of the Bankruptcy (Scotland) Act 1856 (19 & 20 Vict. cap. 79) which enacts as follows :—

> ... Provided that no sequestration shall be awarded by any Court after production of evidence that a sequestration has already been awarded in another Court and is still undischarged.

The petitioners offered to prove that the English sequestration was practically dead. The trustee was released in 1894, and in 1897 the bankrupt, having paid off all his creditors privately, applied for his discharge, which was not opposed by the official receiver or any one else, but was refused by the Court on the ground that the bankrupt having failed to lodge accounts as ordered, was "in contempt of Court." To allow this dead English sequestration to stand in the way of the present application was to enable the debtor to avoid his Scottish creditors under cover of his own offence against the English Court. There was nothing incompetent in concurrent sequestrations (*Kellock* v. *Anderson*, 1875, 3 R. 239 ; *Taylor* v. *Charteris*, 1879, 7 R. 128 ; *Abel* v. *Watt*, 1883, 11 R. 149 ; *Gibson* v. *Munro*, 1894, 21 R. 840).

The Lord Ordinary *sustained* the second objection and *refused* to grant sequestration.

Lord Guthrie. — The respondent objects to sequestration on two grounds. First, he pleads no jurisdiction. He points to the opening words of sect. 13 of the 1856 Bankruptcy Act: "Sequestration may be awarded of the estate of any person in the following cases ; first, in the case of a living debtor subject to the jurisdiction of the Supreme Courts of Scotland," and he submits that there is no evidence before me to shew that he, admittedly of English origin, not alleged to be the owner of any Scotch heritage, and who left Scotland more than forty days before the service of this petition, is subject to the jurisdiction of the Scotch Courts. It is clear that evidence on this point is as necessary as evidence of notour bankruptcy and residence or possession of a Scotch dwelling-house or place of business within a year before the date of the presentation of the petition. Evidence that the respondent was subject to the jurisdiction of the Scots Courts was "one of the other facts necessary to be established" referred to in my interlocutor of 20th December 1907. No such evidence has been produced, and I therefore cannot award sequestration.

Second, the respondent is admittedly an undischarged English bankrupt. He was adjudicated a bankrupt in England in 1891. The trustee was discharged in 1894 ; but the only effect of this under the English Bankruptcy Act of 1883 (46 & 47 Vict. cap. 52) was to throw the matter into the hands of the official receiver. The petitioners offer to prove that the English sequestration is at present what they call "a dead letter." But so far, at least, as the Scotch Courts are concerned, there is either an English sequestration or there is not. It is admitted there is such a sequestration. If so, that is a sequestration which must affect the whole estates of the bankrupt wherever situated, and therefore leaves no room for a Scotch sequestration (*Goetze* v. *Aders, Preyer & Co.*, 1874, 2 R. 150 ; *Phosphate Sewage Co.* v. *Lawson*, 1878, 5 R. 1125 ; *Young* v. *Buckel*, 1864, 2 M. 1077).—*1st February* 1908.

Counsel for Petitioner, C. H. Brown ; Agents, Tods, Murray & Jamieson, W.S.—Counsel for Respondent, Munro ; Agents, Simpson & Marwick, W.S.

A. S. P.

BILL CHAMBER.

(*Lord Guthrie.*)

322. Booth *v.* Mackinnon.

I. PROCESS — PETITION — INNER OR OUTER HOUSE—DISTRIBUTION OF BUSINESS ACT 1857 (20 & 21 VICT. CAP. 56), SECT. 4 —PETITION FOR JUDICIAL FACTOR ON PARTNERSHIP ESTATE—ACTION BETWEEN PARTNERS PENDING IN SHERIFF COURT—PETITION HELD COMPETENT IN OUTER HOUSE.

II. PROCESS—PETITION FOR JUDICIAL FACTOR —COMPETENCY—PETITION MUST CONTAIN CRAVE FOR SEQUESTRATION OF ESTATE EXCEPT IN CASE OF LAPSED TRUST.

Arthur Booth and Archibald Mackinnon were partners carrying on a licensed business in Glas-

gow. This was a petition brought before the Lord Ordinary on the Bills for appointment of a judicial factor on the co-partnery estate. Arthur Booth provided the most of the capital, Mackinnon was the practical manager, and the licence for the partnership premises was issued in his name. On 19th December 1907 Booth presented a petition in the Sheriff Court at Glasgow to interdict Mackinnon from preventing him (Booth) exercising his rights as a partner, averring that he, Mackinnon, claimed that the business was his own, and refused to allow him access to the premises or books of the co-partnery. Interim interdict was granted in the Sheriff Court on that date. On 24th December 1907 Arthur Booth presented this petition for a judicial factor, averring that the respondent Mackinnon made it impossible to carry on the co-partnership business, that he, the petitioner, was raising an action in the Court of Session for dissolution of the partnership, and that meanwhile it was necessary to appoint a judicial factor to take over the management of the co-partnery affairs in order to protect the interests of the petitioner and the goodwill and assets of the business. The prayer of the petition did not conclude for sequestration of the co-partnery estate. The respondent objected on the following grounds:—

1. The petition being incident to an action presently depending, cannot be competently brought before the Junior Lord Ordinary under sect. 4 of the Distribution of Business Act 1857.
2. The appointment of a judicial factor is incompetent so long as the partners are vested in the partnership's business and property.
3. The licence for carrying on the business being in the respondent's name, the appointment of a judicial factor would involve the closing of the business premises, and the probable loss of the licence, being the main asset of the business.
4. A judicial factor could not competently carry on the business of the co-partnership.
5. No reason exists for superseding the respondent in the management of the business; and
6. The respondent is, and has all along been, ready and willing to fulfil the terms of the co-partnership agreement.

Sect. 4 of the Distribution of Business Act 1857 (20 & 21 Vict. cap. 56) enacts as follows: "All summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the Junior Lord Ordinary. . . ."

The Lord Ordinary *held* that the section of the Distribution of Business Act founded on only referred to actions in the Court of Session; but that the estate must in any event be sequestrated before a judicial factor could be appointed, because awkward questions might arise between the officer of the Court and "trustees whose management had not been formally suspended or superseded."

The Lord Ordinary further *held* that he could not appoint a judicial factor on the information before him in the petition, answers, and replies for petitioner; he therefore allowed parties a proof of their averments.

Lord Guthrie.—The respondent objected to the competency of this petition on the ground that, being incident to an action of interdict actually depending at the time of presenting the petition in the Sheriff Court of Glasgow between the same parties, it could only be brought, under the Distribution of Business Act (20 & 21 Vict. cap. 56), sect. 4, in the Inner House. It appears to me that the section of the Act relied on, like the whole other sections of the Act, refers only to actions or causes in the Court of Session. I therefore repel this objection.

The respondent also objected to the petitioner's original proposal that the Court should appoint a judicial factor without sequestrating the estate. I think this objection is sound. So far as can be ascertained, the practice on appointments of judicial factors, except in the case of lapsed trusts, is to sequestrate the estate. The objection to this being done seems merely sentimental, and the absence of sequestration might lead to awkward questions between trustees whose management had not been formally suspended or superseded and the officer of Court. But this objection has been cured by amendment.

The respondent also objected to the petitioner's proposal for the appointment of a factor whose only duties should be to receive the drawings from the licensed business, and to consult with the respondent, the holder of the licence in trust for the co-partnery, in regard to all orders for stock. But the petitioner did not confine himself to this limited crave; but, if it is refused, he asked for the appointment of a judicial factor with the usual powers, the result of which would be that the factor would be entitled to displenish the licensed shop, so far as stocked with partnership goods, and the respondent, being the only licensee, could restock the shop out of his own funds and carry on the business until the termination of the licence.

In any view of the rights of parties, I do not see my way to dispose of this petition without enquiry. I could not appoint a factor, either with full or with limited powers, without evidence of the accuracy of the petitioner's averments. No doubt the respondent makes certain qualified admissions, and his conduct in relation to the Sheriff Court interdict seems to have been indiscreet enough. But neither the evidence nor the admissions before me would warrant the appointment of a judicial factor. I have in view the dependence of the action

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before Lord Salvesen for dissolution of the co-partnery. The proof ordered by me may shew that the partnership estate is in such danger as to necessitate the appointment asked, pending that action. On the other hand, it may appear that the explanations given by the respondent in his answers are well founded and sufficient.—1*st February* 1908.

Counsel for Petitioner, Macrobert; Agent, A. C. D. Vert, S.S.C.—Counsel for Respondent, Horne; Agents, Alex. Morrison & Co., W.S. A. S. P.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

323. The American Mortgage Company of Scotland Limited *v.* Sidway and Another.

Diligence—Arrestment—Arrestment Ad Fundandam Jurisdictionem — Subjects Arrestable—Held that Shares in a Company Were Arrestable to Found Jurisdiction.

(*Reported ante, Vol. XIV. pp.* 521, 924; *supra, p.* 687.)

The Defenders *reclaimed* against the interlocutor of the Lord Ordinary repelling their first plea in law, "No jurisdiction."

Argued for Defenders and Relaimers: Arrestment was not competent diligence. Shares in a limited company were in a different position from shares in an ordinary partnership. In the former case the shareholders had no right in the Company's assets. These belonged only to the Company, not to the individual shareholders (Lindley on Companies, I. 544, 6th ed.; *Lee* v. *Neuchatel Asphalte Co.*, 1899, 41 Ch. D. 1, per Lord Lindley at 23; *Foster & Sons Ltd.* v. *Inland Revenue Commissioners* [1894], 1 Q.B. 516, per Kay, L.J., at 530; *In re Newmann & Co.* [1895], 1 Ch. 674 at 685). There were four essentials to the arrestability of a subject: (1) The arrestee must be under a direct obligation to pay or deliver the subject arrested. (2) He must be a debtor at the date of the arrestment. (3) The arrestee must have possession of the subject arrested. (4) The subject must be capable of being made available in a furthcoming. There were two qualifications to these rules: (*a*) A claim for an accounting was allowed. (*b*) Joint property was not arrestable for the debt of one of the co-owners (*Lucas's Trs.* v. *Campbell & Scott*, 1894, 21 R. 1096). The authorities for these propositions were Ersk., III. 6, sects. 6, 8, 15–17; Bell's Com., II. 69, 71; *North* v. *Stewart*, 1890, 17 R. (H.L.) 60, per Lord Watson at 63, 64; *Heron* v. *Winfields Ltd.*, 1894, 22 R. 182, per Lord Kinnear 185; *Wyper* v. *Harrison, Carr & Co.*, 1877, 4 R. 444, per Lord President Inglis 446; *Leggatt Bros.* v. *Moss' Empires Ltd.*, 1907, 15 S.L.T. 533, per Lord President 536, and Lord Kinnear 538; Bell's Prin., sect. 2283. An arrestment of a contingent claim was the same in substance as that of the arrestment of a share in a company. A person buying a share in a company bought a chance of sharing in the capital of the company in the event of it being wound up, or a chance of a dividend in the event of profits being earned and a dividend being declared. There was no obligation which might be made furthcoming at the date of the arrestment. It was distinguished from a share in a partnership in this, that a partner was always entitled to call his co-partners to account, and an accounting might be ordered at any time. That could not be done in a company. Therefore in a partnership there was an arrestable interest which did not exist in a company (*Douglas* v. *Jones*, 1831, 9 S. 856; *Baines & Tait* v. *Compagnie Général des Mines d'Asphalte*, 1879, 6 R. 846; *Napier, Shanks & Bell* v. *Halvorsen*, 1892, 19 R. 412; *Lucas's Trs.* v. *Campbell & Scott, cit.*, per Lord Kinnear 1106). With reference to arrestment of current rents see More's Notes, p. 286. As to the cases cited for the pursuers in the Outer House, *In re National Bank of Wales* [1897], 1 Chan. 298, and *Lindsay* v. *The London and North-Western Railway Company*, 1860, 22 D. 571, did not affect the question either way, so far as the decisions went, although in the latter case the judges assumed that shares were arrestable. But in neither that case nor *Sinclair* v. *Staples*, 1860, 22 D. 600, was the question argued as it was being argued now. The proper and competent diligence against shares was adjudication, which extended to moveables when arrestment was not competent (Stair, III. 2, 48; More's Notes, p. 299; Ersk., II. 12, 48; Parker on Adjudications, p. 16; *Barbour* v. *M'Minn*, 1826, 4 S. 806; *Morrison* v. *Harrison*, 1876, 3 R. 406, per Lord Justice-Clerk Moncrieff at 409).

Counsel for the pursuers and respondents were not called on.

The Court *adhered.*

The Lord President.—My Lords, in this case jurisdiction is alleged to have been founded against the defenders by the arrestment of certain shares belonging to them in a limited company registered in Scotland under the Companies Act 1862 and the subsequent Acts; and the objection made is that, inasmuch as in the case of this particular company no dividend was at that moment payable and unpaid, there was nothing due by the Company to the common debtor, who was the shareholder, and that consequently there was nothing arrested. We have had a very ingenious and a very interesting argument from Mr Watson, and indeed it needed one. It is a somewhat startling proposition to find at this time of day, over forty years after 1862, that the practice, which has

certainly been going on all this time, of arresting shares of limited companies, is radically wrong. Although there may not have been many cases of arrestment of shares *juridictionis fundandæ causa*, there certainly have been countless cases of arrestment in execution; and it is quite evident that the two matters depend upon the same principles. If this is a bad arrestment *jurisdictionis fundandæ causa*, it would have been an equally bad arrestment in execution. I think that, as a mere matter of authority, the question is decided by the case of *Sinclair* v. *Staples*, 1860, 22 D. 600. *Sinclair* v. *Staples* was decided no doubt upon an earlier Act—before the Companies Act of 1862—but the provision of the earlier Act was the same as in the present series of Acts—namely, that shares in a joint-stock limited liability company are declared to be personal property. Accordingly the decision directly applies. The case there was put, so to speak, the other way. The action was one of adjudication, and the first plea stated by the defenders was against the competency of the action, the defenders saying that adjudication was wrong because arrestment was the proper diligence. Accordingly the whole argument turned upon that matter, and the action of adjudication was dismissed upon the ground that arrestment was competent. The mere statement of the case shews that it is a direct authority. Mr Watson, however, says, and I think says truly, that so far as one can gather from the report the point was not argued in precisely the same way as it has been argued to-day.

But, my Lords, I do not think that the argument to-day alters the authority of that case. I think the matter is exceedingly well put by the Lord Ordinary. After stating that the objectors here do not deny that it is quite competent to arrest in the hands of a partnership the right, whatever it is, of the partner in an ordinary partnership, the Lord Ordinary goes on to say this: "But the defenders deny that the rule regulating ordinary partnerships applies to shares in limited joint-stock companies. They found on the principle enunciated in many English cases, such as that of *In re George Newman* [1895], 1 Ch. 674, per Lord Justice Lindley, at p. 685: 'An incorporated company's assets are its property, and are not the property of the shareholders for the time being.' From this they argue that no debt was due by the Missouri Land Company Limited to the defenders at the date of arrestment, and therefore their shares in that company could not be arrestable. This seems to me to involve a confusion of ideas. As Mr Bell put it (II. Com. p. 71), 'It is the obligation to account which is the proper subject of attachment.'"

Now, my Lords, I think that is the whole substance of the matter. It seems to me there is an obligation to account, in the sense in which Mr Bell puts it, between the limited company and the shareholders of that company, and that this obligation is not at all touched by the doctrine laid down by Lord Justice Lindley as to which I take it there is no doubt whatsoever. It must be remembered that Lord Justice Lindley was speaking as an English lawyer, and naturally had before his mind the fact that according to the English law of partnership what one might call the partnership assets really belong, in a way which we should call *pro indiviso* property, to the various partners. My Lords, there will be found a learned judgment of my brother Lord Kinnear in the case of *Parnell* v. *Walter*, 1889, 16 R. 917, which describes the nature of the rights that a partner in England has in the assets of the partnership. Lord Justice Lindley points out that that is altered when you come to an incorporated company where the property in any particular asset does not belong to the shareholders of the company but belongs to the company. That, in Scotland, is a very familiar notion, because in our law in an ordinary common law partnership the partnership has always been considered a separate *persona*. Accordingly the doctrine that the partnership assets do not belong to the partners but belong to the partnership has always been held quite consistent with our well-established Scottish doctrine that a share of a common law partnership is perfectly well arrestable. My Lords, it seems to me that the point put by Mr Bell is the true criterion. It is the obligation to account which is the subject of attachment, and the obligation to account does not mean that there is then and there a debt due in the sense of something due and payable. That will depend upon circumstances, and the circumstances will vary according to the particular deed of partnership, or according to the particular constituent deed which makes the limited company. I am aware that the right of the shareholder to have a payment made to him (in proportion to his share) of profits that have been earned in the limited company is not a direct right, because, before he can get it, these profits have to be declared as a dividend, and the declaring as dividend is an operation which rests on the will of the properly constituted authorities of the company according to the company deeds, that is to say, its memorandum and articles of association. In the same way in a private partnership the particular time at which a partner might say, "Now you have made profits; give me my share," will depend entirely upon the provisions of the partnership deed. There might be a partnership deed in which it was covenanted between the partners that they should not draw any profits until the expiry of the partnership. There might, on the other hand, be a stipulation, and it is a very common one, that the drawings during the currency of the partnership should be limited to

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The Lord President.

a certain amount, and there would be no objection to adding to that stipulation that the payment of the certain amount should only be at certain seasons of the year. So that it would be perfectly possible to put your finger upon a date in a private partnership when it would be impossible for a partner to say, "Pay me something"; and yet, notwithstanding, there has never been any doubt in our law that the obligation to account is an arrestable subject.

The truth is that any difficulty which exists is really a metaphysical one, and is, I think, satisfactorily dealt with by Lord Cowan in the case of *Sinclair* v. *Staples*, and the metaphysical difficulty seems to me precisely the same whether you take the case of a private partnership in Scotland, or the case of shares in a joint-stock company, because there is a separate *persona* in a Scottish partnership which corresponds exactly with the separate *persona* of an incorporated company. I am of opinion that it would be a great pity to alter the law, and I do not think there is any reason for doing so. The case of *Sinclair* v. *Staples*, which has ruled the practice for nearly half a century, ought, I think, to be followed here. Accordingly I am of opinion that the Lord Ordinary's interlocutor is right, and ought to be adhered to.

Lord M'Laren.—I think the Lord Ordinary's decision is right, and put on the right grounds. The nature of the subject arrestable is not always the same. Some things are arrestable upon one ground and others upon a different ground. In this case the subject is said to be arrestable in the hands of the company because of the principle of accountability to a shareholder by the company. In Scotland we are not embarrassed by a distinction which exists in the law of England—I mean the distinction between a private partnership and a public company, because the law of Scotland recognises a separate *persona* in a private partnership: so much so that in an action against a social firm it is not even necessary to call one of the partners. In this respect I think there is nothing but a formal difference between the right of a partner in a private partnership and the right of a shareholder in a company incorporated under the Companies Acts. Of course, if it could be shewn that there was no way in which the company could be made responsible to its shareholders, in an action for the protection of their interests, then the *substratum* of the doctrine that these shares are arrestable would be gone. But then that is not the law, because although no doubt the determination of the rights of the shareholders rests with the company itself, either through the directors, or in certain matters through meetings of the whole body of shareholders, yet a company managed by dishonest directors, or a dishonest majority of the shareholders acting oppressively and in such a way as to prejudice the legal rights of a minority of the shareholders, or the legal rights of even a single shareholder, can be compelled to give redress. That, I think, shews that the interest or right of the shareholder is always something which, though held by the company, must be administered for his behoof. I think it also shews that the relation between the company and the shareholder is not merely a theoretical but a very real and practical one, that, when necessary, the rights of the shareholders are under the protection of the law. It is true that in the ordinary case the shareholder can only establish his interest through the company, yet, if the company refuse redress, his interest does not fail but can be made effectual through the Court. I agree that the question is exactly the same whether we are dealing with an arrestment to found jurisdiction or an arrestment in execution. In either case the arrestment of shares in a company registered in Scotland is a sufficient ground for putting diligence in force.

Lord Kinnear.—I agree with your Lordships. The question, like every other question of diligence, is highly technical, and therefore we are all the more bound to follow the decisions which have stood for a long series of years and have fixed the practice. Nobody disputes that a share in a joint-stock company is attachable for the debt of a shareholder, and the only question is whether the proper diligence to attach to it is arrestment or adjudication. I say that is the only question, because it has not been suggested that it can be reached by poinding or that it is protected from attachment altogether. Now I think there is a series of decisions which would govern this case even apart from the decision in *Sinclair* v. *Staples*—I mean decisions to the effect that the interest of a partner in an ordinary copartnery is attachable by arrestment even although it may be said that there is no money due at that moment to the partner, and although upon an accounting it might be found that there was no balance in his favour. I should have thought these cases in point; but any doubt I should have had is entirely removed by the decision in *Sinclair* v. *Staples*, which is to my mind a decision directly in point, and which I think we are bound to follow.—31*st January* 1908.

Counsel for Defenders and Reclaimers, T. B. Morrison, K.C., Hon. W. Watson; Agents, Webster, Will & Co., S.S.C.—Counsel for Defenders and Respondents, Campbell Lorimer, K.C., Horne; Agents, J. K. & W. P. Lindsay, W.S.

F. A. U.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

324. Rudman *v.* Jay & Company.

REPARATION—WRONGOUS USE OF DILIGENCE—DECREE AD FACTUM PRÆSTANDUM OBTAINED IN ABSENCE—PARTY DECERNED AGAINST IMPRISONED FOR FAILURE TO IMPLEMENT DECREE—ACTION OF DAMAGES—AVERMENT THAT PARTY IMPRISONED UNABLE, TO KNOWLEDGE OF PARTY DOING DILIGENCE, TO IMPLEMENT DECREE WITHOUT COMMITTING CONTEMPT OF COURT—AVERMENTS WHICH HELD INSUFFICIENT TO SUPPORT ACTION OF DAMAGES.

Reclaiming Note against an Interlocutor of Lord Johnston.

This was an action of damages for wrongous use of diligence brought by Trevor Inglis Rudman, civil engineer, Edinburgh, against Jay & Co., furniture dealers, Glasgow.

The following narrative of the pursuer's averments is taken from the judgment of the Lord Ordinary.

This is an action for damages for wrongous arrestment and imprisonment, on a warrant to imprison obtained after an expired charge *ad factum præstandum*. The alleged circumstances are these:—The pursuer Rudman states that in November 1905 he obtained from the defenders Jay & Company, cabinetmakers, Glasgow, upon a hire and purchase agreement, No. 7 of process, certain articles of furniture, which in November 1906 were still in his possession, and constituted the whole plenishing of his house, 12 Inverleith Gardens, Edinburgh. At the latter date the pursuer was in arrear both with the rent of his house and with the instalments due under the hire and purchase contract. Accordingly, on 20th November 1906, his landlord sequestrated the furniture in said house for rent past due and to become due. There was included in the inventory under this sequestration the whole of the articles belonging to the defenders, and possessed by the pursuer under said hire and purchase contract. They remained under the sequestration till a point of time posterior to the circumstances upon which this action of damages is founded. The pursuer next states that, in the end of November and after the landlord's sequestration had attached, the defenders, as they were entitled to do, he being in arrear with the instalments under the hire and purchase contract (see head 3 of No. 7 of process), sent their representative with a waggon to his, the pursuer's, house to remove their furniture, but that, on his wife informing him of the landlord's sequestration, and exhibiting to him the schedule of sequestration, their representative declined to intermeddle with the furniture. The pursuer further states that on 20th November 1906 one of his creditors presented a petition for cessio against him in the Sheriff Court at Edinburgh, on which decree of cessio was pronounced on 22nd January 1907. The pursuer alleges that in consequence of the said decree of cessio he left his house at Inverleith Gardens, leaving the furniture in question in it, and informed the trustee in his cessio that he had done so. This, however, was not sufficient to vest the trustee in the cessio in possession of the furniture, or in any way to vest him with a title to it. It is not averred that the pursuer has executed a disposition *omnium bonorum*, nor that the trustee has actually taken possession of the furniture.

In these circumstances the defenders, on the 4th February 1907, raised an action in the Sheriff Court at Edinburgh against the pursuer for decree, ordaining him to deliver the articles of furniture in question to them. That the pursuer was personally served with this summons he impliedly admits, as he alleges that he handed the citation to the trustee in his cessio, and did not himself defend the action. It is common ground that the trustee in the cessio was sisted in this action, and, for his interest, consented to decree being pronounced as concluded for, and that decree in absence was pronounced against the pursuer, with £18, 1s. 10d. of taxed expenses. On 3rd May 1907 the defenders gave the pursuer a charge on the decree, and he, not having implemented the decree, they, on 13th May, applied for a warrant of imprisonment, which they obtained on the same day and executed on 14th May 1907, and the pursuer was imprisoned accordingly. He at once presented a note of suspension and liberation, when the defenders consented to liberation, and the note was dismissed, the Lord Ordinary finding the respondents, the present defenders, entitled to expenses. These expenses have not been paid.

The pursuer further averred:

COND. 9. At the time of obtaining and executing the said warrant, implement by the pursuer of the said decree was, to the knowledge of the defenders, impossible, and arrest and imprisonment of the pursuer was wrongously and unjustifiably caused by the defenders. The defenders knew that the pursuer could not personally give delivery as he was not in possession. The defenders, after notice of the transfer of possession to the trustee by the decree of cessio, were bound to take delivery in his hands, but the defenders have refused to take such delivery. The defenders also arrested and imprisoned the pursuer under the said warrant in the knowledge that the pursuer could not intermeddle with the said articles without being guilty of contempt of Court, both for breach of poinding and for breach of the decree of cessio. The defenders also acted in bad faith in imprisoning the pursuer. He intimated to them that he wished to suspend the decree and charge if they were to enforce the charge by imprisonment, and he relied on their answering his letter of 11th May in order to do so. No answer of any kind was sent. The defenders in hiring the furniture undertook the risk of its being sequestrated under the landlord's hypothec, and of its being affected by the pursuer's bankruptcy, and the liability of the pursuer under the said agreement was qualified by that fact as an implied condition thereof; and the defenders were not entitled to execute the said warrant after the sequestration and cessio. Further, the use of the said diligence was an unwarrantable device to force the pursuer to pay his rent, and when it was no longer possible for him to do so, the defenders persisted in the said diligence, and the arrest and imprisonment of the pursuer was part of a scheme to annoy and injure the pursuer. It was not diligence carried out in good faith to enforce the said decree, but imprisonment used to

47*a* AND 48*a*

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compel payment of rent, and it was due to malice, and was without probable cause.

The defenders pleaded:

"2. The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed.

"4. The pursuer having been arrested and imprisoned under a legal warrant regularly obtained and executed, the defenders are entitled to decree of absolvitor."

On 18th December 1907 the Lord Ordinary (Johnston) allowed a proof.

He added the following note:

Lord Johnston [after the narrative above quoted].—The present action is for damages for wrongous imprisonment. To the relevancy of the action the defenders object. They maintain that they acted within their legal rights; that they personally served this action on the pursuer, and, he not opposing, obtained the decree of a competent court, and followed up that decree by legal and competent diligence, everything being done regularly and with judicial authority. And they maintain further that there can be no actionable wrong in following out a legal right (*Allen* v. *Flood*, L.R. [1898], A.C. 1), and that it is no answer on the part of the pursuer that it was impossible for him to implement the decree, without breach of the standing sequestration, for it was always open to him to pay his rent and free the sequestrated articles from the *nexus* laid on by the landlord. They say that there can be no wrong in putting a man in prison on a competent decree, followed by a competent warrant of imprisonment, though there may be good ground, in the discretion of the Court, for letting him out, if he applies in the recognised way for liberation.

I agree with the defenders that their case is quite different from that of a defender who has proceeded on *ex parte* diligence. I also discard consideration of certain averments of the pursuer founded on his cessio. His cessio, there being no divestiture by disposition *omnium bonorum*, or even possession given to and taken by the trustee, was no bar to the pursuer implementing the decree. The effect of cessio and of sequestration are quite different in the matter of divestiture of the bankrupt and investiture of the trustee (*Simpson* v. *Jack*, 1888, 16 R. 131). Still I am not able to sustain the defenders' contention, as I think their argument misses the true ground of action.

The case of *Graham* v. *Dundas*, 1829, 7 S. 876, indeed lays down in unmistakable terms that if a party has "right to obtain decree, he must also be entitled to enforce that decree by the forms and executorials allowed by law," without being liable in damages. This was followed in *Aitken* v. *Finlay*, 1837, 15 S. 683. In both these cases the original decrees were found ultimately to have been erroneous on the merits, but it was held that this did not give relevancy to the claim. In *Bell* v. *Gunn*, 1859, 21 D. 1008, the same conclusion was arrived at, though the decree, which was the foundation of the diligence, was found not erroneous on the merits, but on a technical objection to the instance, which had not been stated by the defender, who made no appearance, though personally cited. See also *Kinnes* v. *Adam & Sons*, 1882, 9 R. 698, and other cases referred to. But in *Wolthekker* v. *Northern Agricultural Co.*, 1862, 1 Macph. 211, the Lord Justice-Clerk (Inglis) predicates an important condition to the freedom from consequences of the litigant who uses any legal right or remedy to which he is absolutely entitled, in these words, "unless he was shewn to have resorted to it maliciously and without probable cause," and less definitely where he speaks of such litigant using "his legal right moderately and in good faith."

It is there that the true case of the pursuer arises. He cannot and does not object to the defenders having taken decree against him, nor can he object to their following up the decree by personal diligence *per se*, but he does object to their doing so in the circumstances in which they and he found themselves, which he says was not the following out their legal rights moderately and in good faith, but oppressively and maliciously.

What, then, are the circumstances alleged? The defenders were apprised of the sequestration. Apart from averments of special intimation at an earlier date, they admit that they did learn of the subsistence of the sequestration on 12th May 1907, the day on which they applied for their warrant for imprisonment, and two days before they executed it. They also knew at the time, 19th March 1907, when they took the decree, which was the foundation for the warrant to imprison, that the pursuer was under cessio, for the trustee was a consenting party for his interest to their taking such decree. They must further be held to have known that it was an incident of their contract of hire and sale, of which they took the risk, that their furniture in the pursuer's possession would be subject to the hypothec of the pursuer's landlord. They must therefore have known that their debtor, the pursuer, could not, unless he was able to pay the rent, implement the decree without breach of the landlord's sequestration, and that being a bankrupt under cessio he could not be expected to pay the rent in order to release the furniture. This seems to me a relevant averment to distinguish the case from the general rule of *Graham* v. *Dundas* and the other cases above quoted, and from which it is possible to infer the malice which is averred.

I do not think that it is necessary to follow the interesting argument which the defenders maintained, on the question whether the impossibility of fulfilment excused from contract liability (*Gillespie & Co.* v. *Howden & Co.*, 1885, 12 R. 800; *Jones* v. *St John's College*, Oxford, 1870, L.R. 6 Q.B. 115; *Lord Clifford* v. *Watts*, 1870, L.R. 5 C.P. 577). There are cases in which undoubtedly it does not. But they depend on the terms of the contract and the cause of the impossibility. But while in many such cases the impossibility of performance will form no defence to an action for breach, it would, I think, form an adequate defence to an action for specific implement, and even if a decree for specific implement was obtained, I think it would be a very dangerous proceeding to attempt to enforce it by personal diligence.

The case is in some of its aspects not unlike that of *Bot'ger* v. *The Globe Furnishing Co.*, decided by me in June 1906, 14 S.L.T. 117, to the judgment in which I refer. But I desire to add that I had not the benefit in that case of such a full argument and such an exhaustive citation of authority, and to admit that consideration of the question of malice, to which no argument was addressed, escaped me. I understand that the case did not go further.

I am unable, as I think there is a sufficient foundation laid for the pursuer's averment of malice, to sustain the defenders' plea to the relevancy. The

action must therefore go to proof. But I do not think that in the exercise of my discretion I should send the case to a jury. There are, to my mind, several reasons why it will be better disposed of by a proof before a judge.

There remains to consider the defenders' contention that the case should not be allowed to proceed without the pursuer as an undischarged bankrupt being required (*a*) to find caution, and (*b*) to pay the expenses found due in the note of suspension and liberation. As regards the first point, I accept as the general rule of practice, what is stated by the Lord President (Inglis) in *Clarke* v. *Muller*, 1884, 11 R. 418, and acknowledge that though exception from the general rule is in the discretion of the judge, that discretion should be sparingly exercised. But I think that in this case there are circumstances which justify the exercise of that discretion in favour of the pursuer. And as regards the second point, while I think it doubtful whether on the information before me expenses should have been given in the suspension and liberation, I think the case bears to be distinguished from the cases of *Irvine* v. *Kinloch*, 1885, 13 R. 172, and *M'Murchy* v. *Maclullich*, 1889, 16 R. 678.

The Defenders *reclaimed* and *argued*: The defenders having obtained a decree which was *ex facie* valid, were entitled to enforce it by appropriate diligence (*Graham* v. *Dundas*, 1829, 7 S. 876; *Aitken* v. *Finlay*, 1837, 15 S. 683; *Bell* v. *Gunn*, 1859, 21 D. 1008). In the case of a decree *ad factum præstandum* the appropriate diligence was imprisonment, and the defenders were entitled to obtain a warrant for imprisonment just as they might have enforced a decree for payment by a charge (Personal Diligence Act 1838, 1 & 2 Vict. cap. 114, sect. 11). It was not suggested that the procedure was irregular, and there was thus no actionable wrong. Even if the pursuer were unable to implement the decree, that could not affect the defenders' right to enforce it (*Gillespie & Co.* v. *Howden & Co.*, 1885, 12 R. 800). Even if the defenders had acted maliciously, that would not help the pursuer. The exercise of a legal right plus malice did not amount to an actionable wrong (*Allen* v. *Flood* [1898], A.C. 1). *Kinnes* v. *Adam & Sons*, 1882, 9 R. 698, and *Wolthekker* v. *Northern Agricultural Company*, 862, 1 M. 211, were special, and the *dicta* in these cases must be read in the light of the special circumstances. But, further, malice was not relevantly averred. Even if the defenders had known that the pursuer could not implement the decree, they were not acting maliciously in putting the matter to the test. In fact, the defenders did not know whether the pursuer could implement the decree or not. The cessio was six months old, and *acquirenda* did not fall under it. The defender might have obtained money since the date of the cessio, or his friends might be willing to help him. In either event the pursuer would have been able to take the furniture out of the sequestration by paying the rent, and he would then have been in a position to implement the decree without being in breach of the sequestration. If the pursuer's averments were relevant, he should not be allowed to proceed except on conditions (*a*) of finding caution for expenses (*Clarke* v. *Muller*, 1884, 11 R. 418) and (*b*) of paying the expenses of the suspension and liberation (*Irvine* v. *Kinloch*, 1885, 13 R. 172; *M'Murchy* v. *Maclullich*, 1889, 16 R. 678).

Argued for the Pursuer: The pursuer's averments were relevant. The defenders had obtained the decree *ad factum præstandum* by means of *ex parte* statements that the furniture was in the pursuer's possession and that he had refused to deliver it to the defenders. These statements the defenders knew to be unfounded, because they knew that the furniture had fallen under the sequestration for rent, and that if the pursuer had interfered with it he would have been guilty of contempt of Court. In doing diligence on a decree so obtained the defenders were in the same position as if they had obtained a wrongous interim interdict. While the defenders were undoubtedly entitled to enforce a decree lawfully obtained, they were not entitled to use diligence unfairly or oppressively (*Wolthekker* v. *Northern Agricultural Co.*, *cit.*; *M'Gregor* v. *M'Laughlin*, 1905, 8 F. 70; *Sturrock* v. *Welsh & Forbes*, 1890, 18 R. 109). Here the diligence had been abused. It was an implied condition of a decree *ad factum præstandum* that the party decerned against should be able to implement it. The defenders knew that the furniture was under sequestration, and that the defender could not have delivered it without being guilty of contempt of Court. It would not do to say that the pursuer might have got rid of the sequestration by paying the rent, because the defenders knew that the pursuer was under cessio and was not in a position to pay the rent. As to the suggestion that the pursuer's friends might be induced to pay the rent, that was not a legitimate use of the diligence of imprisonment. It was not legitimate to use a decree *ad factum præstandum* to operate payment of a money debt (*Mackenzie* v. *Balerno Paper Mill Co.*, 1883, 10 R. 1147). The fact that the furniture fell under the sequestration for rent was the legal result of the contract between the pursuer and the defenders. The defenders were not entitled to use the diligence of imprisonment for the purpose of avoiding the consequences of their own contract. If it were necessary to aver malice, malice was well averred, because the diligence had been used with a wrong motive and with a gross disregard of the pursuer's rights. As to finding caution, that was a matter in the discretion of the Court. In the circumstances of the present case, it would be a denial of justice to ordain the pursuer to find caution. Payment of the expenses of the suspension and liberation should not be made a condition of allowing the pursuer to proceed (*Stuart* v. *Moss*, 1886, 13 R. 572). *Irvine* v. *Kinloch* (*cit.*) was

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special. Counsel also referred to Personal Diligence Act 1838, sect. 6; *Lindsay* v. *Earl of Wemyss*, 1872, 10 M. 708.

The Court *recalled* the interlocutor of the Lord Ordinary, *sustained* the second and fourth pleas in law for the defenders, and *assoilzied* them from the conclusions of the action.

The Lord Justice-Clerk.—This case is somewhat peculiar. The defenders are furniture dealers who supplied certain furniture to the pursuer on the hire-purchase system. When the instalments due for the furniture were not paid, the defenders sent to the pursuer's premises and demanded re-delivery of the furniture. They were met by production of a decree of Court, by which the furniture was sequestrated for rent due for the house in which the furniture was. No doubt that took the furniture out of the control of the pursuer. Then the present defenders, as pursuers, brought an action against the present pursuer as defender, and took a decree in that action for delivery of the furniture. They were quite entitled to take such a decree. That is shewn conclusively by the fact that no one opposed the granting of the decree—neither the present pursuer nor the trustee in his cessio nor any one else. We must assume that this decree was rightly granted. No one has impugned it. Having a decree *ad factum præstandum*, the present defenders—then pursuers—proceeded to enforce it, and the only way open to them for enforcing it was imprisonment. Accordingly the present pursuer was imprisoned under the decree. He was liberated the next day. The question now is whether the person who was so imprisoned has a good claim of damages in respect of such imprisonment. A number of ingenious arguments have been stated to us in support of the pursuer's case, but I am satisfied that none of these arguments are well founded, and that the pursuer has no relevant case. Further, I am satisfied that the pursuer was imprisoned under a legal warrant, regularly obtained and executed, and that the defenders are entitled to decree of absolvitor. I do not go further into details, except to say this, that I do not think there is any relevant averment of malice in the pursuer's record, and there is nothing alleged from which malice could be inferred. I think therefore that we should recal the interlocutor of the Lord Ordinary, sustain the second and fourth pleas for the defenders, and assoilize them from the conclusions of the action.

Lord Stormonth-Darling and *Lord Low* concurred.

Lord Ardwall.—I agree with your Lordship in the chair that the pursuer has set forth no relevant case, and that the Lord Ordinary's interlocutor ought to be recalled, the second and fourth pleas in law for the defenders sustained, and the defenders assoilzied.

The facts are sufficiently set out in the Lord Ordinary's opinion, and it is unnecessary to recapitulate them at any length.

The defenders, who are furniture dealers in Glasgow, raised an action against the pursuer for delivery of articles of furniture which belonged to them. The present pursuer did not appear to defend the action, but the trustee in his cessio was sisted in the action, and for his interest consented to decree being pronounced as concluded for. The pursuer in the present action not having appeared at all, decree for delivery *ad factum præstandum* in absence was pronounced against him, with expenses. The defenders gave the pursuer a charge on this decree, and he having failed to implement the decree within the days of charge, on 13th May 1907 they applied in ordinary course for a warrant for imprisonment, on which the pursuer was imprisoned. What the present defenders did was entirely within their rights. They merely carried out the decree that they had obtained without objection on the part of the pursuer. The whole proceedings were orderly proceeded, and perfectly regular.

This is not one of the proceedings which the party setting them in motion is held to adopt *suo periculo*, such as a summary application for interdict or the arrest of a person *in meditatione fugæ*; and although it is said that the diligence was due to malice and was without probable cause, yet there are no relevant averments of malice or want of probable cause. The pursuer's allegations, so far as they have even a semblance of relevancy, seem to be founded on this, that there was no reason for the diligence of imprisonment being put in force, because the furniture in question being sequestrated, the pursuer did not have it in his power to deliver it to the defenders; and being under a cessio, he had no money wherewith to pay his rent and release the furniture from the landlord's sequestration.

I cannot accept this view of the situation. Under the old law of imprisonment for debt, debtors were frequently put in prison although they had no effects or money in their possession, simply as a *compulsitor* to make them or their friends find the money to pay the debt, and in the same manner the defenders in this case used imprisonment as a *compulsitor* to induce the pursuer, by raising money, to get rid of the landlord's sequestration and to deliver the furniture in terms of the decree. This was a perfectly intelligible piece of procedure, and was, as I have said, entirely within the rights of the defenders; and while I am not prepared to say that in no case might it be possible that malice could be relevantly averred against a person using such diligence, such averment would require to be very distinct and specific, and I do

not think that any such exists in the present action. I regard it as wholly out of the question that any person should be subjected to an action of damages for executing the appropriate lawful diligence following on a decree *ad factum præstandum* of a competent Court on bare averments that the diligence was used maliciously and without probable cause.

It is unnecessary to consider the other question as to whether the pursuer is bound to pay the defenders' expenses in the suspension and liberation as a condition of being allowed to proceed with the action.—*7th February* 1908.

Counsel for Pursuer, T. B. Morison, K.C., A. M. Stuart; Agent, Robert White, Solicitor.—Counsel for Defenders, Clyde, K.C., Mitchell; Agents, Graham, Pole & Lawrence, S.S.C.

J. S. M.

HOUSE OF LORDS.

(*The Lord Chancellor* (*Lord Loreburn*), *Lords Macnaghten, Robertson, Atkinson and Collins.*)

325. Murdoch's Trustees *v.* Weir and Others.

Succession — Trust — Uncertainty — Charitable Bequest—Direction to Trustees "to Employ . . . . Residue . . . . on a Scheme for the Relief of Indigent Bachelors and Widowers . . . . Who Have Shewn Practical Sympathy . . . . in the Pursuits of Science . . . ."—Bequest Held Not Void From Uncertainty.

(*Reported ante, Vol. XIII. p. 777; Vol. XIV. p. 515.*)

Appeal against an Interlocutor of the Second Division (*The Lord Justice-Clerk, Lords Kyllachy, Stormonth-Darling and Low*) *reversing an Interlocutor of Lord Johnston.*

The claimants, the next of kin, appealed. The arguments and facts of the case and the terms of the bequest sufficiently appear from the previous reports.

The House *dismissed* the appeal.

The Lord Chancellor.—My Lords, the question in this case is whether a charitable bequest is to be treated as void for uncertainty. The bequest was of an unusual kind. Its object, according to the will, was to benefit persons who had shewn practical sympathy in the pursuits of science. A number of conditions were prescribed. The recipients of this bounty were, among other things, to be widowers or bachelors of fifty-five years of age or upwards, whose lives had been characterised by sobriety and other specified virtues. They were to be indigent—a provision which stamps the bequest as charitable. These conditions were not really canvassed in argument and need not be further considered, for no one of them is such as to impart to the bequest an uncertainty which will vitiate it in law.

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The only point seriously made against this clause in the will is that the recipients of this charity were to be persons who had "shewn practical sympathy in the pursuits of science." These words have been subjected to a rigorous criticism. What is science, it was asked, and how are we to know its bounds? What is sympathy in the pursuits of science, and when and how does it become practical? What are pursuits of science in the plural as distinguished from pursuit in the singular? The thought underlying this current of observation seems to be that, if a bequest is to a class of persons, the class must be capable of being defined, and be defined so precisely that there can rarely be a doubt who does or who does not fall within it.

Now there is no better rule than that a benignant construction will be placed upon charitable bequests. It is difficult to imagine a construction less benignant than that suggested by criticisms such as those to which I have alluded. Few indeed are the charitable bequests that could survive such an ordeal. The fact is, that whenever anyone wishes to describe a class of people otherwise than by referring to their age, sex, birthplace, or similar facts capable of precise ascertainment, the language used must of necessity be general, and there must always be numerous cases on the border line. Deserving literary men who have not been successful, poor members of a particular trade, reduced gentlewomen, are examples of classes of persons who may certainly be benefited; but in each case exactly the same reasoning might be used as was used in the present case to destroy the validity of the will. There is no law requiring that kind and degree of certainty. All that can be required is that the description of the class to be benefited shall be sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator. I have no doubt that this can be done here. Persons who have shewn practical sympathy in an object obviously are persons who have given time or money or made some sort of sacrifice to further it. I am satisfied that the trustees, or, failing them, the Court, would find no difficulty in giving effect to the bequest. Accordingly I think that this appeal ought to be dismissed. The parties have agreed that the appellants are to have their judicial expenses of appeal out of the trust funds; the expenses as awarded in the Court of Session to remain unaltered. I think your Lordships may properly act upon this agreement.

Lord Macnaghten.—My Lords, to my mind the difficulty in this appeal—and it is, I think, a real difficulty—is to discover any substance in the appellants' case.

HOUSE OF LORDS.

Murdoch's Trustees v. Weir and Others.

Lord Macnaghten

The gift is a gift in perpetuity, to be administered by trustees for the benefit of bachelors and widowers, poor and aged, whose lives have been characterised by sobriety, morality and industry, "and who have shewn practical sympathy in the pursuits of science in any of its branches." This gift, it is said, is void for uncertainty. Why? The relief of those who suffer from the ills of poverty and the weight of advancing years is, by common consent, the peculiar province of charity in its popular as well as in its legal sense. Unhappily it is only too easy to recognise the aged and the poor who are always with us. Then, I suppose, it has happened to most men to have formed an opinion, satisfactory at least to themselves, as to the moral and the general character of some applicant for some employment or other. Notwithstanding the ingenious argument of the learned counsel who spoke second, I cannot think that the task is really beyond the capacity of any ordinary individual.

There remains one other qualification to be considered. What is science? and what is "practical sympathy in the pursuits of science"?

Science, it was said, is so vague and comprehensive a term as to be unmeaning. In the view of the Lord Ordinary, "'Science' is a term of no definite or 'particular' meaning." That is certainly not the view of the Legislature. There are, for instance, many enactments in favour of institutions formed for the advancement of "science." The generality of the word has never prevented the Court from applying to the particular case before it the provisions of the Act under its consideration. But what is "practical sympathy"? "An altogether nebulous phrase," says the Lord Ordinary. It is not, perhaps, a happy expression. But if you follow the directions of the testator with a willing mind it is, I think, perfectly intelligible. The wish of the testator was to help those who are in need of help, and who may have done something, much or little, in the way of promoting some branch of science. Within the realms of science the field of choice is wide. But the testator has taken pains to provide competent judges. It is for the trustees to consider and determine the value of the service on which a candidate may rest his claim to participate in the testator's bounty.

I think that the case is much too clear for argument, and that the appeal must be dismissed.

Lord Robertson.—My Lords, I must own that I think this a perfectly clear case. If it is said of anyone that he has shewn practical sympathy in the pursuits of science, this is merely a roundabout way of saying that he has helped the pursuits of science; just as to shew practical sympathy in A. B. means to help A. B. Again, the word science embraces a wide but perfectly ascertainable range of subjects. Accordingly, I consider the meaning of this testator to be plain and intelligible.

Lord Atkinson and *Lord Collins* concurred.—*6th February* 1908.

Counsel for Appellants, Upjohn, K.C., C. D. Murray; Agents, Murray Lawson & Darling, S.S.C.; Collyer, Bristow & Co., London.—Counsel for Respondents, Dean of Faculty (Campbell, K.C.), Cullen, K.C., Gillon; Agents, J. & J. Turnbull, W.S.; John Kennedy, W.S., Westminster.

COURT OF SEVEN JUDGES.

(First Division Cause.)

(The Lord President, Lords M'Laren, Kinnear, Stormonth-Darling, Low, Pearson, and Ardwall.)

326. Earl of Mansfield *v.* Lord Scone.

ENTAIL — DISENTAIL — DATE OF ENTAIL—TRUST—TRUST FOR PURCHASE OF LANDS TO BE ENTAILED—DIRECTION TO TRUSTEES TO INVEST CERTAIN SUM IN LANDS, EITHER IN ENGLAND OR SCOTLAND, TO BE ENTAILED—FAILURE OF TRUST—SUBSEQUENT EXECUTION BY TRUSTER'S EXECUTOR OF DEED OF ENTAIL, IN IMPLEMENT OF DIRECTION TO TRUSTEES, OF LANDS IN SCOTLAND PURCHASED FOR VALUE EXCEEDING SAID SUM—HELD (DISSENTING LORDS M'LAREN AND PEARSON) THAT THE DATE OF THE ENTAIL WAS THE DATE AT WHICH THE TRUST DIRECTION CAME INTO OPERATION—ENTAIL AMENDMENT ACT 1848 (11 & 12 VICT. CAP. 36), SECTS. 2, 27 AND 28—BLACK V. AULD, 1873, 1 R. 133, FOLLOWED — LORD ADVOCATE V. STEWART, 1902, 4 F. (H.L.) 11, COMMENTED ON.

Report by Lord Ordinary on the Bills.

This was a petition presented by the Earl of Mansfield for authority to disentail the lands of Logiealmond in Perthshire.

The Lord Ordinary (Guthrie) having appointed a *curator ad litem* to Lord Scone, the pupil son of the petitioner, who was the heir next entitled to succeed to the entailed estate, remitted to Mr Alexander Wallace, W.S., to report. The questions involved in the decision are set forth at length in Mr Wallace's report, which, after stating that the petition was otherwise in order, proceeds in the following terms:—

It humbly appears, however, to the reporter that the granting of the prayer of the petition by your Lordship depends upon whether the petitioner is right in saying that for the purposes of the petition the date of the entail is 18th February 1840. If he is right, then the petitioner, having been born after the date of it, is entitled to disentail without any consent. But if the entail falls wholly or partly to be dealt with according to its actual date, namely, 2nd February 1866, then as the petitioner was born in 1864 he cannot disentail (wholly or in part as the case may be) without the consent of the nearest heir; and as the nearest heir is a pupil such consent can

only be given by his tutor *ad litem* after the value of his interest has been fixed and provided for. When an entail is granted in terms of a trust there seems no doubt that, for the purposes of an application like the present, the date of the entail is the date when the trust comes into operation—this apparently being quite clear from the Act 11 & 12 Vict. cap. 36, sect. 28, and the decision in *Black* v. *Auld*, 1 R. 133. But the circumstances of the present case are somewhat peculiar, and the reporter thinks it his duty to direct your Lordship's attention to them.

By a codicil to the last will and testament of the Right Honourable William, Earl of Mansfield, bearing date 11th June 1838, the testator gave and bequeathed to Sir George Clerk, Baronet, William John Law and Cuthbert Ellison the sum of £150,000 in trust, that they or the survivors or survivor of them, or the executors or administrators of such survivor, should, as soon as a proper and convenient purchase or purchases could be found, lay out and invest the money in the purchase of hereditaments in England or Scotland, of a clear and indefeasible estate or inheritance in fee simple, either freehold or copyhold or both, and settle and assure the same or cause the same to be conveyed, settled and assured so and in such manner as that the same might go along with and be holden and enjoyed by such person or persons as for the time being should, as heirs-male of his body, be entitled to the peerage, honour and title of Earl of Mansfield, in the county of Middlesex, which he then had, and was entitled to so far, and to be unalienable and inseparable therefrom so far as the rules of law or equity would permit. . . . The codicil further provided that Sir George Clerk, William John Law and Cuthbert Ellison, or the survivors or survivor of them, or the executors or administrators of such survivor, should invest the money or such part as should remain in their hands, and declared that any profits arising from such investments should be added to the capital sum directed to be entailed, and that the dividends, interest, and annual proceeds arising or accruing should be paid to the person or persons as would be entitled for the time being to the rents, issues, and profits of the lands, tenements, and hereditaments so to be purchased, in case the same had been purchased and settled as aforesaid; it also contained various other clauses not material to the present question.

. . . . . .

The disposition and deed of entail of the estate of Logiealmond is dated 2nd February 1866, and was registered in the Register of Entails on the 16th day of May 1893. It is granted by William David, Earl of Mansfield, son of the said William, Earl of Mansfield. It proceeds on the consideration that the said William, Earl of Mansfield, by his last will and testament, dated 11th June 1838, nominated, constituted, and appointed the said William David, Earl of Mansfield, his sole executor, and on consideration of the foregoing first-mentioned codicil, which is fully narrated. It then proceeds: "Considering further that the said William, Earl of Mansfield, my father, having died on or about the eighteenth day of February, eighteen hundred and forty, and his said last will and testament having been duly proved in the Prerogative Court of Canterbury on the twenty-eighth day of March thereafter, I as sole executor thereby appointed, proceeded to realise the personal estate of my said deceased father, and in that character acquired and became possessed of funds to an amount exceeding the said sum of One hundred and fifty thousand pounds given and bequeathed by the before-recited codicil to the said Sir George Clerk, William John Law, and Cuthbert Ellison as trustees for the purchase and settlement of lands and heritages as therein directed; and whereas the said trustees did never accept or act in the execution of the said trust, and I did not pay over to them the said sum of One hundred and fifty thousand pounds, but have retained that sum and have been in the enjoyment of the interests and annual proceeds thereof since the time when the same came into my hands, and I am still a debtor to the said trustees therefor; and whereas at the term of Martinmas Eighteen hundred and forty-six I purchased and acquired in fee-simple the lands, baronies, and others hereinafter described and disponed, commonly called the lands and barony of Logiealmond and others, at the price of Two hundred and three thousand pounds, conform to disposition in my favour by James Brown, accountant in Edinburgh, and James Condie, writer in Perth, factors, commissioners and attornies nominated and appointed by Sir William Drummond Stewart of Grandtully and Logiealmond, Baronet, dated the fifteenth day of May Eighteen hundred and forty-seven and the third day of August Eighteen hundred and forty-eight, and instrument of sasine following thereon, registered in the General Register of Sasines, at Edinburgh, on the twenty-first day of May Eighteen hundred and fifty-two, and that I have been in possession of the said lands, baronies, and others since the said term of Martinmas Eighteen hundred and forty-six, but no conveyance thereof in favour of the said trustees, nor deed of settlement or entail, in terms of the said codicil, has yet been executed by me, and now seeing that I am willing and desirous to carry the trust committed to the said Sir George Clerk, William John Law and Cuthbert Ellison, trustees foresaid by the codicil before narrated, into execution, in so far as the same relates to the application of the said sum of One hundred and fifty thousand pounds in the purchase of lands and heritages to be settled and entailed as aforesaid, by conveying and settling or entailing the said lands, baronies, and others, in manner herein underwritten, and whereas the said Cuthbert Ellison, one of the trustees named in the before-recited codicil, died on the day of , and the said Sir George Clerk and William John Law, being now the only surviving trustees, have declined to accept of or act in the said trust, and have devolved the whole purposes of the said trust and of the execution of the same, and of the whole powers and instructions specified and contained in the said codicil, upon me, conform to their declinature and devolution of trust dated the thirtieth day of July and third day of August, both in the year Eighteen hundred and sixty-three; therefore, in implement of the trust created by the said codicil, I have assigned, disponed, and conveyed, as I by these presents assign, dispone, and convey."

It thus appears that on the death of William, Earl of Mansfield, his son William David, Earl of Mansfield, as his executor, entered upon and realised his estate; and that, had the terms of the codicil of 11th June 1838 been then carried out, he would, as executor, have paid to Sir George Clerk, William John Law and Cuthbert Ellison the sum of £150,000, with which to purchase lands to be entailed. That he received, as executor of his father, more than the said sum. That in 1846 he purchased, at the price of £203,000, the property of Logiealmond. That in 1866, nothing having been done to implement the codicil, and one of the trustees appointed by the codicil having died, the other two trustees refused

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to accept the trust and devolved the purposes of it upon William David, Earl of Mansfield, who, "in implement of the trust created by the said codicil," executed an entail of the property which, in 1846, had cost £203,000. The cost of the estate was thus £53,000 more than the sum directed to be dealt with, making it doubtful if the entail was granted wholly in execution of the trust. The deed of entail was granted by William David, Earl of Mansfield, as an individual, so that there is no intervention of any trustee who in an independent capacity might have acquired the estate from him for £150,000 (even if that were less than its true value) and thereafter entailed it in terms of the trust created by the codicil. It may be, therefore, that the entail as a whole, or so far as the value of the estate was in excess of £150,000 at the date when the entail was granted, must not be looked upon as dating for the purposes of the present petition from 13th February 1840, when the codicil came into operation, but as dating for all purposes from 2nd February 1866, when it was executed.

The reporter therefore humbly considers it necessary that your Lordship should decide whether for the purposes of the present petition the date of the entail is 13th February 1840, when by the death of William, Earl of Mansfield, the codicil referred to came into operation; or whether the date must, as regards the whole estate or the amount (if any) by which when entailed its value exceeded £150,000, be held to be 2nd February 1866, when the deed of entail was granted.

On 25th June 1907 the Lord Ordinary made a verbal report to the First Division, and after a hearing the case was appointed to be heard before Seven Judges.

Sect. 2 of the Entail Amendment Act 1848, *inter alia*, enacts: "Where any estate in Scotland is held by virtue of any tailzie dated prior to the said first day of August One thousand eight hundred and forty-eight, it shall be lawful for any heir of entail born on or after the said first day of August, being of full age and in possession of such entailed estate, by virtue of such tailzie, to acquire such estate in whole or in part in fee simple by applying to the Court of Session for authority to execute, and executing and recording, in the Register of Tailzies, under the authority of the Court, an instrument of disentail in the form and manner hereinafter provided."

The other sections of the statute on which the question turned are sufficiently set forth in the opinion of the Lord President.

Argued for the Petitioner: It was clear that the entail of the estate made in 1866 was in execution of the trust which became operative in 1840, and therefore the entail must be reckoned to have been made in 1840 (Entail Amendment Act 1848, sects. 27 and 28; *Black* v. *Auld*, 1873, 1 R. 133). To hold otherwise would be against the whole policy of the Act, which was aimed at entails made after its passing and the evasion of its provisions by means of trusts, and all that would be requisite to defeat the statute would be an option given to trustees to buy land for entail in England or Scotland. Here the respondent relied on such an option, but once the election was made and the entail executed according to Scots law, its date must be determined by that law also (sect. 28, and *Black* v. *Auld*, *cit. supra*).

The deed of entail in 1866 was, in fact, an execution of the trust of 1840, and though it might be informal as a deed of devolution, such informality could be condoned by the beneficiaries.

As to the value of the lands entailed, they were bought in 1846 for £203,000, but there was nothing to shew their true value then or in 1866, nor could that be ascertained. There was nothing to raise a presumption that the entailer meant a double transaction in 1866, or to do anything but expressly to implement his father's directions. The prayer of the petition should be granted.

Argued for the Respondent: The date of the entail in question was the actual date, viz. 1866. It was not *de facto* in implement of the trust direction coming into operation in 1840, either in form or substance. Sect. 28 did not apply, for it referred back to sect. 27, which was directed to land to be purchased in Scotland only, which alone was in fact entailable. Now here the trustees might in their option have purchased land in England (*Lord Advocate* v. *Stewart*, 1902, 4 F. (H.L.) 11, Lord Robertson at p. 18, Lord Lindley p. 19), where a radical distinction was drawn between money subject to the jurisdiction of the Scots Courts, and money which possibly might become so subject. That point was not raised in *Black* v. *Auld*, *cit. supra*; had it been raised, the decision would have been different. Sect. 28 allowed a certain type of entails to be reckoned as of an artificial date, viz. those described in sect. 27, of which this was not one. Further, the entail was not entitled so to be reckoned, not being "in execution of the trust" in the strict sense. The trustees had never elected as between Scottish and English lands, and also the maker of the entail made himself institute instead of liferenter. (In answer to the Court, *Studd* v. *Cook*, 1883, 10 R. (H.L.) 54 was referred to.) The mere fact that the object of the direction had now been achieved could not bring the transaction within sect. 28. In any case, as to the excess in value of the lands entailed over the original trust fund of £150,000, the date of the entail must be held to be 1866.

The Court *remitted* to the Lord Ordinary to grant the prayer of the petition.

The Lord President.—William, third Earl of Mansfield, died in 1840. Part of his testamentary writings consisted of a codicil by which he left the sum of £150,000 to trustees whom he named. The trust purpose was to buy land in England or in Scotland and settle it as therein prescribed upon a series of persons

who may be described as in the first instance the persons entitled in their order to succeed to the earldom of Mansfield. The phraseology used is technical and appropriate to English conveyancing; but it may be taken in accordance with the decision of the House of Lords in *Studd's* case, 10 R. (H.L.) 54, that, had the trustees bought land in Scotland, they would have appropriately complied with the direction by executing a Scotch deed of strict entail.

William, third earl, was succeeded in the title by his son William David, fourth earl, who was also his general representative. The general succession greatly exceeded £150,000. The trustees named in the codicil did not accept office, and nothing was done. So matters stood till 1866. In that year the fourth Earl of Mansfield executed a deed of entail of the estate of Logiealmond, which he at that time held in fee-simple, having purchased it for a sum exceeding £150,000. The narrative of that deed was as follows. [His Lordship read the narrative quoted above.]

By this time the state of the family was that the fourth earl had an only son, Lord Stormont, who had three sons, of whom the third, born in 1864, is the present and sixth earl. As such he has succeeded under the destination in the said entail, and he presents this petition to disentail the said estate. Appearance has been made for his only son Lord Scone, born in 1900, a pupil, and his *curator ad litem*. The son is heir apparent under the entail. The point, therefore, to be decided is what is the date of the entail. If the date is the date of the execution in 1866, then, as the petitioner was born before that date, he can only disentail by having his son's consent valued and dispensed with; but if the date of the entail is the date when the trust deed first came into operation, viz. 1840, then the petitioner, being born after that date, can disentail without consents.

The petitioner relies on the 28th section of the Rutherfurd Act, which is as follows:—"And be it enacted, that for the purposes of this Act the date at which the Act of Parliament, deed, or writing placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail." The expression "such money . . . . such land" refers us back to the 27th section, the opening words of which are: "Where any money . . . . has been or shall be invested in trust for the purpose of purchasing land to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried into effect," etc.

The first answer that is made to the petition is that in this case the entail was not made in execution of any trust. I do not think this view is correct. It is true that the actual trustees did not accept and proceed to entail. But what was the position in 1866? The fourth earl was still debtor in the sum of £150,000. It seems to me that at any time from 1840 till the expiry of the period of the long prescription the machinery of the trust could have been reconstituted, the fourth earl, or his representatives if he had died, been made to pay the £150,000, and the lands been bought and the deed executed. If, then, the fourth earl, knowing all this, chose as he did to execute the entail himself, he being proprietor of the land to be entailed, and the value being admittedly over £150,000, I do not think that the transaction altered its quality because of that fact. Suppose the trustees had accepted, been paid the £150,000, and bought land of a third party. It would have been a perfectly competent form of conveyancing to execute the entail in the form of a disposition and deed of entail by that third party, leaving out altogether any conveyance to the trustees. That being so, can it be said to alter the matter because Lord Mansfield, the debtor in the £150,000, does the whole thing himself without going through the form of going to the Court to appoint trustees, who would then merely ask him to execute precisely the deed which he did execute? And, further, that Lord Mansfield thought that the entail was being made in execution of the trust is clearly shewn by the narrative of the deed itself. Another test is this: if the entail is not in execution of the trust deed, then up till 1880 the trust deed could still have been made available. Suppose the trustees, if alive, had tardily accepted, or if new trustees had been appointed by the Court, could they after 1866 have sued Lord Mansfield for £150,000? Surely the execution of the entail would inevitably have furnished a sufficient defence.

The second argument for the respondents raises a more general point. They call attention to the fact that the expression "the trust" in sect. 28 refers you back to sect. 27, and they say that "in trust for the purpose of purchasing land to be entailed" must necessarily mean Scotch land, for that alone can be "entailed"; and that, inasmuch as this trust permitted of the purchase of English land, it cannot be a trust of the kind contemplated; and they rely on the case of the *Lord Advocate* v. *Stewart*, 4 F. (H.L.) 11.

So far as decision goes this case seems ruled in terms by the case of *Black* v. *Auld*, 1 R. 133. A reference to the report will shew that in the trust deed in that case there was an option to buy either English or Scottish land. But we must face the fact that, first, this point does not seem to have been argued; and, second, the judgment of the House of Lords in the *Lord Advocate* v. *Stewart* had not yet been pro-

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nounced. I am, however, of opinion that *Black* v. *Auld* was rightly decided, and that the principles there laid down rule this case.

The question in the *Lord Advocate* v. *Stewart* was whether money held in trust did or did not answer the description of "entailed land" in the Finance Act, and was or was not liable to settlement duty. Now, inasmuch as money is not land, it could only become "entailed land" by force of statutory definition. The House of Lords held that whether money destined by trust purpose for the purchase of land to be entailed was entailed land or not—as to which there was a difference of opinion between the judges of the Court of Session and certain of the noble and learned Lords—that could never be predicated of money which under the terms of the trust might never purchase lands which could be entailed, but which might purchase lands in a country other than Scotland to be settled by other forms not those of Scotch entail; and, in accordance with the clause of limitation of all taxing statutes, unless the property was specified as falling under the tax it must go free.

But the question here is what is the date of the entail for all the various requirements of the entail statutes, and I think that sect. 28 takes entails as it finds them and fixes an artificial date. And where I think *Black's* case comes as an authority is not because it also affords an example of a trust deed where land other than Scotch might have been bought (for, as I said, that point was not argued), but because it fixes a date, the entail once having been made, in a case where antecedently it might have been truly said that there was no certainty that the entail ever would be made. In *Black's* case the entail was not to be made until Captain Black reached at least the age of twenty-five; it was to be made before he was thirty. Antecedently, therefore, it was not certain till Captain Black became twenty-five that the entail ever would be made. Nevertheless, the time having come when it ought to have been made—*i.e.* Captain Black having passed the age of thirty—it was held that the date was the date of the trust deed and not the date when Captain Black became either twenty-five or thirty. I refer especially to the remarks of Lord President Inglis, which are too long to quote in full, but which shew clearly that the whole difficulties of the situation were present to his mind. I quote, however, his conclusion:—"The words in the section which probably create the greatest difficulty are those which enact that that date shall be held to be the date at which the lands should have been entailed in terms of the trust deed; and it does seem a little startling at first sight that when, according to the directions of the truster, it is not possible that lands should have been entailed in terms of the trust for a long period after the trust deed came into operation as a trust deed, yet still that the date of the trust deed is to be held to be the date at which the lands ought to have been entailed. It seems as if in a case like this it was a provision of the statute that the direct contrary of what the truster provided shall be carried into effect. But that is really not so, because it is a mere artificial date that is here created, and created for a special purpose—for the purpose of securing the full and effectual operation of the disentailing clauses of the statute. And it was a provision of a very necessary kind, because if this clause were to be read otherwise, a man might succeed, by means of trust directions, in keeping up the money or the land for so long a period before it was actually entailed, that there should be parties in the enjoyment of the money or the land substantially under all the restrictions and fetters of an entail, although the entail has not been executed down to a very late period, it may be for two or three generations. The consequence of that, in regard to such a trust deed, would be to defeat the leading object of the statute, and to enable a truster to bind a succession of persons not born at the date of his trust deed. Now that, I think, is a conclusive argument against the construction of the 28th section contended for by the respondents; and upon that ground I am for adhering to the Lord Ordinary's interlocutor."

Upon that I make two remarks. First, that in one sense *Black's* case was *a fortiori* so far as difficulty was concerned, because while there was impossibility during the period up to the vesting of the entail to be executed, here there is only uncertainty; and second, that so far as defeating the statute is in his mind it would indeed be an easy way to defeat it by inserting a power in a trust deed to make it optional to buy foreign land. Put in its simplest form my opinion comes to this, that sect. 28 applies to all entails as it finds them; and that if an entail has been *de facto* made in virtue of the directions of a trust, then sect. 28 settles the date as the date of the trust first coming into operation, even although there may have been contingencies which, if they had operated, would have prevented an entail ever being executed at all.

Last of all, the respondents argue that in so far as the estate of Logiealmond exceeds £150,000 in value it must be held to be entailed for the first time in 1866. I do not think we can enquire into that matter. It seems to me by the narrative of the deed the fourth earl was content, so to speak, to give up Logiealmond as in exchange for the discharge of his debt of £150,000, and that we cannot go into the question of the exact value as at that date.

I am therefore for granting the prayer of the petition.

Lord M'Laren.—I am afraid I am unable to concur with the majority of the Court in this case. The case has been reported by the Lord

Ordinary to this Division of the Court on the question whether the petitioner, the Earl of Mansfield, is entitled to disentail the estate of Logiealmond without consents, or whether he is in the position of being unable to disentail without the consent of the nearest heir, in which case, as the nearest heir is a pupil, the required consent can only be given by his tutor *ad litem*, after the value of his interest has been fixed and provided for. This question again depends on the date, actual or constructive, of the entail under which the lands are held. The estate is held under a disposition and deed of entail made by William David, fourth Earl of Mansfield, bearing date 2nd February 1866, and registered in the Register of Entails 16th May 1893. If the date of the deed of entail (1866) is to be taken as the true or legal date of the entail, then the petitioner, who was born on 25th October 1864, is not in a position to disentail without consent. But the theory of the petition is that the deed of entail was executed in fulfilment of a trust constituted by the testamentary writings of William, third earl, who died in the year 1840, which we are asked to hold to be the date of the entail. If it is so determined, Lord Mansfield would be entitled to disentail the estate without his son's consent, because on that assumption he was born after the date of the settlement.

The question arises in this way. By a codicil to the last will of the third earl, the testator gave and bequeathed to three trustees (who did not accept the trust) the sum of £150,000, in trust, to lay out and invest this sum of money in the purchase of lands and estate in England or Scotland, and to cause the same to be settled and assured so as to be holden and enjoyed by such person or persons as, for the time being, should be entitled to the peerage, honour, and title of Earl of Mansfield. The codicil prescribed certain further limitations which it is not necessary to repeat, and it directed that the annual proceeds of the invested money should be paid to the persons who would be entitled to the rents of the lands to be purchased, in case the same had been purchased and settled as aforesaid.

The testator made another codicil, dated 11th June 1838; but I understand that, in the events which have happened, this codicil does not bear upon the question under consideration.

It appears from the narrative clause of the deed of entail of 1866 that the granter, the fourth earl, was his father's sole executor, and that in that character he had acquired and become possessed of funds to an amount exceeding the prescribed sum of £150,000; that, as the entailer narrates, "the trustees did never accept or act in the execution of the said trust, and I did not pay over to them the said sum of £150,000, but have retained that sum and have been in the enjoyment of the interests and annual proceeds thereof since the time when the same came into my hands, and I am still a debtor to the said trustees therefor." It is then narrated that in 1846 Lord Mansfield had purchased Logiealmond at the price of £203,000, and that he was desirous to carry the trust into execution by conveying and settling or entailing this estate in manner underwritten. He accordingly assigned and disponed Logiealmond in terms of his father's trust destination, and under the fetters of a strict entail.

The determination of the date of the entail for the purposes of the Entail Amendment Act (11 & 12 Vict. cap. 36) depends on sect. 28; but the 27th section has also to be considered. The effective date, according to the 28th section, is "the date at which the Act of Parliament, deed, or writing, placing such money or other property under trust or directing such land to be entailed, first came into operation." The part of sect. 27 which bears on the construction is the introductory expression, "where any money or other property, real or personal, has been or shall be *invested in trust* for the purpose of purchasing land to be entailed"; in the case there defined the party who would be the heir in possession of the lands may get payment of the money in question under the same conditions as would apply to the acquisition of lands in fee-simple.

As affecting the legal date of the entail under consideration three questions arise: (1) Considering that under the codicil which directed the settlement of landed estate, the trustees had an option to purchase lands either in England or in Scotland, can it be held that a trust for the execution of a Scottish entail came into operation until an election was made as between English and Scottish estate? (2) Can it be held that there was in any true sense an investment in trust for the purposes of the codicil until the estate of Logiealmond was settled by a deed of entail? (3) If these questions are answered in favour of the petitioner, is not 1866 the true as well as the actual date of the settlement as regards the excess of the value of the lands over £150,000?

On the first question my opinion is that it ought to be answered in the negative. The hypothesis of the 28th section is that there is a deed or writing placing money under trust, and by referring back to the 27th section we see that the trust in contemplation is a trust "for the purpose of purchasing land to be entailed." No other species of trust are contemplated except a trust of purchase money, or a trust of lands to be entailed. I think it is also clear that the entail considered in sect. 28 is an entail of Scottish estate, because the provisions of the statute have exclusive reference to Scotland. On this hypothesis the 28th section provides that the date when the deed or writing "first came into operation" shall be held to be the date of any entail to be made thereafter in execution of

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the trust. Now, to put the case most favourably for the argument of the petitioner, let it be supposed that Lord Mansfield's trustees had accepted the trust, that the money had been paid over to them, and that in the year 1866 the entail of Logiealmond was executed by the trustees. At any time before 1866 it would have been open to the trustees to purchase and settle a landed estate in England, and I do not see how in the case supposed the codicil could be said to have come into operation as a trust for the purchase and entailing of lands in Scotland until the trustees had made their election. At most it was only a power or an alternative direction. But then the alternative direction only comes into operation as a Scottish trust, when the trustees have elected between the two members of the alternative. This brings the case within the principle of the case of *Lord Advocate* v. *Stewart* (Sprot's trustee), where it was held by the House of Lords that an alternative direction of this nature did not bring the money into the category of "entailed estate" (1902, App. Cas. p. 344). The fact that the second alternative is the purchase and settlement of lands in England does not seem to be very material to the question. The case would be just the same if the alternative had been to establish a picture gallery or to make provisions for the family of the heir. Again, I think that it makes no difference in this question that the money was never paid to trustees. The fourth Lord Mansfield took it upon himself to administer the trust, and his administration has been accepted. But if it is granted that he was a virtual trustee, then he had an election as between English and Scottish estate; and if he was not a trustee, then the entail is his own act, and the date of the deed is the date of the entail.

It is necessary, however, to attend to the principle of the decision in *Black* v. *Auld*, 1 R. 133, because there the testator had directed an entail which could not come into operation so as to confer a benefit on anyone until the institute of entail (the testator's second son) had attained the age of twenty-five, and yet it was held that the date of the testator's death was the date when the trust first came into operation. This is a decision of a Court of Seven Judges, and the leading opinion, that of Lord President Inglis, proceeds largely on the policy of the Entail Amendment Act and the obvious motive of the 27th and subsequent sections, which was to prevent evasion of the enactments restricting the duration of entails by the instrumentality of trusts, liferents in succession, or other limitations in perpetuity. But then I think the determining element in *Black* v. *Auld* was this, that by the death of the testator it was irrevocably fixed that there should be an entail, if there were heirs to take, though the benefit to be taken by the institute was postponed. As it happened, the institute was the only person in existence taking benefit under the trust, and he was thus enabled successfully to claim the fund; but that circumstance was not allowed to affect the construction of the Act of Parliament, and the entail was held to have come into operation when according to the conception of the will there was an unqualified, though postponed, trust purpose for constituting an entail. In the present case there was not an unqualified purpose or direction for the entailing of land in Scotland; and while it is easily seen that by means of alternative directions the duration of a proposed entail may be prolonged to an extent somewhat exceeding the contemplation of the Entail Amendment Act, yet, if this result follows, it is only because the Act of Parliament has not explicitly dealt with this particular mode of prolongation. The statutory provisions are altogether within the domain of positive law, and I do not think we can be guided by analogy or can hold that a Scottish trust had come into operation at a time when consistently with the testator's wishes his money might have been diverted into a different channel of investment.

If my opinion is well founded, the date of the entail is 1866, and the petitioner will be under the necessity of purchasing the consent of his pupil son. But it is proper that I should also answer the other questions that arise. On the second of these questions, and reading the 27th and 28th sections together, I think the 28th section presupposes that there is "money invested in trust for the purpose of purchasing land to be entailed." The words I am quoting are in the 27th section, but I think that in sound construction they must be read into the 28th; because the 28th section is to some extent of the nature of a proviso to the 27th, and does not profess to repeat in words at length all the conditions of the cases with which it deals. Now in the present case there never was any specific investment of money for the purpose of providing an entailed estate in favour of the Earls of Mansfield in their order. On the declinature of the appointed trustees it would have been open to any of the prospective heirs of entail to have the trust constituted by the appointment of new trustees or a judicial factor. Or again, the fourth Lord Mansfield might have voluntarily put the sum of £150,000 beyond his control so as to impress it with a trust for the purposes of the codicil. But neither of these things was done, and until the year 1866 the money, or its equivalent in land, remained subject to the order and disposition of Lord Mansfield. I consider therefore that there was no effective trust in the sense of the statute during the period antecedent to 1866.

On the third of the questions I have stated, I think it is perfectly clear that in so far as the value of the estate of Logiealmond exceeded the sum of £150,000 plus any profits derived from

investments of that sum before the purchase, the surplus value of the entailed estate must be taken to be properly settled by the fourth Lord Mansfield. To the extent of such surplus value the entail is not an instrument in execution of any antecedent trust, and in any view of the case this value would not be acquired in fee simple by the present earl except on the basis of the consent of the next heir.

Lord Kinnear.—I agree with the Lord President. The question really is whether the petitioner holds the estate of Logiealmond under an entail executed in terms of a trust for the purchase of land to be entailed. If he does, then upon the plain terms of the 27th and 28th sections taken together, the date of the entail, under which he holds, must be the date of the deed which put the money in trust. It is beyond all question that the third earl, by his will, which came into force in 1840, did put a sum of £150,000 in trust in order that it might be applied, either in the purchase of land in Scotland to be entailed according to the law of Scotland, or else in the purchase of land in England to be entailed on the same series of people according to the law of that country; and it is beyond question that the deed upon which the present earl holds, purports in terms to be executed by the fourth earl in performance of the trust created by his father's will. If that is a true recital, then the question is plainly answered in favour of the present earl.

But then it is said that that is not a correct recital, and that in truth the estate of Logiealmond was not entailed in execution of any trust, but for some other cause, which I understand to be the mere will and pleasure of the fourth earl to settle his own estate upon a series of heirs of his own selection. There are two points taken by the respondent in support of his contention. In the first place, it is said that the trust undoubtedly created by the third earl will never come into operation. The trustees declined to act, nothing was done in execution of the trust; and the fourth earl, who made the deed of entail, was not acting in the execution of a trust, because although he was the heir and executor of the truster, no trust had been committed to him. It is quite true that the trustees declined to accept, but then it is elementary and fundamental that the failure of trustees to accept does not affect the beneficial interests of the objects of the testator's bounty. There can be no question that the failure of the trustees to take up the trust did not relieve the sole executor and heir of the truster of the obligation to account for the £150,000 to be applied in terms of the trust. If any application had been made to this Court to supply the defect of administration arising from the failure of the trustees, there would have been no difficulty in giving effect to it; and if any person entitled to benefit under the entail directed by the third earl had brought an action to compel the fourth earl to account for the £150,000, and put it into the hands of a judicial factor or trustees appointed by the Court, there could have been no good answer to such an action. Therefore I think that the fourth earl was stating his own position perfectly correctly when he said: "I have obtained this money, and being in possession of the money my father destined for the purchase of entailed estate, am bound to carry out the purpose defined in his will"; and if he had thereupon said, "I therefore put the £150,000 into a trust or into the hands of a judicial factor in order to carry out the directions of the truster," there could have been no further question. It makes no difference that, instead of paying the money to purchase land, he gave the land he had already purchased to be entailed in accordance with the directions of the trust deed. It was given as an estate of the full value of £150,000; and I think it must be held that it was a perfectly sufficient surrogatum for the money. Nobody has taken any objection to the method of satisfying the fourth Earl's obligation by the transfer of land instead of the payment of money, and I think if any objection were taken it would be too late to raise it now. We must take it as the consequence of the whole treatment of the situation by all the parties interested in it that the estate of Logiealmond is a good and sufficient surrogatum for the £150,000; and I can see no reason for disputing the assertion that it was settled in performance of the obligation to provide that sum of money for the purchase of land to be entailed. Therefore we must take the entail made by the fourth earl as truly an entail in execution of the trust created by his father.

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But then, if that be so, it is said that there is a greater difficulty, because the third earl never created a trust which answers the description in the 27th section of the Entail Act at all. He did not put money in trust for the sole purpose of buying and entailing land in Scotland, but put it into the hands of trustees who had a discretion either to buy land in England and settle it according to the law of England, or to buy and entail land in Scotland; and it is said that during the whole period which might elapse between the date of the trust deed coming into force and the date when the fourth earl made his entail, there was no Scotch entailed estate which could be brought within the scope of the Entail Act of 1848.

Now I entirely agree that so long as the money remained in the hands of the trustees to be ultimately appropriated either to the purchase of land in England or to the purchase of land in Scotland, there was no Scotch entailed estate. That is quite clear. Money is not entailed estate, and nothing that was said in the House of Lords in the case of the *Lord Advocate* v. *Stewart*, 4 F. (H.L.) 11, at all suggests anything

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to the contrary. The Lord Chancellor, I think, puts it quite clearly that nobody can call money entailed estate except by the application of some interpretation clause in the Finance Act which the House of Lords was then considering. But apart from verbal criticism I think it clear enough, upon the authority of the *Lord Advocate* v. *Stewart*, and for my own part I should say that it was clear upon the plain construction of the statute—even if we had no authority to guide us — that so long as money remains subject to a discretion vested in trustees to buy land in Scotland or to buy land in England, it cannot be treated as if it were already converted into entailed land in Scotland so as to support a claim for immediate payment under the 27th section of the Entail Act, because such a claim would be completely defeated by a resolution of the trustees to buy land in England. So long, then, as the destination of the money is in suspense, the right given to a future heir of entail by the 27th section cannot be put in force. I think this follows from the judgment of the House of Lords in the *Lord Advocate* v. *Stewart*. But the moment the suspense is determined by the purchase of land and the execution of a deed of entail, it is ascertained at the same time that land has been purchased and entailed in the due performance of a trust. It is nothing to the purpose that an alternative course might have been followed. The trustees have none the less executed a trust by which money was put into their hands for the purchase and entail of land in Scotland. If this be so, the fact that during the interval while the final destination of the money was uncertain, the person who ultimately became heir of entail could not require immediate payment to himself, does not create the slightest difficulty, to my mind, in referring the terms of the 28th section to the terms of the 27th section for the mere purpose of ascertaining what is meant by "the deed placing such money under trust." Any difficulty which might have arisen in the construction of the 28th section itself is removed by the decision in *Black* v. *Auld*, 1 R. 133, which, I agree with the Lord President, is directly in point. It must be kept in view that the artificial date which is created by the 28th section is not the date of the performance of the particular trust. It is the date when the deed itself comes to be operative, and therefore there can be no difficulty in the application of that enactment owing to any lapse of time, or any contingency which might postpone the specific performance of the trust to buy and entail land. It is just because such purchase and entail may be indefinitely postponed that the statute creates an artificial date for determining the conditions of disentail. The date to which the statute refers is the date when the deed came into operation, and I apprehend that the deed comes into operation, when it is a testamentary deed, on the death of the testator, and that nothing which happens afterwards can alter that condition of things.

I cannot say that I think much difficulty arises from the phrase "the date at which the land should have been entailed in terms of the trust." I do not say that I have no difficulty in fixing the exact meaning of that phrase. But I take it to be clear that it does not refer to any date at which it can be found that the trustees ought in fact, and in the due execution of their duty, to have made a deed of entail, because that time never can by any possibility coincide with the date when the deed creating the trust comes into operation. There must always in the nature of things be an interval of time, less or more, between the coming into force of a trust deed and the time when the trustees proceed to carry out their trust; and it seems to me obvious that the contingency for which the enactment provides is not only an undue delay by trustees to perform their duty, but also any indefinite postponement contemplated by the truster himself. The general meaning of the words seems to be that we are to assume that instead of putting his land or his money in trust for the purpose of an entail, the truster should have made the entail himself. But any practical difficulty is entirely removed by the subsequent part of the clause, which really does not admit of more than one construction, and it is that the date of the trust deed coming into operation shall be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail. The true answer to all the criticisms which have been made upon the 28th section seems to me to be that of Lord President Inglis,—that the statute for its own purposes has imposed an artificial date upon all entails of a certain class; and it is of no consequence that this artificial date may not square with the facts which have determined the actual date of a particular deed of entail. I therefore agree with your Lordship in the chair that the petition must be granted.

Lord Low.—I concur with your Lordship in the chair and with Lord Kinnear. Your Lordships have so fully expressed my views upon the case that I do not think I could usefully add anything to what has been said.

Lord Ardwall.—I also concur in the opinion expressed by your Lordship and Lord Kinnear.

The Lord President.—Lord Stormonth-Darling concurs in my opinion, and *Lord Pearson* concurs in the opinion of Lord M'Laren. We will remit to the Lord Ordinary to grant the prayer of the petition.—18*th January* 1908.

Counsel for Petitioner, Cullen, K.C., Chree; Agent, F. J. Martin, W.S.—Counsel for Respondent Lord Scone's Curator ad litem, Dean of Faculty (*Campbell, K.C.*), *J. R. Christie.*

W. A. R.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

327. William Baird & Company Limited *v.* Burley.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 1 (1)—Accident Arising Out Of and In Course of Employment—Accident Caused by Act of Fellow-Workman — Workman Attempting to Recover Working Appliance Taken Away by Fellow-Workman—Injury Caused While Workman Trying to Avoid Missile Thrown by Fellow-Workman — Circumstances Where Held (diss. Lord Stormonth-Darling) that Accident Did Not Arise Out Of and In Course of Employment — M'Intyre v. Rodger, 1903, 6 F. 176, Distinguished.

Stated Case under Workmen's Compensation Act 1897.

This was an appeal by way of stated case from the judgment of the Sheriff-Substitute (Mackenzie) at Kilmarnock, in an arbitration under the Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), in which James Burley, miner, Galston, claimed compensation from Messrs William Baird & Co. Ltd., coalmasters, Hurlford.

The case stated:

This is an arbitration to fix the amount of compensation payable to the pursuer, in which I found the following facts proved, namely, that the pursuer is a drawer and was employed in the defenders' Maxwood Pit, Galston, which is a mine within the meaning of the Coal Mines Regulation Act 1887 and the Workmen's Compensation Act 1897; that on 31st May 1907, while in the course of his employment in said pit, he sustained an injury to his eye; that two other lads named Smith and Paton, who were also drawers in said pit, were taking an empty hutch to their own working place, Smith sitting on the front of said hutch and driving the horse, while Paton was sitting on the back of the hutch; that on passing the entrance to pursuer's working place, Smith and Paton found a hutch which pursuer had brought there for his own use, and that said hutch contained a tree or wooden prop about 7 feet long; that Smith and Paton took possession of this hutch and proceeded to carry it along with them by Paton holding it with his hands while he continued to sit on the first hutch; that when they had passed through a trap door near at hand, the pursuer, returning to his place, found the hutch gone and went in pursuit of Smith and Paton to recover it; that the pursuer passed through the trap door after them, and coming up to the hutch in which there was the said wooden prop he raised the end of this prop and pushed it with some force against the front of Paton's body in order to detach the hutch in dispute from his grasp; that Paton resenting this, took up a handful of dust or rubbish and threw it at the pursuer; that in avoiding this missile the pursuer struck his head against a rough or projecting part of the side of the narrow passage in which they were and received the said injury.

On these facts I found that the said injury having been sustained by the pursuer in the course of his employment with defenders, and it having arisen out of that employment, the defenders were liable in compensation to the pursuer, and decerned against them for the sum of 15s. 11d. per week from and after 14th June 1907, said weekly payments to continue till the further orders of Court.

The Question of Law for the opinion of the Court was:—

> Whether on the facts proved the personal injury to the pursuer was caused by accident arising out of and in the course of his employment within the meaning of the said Workmen's Compensation Act 1897?

The Defenders *appealed* and *argued*: No compensation was payable where the accident was due to the wrongous act of a fellow-workman which was outside the scope of his employment (*Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Co. Ltd.*, 1901, 3 F. 564; *Armitage* v. *Lancashire and Yorkshire Railway Company* [1902], 2 K.B. 178). In the present case the cause of the accident was the throwing of dust by Paton. That was an act outside the scope of Paton's employment, and therefore compensation was not due. *M'Intyre* v. *Rodger & Co.* (1903, 6 F. 176), and *Challis* v. *London and South-Western Railway Company* ([1905], 2 K.B. 154), were distinguishable. In these cases it was held that the accident arose out of a danger which was truly incidental to the employment. It could not be said in the present case that throwing dust was incidental to the employment either of Paton or of the respondent.

Argued for Respondent: The question was whether the facts did not admit of the view taken by the Sheriff, that the accident arose out of and in the course of the employment (*M'Intyre* v. *Rodger & Co.*, *cit.*). There was nothing to suggest that the hutch was taken away for a "lark," or for any other purpose than the performance of the employers' work. The end which the respondent had in view was to get back the hutch for the purpose of proceeding with his work. That being so, the accident arose out of and in the course of his employment, even if it were assumed that the means which he adopted were objectionable. *Challis* (*cit.*) was *a fortiori* of the present case. *Falconer* (*cit.*) and *Armitage* (*cit.*) were distinguishable, because at the time of the accident work had been abandoned, at least by the workman by whose act the injury was caused.

The Court (*diss.* Lord Stormonth-Darling) *found* that the injury to the respondent was not one arising out of his employment, *recalled* the award of the arbitrator, and *remitted* to him to dismiss the claim.

The Lord Justice-Clerk.—In this case I have come to an opposite opinion from that arrived at

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by the Sheriff-Substitute. The facts as stated by him are that two other men in the mine where the pursuer was employed carried off a hutch which the pursuer had brought to his own working place, by one of them sitting on their rake of hutches which was in motion and holding the pursuer's hutch by hand; that on the pursuer going forward and endeavouring to get possession of his hutch by pushing a prop against the man who held it so as to detach his hold, the other man took up a handful of rubbish out of the hutch and threw it at the pursuer, who, in avoiding being struck in the face by it, brought his head against the side of the passage and was injured. He was naturally alarmed by the other man's action, fearing to receive an injury by being struck by what was thrown, which might be a hard substance.

I am unable to hold that this injury was one arising out of or in the course of the pursuer's employment. What caused the injury was not in any sense an accident, but was a fault by a wrongdoer, who was acting in a wilful and unjustifiable manner, and the injury was caused by this wrongful personal act. It was not an accident occurring in the course of work. If a person throws a stone to strike another and he is injured, the fact that both men are workmen in the place of work where the injury is done will not make the injury one for which the master must pay compensation.

I am therefore of opinion that the question in the stated case should be answered in the negative.

Lord Stormonth-Darling.—I have the misfortune to differ from your Lordships. There is no dispute that personal injury by accident was here caused to a workman in the course of his employment; and the Sheriff-Substitute, holding that the injury arose out of as well as in the course of his employment, has awarded him compensation in terms of the Act. The sole question is whether the Sheriff was right in holding that the accident arose *out of* the employment. I am of opinion that he was, and therefore I should be in favour of sustaining his award.

The injury was to the workman's eye, and it was sustained by the man striking his head against a rough or projecting part of the side of the narrow passage through which he was then passing. No doubt he sustained this injury in trying to avoid a handful of dust and rubbish which another workman in the pit had thrown at the pursuer. And the Sheriff tells us very clearly how this came about. It seems to me that one difficulty in reversing a finding which the statutory arbitrator has come to on the facts—especially when he is so sound and sensible a judge of evidence, as we know from repeated experience this arbitrator to be—is that, in a matter like this, a very little difference in the precise mode of stating the facts may make all the difference in the proper conclusion to be drawn from them. Now I take the facts as stated here to be that the lads, who were all "drawers" in the pit, were not engaged in "horseplay" or anything of the nature of a "lark" at all, but were going about their proper business in the pit, though the lads called Smith and Paton had been guilty of a bit of mischief in carrying off a hutch which belonged to the pursuer—in the sense that he was entitled to the use of it—and that Paton was certainly in the wrong in throwing the handful of dust or rubbish at the pursuer, though the act might be very far short of a criminal act, as was suggested in the course of the discussion. To that extent I am willing to take the case, as I think the Sheriff-Substitute must have taken it, on the footing that Paton, in throwing the handful of dust or rubbish, was the aggressor.

But is it the law that the moment you find that an injury, sustained by a workman dutifully engaged in doing his master's work at the time when he received the injury, was caused at some link in the chain of causation by the act of a fellow-workman, the employer is relieved of all liability under the Act? I put the question in that form because the proximate cause—the *causa causans*—of the injury in this case was the striking of the pursuer's head against the projecting part of the narrow passage. If there had been no projection, there would have been no injury. But I am willing to take the case on the footing that what caused the pursuer to duck his head was the throwing of the missile. Even so, is it the law, taking the decisions both in England and Scotland as a whole, that the circumstance of the injury being caused, though not immediately caused, by the act of a fellow-workman, has the effect of relieving the employer from liability? Now, I must rather demur to decisions about a necessarily different set of facts being taken as if they ruled or governed the particular set of facts which are found by the arbitrator, and on which, so far as they are facts and not law, he is final. At all events these decisions can only be so taken so far as they can be said to lay down some definite and consistent rule of law.

What, then, are the decisions which are said to have this effect? There is first the case of *Falconer*, 1901, 3 F. 564, as to which I must be allowed to say that it was the judgment of two judges of this Division against one, Lord Young being absent and Lord Moncreiff dissenting. In the subsequent case of *M'Intyre*, 1903, 6 F. 176, Lord Young, at p. 178, confessed that he would have had very great difficulty in agreeing with the judgment in the case of *Falconer*, and said that if he had been present he would have been disposed to concur with Lord Moncreiff. That learned judge admitted in *Falconer's* case that the result might have been different if the proxi-

mate cause of the accident had been something wholly outwith the employment; and his Lordship's dissent was based on the ground, for which at least there was a great deal to be said, that the injured workman was engaged at his work, while the workman who caused the injury was engaged in something wholly different—viz. horseplay.

I admit that *Falconer* was approved of in the English case of *Armitage* [1902], 2 K.B. 178, in which it was decided that a workman who was injured through the tortious act of a fellow-workman, which had no relation whatever to their employment, had no claim against his employer because the injury did not arise out of the employment. The case was one of "larking" pure and simple, because the piece of iron which was thrown by one boy at another missed that other and injured the claimant. The accident was therefore treated as a tortious act, "having no relation whatever to the employment"; these are the very words of the present Master of the Rolls. I do not think, for the reason I have given, that that could be said of the accident in the present case.

But what is to be said of the subsequent case of *M'Intyre, supra cit.*, in this Court? I greatly doubt whether the case of *Armitage* would have been decided as it was if the English Court of Appeal had had the case of *M'Intyre* before it, which it could not have, because it was later in date than *Armitage*. At all events, I think we are not bound, in deference to an English decision, to disregard a judgment of our own Courts. There the injury to the workman complaining was held to be one arising out of and in the course of his employment, though it was the direct result of a forcible act—pulling a brush out of the hand of the injured workman, which drew his hand across the sharp surface of a piece of machinery which was near, and so cutting his hand. Your Lordship in the chair, who had been one of the majority of this Court in *Falconer's* case, distinguished that case from *M'Intyre's* by pointing out that the workman whose act was the immediate cause of the injury had no intention of injuring M'Intyre; and Lord Trayner, who had been the other member of the majority, drew practically the same distinction, for he said that the act, however careless it was, might still be properly described as "incidental to the employment." That was undoubtedly a "fine distinction," as was admitted by your Lordship in the chair in *M'Intyre's* case; and I cannot doubt that the presence of Lord Young and Lord Moncreiff had something to do with the difference in result. But if the intention of the man who caused the injury had anything to do with the effect in law, what is to be said of *Armitage's* case, where there was no bad intention, for the man who threw the missile hit the wrong man?

What, again, is to be said of the later English case of *Challis* v. *London and South-Western Railway* [1905], 2 K.B. 154? There, a stone wilfully dropped on a train by a boy from an overhead bridge injured the driver of the train, and it was held to be an accident arising out of as well as in the course of the employment, because it was a matter of common knowledge and experience, in the opinion of the learned judges of the Court of Appeal, that boys should throw stones at passing trains; and therefore they held it to be a risk incidental to the employment of an engine-driver, although it was a matter over which the company had no control. But it was none the less a tortious act committed by a bystander, and therefore, if the element of tort was to decide the question whether an act was, or was not, to relieve the employer from liability, I do not see why the employer in that case should have been held liable. The case of *M'Intyre* does not appear to have been cited in *Challis's* case, although the older case of *Falconer* was.

On the whole matter I do not think that the cases cited, when viewed as a whole, lay down any definite or consistent rule of law, and therefore I think that we should sustain the Sheriff-Substitute's decision. If there be any coherent rule of law derivable from the cases, it must be subject to so many exceptions as practically to deprive it of all value as a working rule. For it can be no more than this, that an injury may arise out of, as well as in the course of, the employment, although the act which causes the injury may be the act of a fellow-workman or of a bystander, whether malicious or not, and may have no relation to the employment, except that it is one of the risks to which the injured workman is bound to submit, as being a risk incidental to the employment in which he is engaged.

Lord Low.—I am of opinion, in the first place, that it is immaterial that the injury which Burley sustained was occasioned not by his being struck by the missile which Paton threw at him, but by his head coming in contact with some projection when he was avoiding the missile. The question, in my judgment, would have been the same if the missile had struck him and caused the injury.

The question is whether this accident was one "arising out of" the employment, because it is not disputed that it arose "in the course of" the employment.

There are two decisions in which the meaning of the words "arising out of" the employment has been construed in reference to circumstances closely approaching those of the present case. The one is *Falconer* v. *London & Glasgow Engineering and Shipbuilding Co. Ltd.*, 1901, 3 F. 564, which was decided in this Division, and the other is *Armitage* v. *Lancashire and Yorkshire Railway Company* [1902], 2 K.B. 178, which was decided in the Court of Appeal in England.

With the exception, perhaps, of Lord Moncreiff,

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the learned judges in both of these cases took substantially the same view of the meaning and effect of the words "arising out of the employment," and I think that the result may be accurately stated thus: If an accident occurs by reason of a danger which is incidental to the employment, the workman will be entitled to compensation; but he will not be entitled to compensation if the accident is caused by something done by a fellow-workman outside the scope of the employment.

Now, for a workman to throw something at another is not a danger which is incidental to employment in a coal-mine, and it is certainly an act which is entirely outside of the scope of the employment. I am accordingly of opinion that the question of law should be answered in the negative.

Lord Ardwall.—The accident which gives rise to this case was a very regrettable one, but the question which the Court has to decide is whether, in the words of sect. 1 (1) of the Workmen's Compensation Act 1897, the accident was one "arising out of and in the course of the employment" in which the workman was engaged. There is no question that it arose in the course of his employment, but the difficulty is with regard to the additional condition, which must be established in order to entitle him to compensation against his employers, namely, that it arose out of his employment.

I am of opinion that it did not, for the reason that it arose directly from the boy Paton throwing a handful of dust or rubbish at the pursuer, in avoiding which the pursuer suffered the injury complained of. It was certainly no part of Paton's employment to throw a missile at any of his fellow-workmen, nor was his doing so a risk incidental to the pursuer's employment which the employers might be supposed to have undertaken the chance of when they employed him. On the contrary, the throwing of the missile in question was a gratuitous piece of mischievous folly on the part of the boy Paton, and I cannot hold that it was such a piece of folly as is common among boys employed in mines.

I may add that, in my opinion, the present question is covered by decided cases, for I am unable to distinguish it, so far as principle is concerned, from the cases of *Falconer*, 1901, 3 F. 564, and *Armitage* [1902], 2 K.B. 178. The latter case was very similar to the present, for there a boy named Smith pushed another boy named Harrop into a pit, and Harrop, becoming angry, picked up a piece of iron and threw it at Smith. It missed Smith and hit Armitage on the eye, causing him considerable injuries, and there it was held that Armitage had no claim against the employers.

In the case of *Challis* [1905], 2 K.B. 154, where an engine-driver was injured by being struck by the glass of the screen of the engine which had been broken by a stone wilfully dropped on a train by a boy from a bridge, the employers were held liable, on the ground that the risk of mischievous boys discharging missiles from bridges was a risk incidental to the employment of an engine-driver, and that the accident accordingly arose out of the employment; but I do not think that that case can be held to apply to the present, because, as I have already said, the throwing of missiles by boys or others in mines at miners is not, according to common experience, a risk incidental to a miner's employment.

On the whole matter, I am of opinion that the accident arose, not out of the employment in which the pursuer was engaged, but out of the mischievous and illegal act on the part of the boy Paton, and that accordingly the only remedy he can have is against the wrongdoer, and not against his employers.—*7th February* 1908.

Counsel for Appellants, M'Clure, K.C., Horne; Agents, Simpson & Marwick, W.S.—Counsel for Respondent, Hunter, K.C., Munro; Agents, Macpherson & Mackay, S.S.C. J. S. M.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

328. Lochee Sawmill Company Limited and Liquidator *v.* Stevenson & Johnston.

Company—Liquidation—Law Agent's Lien—Titles of Company's Heritage Produced by Agents Without Prejudice to Lien—Law Agents also Agents for Heritable Creditors and Trustees for Debenture-holders — Subjects Sold by Liquidator With Consent of Heritable Creditors—Price Realised Insufficient to Meet Bonds—Circumstances Where Held Agents Had No Effective Right of Lien and Not Entitled to Preferable Ranking.

Reclaiming Note against an Interlocutor of Lord Johnston.

On 9th November 1906 a resolution was passed to wind up the Lochee Sawmills Co. Ltd., Lochee. On 6th December 1906 a supervision order was pronounced, and the liquidation proceedings were remitted to Lord Johnston.

Messrs Stevenson & Johnston, solicitors, Dundee, had acted as law agents to the Company from November 1904 to November 1906. They held the titles of certain heritable properties belonging to the Company, over which they claimed a lien for the amount of their business account.

By interlocutor dated 18th January 1907 the Lord Ordinary ordained John Laurence Stevenson

and Peter Reid Johnston, the partners of the firm of Stevenson & Johnston (the claimants) to produce the title-deeds of the heritable subjects which belonged to the Company, "in terms of sect. 115 of the Companies Act 1862, without prejudice to any lien which the claimants or their said firm might have over the said title-deeds as provided by said section."

On 28th February 1907 Stevenson & Johnston lodged a claim in the liquidation for a preferable ranking for the sum of £216, 13s. 9d., the amount of their business account. The liquidator pronounced a deliverance whereby he disallowed certain items in the account, and allowed an ordinary ranking for the sum of £144, 16s. 8d. (subject to taxation).

The liquidator presented a note to the Lord Ordinary for, *inter alia*, approval of this deliverance. Stevenson & Johnston lodged answers.

It appeared that the heritable subjects in question were burdened (1) by a bond and disposition in security for £750 in favour of Stevenson & Johnston, and (2) by a bond and disposition in security in favour of a Mr Alfred Stevenson, for whom Stevenson & Johnston acted as agents. These bonds were guaranteed to the lenders by the General Accident Assurance Corporation Limited. Subsequently the General Accident Assurance Corporation repaid the sums in the bond to the bondholders, and took from them an assignation to the bonds.

The Lochee Sawmills Co. Ltd. had also issued debentures to the amount of £1130. By a relative disposition the Company disponed, *inter alia*, the heritable subjects in question to Mr J. L. Stevenson, Mr Johnston, and another as trustees for the debenture-holders. At a meeting held on 28th January 1907 the debenture-holders resolved that they were satisfied to leave their interests in the liquidation in the hands of the liquidator and to concur with him in bringing the heritable subjects to sale.

The subjects in question having been damaged by fire, the liquidator recovered from a fire insurance company the sum of £465, which he paid to the General Accident Assurance Corporation as being in right of the bonds. The sum due under the bonds was thus reduced to £1085.

On 19th February 1907 the subjects were exposed to sale by the liquidator at the upset price of £1250. On 3rd May 1907 they were re-exposed by the liquidator, with consent of the General Accident Assurance Corporation, at the upset price of £950. Ultimately the subjects were sold on 14th June 1907 for the sum of £902. This sum, less expenses, the liquidator paid to the General Accident Assurance Corporation. The Assurance Corporation recovered the sums in the bonds so far as not recovered from the proceeds of the security subjects from co-obligants (who claimed in the liquidation in respect of their loss).

On 20th November 1907 the Lord Ordinary pronounced an interlocutor whereby he, *inter alia*, *found* that in the circumstances in which the heritable property was realised there was no lien available to Stevenson & Johnston over the titles to the Company's heritage; and before dealing further with the claim remitted to the Auditor to tax Messrs Stevenson & Johnston's accounts, and to report.

He issued the following note.

Lord Johnston.—The liquidator has received and adjudicated upon claims in the liquidation to the number of forty-five, and his deliverance is No. 67 of process. Of these only two, viz. the adjudications on claims No. 36 and No. 37 in No. 67 of process, are objected to, and fall to be considered by me.

In regard to claim No. 36, apart from questions of taxation, there arises a question of agents' lien, which it is requisite that I should at once dispose of. The claimants Stevenson & Johnston, solicitors, Dundee, claim a preference for business accounts amounting to £216, 13s. 9d., in respect that the benefit of a lien, which they allege they had over the titles to the heritage of the Company in liquidation, was reserved to them, when they were ordered to hand over the titles to the liquidator.

The circumstances were these: Messrs Stevenson & Johnston were, for some time prior to the liquidation, the law agents of the Company, and at the date of the liquidation they were in possession of the title-deeds. While they were agents and in possession of the title-deeds, the firm made an advance to the Company of £750, in security of which the Company granted to Mr Stevenson and Mr Johnston, as trustees for the firm, a heritable security over their heritage, containing an assignation to the writs in the ordinary short statutory form, but I understand without an inventory. At the same time Mr Alfred Stevenson, a gentleman not connected with the firm, made another advance to the Company of £800, and also obtained security over the Company's heritage with the same assignation of writs. Messrs Stevenson & Johnston were, of course, in the position of agents for the lenders in relation to their own advance, and they were likewise agents for Mr Alfred Stevenson. Although the writs were assigned, there was no change in their custody. Early in the liquidation a note, No. 12 of process, was presented to me, craving that I should ordain Mr Stevenson and Mr Johnston and Mr Alfred Stevenson, or such of them as might have the custody of the title-deeds of the Company's heritage, to produce and exhibit the same to the liquidator in order that he might allow them to be examined by intending purchasers of the heritage, and in order that he might be in a position to meet a threatened claim by the over-superior. The parties appeared before me, and it was very soon seen, as stated in the note to my interlocutor of 18th January last, "that if the property of the Company in liquidation is not to be sacrificed, the parties concerned must meet one another with more reason than they have hitherto shewn," and accordingly I ordained Mr Stevenson and Mr Johnston and Mr Alfred Stevenson, or such of them as might have the custody of the title-deeds, not exactly in the terms of the prayer to the liquidator's note, but in terms which the discussion before me shewed were necessary in the interest of all concerned, "forthwith to produce the same in terms of sect. 115 of The Companies Act 1862,

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without prejudice to any lien which the said John Laurence Stevenson, or Peter Reid Johnston, or their firm of Stevenson & Johnston, may have over the said title-deeds, as provided by said section." And they have been produced accordingly.

Now there are two other circumstances which require to be noticed. The two bonds for £750 and £800 respectively were guaranteed by the General Accident Insurance Corporation Limited, and as it was perfectly clear that there was to be a deficiency in the heritable security, that Corporation paid up the sums contained in the bonds to the bondholders, and took from them assignations thereof, covering, of course, the right of the bondholders to delivery of the writs. It was also the case that the Company's heritage, subject to the bonds in question, was conveyed to Mr Stevenson and Mr Johnston as trustees for a debenture issue by the Company.

Now the liquidator could do nothing in the way of selling the heritage except under burden of the bonds, unless by arrangement with the bondholders—that is, he could only sell the Company's reversion. Had there been any reversion to realise, and had the liquidator realised it, there can be no doubt that as against him Messrs Stevenson & Johnston's lien would have been good, and that in respect of the condition under which the titles were handed over, he must have given Messrs Stevenson & Johnston a preference in lieu of their lien, not only over the proceeds of the reversion, but over the general assets in liquidation (*Skinner* v. *Henderson*, 1865, 3 Macph. 867). But there was no reversion to realise, and the liquidator could do nothing without the consent of the bondholders. The original bondholders having no longer any interest, but having transferred their interest to the Assurance Corporation, the liquidator, with consent and concurrence of the Corporation as assignees, and also of the debenture-holders of the Company, whom I caused to be consulted independently of their trustees Messrs Stevenson & Johnston, who had a hostile interest, has now realised the heritage and applied the net proceeds in payment *pro tanto* of the sums due to the Insurance Corporation as assignees of the original bondholders. There proved on realisation to be a considerable deficiency even to pay the Insurance Corporation. They have a considerable claim, as ordinary creditors in the liquidation, for balance due to them. And, of course, there was nothing from the proceeds of the heritage for the debenture-holders and *a fortiori* for the general creditors.

Now, in effecting the sale the liquidator was acting, it appears to me, by reasonable arrangement, primarily as agent for the secured creditors, though in his capacity as liquidator, and Messrs Stevenson & Johnston's lien must be considered as in a question with the secured creditors, and not as in a question with the Company, who were the debtors. From the moment the bonds were granted Messrs Stevenson & Johnston were holding the titles both as agents for the Company, the debtors, and as agents for the bondholders, their creditors, in respect that they were agents for both borrower and lender. They might plead their lien to effect against their clients the borrowers, but they could not plead their lien to effect against their clients the creditors (*Drummond* v. *Muirhead & Guthrie Smith*, 1900, 2 F. 585). The fact of their double agency, which is not affected by the further fact of their personal interest as one of the lenders, makes an exception from the ordinary rule. If this exception holds, it is impossible that they should be heard to set up their lien against their own assignees and the assignees of their clients. In the circumstances of the actual realisation, therefore, Messrs Stevenson & Johnston had, in my opinion, no effectual lien to reserve, and I am unable to listen to the contention that the mere fact of reserving a law agent's lien under the 115th section of The Companies Acts 1862, *ipso facto*, gives the law agent a preference over the general assets of the Company, irrespective of such circumstances as I have narrated. I shall therefore sustain the liquidator's deliverance on Claim No. 36, so far as the principle of his determination is concerned. But before I can deal with his deliverance in detail there must be an audit of the various business accounts involved.

The Respondents *reclaimed* and *argued*: (1) The titles having been delivered without prejudice to the respondent's lien, and having been used by the liquidator in effecting a sale, it followed that the respondents were entitled to a preference (*Renny & Webster* v. *Myles & Murray*, 1847, 9 D. 619; *Jas. Donaldson & Co. Ltd.* v. *Thos. White & Park*, 1907, 15 S.L.T. 578). No doubt an agent could not plead his lien against bondholders who were his own clients (*Drummond* v. *Muirhead & Guthrie Smith*, 1900, 2 F. 585), but here the bondholders had been fully paid. The debenture-holders had no interest to oppose the present claim, because they could get nothing out of the subjects until the bondholders were paid, and the bondholders here had carried off the whole proceeds. Further, neither the bondholders nor the debenture-holders appeared to oppose the present claim, and in their absence the liquidator could not plead their rights. (2) The agent's lien was a right to retain the titles until his account was paid (Bell, Prin., sects. 1438, 1441; *Ferguson & Stuart* v. *Grant*, 1856, 18 D. 536). The preference therefore extended over the whole assets of the Company and was not limited to the subjects contained in the titles (*Paul* v. *Mathie*, 1826, 4 S. 420, N.E. 424; *Skinner* v. *Henderson*, 1865, 3 M. 867).

Argued for Petitioner: (1) The respondents were admittedly not entitled to plead their lien against the bondholders or the debenture-holders, who were their own clients. Now the liquidator represented the whole creditors, secured and unsecured, in accordance with their rights and preferences. In selling the subjects he was acting on behalf of the bondholders and on their instructions—the sale was a proceeding in which the unsecured creditors had no interest, because it was plain that there could be no reversion. Further, if the respondents' present claim were upheld it would carry off the greater part of the Company's assets and would thus prejudice the debenture-holders. In these circumstances there was no effective lien at the time the documents were produced, and the fact that they had been produced without prejudice to a lien would not create a lien (Bell, Prin., sect. 1441; Goudy on Bankruptcy, p. 600;

Gloag and Irvine on Rights in Security, p. 392; *Skinner* v. *Henderson*, *cit.*). If there was no lien there could be no preference. *Renny & Webster* v. *Myles & Murray* (*cit.*) was distinguishable. (2) In any view, if the respondents had a preference it was limited to the subjects included in the titles.

The Court *adhered.*

The judgment of the Court was delivered by

Lord Ardwall.—On 18th January 1907 the Lord Ordinary in this liquidation required the reclaimers Stevenson & Johnston, who are a firm of solicitors in Dundee, to produce the title-deeds of the heritable subjects which belonged to the Company, in terms of the 115th section of the Companies Acts 1862, "without prejudice to any lien which the claimants or their said firm might have over the said title-deeds, as provided by the said section," and the question raised by this reclaiming note is whether, in respect of the said lien so reserved, the reclaimers are entitled to a preferable ranking in the liquidation. The Lord Ordinary has held that they are not, and I agree with him in that opinion.

The mere reservation of a law agent's lien under the section above quoted does not give them a preference over the general assets of the Company unless it can be shewn that, had the titles not been ordered to be delivered up by the Lord Ordinary, they would have had an effectual lien over them for their account.

Now, as pointed out by the Lord Ordinary in his opinion, which clearly and carefully recapitulates the whole circumstances of the case, Messrs Stevenson & Johnston held these titles, not only as agents for the Company, but also as agents for certain bondholders who had granted loans over the security of the subjects to which the titles refer. There were two bonds for £750 and £800 respectively, and these were guaranteed by the General Accident Assurance Corporation Ltd., and when it became perfectly clear that there was to be a deficiency in the heritable security, that Corporation paid up the sums contained in the bonds, and took assignations from the bondholders some time after the date of the liquidation. In addition to these bonds the Company had issued certain debentures, and in security of these the said subjects had been conveyed to trustees, of course under burden of the bonds. It appears that Messrs Stevenson & Johnston also acted as trustees for these bondholders, so here again they were holding the titles for postponed heritable creditors. Now, as pointed out by the Lord Ordinary, it is settled by the case of *Drummond* v. *Muirhead & Guthrie Smith*, 1900, 2 F. 585, that Stevenson & Johnston, though they might plead their lien with effect against their clients the borrowers, could not plead their lien with effect against their clients the lenders. Accordingly, either the bondholders or debenture-holders could have insisted on delivery of the titles at the date of the liquidation for the purpose of realising their security, and indeed the bondholders had taken steps towards such realisation by serving a schedule of intimation, requisition, and protest upon the liquidator on the 6th of February 1907. It was evident, therefore, that it was in the interest of all parties, both in the way of saving expense and otherwise, that the liquidator should be entrusted by the heritable creditors and bondholders with the realisation of these properties. With regard to the debenture-holders, they put all their rights and interests in the hands of the liquidator at a meeting held on 28th January 1907, and the subjects were exposed by the liquidator with the consent and concurrence of the said Corporation as heritable creditors, as appears from the Minutes of Exposure, No. 109 of process. But in so exposing them he was acting, not for the general body of creditors in the liquidation, but for these secured creditors, it being absolutely clear that there would be no reversion after satisfying their claims, so that the fact that the liquidator did make use of the titles in selling the properties does not in any way strengthen the reclaimers' case; and the suggestion that the properties were originally exposed at a price which would have left a reversion really does not matter, and, as I understand, is contradicted by the information which has been supplied to us since the discussion, and which shews that in addition to bonds the subjects were burdened with the debt due to the debenture-holders, amounting in all to apparently £1500.

Applying the principle of the case already quoted, it would appear that after the secured creditors were satisfied there was nothing against which the reclaimers' lien over the titles could be made effectual, as after the heritable creditors were satisfied neither the liquidator nor the shareholders nor the ordinary creditors of the Company had any interest whatever in the titles, nor could they have made any use of them. The right of lien as existing in Messrs Stevenson & Johnston would have therefore become of no effective value whatever; for a law agent's lien confers no active right, but merely entitles him to retain the papers until either his account shall be paid or a preferable ranking given him in case of bankruptcy or liquidation (Bell's Prin., 1441).

And supposing there had never been an order pronounced ordaining the law agents to deliver up the titles, they must have delivered them up to the bondholders and debenture-holders to enable them to effectuate a sale of the properties, and after that, as the titles were of no value whatever either to the liquidator or those interested in the remaining assets of the Company as creditors or shareholders, the liquidator would have left them alone and would never have come under an obligation to give Stevenson & Johnston a

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preferable ranking in return for the delivery of them. The lien would accordingly have been valueless, and it cannot now be treated as ever having been anything else. I am therefore of opinion that the reclaiming note should be refused, with expenses since the date of the Lord Ordinary's interlocutor.—*8th February* 1908.

Counsel for Petitioner, T. B. Morison, K.C., Hendry; Agents, Taylor & Rorie, W.S.—Counsel for Respondents, Graham Stewart, K.C., D. Anderson; Agents, T. F. Weir & Robertson, S.S.C. J. S. M.

OUTER HOUSE.

(*Lord Salvesen.*)

329. The "Seaspray" Steamship Company Limited *v.* Tenant and Another.

I. REPARATION — RELEVANCY — COMPANY — MALICIOUS APPLICATION BY SHAREHOLDERS FOR COMPULSORY WINDING UP —ISSUE—MALICE AND WANT OF PROBABLE CAUSE — RELEVANCY — CIRCUMSTANCES WHERE HELD THAT MALICE SUFFICIENTLY AVERRED.

II. SLANDER—JUDICIAL SLANDER— STATEMENT IN PETITION FOR WINDING UP THAT COMPANY INSOLVENT — MALICE — RELEVANCY—FORM OF ISSUE.

In this action the pursuers sued James Tenant and Joseph Reid for £500 damages for having falsely, maliciously, and without reasonable and probable cause presented a petition to have the pursuers' Company wound up under the Companies Acts; and for having in the said petition maliciously and without probable cause made false and slanderous statements of and concerning the pursuers.

The defenders were shareholders in the said Company.

The facts, as narrated by the Lord Ordinary in his Opinion, were as follows:—

"On 3rd May 1907 the defenders presented a petition to the Second Division of the Court of Session to have the pursuers' Company wound up by the Court under the provisions of the Companies Acts 1862 to 1900. The petition set forth some alleged irregularities on the part of the manager and secretary in vouching the account of the Company; and narrated its unsuccessful trading during the previous two years —which had resulted in a debit balance of £642, 7s. 4d. It averred that credit had been taken in the accounts for an alleged loan of £1200 to the 'Isobel' S.S. Co. Ltd. for which there was no voucher, and for two other loans of £800 each to the 'Gadeby' S.S. Co. Ltd. and the 'Robin' S.S. Co. Ltd., with regard to which it was said that they were believed to be of no value, as the finances of the two last-mentioned Companies were in a very unsatisfactory condition. The petition proceeded as follows: 'The Company, in this view, is accordingly insolvent and unable to pay its debts, or continue to carry on business.' Some further allegations were made as to the management of the Company, and the refusal of the manager to carry out a resolution passed by the shareholders to divide the reserve fund. Sect. 79 of the Companies Act of 1862 was then quoted in part, and the petitioners summed up their averments as follows: 'The said Company is unable to pay its debts; and, further, in the circumstances above narrated, it is just and equitable that the Company should be wound up.'

"No previous notice of this petition was received by the pursuers or their manager, and they did not know of its existence until its presentation had been publicly advertised. Answers were lodged by the pursuers, and the case was heard on 25th May 1907, when the Court, without calling on counsel for the Company, unanimously dismissed the petition."

The pursuers made the following further averments:—

COND. 4. Prior to the presentation of said petition, the defenders personally and through their law agents, Messrs G. H. Robb & Crosbie, writers, Glasgow, and also through Mr John Mann, junior, C.A., made repeated efforts to induce the pursuers or their said manager to purchase their shares. At first they tried to get a price above par, but, meeting with no success, they made the final proposal which is contained in a letter dated 15th February 1907 from Messrs Robb & Crosbie to Mr John E. Wilson, writer, Glasgow, who is the pursuers' law agent. The said letter contains the following passage. "Our clients, however, do not wish to stand on ceremony, and as a last attempt they have authorised us to say that they will accept 20s. per £1 on their shares, exclusive of course of the dividend and together with £10 10s. of expenses to Messrs Mann & Son and a like fee to ourselves." This proposal was rejected by the pursuers in terms of Mr Wilson's letters of 16th February and 4th March 1907.

COND. 5. At an adjourned general meeting of shareholders of the said Company held on 26th March 1907, the defenders, during the said manager's absence from the room, caused to be entered into the Minute-Book what purported to be a resolution proposed by the said John Mann, who represented the said Joseph Reid by proxy, and seconded by the said James Tenant, "that the reports and accounts be not accepted or adopted, and that the manager and secretary be instructed forthwith to divide the Reserve Fund amongst the shareholders." The said resolution was invalid because no notice had been given of it as required by the Memorandum and Articles of Association of the said Company, and was immediately repudiated by the said manager in a letter to Mr Mann of the same date.

COND. 6. It was upon the failure of the schemes condescended on in Articles 4 and 5 that the defenders resorted to the expedient of presenting said petition for the winding up of the said Company. They did so, it is believed, for the purpose of forcing the pursuers to purchase their said shares. In order to bring greater pressure to bear upon the pursuers or

their manager to purchase the shares, they recklessly, and in the knowledge of the falsity of their statements, alleged that the pursuers' Company was insolvent and unable to pay its debts. In point of fact the pursuers' Company, as the defenders knew, was in a flourishing condition. It had since 1895 paid by way of dividend £107 per cent. on the capital of the shareholders; for the year 1906 it had earned 9 per cent., and no creditor was making any demand upon the Company for payment. These facts were all known to the defenders.

Cond. 7 contained averments of special damages suffered by the Company through the proceedings of the defenders.

Each of the defenders lodged defences, and they both pleaded that the action was irrelevant. The Lord Ordinary *repelled* the plea as to relevancy, and ordered issues.

The following issues were subsequently approved of for the trial of the cause.

1. Whether on or about the 3rd day of May 1907, the defenders maliciously and without probable cause presented to the Second Division of this Court a petition for the judicial liquidation of the pursuers, to the loss, injury, and damage of the pursuers?

2. Whether the statements contained in the schedule hereto appended are of and concerning the pursuers, and falsely, calumniously, and maliciously state that the pursuers are insolvent and unable to pay their debts, to the loss, injury, and damage of the pursuers?

Damages laid at £500.

The schedule annexed consisted of a copy of the said petition.

Lord Salvesen [after narrating the facts as quoted above].—The present action has been brought to recover damages from the defenders in respect of their presenting this petition, and for the slanderous statements which it contained. Cond. 7 contains an averment of special damage caused to the pursuers through their credit having been impaired by the presentation of the petition.

The defenders plead that the action is irrelevant, and founding on the case of *Aitchison & Co. Ltd.*, 1903, 10 S.L.T. 501, they start with the proposition "that a petition for judicial winding up of a company is an action or judicial proceeding; and the general rule is that an action of damages on the ground that judicial proceedings have been instituted will not be relevant unless malice and want of probable cause are alleged." This proposition is so stated in Lord Low's opinion, with which I entirely agree. They next maintain that the present action contains no relevant averments of malice and want of probable cause against the defenders.

In my opinion there is sufficient material upon record from which the inference may be drawn that the petition was not merely presented without probable cause, but maliciously in the sense that the defendants were actuated, "not by a desire to benefit the shareholders, but by an indirect motive" (see *Quartz Hill Consolidated Co.*, 1883, 11 Q.B.D. 674, per Brett, M.R., 687), namely, to concuss the pursuers into purchasing their shares. The negotiations which are narrated in Cond. 4 constitute *prima facie* evidence of both statements. It is hard to believe that shareholders who thought that the Company was insolvent should demand a price above par as the value of their holding in it; yet this, it is admitted, the defenders did only two or three months before the petition was presented. How in the face of such a demand, and in view of what is stated on record by the pursuers, the defenders can say that they had reasonable cause to believe that the Company was unable to pay its debts is difficult to understand; but it is not difficult to see how the presentation of the petition for winding up might be considered a means of compelling the pursuers to buy up their shares. The defenders now say that they really never meant that the Company was insolvent in the sense of not being able to pay its creditors; and the qualified statement of insolvency which I have already quoted from the petition might conceivably bear this interpretation. If that, however, was what they really meant, I think they had no justification for averring that the Company was unable to pay its debts, or demanding that the Company should be wound up on that ground. On the question of malice—apart from the indirect motive to which I have already referred—I think the averment made by the pursuers, that the defenders were well aware of the falsity of their statements as to the Company's insolvency when they presented the petition, is a sufficient allegation of their having acted maliciously. I am accordingly prepared at this stage to repel the first plea in law maintained by each of the defenders; and as both parties desire that the case should go before a jury, I shall appoint the pursuers to lodge the issue or issues which they propose for the trial of the cause.—1*st February* 1908.

Counsel for Pursuer, Hunter, K.C., Macdiarmid; Agents, Whigham & MacLeod, S.S.C.—Counsel for Defenders, Clyde, K.C., Spens; Agents, A. C. D. Vert, S.S.C., and Simpson & Marwick, W.S. J. W. F.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

330. R. D. Simpson Limited and Liquidator *v.* Hudson Beare and Others.

I. Company — Liquidation — Claim — Company Found to Have Infringed A Patent—Claim By Patentee Against Company—Patentee Threatening to Proceed Against Directors Personally for £4200 — Patentee's Claims

2ND DIV.

R. D. Simpson Ltd. and Liquidator v. Hudson Beare and Others.

SETTLED BY PAYMENT OF £1000 BY DIRECTORS IN RETURN FOR ASSIGNATION OF PATENTEE'S CLAIM AGAINST COMPANY —CLAIM IN LIQUIDATION BY DIRECTORS FOR £2000 SUSTAINED BY LIQUIDATOR— CIRCUMSTANCES WHERE HELD DIRECTORS ENTITLED TO ORDINARY RANKING FOR £1000 ONLY.

II. COMPANY — LIQUIDATION — LIQUIDATOR — PROCEDURE — DUTY OF LIQUIDATOR IN ASKING APPROVAL OF DELIVERANCES TO DISCLOSE TO COURT FACTS RELATING TO CLAIM WHERE CLAIM BASED ON COMPROMISE — FAILURE OF LIQUIDATOR TO MAKE FULL DISCLOSURE—CIRCUMSTANCES WHERE HELD (REVERSING JUDGMENT OF LORD JOHNSTON) THAT DEDUCTION SHOULD NOT BE MADE FROM LIQUIDATOR'S FEE, BUT WHERE ALSO HELD THAT IN RESPECT OF HIS ERROR IN PROCEDURE LIQUIDATOR NOT ENTITLED TO CHARGE EXPENSES OF RECLAIMING NOTE AGAINST FUNDS OF LIQUIDATION.

(*Reported supra, p.* 649.)

Reclaiming Note against an Interlocutor of Lord Johnston.

The facts of the case sufficiently appear from the previous report.

On 4th December 1907 the Lord Ordinary pronounced an interlocutor whereby he, *inter alia*, reduced the ranking of the claimants Thomas Hudson Beare and others to the sum of £1000, and directed a deduction of £15, 15s. to be made from the fee to be allowed to the liquidator.

The claimants Thomas Hudson Beare and others *reclaimed* and *argued*: The claimants being directors of R. D. Simpson Ltd., were personally liable along with the Company to Van Berkel in damages and in the costs of the action *Van Berkel* v. *R. D. Simpson Ltd.*, 1907, S.C. 165 (Frost's Patent Law and Practice, 1907, ed. Vol. I. p. 389). They had settled with Van Berkel by paying £1000 in return for an assignation of Van Berkel's claim (amounting to £4200) against the Company. They were therefore entitled to be ranked for £4200, and the liquidator could not resist a claim for £2000. No doubt while the Company was a going concern the directors were trustees of their powers for the Company, and might have been forced to communicate to the Company the benefit of their transaction with Van Berkel. But as soon as the Company went into liquidation the directors' powers, and of consequence their duties as trustees, came to an end (Companies Act 1862, 25 & 26 Vict. cap. 89, sect. 133 (5) and sects. 138 and 89). But even if they were still trustees the Company could force them to communicate, only on condition of keeping their trustees *indemnis* and of paying the £1000 which the claimants had paid to Van Berkel. In that view the claimants would be entitled to a preference for £1000, which would be much more advantageous than the ranking allowed by the liquidator. There was no collusion between the claimants and the liquidator, and no attempt had been made to conceal the facts from the Court. The Lord Ordinary's strictures were unwarranted. Counsel also referred to Companies Act 1862, sect. 158; Buckley on the Companies Acts (8th edition), p. 403; *Imperial Land Company of Marseilles*, 1877, L.R. 4 Ch. D. 566).

Argued for the Liquidator: It was not sound to say that this was a compromise. The liquidator had gone into the whole matter long before, and had satisfied himself that £2000 was the sum for which a ranking should be given. There was no concealment. The liquidator's motion was that the whole matter should be sent to an accountant for examination. The procedure adopted was the ordinary procedure in such cases. There was no ground for the allegations made by the Lord Ordinary or for making a deduction from the liquidator's fee.

The Court *adhered* to the interlocutor of the Lord Ordinary, except in regard to the deduction of £15, 15s. from the fee to be allowed to the liquidator, which finding was recalled; *found* the liquidator not entitled to charge his expenses in the reclaiming note against the estate in the liquidation, and the reclaimers not entitled to expenses in the cause since 4th December 1907.

Lord Stormonth-Darling.—It is always a rather delicate matter for a court of review to interfere with the discretion exercised by a judge in the Outer House who has been charged with the supervision of the liquidation of a company. Not only is he more intimately acquainted with the details of the liquidation than any other judge can be, but his knowledge is derived from recurring experience of both the persons and the questions connected with it. I have come to the conclusion that in the particular question raised by this reclaiming note the Lord Ordinary has come to a right conclusion, although I cannot help wishing that his Lordship had remembered how heavily a judicial hand may fall on professional men when he has occasion to animadvert on their conduct.

The Lord Ordinary has correctly resumed the circumstances out of which the question has arisen. The Company in liquidation was practically brought down by an action of interdict at the instance of a foreign patentee and the Dutch company which worked his patent. On the successful result of the interdict by the foreigners, there arose a claim of damages for infringement in addition to the claim for costs under the suspension. Negotiations were entered into between the Company and the foreign litigants, and these had proceeded

a certain length, but had not been finally adjusted when the Company found itself obliged, in March 1907, to go into voluntary liquidation, and Mr C. J. Munro, C.A., was appointed liquidator. On 19th March the liquidation was placed under Lord Johnston's supervision. Shortly after the date of liquidation the foreign complainers intimated to the directors of the Company that they held them personally liable for the expenses incurred in the interdict action, and also for the damage sustained by them through the infringement of their patent. This action was served on the directors as individuals on 17th April 1907, concluding for £4250, made up of £1250 for infringement of patent, and £3000 for costs said to have been incurred in the previous suit. Before the action was raised, and while it was still possible that the foreign patentees might sue the Company, a meeting of the general body of creditors was held in the liquidator's chambers, at which a state of the Company's affairs was submitted by the liquidator, estimating the Company's liability under an action by Van Berkel at the sum of £2000. When the action against the directors was actually launched, the individual directors, or at least those of them who are reclaimers in the present proceedings, being advised that they were personally liable, resumed negotiations with the foreign complainer, and finally on 30th July 1907 they settled the action in full by payment of £1000, taking in exchange for the money an assignation in their favour as individuals of all claims of damage and rights of action competent to the payees against the Company. It is upon this assignation, and this alone, that the claim of the individual directors against the Company in liquidation rests. The liquidator in his answers to Mr Scott Tait's report (App. A, p. 12) admits that he was "threatened with an action at the instance of the assignees, but negotiations took place between the assignees and the liquidator for the adjustment of the said claim."

It is here that Mr Tait's chief objection to the liquidator's action comes in. He states his opinion (App. A, p. 9), that "before the liquidator came to any bargain whatever with the claimants in respect of the amount of the claim for which they considered they were entitled to receive a ranking, he ought to have submitted the matter to the Court for sanction." With regard to Mr Tait's action in this matter I should like to express my entire concurrence with the commendation which the Lord Ordinary has bestowed on it, all the more that, as it happens, I myself was the Lord Ordinary on the Bills who made the remit to Mr Tait to examine the liquidator's accounts (I did so because I had confidence in Mr Tait's care and thoroughness), and it might quite well have escaped the attention of a less careful reporter that such comment was necessary in the interests of the liquidation. The Lord Ordinary is of the same opinion, and there, I think, his Lordship is unquestionably right. If the assignees were to receive anything more than a dividend on the £1000 which they had actually paid, there were only two ways of doing it. The transaction must have taken the form either of a preferable ranking for £1000, or of a compromise of the debt of £1000. The latter is the view which the liquidator takes of the matter in his answers (App. A, 14), where he says that "the *compromise* with the directors as assignees foresaid is conditional upon the Court's sanction being obtained thereto." In either case the attention of the supervising judge ought to have been pointedly called to the transaction, and most liquidators, for their own protection, would have taken care that a bargain should not be concluded with directors in the character of assignees without obtaining such permission and approval. It is certainly remarkable that not a hint was given by the liquidator either in the note presented to the Lord Ordinary on the Bills of 11th September 1907, or afterwards to the supervising judge, that any such sanction was necessary or would be asked for. I do not wonder, therefore, that the Lord Ordinary was seriously dissatisfied with this omission, although I do not share his Lordship's suspicions of the liquidator's motive in so acting, because it is to be observed that throughout the liquidation both the directors and the liquidator had every reason to suppose that the general body of creditors, who had the only adverse interest (for this was from the beginning what is called a creditors' liquidation) were quite satisfied. Even when the Lord Ordinary on 19th November last drew their attention pointedly to the whole matter (including Mr Tait's report) by ordering a circular letter to be sent to each of them, and appointing all parties interested to be heard, no appearance was made by anybody. I suppose the creditors' view was that the directors had lost enough through the ruin of the Company, and probably also they thought that the directors were not much to blame, so far as infringement went. In short, although I do not think that, strictly speaking, the liquidator was justified in acting as he did, yet I do think that both he and the directors may have supposed that in settling their own debt they were truly settling the debt of the Company, and were entitled to something more than an ordinary ranking, especially as the general body of creditors were not complaining, but were still apparently of the same mind as they had been in (under somewhat different circumstances) at the meeting of the creditors on 4th April 1907, when they passed an item of £2000 as an estimate of the Company's liability under the threatened action by the foreign patentees.

The Lord Ordinary at pages 4 and 5 of his opinion indicates a doubt as to whether the directors were personally liable at all, having acted honestly, carefully, and to the best of their

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judgment. Unfortunately I cannot find much support for this suggested legal doubt in the English cases on the subject. In *Betts* v. *De Vitre* (1868), 3 Ch. App. 430, it was held by Lord Chelmsford, sitting in the Lord Chancellor's Court, that in order to free directors of a company from personal liability, it was not enough to shew that acts had been done by servants of the company contrary to orders; the directors must see that their orders were obeyed; and the directors were personally ordered by the Lord Chancellor to pay the costs of an action of infringement which had been brought against the company itself. There cannot, therefore, be much doubt, I think, that the foreign patentees were entitled to proceed against the directors personally. At all events, they did so proceed, and the directors came to an arrangement with them in their individual capacity. The Lord Ordinary is satisfied that the directors are entitled to relief, and the only question is whether they can claim from the Company, now that it is insolvent, more than a dividend on what they actually paid. Now, the liquidator has admitted them to an ordinary ranking on £2000, apparently on the view that this sum would yield a dividend of something less than the sum they have actually paid, although more than if he had ranked them for that exact sum. We are not told what the actual calculation was, but, even apart from all questions as to the necessity of getting the approval of the supervising judge, I am of opinion that a liquidator is not entitled to enter with a creditor into any calculation as to what dividend an ordinary ranking will produce, and to concert with him the amount for which he is to be ranked accordingly. His duty is to treat a creditor who has a claim against the Company founded on assignation as a person to be dealt with at arm's length, because the ranking of his claim will proportionately diminish the dividend payable to each of the other creditors, and the primary duty of a liquidator is to distribute the property of the Company in satisfaction of its liabilities *pari passu* (see sect. 133 (1)). If, therefore, a creditor is only entitled to an ordinary ranking—and that was the legal position of the directors here—he must be content with the dividend which that ordinary ranking will afford.

I agree with Lord Ardwall that the disallowance of the liquidator's expenses of this reclaiming note as a charge against the funds of the liquidation will be sufficient reparation for any error which the liquidator has committed in the conduct of this liquidation, and that we should therefore recal that portion of the Lord Ordinary's interlocutor in which he practically imposes a fine upon the liquidator by directing a deduction of £15, 15s. from the fee to be afterwards allowed to him.

Lord Low.—This does not seem to me to be purely a case of a proposed compromise of the claim of a creditor in a liquidation. If it were, I apprehend that the Court could only determine whether the compromise was or was not one which ought to be sanctioned, and could not say that the creditor must be content to be ranked for a smaller sum than that for which he was willing to compromise his claim.

It is, however, clear from the liquidator's answers to Mr Tait's report, that he regarded the negotiations which took place between him and the directors before the latter lodged a claim in the liquidation as being negotiations for a compromise (as no doubt in a sense they were) which actually resulted in a compromise, the directors agreeing to limit their claim in the liquidation to £2000, the amount at which the liquidator had previously estimated the liability of R. D. Simpson Ltd. to Van Berkel & Co. In these circumstances the liquidator might certainly, upon his own shewing, have submitted the matter to the supervising judge, and no very satisfactory explanation of his failure to do so has been given. At the same time, seeing that the directors accepted, and limited their claim to, the amount at which the liquidator had, before any question with them arose, estimated the liability of R. D. Simpson Ltd. to Van Berkel & Co., I see no reason to infer that there was anything of the nature of collusion between the directors and the liquidator, or that the failure of the latter to bring the matter pointedly to the notice of the Lord Ordinary was more than an error in judgment. I therefore agree with Lord Stormonth-Darling that there is no occasion to cut down his fee as proposed by the Lord Ordinary.

The true question which has to be determined appears to me to be, What is the nature of the claim which the directors have against R. D. Simpson Ltd.? If they are in the position of persons who have paid to Van Berkel & Co. a debt due to that company by R. D. Simpson Ltd., and who have obtained from the former Company an assignation of the debt, then they are entitled to claim and to be ranked in the liquidation for the full amount of the debt. I gather that that was the footing upon which the directors made their claim in the liquidation, and upon which the liquidator gave them a ranking.

I am of opinion, however, that that is not a sound view of the claim. The directors are not, in my judgment, in the position of a person who has paid the debt of another, or of a cautioner who has paid the debt of his principal and who has obtained an assignation of the creditor's right. The claim of Van Berkel & Co. against the directors was a claim against them personally, on account of what they had done when acting as directors. In short, I take it that the claim was founded upon *quasi*-delict on the directors' part. Now, if the directors had not compromised the claim, but if the litigation had gone on and

Van Berkel & Co. had obtained decree for the amount which was ascertained to be the loss which they had sustained through infringement of their patent rights, and the costs which they had incurred in vindicating these rights, I do not think that the directors would have been entitled to claim relief—that is to say, total relief—from R. D. Simpson Ltd.; nor is it altogether clear that they would have been entitled to claim even partial relief upon the principle of contribution. No question of that kind, however, has been raised. The directors claim solely as assignees of Van Berkel; and no one is challenging their right to claim as such assignees. The only question is as to amount.

Now, for the purpose of this case the total loss and damage sustained by Van Berkel & Co. must be taken to be £2000. That is the amount estimated by the liquidator, and it has been accepted by all parties interested. One-half of that sum has been paid by the directors to Van Berkel & Co., but the latter have never discharged their claim against R. D. Simpson Ltd., but have assigned it to the directors. It seems to me that in the position of matters which I have explained, the directors, as such assignees, cannot claim in the liquidation more than the amount by which the debt to Van Berkel & Co. is still unpaid—that is to say, £1000. I have had the advantage of reading the opinion of my brother Lord Ardwall, in which he deals fully with the view of the case which I have indicated, and as I concur in that opinion it is unnecessary for me to say more on the subject.

I have only to add that I agree entirely with what Lord Stormonth-Darling has said in regard to Mr Tait's report.

Lord Ardwall.—I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed except in so far as it directs the deduction of £15, 15s. to be made from the fee to be afterwards allowed to the liquidator.

It is necessary to advert only shortly to one or two points of fact, as the Lord Ordinary has detailed them very thoroughly in his opinion.

The insolvency of the company in liquidation was principally caused by their having been unsuccessful in an action of interdict brought against them for infringement of the patent of Mr Van Berkel of Rotterdam. The case was a narrow and difficult one, and not the slightest blame attaches to the directors for having on behalf of the Company resisted the action as strenuously as they could. But the Van Berkel patent, the validity of which was questioned, was upheld by both Lord Dundas and the First Division on a reclaiming note, and perpetual interdict was granted on 20th November 1906. That action having been so decided, there arose a claim against R. D. Simpson Limited for the expenses of the suspension process and for damages. The Lord Ordinary in his note states that this claim for damages and expenses was before liquidation adjusted by the Van Berkel Company and R. D. Simpson Limited at £1000, but this, though so far correct, is somewhat misleading, inasmuch as the £1000 was only agreed to by the complainers in the suspension on the footing of the payment being adequately secured to the satisfaction of the complainers, and proportional instalments paid every quarter, but in reality the claim for damages amounted to at least £1440, and the expenses, on a very moderate computation, to about £600; and accordingly the liquidator, who very properly, and without being obliged to do so, called a meeting of creditors on 4th April 1907, laid before them a state of affairs, No. 34 of process, shewing the assets and liabilities of the Company, and amongst the liabilities there was the following entry: "Liability under action by W. A. Van Berkel estimated at £2000." This sum was mentioned and laid before a meeting of creditors nearly a fortnight before any action was taken against the directors of the Company, amongst whom are the three claimants, and there is therefore no room for the suggestion that this sum was long subsequently fixed between the liquidator and the said claimants collusively or clandestinely as the measure of the debt due to Van Berkel's company by R. D. Simpson Limited. On the 17th of April 1907 an action was raised against the directors of R. D. Simpson Limited, not as directors, but personally and individually, for £4250, being £1250 of damages claimed in respect of the breach of the pursuer's patent, and £3000, being the estimated costs, judicial and extra-judicial, of the action of suspension and interdict. It perhaps ought here to be noted that the voluntary liquidation was ordered to proceed under supervision of the Court on 19th March 1907. Accordingly at the time this action was raised against the individual directors, their powers as directors had, for the time, come to an end (see Companies Act 1862, sect. 133 (5)), although, as observed by the Lord Ordinary, they, for some purposes, remained officers of the Company. But, as has been laid down in a number of decided cases, they were liable personally as persons who had authorised an infringement of a patent for the damages, including expenses, occasioned to the complainers by the infringement (see Frost on Patents, I. 389). In this state of matters the claimants compromised the said action by a cash payment of £1000 in full of the conclusions of the summons, and under a settlement which exonerated them from all liability of any kind. They deemed it right, however, in their own interests, to obtain, as part of the settlement with the Van Berkel Company, an assignation of all claims for damages and rights of action whatever competent to the complainers against R. D. Simpson Limited, in respect of the infringement of patent or arising in the way of claims for

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expenses, and specially including £1100, being the amount of their judicial expenses in the said action. On this assignation such of the directors as are in right of it made a claim against the Company for which they were prepared to raise an action, but before doing so they quite properly submitted their claims to the liquidator, who went carefully into the whole matter, and the claim was adjusted at £2000, for which the liquidator arranged to give them an ordinary ranking, and thus obviated a litigation.

If the claimants had been persons wholly unconnected with the infringement of the patent, and had purchased the claims of the Van Berkel Company against R. D. Simpson Limited, before the former company had received anything to account of these claims, I think £2000 would have been a very fair and reasonable sum at which to estimate the debt and at which to compromise the claim. As has been already noticed, £2000 was the sum at which the liquidator had estimated Van Berkel's claim in the original state of affairs, and I think that this circumstance led the liquidator, mistakenly, as I think, in point of law, to consider the claimants entitled to a ranking for £2000.

But in my opinion the claim ought to be restricted to £1000, not exactly on the grounds stated by the Lord Ordinary, but for the following reasons:—

The directors did not intervene in the matter and pay the £1000 in order to free the Company from liability, nor did they pay that sum on behalf of the Company. They paid it in settlement of a personal action directed against themselves as persons who had authorised the infringement of a patent. This is clearly set forth in all the documents relating to the matter, and is common ground to both Mr Tait and the liquidator. This being so, it follows that the only right in virtue of which the directors were entitled to sue the Company is the right conferred by the assignation. Now what is the value of that right?

On the assumption that all that was due to the Van Berkel Company in respect of damages and expenses caused by R. D. Simpson Limited's infringement of their patent was fairly estimated at £2000, it was, in my opinion, only that sum, under deduction of the £1000 already recovered by the Van Berkel Company from the directors. It may make this clearer if we suppose that the Van Berkel Company, after receiving the £1000 from the directors in settlement of the personal action against them, had assigned their whole claims against R. D. Simpson Limited to some third person called "A" who was willing to speculate on the chance of recovering more than the price in the liquidation, and that "A" had raised an action against R. D. Simpson Limited in liquidation for £2000. It would have been an absolutely good defence to the extent of £1000 for the liquidator to plead that the Van Berkel Company had recovered £1000 from the directors as individuals, and were entitled to sue only for the balance of their claim of £2000, and that "A" as their assignee was in no better position. In my opinion the present claimants are in no better position—they are suing in right of the Van Berkel Company, who have already received £1000, and on the footing that £2000 properly represents the whole damages and expenses, that leaves only the remaining £1000 to be recovered in any action they might have raised, and accordingly I think that this is all that the liquidator ought to have ranked them for. If the facts had been different, and if the directors had paid the £1000 to the Van Berkel Company on behalf of R. D. Simpson Limited, and were entitled on that ground to be relieved of loss by the Company, the pecuniary result would have been the same, because all that they could have recovered in that case had the Company been solvent would have been the £1000 they were out of pocket, and now that the Company is in liquidation that is all that the liquidator would have been entitled to rank them for. But, it being clear in fact and in law that the claimants did not pay the £1000 on behalf of R. D. Simpson Limited, and are claiming in the liquidation solely as assignees of the Van Berkel Company, I am of opinion, for the reasons I have stated, that they are only entitled to be ranked for £1000, being the balance of the debt of £2000 which the Van Berkel Company have not recovered otherwise.

While I think the liquidator acted *bona fide*, though mistakenly, in the matter of the compromise and ranking, and that what he did was probably due to his mixing up the character of the claimants as individual assignees, yet I entirely agree with the Lord Ordinary that in a compromise involving difficult and delicate questions of both fact and law, the liquidator ought to have obtained special sanction to the compromise from the judge of the liquidation upon a note presented for the purpose, and I think that the Lord Ordinary had good reason to be seriously displeased with this not having been done; but at the same time I differ altogether from him in his criticisms of the liquidator's moral conduct. Though it would have been the proper course to have made a special application for a sanction to this compromise, I cannot find in the conduct of the liquidator anything to justify the remark that he deliberately attempted "to smuggle" the matter through without the Court being made aware of the circumstances, and there is no evidence in the case to shew that the liquidator withheld any information from the Lord Ordinary, or indeed that he was ever asked to "vouchsafe" such. Still less do I think there is any ground for the assumption that there was some sort of collusive agreement or conspiracy between the liquidator and the directors as to the lodging and admission

of their claim. It is quite true that the claim was made after consultation with the liquidator and after the directors had satisfied him that the claim was a reasonable one to be admitted to an ordinary ranking, but the idea that the sum was fixed collusively to the detriment of creditors, I think, is conclusively disposed of by the fact that that very sum had been estimated at the outset by the liquidator before the directors had incurred any liability, as the estimated amount of R. D. Simpson Limited's liability to the Van Berkel Company, and had been embodied in the state of affairs submitted to the meeting of creditors on 4th April 1907. This being so, it is not surprising that not a single creditor has come forward in response to the invitation contained in the circular which the Lord Ordinary directed to be sent to them, at considerable expense.

On the whole matter, I must absolve the liquidator from any intention to conceal this matter or to sacrifice the interests of the creditors to those of the directors of the Company.

For the error he committed in not applying to the Lord Ordinary for sanction to the compromise in question, it will be sufficient reparation if the Court disallow his expenses in this reclaiming note as a charge against the estate in the liquidation. He has succeeded, it is true, in having his professional character vindicated from the aspersions cast on it by the Lord Ordinary, but it was his own error in procedure that led the Lord Ordinary to make the remarks he did, and therefore I think his expenses in the reclaiming note should not form a charge against the funds of the liquidation.

With regard to the other reclaimers, they have not succeeded in having the Lord Ordinary's judgment altered in their favour, and they must accordingly bear their own expenses in the appeal.

The Lord Justice-Clerk.—My Lords, the somewhat painful position into which the liquidator has been brought by the animadversions of the Lord Ordinary on his personal conduct made it necessary that the subject of the reclaiming note should receive anxious consideration. I can only say that I entirely concur with what has fallen from your Lordships on that matter, and with the course proposed.

Upon the other questions involved I have had an opportunity of perusing the opinions which your Lordships have just read. I entirely concur in them, and do not think it necessary to do more than express my adhesion to the views which are expressed in those opinions.—*8th February* 1908.

Counsel for Claimants, Clyde, K.C., Constable; Agents, Davidson & Syme, W.S.—Counsel for Liquidator, Scott Dickson, K.C., Sandeman; Agent for the Liquidator in the Reclaiming Note, A. C. D. Vert, S.S.C.—Agents for the Liquidator in the Liquidation, Paterson & Gardiner, S.S.C.

J. S. M.

2nd Div.

Dempster v. William Baird & Co. Ltd.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

331. Dempster *v.* William Baird & Company Limited.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 1 (3)—Arbitration or Agreement — Procedure — Workman Injured in March 1899—Agreement under which Weekly Payments of Compensation Made Until May 1900—Payments Stopped on Workman's Return to Work in May 1900 — Workman Again Incapacitated in April 1907 — Application to Sheriff as Arbiter to Award Compensation—Finding by Sheriff That Original Agreement Neither Varied nor Ended—Held Application Competent.

Stated Case under Workmen's Compensation Act 1897.

This was an appeal by way of stated case from the judgment of the Sheriff-Substitute (Campbell Shairp) at Ayr in an arbitration under the Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), in which Alexander Dempster, miner, Muirkirk, claimed compensation from William Baird & Co. Ltd., Muirkirk.

The case stated:

This is an arbitration under the Workmen's Compensation Act 1897, in which the said Alexander Dempster (who, on or about the first day of March 1899, whilst in the employment of the said William Baird & Co. Ltd., in Lightshaw No. 1 Pit, Muirkirk, was struck by a fall of rock from the roof of said pit, and sustained severe injuries to his back, and also severe internal injuries, in an ordinary application or petition, and not by a minute) craves the Court to ascertain and fix such weekly payments as may be found to be due and payable to him under and in terms of the said Act, and to grant an award against the said William Baird & Co. Ltd. in his favour, finding him entitled to such weekly payments, beginning the first payment as on the 28th day of May 1900 for the week preceding that date, and so on weekly thereafter until he is again able to earn his full wages, or such weekly payment is varied, with interest on each weekly payment at the rate of 5 per centum per annum from the date when the same became and becomes payable till payment, with expenses.

The following facts were admitted or proved:—(1) That as the result of the said injuries received by him the said Alexander Dempster was totally incapacitated for his work as a miner from the said 1st day of March 1899—the date of the said accident—until the 21st day of May 1900. (2) That his average weekly earnings in the employment of the said William Baird & Co. Ltd. during the twelve months previous to the date of said accident were twenty-eight shillings and eightpence. (3) That in the fourth article of the applicant's condescendence it is averred that "the applicant, by agreement with the respondents, received compensation, under the

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Workmen's Compensation Act 1897, from the 15th day of March 1899 until the 21st day of May 1900, at the rate of 14s. 4d. per week"; and the answer of the said William Baird & Co. Ltd. to this averment is, "Admitted." That accordingly, under an agreement entered into between the applicant and the said William Baird & Co. Ltd., they agreed to pay to him, and he agreed to accept and receive from them as compensation under said Act, for his said injuries, the sum of 14s. 4d. weekly from the 15th day of March 1899. That it was not averred or proved that such agreement had been ended or varied, and that no memorandum of said agreement was sent to the sheriff-clerk, or recorded by him in the special register. (4) That, on or about the 21st day of May 1900, the said William Baird & Co. Ltd. ceased to pay to the said Alexander Dempster the said weekly payments, but gave him employment as a pit bottomer, and that the said Alexander Dempster worked when he was able for the said William Baird & Co. Ltd. as a pit bottomer from about the said 21st day of May 1900 till about the first day of April 1907, when, as the result of his said injuries, he became totally incapacitated for even light work, and ceased working altogether. And (5) that the said William Baird & Co. Ltd. refused to pay him compensation from and after the said 21st day of May 1900.

On these admitted or proved facts I sustained pleas in law stated for the said William Baird & Co. Ltd., to the effect that their liability to pay compensation under the said Act to the said Alexander Dempster having been settled by agreement between him and them (a memorandum of which agreement might have been recorded by the said Alexander Dempster, in terms of sect. 8 of the Second Schedule to the Workmen's Compensation Act 1897, and upon an extract of which recorded memorandum the said William Baird & Co. Ltd. might have been charged to pay to the said Alexander Dempster the weekly payments agreed upon), his application for arbitration was incompetent; and I accordingly dismissed the application, and found the said Alexander Dempster liable to the said William Baird & Co. Ltd. in their expenses of process.

The Question of Law for the opinion of the Court was:—

> Was the Sheriff-Substitute right in holding that, the compensation due to the applicant having been settled by agreement between him and the respondents, the proper course for the applicant to have adopted was to have recorded a memorandum of said agreement, and charged the respondents thereunder; and that the present application for arbitration is incompetent because an agreement as to the compensation to be paid to the applicant by the respondents has been entered into between the parties?

Alexander Dempster *appealed* and *argued*: The agreement subsisted only during incapacity (*Colville & Sons Ltd.* v. *Tigue*, 1905, 8 F. 179), and therefore came to an end on the appellant's return to work in May 1900. As the agreement was not a subsisting agreement, and as a question as to the duration of compensation had arisen, arbitration was competent (*Strannigan* v. *Baird & Co. Ltd.*, 1904, 6 F. 784). The appellant could not have recorded a memorandum of an agreement which was no longer in existence. The respondents having ceased to pay compensation under the agreement, and not having averred a new agreement, were barred from maintaining that arbitration was excluded. *Dunlop* v. *Rankin & Blackmore* (1901, 4 F. 203) was distinguishable. The application there was brought shortly after payments were discontinued, and it was held on the facts that there was a subsisting agreement.

Argued for the Respondents: An agreement once made remained in force until the weekly payments were reviewed under Sched. I., sect. 12. If so, the agreement in the present case was still a subsisting agreement. It followed that arbitration was excluded (*Dunlop* v. *Rankin & Blackmore*, *cit.*; *Colville & Sons Ltd.* v. *Tigue*, *cit.*). The claimant's remedy was to record a memorandum of the agreement (*Fife Coal Co. Ltd.* v. *Lindsay*, 1908, 15 S.L.T. 742). Even if the agreement were held to be suspended while the appellant was receiving wages, it was still sufficient to exclude arbitration. *Strannigan* v. *Baird & Co. Ltd.* (*cit.*) was not in point. The question in that case was whether a workman lost his right to compensation because, although dissatisfied with the certificate of the employers' doctor, he did not submit himself to a medical referee. Counsel also cited *Lochgelly Iron and Coal Co. Ltd.* v. *Sinclair*, 1907, 15 S.L.T. 544.

The Court *answered* the question of law in the negative, and remitted to the arbitrator to proceed.

The Lord Justice-Clerk.—This is a very exceptional and peculiar case. The workman, whose injury occurred in the early part of 1899, agreed with his employer to accept a certain weekly payment in respect of incapacity, and this was paid down to May 1900. At that time payments as for compensation were stopped, and the workman was taken back into the employment as a bottomer, and paid by wages for his work. He neither asked for nor received any money in name of compensation for the injury. No agreement was registered, and for seven years the work was continued to him and the wages for the work given to him. Then a new state of matters arose. The injury he had received had not been cured, for he again became incapacitated by reason of the injury, and now remains incapacitated.

Such being the facts, the question arises whether the workman, being now incapacitated by the injury incurred seven years ago, is entitled to ask for compensation in an arbitration.

The Sheriff-Substitute has held that he cannot competently do so—that as there was an agreement for compensation in 1899, the workman's course was to register a memorandum of that agreement in terms of the Act and insist on his compensation being paid to him under it. I am

of opinion that the view of the Sheriff-Substitute is erroneous.

The agreement of 1899 was one on the footing of total incapacity, and when in 1900 total incapacity ceased, the agreement must have been modified if the master so required, either by a new agreement, or if the agreement was put on the register, by the Sheriff being called upon to reduce the amount payable. No such proceedings took place. The master simply refused to pay any more, in respect he was employing the workman and paying him wages, and the workman was accepting the wages and claiming no compensation. The course of time, therefore, during the seven years was not regulated by the agreement—there was no agreement which applied to the circumstances, for an agreement based on ascertained total incapacity, and implemented by payments applicable only to total incapacity, could not apply to a case where a workman was earning the full wages of the employment which he was offered and accepted, and was receiving nothing else.

The workman now comes forward, demanding to be paid compensation for all the past seven years, and to this end brings a petition in ordinary form for an arbitration under the statute. I cannot hold that he is debarred from instituting such a proceeding, he being now incapacitated. I say nothing as to whether he can succeed in his demand for compensation during the seven years when he was in employment on wages. The only question before the Court now is whether his present proceeding is bad from incompetency. The question put raises that question only, and I have no hesitation in answering it in the negative. The result will be that the case must go back to the Sheriff for further procedure.

Lord Stormonth-Darling.—If the facts stated by the Sheriff had admitted of it, there would have been a great deal to be said for his view in law that the proper course for the workman to have adopted was to have registered a memorandum of agreement, and that the course which he actually did adopt, viz. to bring an application for arbitration, was incompetent. The argument in support of the Sheriff's view comes somewhat strangely from the employers, because it is to all appearance very much against their interest.

But I do not think that the facts, viewed as a whole, warrant that conclusion, and I think we are bound to take the facts as they are stated, without regard to the pleadings of parties.

The agreement admittedly made, and for fourteen months acted on, viz. from 15th March 1899 to 21st May 1900, was not a recent agreement, and a good deal has happened since then. First, on 21st May 1900, the employers ceased to make the weekly payments which they had agreed upon, and gave the workman employment as a pit bottomer. It is not said at what wage; but whatever it was, it was wage and not compensation which the workman presumably accepted, for it is expressly found that the original agreement of 15th March 1899 was never ended or varied under par. 12 of Schedule I. of the Act. Then a period of seven years elapsed, and it is further found that, on 1st April 1907, the workman became totally incapacitated for even light work, "as the result of his said injuries," and that he ceased working altogether. Finally, it is found that the employers "refused to pay him compensation from and after the said 21st day of May 1900."

I do not understand how that is consistent with there being a continuing and subsisting agreement during all that period of more than seven years, that the employers should pay him compensation at the full rate of 14s. 4d. weekly. In other words, I do not understand how it can be said that there was an agreement, when both parties shewed by their conduct that there was no agreement. If there was no such subsisting agreement, how can the Sheriff's finding in law be justified? It is suggested that the Sheriff must have been satisfied on that head, or he would not have pronounced his finding in law. I admit that Lord Kyllachy at one point of his opinion in *Colville* v. *Tigue*, 1905, 8 F. 179 (p. 183), said that the statutory tribunal "might have to decide incidentally whether some agreement submitted to it as excluding its jurisdiction is a real agreement and a subsisting agreement." But he also said (p. 184) that "if the Sheriff thought (as perhaps he might) that there was no subsisting agreement, that on its just construction the alleged agreement came to an end when the incapacity in fact ceased, his duty was to proceed to arbitrate (under sect. 1, sub-sect. 3); but, doing so, to reject the applicant's claim as wholly unfounded. There was no third course open to him." In my own opinion in *Colville* v. *Tigue*, I see I expressed the view (at p. 187) that the application for arbitration in that case was "competently brought," and Lord Low's opinion was distinct (p. 290), that "there was nothing in the Act which, when there is only an unrecorded agreement to pay compensation during incapacity, compels the employer to continue payment after the incapacity has in fact ceased." The actual decision in *Colville* v. *Tigue*, in the course of which *Dunlop* v. *Rankin & Blackmore*, 1901, 4 F. 203, was cited, was that the employers "were not liable to pay compensation to the respondent from the date at which his incapacity ceased to the date of the arbitrator's award." The facts of that case were that the accident happened on 24th August 1903; that the employers agreed with the workman to pay him compensation at a certain rate during the period of his incapacity; that this agreement was not recorded; that the employers made payments to him in terms of the agreement

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down to 14th December 1903; that they then ceased to make payments, alleging that the workman's incapacity had ceased, and offering him work at full wages, which he declined; that in March 1905 the workman instituted proceedings by way of arbitration before the Sheriff; that the Sheriff found that incapacity had ceased by 14th December 1903, but ordained the employers to make payment to the workman at the agreed on rate from 14th December 1903 to 12th July 1905, being the date of his award; and he assoilzied the employers from any claim for future compensation.

Now, these facts are not precisely similar to those in the present case, but they resemble them very closely. In particular they resemble them in respect that years had elapsed since the original agreement had been made—in *Colville's* case two, in this case more than seven years—and that a different kind of contract, viz. an agreement for wages, had been substituted for an agreement to pay compensation. In *Dunlop* v. *Rankine & Blackmore* I admit there was the same feature as in the present case of a refusal by the employers to continue payments under the original agreement, and yet the Court seems to have held that the workman was still entitled to have the agreement recorded, and they remitted to the Sheriff to discuss the application for arbitration. But the agreement in that case was *de recenti*, *i.e.* within a year from the date of the accident, and the sole reason for the application for arbitration would seem to have been to provide for the event of supervening incapacity. I do not therefore think that the case has any real application. The more recent case of *Beath & Keay* v. *Ness*, 1903, 6 F. 168, where a workman had returned to the same employment on wages, and the cases which have followed it, seem to be much more in point.

In short, I am of opinion that we are entitled and bound, as in every case of mixed fact and law, to take the facts of the case as a whole, in order to do justice between the parties; and if we are satisfied that the agreement of 15th March 1899 has ceased to be since 21st May 1900 and is not now a subsisting agreement, that we should so hold, and that we should answer the sole question of law—which is, whether the present application for arbitration is incompetent—in the negative, and remit to the Sheriff to proceed with it as may be just.

Lord Low.—So long ago as 1st March 1899 the appellant was injured while in the employment of the respondents, and an agreement was entered into whereby the respondents agreed to pay to the appellant as compensation under the Act, 14s. 4d. weekly, that being the statutory maximum amount. The respondents paid that amount to the appellant weekly from 15th March 1899 until the 21st May 1900. No memorandum of the agreement has been recorded, and the Sheriff-Substitute states that "it was not averred or proved that such agreement had been ended or varied." The Sheriff-Substitute then states that on 21st May 1900 the respondents ceased to pay the weekly payments to the appellant, but gave him employment as a pit-bottomer, and that he worked in that capacity from 21st May 1900 till 1st April 1907, when, as the result of his injuries, he became totally incapacitated. I assume, although it is not stated in the case, that during that period the appellant was paid wages.

In these circumstances the appellant instituted arbitration proceedings under sect. 1 (3) of the Act, in which he claims compensation from and after 21st May 1900.

The Sheriff-Substitute has dismissed the application as incompetent, on the ground that the proper course for the appellant to follow was to record a memorandum of the agreement and charge the respondents thereon.

Now the agreement entered into between the parties in 1899 being an agreement under the statute, was of course only an agreement on the respondents' part to pay compensation to the appellant during incapacity. Further, the amount fixed by the agreement being the maximum amount allowed by the statute, was payable only during total incapacity. Whenever the appellant ceased to be totally incapacitated the respondents were entitled to have the amount fixed by the agreement reduced, and it could have been reduced either by an arbiter in an application for review of the weekly payments, or by agreement. Now, from the 21st of May 1900 until the 1st of April 1907, a period of nearly seven years, the appellant was not totally incapacitated, because during that period he was working and receiving wages. We are not told what the amount of his wages was, but we are told that he received no compensation. In these circumstances it seems to me that during the seven years the rights and obligations of parties could not possibly be regulated by the original agreement. The natural inference from the facts which are stated is that during that period the respondents gave the appellant employment according to his capacity, and that in consideration thereof, and of the wages which he thereby earned, he made no claim for compensation. If, however, that was what happened, the parties were during these seven years proceeding upon an agreement, express or implied, which was different from, and for the time superseded, the original agreement. It is perhaps possible that all the time the appellant was claiming compensation as well as wages, but if so then there was no agreement applicable to the circumstances, because as the appellant was earning wages he could not claim the maximum amount, which was all that the original agreement provided for.

The appellant is now claiming that he was entitled to some compensation during the whole

of the seven years, and the question really is whether he has adopted a competent method of enforcing that claim. If I am right in thinking that in consequence of the change of circumstances—the partial recovery of the appellant, and his employment by and receipt of wages from the respondents—the original agreement could not be appealed to as settling the rights and obligations of parties during the seven years, I think that the appellant was entitled to make an application under sect. 1 (3) of the Act, because his claim raises questions as to whether he is entitled to compensation at all during the seven years, and if so to what amount—questions in regard to which the parties are not agreed.

No doubt it would have been competent for the appellant to register a memorandum of the original agreement, and charge the respondents thereon, and if that had been done the question of the appellant's right to compensation during the seven years could have been raised by a suspension of the charge. But, although such a proceeding might be competent, I think that it would be less consonant with the intention of the legislature than the course which the appellant has adopted, because it was evidently intended that such questions should, as far as possible, be kept out of the courts of law, and determined by arbitration.

I have dealt solely with the question of the pursuer's claim for compensation during the seven years, because it appears that that is the only matter in controversy, the respondent's counsel having stated that they admitted the appellant's right to, and are willing to pay to him, full compensation from the date when he again became totally incapacitated.

It was argued, however, that all inquiry is excluded, and that there is no room for arbitration, in respect that the Sheriff-Substitute has stated as matter of fact that it was not averred or proved that the original agreement had "been ended or varied." That statement, however, must be read along with that which immediately follows in regard to what happened during the seven years. But when these two statements are read together it seems to me to be plain that all that the Sheriff-Substitute means when he says that the original agreement has not been ended or varied is, that it has not been formally ended or varied, as, for example, by the determination of an arbiter under an application for review of the weekly payments.

I am therefore of opinion that the question in the case should be answered in the negative, and the case remitted back to the Sheriff-Substitute.

Lord Ardwall.—This stated case, both as regards the statement of facts and the question of law, is a far from satisfactory document.

The first part of the question of law is put on this assumption: "The compensation due to the applicant having been settled by agreement between him and the respondents," and the second part of the question is put upon this assumption, that "an agreement as to the compensation to be paid to the applicant by the respondents has been entered into between the parties." These assumptions appear to amount to this, that at the date when the arbitration proceedings were initiated there was a subsisting agreement between the workman and the employers as to the rate of compensation to be paid to him at that and any future time until the weekly payment thereby provided should be ended, diminished, or increased, in terms of sect. 12 of the first schedule of the Act, or otherwise ended.

If this is so, it is surprising that the Sheriff-Substitute or anyone else could consider it necessary to have a stated case at all, because, under sub-sect. 3 of sect. 1 of the Workmen's Compensation Act 1897, arbitration is only competent if the question as to the amount of compensation is "not settled by agreement," and, according to the question and statement of the case, the compensation due to the appellant was and is "settled by agreement"; but I agree with your Lordships that we are not bound to answer the question as put, but must take the real facts of the case, apart from the gloss put upon them by the Sheriff-Substitute.

It is, I think, apparent that at the date of the commencement of the arbitration proceedings the unrecorded agreement which was entered into, and which had no definite period of endurance, had by common consent been allowed to lapse; and further, that at the date of the arbitration the parties were in dispute as to what compensation should be paid for the present and the future. Accordingly, I have no difficulty in holding that when the arbitration proceedings commenced, the agreement of 1899, such as it was, had lapsed, and that an entirely new state of matters had arisen, in which the parties were in dispute regarding the amount of compensation payable to the applicant, and regarding which compensation accordingly the arbitration was perfectly competent.

I accordingly agree that we should answer the question put in the case by finding that, in the circumstances, the appellant's application for arbitration was competent, and should remit to the Sheriff-Substitute to proceed with the same.—*7th February* 1908.

Counsel for Appellant, G. Watt, K.C., Spens; Agent, J. A. Kessen, S.S.C.—Counsel for Respondents, M'Clure, K.C., Horne; Agents, M. J. Brown, Son & Co., S.S.C. J. S. M.

Outer House. *Lord Johnston.*

Fryer v. North British Railway Co. and Burgh of Clydebank.

OUTER HOUSE.

(*Lord Johnston.*)

332. Fryer *v.* North British Railway Company and Burgh of Clydebank.

I. Reparation — Relevancy — Railway — Child Killed at Level-crossing—Road Formerly Private Adopted by Burgh as Access to Public Park—No Additional Duty on Railway Company Through Alteration in Use of Road —Duty upon Burgh to Ensure Safety at Level-crossing.

II. Reparation—Contributory Negligence —Whether Negligence of Parent in Allowing Young Child to go Unattended Constitutes Contributory Negligence is Question of Fact—Crawford v. Magistrates of Edinburgh (1906), 14 S.L.T. p. 383, Referred to.

III. Proof — Proof or Jury Trial — Circumstances in Which Proof Before Lord Ordinary Preferred to Jury Trial.

This was an action in which Edward Phipps Fryer, a labourer residing in Clydebank, sought damages against the North British Railway Company and the Burgh of Clydebank, "jointly and severally, or severally," in respect of the death of his son, a child of 22 months old, which took place on 15th May 1907, while the child was crossing the North British Railway by a level-crossing leading to a public park belonging to the Burgh.

The facts of the case and contentions of parties sufficiently appear from the Lord Ordinary's Note.

The Lord Ordinary *dismissed* the case against the Railway Company and *allowed* a proof before answer against the Burgh, *holding* that in the circumstances a proof was more suitable than trial before a jury.

Lord Johnston.—In this case Fryer, a labourer residing at 15 Dunn Street, Dalmuir, which is part of the Burgh of Clydebank, sues both the North British Railway Company and the Magistrates of Clydebank for reparation for the injury done him by the death of his son on 15th May 1907, while crossing the North British Railway by a level-crossing leading to the public park belonging to the burgh, he having been run down on the crossing and killed by a train belonging to the North British Railway Company. From the death certificate No. 11 of process it appears that the child at the date of its death was 22 months old.

The circumstances, as disclosed by the statements and admissions on record read along with the Ordnance Survey, No. 13 of process, and the plan, on a larger scale, No. 12 of process, are these. The high road from Glasgow to Dumbarton traverses the burgh of Clydebank from south-east to north-west, and the Glasgow, Dumbarton and Helensburgh line of the North British Railway also traverses the burgh from east to west, the road and the line converging at the west end of the burgh. The line is to the north of the road. The west end of the burgh is known as Dalmuir, being formed of feus off the Dalmuir estate. There is a station on the line for the district called Dalmuir Station. Near the western burgh boundary there is room for a series of short side streets, running practically at right angles to the road and the railway, entering from the high road and ending a short distance from the railway fence. The buildings in these streets do not abut close upon the railway fence, but leave space enough for passage along the side of the railway fence between it and the ends of the streets, though whether this is mere vacant ground, or is maintained as a road or pathway, I am not at present informed. On the opposite side of the railway *ex adverso* of these streets stood the mansion-house and grounds of Dalmuir. Quite recently the western portion of the policies of Dalmuir have been acquired by the burgh of Clydebank, and laid out as a public park. And this park extends on the opposite side of the railway *ex adverso* the whole length of the ground occupied by the side streets to which I refer.

When the railway line was made in 1858 there existed more or less in the line of Burns Street, the centre one of the five side streets already laid out, a private estate road or back avenue leading to Dalmuir house and stables. The Railway Company were allowed to cross this private road on the level. At the level-crossing there are provided gates for carriage and cart traffic which are kept locked, keys being supplied to the proprietor of Dalmuir, and I presume also now to the town authorities, who say, however, that as a carriage or cart road the access is no longer used. But alongside of these gates there are swing wickets to accommodate foot passengers, which are not locked, nor are they under control of the nearest signal-box, which is about a hundred yards away. The Railway Company have kept no watchman at this crossing.

On the acquisition of the ground at Dalmuir as a public park, the magistrates made its main entrance at the west end, from Mount-Blow Road, at a point considerably north of the bridge which carries that road across the railway. But the existing level-crossing at the foot of Burns Street remains open, at any rate for foot passengers, and is no doubt much used by the public, as it is a short cut from the more populous part of the burgh of Clydebank to the new public park. And in pretty close proximity to this level-crossing, in fact, not more than fifty or sixty yards from it, the magis-

trates have placed gymnastic apparatus, swings, etc., for the use and amusement of children, their site being close to the north side of the railway line.

The pursuer lives in Dunn Street, the eastmost of the cross streets, and his house appears to be from 150 to 200 yards from the level-crossing going by the vacant ground between the street ends and the railway. It is admitted that the pursuer's child was on the crossing on 15th May 1907, unattended, when an express train due to pass Dalmuir station about 11.30 a.m. ran over it and killed it on the spot.

The ground of action against the Railway Company is that they failed to take reasonable and proper precautions for the safety of the public using the level-crossing, either by maintaining a watchman at the crossing or by providing mechanical control of the swing-gates, from the signal box, which was said to be about a hundred yards distant. I understand it to be maintained that this duty was more particularly imposed upon the Railway Company by the change of circumstances occasioned by the feuing of the adjacent ground on the south side, which involved a large increase in the population in the neighbourhood of the crossing, and by the creation of the public park on the north side, including the gymnasium and playground for children erected in the immediate neighbourhood of the crossing.

The ground of action against the magistrates of Clydebank is that, in full knowledge of the danger of the level-crossing, to which their attention had been called, and of the necessity of special precautions for the safety of persons using it being taken, which it is alleged had been pressed upon them, they failed in their duty to take any precaution for the safety of the public, whom they invited to resort to the park, and particularly of the children, whom they invited to resort to the gymnasium and playground, and both of whom they invited to use the level-crossing as an access thereto. Their duty is stated to have been to have provided either a footbridge or a subway for foot-passengers, to replace the level-crossing, and failing their being able to arrange that, which might depend on their rights in the road and level-crossing, then to have stationed a watchman to give people, and particularly children, warning of the approach of trains.

I am asked to determine on the relevancy of these grounds of action.

That against the Railway Company I hold to be not relevant. This road was a private occupation road when the Railway Company obtained their powers. Its use was confined to those going and coming to and from Dalmuir house and stables. The Railway Company were allowed to cross this back road on the level. Not being a turnpike road or public highway, it did not fall under the Railway Clauses Act 1845, sects. 39 and 40. I do not think it was even a "highway other than a public carriage way" in the sense of sect. 52. But even if it was such, the requirements of that section were complied with. I think that the road must be assumed to have been an occupation road, and to have fallen under sect. 60 *et seq.* of the Act; and I refer specially to sect. 68, which imposes the duty of shutting and fastening the gates on such a road on the owners and occupiers of adjoining lands. The swing-gates for foot passengers need not have been there, or might have been stiles, but for arrangement with the owner of Dalmuir. In fact, the whole matter of this back access to Dalmuir was, from the necessity of the situation, one of arrangement with the owner of Dalmuir, and with him alone.

I think that there was no obligation on the Railway Company to take any further precautions than originally bargained for, unless something in the construction or subsequent development of their line made this reasonably necessary, which is not alleged (*Cliff* v. *Midland Railway Co.*, L.R. 1870, 5 Q.B. 258, explaining *Bilbee* v. *London and Brighton Railway Co.*, 34 L.J. C.P. 182). And I do not think that any such duty was thrown upon the Railway Company by the change of circumstances founded on, in which they had no hand. The altered use of the crossing had nothing to do either with the construction of their line or with the traffic upon it.

But it is different with the other defenders. They, as magistrates of the burgh, construct out of the private grounds of Dalmuir House a public park. To that park the public are invited, and, if the existing private accesses are allowed to become public accesses to that park, a new situation arises, and the responsibility of seeing that they are reasonably safe, or that reasonable precautions for public safety are taken, lies, I think, upon the magistrates of the burgh. It may be that on proof it can be shewn that nothing more was required. But if it was, these defenders cannot rely upon the Railway Company making changes to meet the altered use to which they, the magistrates of the burgh, have put the ground in question, and the consequent change of the road from a private to a public access. I need say no more on this point. So far as the magistrates are concerned, I think that at any rate a relevant case for enquiry is made.

It is maintained farther in defence that the admitted fact of a child of such tender years having been allowed to wander to this crossing unattended is an admission of contributory negligence, which must *eo ipso* nonsuit the pursuer. Contributory negligence on the part of a child is a matter of circumstance and degree. I refer to my judgment in *Crawford* v. *Magistrates of Edinburgh*, 14 S.L.T. 383, for a citation of the authorities. But in no circum-

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stances, I think, could contributory negligence be predicated of a child of twenty-two months old; and if it could be so, the defence could only be decided on proof. But this plea is rather of the nature of one of personal bar in relation to which the pursuer and his wife may be regarded as one, and his wife's negligence may be regarded as attaching to the pursuer. I heard an able argument on this point. But I am not satisfied that the proposition can be maintained, that a parent must either see that a young child is attended, or take the responsibility of its running into danger. There may doubtless be, and most certainly are, many cases in which such responsibility is incurred, and this may be one of them. But I do not think that the question can be divorced from circumstances, and I cannot therefore dispose of it pre-judicially.

I shall therefore sustain the first plea in law for the defenders the North British Railway Company, and repel that for the defenders the burgh of Clydebank. It remains to hear parties on the mode of proof, to which they have already spoken, but the circumstances are somewhat changed by my judgment.—*2nd February* 1908.

Lord Johnston.—I have further heard parties as to the mode of proof in the case, but I remain of the opinion which I formerly entertained, that this case will be better disposed of on a proof than by sending it to a jury.—*4th February* 1908.

Counsel for Pursuer, Hunter, K.C., J. A. Christie; Agents, St Clair Swanson & Manson, W.S.—Counsel for North British Railway Company, Dickson, K.C., Grierson; Agent, James Watson, S.S.C.—Counsel for Burgh of Clydebank, Munro; Agents, Douglas & Miller, W.S.

R. S. B.

OUTER HOUSE.

(*Lord Salvesen.*)

333. The Clyde Salvage Company Limited *v.* Anstruther Union Harbour Commissioners.

PUBLIC AUTHORITIES PROTECTION ACT 1893, SECT. 1 — LIMITATION OF ACTION — ACTION AGAINST HARBOUR COMMISSIONERS — GROUNDING OF VESSEL THROUGH FAULT OF HARBOUR-MASTER — HELD THAT ACTION BROUGHT TOO LATE.

The pursuers in this action claimed £1200 damages from the defenders for the loss sustained by them through the grounding on a rock outside Anstruther harbour of a wrecked vessel which the pursuers had salved and were towing into said harbour. The wreck was attached to a lighter, and the pursuers averred that the navigation of the tug and of the wreck and lighter into the harbour was being conducted under the instructions of the harbour-master, and that the grounding of the wreck was due to the fault of the harbour-master in giving an unskilful and negligent order.

The defenders denied liability and pleaded, *inter alia*—

"4. *Separatim*, the act, neglect, or default complained of having been committed more than six months prior to the commencement of the present proceedings, the action is incompetent in respect of the provisions of the Public Authorities Protection Act 1893."

The Lord Ordinary *sustained* this plea, and *assoilzied* the defenders.

Lord Salvesen.—The pursuers in this case were, in July 1906, conducting salvage operations on a steamer called the "Saxon," which was stranded on the May Island in the Firth of Forth. On 8th July they succeeded in getting the "Saxon" floated, and taken by means of tugs into the proper channel for getting alongside the pier in the harbour of Anstruther, to which they had previously arranged the "Saxon" should be brought. They allege that the navigation was being conducted under the instructions of the harbour-master, and that, through a negligent order which he gave, the "Saxon" was damaged by grounding on a hard ridge of rock of the existence of which he was or ought to have been aware, and of which the pursuers were unaware. The defenders in their fourth plea in law found upon sect. 1 of the Public Authorities Protection Act 1893 as excluding the action.

The act complained of was admittedly committed more than six months prior to the commencement of the present proceedings, and accordingly the only question is whether the defenders are entitled to the peculiar privileges which the statute confers on public authorities. This statute has so often been made the subject of construction by the Courts both in Scotland and in England, that it is unnecessary that I should say anything further than that I am unable to distinguish the present case from "*The Ydun*" [1899], P.D. p. 236. In that case the plaintiffs sued the Corporation of Preston, who were constituted the Port and Harbour Authority for Preston by a private Act of Parliament, for damages sustained by the grounding of their vessel within the port through the alleged negligence of the defendants in inviting the vessel to go up when there was not sufficient water in the channel leading to the docks. Jeune, J., dismissed the action, holding that the defendants were acting in pursuance of their public duties, so that sect. 1 of the Public Authorities Protection Act applied; and, on appeal, this decision was confirmed. The defenders here are the Port Authority of Anstruther, in precisely the same way as the Preston Corporation was at Preston; and they were

so constituted in the public interest by the Anstruther Union Harbour Act 1860, which has since been amended by two Provisional Orders. An attempt was made to distinguish the present case from that of *The "Ydun"* on two grounds: (1) Under sect. 12 of the Provisional Order of 1880—while the rates levied and revenues received by the defenders are to be applied primarily for the maintenance and improvement of the harbour, any surplus is to be appropriated and set apart as a sinking fund as provided in the Act of 1860; and it was said that a time might arrive—after the purposes to which the sinking fund was to be applied has been implemented—when the surplus of rates might be lawfully appropriated to private purposes. In my opinion there is no warrant whatever for this contention; and no suggestion was made as to what private persons might take benefit under the Act, in the unlikely event of the principal sums borrowed from the Loan Commissioners being paid off.

(2) The second ground of differentiation is, in my opinion, equally shadowy. It was argued that, as the Commissioners had power to make bye-laws, and as the harbour-master was acting in pursuance of the bye-laws when the act or default was committed, he was not acting in pursuance or execution of any Act of Parliament. I utterly fail to see that there is any distinction. I have therefore no alternative but to sustain the defenders' fourth plea in law; and in terms thereof to assoilzie them from the conclusions of the action.—24*th January* 1908.

Counsel for Pursuers, Hunter, K.C., Spens; Agents, Whigham & MacLeod, S.S.C.—Counsel for Defenders, Dickson, K.C., Horne; Agent, A. P. Nimmo, W.S. J. W. F.

LANDS VALUATION APPEAL COURT.

(*Lords Low and Dundas.*)

334. The Airdrie, Coatbridge and District Water Trustees and The Caledonian Railway Company *v.* The Assessor for the County of Lanark.

Valuation—Subject—Slag Heap—Lands Valuation (Scotland) Act 1854 (17 & 18 Vict. cap. 91), sect. 42—Held that a Slag Heap which was the Subject of a Lease for an Annual Rent or Lordship was Lands and Heritages Liable to be Assessed—Opinions that the Slag Heap was Neither "Minerals" nor "Quarries" in the Sense of sect. 42 of the Lands Valuation (Scotland) Act 1854.

Case.

At a meeting of the Valuation Committee of the County Council of the County of Lanark for the Middle Ward District of the county, held at Hamilton upon the 10th day of September 1907, the Airdrie, Coatbridge and District Water Trustees and the Caledonian Railway Company appealed against an entry in the Valuation Roll for the year from Whitsunday 1907 to Whitsunday 1908, of slag lordship, Chapelhall, of which they were entered as proprietors and occupiers respectively at a rent of £648, 1s.

They craved that the entry should be struck out of the Roll.

The following were the facts as stated in the case:—

The subjects in respect of which the appeal is raised is known as the Chapelhall slag heap, and consists of a large deposit of slag owned by and lying on a piece of ground belonging to the appellants the Airdrie, Coatbridge and District Water Trustees.

The predecessors of the Water Trust had, in connection with the acquisition of the water rights, to acquire the ground and the slag heap for a valuable consideration.

The appellants the Caledonian Railway Company have entered into an agreement with the other appellants the Airdrie, Coatbridge and District Water Trustees, for the right to use the slag for purposes in connection with their railway, and they do so use it mainly in the construction and repair of the permanent way as ballast for the rails, breaking it up by machinery erected at the slag heap so as to make it useful for this purpose. The Railway Company pay a royalty of 2d. per ton for the slag so used, the proprietors of the slag heap, the Airdrie, Coatbridge and District Water Trustees, having elected to take that option in the agreement rather than the alternative of a fixed rent of £130.

It is only the slag that is let to the Railway Company, and should iron be found in the heap, the Railway Company have no right to it under the agreement.

The sum entered in the Valuation Roll is the amount of the royalties for the past year, and there is no dispute as to the amount of the entry should it be decided that the subject falls to enter the Valuation Roll.

Slag is the residuum left from the manufacture of ore into iron and steel, and in the present case the appellants stated, and the assessor was not in a position to deny, that the ore originally treated at the works which produced the slag heap did not necessarily come from the locality, but may have been in whole or in part foreign ore imported into this country from Spain and elsewhere.

Both appellants concurred in appealing on the grounds (1) that slag, from its nature and composition, is not a mineral, and being therefore not an heritable subject, no entry should be made in the Valuation Roll in respect of the sum received from its sale; and (2) that even if it were an heritable subject, there is no let of the subject, the arrangement being merely a bargain as to sale of a commodity.

In addition, the appellants the Caledonian Railway Company contended that the entry, so far as relating to them, should be expunged, on the ground that the subject is already included in the Valuation Roll made up by the Assessor of Railways, etc.

Both appellants argued that, looking into its composition, slag could not be considered a mineral substance. It was merely the refuse left over from the treatment of iron ore for its primary purpose, the

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manufacture of iron or steel, and the fact that it had now attained a commercial value was no reason for its inclusion in the Valuation Roll. It had no resemblance to clay or blaes, which are considered minerals in the sense of the Valuation Acts, because the reason that these fall to be entered in the Roll is that they are in their natural state as extracted from the earth. Further, the slag heap was not a quarry. The material had for convenience been placed on the surface of the ground, which thus became merely the storehouse for the slag.

In reply on this point of the case the Assessor argued that the mere fact that the iron had been by treatment extracted from the original mineral substance did not necessarily imply that what remained was not mineral in composition; and as the definition in sect. 42 of the Valuation Act of 1854 had been held to be not exhaustive in its application, he was entitled to consider, as he did, that the slag here was in substance a mineral. The mere fact that the ironstone which produced the slag might have been imported from abroad did not, in his opinion, affect the case, if he was right in his view on the main point. Slag was as much a land and heritage as kelp cast up by the sea, and it had been decided that kelp should enter the Valuation Roll. Alternatively the slag heap was a quarry in any event or an assessable subject in the sense of the Valuation Act, which, he again pointed out, was not exhaustive in its definition.

On the second ground of appeal, viz. that the case was simply one of the sale of a commodity and not a let, the appellants submitted that assuming slag to be a mineral, the circumstances of the present case were such as to prevent its inclusion in the Valuation Roll.

This, they argued, was not a case of the working of minerals, but the mere sale of an article of commerce, and the fact that a written agreement had been entered into between the sellers and the buyers was not adverse to this view. Further, the fact that the agreement stipulated for payment of a "royalty," an expression which they admitted was usual in the case of a let of minerals, did not alter the true facts of the case, which amounted to a contract for sale—the sellers having a commodity to sell, choosing to restrict themselves to one customer, and to make a contract with him.

The Assessor contested this view, and submitted that the facts clearly shewed that the relationship between parties was one of landlord and tenant. The fact that the Railway Company had erected plant to treat the material on the ground was significant, as they would not have done so unless under a continuing arrangement, and the arrangement in the case was on all fours with a lease in ordinary form, the duration being determined by the life of the slag heap.

The appellants the Railway Company argued (3) that no entry fell to be made in the local Valuation Roll, for the reason that the value of the slag used by them was already dealt with in the Roll made up by the Assessor of Railways, etc. It was used in the formation or repair of the permanent way, of which it thus formed part, and as the value of the permanent way is entered in the Railway Assessor's Roll, the value of the slag must necessarily be included in that Roll, and should therefore not be entered in the local Valuation Roll.

In reply to this point the Assessor contended that the appellants' argument was untenable, because there was no difference between the use of the slag in this case and the ordinary case of the Railway Company buying metal for use on the permanent way from the tenant of an ordinary quarry or similar subject. In that case the tenant would be entered in the local Roll for the value of the metal produced, and there could be no ground for contending that because in this case the Railway Company were themselves the tenants they should escape assessment.

The Valuation Committee agreed by a majority on the first two points, and unanimously on the third point—(1) that slag was a mineral, or alternatively, that the slag heap was a quarry in the sense of the Valuation Acts; (2) that the Railway Company are, in the sense of the Valuation Acts, tenants or occupants of the slag heap; and (3) that the fact that the valuation of the slag is dealt with by the Railway Assessor in computing the value of the undertaking does not operate against its inclusion in the local Valuation Roll. They accordingly dismissed the appeals.

The Water Trustees and the Railway Company appealed to the Valuation Judges.

The agreement between the Appellants was in the form of a lease. It proceeded as follows:—

> This lease, entered into between the Airdrie and Coatbridge Water Company, incorporated under Act of Parliament, hereinafter referred to as the first party,—*of the First Part*; and the Caledonian Railway Company, incorporated under Act of Parliament, hereinafter referred to as the second party,—*of the Second Part*;

Witnesseth as follows, viz.:—The first party hereby let to the second party, and the second party take in lease from them, All and Whole the slag heaps deposited upon that part of the first party's lands at Chapelhall, ... with free ingress and egress to and from the said slag heaps, and liberty to remove and carry away the same in the ways and roads least hurtful to the first party's remaining lands, and likewise with liberty to erect a crusher or crushers, with the necessary engine or engines, on a suitable site on the first party's ground to be approved by the first party, but excepting and reserving all iron in the said slag heaps, and that for the period and on the terms and conditions following, viz.:—

First. The term of the second party's entry to the subjects hereby let shall be as at the term of Candlemas 1902, notwithstanding the date hereof. The lease shall endure for five years from and after that term, and shall be terminable thereafter by either party on six months' previous notice in writing.

Second. The second party bind and oblige themselves to pay to the first party and their assignees the yearly rents after specified, ... viz. for the first year of this lease the sum of £50 sterling of fixed money rent, and for the remaining four years of this lease the sum of £130 sterling of fixed money rent yearly; or, in the option of the first party, the following lordship or royalty in the event of the lordship or royalty in any year ending Candlemas during the currency of this lease exceeding the said fixed money rents, viz. a lordship or royalty of 2d. per ton for every ton of crushed or screened slag that shall be removed and carried away by virtue hereof: . . . . and the second party bind and oblige themselves, over and above the said rents or lordship or royalty, to pay all damages whatever which shall be occasioned to the land, or to the fences and drains therein, or to the party or parties working the minerals under the

said land, by any of their operations in removing and carrying away the slag hereby let.

The Lands Valuation (Scotland) Act 1854, sect. 42, provides:

". . . . the expression 'lands and heritages' shall extend to and include . . . . mines, minerals, quarries . . . ."

Argued for Appellants: (1) A slag heap was not "minerals" in the sense of the Act. It was an extraneous substance which was brought in and deposited on the ground. The fact that slag was mineral in its nature did not settle the question. The word in the Act meant something one took from the ground in its natural state and carried away. But this was not a natural mineral. It was extracted from another mineral. One might as well assess iron which was extracted from the ore and stored somewhere. At what time did slag deposited on the ground become assessable? It never became incorporated with the ground. If a single piece of slag was not assessable, a heap was not, because it was simply an accumulation; and it was impossible to state any time in the process of accumulation at which it became an assessable subject. There were cases where—although not under this Act—the meaning of the word "minerals" had been dealt with. In *Magistrates of Glasgow* v. *Farie*, 1888, 15 R. (H.L.) 94, it was held that a bed of clay was not "minerals" in the sense of the Waterworks Clauses Act 1847, sect. 18; in *Nisbet Hamilton* v. *North British Railway Company*, 1886, 13 R. 454, stone in a cutting was held not to be "minerals" in the sense of the Railways Clauses Consolidation Act 1845, sect. 70; in *Scott* v. *Midland Railway Company*, 1897, 13 T.L.R. 398, a bing of slag was held not to be a quarry or "minerals" in the sense of the Quarries Act 1894. As to the cases cited for the Assessor—kelp was a natural substance, and the rent derived from it was the rent of a heritable subject partly growing on and partly washed up on to the shore. Blaes was also an entirely different subject, being a natural mineral produced from the ground, and not the residuum of the treatment of such a substance as ore for the purpose of extracting another mineral, viz. iron, from it. (2) While the form of the contract between the appellants was no doubt a lease, that was not conclusive. It was in reality a sale of the slag at twopence a ton. The stamp on the contract was adjudicated by the Inland Revenue at 10s. against the protest of the Railway Company, and the reason given for the amount was that the agreement gave a right of entry and power to erect machinery on the land. (3) The slag had already been assessed in the form of iron-ore. To assess it in the heap would be to assess it twice over.

Argued for Respondent: The Court had not to determine whether the heap of slag was "minerals," but whether it should be entered in the Roll as "lands and heritages." The case of the heap of blaes (*Assessor for Stirlingshire* v. *Stein & Co.*, 1900, 2 F. 596) was conclusive on the question. The case of *Nisbet Hamilton* v. *North British Railway Co.* (*cit. sup.*) turned on whether the stone was of any merchantable value. That was the ground of decision. The case of *Scott* v. *Midland Railway Co.* (*cit. sup.*) turned on the particular definition of quarry in the Quarries Act. The kelp cases (*The British Seaweed Co. Ltd.*, 1866, 4 M. 1139; *Gordon*, 1866, 4 M. 1141) were also in point in shewing that everything heritable in its nature which was of merchantable value was a proper subject for entry in the Valuation Roll. As to part of the slag being brought in from Spain, a similar argument was put forward in the oyster fishery case (*Wallace* v. *Assessor for Wigtownshire*, 1902, 4 F. 515) and rejected. The subject became assessable when it became of merchantable value, although it was "lands and heritages" from the time when it was placed on the ground.

The judges were of opinion that the determination of the Valuation Committee was right.

Lord Low.—I do not regard the slag heap in question as being either "minerals" or a quarry within the meaning of the Valuation Act; but it seems to me that it is undoubtedly a heritable subject which is let for a yearly rent. It is therefore liable to assessment. In the case slag is described as "the residuum left from the manufacture of ore into iron or steel," and we all know very well how in practice such a residuum is treated. A suitable piece of ground is obtained and the slag is deposited on that piece of ground. In course of time a large hill is formed, and, when that hill comes to be profitable, I fail to see why it should not be assessed. It is undoubtedly heritable, and is a subject capable of being let and yielding a rent.

I am accordingly of opinion that the decision of the Valuation Committee must be upheld.

Lord Dundas.—I am of the same opinion; and I should not have added anything to what your Lordship has said, but that the question is an interesting one, and we have had a good argument upon it. It is not, in my judgment, necessary to decide whether this slag heap is, or is not, "minerals," in the sense of sect. 42 of the Lands Valuation Act 1854. If it were necessary to do so, I should be disposed to answer that question in the negative, because the word "minerals," occurring, as it does, between the words "mines" and "quarries," seems to relate to something in the nature of mineral which is being wrought out from its native place in the ground. I am further of opinion that the slag heap is not a "quarry" in the sense of the Act. Then, there is a question whether the document which forms the contract between the parties (appellants) is clearly and absolutely a lease, or may be regarded as an agreement of sale. I

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must say that, although the form of the document is not necessarily conclusive, the contract is very like a lease. It bears to be a lease; it is stamped as such; and it contains provisions not only for payment of lordships but of a stipulated fixed rent.

But however that may be, I agree in thinking that the real point in the case, and a safe and sufficient basis for our decision, is that this slag heap is heritage—a heritable subject—a corporeal hereditament—capable of yielding, and in fact yielding, an annual return; and is therefore a fit subject of assessment. We are not, I think, called upon to decide the precise point of time at which the slag heap became such a heritable subject; but it seems clear enough that it did so as least as soon as, if not before, the time when the agreement or lease was entered into. We heard very little argument in support of the third point raised by the Railway Company, to the effect that the slag being in fact used by them in the construction of their permanent way, the value of which is otherwise assessed, the Company were in danger of double assessment. This argument is, in my judgment, clearly untenable, and I say no more about it. Upon the whole matter, I agree with your Lordship that the determination of the Valuation Committee is right.—19*th February* 1908.

Counsel for Appellants, Blackburn, K.C., King; Agents, Hope, Todd & Kirk, W.S.—Counsel for Respondent, Orr Deas; Agents, Ross Smith & Dykes, S.S.C. F. A. U.

LANDS VALUATION APPEAL COURT.

(*Lords Low and Dundas.*)

335. The Melrose Gas Company Limited *v.* Assessor for the County of Roxburgh.

Valuation—Rent—Gas Works—Revenue Method—Average of Years—Held that a Five Years' Average was a Proper Basis to Apply in Arriving at the Annual Rent or Value of Gas Works, Although the Five Years Included a Year of Exceptional Prosperity.

Case.

At a meeting of the Valuation Committee of the County Council of the County of Roxburgh, held at Jedburgh on 10th September 1907, the Melrose Gas Company Limited appealed against entries in the Valuation Roll for the year ending Whitsunday 1908 of gas works and pipes at a rent of £456.

They craved that the subjects should be entered at the sum of £248.

The facts were set forth in the case as follows:—

(1) That the free income or revenue of the Melrose Gas Company for each of the past five years, after making the necessary deductions based on decided cases, was as stated in the second column below, and (2) that the corresponding entries in the Valuation Roll were in the respective years as shewn in the third column below, viz:—

Year.	Income.	Entry in Valuation Roll.
1903	£371	£355
1904	871	375
1905	399	375
1906	442	375

It was also admitted and found that the foregoing entries in the Valuation Roll had not been based on average, while the assessor's valuation in the present year was based on a five years' average of the net profits or income.

It was contended for the appellants that the Melrose Gas Company Limited are entered in the Valuation Roll for the year ending Whitsunday 1907 and rated in respect of their works and piping at £375.

The present Limited Company purchased the works in the year 1894, and at that date the entry in the Valuation Roll was £325, at which figure it remained until the year 1903–4, when it was increased by £30 to £355 and by £20 to £375 in the following year—the increase being all put on the works and not on the piping. The increase in those two years was no doubt made by the Assessor on account of a considerable capital outlay on the works, amounting to about £800, made during the year 1903. The entry in the Valuation Roll has up to this year remained at £375. The Assessor gave notice to the appellants that the valuation of £456 had been put upon the works and pipes, that amount having been arrived at by a calculation following the method laid down in the case of the *Kinross and Milnathort Gas Light Company Limited* v. *Assessor of the County of Kinross*, 1890, 17 Rettie 850. This method of arriving at the yearly value had not been adopted by the previous assessor, but the appellants are quite prepared to accept it as the correct method of doing so. It was discovered, however, that the Assessor had based his calculation on figures which were not correct, and when he took the figures in the balance-sheet of the Company for the year to the 31st December 1906, the annual value as brought out by his own calculation amounted to £248, at which figure the appellants desire to be rated. The Assessor, however, then contended that the valuation should be based on the average value for the past five years according to the above-mentioned method of calculation, which amounted to £466. The appellants could not agree to this entry, and duly intimated an appeal. At the County Valuation Appeal Court the appellants contended that they should be entered at the sum of £248, being the amount arrived at by the foresaid method of calculation on the workings for the past year alone. In support of their contention they referred to the following cases, viz.: *The Assessor for Falkirk* v. *Falkirk Gas Company Limited*, 1883, 10 Rettie, p. 651, and *The Kinross and Milnathort Gas Light Company Limited* v. *Assessor of Kinross-shire*, 17 Rettie, p. 850, in both of which cases the result of the calculation based on the year's workings alone had been taken as the correct entry for the Valuation Roll. The appellants further contended that in any case it was inequitable to take an average of the five

past years, as since the beginning of that period competition had been started by an electric lighting Company in the town of Melrose in the year 1904, owing to which the appellants had lost a considerable amount of street and private lighting, and that the competition tended to restrict the free hand of the Company in fixing the price of gas. The appellants further contended that a definite method should be adopted by the Assessor, and that as he had first taken the result of one year's working, he should not have altered his method simply because he found that it was to be to his advantage to adopt an average over five years. They also contended that he could not legally now use as an argument for increasing the valuation his allegation that during the past years the Company had been under-assessed.

The Assessor stated that his valuation of £456 was based on an average of the accounts and profits of five preceding years, and he had adopted that course because in the words of the statute the subject had to be valued at the rent at which "one year with another" it might be reasonably expected to let "from year to year." Gasworks were trading, profit-earning concerns quite capable of being let or sold; they frequently were sold, and all such sales were arranged on the basis of profit for a term of years in the same way as a lease would be arranged. The Melrose Gas Company would not let their concern to a tenant on the basis of the small value of 1907—£248—nor would a tenant agree to rent it on the high value of 1904—£871, so that the fair and proper way of valuing such a subject was by an average. This system had, with the concurrence of the gas companies themselves, been generally adopted in Fife and elsewhere, the basis taken being an average of five preceding years. In this way sudden and unnatural fluctuations were avoided. It was quite possible that, whereas in the case of most gas companies, 1906 showed large profit and high value, 1907 or a subsequent year might shew an absolute loss. If so, it could not be successfully contended that the works should be entered in the Rolls at *nil*, because the two expressions "one year with another" and "from year to year" would prevent that. There were subjects such as harbours which, in some years, shewed no surplus revenue, and yet were continued in the Rolls at substantial sums. The gas cases decided by the judges in the Lands Valuation Appeal Court had all been brought up on the accounts of a single year, so that the question of average had not come up, and no decision for or against had yet been given. The Melrose Gas Company itself had, through their agent, offered to agree to the principle of the average in subsequent years provided they were allowed the benefit of the small profit of 1906 in the shape of the small valuation for 1907—£248. If the Valuation Committee was of opinion that the principle of average was a proper one, it should be put in force at once, more particularly as the figure before them showed that in previous years the Company had received an advantage in rating owing to the rules laid down in the *Kinross and Milnathort* case (30th May 1890, 17 R. 850) not having been applied to them.

The County Valuation Committee being of opinion that in the circumstances — previous valuations neither having been based on the actual profits of each year nor on an average of years— the principle adopted by the Assessor was correct.

The Gas Company appealed to the Valuation Judges, and argued that the actual net revenue ought to be taken, or, if an average was taken, three years should be the time for which the average was struck. In any case a year of exceptional prosperity should not be taken, when conditions had materially altered and the income of 1904 was not likely to be repeated in the near future.

The Valuation Judges *were of opinion* that the determination of the Valuation Committee was right.

Lord Low.—I have no doubt the Assessor is perfectly right in arriving at his valuation by taking the results of trading on an average of years, because, as Lord Fraser pointed out in the *Falkirk* case, the hypothetical tenant would, in considering what rent he could afford to give, enquire what had been the revenue upon an average of years.

I am further of opinion that five years is a fair period, and indeed is generally recognised in practice to be a fair period to take. The only difficulty is that in the five years taken is included the year 1904, when the Company seems to have had an abnormally large income, and it is said that a change of circumstances has occurred since that time which has materially diminished the demand for gas. There may, however, for anything which appears to the contrary, again be a change of circumstances which may increase the income of the Company. And although I have a good deal of sympathy with their objection to the year 1904 being included in the average, I do not think that we would be justified in taking the average of a smaller number of years, or in estimating the income of the year 1904 at a less amount than that which was actually earned.

For these reasons I am of opinion that we should hold that the determination of the Committee was right.

Lord Dundas.—I am of the same opinion.—20*th February* 1908.

Counsel for Appellants, C. D. Murray; Agent, Robert Simson, W.S.—For Respondent, Party.

F. A. U.

OUTER HOUSE.

(*Lord Salvesen.*)

336. The St Mungo Manufacturing Company *v.* Hutchison, Main & Company Limited.

I. Administration of Justice—Contempt of Court — Publishing Pendente Lite Comments upon the Proceedings — Action of Interdict for Infringement of Patent—Circular Issued by Complainer to Respondents' Customers

OUTER HOUSE. *Lord Salvesen.*

The St Mungo Manufacturing Company v. Hutchison, Main & Co. Ltd.

AGAINST PURCHASE OF GOLF BALLS ALLEGED TO BE INFRINGEMENTS OF HIS PATENT — INTERDICT OF CIRCULAR BY RESPONDENTS—EXPENSES.

II. PATENT—SLANDER OF TITLE—DAMAGES—INTERDICT — THREATS — HALSEY v. BROTHERWOOD, 1881, 19 CHAN. DIV. 386, CONSIDERED.

The opinion of the Lord Ordinary sufficiently reports this case.

Lord Salvesen.—This action was raised so far back as 8th December 1906, to have the respondents interdicted from distributing a circular issued by their law agent on their behalf. Both parties are golf ball manufacturers; and the respondents, prior to the issue of the circular, had served on the complainers a note of suspension and interdict against an alleged infringement by the complainers of a registered design applicable to golf balls. This case went to proof, and resulted in the present complainers being assoilzied. The circular complained of was issued a fortnight after the note of suspension and interdict had been presented to retail dealers in the golf ball trade, and its object was to warn them from dealing further in the so-called "Colonel" golf balls manufactured by the complainers.

The complainers seek interdict on two separate grounds: first, that the circular was issued in contempt of Court, and was calculated to prejudice their interests in the pending proceedings; and second, that it contained false representations which tended to interfere with their legitimate trade. Lord Kyllachy granted interim interdict on 28th December 1906, and this interdict was continued by Lord Mackenzie when he passed the note on 10th January 1907. The application has accordingly served its purpose; and the complainers do not ask that the interdict should be made perpetual, but they claim that the respondents should be found liable in the expenses to which they have been put.

The decisions relied on by the complainers that the issue of the circular in question constituted a contempt of Court seem to support their proposition. In the earliest case on the subject (*Henderson* v. *Laing*, 1824, 3 S. 384) a person who published and circulated a statement tending to create an impression as to the merits of the question which formed the subject of pending actions unfavourable to his opponent, was found to have committed an improper and unwarrantable interference with the proceedings of the Court, and was subjected in payment of the expenses of a petition and complaint. In *M'Lauchlan* v. *Carson*, 1826, 5 S. 147, it was held to be an interference with the administration of justice to publish a report of a statement made at a public meeting of road trustees by their agent relative to a case depending in Court against them. The Lord President (Hope), in sustaining the petition and complaint and finding the respondents liable in expenses, said: "Reports of depending cases are at all times very dangerous, and tend to interfere with the administration of justice. It may be perfectly lawful to report that an interesting point of law has arisen and is depending in Court, but it is extremely improper to enter upon all the facts of the case." No doubt there was a specialty in that case that the newspaper in which the report appeared was likely to be read by persons who might be jurors or witnesses at the approaching trial, but the observations made were perfectly general. In the subsequent case of *Smith* v. *Mitchell*, 1835, 14 S. 172, although nothing had been done by the respondent except to print in the form of a pamphlet a memorial and queries previously submitted by him to counsel and calculated to produce an impression prejudicial to his opponents, he was found liable in the expenses of a petition and complaint to have the circulation interdicted, although the copies complained of had not been circulated by his direction or authority. It thus appears that, according to our law, any publication bearing upon the merits of a dispute which is *sub judice* and which prejudges the case, or discounts the judgment before it is issued, is liable to be restrained. I think the circular complained of is of this nature. It states as a fact that the complainers had applied a fraudulent or obvious imitation of a registered design belonging to the respondents to their golf ball called the "Colonel," and it warned retail dealers that if they sold "Colonel" golf balls with this design they would expose themselves to certain statutory penalties. The respondents were practically, therefore, by means of this circular endeavouring to obtain the same advantages as they would have got if an interim interdict had been granted, and—if their argument is sound—without exposing themselves to any liability for damages.

The case relied upon by the respondents—*Halsey* v. *Brotherwood*, 1881, 19 Ch. Div. 386—does not really meet the argument for the complainers. It was there held that the holder of a patent the validity of which was not impeached, was entitled to issue notices against people purchasing certain articles on the ground that they were infringements of his patent, and was not liable to an action at the instance of the vendor of said articles if he acted in *bona fide*. The circulars there complained of, however, were not issued while any action was in dependence. The other English case quoted—*The Gillette Safety Razor Co.*, 1906, 24 R.P.C., p. 1—shews that the English Courts, equally with our own, will restrain a misrepresentation by parties to judicial proceedings with reference to these proceedings. This latter case is not directly in point, because the circular complained of con-

veyed the impression that an injunction had been refused on the merits, whereas the refusal applied only to an interlocutory injunction. Still the principle on which Warrington, J., proceeded, in giving judgment, seems to me to be practically the same as that which pervades the early decisions to which I have referred. It is true that, in the present case, the circular—even if it had come to my knowledge—would certainly not have affected my mind in favour of the respondents. It was rather calculated to produce the opposite effect; but I think it is a wholesome rule that, in all cases that have been submitted to a legal tribunal for decision, the merits of the case should not be tried or discussed in publications by interested parties, or by the newspapers, and that any breach of this rule should be visited by the penalty that the Court may deem appropriate.

In this view it is unnecessary for me to consider the other ground of action; but as the point was argued I shall briefly express my opinion upon it. I do not doubt that the Courts here would follow the decision in *Halsey's* case in similar circumstances; and would protect a patentee—the validity of whose patent had never been challenged — against actions raised by persons whom he had *bona fide* alleged to be infringing his patent rights. The proper way for them to protect themselves, in such circumstances, is to bring an action challenging the validity of the patent, or asking that the patentee should be restrained from making injurious statements with regard to the articles sold by them; and in the meantime, to take the course which the complainers here adopted so as to minimise damage by issuing counter circulars to the retail dealers. I doubt, however, whether when an action for infringement is actually defended on grounds which are intelligible and proved to be conclusive that the patentee or registered proprietor of a trade mark — as the case may be—is entitled to issue a circular such as the one in question, which broadly asserts that his opponents are infringing his rights, without at the same time indicating that these rights are being challenged. The result certainly may be to mislead the persons to whom the circular is addressed, and to induce them to stop dealing with the alleged infringer. On this separate ground I am prepared to hold that the circular was not one which ought to have been issued by the respondents; and that they deserve accordingly to be cast in the expenses of the necessary application to restrain its further publication.—17*th February* 1908.

Counsel for Complainers, Sandeman; Agents, J. & J. Mackenzie, W.S.—Counsel for Respondents, Macmillan; Agents, Ronald & Ritchie, S.S.C. J. W. F.

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Wilkie v. Wilkie.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Ardwall.*)

337. Wilkie *v.* Wilkie.

Husband and Wife — Donation Inter Virum et Uxorem—Nullity of Marriage—Money Given to Husband to Place in Bank in Wife's Name—Money Alleged to Have Been Applied to Joint Purposes—Circumstances Where Held Wife Entitled to Recover.

(*Reported supra, p.* 134.)

Reclaiming Note against an Interlocutor of Lord Mackenzie.

The facts of the case sufficiently appear from the previous report and from the judgments of the Court.

The pursuer *reclaimed* and *argued*: In order to succeed the defender must prove (1) donation; (2) that the money had been spent on mutual purposes; (3) that the money was no longer extant (*Livingstone* v. *Livingstone*, 1907, 14 S.L.T. 892). There was no donation—the money was handed to the defender for the purpose of being lodged in bank in the pursuer's name. It was not proved that the money was expended on mutual purposes or that it was not extant. *Livingstone* v. *Livingstone* (*cit.*), and *Hedderwick* v. *Morison* (1904, 4 F. 163), were distinguishable. In these cases the wife had herself disbursed the money, which was applied to mutual purposes. Where a wife's money was immixed with the husband's funds the wife was a creditor, although a postponed creditor (Married Women's Property (Scotland) Act 1881, 44 & 45 Vict. cap. 21, sect. 1 (4)). Even if there was donation the defender was bound to restore when decree of nullity was pronounced (Fraser, Husband and Wife, I. 149; Ersk., I. 6, 43; *A. B.* v. *C. B.'s Trs.*, 1907, 15 S.L.T. 108, affd. 20th February 1908).

Argued for the Defender: The pursuer had refrained for four years from making any demand for the return of the money. She knew that it had been used for the hotel business, which was carried on for the joint behoof of the parties. The pursuer must therefore be held to have acquiesced in the money being devoted to joint purposes. It followed that she could not demand repayment (*Hutchison* v. *Hutchison's Trs.*, 1842, 4 D. 1399; *Hedderwick* v. *Morison*, *cit.*; *Livingstone* v. *Livingstone*, *cit.*). It was immaterial that the marriage had been found to be null. The case depended on the pursuer's acquiescence in the money being devoted to joint purposes, and her attitude of mind could not be affected by what happened subsequently. In this class of case there was no distinction between spouses

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who were subsequently divorced, parties who erroneously believed themselves to be spouses, and parties who were living in concubinage. The Married Women's Property Act 1881, sect. 1 (4), did not apply. This was a case of consumption, not of immixed funds.

The Court *recalled* the interlocutor of the Lord Ordinary and decerned against the defender for the sum of £100.

The Lord Justice-Clerk.—I am of opinion that the Lord Ordinary's interlocutor must be recalled. The facts are simple, and lead to only one conclusion. The pursuer handed over a cheque for £100 to the defender on the understanding that he was to pay it into bank in her name. He did not do this, but instead paid £80 of it into his own account, and gave the pursuer the remaining £20 to pay the ordinary business bills of the hotel, in circumstances which would not necessarily lead her to suppose that the £20 formed any part of the £100 she had handed to him. Her evidence is that she often asked him for the £100, and in particular requested him to give her a receipt, and that he always told her it was all right, and that he would give her her money when she really required it. Now the Lord Ordinary believed her evidence. That being so I cannot see how he arrived at the conclusion he did. If her evidence is true, the money was originally hers; she never gave it to the defender or authorised him in any way to spend it, and I entirely fail to see why she should not now be found entitled to repayment.

Lord Stormonth-Darling.—I concur with your Lordship. There is no doubt that the £100 originally belonged to the pursuer. Her father gave it to herself as a present for her own purposes, in recognition, it would appear, of the services she had for a long time rendered to him without wage or remuneration. That being so, the money would never have found its way at all into the defender's hands, had the pursuer not asked him to pay it into bank in her own name. She handed it over to him for that purpose alone, and that purpose he never carried out. Instead of doing so he, without any justification, paid it into his own account. The money therefore was never his, and I accordingly think that he must now restore it, there being no evidence in the case to shew that she ever consented to its being spent for household or other purposes, or in any way waived her right to demand the money as her own. It was argued to us that, as the money had in fact been spent for mutual purposes, the pursuer could not now recover it, even although she had never given it to the defender or actually authorised the expenditure, the argument being founded on the supposed analogy of a marriage dissolved by divorce, in which case, apparently, there is authority for the proposition that neither of the spouses can, on the dissolution of the marriage, recover from the other money which has in fact been spent for their mutual benefit. The Lord Ordinary gives effect to this supposed similarity of principle by assoilzieing the defender from the petitory conclusions of the summons. But I am of opinion that there is no analogy between a marriage dissolved by divorce and one annulled on the ground that it never was truly contracted. In the former case, down to the date of decree the parties were married persons; in the latter they never were married persons at all, and therefore could have no properly mutual purposes. To use the words of Erskine (Inst., I. 6, 43): "As marriages, in themselves void, can have no legal effects, everything must, on a declarator of their nullity, return *hinc inde* to its former condition."

Lord Ardwall.—I agree with your Lordships. I think that there is no record for the ground on which the Lord Ordinary has decided this case. There is no averment and no plea that the money was spent for mutual purposes. The only specific plea which is stated for the defender is that the money was a donation to him. In face of the evidence this plea is not maintainable, and was not maintained at the debate. Neither party maintains that the money in question formed the subject of a loan, and on the evidence it is proved that it never formed the subject of a donation to the defender. I should therefore have been prepared to hold that the defender's case as set forth on record has wholly failed.

But it is right to take notice of the ground on which the Lord Ordinary has decided the case. That ground is stated by him as follows: "The question is whether the pursuer, who, during the time in question, occupied the position of the defender's wife, can now recover from him moneys which she must be held to have known were being applied for mutual purposes. If this were the case of a marriage dissolved by decree of divorce, it would, I think, be plain from the decision in *Fenton Livingstone*, 14 S.L.T. 892, and the cases there referred to, that she could not. . . . I am of opinion that the principle of the cases above referred to applies to moneys spent on mutual purposes during the period pursuer and defender believed they were married persons." Now I differ from the Lord Ordinary, because I do not see how the pursuer can be held to have known that the money was being applied for mutual purposes unless she knew for what purposes it had been withdrawn from the defender's bank account, and this she had no means of knowing. Whether it had been withdrawn for the purposes of speculative investment or for the purpose of making additions to the stock of the hotel business, she could not know. She would not assume that the cheques which she received for the purpose of paying the hotel bills came from

the £100 in question; the defender assured her to the contrary, and led her to believe that the money was all right and that she could get it at any time.

Still less is there any room for a plea of acquiescence, for the pursuer says: "After the end of September, when I knew Mr Wilkie had diverted the money for his own use I repeatedly complained to him about it. I was always put off with excuses"; and again, "I knew it was in his name, and that there was an overdraft, but he said he would give me back the £80." These passages shew clearly that the pursuer did not acquiesce in the money being spent by the defender for current expenses or otherwise. I believe her statement, and I do not believe the contrary statements of the defender. In these circumstances I do not see any foundation in fact for a plea of acquiescence or taciturnity.

The case of *Fenton Livingstone*, besides being differentiated from the present case by the fact that the marriage was dissolved by decree of divorce, is also differentiated from the present by the fact that in that case the money came into the husband's hands by way of donation from his wife, and was applied to mutual purposes such as the payment of jewellers' bills and the husband's personal expenses. In the case of *Hedderwick*, 1901, 4 F. 163, the wife herself had expended her own money on household purposes, and she was held not entitled to recover it as a debt from her husband. The case of *Hutchison*, 1842, 4 D. 1399, does not appear to me to have much bearing on the present case; so far as it goes, it appears to me to be adverse to the defender's contentions. I think, therefore, that none of these cases support the defender's argument.

I agree with my brother Lord Stormonth-Darling, that the case in which the married life of the parties is brought to an end by a decree of nullity is very different from the case where a marriage is dissolved by a decree of divorce, and this is an additional reason for holding that the case of *Fenton Livingstone* does not apply to the present.—20*th February* 1908.

Counsel for Pursuer, Scott Dickson, K.C., A. M. Anderson; Agents, Clark & Macdonald, S.S.C.—Counsel for Defender, M'Clure, K.C., Spens; Agents, Cunningham & Lawson, Solicitors.

J. S. M.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling and Ardwall.)

338. The Clan Steam Trawling Company Limited and Others *v.* The Aberdeen Steam Trawling and Fishing Company Limited.

2nd Div. — The Clan Steam Trawling Co. Ltd. and Others v. The Aberdeen Steam Trawling and Fishing Co. Ltd.

Shipping Law—Salvage—Pre-existing Obligation to Render Services—Vessels Insured in Same Company—Obligation in Policy on All Vessels Insured to Assist Each Other When Required—Held Claim for Salvage Remuneration Excluded by Obligation in Insurange Policy.

(Reported supra, p. 788.)

Reclaiming Note against an Interlocutor of Lord Salvesen.

The facts of the case are sufficiently set forth in the previous report.

The Defenders *reclaimed* and *argued*: The pursuers had no claim for salvage remuneration because they had not performed salvage services. It was of the essence of salvage services that they should be voluntary—that the salvor should be under no pre-existing obligation to render them (Abbott, Law of Merchant Ships and Seamen, fourteenth edition, p. 965; M'Lachlan, Law of Merchant Shipping, p. 642; Kennedy on Civil Salvage, second edition, pp. 2, 71, 84, 97; *The "Neptune,"* 1824, 1 Hagg. Adm. Cas. 227; *The "Zephyr,"* 1827, 2 Hagg. Adm. Cas. 43; *The "Calypso,"* 1828, 2 Hagg. Adm. Cas. 209; *The "Harriot,"* 1842, 1 W. Rob. 439; *The "Sappho,"* 1871, L.R. 3 P.C. 690; *The "Solway Prince"* [1896], P. 120). Here there was a written contract imposing a duty to render assistance. This contract was not contrary to public policy, because it affected only the owners of the salving ship and left the claims of the master and the crew untouched. The agreement was a reasonable arrangement. The members of the insurance company associated themselves on the footing that if one of their number sustained loss (whether the loss of the ship or loss incurred through having to pay for salvage services) the whole members should contribute rateably. The advantages which the pursuers got were (1) that their ships were insured at low premiums; (2) that they escaped liability for salvage claims in respect of other members' vessels; (3) that they had right to claim gratuitous assistance from the other members of the Company if their own ships got into difficulties. The cases cited by the pursuers were distinguishable. *The "Margery"* [1902], P. 157, turned on want of notice. In *The "Waterloo,"* 1820, 2 Dodson 433, and *The "Swan,"* 1839, 1 W. Rob. 68, the alleged obligation was founded on a custom which was held not to have been proved. If it had been proved it would have excluded the claim. The present case, the case of a written agreement, was a stronger case for the defenders. The towage and pilotage cases were truly illustrations of the principle for which the defenders contended. The pilot or tug was entitled to salvage remuneration if the services rendered were such that they could not fairly be held to form part of the duties included in their contract with the shipowner (*Akerblom* v. *Price*, 1881, L.R. 7 Q.B.D. 129).

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Argued for the Pursuers the Clan Steam Trawling Co. Ltd.: The services rendered were, *prima facie*, such as entitled the pursuers to claim salvage remuneration. Salvage was compensation for services rendered to ships in distress (Abbot, Merchant Ships and Seamen, fourteenth edit., pp. 960, 962). The right to salvage remuneration was highly favoured by the law, and if the defenders were to escape liability, they must make the exemption clear beyond dispute (*The "Waterloo," cit.*). They attempted to do so by tabling an agreement which no doubt bound the pursuers to render assistance, but which did not specify the terms on which assistance was to be rendered. The defenders' construction obliged them to read in the words "without remuneration," and it was not to be presumed that the pursuers agreed to render gratuitous services. The agreement, therefore, did not exclude the pursuers' claim (*The "Margery," cit.*). An exclusion of salvage remuneration was implied only where the salvors and the shipowner were engaged in a common enterprise (*The "Swan," cit.*; *The "Zephyr," cit.*; *The "Harriot," cit.*; *The "Sappho," cit.*). The cases were cases where the salvor stood in a particular relation to the salved vessel, as in the case of services being rendered by the ship's crew (*The "Neptune," cit.*), or in the case where a pilot or tug rendered services which were covered by their ordinary remuneration (*Akerblom* v. *Price, cit.*). There was no such element in the present case.

The Court *recalled* the interlocutor of the Lord Ordinary and *assoilzied* the defenders from the conclusions of the action so far as laid at the instance of the Clan Steam Trawling Co. Ltd.

The Lord Justice-Clerk.—My Lords, at the hearing of this case I formed a fairly decided opinion that this reclaiming note must be successful, and a subsequent investigation of the authorities to be found in previous decisions confirmed my view as taken at first. I agree with the Lord Ordinary that "salvage remuneration" is very much favoured in the law, but he seems to me to err in holding that this is a case of salvage. It does not appear to me that the services rendered by the "Clan Grant" to the "Strathclyde" fall under the description of salvage services. The whole tone of the authorities is to be found in the expression "voluntary." Services to be rendered by one vessel to another in distress are services for which salvage is exigible when the service is not a service of contract or obligation, but is a service which those rendering it could refuse to render without committing any breach of contract or duty undertaken as matter of obligation. It is of course true that there is a duty in the sense of the moral law to render succour as far as may be possible to those in distress at sea. This moral obligation applies on land as well as on sea, and its force as a moral obligation is only greater in the case of sea perils because these are in the general case more clamant in their call for aid, because of their exceptionally dangerous character. But this is an obligation which applies not to seafaring matters only, but to all circumstances in which the citizen can, by timely assistance, save others from danger. And even that obligation can hardly be held to exist as regards saving of corporeal subjects. It applies only to persons. But, whatever be the extent of it, it is plainly not an obligation in law; its non-fulfilment cannot be visited with public official censure or give claim in civil suit in respect of failure. Salvage in its true sense is suitable reward for services voluntarily rendered in circumstances where, by the services offered on the one hand and accepted on the other, there is saving of what otherwise was in risk of perishing or being lost.

It seems to me quite clear that the word "salvage" does not apply to services which those rendering them had by contract undertaken to render.

Here, in this case, the insurance conditions were that the vessels mutually insured gave as part of the consideration for the insurance an obligation to render assistance to vessels mutually insured with them. It may be taken to be quite certain that this obligation was as much a part of the premium of insurance as the money paid by the insurer. Each insured bargained for the assistance of the others, and undertook to render assistance to the others, when any two vessels came to be the one in the position of being a vessel in distress, and the other a vessel able to render assistance. It was a perfectly intelligible and efficient contract for a benefit, which the one had a right to claim, and the other had contracted to give.

That being so, I have without hesitation come to the conclusion that the defenders' plea in law, which the Lord Ordinary has repelled, should be sustained. I do not think it necessary to go over the authorities in detail: I have had an opportunity of perusing an opinion of Lord Ardwall which reviews these authorities very fully, and in which I concur.

Accordingly I would move your Lordships to recal the interlocutor of the Lord Ordinary, to sustain the first plea in law for the defender, and to grant absolvitor from the claim for salvage. The defenders are willing to meet such charges as may be necessary to meet outlays and payments to officers and crew of the "Clan Grant," and the case will be remitted back to the Lord Ordinary that this matter may be disposed of.

Lord Stormonth-Darling.—Had the proof allowed by the Lord Ordinary been a proof before answer, I should have been disposed to think that the enquiry might have thrown some light on the question whether the sum claimed by

the owners of the "Clan Grant" was for "salvage services" as claimed in the summons. But that is not the nature of the proof, for the Lord Ordinary prefaces his allowance of it by repelling the first plea in law for the defenders, which distinctly tables the proposition that the owners are not entitled to salvage. Now, being thus brought face to face with the question whether this claim, so far as at the instance of the owners, is a salvage claim at all, I have come to agree with the opinion of your Lordship and also with that which my brother Lord Ardwall is about to read.

Lord Ardwall.—This is an action raised by the Clan Steam Trawling Co. Limited, as owners of the ship "Clan Grant," and the officers and crew of the said ship, against the Aberdeen Steam Trawling and Fishing Company Limited, the owners of the steam trawler "Strathclyde," and it concludes for payment of £500 in name of salvage, in respect of "the salvage services specified in the condescendence."

It is not disputed by the defenders that if the services in respect of which the claim is made had been rendered spontaneously and voluntarily, the owners of the "Clan Grant" would have been entitled to salvage; but in their first plea in law they plead that the pursuers, the owners of the "Clan Grant," being under pre-existing obligation to render the services in question to the "Strathclyde," are not entitled to salvage. With regard to the claim of the officers and crew, the defenders represent themselves as being willing to pay a reasonable amount of salvage, and with regard to them the only question that remains is as to the amount to be paid.

The question that has to be decided now is whether the first plea in law for the defenders ought to be sustained or repelled. The Lord Ordinary repelled the plea, on the ground, apparently, that the services rendered by the "Clan Grant" were salvage services, and that there is nothing in the contract founded on by the defenders to exclude the claim. He expresses himself thus: "The right to obtain salvage remuneration is one very much favoured in the law, and therefore cannot be excluded except by express words or by very clear implication from the language used. Rule 30 contains no express exclusion of such a claim, and it does not appear to me that there is any implication at all that it should be excluded"; and again he says: "I reach the conclusion that the present claim is not barred, because there is nothing in the agreement to exclude the right of the salvor to receive the remuneration for his services which the law gives him."

It humbly appears to me that the Lord Ordinary has in these passages and the rest of his opinion assumed that the services rendered were salvage services, giving the pursuers a right to remuneration unless such right was barred by contract.

I cannot help thinking that the Lord Ordinary by making the assumption alluded to has failed to attend to what is implied in the term "salvage services," and that the question is not whether the pursuers have barred themselves from claiming the salvage remuneration they are entitled to, but whether they are entitled to any salvage remuneration at all—in other words, whether their services were of the nature of "salvage services."

Now, I think it clear upon the authorities that in order to entitle a person to claim salvage remuneration the services in respect of which he claims must have been spontaneously and voluntarily rendered, and not rendered in respect of any contractual or official duty resting on the person rendering them. This, I think, is established by a series of *dicta* pronounced by judges of the greatest eminence in a variety of cases.

In the case of *The "Neptune"* (1824), 1 Hagg. 227, at p. 236, Lord Stowell is reported as having expressed himself as follows: "What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship." And the same noble and learned Lord in the case of *The "Zephyr,"* 1827, 2 Hagg. 43, refused to entertain a claim of salvage for services rendered by one vessel to another, where the vessels were sailing as consorts and under an agreement to render mutual assistance. And in the same volume of Reports, in the case of *The "Calypso,"* 1828, p. 209, Sir Christopher Robinson, in considering an alleged distinction between civil and military salvage, expressed himself thus, p. 217: "It will be found, I think, that both these forms of salvage resolve themselves into the equity of rewarding spontaneous services rendered in the protection of the lives and property of others. This is a general principle of natural equity, and it was considered as giving a cause of action in the Roman law, and from that source it was adopted by jurisdictions of this nature in the different countries of Europe." He then refers to a judgment of Sir William Wiseman, in which he refers to the Digest, Lib. 3, tit. 5.

The case of *The "Waterloo,"* 1820, 2 Dodson 433, was quoted by the pursuers for certain *dicta* therein which they alleged to be favourable to their contention. In that case the East India Company attempted to escape liability for a claim for salvage on the ground that there was a usage and practice exempting them from payment of salvage when ships belonging to them were salved by a ship in their employment. Lord Stowell—then Sir William Scott—held that no such custom or usage was proved, and in the course of his judgment said that where an exemption is claimed from a submission to a

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general rule, the exemption must be so set forth as to be intelligible in its extent, that an indefinite claim of exemption is "rank," and made other remarks to the some effect; but nowhere, as far as I read the judgment, is there anything controverting the general principle that to bring services within the category of salvage services they must be rendered voluntarily and not in respect of any contract or official duty. The soundness of the definitions and dicta above quoted have been recognised in a variety of cases, for instance, in *The "Cargo ex 'Schiller,'"* 1877, L.R., 2 P.D. 145, Lord Justice Brett says, at p. 149: "Both cases are therefore consistent with what was said in *The 'Thetis,'* 1833, 3 Hagg. 14, and *The 'Neptune,'* that salvage is the service which volunteer adventurers spontaneously render to the owners in the recovery of property from loss or damage at sea under the responsibility of making restitution, and with a lien for their reward."

In the case of *The "Solway Prince"* [1896], P. 120, it was held by Sir F. H. Jeune, that a contract with underwriters which was not depending on success, precluded the plaintiffs from asserting a "maritime lien" on the vessel and claiming salvage remuneration from her owners. In delivering judgment he said: "There is not, so far as I know, any direct authority in the Court of Admiralty on the point, unless it is to be found in those cases which decide that persons who perform services in themselves of a salvage nature because they are bound by a pre-existing contract or a pre-existing duty to perform them, are not entitled to claim as salvors. See *The "Neptune"* and *The "Hannibal,"* 1867, L.R. 2 A. and E. 53. . . . These authorities at least illustrate the voluntary character which is held to be essential to the claim of a salvor, and they show that if work be done in pursuance of a contract other than a salvage contract, it does not, under ordinary circumstances, give rise to a salvage claim."

The rule of these decisions is very well set forth in Lord Justice Kennedy's Treatise on Civil Salvage. On page 2 his definition of salvage services concludes thus: "If, and so far as the rendering of such services is voluntary and attributable neither to legal obligation nor to the interests of self-preservation nor to the stress of official duty"; and again he says, on page 28 of the same work: "Voluntariness on the part of the salvor is equally, with danger to the thing saved, an essential element in the constitution of a salvage service."

The cases in which the services of a tug or of a pilot were remunerated as salvage services were referred to as detracting from the universality of the rule regarding voluntariness that I have just been considering, and in particular the case of *Akerblom* v. *Price, etc.*, 1881, L.R. 7 Q.B.D. 129, was referred to. In that case some pilots had rendered important services towards a vessel, and it was held that they were entitled to be remunerated as for salvage services, but in concluding the judgment of the Court, Lord Justice Brett spoke as follows:—

"We have thought it right to give our reasons at length, but we might decide this case by saying that the service rendered was one which the pilots were not bound to render. It was a danger they were not bound to encounter; next, that the service was not one of pilotage; it was not a piloting to any port or place, but of taking out—a salving from danger."

And so with regard to all similar cases it appears that the services were considered to be salvage services, because they were outside of and not within the contracts of towage or pilotage. In the present case the alleged salvage services, according to the pursuers' own averments, were of a most ordinary description.

The law standing thus, the only question is whether in the present case the owners of the "Clan Grant" were or were not under a contractual obligation to render the services they did to the "Strathclyde." This depends on the effect to be given to the policies of insurance, the articles of association, and the rules of the Aberdeen Mutual Steamship and Trawlers Insurance Company. The "Clan Grant" was insured with this Company, under a policy which is No. 15 of process, and in that policy it is provided that the premiums or contributions of the nature of premiums, payable in respect of the insurance, are to be calculated according to the losses by way of mutual insurance, and the policy goes on to provide thus:—

"And it is mutually agreed between the assured and assurers, that the articles of association of the assurers' Company, and the rules of the Company, shall be deemed part hereof, and be binding upon the assured and assurers as fully and effectually, to all intents and purposes, as if such articles were inserted in this policy, and any breach thereof will invalidate the same."

By No. 3 of the articles of association it is provided that every insurer is to be deemed to become a member of the Company, and by article 9 the members bind themselves to accept and agree to be bound by the rules of the Company. Article 30 of the rules of the Insurance Company provides as follows:—

"Ships insured in this Company shall give assistance to any steamer broken down or in distress, which is insured either in this Company or in the Total Loss Mutual Steamship Insurance Company (Sunderland), or the United Kingdom Steam Tug and Trawler Insurance and Indemnity Association (Shields), or any other Association with which an agreement is or may be entered into." And rule 32 provides that the funds required for the payment of claims shall be raised by contributions from all the members.

The "Strathclyde" was insured with the same

Company under a policy of insurance in identical terms with the policy over the "Clan Grant."

It is obvious from the above contract of insurance, taken along with the articles and rules which are declared to be incorporated therewith, that there was established a mutuality of obligation between all the members of the Insurance Company. All the members had an interest in keeping down claims for loss, because the fewer of these, the smaller would be the contribution periodically demanded from the various members, and while each member was bound by the rules to give assistance to ships of other members of the Company, he was on his part entitled to receive assistance from them; and if a ship belonging to any member of the Company failed to give assistance to any other ship insured in the Company, which was broken down or in distress, it is, I think, clear, first, that the owners of the former ship would be guilty of a breach of contract, in consequence of which their own policy would be invalid, and they might in addition be subjected to an action for damages.

I therefore think that it is perfectly plain that in the present case the "Clan Grant" was bound to give assistance to the "Strathclyde" which was in distress at the time the services condescended on were rendered. If this is so, it appears to me that there is an end of the pursuers' case so far as at the instance of the owners of the "Clan Grant," because there was a pre-existing contract under which that vessel was bound in the circumstances to give assistance to the "Strathclyde"—in other words, the services which were rendered by the "Clan Grant" to the "Strathclyde" were not in law salvage services at all, but were services rendered in pursuance of the contract between the owners of the "Clan Grant" and the Mutual Insurance Company in which the owners of the "Strathclyde" had a *jus quæsitum*.

This being so, it is irrelevant and unnecessary to enquire whether the owners of the "Clan Grant" are barred by the contract from claiming remuneration as for salvage services, there being no salvage services for which remuneration can be claimed. But it is satisfactory to notice that the conclusion I have arrived at as matter of law is truly in accordance with the special contract, because I think it clearly appears from Article 25 that no remuneration for services was contemplated by the contract, except for charges and expenses; and Rule 92 of the Total Loss Mutual Steamship Insurance Company, which was referred to by the pursuers as aiding their argument, is, I think, equally clear to the effect that salvage remuneration is not contemplated as a reward to steamers insured in that Association giving assistance to vessels in distress, but only such "compensation" as may be determined by the committees of the Association, and I need hardly point out that compensation and salvage remuneration or "reward," as it is sometimes termed, are two very different things, and are arrived at in very different ways. To take one point of difference, the value of the property salved falls to be taken into account in salvage remuneration, whereas it has no place in a claim for compensation.

On these grounds, I am of opinion that the Lord Ordinary's interlocutor should be recalled, that the first plea in law for the defenders should be sustained, and the defenders assoilzied from the conclusions of the action so far as at the instance of the Clan Steam Trawling Co. Ltd., and that *quoad ultra* the case should be remitted to the Lord Ordinary for further procedure.—25*th February* 1908.

Counsel for Pursuers, Hunter, K.C., D. Anderson; Agents, Davidson & Macnaughton, S.S.C.—Counsel for Defenders, Scott Dickson, K.C., Lippe; Agents, Beveridge, Sutherland & Smith, S.S.C. J. S. M.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

339. The Glasgow and South-Western Railway Company *v.* The Provost, Magistrates and Councillors of the Burgh of Ayr and Others.

I. Burgh—Street—Burgh Police (Scotland) Act 1892 (55 & 56 Vict. cap. 55), sect. 4 (31)—Burgh Police (Scotland) Act 1903 (3 Edw. VII. cap. 33), sect. 103 (5), (6)—"Road . . . . Forming Part of Any . . . . Railway"—Solum of Road Belonging in Property to Railway Company—Acquired in Virtue of Power to Purchase Lands for Extraordinary Purposes Conferred by Railway Clauses Act and Special Act—Road Subject to Public Right-of-Way—Acquisition by Agreement—Held Not to be Land Forming Part of Railway, But to be a Private Street.

II. Burgh—New Street—Petition to Form—Burgh Police (Scotland) Act 1903 (3 Edw. VII. cap. 33), sect. 11—Held That This Section Did Not Confer Power to Authorise the Forming of a New Street on Land Belonging to Another Without His Consent.

Appeal from the Town Council of the Burgh of Ayr in Works Committee.

This was an appeal from a decision of the Town Council of the Burgh of Ayr in Works Committee, on a petition presented by Robert Hutchison and others, under section 11 of the Burgh Police (Scotland) Act 1903. The circum-

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stances are narrated in the following extract from the opinion of Lord Pearson aftermentioned.

"This is an appeal by the Glasgow and South-Western Railway Company against a deliverance of the Town Council of Ayr sitting as the Works Committee, in a petition by certain proprietors of feuing ground for authority to form and lay out a new street on the line of an existing road known as Oswald Road.

"These proprietors are desirous of building houses on their feus, and one of them applied to the Dean of Guild for warrant to erect buildings. But it is provided by the 11th section of the Burgh Police (Scotland) Act 1903, that the Dean of Guild shall not grant warrant for the erection of buildings abutting on any new street until warrant for the formation of such new street has been granted. Accordingly the Dean of Guild refused to grant warrant to build until the proprietors petitioned the Town Council under the same section to have Oswald Road at that part of it formed and laid out as a new street.

"Oswald Road runs in a southerly direction from the lands of Prestwick through what was formerly the burgh of Newton-on-Ayr (now merged in the burgh of Ayr), and thence to a place called Oswald Yard at Ayr harbour.

"The petitioning feuars are frontagers to Oswald Road on the east side of it for a length in all of about one-third of a mile. The frontagers on the west side of the road are the appellants (the Glasgow and South-Western Railway Company) and Messrs Wylie & Co. Messrs Wylie & Co. are owners and occupiers of chemical works and stores extending along the west side of the road for about 400 feet. Their ground is practically all occupied by buildings, and they do not oppose the petition. The Railway Company, besides having a title to the road itself, as I will presently explain, are frontagers for a length of about 800 feet to the south of Wylie's works, and for a length of about 350 feet to the north of those works. For this length of 350 feet their property next the road is a field unbuilt on. For the length of 800 feet just mentioned, their railway line approaches the west side of the road. It is stated in a note to the deliverance appealed against that the line is a foot or two above the level of the road, and that there is a railway retaining and boundary wall running outside the railway and abutting hard on the proposed street.

"By section 61 of the Act of 1903, as adopted by the burgh of Ayr, it is not lawful to lay out or form any new street unless it has a width of forty feet of carriage-way and footpath, and sixty feet between the building lines. We are informed by the Town Council that the Dean of Guild being directed by the statute to refuse to pass plans of buildings abutting on an intended new street until warrant for the street has been obtained, this in practice prevents buildings being put down so as to form a street until the line and level of the street has been fixed.

"Now Oswald Road, as it exists, is an unformed road, forty feet in width, and is used by carts and foot passengers. The whole *solum* of the road, and indeed all the neighbouring ground, originally belonged to the old burgh of Newton. The road was at first only thirty feet wide; but at some date which does not clearly appear, it was widened to forty feet by the addition of a ten-foot strip along the east side. The original thirty-foot road was acquired by the Railway Company in 1889 by disposition in ordinary form from Mr Oswald of Auchincruive, by whose ancestor it had been acquired in feu from the magistrates of Newton in 1765, to be used as a waggon road from his coal pits to the harbour of Ayr. Both titles contain a reservation of minerals, and are granted subject also to this special provision and declaration—'that the freemen and other inhabitants of the said burgh of Newton, or others having their permission, shall not be stopped, barred, or impeded from crossing or passing over the said piece of ground hereby fewed out of the breadth foresaid from the march of the grounds belonging to the said burghs of Prestick and Newtown to the north dyke aforesaid, with their horses and carriages, leading dung to their lands, lime, sand, stones, or other materials for building or for any other lawful purposes; and free liberty to the cattle pasturing upon the Newton common to pass and repass over the same in all places. And also providing and declaring that there shall be at all times a free passage to the inhabitants of said burgh of Newtown of therty feet wide betwixt the said north dyke and the said acre and ffourteen falls of ground or thereby ffewed out.'

"It further appears from the title that the road was acquired by them in virtue of the power to purchase land for extraordinary purposes conferred by section 38 of the Railway Clauses Act 1845, and section 12 of the Company's special Act of 1865.

"By the decision under appeal, the Town Council of Ayr, sitting as the Works Committee with powers, authorised the petitioning feuars on the east side of the road to form and lay out the road as a new street *ex adverso* of their feuing-ground under section 11 of the Burgh Police Act 1903, the Dean of Guild Court having, as I have said, held this to be a necessary preliminary to granting the feuars a lining for their building operations.

"The petition was opposed by the Glasgow and South-Western Railway Company, and they now appeal against the deliverance of the Town Council. It does not appear that there were any objections stated in detail to what is proposed. The appellants' objections go to exclude altogether the laying out of a new street at the place proposed, and in particular the assuming as part of the new street of any portion of their

thirty foot road. Their position is that that is private property; that it is part of their railway; that they have already set apart and used other portions of Oswald Road for railway purposes, and that they will from time to time so dedicate and use the part of the road now in question, though they have not yet done so; and that if the feuars desire to have a new street laid out they must themselves supply the ground."

The Burgh Police (Scotland) Act 1892, sect. 4 provides:

(31) "Street" shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage or other place within the burgh used either by carts or foot passengers, and not being or forming part of any harbour, railway, or canal station, depôt, wharf, towing-path, or bank.

The Burgh Police (Scotland) Act 1903, sect. 103, provides:

(5) "Public street" shall, in the principal Act and this Act, mean (1) any street which has been or shall at any time hereafter be taken over as a public street under any general or local Police Act by the town council or commissioners; (2) any highway within the meaning of the Roads and Bridges (Scotland) Act 1878, vested in the town council; (3) any road or street which has in any other way become or shall at any time hereafter become vested in or maintainable by the town council; and (4) any street entered as a public street in the register of streets made up under this Act.

(6) "Private street" shall, in the principal Act and in this Act, mean any street other than a public street.

The Burgh Police (Scotland) Act 1903, sect. 11, provides:

Petition for warrant to form new street.—Every person who intends to form or lay out any new street, or to widen, extend, or otherwise alter any street, shall present a petition for warrant to do so to the town council, and along with the same he shall lodge a plan of the street as proposed to be laid out or altered, with longitudinal and cross sections, shewing the proposed centre, building, and kerb lines, and also the inner lines of the footway where these differ from the building lines, shewing also the levels and means of drainage, specifying the proposed material and mode of construction, and having marked upon it the names of all persons owning the street or any ground abutting thereon affected by the proposal and appearing in the valuation roll. A copy of said petition shall be served by the petitioner upon all such owners and also upon the burgh surveyor, and the town council shall within fourteen days from the presentation of the petition afford the petitioner and all other parties interested an opportunity of being heard, and shall dispose of the application as soon as possible thereafter. If it shall appear to the town council that the proposed street, or any portion thereof, or any of the details shewn on the said plan, does not fulfil the conditions required by the Burgh Police Acts, or is otherwise contrary to law or to private rights, the town council may either refuse the said petition, or grant the same subject to such alterations and modifications on the plans, or other lawful conditions, as may be necessary in the circumstances. The Dean of Guild Court shall not grant warrant for the erection of any buildings abutting on any new street until warrant for the formation of such street has been granted. The plans approved of by the town council shall, except in so far as they may afterwards be altered in terms of this section by the authority of the town council, be adhered to by the applicant and by every person erecting any building abutting on the street. In the event of no part of any new street for which a warrant has been obtained being formed or laid out within twelve months from the date of the warrant, the warrant shall lapse, and it shall be necessary before the street is formed or laid out to obtain a fresh warrant.

The Court on 7th November 1906 allowed parties a proof of their respective averments. The Opinion of the Court was delivered by Lord Pearson.

Lord Pearson [after narrating the facts as above quoted]:

The appellants point to the provision in section 11 to the effect that if the proposed street does not fulfil the statutory conditions, "or is otherwise contrary to law or to private rights," the Town Council may refuse the petition or alter the proposed plans. In the first place they maintain that the proposal is contrary to law on the ground that section 11 applies only where a proprietor seeks to have the whole thing done on his own property. Now, while the section plainly does apply to a case where a proprietor petitions for authority to make operations *in suo*, it is not confined to that case; and I have no doubt that where feuing-ground is bounded by a road (as we are told is the case with the titles of all the feus belonging to the petitioners), this lets in the possibility of including that road in the new street to be laid out, unless there is some specific reason for excluding it. Such reason the appellants find in the definition of the term "street" in the Burgh Police Act 1892, section 4, sub-section 31, which enacts that "street" shall include any road, etc., within the burgh used either by carts or foot passengers, and "not being or forming part of any harbour, railway or canal, station, depôt, wharf, towing-path, or bank." This road, or the portion of it in question, is (the appellants say) part of a railway, acquired by private agreement for extraordinary railway purposes; and to lay it out as a new street or part of a new street is contrary to law, seeing that it falls within the exception, and is thereby excluded from the definition of "street" in section 4. But obviously a piece of ground is not "part of a railway" merely because it belongs to a railway company; and, on a sound construction of the section, this ground does not appear to me to fall within any of the categories set forth in the words of exception. Nor do I think that the question can be solved in favour of the appellants by their statement that, as their traffic requirements demand, this road will be dedicated to and used for railway purposes, if it is clearly shewn that this is not within their power. Now this, which I think is the crucial part of the case, involves matter of fact on which the parties differ widely in their averments. They are substantially agreed as to the legal attributes of the road so far as these depend on the titles; but as to all beyond that they are entirely at variance. There are two possible results flowing from the petitioners' averments, if these are established. Either the

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portion of the road now in question is subject to a public right of way; or, short of that, it is subject to a servitude of way so wide and indefinite as to make it practically impossible to restrain the public from using the road. If the former alternative were set up, it might have an important bearing on the position of the Railway Company on all the matters raised on the record; and even if the lesser alternative were established, it might affect the position of the Company upon their plea that they are still entitled to dedicate this part of the road to railway purposes. I indicate no opinion as to whether or how far the position of the appellants will really be affected in these various events. I only say that it may be materially affected; and I think this is clearly a case in which we should not decide upon the appeal until the parties have an opportunity of laying the facts before us by proof or admissions.

The proof was taken before Lord Pearson and reported to the Division.

Argued for Appellants: (1) This road was land forming part of a railway. It was acquired by agreement, and therefore was in the same position as land acquired by any other purchaser, and could not become superfluous (*Caledonian Railway Co.* v. *City of Glasgow Union Railway Co.*, 1869, 7 M. 1072, 1871, 9 M. (H.L.) 115. A railway company could not acquire land except for the purpose of its undertaking. This land was acquired under compulsory powers, and was land forming part of the railway undertaking. It had been proved that the appellants were able to utilise the road by putting rails on it for railway purposes without doing anything inconsistent with the right of the public in it. It belonged to the Company; they acquired it for railway purposes, and the fact that no rails were yet laid down did not prevent it from being part of the railway. If the respondents' claim was made good, it would prevent the use of the road for the purposes to which the Company proposed to put it. The doctrine of dedication to public use had no application to cases of this kind. A town council might hold ground dedicated to public uses, such as recreation, which had been so dedicated by grant. There might be a dedication by grant for a purpose for which one could not prescribe a right, or one for which one could prescribe a right (*Dyce* v. *Hay*, 1852, 1 Macq. 305). And in the latter case a right prescribed was as good as one by grant. The present right of public user could have been acquired by prescription, and the respondents were in no better position than if it had been. The right was not inconsistent with the use of the land for railway purposes (*In re Gonty* v. *The Manchester, Sheffield and Lincolnshire Railway Co.* [1896], 2 Q.B. 439; *Grand Junction Canal Co.* v. *Petty*, 1888, 21 Q.B.D. 273). (2) Sect. 11 of the 1903 Act did not apply in this case, the ground being part of a railway. Further, the section protected private rights, and these would be injured by the granting of this petition. The applicants were not entitled to lay out a new street on ground belonging to other people. And the erection of houses did not make a street (*Mair* v. *Police Commissioners of Dumbarton*, 1897, 25 R. 298; *Stewart* v. *Marshall*, 1894, 21 R. 1117).

Argued for Respondents: The applicants were not proposing to make a road. The road was there already. The whole question was as to the parties' rights in it. The Railway Company got the *solum* for extraordinary purposes, as these are described in sect. 38 of the Railway Clauses Act. They proposed to put it to ordinary railway purposes. It was originally meant to do no more than put down a tramway. The purpose to which the Company now proposed to put it would interfere with the right of the public in it. A different test was to be applied in this matter from a case where a public right-of-way crossed a line of rails and that did not interfere with the use of the line for its usual purpose (*Stewart* v. *Greenock Harbour Trs.*, 1864, 2 M. 1155). This road became a private street by virtue of the Burgh Police Act of 1862 (25 & 26 Vict. cap. 101, sect. 3), and it remained so under the Acts of 1892 and 1903. Counsel referred on this point to *Campbell* v. *Police Commissioners of Leith*, 1866, 4 M. 853; *Kinning Park Commissioners* v. *Thomson & Co.*, 1877, 4 R. 528; *Neilson* v. *Borland, King & Shaw*, 1902, 4 F. 599). The test of whether the road formed part of the railway was not ownership but occupancy (*Adamson* v. *Edinburgh and Glasgow Railway Co.*, 1855, 4 Macq. 331; *North British Railway Co.* v. *Greig*, 1866, 4 M. 645). The Railway Company was not bound to use this ground for railway purposes, as would have been the case if they had acquired it compulsorily (*Magistrates of Edinburgh* v. *North British Railway Co.*, 1904, 6 F. 620). If the land was acquired by compulsion the Company could not make a grant of a right which was inconsistent with the purpose for which it was obtained. And as it was a private street, the magistrates might prevent it being used for a railway. They had power to order the removal of any obstruction (*Matson* v. *Baird & Co.*, 1878, L.R. 3 A.C. 1082). Sect. 11 of the 1903 Act did not require the applicants to do anything as a consequence of the warrant being granted. The result was merely to establish a set of rules with reference to the area of ground which the Dean of Guild found to be a new street. What the section meant was that a street in the popular sense was to be formed (*Robinson* v. *Barton Local Board*, 1882, 21 Ch. D. 621; *Attorney-General* v. *Rufford & Co.* [1899], 1 Ch. 537). The putting up of houses on the side of what came to be a street might be the formation of a new street. It was a question for the Town Council whether what was proposed to be done amounted to the laying out of a new street.

The Court *sustained* the appeal, *recalled* the

interlocutor of the Town Council, and *dismissed* the petition.

The Lord President.—The circumstances under which the present appeal is brought have been detailed in the opinion delivered by Lord Pearson, when a proof was allowed. We have now the proof before us, and have to dispose of the petition. In my opinion the result of the proof and admissions of parties is to establish the following propositions. Oswald Road belongs, as far as the western portion of thirty feet is concerned, to the Railway Company. It is not occupied by lines, and is in fact shut off from the railway sidings or yard at that place. Over Oswald Road there exists a public right of way for traffic of every description. The result of this in law is, I think, first, that the thirty feet of roadway is not "part of the railway" in the sense of the exception to the 31st sub-section of section 4 of the Burgh Police Act, 1892, and that accordingly, second, by the combined operation of said sub-section and of section 103, sub-sections (5) and (6), of the Burgh Police Act of 1903, the road in question is a private street within the burgh of Ayr.

This makes it necessary to decide the case purely and simply on the applicability of the 11th section of the Act of 1903, under which the petition was presented. After repeated consideration I have come to the conclusion that that section does not give any powers whatever, and that it is therefore improperly invoked by one person against another. It is to be observed that although not actually so expressed, there can be no doubt that it and the succeeding section were meant to replace sections 146 *et seq.* of the Act of 1892. This is made clear by the repealing schedule to section 104, which repeals sections 146–148 inclusive, and also section 153. This seems to me to let in as authority the case of *Mair* v. *Police Commissioners of Dumbarton*, 1897, 25 R. 298, decided by the Second Division. The opinion of Lord Young on the point is quite clear. Speaking of the applicant, who had been told he ought to have applied to lay out a new street under section 146, Lord Young says, "he was not in a position to do so." And Lord Moncreiff says: "I am inclined to think section 146 is confined to the case of a proprietor who intends to construct a street on his own land."

Apart from authority, I think the whole phraseology of the clause leads to this conclusion. There is no indication in it of doing what no doubt the Legislature might do, but which it is never presumed it will do, giving to one person a right to proceed to do something on the property of another *in invitum*. The whole structure of the clause points to veto and regulation, not to authorisation. It need not be strictly confined to his own property; for there is certainly the case where there is the consent of other parties, and there might be the case of including an existing road where there was no one with rights in the *solum* of the road who came forward and objected. There is a sentence in the opinion of Lord Pearson which might be construed as going beyond this; but it is only the more limited construction that on the maturer consideration of the case we hold as the judgment of the Court.

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The Lord President.

The result of this is that I think the present petition is in the circumstances incompetent, and ought to be dismissed. It follows, I think, that the Dean of Guild was wrong at an earlier stage in refusing *de plano* to grant warrants of lining. In fact, I think that part of his judgment is not in accordance with *Mair's* case, which probably was not brought before his notice. We were much pressed by the counsel for the respondents with the English case of *Robinson* v. *Local Board of Barton*, 1882, 21 Ch. D. 621, decided by the Court of Appeal and partially affirmed in the House of Lords. I do not think that a matter which depends purely upon statutory enactment in a complicated set of provisions can ever be much helped by decisions on quite a different statute with other provisions. The statute must be taken as a whole to see its scheme. Further, there is a great difference between applying provisions to a street when a street becomes so in fact, and applying them to a place which is only a street by virtue of definition. An instance of the difficulties which arise is well shewn by the variation made by the judgment of the House of Lords on that in the Court of Appeal. It must also be remembered that the result of our decision is not to relegate Oswald Road to a state of perpetual quagmire. As it is by virtue of definition a private street, that lets in the whole fasciculus of sections, beginning at section 133, and partly amended by the 1903 Act, under which the municipal authorities have very considerable powers.

Lord M'Laren.—I concur.

Lord Kinnear.—I also agree with the Lord President's opinion.—19*th February* 1908.

Counsel for Appellants, Hunter, K.C., Macmillan; Agents, John C. Brodie & Sons, W.S.—Counsel for Respondents, M'Lennan, K.C., Hon. W. Watson; Agents, Dalgleish, Dobbie & Co., S.S.C. F. A. U.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

(Exchequer Cause.)

340. Lord Advocate *v.* Caledonian Railway Company.

I. Statute — Construction — Revenue — Stamp Duty—Finance Act 1895 (58 &

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59 Vict. cap. 18), sect. 12—Railway Company—Provisions of Section Held to Apply to Conveyance to Railway Company of Property Authorised to be Acquired by Compulsory Powers.

II. Revenue—Stamp Duty—Finance Act 1895 (58 & 59 Vict. cap. 18), sect. 12—Railway Company—Stamp Duty upon Conveyance of Property Purchased under Statutory Power—Interpretation of Section—Opinion that Obligation to Produce Deed Duly Stamped Not Implemented by Presentation of Deed for Stamping.

III. Revenue—Stamp Duty — Finance Act 1895 (58 & 59 Vict. cap. 18), sect. 12—Railway Company—Stamp Duty upon Conveyance of Property Purchased under Statutory Power—"Completion of Purchase"—Production of Deed of Conveyance Duly Stamped—Opinion that Date of Completion of Purchase is Date When Purchase Price Paid.

Reclaiming Note against an Interlocutor of Lord Johnston.

(*Reported supra, p.* 372.)

The Pursuers *reclaimed* and *argued*: (1) This was clearly a case to which the section applied. Its application to all property authorised to be purchased was without qualification or ambiguity. The reference to the practice in previous legislation in order to put upon the words of the section an interpretation other than their plain meaning was neither necessary nor admissible. (2) The production of the deed for the purpose of stamping was not sufficient to satisfy the requirements of the section. The deed had not, in fact, been produced when "duly stamped," nor was the stamping already effected final; it was still open to the Inland Revenue, and until adjudication, to challenge the deed as not duly stamped (*Eastbourne Corporation* v. *Attorney-General* [1902], App. Cas. 155; *Inland Revenue* v. *Irvine Water Board*, 1905, 13 S.L.T. 582; *Attorney-General* v. *Felixstowe Gaslight Co.* [1907], 2 K.B. 984). (3) The date of the "completion of the purchase" must be held to be that at which the purchase price is paid (*Lewis* v. *S. Wales Railway Company* (1853), 22 L.J. Ch. 207).

Argued for the Respondents: (1) The application of the section was limited to the case of previous agreements sanctioned by statute. Previous to the passing of the Finance Act it had been usual to insert in Railway Acts a provision similar to that made in sect. 12 with regard to the purchase of lands or undertakings under agreements already arrived at, but not with regard to purchases to be made under compulsory power. The object of the Act was to embody such a provision in a general statute, and the provision should not be given the wider interpretation sought to be put upon it by the reclaimer. (2) The production already made for the purpose of stamping had fulfilled the requirements of the statute; the demand of the Inland Revenue for a second production was only for the purpose of establishing a register or methods of recording conveyances for the convenience of the Department, for which the statute makes no provision. That this was the proper view of the provision appeared from the terms of the penalty clause; it was absurd to say that duty already paid should be a debt, that that which was not a debt should bear interest. (3) The Lord Ordinary was right in holding that the date of the completion of the purchase was that of the delivery of the conveyance.

The pursuers did not insist in their claim for penalty.

The Court *recalled* the Lord Ordinary's interlocutor, and *found* in terms of the first conclusion of the summons; and in respect the pursuer did not now insist in the other conclusions of the summons, dismissed the same.

The Lord President.—My Lords, in this case two questions were argued to us. The first is the purely general question of whether the 12th section of the Finance Act imposes a duty upon persons, in the position of the Railway Company here, to produce, within a period of three months after the completion of the purchase, an instrument of conveyance of property where that property is acquired in respect of the exercise of compulsory powers; and then there was the second question, whether a particular conveyance by which the Caledonian Railway Company acquired St Columba's Gaelic Church in Glasgow had been duly produced to the Inland Revenue authorities.

The Lord Ordinary has discussed the first general proposition, but he has not actually come to a decision upon it. In his view, as the pursuers, the Department, were wrong upon the second question, he thought that that disposed of the conclusions of the summons; but he has, I think, indicated in his opinion a certain amount of sympathy with the view of the defenders, namely, that the provisions in the statute were not really meant to apply to cases of property taken in the ordinary manner under compulsory powers, but were meant to embody in one general statute a class of provision which in the past it had been customary to put into special statutes, where, for instance, some railway company or other great corporation took over, by special statute, the whole undertaking of some other company, and where, accordingly, the conveyance was really contained in the statutory enactment itself—a condition of circumstances which made it unnecessary to execute a formal conveyance which would, in the ordinary way, bear a stamp.

It may be, and I dare say it is, true that the historical reason, so to speak, of this section of the Finance Act was to effectuate that general object, but your Lordships, I am afraid, cannot construe statutes, when their terms are plain, by consideration of the historical reason for which they were passed. No doubt the history of a statute may often throw light upon a disputed provision; but if the language is plain, then there is nothing more to be done than to obey that language; and here it seems to me that the language is so exceedingly plain that it leaves no room for discussion. For reasons best known to itself the Legislature has gone beyond what was done before; but that it has included in perfectly plain terms not only the cases where a transference is made by virtue of a statutory provision, but also cases where transference follows upon the exercise of compulsory powers, is, I think, absolutely clear as soon as you read the words of the statute itself. The Lord Ordinary has set them forth very clearly in his note, and, leaving out the parts that do not apply, you have it enacted that when any person is authorised to purchase property in virtue of an Act—that is, the ordinary case of a railway company which has compulsory powers—such person shall within three months after the completion of the purchase produce to the Commissioners of Inland Revenue an instrument of conveyance of the property duly stamped. My Lords, that seems to me to end the whole matter so far as the first question is concerned.

I now come to the second question. If the Inland Revenue, in this case, had insisted upon the penalty, I think the case would have been one of considerable difficulty, and I confess I think I should have probably arrived at the same practical conclusion as the Lord Ordinary, although not perhaps precisely on the same grounds. But the Inland Revenue have, I think very properly, conceded that they have no intention here of asking for the penalty in this case, because what happened in the case of this title to St Columba's Church was that the title was taken to the office in Glasgow with the view of having what is really a sort of preliminary marking put upon it as to what the stamp ought to be. We have had a long enquiry in the case, which I do not think I need detail, but it comes to this, that for the convenience of everybody—and I have no doubt it is most convenient and a perfectly proper plan—the Inland Revenue are in the habit of allowing persons to bring their deeds which are going to be stamped, and to have a sort of provisional opinion given as to what the stamp should be. It is only a provisional opinion, because everybody knows that it does not carry finality. If a person wants to be perfectly certain of the amount, and to be perfectly certain that that amount will never be questioned thereafter by the Inland Revenue, there is a well-known and statutory way of doing it, namely, by asking for an adjudication stamp, and of course if he gets an adjudication stamp, then the mouth of the Inland Revenue is shut for ever upon the question of the amount of the stamp. But side by side with that, which is the method when it is wanted to make the thing absolutely certain, there is the very convenient method which I have described. Now, when the question had never been raised, it would perhaps have been rather hard if a penalty had been incurred, when the deed had been brought in this way and when it had been stamped, and, for aught seen, perfectly properly stamped,—but as I say, that question is not raised.

But when we come to the question of what is to be done in the future, it seems to me that the Inland Revenue are entitled to make their own arrangements about what is a proper production in answer to the words of the statute. I do not mean to say that if they made utterly unreasonable arrangements they could not be interfered with, but within reason they are, I think, entitled to make their own arrangements; and I can quite understand, from their point of view, that it is not such a production as they wish, namely, this bringing of the deed before it is stamped at all in order to get a certain provisional view from the officials in the office as to what the stamp should be.

My Lords, if you merely take the question literally, it is quite clear that the production of an unstamped instrument will scarcely fit the words of the statute, which puts a duty "to produce an instrument of conveyance duly stamped." And really I think all hardship is out of the matter, because there was a circular, which was brought before our notice in the case, which was sent out by the Inland Revenue and sent to the railway companies drawing attention to the provisions of sect. 12 of the Finance Act, and putting it to them perfectly clearly that it would be necessary in the future for them to produce their conveyances, in the case of lands acquired compulsorily, within three months.

Accordingly, my Lords, it seems to me that the proper disposal of the case is not to do as the Lord Ordinary has done, which is to assoilzie the defenders, but to pronounce a declaratory finding in the terms of the first conclusion which, I confess, does nothing except simply to shew that the case has been decided, because it is a mere echo of the statute, and then, in the circumstances, to find it unnecessary to dispose of the other conclusions of the case.

There is one other question which it is right we should make clear, and that is, what is the completion of the purchase. Now, the Lord Ordinary has given very cogent reasons why the completion of the purchase in cases of this sort cannot be taken to be the date of the notice. My Lords, upon the whole matter I come to the conclusion that the simple date to take as

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The Lord President.

the completion of the purchase is the final payment of the price to the seller. That date seems to me to get rid of all real difficulties. It will never be too soon, because the Railway Company will take care that it does not pay the price finally until it gets a disposition from the purchaser. That it would do for its own protection. On the other hand, it will never come too late, because we can be pretty sure that the purchaser will not be content to wait for an indefinite time for his money. Accordingly, I think that is the date that is meant by completion of the purchase There was an authority quoted—*Lewis* v. *South-Wales Railway Company*, 1853, 22 L.J. Ch. 209—in which Lord Justice Turner seems to have come to the same conclusion upon a different matter, but he construed the same phrase in the same way. I do not really put that as an authority, but at the same time I think it does no harm to the conclusion at which I have independently arrived.

Lord M'Laren.—I concur in all that has been said by your Lordship in the chair. Upon the second point it seems to me that the date of the transaction must either be the date of the contract of sale or the date of completing the execution of the contract. Now, it could not be intended that the date of the contract of sale should be taken, because it would not always be possible to have the transaction carried through, and a stampable deed executed, within three months of the contract. I see no intermediate point of time, and it is plain that the Company, in the case supposed, would not pay the price until they were put into possession of the subjects. In the general case they have possession of the subjects under their notice before the price is paid; so that, if the date of payment of the price were taken, that necessarily would be the date of the complete fulfilment of the reciprocal obligations under the contract.

Lord Kinnear concurred. — 19*th February* 1908.

Counsel for Pursuers, Solicitor-General (Ure, K.C.), Hunter, K.C., Munro; Agent, P. J. Hamilton Grierson, Solicitor of Inland Revenue. —Counsel for Defenders, Clyde, K.C., King; Agents, Hope, Todd & Kirk, W.S.

W. A. R.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

341. A. B. *v.* C. B.'s Trustees.

I. Succession — Provisions for Widow — Restriction of Widow's Rights Under Settlement on "Entering into a Second Marriage" — Ceremony of Marriage Solemnised — Subsequent Decree of Nullity of Marriage Pronounced by High Court in England—Held that Widow's Provisions Were Not Subject to Restriction.

II. Husband and Wife—Marriage—Impotence—Decree of Nullity—Marriage Held Null at its Date.

(*Reported supra, p.* 108.)

Reclaiming Note against an Interlocutor of Lord Guthrie.

The Defenders *reclaimed* and *argued*: Whatever the effect of the decree of nullity, it could not affect the rights of the son of the marriage, a third party, to whose capital account the arrears now claimed had been credited (Fraser, Husband and Wife, p. 152, and *Cage* v. *Acton*, 1699, 1 Raymond 515).

The Court, without calling upon counsel for the respondents, *adhered* to the interlocutor reclaimed against.

The Lord President.—I agree with the Lord Ordinary.

Lords M'Laren and *Kinnear* concurred.—20*th February* 1908.

Counsel for Pursuer and Respondent, Scott Dickson, K.C., Moncrieff; Agents, Fraser, Stodart & Ballingall. — Counsel for Defenders and Reclaimers, Hunter, K.C., Black; Agents, Forrester & Davidson, W.S. W. A. R.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling and Ardwall.)

342. Penny's Trustees *v.* Penny.

Succession — Trust Disposition and Settlement—Vesting—Vesting Subject to Defeasance—Estate to be Realised and Divided Among Children of Testator on Death of Liferentrix—Issue of Predeceasing Children Taking Share Which Would Have Fallen to their Parents—Power to Trustees to Advance Capital to Children During Subsistence of Liferent—Held Children Took a Vested Interest a Morte Testatoris Subject to Defeasance in the Event of their Predeceasing the Liferentrix Leaving Issue Who Should Survive the Liferentrix—Cairns' Trs. v. Cairns, 1907, S.C. 117, Followed—Opinions Reserved on Question Whether Defeasance Took Place in the Event of a Child Predeceasing the Liferenter Leaving Issue who also Predeceased the Liferentrix.

Special Case.

The late James Penny of Park, in the counties of Aberdeen and Kincardine, died on 22nd January 1902, possessed of estate of the value of about £20,000, of which about £19,500 consisted of heritage. He left a general settlement in the following terms:—

I, James Penny of Park . . . . appoint my wife to be my sole trustee and executrix, with power to her as trustee and executrix foresaid to borrow money on the security of my estate, either for the purpose of setting up any of my children in business or on their marriage, or for the purpose of paying estate duty, or for the proper upholding of the buildings on the estate of Park—all payments made to children being reckoned as part of their ultimate share when the same falls to be divided: And I leave my said wife the liferent of my whole means and estate of every kind, the same to be realised and divided equally on her death among my children, share and share alike, the issue of predeceasing children taking among them the share which would have fallen to their parents if in life: And I grant full powers of sale by public roup or private bargain. . . .

The truster was survived by his widow Mrs Mary Penny, who was alive at the date of the case. Mrs Mary Penny and another, as trustees under the settlement, were the first parties to the case.

The second parties were Mrs Mary Penny or Adams and others, those of the testator's children who were in life at the date of the case.

The testator was also survived by his son James Penny of Lochwood, who died on 1st November 1905, leaving a trust disposition and settlement whereby he conveyed his whole estate to trustees. The trustees were the third parties to the case.

James Penny of Lochwood was survived by his wife Mrs Jane Davidson or Penny, who was the fourth party to the case. He was also survived by three pupil children, Mary Penny and others. The tutors and curators of said pupil children were the fifth parties to the case.

The second, third and fourth parties maintained that a share of the fee of the trust estate vested absolutely in James Penny of Lochwood *a morte testatoris*. The fifth parties maintained that as James Penny of Lochwood had predeceased the liferentrix, no part of the trust estate had vested indefeasibly in him.

The following Question of Law was stated:—

1. Did the fee of the shares of the estate of the truster vest in his children *a morte testatoris*? Or
   Did said estate vest in the children of the truster subject to defeasance in the event of their predeceasing their mother, the liferentrix, leaving issue? Or
   Is the vesting of said estate postponed till the expiry of said liferent?

Argued for the Fifth Parties: A destination over to issue was presumed to be referable to the date of distribution (*Bowman* v. *Bowman*, 1899, 1 F. (H.L.) 69; *Young* v. *Robertson*, 1862, 4 Macq. 314). The legal result was either that vesting was suspended until the death of the liferentrix (*Parlane's Trs.* v. *Parlane*, 1902, 4 F. 805; *Forrest's Trs.* v. *Mtchell's Trs.*, 1904, 6 F. 616), or that vesting took place *a morte* subject to defeasance in the event of the institute predeceasing the date of distribution leaving issue (*Cairns' Trs.* v. *Cairns*, 1907, S.C. 117). In view of the case of *Cairns' Trs.* (*cit.*) the latter was probably the correct view. The case of *Cairns' Trs.* (*cit.*) was directly in point, and the point that the destination over was not expressly referred to a specific date was taken in the argument. There was nothing to take the present case out of the ordinary rule. The power to advance was just as consistent with postponed vesting as with vesting *a morte* (*Bowman* v. *Bowman*, *cit.*; *Fyfe's Trs.* v. *Fyfe*, 1890, 17 R. 450, per Lord Rutherfurd Clark at p. 453).

Argued for the Second, Third, and Fourth Parties: The date to which the destination over was to be referable was not specified in the will. Apart from the case of *Cairns' Trs.* (*cit.*) there was no case where a destination over to issue in general terms had been referred to any date other than the death of the testator (*Thomson's Trs.* v. *Jamieson*, 1900, 2 F. 470; *Bowman* v. *Bowman* (*cit.*); *Matheson's Trs.* v. *Matheson's Trs.*, 1900, 2 F. 556; *Taylor's Tr.* v. *Christal's Trs.*, 1903, 5 F. 1010; *Ogle's Trs.* v. *Ogle*, 1904, 6 F. 359). Both in *Parlane's Trs.* v. *Parlane* (*cit.*) and *Forrest's Trs.* v. *Mitchell's Trs.* (*cit.*) the destination over was expressly referred to a given date. *Cairns' Trs.* (*cit.*) was decided on the authority of *Provan* v. *Provan* (1840, 2 D. 298); and the point now argued was not taken. In any view the rule that a destination over was referable to the date of distribution was excluded where a contrary intention appeared from the other clauses of the deed. In the present case the trustees were empowered to make advances to children, but not to the issue of children. If vesting were postponed that clause practically gave the trustees power to determine whether the children should take or not. That was not to be presumed, and the natural inference was that the children were intended to take a vested interest *a morte testatoris* (*Wilson's Trs.* v. *Quick*, 1878, 5 R. 697; *Bowman* v. *Bowman*, *cit.*, per Lord Watson; *Matheson's Trs.* v. *Matheson's Trs.*, *cit.*; *Taylor's Trs.* v. *Christal's Trs.*, *cit.*).

The Court *answered* the second branch of the first question of law in the affirmative and the first and third branches in the negative.

Lord Stormonth-Darling.—The will in this case is a very simple one, with few complications. I am of opinion that its just construction is governed, so far as the provisions of one will can be said to govern another, by the case of *Cairns' Trs.* (1907), S.C. 117, and that we should

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answer the first question by affirming its second alternative, *i.e.* by holding that the fee of the shares of the truster's estate vested in his children *a morte testatoris*, but subject to defeasance in the event of their predeceasing their mother, the liferentrix, leaving issue.

The only material facts are that the testator, Mr Penny of Park, in Aberdeenshire, died on 22nd January 1902 possessed of a heritable estate worth nearly £20,000, which was almost all he had. He was survived by his widow, who is still alive, and by four sons and four daughters. To his widow he left the liferent of his whole estate. He also appointed her his sole trustee and executrix, giving her power to borrow money on the security of his estate, either for the purpose of setting up any of his children in business, or on their marriage, or for the purpose of paying estate duty, or for the proper upholding of the buildings on the estate of Park, "all payments made to children being reckoned as part of their ultimate share when the same falls to be divided." With regard to the fee of his estate, after giving the liferent to his widow, he directed the same to be "realised and divided equally on her death among my children, share and share alike, the issue of predeceasing children taking among them the share which would have fallen to their parents if in life."

The eldest son, James Penny of Lochwood, died on 1st November 1905, having received a payment from his father's trust of £609, 17s. 9d. under the powers of the will, for the purpose of setting him up in business. He was survived by a widow and three daughters, who are still in pupillarity. It is maintained for the tutors and curators of these pupil children that their father, James Penny of Lochwood, having died before the period of division of the truster's estate, viz. the death of the liferentrix, no share of the fee vested in him, but passed to them as conditional institutes. Their mother also urges a plea which has some similarity to that stated in *Cairns'* case, viz. that she desires to know what her late husband was entitled to under his father's will, in order that she may decide whether to claim her legal rights or not. [His Lordship then dealt with a question not now reported.]

With regard to the question of vesting, it all turns, just as it did in *Cairns'* case, on the meaning to be attached to the words "the issue of predeceasing children taking among them the share which would have fallen to their parents if in life." Now when the word "predecease" or "survivorship" occurs in a will, it plainly refers to some point of time—either death before the time, whatever it may be, or survivance after the time. I find that Lord Low in his opinion, at the top of page 124, deals with the words as *in pari casu*, for he speaks of "there being nothing in the context to take the case out of the general rule that provisions in regard to predecease or survivorship refer to the term of payment." And the effect of the whole judgment was to hold that, while it was impossible to limit the words "any predeceasing child" to the event of the immediate child predeceasing the testator himself, it would be contrary to the current of recent decision to hold that vesting was absolutely suspended. Accordingly, we all agreed with Lord Kyllachy in the view which he had expressed in the case of *Wylie's Trs.*, 8 F. 617, that "a contingency depending merely upon the existence or survivance of issue falls to be read as a resolutive and not as a suspensive condition." But we did not decide there—and, as I understand, we do not decide here—that defeasance necessarily takes place on the child's issue merely surviving their parent (which has happened in the case of the three children of James Penny of Lochwood) irrespective of whether or not they also survive the liferentrix (which either may or may not happen). That question was expressly reserved by Lord Kyllachy in his opinion at page 122 of S.C. (1907), and it would hardly be proper that we should attempt to decide it *ab ante*, since it may never arise as a practical question. I think therefore that we should reserve it here

For these reasons I am for answering the first and third branches of the first question in the negative, and the second branch of the first question in the affirmative.

The Lord Justice-Clerk and *Lord Ardwall* concurred.—25*th February* 1908.

Counsel for First and Fifth Parties, Dean of Faculty (Campbell, K.C.), A. R. Brown; Agent, R. C. Gray, S.S.C.—Counsel for Second, Third, and Fourth Parties, Cullen, K.C., A. M. Mackay; Agents, Alex. Morison & Co., W.S.

J. S. M.

HOUSE OF LORDS.

(The Lord Chancellor (Lord Loreburn) and Lords Robertson and Collins.)

343. Montgomerie & Company Limited *v.* The Burgh of Haddington.

Burgh—Drainage—Improvement Scheme—Code of Procedure Under Public Health (Scotland) Act 1897 (60 & 61 Vict. cap. 38) Independent of That Under Burgh Police (Scotland) Act 1892 (55 & 56 Vict. cap. 55)—Right of Burgh Authority to Proceed Under Either of Said Acts.

(Reported supra, p. 474; and ante, Vol. XIV. p. 183.)

Appeal against an Interlocutor of the Second Division (The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall) adhering *to an interlocutor of Lord Dundas.*

The facts of the case sufficiently appear from the previous report.

The pursuers *appealed.*

The House, without calling on counsel for the respondents, *dismissed* the appeal.

The Lord Chancellor.—My Lords, I agree with the conclusion of the Second Division for one short reason. The pursuers' contention is that the works executed by the defenders could not lawfully be executed without their consent as required by sect. 217 of the Burgh Police (Scotland) Act, 1892. Now in my opinion that section does not touch this case at all. The Act of 1892 furnished burghs with one method of carrying out sewerage works. Another Act, the Public Health (Scotland) Act 1897, furnished burghs with another method of carrying out sewerage works; and each of those methods was complete in itself. In 1901 an Act was passed which put an end to some of the differences between those two methods, and also contained a section, numbered fifth, which to my mind is the only section of that Act which really concerns us to-day. By that section a burgh obtained or retained all the powers created by the Acts of 1892 and 1897 save as altered by the Act of 1901; and the Act of 1897 was incorporated with the Act of 1892 so far as was necessary to give effect to that enactment.

In my opinion the defenders, as the result, possess the right either to proceed under the Act of 1892 (in which case the pursuers' consent was, I assume, needed) or to proceed under the Act of 1897, in which case the consent was not needed. They elected to take the latter course. The appellants cannot dispute that if this be so, their appeal must fail; but they say that the effect of incorporating the latter with the earlier Act was to qualify the powers of the latter Act by the restrictions contained in the former, and that, as consent is required by the Act of 1892, so it is now required if the powers of the Act of 1897 are exercised, because of the incorporation.

I can see no foundation for this view. Section 217 of the Act of 1892, which requires the consent, is expressed to be a restriction only as to what is contained in that Act. If the appellants' contention prevails, the mere incorporation of a later Act would make it a restriction as to what is not so contained.

I think that this is really a plain case, and that the appeal ought to be dismissed.

Lord Robertson.—My Lords, I concur, and for the reasons which have been given by my noble and learned friend on the Woolsack.

In reaching this conclusion I do not suppose that your Lordships applaud the legislation as it stands, and it is doubtful whether it is either symmetrical or even entirely coherent; but I am afraid as regards some modern legislation the maxim applies, which primarily relates to an earlier system, *Non omnium a majoribus nostris constituta ratio reddi potest.*

Lord Collins.—My Lords, I am of the same opinion.—21*st February* 1908.

Counsel for Appellants, Clyde, K.C., Horne; Agents, T. S. Paterson, W.S.; John Kennedy, W.S., Westminster.—Counsel for Respondents, Dean of Faculty (Campbell, K.C.), Malcolm; Agents, John C. Brodie & Sons, W.S.; Grahames, Currey & Spens, Westminster.

OUTER HOUSE.

(*Lord Salvesen.*)

344. A. B. or D. *v.* C. D.

Husband and Wife—Nullity of Marriage—Impotency — Procedure — Defender in Asylum—Order for Compulsory Examination of Defender's Person.

In this action the pursuer (a wife) sought decree of declarator of nullity of marriage on the ground of impotency of the defender.

The marriage took place upon the 30th January 1900. Shortly thereafter the defender left for service in South Africa. He was invalided home in October 1900. It was averred by the pursuer that, after a period of cohabitation lasting till May 1901, the defender's health got worse and his brain came to be affected: that in September, when the pursuer was herself invalided, he was removed by relatives to a lunatic asylum; that he escaped thence, but that the pursuer never saw him, his relatives assuring her that they had taken charge of him; and that after considerable trouble the defender had been ascertained to be now a resident of Gartnavel Asylum, Glasgow. The case was undefended.

The pursuer moved the Court to appoint a medical inspection of the defender's person to take place, and to appoint certain medical men inspectors. Counsel stated that such inspection was essential to the pursuer's case, and that the practice was well settled in England, although no precedent existed in Scots law. The pursuer did not admit defender's insanity.

The Lord Ordinary *granted* the motion.

Lord Salvesen.—This is an action of declarator of nullity of marriage at the instance of a wife against her husband. The specialty in the case arises from the circumstance that the husband has become insane, and is in a lunatic asylum. The pursuer now asks me to appoint the defender to be medically examined with a view to corroborating her statement that the marriage was never consummated through the defender's physical incapacity. I am of opinion that this motion ought to be granted. In England, where the law

Outer House. *Lord Salvesen.*

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on this subject is substantially the same as our own, it seems to be the regular practice for the Court to order a medical inspection of the defender, and if necessary this order will be enforced; although where the defender being sane refuses to submit to such an inspection, such refusal may in some cases be regarded as sufficient corroboration of the pursuer's evidence. As the defender is insane, I think, however, such an inspection should not take place unless with the permission of the asylum doctor. I have no information as to what is the nature of the defender's insanity, but it may well be that it is not of such a kind as to prevent his giving an intelligent and reliable account of his married life, and this might be very material in expiscating the true facts of the case.

The following interlocutor was pronounced:—"The Lord Ordinary, on the motion of the pursuer, appoints Henry Alexis Thomson, M.D., M.R.C.S., and David Wallace, M.R.C.S., both of Edinburgh, inspectors, to examine the defender with respect to the averments contained in the condescendence annexed to the summons, and to report whether he has or has not any impediment, malformation, or defect on his part such as to prevent the consummation of marriage; and whether the defender is, in the opinion of the inspectors, at the present time impotent and unable to consummate marriage, and whether such condition existed, or, in the view of the inspectors, is likely to have been in existence at the date of the marriage as libelled; and appoints the inspection to take place in Gartnavel Asylum *quam primum*, subject always to the asylum doctor reporting that such inspection can be made without injury to the defender's mental condition."—*5th February* 1908.

Counsel for Pursuer, A. M. Mackay; Agents, St Clair Swanson & Manson, W.S. J. W. F.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

345. Merrilees *v.* Leckie's Trustees.

Expenses—Reduction of Will—Trustee—Allegations Against Conduct of Trustees—Defences Lodged by Trustees—Will Reduced—Circumstances in Which Trustees, Although Unsuccessful in Defending the Deed, Awarded Expenses as Between Agent and Client.

This was an action brought by Charles Merrilees, dentist, Dublin, one of the next of kin of the deceased Mrs Annie Gordon Merrilees or Leckie, Portobello, in which he sought reduction of a will made by that lady on 27th February 1907. The grounds of reduction were (1) incapacity, and (2) impetration by Mrs Beaton, a neice of Mrs Leckie's, who was the chief beneficiary under the will in question, and her husband, an ultimate contingent beneficiary. The pursuer's statements upon record involved aspersions upon the *bona fides* and professional capacity of the two accepting trustees, a solicitor and a doctor, who had been called in, the former by Mr Beaton to take Mrs Leckie's instructions, and the latter by the solicitor to satisfy him that Mrs Leckie (who was, as he was informed, seventy years of age and in bed with cold) was mentally capable of giving instructions for a will.

Upon record it was stated by the pursuer, *inter alia*—

"Cond. 7. . . . . Mr R. is the solicitor of the defender Duncan Beaton.

"Cond. 12. The said pretended trust disposition and settlement is not the deed of the said Mrs Leckie, in respect that at the time when it bears to have been executed she was not of sound disposing mind or mentally capable of giving instructions for the disposal of her estate, or of understanding a deed purporting to deal therewith. Further, even assuming that the deceased was capable of understanding the said deed and executing it, which is denied, she was at its date weak and facile in mind and easily imposed upon; and the defenders Mr and Mrs Beaton, taking advantage of her said weakness and facility, by fraud and circumvention impetrated the said deed from her, to her lesion and the lesion of the pursuer. . . . In point of fact she did not give instructions for the preparation of the said deed, but was induced by the Beatons to sign it, being unable to resist the pressure which they exercised to get her to sign the deed, especially when a lawyer and a doctor who were both strangers to her were brought with the deed."

The pursuer made no attempt in his proof to lead evidence as to the circumstances relating to the instructions for and execution of the deed. The defenders gave a clear account of the whole circumstances, which were briefly these. Mr Beaton, after unsuccessfully attempting to interview two other law agents recommended by a friend, called on Mr R., who was also out, but with whose clerk he made an appointment for the next day. When Mr R. then interviewed him he was informed that his services were required to make a will for his (Beaton's) wife's aunt. The interview was a very short one, but Mr R., upon learning that Mrs Leckie was an elderly lady and in bed with a cold, requested that her doctor be in attendance to satisfy him as to her capacity. Being told that her late medical attendant was dead and that she had required no other since, Mr R. intimated that he would bring a doctor to examine Mrs Leckie. He engaged Dr R., a medical gentleman whom he knew slightly, and who resided near his office. Accompanied by the clerk of the former, Mr R. and Dr R. attended at

Mrs Leckie's house next day, when she gave instructions for her will, which was during the visit drafted at the dictation of Mr R. and extended by his clerk in another room, and finally executed by Mrs Leckie. Both Mr R. and Dr R. were satisfied that Mrs Leckie thoroughly understood what she was doing, and Dr R., in addition to hearing all that passed, made a medical examination of her and engaged her in further conversation. Owing to Mrs Leckie's solitary social habits, she was at a loss to think of trustees, and after some discussion Mr R. and Dr R. agreed to act along with another trustee nominated originally by herself.

In spite of the clear statements of the lawyer and doctor, questions insinuating complicity in a fraud were pressed upon Mr R. in cross-examination, and his conduct was adversely commented upon in the speech of pursuer's counsel to the jury. At the close of the trial the jury found unanimously for the defenders upon the first issue (incapacity), and by a majority of nine to three for the pursuer upon the second issue (impetration by the Beatons). After the verdict was returned, Lord M'Laren, the presiding judge, intimated that the verdict involved no reflection upon Mr R., "who in circumstances of great difficulty had acted with perfect discretion."

The pursuer moved the Court to apply the verdict to reduce the deed and to find him entitled to expenses. The defenders moved to be awarded expenses as between agent and client out of the trust estate.

The Court, on the pursuer's motion, *reduced* the said trust disposition and settlement and found the pursuer entitled to expenses, both as against the compearing defenders (the trustees), and also against the estate of the said Mrs Annie Gordon Merrilees or Leckie; and on the defenders' motion, found the said defenders entitled to expenses as between agent and client (excepting the expenses in connection with the new trial) out of the estate of the deceased Mrs Annie Gordon Merrilees or Leckie.

The Lord President.—There are two motions here. The first, which is made on behalf of the pursuers, is to find them entitled to expenses, not only against the trustees, but also against the trust estate. In the other, that on behalf of the defenders, who are the trustees and the unsuccessful parties in the action, we are asked to allow them their expenses out of the trust estate. There is also a subsidiary question as to whether, if the trustees are allowed expenses, these expenses are to be taxed as between party and party, or as between agent and client.

As to the first, there is no question that the pursuers are entitled to their expenses against the trustees, and—apart from any difficulty as to mere matter of form—it would seem that a finding for expenses against the trustees would carry liability against the trust estate. In the present instance, however, I see no reason why the pursuers should not be allowed their expenses against both the trustees and the trust estate.

As regards the defenders' expenses, it has been pointed out on several occasions that there is no absolute rule. While I am far from wishing to countenance the idea that when a will is challenged trustees are entitled to defend at the expense of the trust estate, no matter what the circumstances may be, there is one consideration which will weigh with the Court, and it is this—"What is said about the trustees?" Now in the present case I do not think it necessary to pursue the enquiry minutely farther than to say that both Lord M'Laren, who tried the case, and my brother Lord Kinnear and myself, who gave the case very careful and special consideration, think that the trustees should be allowed expenses.

As to the scale on which these expenses ought to be taxed, it seems to me that once the trustees have been allowed their expenses these expenses really become expenses of administration and not expenses of litigation. Accordingly I do not see how we can apply to such expenses a scale which is appropriate to the domain of "litigation" and is not appropriate to the domain of "administration." No doubt the administration of an estate may have been so conducted as to disentitle trustees to any expenses, but in the present instance I see no reason why the trustees should not be allowed expenses as between agent and client.

Lords M'Laren and *Kinnear* concurred.—19*th February* 1908.

Counsel for Pursuer, Watt, K.C., Lippe, Lyall Grant; Agents, Gardiner & Macfie, S.S.C. —Counsel for Defenders, Crabb Watt, K.C., Scott Brown, W. J. Robertson; Agent, John Robertson, Solicitor. W. A. R.

OUTER HOUSE.

(*Lord Guthrie.*)

346. Managers of the Old Meldrum United Free Church.

Trust—Administration — Power to Sell Heritage—Trusts (Scotland) Act 1867 (30 & 31 Vict. cap. 97), sect. 3—Power Granted to Sell Church and Manse, After Congregation Amalgamated with Another, Though Contrary to Original Trust Deed.

This was a petition presented to the Junior Lord Ordinary under the Trusts Act (30 & 31 Vict. cap. 97), sect. 3, for authority to sell heritage.

The subjects were held by the petitioners in trust for behoof of the Old Meldrum United Free Church. The trust was constituted by a tack entered into in 1828 between the heritable proprietor and the managers of the United

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Associate Congregation of Old Meldrum. Said congregation became the United Presbyterian congregation of Old Meldrum in 1847, and in 1900 the Albert Road United Free Church, Old Meldrum. On 15th February 1905 the congregation amalgamated with the North United Free Church, Old Meldrum, and the united congregation is now known as the Old Meldrum United Free Church.

After this amalgamation the church and manse, built on the subjects contained in the tack, were no longer required for the congregation. This application was therefore brought for authority to sell the subjects.

The Lord Ordinary remitted to Mr H. E. Richardson, W.S., to enquire and report in the usual form.

The reporter stated *inter alia* that the original tack provided that "in no case whatever, excepting the foresaid extreme difficulties in which the congregation may fall" (which had not occurred), "shall the members thereof or any majority of them be at liberty at any time during the whole period of this present tack to dispose of said grounds or to use the same for any other purposes than those for which they are hereby let, namely, as sites or stances for a church or meeting house and other necessary buildings for the use and accommodation of a Presbyterian congregation in connection with the United Associate Synod of the Secession Church in Scotland."

The reporter considered that this excluded the possibility of sale, unless on the ground that the trust was self-imposed and that those who created the trust must have the power to remove it, and quoted the following cases: *Craigie* v. *Marshall*, 1850, 12 D. 523; *Presbytery of Edinburgh* v. *De La Condamine*, 1868, 7 M. 213; and *Kennedy* v. *Morrison*, 1879, 6 R. 879. He further considered that even if such a power could be granted on the latter ground, it would not be "for the execution of the trust," but for the purpose of terminating or altering the trust, and therefore the petitioners were really applying for an exercise of the *nobile officium* of the Court, and therefore the petition was incompetent under sect. 3 of the Trusts Act 1867. If competent, the reporter considered "the proposed sale to be highly expedient."

The Lord Ordinary *held* that this was a competent application under sect. 3 of the Trusts' Act 1867 and *granted* the prayer of the petition.

Lord Guthrie.—I think this case is ruled by the case of *Downie*, 10th June 1879, 6 R. 1013; the power asked in that case was not granted by the First Division under its *nobile officium* but because the judges thought the application fell within the terms of sect. 3 of Trusts (Scotland) Act 1867.—21*st February* 1908.

Counsel for Petitioners, Wilson, K.C., Dunbar; Agents, Millar, Robson & Maclean, W.S.

A. S. P.

OUTER HOUSE.

(*Lord Salvesen.*)

347. Clark and Another *v.* Hine and Others.

I. Shipping Law—Maritime Lien—Assignability—Wages—Assignation of Claim for Wages—Right of Assignee to Enforce Maritime Lien.

II. Shipping Law—Maritime Lien—Priorities—Judicial Sale—Effect of Sale.

III. International Law—Maritime Lien—Valid Lege Loci Contractus But Not Lege Fori—Disbursements Abroad by Foreign Creditor — Bankruptcy of Shipowner and Assignment to a Trustee—Rights of Foreign Disburser—Foreign Disburser Having No Lien Recognised by Law of Scotland, Held to be in Position of Unsecured Creditor.

IV. Process—Bankruptcy—Bankruptcy of Owner of Ship and Assignment to a Trustee—Action of Judicial Sale—Title of Unsecured Creditor to Defend.

This action, which was one of declarator and for judicial sale of the s.s. "Abbey Holme," was raised at the instance of Robert Clark, shipowner, Glasgow, as mandatory and true and lawful attorney for William Brown, master of the said vessel, and as assignee of certain members of the crew, and as an individual, with consent of the said William Brown; and the said William Brown. The defenders called were (first) Wilfred Hine, the registered owner of the said vessel, a partner of the firm of Hine Brothers, shipowners, Maryport, as such partner and as an individual, and the said Hine Brothers; (second) W. E. Mounsey, C.A., Liverpool, trustee acting under an assignment granted by the said Hine Brothers and Wilfred Hine for behoof of their creditors in his favour dated 16th July 1907; (third, fourth and fifth) three firms who held mortgages on account current over the "Abbey Holme"; (sixth) Messrs Bowring & Co., an American firm having its principal office in New York; (seventh) Messrs C. T. Bowring & Co. Ltd., of Liverpool, who acted as agents for the said American firm in this country; and (eighth) John Simpson, marine engineer, Maryport, who had prior to these proceedings raised an action in the Sheriff Court at Greenock against the master of the "Abbey Holme" for payment of £140 of wages. Said action was defended, and at the date of closing the record in this action the process was ordered *ob contingentiam* to be transmitted from the inferior Court to this process. The first four conclusions of the summons were for declarator that the pursuers, or one or other of them, had a right of maritime lien over the

"Abbey Holme," and were entitled to have the vessel sold. The fifth conclusion was for an order for judicial sale in the usual form.

The only defenders who lodged defences were Messrs Bowring & Co. of New York. The circumstances under which they opposed an order for sale sufficiently appear from the Opinion of the Lord Ordinary. They pleaded, *inter alia*, that in respect that the pursuer William Brown had been paid the sums alleged to be due to him, and in respect that his right of maritime lien was not transferable, or at all events had not been validly transferred to the other pursuer, neither of them had a title to sue the present action.

The pursuers, on the other hand, pleaded that the compearing defenders had no title to defend.

The Lord Ordinary, holding that the pursuers had a title to sue, and that the compearing defenders had no title to defend, *granted* decree in terms of the fifth conclusion of the summons, leaving to the pursuers to establish the specific amounts to which they were entitled to be ranked in the competition to follow the sale.

Lord Salvesen.—This is an action for the judicial sale of a steamship called the "Abbey Holme." The vessel is lying at Greenock, but hails from Maryport; and her registered owner, Mr Hine, has become bankrupt and granted an assignment for behoof of his creditors in favour of the defender, Mr W. E. Mounsey, chartered accountant, Liverpool. In such circumstances it is unusual to have an action of this kind defended, because, whenever a sale has been carried through by order of the Court, the sum realised is deposited with the clerk of court; and all creditors are given an opportunity of lodging their claims and competing, *inter se*, for preferential rankings if the fund should prove inadequate to pay all. In short, the action is really converted into a multiplepoinding, and all the liens and preferences which existed over the ship are ranked upon the price in their order of priority. It is therefore very seldom, where the owners have become bankrupt, that any opposition is offered to a judicial sale.

The compearing defenders are a corporation recognised and existing under the laws of the State of New York. They narrate that on 5th December 1906 the "Abbey Holme" arrived at New York in a damaged and unseaworthy condition, which made it necessary that she should go into dry dock for repairs, that they contracted with the owners to have her put into a seaworthy condition, and paid the shipbuilders' account for repairs and made other disbursements on behalf of the steamer. For those disbursements they drew a bill of exchange on Hine Brothers, the managing owners, dated 19th February 1907. This bill matured on 3rd May, and on that day Messrs C. T. Bowring & Co. Ltd. arranged to give further delay; and, in lieu of the bill which had matured, they, in their own name, drew on Messrs Hine Brothers for the same amount. The bill was duly accepted, but was dishonoured when it became due on 5th July 1907. The compearing defenders say that they relied upon the credit of the ship in making these advances; and that, according to the maritime law of the United States, and of New York State in particular, they have a maritime lien upon the ship in respect of the sums expended by them on said repairs and accessories. At the debate they did not maintain that, according to the law of Scotland or the general maritime law of Great Britain, they could maintain this claim of lien; and as I can only apply our own law in determining the ranking of claims on a British ship locally situated in Scotland, they must be treated as unsecured creditors of the bankrupt owner.

These defenders have an obvious interest in resisting a judicial sale, for if the vessel were to go to an American port they would be able to enforce their alleged lien against her there, and that possibly notwithstanding that she might have changed hands under a private sale. If, on the other hand, the vessel is sold judicially, and declared by decree of this Court "to pertain and belong to the purchaser freed and disburdened of all bonds, mortgages, liens, rights of retention and other encumbrances affecting the same," in terms of the fifth conclusion of the summons, they are apprehensive—and I think with good reason—that the maritime lien which is said to exist in their favour in America might be completely destroyed. Hence their anxiety to prevent a judicial sale taking place.

It is conceded by the pursuers that, in order to give them a title to demand a judicial sale, they must have a right and claim of maritime lien or hypothec and real burden over the "Abbey Holme." If they were mere unsecured creditors of the owner, they would be bound to lodge their claims with the trustee in bankruptcy—to whom the ship itself would belong as part of the assets of the bankrupt estate. Accordingly Mr Clark, the leading pursuer, claims to have such a lien on three heads: (1) as having paid the wages due to the master, from whom he holds a power of attorney, and who is a concurring pursuer; (2) as assignee to the wages due to some members of the crew, under an assignation No. of process; and (3) as having paid two drafts drawn by the master in favour of two companies who had supplied coals and necessaries to the vessel in foreign ports. In addition to the owner and his assignee in bankruptcy, three defenders are called who hold mortgages on account current over the "Abbey Holme." None of these persons have lodged defences to the action, and it may be assumed, therefore, that they admit the maritime lien claimed, although—in the case of the mortgages, at all events—they have a strong interest to maintain the opposite.

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In my opinion the compearing defenders have no title to defend. On their own statement of the facts it is plain that they are merely unsecured creditors of Hine Brothers—or of the registered owner Mr Wilfred Hine, for whom the firm acted as managers. As such they are represented by the trustee in bankruptcy, Mr Mounsey. It is said that Mr Mounsey has no interest to object to a sale, because the prior mortgages are so large as to more than absorb the estimated value of the ship, and that the defenders have the interest which I have already adverted to. That, however, in my opinion, does not entitle them to take up a position which the trustee—who represents other interests—regards as untenable. They are, no doubt, called as defenders in the present action, but that is because they claimed at that time to have a maritime lien, and, in that view, had an obvious interest in opposing the claim of the pursuers to a lien which might take priority of theirs. It having now turned out that they cannot maintain any lien—according to the law which I am bound to administer—they are in no better position than any of the other creditors of Mr Hine, who must be taken to be fully represented by the assignee in bankruptcy. On that ground alone I would be prepared to repel their defences, and to proceed in this action thereafter as if it were undefended.

The same result would follow if I hold that the pursuers have in fact a maritime lien for all or any of the sums in respect to which the claim is made. The leading ground upon which their claim is contested is that a lien for wages or disbursements is a privilege personal to the master and crew, or to the master in respect of disbursements, and cannot be assigned. No Scotch authority was quoted in support of this proposition; but I was referred to a solitary passage in the latest edition of Abbott on Shipping, and to the following cases on which it is founded: *The "Lyons,"* 1887, 6 Asp. M.C. 199; *"Bridgewater,"* 1877, 3 Asp. M.C. 506; *"Cornelia Henrietta,"* 1866, L.R. 1 A. and E. 51, and *"The Fair Haven,"* P. 67. In my opinion these cases do not support the proposition that a maritime lien for wages cannot be assigned in favour of a third party who pays the wages. All the length they go is that the Admiralty Court will not, in the ordinary case, sanction the payment of money by way of wages to the crew by a third party without his first obtaining the consent of the Court. In all these cases an action had already been instituted for judicial sale of the vessel; and Dr Lushington seems to have desired that the Court should be consulted before wages were paid to seamen in order to get rid of the expense of keeping them, if the person paying them was to be assigned into their place. That may be a useful enough rule of court, the real application of which, I rather think, is confined to cases where no assignation has been obtained from the crew, or where it is desired to stop their claims from running without their consent. But there is no case in which a person who paid the crew's wages, and obtained an assignation of their claim, was held to be in no better position than an unsecured creditor. On the contrary, I was referred to two cases: the *"William Safford,"* 1860, Lush., P. 69, and the *"St Lawrence,"* 1880, 5 P.D. 250, in both of which persons who had advanced money to pay claims which conferred a maritime lien, were ranked on the proceeds of the ship in the priority to which the cedents would have been entitled; and I cannot see any principle on which a claim for money against a shipowner, secured by a maritime lien, should not be capable of assignation like any other money claim with its relative securities. It is no doubt true that a maritime lien differs from many other forms of security, in that it may be insisted in to the prejudice of a purchaser of a ship who has no knowledge of its existence, but unless a maritime lien followed the ship after it had changed owners it would really be valueless, and the assumed hardship is not materially increased by holding that the assignee of such a right may enforce it equally with the original holder. The hardships the other way are much more conspicuous. The result of the Solicitor-General's argument would be that the representatives of a master or a seaman who had a good maritime lien for wages, would not have the benefit of that lien to enforce payment of their author's claim. Besides, it would lead to great extra expense if such a doctrine were to be recognised, as crews could not be paid off by a bondholder or other secured creditor, to whose claim the wages were preferable, until the sanction of the Court had been obtained to his doing so by some form of process which has yet to be invented.

A further argument was offered on the footing that the pursuers' various claims were not sufficiently vouched. In my opinion, at all events so far as the master's claim and the claim for disbursements are concerned, there is no substance in this objection. The account for coals supplied at Las Palmas, to take only one instance, and the draft by the master in favour of the coal company, are both produced; and, in the absence of any specific attack, I think this must be treated as conclusive, at all events for the purpose of entitling the pursuers to have the vessel judicially sold. I shall accordingly grant a decree in terms of the fifth conclusion of the action, leaving to the pursuers to establish the specific amounts to which they are entitled to be ranked in the competition which will follow.—*25th January* 1908.

Counsel for Pursuers, Clark, K.C., C. D. Murray; Agents, Smith & Watt, W.S.—Counsel for compearing Defenders, the Solicitor-General (Ure, K.C.), Horne; Agents, Boyd, Jameson & Young, W.S. J. W. F.

LANDS VALUATION APPEAL COURT.

(Lords Low and Dundas.)

348. Charles Jenner & Company *v.* Assessor for Edinburgh.

The North British and Mercantile Insurance Company *v.* Assessor for Edinburgh.

I. Valuation — Rent — Shop — Specially High Rental Obtained for Shops in Street—Comparison with Other Shops in Street—Valuation by Floorage Area—Premises Occupied from Basement to Roof—Comparison with Shop Premises Only Occupying Street Floor—Re-Valuation After Recent Fixing of Valuation—No Change of Circumstances—Held that the Valuation Recently Fixed Must Be Retained.

II. Valuation — Rent — Insurance Company's Offices in Street Suitable for Shops—No Similar Premises in Street—Comparison with Similar Offices in Other Streets—Valuation by Floorage Area—Comparison with Shops in Same Street—Held that the Comparison Must Be with Premises in the Same Street, and that Valuation by Floorage Area was the Proper Method.

Cases.

These were two appeals from decisions of the Magistrates of Edinburgh. They were both heard and decided together.

Charles Jenner & Company's Case.

At a Court of the Magistrates of the City and Royal Burgh of Edinburgh, held at Edinburgh on 12th September 1907, to dispose of appeals against valuations made by the Burgh Assessor for the year ending Whitsunday 1908, under the Valuation of Lands (Scotland) Acts, Charles Jenner & Company, silk mercers, &c., 47 Princes Street, Edinburgh, appealed against an entry in the Valuation Roll of the Burgh of Edinburgh, of house, shop, &c. at a rent of £8780. The appellants craved that the entry in name of yearly rent or value should be £6000 instead of £8780.

The case set forth :—

1. The appellants are owners and occupiers of a large block of buildings fronting Princes Street on the south, St David Street on the east, and Rose Street on the north. The buildings have a frontage to Princes Street of about 80 feet, to St David Street of 230 feet, and to Rose Street of 99 feet. The main portion of the building, viz. that fronting Princes Street and extending northwards along St David Street for about three-fourths of the distance to Rose Street, was erected in or about the year 1895. The premises forming the back portion were completed in 1905. The area covered by the buildings extends to 2324 square yards; the total floorage area of the buildings is 106,490 square feet; and the cubic contents 2,000,000 cubic feet.

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2. The main portion of the building consists of nine floors, including a basement and a mezzanine floor. The back portion consists of eight floors, including a basement floor. The appellants occupy the whole buildings in connection with their business of drapers, silk mercers, etc. The main floors are used as shops and saloons and the upper floors as workrooms and a boarding residence for the firm's employees.

3. The cost of erecting the buildings, exclusive of the cost of embellishments, was £70,000.

4. The main portion of the building was completed in 1896, and the total assessment at that time was £6450, being £6000 for the newly-erected portion and £450 for the old buildings on the site now occupied by the back portion. The valuation remained at that figure till 1904, when it was reduced to £6000 in respect that the old buildings were being removed and the present back portion was being erected. After this reconstruction was completed in 1905 the valuation was fixed by the Assessor and acquiesced in by the appellants at £7250 — £1250 being added for the then new buildings. The Assessor raised the valuation for the year ending Whitsunday 1908, because on a comparison with premises in Princes Street actually let he was of opinion that the valuation of £7250 was quite inadequate.

5. There are in Princes Street ninety shops and offices actually let and thirty-two shops and offices occupied by proprietors. The valuation of many of the latter has not been considered in recent years, and the rents of premises let in Princes Street have undergone considerable increase within the last few years. The Assessor is in course of scrutinising the assessable value of all the subjects occupied by proprietors with a view to bringing the whole premises in Princes Street to one level of valuation, but he has not yet overtaken the revisal of the whole of such premises.

The Assessor arrived at his valuation of £8780 by taking the floorage area of each floor of the appellants' premises and applying thereto varying rates per square foot. These rates were based upon an analysis of the rents actually paid for the premises in Princes Street referred to in the Assessor's evidence. The Assessor further took as a check upon the sum thus arrived at, the figure yielded by taking percentages upon the site value and the cost of the buildings, and he found that this figure exceeded the sum of £8780.

The appellants contended that the valuation should be arrived at by a comparison of the valuations as appearing in the Valuation Roll for the year to Whitsunday 1908 of the most comparable premises in Princes Street, whether such premises were actually let or occupied by the proprietors, and whether or not in the latter case the valuations had been recently scrutinised by the Assessor and adjusted or fixed.

The magistrates, having heard the evidence and the arguments for the parties and considered the whole circumstances, were of opinion—

1. That the appropriate method of arriving at the valuation of the appellants' premises for the purposes of the Valuation of Lands (Scotland) Acts is by comparison with such other premises in Princes

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Street as most nearly resemble them in situation, character, and accommodation, provided such other premises are actually let, and that an important factor in instituting a comparison with such other premises is by means of ascertaining the rate per square foot of floorage space for each floor or part of a floor of such similar premises and applying these rates to the floorage areas of the present premises, subject to such variations as may be necessary to give effect to the specialities of the present case, and in particular the advantage of having a frontage to three streets and the disadvantages connected with the large number of floors.

2. That while, as an alternative to the method of ascertaining the value by comparison with other premises, it is sometimes expedient, where the owner has erected buildings for his own occupation and there are no similar let properties in the neighbourhood available for comparison, to enquire what interest or return an owner might reasonably expect upon his outlay if the building had been erected for letting to a tenant, and regard this as an equivalent of rent, it is not necessary or appropriate to adopt this alternative in the present case.

The Magistrates, taking the whole circumstances into account, and acting in accordance with the opinions above set forth, resolved to fix the rental in the Valuation Roll at £8000.

The appellants obtained a case for the opinion of the Valuation Judges.

The respective contentions of the parties were set forth in the case as follows:

The appellants contended that their premises not being let but being in their own occupation, the fair method of arriving at their annual value was by a comparison with the rental or assessed annual value of other similar premises in the immediate vicinity. The appellants' premises consisted of a front portion abutting on Princes Street, 784 square yards in area, a middle portion, 1018 square yards in area, and a back portion, 522 square yards in area, the front and middle portions having been erected in 1895, and the back portion in 1904. As regards the new back portion, this had been valued in 1905, immediately after its erection, at £1250, and had remained at this figure in 1906, but although no change of circumstances had taken place, the Assessor proposed to supersede this recent valuation, and value the back portion at £1514, 16s., an increase of £264, 16s. As regards the middle portion it was conceded that this portion fell to be entered at half the rate fixed for the front portion. The main controversy was as to the valuation of the front portion, and comparison with similar neighbouring premises showed that the Assessor had valued this portion at an excessive figure. The neighbouring premises which were most nearly comparable with the front portion of the appellants' premises were those of Messrs Cranston & Elliot Ltd., assessed at £3000; Messrs John Wight & Co., presently let at £1400; Messrs Henry Darling & Co., let at £875; and Messrs Cowan & Strachan, let at £850. All of these premises were situated in Princes Street, and were occupied in each case by a single firm from roof to basement, as was the case with the appellants' premises. If the front portion of the appellants' premises were valued at the same rate proportionally to area as the premises mentioned, the middle portion at half that rate, and the back portion at £1250, the valuation would not exceed £6000. If this result were tested by taking the rate per square foot of the floorage area, and per cubic foot of the cubical contents of the premises compared, and applying the same to the appellants' premises, a figure practically identical would be reached. While the appellants' premises had the advantage of a frontage to South St David Street, this was counterbalanced by the fact that the proportion of floorage area to frontage to Princes Street was very much larger in the case of the appellants' premises than in the case of any of the premises compared. A large amount of back floorage, proportionally to street frontage, rendered premises much less marketable. Moreover, in the particular case of Messrs Cranston & Elliot Ltd., the frontage to Princes Street exceeded the appellants' frontage by 13 feet.

The appellants further contended that the Assessor had erred in the method of comparison adopted by him. He had merely taken the average floorage rates of a number of other premises in Princes Street, and applied these rates to the corresponding floors in the appellants' premises. Apart from the objection that floorage rates by themselves afforded no satisfactory guidance, the average rates which the Assessor had taken were in no case derived from premises occupied by a single firm from roof to basement. On the contrary, his floorage rates for the street or shop floor were taken, with a single exception, from premises where the occupier occupied only that floor. As the street floor was by far the most valuable, and if let separately commanded a much higher rent proportionally than if let along with and as part of a whole tenement, the rates selected by the Assessor for comparison afforded no criterion for the valuation of the street floor of the appellants' premises, which were occupied as a *unum quid* from roof to basement.

While the method of taking a percentage on cost was not regarded by the Court as a sound system of valuation, the appellants' premises had been greatly over-valued by the Assessor on this basis also. The site had been independently valued within two years at £100,000, and the cost of the buildings, apart from embellishments, it was agreed, might be taken at £70,000 or thereby. At the rate of 3 per cent. on the site value and 4 per cent. on the structural cost, which were fair rates in the case of so large and unmarketable a concern, the figure of £5800 was reached.

The appellants' premises, after their completion in 1905, had been valued at £7250, which the appellants considered excessive, but against which they did not at the time appeal, and the proposed increase of £1530 on this very recent valuation was not justified by any change of circumstances whatever. If the valuation of Princes Street premises generally was to be revised, it was appropriate that the valuations of old standing should first be dealt with, and in any event it imposed an unfair burden on the appellants in competition with their trade rivals to single out their premises for increased valuation this year, in place of proceeding by way of a comprehensive and simultaneous scheme of re-valuation of all business premises in Princes Street.

The Assessor contended that the valuation arrived at by the Magistrates should not be interfered with. The Assessor had arrived at a figure appreciably higher on a basis which he maintained was fair, but he did not quarrel the valuation arrived at by the Magistrates.

The Assessor submitted that as many of the valuations in Princes Street had not been revised for many

years, it was proper for him to undertake the revisal of these as early as possible.

The Assessor submited that the best criterion for assessing the value of the appellants' property in Princes Street was a comparison with the subjects actually let in the vicinity.

In Princes Street ninety of the premises were actually let, while thirty-two were in the occupation of proprietors. The Assessor, therefore, analysed each separate let subject and arrived at figures or rates applicable to each flat of the different tenements, which rates having been taken from many varied subjects gave a fair indication of the values applicable to each flat of all the tenements in the street. He was then, he considered, in a position to proceed by comparison to adjust the value of the appellants' subjects.

The Assessor, though unable to overtake the complete re-valuation of the whole street in this year, was able to revise a considerable number of the valuations of subjects lying between the east end of Princes Street and Hanover Street. In all, the Assessor had revised nine such valuations. After conference with the Assessor, Messrs Thomas Methven & Sons, 15 Princes Street; Andrew Elliot, 17 Princes Street; Sun Fire Office, 40 Princes Street; John Dickson, 63A Princes Street; Edinburgh Café Co., 70 Princes Street; and H. C. Baildon & Sons, 73 Princes Street, acquiesced in valuations practically on the basis proposed by the Assessor in this case. Messrs Romanes & Paterson, who appealed to the Magistrates, had acquiesced in their decision, which applied the Magistrates' decision in this case proportionately to their smaller premises, and were not to proceed further.

The Assessor contended that he had adopted the only method for valuing a large block of buildings such as that of the appellants, viz. by comparison and applying floorage rates taken from premises actually let. He had arrived at his valuation by taking rates from subjects actually let and in the immediate vicinity of the appellants' premises, whereas the appellants founded upon instances of valuations—as distinguished from lets—and of subjects which lay at a considerable distance from the premises in question.

The appellants' premises had been the subject of two previous separate valuations—one after the front portion was completed in 1895 and the other after the back portion was completed in 1905. When the last mentioned valuation was made, the sum arrived at was simply added to that of the former. The Assessor considered that in fairness he was bound to look at the premises as a whole, and the result was shewn by the table incorporated in his evidence giving the areas and the various rates applicable to each.

The Assessor contended that the appellants' premises could not in any case be considered as having any back portion, as the so-called "new portion" and "back portion" had very valuable frontage to St David Street. He did not admit that the mid-building should be charged at half rates, nor did he admit that the "back portion" should be taken as of a fixed value of £1250. This sum was apparently taken because of its being the valuation placed upon the last erected portion of the premises, and when this sum was fixed it was simply added to the former valuation of the older erection. The Assessor contended that the premises must be valued as a whole; and further, that the appellants could not assume the value of the back premises taken in connection with and as a part of an entire building to be £1250, unless they were able to shew that that sum represented the true value, and this they made no attempt to prove.

As an additional test of the valuation arrived at, as above pointed out, the Assessor applied the test of cost, and this worked out at £9500. In making this additional test the Assessor assumed the value of the area to be £150,000, and the building £70,000, exclusive of any consideration for embellishments. The appellants virtually admitted the latter sum to be correct, and the Assessor submitted that his valuation of the site was justified by the values spoken to in the proof as having been actually paid for sites in the vicinity, and other evidence.

Taking the figures assumed by him, the Assessor took 4 per cent. on the value of the site, . £6000
and 5 per cent. on the buildings, exclusive, as above-mentioned, ... 3500

Making . . £9500

He was thus satisfied that his method of valuation by comparison and application of rates of floorage was reasonable, and he accepted the lower figure in the table in fixing the valuation.

The Assessor further contended that the usual percentage rate applied in Scotland is 4 per cent. on land, and 5 per cent. on buildings. The percentages of 3 per cent. and 4 per cent. were not applicable to the present case.

The Assessor further contended that he could not be expected to revise the whole of such an extensive street as Princes Street in one year, and he did not admit that he was bound by any particular mode of procedure in dealing with subjects coming into his valuation, or that he ought to withhold any number of valuations from the Roll from year to year until he has completed a street. The logical issue of such a principle would require him to hold over the valuation until a district, or even the whole of the city, was revised and put on the same footing. He contended that so soon as he was satisfied that the valuation of any single subject in the city required to be altered he was bound to enter such new valuation in the Roll. He further contended that any arguments drawn from comparison with unrevised premises in Princes Street being obsolete, valuations fell to be disregarded.

The Assessor submitted that the valuation as fixed by the Magistrates was fair and reasonable in comparison with other subjects in the vicinity, and that the appellants had not proved that their determination was wrong in principle or unfairly applied.

The passage in the evidence of the Assessor referred to in the case was as follows:

I based my valuation on certain rates I have given, and applied them to the floorage area. These rates I justify by comparison with actual lets in Princes Street. The figure of 10s. which I give for the street floor in my valuation of Jenner's I justify by a comparison with the nine cases I gave. The case of Mackay & Chisholm brings out 9s. 10½d.; Goodson's, 10s. 2d.; Dow, 12s. 8d.; Duncan, 10s. 9d.; Lennie, 19s.; Stanley, 10s. 6d.; Crouch, 10s. 9d.; Milne, 10s. 8d.; Renton's, 11s. These are all for street floors. These are all in Princes Street, but they are not all back 50 feet. In each of the nine cases the premises are let. Roughly speaking, the rates I have taken apply to the floorage given in each of the nine

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cases of rent. With reference to the other rates I apply to Jenner's, if required I can by reference to one or other of these nine cases shew that in each case my rate is warranted, with the exception of the basement, which in my estimate of Jenner's is too low. Coming to the nine cases which are actually let, I have applied my rates in each one of the cases. In the case of Mackay & Chisholm I have applied my rates and got £905, 14s. 6d., and the rent is £905. Applying my system to the case of Goodson's I get in my rates at £1001, and the let price is £1000. In the case of Dow my rates give £501, whereas it is let at £500. In the case of Duncan my rates give £551, and it is let at £550. In the case of Lennie the figures come out exactly. In the case of Stanley my rates applied give £1232, and the rent is £1235. In the case of Crouch my rates are £374, actual let £375. In the case of Milne my rates give £302, and they let at £300. That leaves only the case of Renton. In the case of Renton my rates work out at £2237, whereas the let is £2210. My view is that the system I have taken as evidence is fair when applied to the premises let, as it shews exactly the same as the rent.

Counsel for the appellants *argued* that all premises of a similar nature ought to be taken into consideration in making a comparison, whether they were let or occupied by their owners, and cited *M'Vitie* v. *Assessor for Edinburgh*, 1898, 25 R. 601.

Counsel for the Assessor *argued* that the case of *M'Vitie* had no application, as there were in that case no similar premises let at all.

The Valuation Judges *were of opinion* that the determination of the Magistrates was wrong, and that the annual valuation should be reduced to £7250.

The North British and Mercantile Insurance Company's case.

At a Court of the Magistrates of the City and Royal Burgh of Edinburgh, held at Edinburgh on 12th September 1907, to dispose of appeals against valuations made by the Burgh Assessor for the year ending Whitsunday 1908, under the Valuation of Lands (Scotland) Acts, the North British and Mercantile Insurance Company, incorporated by Royal Charter and special Acts of Parliament, appealed against an entry in the Valuation Roll of the Burgh for the year ending Whitsunday 1908, of their office at 64 Princes Street, at a rent of £5500.

The appellants craved that the entry in name of yearly rent or value should be £2000 instead of £5500.

The case set forth:

The following facts were admitted or held by the Magistrates to be proved, or within the knowledge of the Magistrates:—

1. The appellants are owners and occupiers of the premises forming No. 64 Princes Street, the building of which has been completed since the Valuation Roll for the year 1906–7 was made up. The building is rectangular in shape, having a frontage of 102 feet to Princes Street, and extending northwards 114 feet to Rose Street Lane. The area covered by the buildings is 1632 superficial yards in extent, and the gross floorage area of the building is 49,175 square feet. The building consists of three sections, viz.: (1) a front block facing Princes Street, containing a basement floor, a street floor, and three flats and an attic flat above; (2) a centre block containing a ground floor and basement under; and (3) a back block adjoining Rose Street Lane containing a basement floor and three storeys above. The front wall of the section facing Princes Street is separated from the street by a recess or area, and the ground floor of that section is raised 4 feet 6 inches above the level of the street.

2. The whole building is occupied by the appellants for the purposes of their business of a fire and life insurance company. The street and upper flats of the front section contain a board-room and accommodation for the officials and clerks of the company; the middle section is used as a public office, and the back block as offices, lunch-rooms, cloak-rooms, and lavatories. The basement floors consist of storage accommodation, safes, etc.

3. The value of the site upon which the buildings are erected is £82,000, and the cost of the buildings, excluding the cost of embellishments, is £48,000.

4. Prior to the erection of the present buildings, the site was covered by old buildings, consisting of four storeys owned by the appellants and occupied partly as shops let to tenants, and partly as offices used by the appellants for the purposes of their business. The shops occupied about one-half of the frontage to Princes Street on the ground floor. The whole buildings were then assessed at £3025, of which £1400 represented the rent paid for the shops.

There are in Princes Street ninety shops and offices actually let and thirty-two shops and offices in the occupation of proprietors. The valuations of many of the latter have not been considered in recent years, and the rents of premises let in Princes Street have undergone considerable increase within the last few years. The Assessor is in course of scrutinising the assessable value of the subjects occupied by proprietors with a view to bringing the whole of the premises in Princes Street to one level of valuation, but he has not yet overtaken the revisal of the whole premises, and in particular has reconsidered none of the premises in the section of Princes Street west of Hanover Street.

The Assessor arrived at his valuation of £5500 in the following manner. He took the floorage area of each floor of the appellants' premises and applied thereto varying rates per square foot. The rates were based upon an analysis of the rents actually paid for the premises in Princes Street, referred to in the Assessor's evidence, after allowing for the differences in construction, character, and purpose. This method gave a valuation of £5273. He then calculated the value on the basis of taking percentages upon the value of the site and the cost of the buildings, and this gave a valuation of £5680. The figure inserted in the Valuation Roll was arrived at by taking the average of these two sums.

The appellants maintained that the method of valuation by cost was not applicable, and that the true method was by comparing the building with others in the city of about the same size and used for a similar or somewhat similar purpose. They supported their figure of £2000 by a comparison by means of floorage rates of certain premises in George Street and St Andrew Square, occupied as offices of insurance companies, and with buildings in the section of Princes Street west of Hanover Street, occupied by the proprietors as club premises.

The Magistrates, having heard the evidence and the arguments for the parties and considered the whole circumstances, were of opinion—

1. That the appropriate method by which to arrive at a valuation of the premises in question, for the purposes of the Valuation of Lands (Scotland) Acts, was by comparing them with other premises in Princes Street, and that an important factor in instituting a comparison of other premises in Princes Street with the present premises is by means of ascertaining the rate per square foot of floorage space for each floor, or part of a floor, of such other premises as are actually let, and applying such rates to the corresponding floorage areas of the appellants' premises, subject to such variations as may be necessary to give effect to the specialities of the present case, particularly the use made of the premises, the fact that the frontage to Princes Street is recessed and that the ground floor is raised above the level of the street, and the number of flats occupied by the appellants.

2. That in respect there are no very similar premises available for comparison with the building in question, the Magistrates are entitled to enquire what interest or return should reasonably be expected upon the value of the site and the outlay on the buildings, if the buildings had been erected for letting to a tenant, and regard the result, not as the rental to be inserted in the Valuation Roll, but merely as a check upon the result obtained by the comparison of floorage rates above specified. If the method now indicated were adopted, it would give a larger sum than the valuation appealed against.

The Magistrates, taking the whole circumstances into account, and acting in accordance with the opinions above set forth, resolved to fix the rental in the Valuation Roll at £5000.

The appellants obtained a case for the opinion of the Valuation Judges.

The respective contentions of the parties were set forth in the case as follows:

The appellants contended that the yearly value put upon their premises was excessive, and was arrived at upon an erroneous principle and by an improper method of valuation.

The Assessor proposed to value the said premises at £5500 yearly. This figure he reached by applying to the floorage area of the appellants' premises a rate per foot obtained from the rental, not of offices, but of shops in Princes Street—that is to say, by considering what rental the appellants' buildings would yield if converted into shops; and by arbitrarily dividing the difference between the figure so arrived at—£5273—and a sum equal to 4 per cent. on the estimated cost of the site and 5 per cent. on the estimated cost of the buildings—£5680. There was no principle on which this method of valuation could be justified. In the first place, it had been frequently decided that the cost of the subjects formed no good guide for determining the yearly rent which they would bring, and further, the rates selected by the assessor of 4 and 5 per cent. on site and buildings respectively was purely arbitrary and was excessive. In the second place, it was an erroneous method of valuation to take into account what the premises would yield, if turned to some other use from that to which they were presently applied. Both of these tests of yearly value were expressly disapproved in the case of the *North British Railway Co.* v. *Assessor for Edinburgh*, 1905, 7 Fraser 435. It was impossible, therefore, to reach any proper conclusion by arbitrarily splitting the difference between the results arrived at through these two erroneous methods of valuation. Further, it was notorious that premises in Princes Street, let as offices, would not yield the rental which they would obtain if let as shops, and instances might readily be found in the Valuation Roll showing that banks and offices in Princes Street were assessed at less than similar premises occupied as shops. The appellants did not expect, nor obtain, any advantage, as shops did, from passing traffic; their premises were designed only for offices, and by reason of the fact that the building was recessed from the street and that the first floor was built several feet above the street level, they could not conveniently be used for shops. Cook's tourist office, to which the Assessor referred, was really a shop and did reap an advantage from its prominence and accessibility to the passers-by. It therefore afforded no proper comparison.

But even if it were legitimate to take the rental of shops in Princes Street as the basis of comparison, the examples founded upon by the Assessor afforded no guide for the valuation of the appellants' premises. In most cases they consisted of shops occupying only a ground floor, which were universally highly rented as compared with shops containing several floors, and yielded rents which could not be obtained in the same proportion for premises like those of the appellants, which, from floor to roof, were in one occupancy. In some cases, again, they were shops of little depth from the street and afforded no ground of comparison, because the less the depth in proportion to the frontage the higher was the rent. Further, while in the case of shops extending to a greater depth than 50 feet from the street, the Assessor diminished the rate by one-half on the further back portions of the buildings, he made no such diminution in the case of the appellants' premises. Finally, all the rates put upon the different portions of the premises selected by the Assessor were purely arbitrary and were founded upon no ground of fact.

The appellants contended that the most reliable basis for the valuation of their subjects was to be found in the valuation of similar buildings used as one tenement for the same purposes. Such examples were to be found in the cases of the Standard Insurance office and the Scottish Equitable Insurance office. If the rate of valuation per foot of the floor area of the first of these offices were taken, the appellants' premises would be valued at £2088, and if the rate of the second were applied the result would be £2007. The offices referred to were respectively in George Street and St Andrew Square; but insurance offices obtained no advantage from being in Princes Street, and there was no ground for assuming that insurance companies would pay a higher rent for offices in the one street than in the others. In the case of the Life Association Insurance offices, which were in Princes Street, the rent at which they were let on the first floor is 1s. 4d. per foot, and of the shops on the ground floor 4s. 5d. per foot. Similarly the offices on the first floor of the Palace Hotel buildings fetched a rent of 1s. 5d. per foot. If these rates were applied to the appellants' premises the total rent would be under £2200.

No buildings in any way similar to those of the appellants were entirely occupied as offices in Princes Street. The nearest examples of similar blocks of buildings occupying similar sites were the New Club, the Conservative Club, and the University Club.

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Taking the present valuation of these Clubs, the yearly value per foot of floor area worked out at 10·02d. per foot in the case of the New Club, 10·23d. per foot in the case of the Conservative Club, and 8·45d. per foot in the case of the University Club. If these rates were applied to the appellants' premises they would give valuations of £1932, £1972, and £1731 respectively.

The appellants accordingly contended that in accordance with these figures and the evidence adduced by them, their premises should not be entered in the Valuation Roll at more than £2000.

The Assessor contended that, in the absence of any buildings quite analogous in Princes Street, he had acted correctly in applying the principle of floorage space, checked by cost. This he submitted was a correct basis, and in so far as it bore hardly on the appellants, was amply corrected by the deduction made from his valuation by the Magistrates.

The Assessor submitted that, as many of the valuations in Princes Street had not been revised for many years, it was proper for him to undertake the revisal of these as early as possible.

The Assessor submitted that the best criterion for assessing the value of the appellants' property in Princes Street was a comparison with the subjects in the vicinity.

In Princes Street, ninety of the premises were actually let, while thirty-two were in the occupation of the proprietors. The Assessor therefore analysed each separate let subject, and arrived at figures or rates applicable to each flat of the different tenements, which rates having been taken from many varied subjects, gave a fair indication of the values applicable to each flat of all the tenements in the street. He was then, he considered, in a position to proceed by comparison to adjust the value of the appellants' subjects.

The Assessor, though unable to overtake the complete re-valuation of the whole street in this year, was able to revise a considerable number of the valuations of subjects lying between the east end of Princes Street and Hanover Street; in all, the Assessor had revised nine such valuations.

The application of the rates before mentioned to the appellants' premises, brought out a total of £5273, 11s. 9d. The Assessor proceeded to check the result on the "cost" principle. He accepted the figures supplied to him by the manager of the appellants' company, viz.:—

Site, ...	£82,214	0	0
Say £82,000 at 4 per cent., . . and buildings £52,000—less allowance for embellishments £4000—£48,000 at 5 per cent., . .	£3,280	0	0
	2,400	0	0
Making	£5,680	0	0

and in fixing the valuation of £5500 he split the difference between the result obtained by measurement and that obtained by cost, making practically £5500.

The Assessor referred to his evidence, in which he distinctly stated that his valuation was based on the "floorage" principle, and that he used the "cost" principle as a check. He did not value the appellants' premises at what they might bring if turned to some other use than that for which they were specially designed and intended, and he did not base his valuation on the "cost" principle, although he considered he was justified in using that principle as a check on the figures otherwise arrived at by him.

Under the former valuation, prior to the erection of the new building, the assessments stood at £3025. The additional value of the new building brought the valuation up to at least £5000.

The Assessor believed that a sum of about £52,000 was spent in demolishing the old buildings and erecting the new ones. He submitted that, this being so, the subjects fell to be entered as at least £5000.

The Assessor did not admit that premises in Princes Street let as those premises were did not yield the same return as shops. Such subjects as were let for offices yielded as high rents as similar subjects when otherwise occupied.

The analogy of insurance buildings elsewhere than in Princes Street had, the Assessor submitted, no bearing, and the valuation of clubs in Princes Street—whose values were as yet unrevised by him—were, he submitted, of no value at all.

The Assessor submitted that, in the absence of any building quite analogous, he acted correctly in going by floorage space, checked by cost. This he submitted was an accurate basis, and, in so far as it bore hardly on the appellants, if it did so at all, was amply corrected by the reduction made by the Magistrates.

The passage in the evidence of the Assessor referred to in the case was as follows:

In the case of Jenner's I took nine concrete cases of analogous premises in Princes Street, and these are available for reference in the present case. I have considered the North British and Mercantile flooring space. Taking first the basement floor, the cellars under the front pavement give 810 feet at 3d. per foot, £10, 2s. 6d. The general stores on the basement floor, 9983 feet, taken at 6d., give £249, 11s. 6d. These two rates are very ordinary rates, and are to be found in a large number of the nine cases alluded to. These are inferior properties. The rates are extremely low—6d. for general stores is very low. Coming to the most valuable part of the place, the street floor, front block in centre, 3537 feet at 7s. 6d., yields £1326, 7s. 6d. The centre portion, 5298 feet at 7s. 6d., gives £1986, 15s. It is rather difficult in the nine instances given in the previous case to find anything exactly analogous to that, so I have prepared a list of the cases I considered analogous. The 7s. 6d. is arrived at, or rather a less sum than 10s. is taken, because the street floor in this instance is up some steps, making it less convenient; on that account I make an allowance of 2s. 6d. *Q.* Are there any other cases in which you have adopted the same course?—*A.* There are some older shops in Princes Street where there are steps. In these cases the rental yields somewhat less than 10s. For instance, 41A Princes Street yields 7s. 6d. That is a shop where you have to ascend several steps. At 73 Princes Street, Baildon, you have to ascend five steps, 7s. 6d. is the rate. In Stevenson's, where there are three steps, the rate is 7s. 3d. I point to these as justifying the variation from the 10s. rate I here make.

The Valuation Judges *were of opinion* that the determination of the Magistrates was right.

Lord Low.—These cases have been extremely well argued, and as I have formed an opinion on both of them, in which I understand your Lord-

ship agrees, I think it is best that we should dispose of them at once.

Taking in the first place the case of Jenner & Co., I agree with the statement of the Magistrates that the appropriate methods of valuation "is by comparison with such other premises in Princes Street as most nearly resemble them in situation, character and accommodation."

Now it happens that there are a number of premises in Princes Street which are as similar in character, situation, etc., as one is likely to find. I refer to those of Wight & Co., Cowan & Strachan, Henry Darling & Co., Renton & Co., and Cranston & Elliot. A comparison with these has made on my mind a strong impression that the amount at which the appellant's premises have stood in the Valuation Roll for some time, viz. £7250, is a fair yearly value for them in their present condition.

It is said that the main part of the building has stood at the same figure (namely, £6000) in the Roll for twelve years. Now that is true, but then in 1905 the valuation was reviewed by the Assessor and fixed at the above-mentioned sum of £7250.

Now I confess I can find no evidence of change of circumstances to warrant the increase which the Assessor proposes to put on the premises for the present year. But, on the other hand, no circumstances have been stated to warrant their being entered at a lower figure than formerly. I propose therefore that we hold that the determination of the Magistrates is wrong, and that the premises should be entered in the Roll as formerly at £7250.

Coming to the case of the North British and Mercantile office, the first observation which I desire to make is that it appears to me that the figure of £2000 suggested by the Insurance Company is altogether inadequate. It is difficult to find a basis for assessing the value of this subject, as there are no other premises in Princes Street, used as offices, at all comparable with it. I entirely agree with the Assessor that you cannot value premises in Princes Street at a value put on similar subjects in George Street or St Andrew Square. This much may be said—that insurance offices should be valued at a somewhat lower rate than shops, because the same rent would not be got for an office as for a shop.

The valuation made by the Assessor was £5500, and the Valuation Committee have reduced that figure to £5000. I confess that I should have been very well pleased if the Committee had fixed a smaller amount, because my impression is that £5000 is a full valuation. Still, this is one of those cases in which it is impossible to do more than make an approximate estimate of the value, and I think that it is impossible to say that the estimate made by the Committee is not reasonable. I am therefore of opinion that we would not be justified in interfering with their determination.

Lord Dundas.—I agree in regard to both the cases for the reasons which your Lordship has stated, and I have nothing to add.—21*st February* 1908.

Counsel for Appellants, Blackburn, K.C., Macmillan; Agents, Dundas & Wilson, C.S.— Counsel for Respondent, Dickson, K.C., Spens; Agent, Andrew M'Dougall, Solicitor.

F. A. U.

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Lord Dundas.

OUTER HOUSE.

(*Lord Dundas.*)

349. Oliver *v.* Bird and Others.

Bankruptcy—Trust Deed for Creditors—Title to Sue—Action by Creditor Against Trustee for Illiquid Debt—Plea of Incompetence Sustained.

This was an action at the instance of William Oliver, builder, Leith, against Philip, Laing & Harley, Writers to the Signet, Edinburgh, and David Philip and Alexander Laing as individual partners of said firm; and against George Bird, Chartered Accountant, Edinburgh, as trustee for behoof of the creditors of Harry Herbert Harley, Writer to the Signet, Edinburgh, and presently residing in London, acting under trust disposition by the said Harry Herbert Harley, dated 16th July 1906; and also against the said Harry Herbert Harley for any interest he might have as an individual and as a partner of said firm. The action concluded for payment by the defenders jointly and severally of the sums of £417 and £540 as damages. The pursuer carried on building speculations in Edinburgh by purchasing pieces of ground on which he erected buildings and then created and sold feu-duties on these. In these transactions the said firm of Philip, Laing & Harley acted as the pursuer's agents, and the alleged damages consisted of the difference between the price at which certain feu-duties were actually sold by the said firm on the pursuer's behalf and what the pursuer averred was their real value. The said sales of feu-duties took place in 1899.

The said David Philip and Alexander Laing withdrew from said firm in 1900 and 1904 respectively. The said Harry Herbert Harley carried on the business as sole partner till 16th July 1906, when he granted the said trust disposition in favour of the said George Bird.

The defender George Bird pleaded, *inter alia*: —"(1) No title to sue. (2) The action is incompetent. (3) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action ought to be dismissed."

The Lord Ordinary *sustained* the second and third pleas in law for the defender George Bird, and *assoilzied* said defender from the conclusions

OUTER HOUSE. *Lord Dundas.*

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of the summons; and *quoad ultra* allowed a proof before answer.

Lord Dundas.—The pursuer, William Oliver, is a builder who, according to his statement, is in the way of carrying on building speculations in Edinburgh, by purchasing pieces of ground, erecting buildings, and creating and selling feu-duties on these. The action is one of damages against a now dissolved firm of law agents in Edinburgh, Messrs Philip, Laing & Harley, W.S., and the partners of that firm, as such partners and as individuals; and the damages represent the difference between the price (twenty-five years' purchase) at which certain feu-duties were sold on the pursuer's behalf, and what the pursuer alleges to have been their real value at the date of sale, viz. twenty-eight years' purchase. . . .

I shall deal first with the case as directed against Mr Bird, who, as already stated, is sued for payment jointly and severally along with the firm and its partners. The pursuer states that, from and after 1904, Mr Harley, "as sole partner, carried on the business under the name of Laing & Harley, W.S., until 1906, when he granted a trust deed for behoof of his creditors in favour of the defender George Bird, C.A., who is now in possession of the estate of the said Harry Herbert Harley for behoof of his creditors." There are no statements on record as to whether or not the pursuer has acceded to the trust, nor whether any dividend has been, or is likely to be, declared. Mr Bird's counsel informed me from the bar that no dividend has yet been declared, and that any dividend which may hereafter be declared must be a very small amount per £. However this may be, it seems to me very clear that Mr Bird is entitled to be assoilzied from this action. He has pleas directed against its competency and its relevancy. I cannot see any valid theory upon which the case can be maintained against him. Mr Bird certainly is not, and never was, a partner of the said firm; nor is he, in any true sense, the representative of a partner, viz. Mr Harley. He is not *eadem persona*, like an executor; on the contrary, he is trustee for Mr Harley's creditors (Bell, Comm., II. 383; *Nicolson*, 1872, 11 M. 179, per Lord Deas, at 185). The pursuer's pleas in law seem to be all directed against the firm and its partners, and to be of no avail against Mr Bird. Nor, again, can the pursuer, in my judgment, sue Mr Bird in this action, on the footing that he (the pursuer) is a creditor of Mr Harley. He has at best an illiquid claim of damages against Mr Harley. The action is not framed merely for constitution of this debt, but for payment by Mr Bird, jointly and severally with others, of the whole sums sued for. Mr Harley, as already stated, is only called for any interest he may have. The case of *Ogilvie*, 1887, 14 R. 399, does not seem to me to help the pursuer. There, a non-acceeding creditor was allowed to obtain decree against the trustee for a share of the debtor's estate in proportion to his debt; but what he asked and got was just payment of a dividend (which had been declared by the trustee) of so much per £ of his debt, which was a liquid debt, and was admitted by the trustee. In this case, if I were to grant the decree concluded for, it might, I apprehend, operate injustice, by giving the pursuer a preference over Mr Harley's other creditors. It is not, in my judgment, as the pursuer's counsel argued, a mere matter of *pluris petitio*. The summons, so far as directed against Mr Bird, is, I think, radically ill founded upon any theory of law. I shall therefore sustain his second and third pleas, and assoilzie him, with expenses. . . .—21*st January* 1908.

Counsel for Pursuer, Mackenzie Stuart; Agent, Robert White, Solicitor.—Counsel for Defender George Bird, Jameson; Agents, Scott & Glover, W.S.—Counsel for Defender Laing, M'Lennan, K.C., Munro; Agents, Marr, Duncan & Laing, W.S.—Counsel for Defender Philip, M'Kechnie, Ingram; Agent, David Philip, S.S.C. A. M.

OUTER HOUSE.

(*Lord Mackenzie.*)

350. Finburgh *v.* Moss' Empires Limited.

SLANDER — VICARIOUS SLANDER — MASTER AND SERVANT—LIBEL BY SERVANT OF A LIMITED COMPANY—VERBAL SLANDER UTTERED BY A COMPANY'S SERVANT — CIRCUMSTANCES IN WHICH ISSUES ALLOWED AGAINST COMPANY—PRIVILEGE.

This was an action of damages for verbal slander at the instance of Mrs Dora Alexander or Finburgh against Moss' Empires Limited.

The slanderous statements were alleged to have been uttered by the manager, the under-manager, and an attendant in the employment of the Company. The material averments in the case and the contentions of parties sufficiently appear from the judgment of the Lord Ordinary.

The pursuer proposed the following issues which were approved:—

"1. Whether, on or about 13th November 1907, in the Empire Theatre of Varieties, Sauchiehall Street, Glasgow, owned and managed by the defenders, the defenders by their under-manager, in the presence and hearing of pursuer's husband, David Finburgh, residing at Maplewell House, New Walk, Leicester, Joseph Lipscher, 25 Rue de Orleans, Paris, and John Franklin, 75 Garmoyle Road, Liverpool, or one or more of them, falsely and calumniously stated of and concerning the pursuer that she was a bad character and must leave the theatre, or used words of like import and effect, to the loss, injury, and damage of the pursuer?

"2. Whether, on or about 13th November 1907,

in the Empire Theatre of Varieties, Sauchiehall Street, Glasgow, owned and managed by the defenders, the defenders by their under-manager and one of their attendants at said theatre, or one or other of them, in the presence and hearing of David Finburgh, residing at Maplewell House, New Walk, Leicester, Joseph Lipscher, 25 Rue de Orleans, Paris, or one or other of them, falsely and calumniously stated of and concerning the pursuer that she was a prostitute and had been put out of the theatre shortly before for being drunk and disorderly; whether, on hearing said statement, the defenders' manager said, 'That is quite enough; the woman must leave at once,' or words of like import and effect, and whether the defenders, by their said manager, thereby falsely and calumniously represented or intended to represent that the pursuer was a prostitute and unfit to be allowed to remain in a respectable theatre, to the loss, injury, and damage of the pursuer?

"Damages £1000."

Lord Mackenzie.—The question raised in this action is whether the defenders, a limited company, are liable for verbal slander, alleged to have been uttered in one of their theatres by the under-manager and an attendant, in the course of their service, and for the defender's benefit. The case therefore raises the point recently discussed in *Nicklas* v. *The New Popular Café Co. Ltd.*, 25th January 1908, 15 S.L.T. 735. An issue was there refused, because I was of opinion that it could not be said, upon the averments, that the defenders' servant was acting within the scope of her authority in using the language complained of. In *Eprile* v. *Caledonian Railway Co.*, 2nd July 1898, 6 S.L.T. 87, an issue was refused in similar circumstances by Lord Kincairney.

I am, however, of opinion that if on record a pursuer sets forth that verbal slander was uttered by the servant of a Company in such circumstances as to indicate that *prima facie* the uttering of the slander was an act of the Company, he is then entitled to an issue in the form proposed in the present case, viz.—whether the defenders by their servant uttered the slander complained of? It will then be for the jury to say whether the act complained of fell within the scope of the servant's employment, or whether it was one for which the defenders are not responsible.

This conclusion seems to me to follow from what has been decided in Scotland as regards written slander. It has been held, in *Ellis* v. *National Free Labour Association*, 1905, 7 F. 629, that the principle laid down by the Privy Council in *Citizens Life Assurance Co.* v. *Brown*, 1904, A.C. (P.C.) 423, applies in Scotland. According to that a servant may write a slander involving liability on his master, just as he may commit any other act on which an action for reparation against his master can be founded. The question in such a case, as is pointed out by the Lord President, is just whether the servant in doing what is complained of was acting within the scope of his employment or not. If this be the question, then I am unable to see, in point of principle, why if the servant is acting within the scope of his employment, the master should not be equally liable, whether the slander be spoken or written. It is true that up to the present no case has occurred in which an issue has been granted in such circumstances. In *Nicklas* I stated I would be slow to grant one, having fully in view what was said in *Agnew* v. *British Legal Life Assurance Co. Ltd.*, 1906, 8 F. 422, that to open the door to liability for any slanderous language rashly used by anyone in the employment of another, or of a corporation, would be to open the door very wide indeed.

The safeguard against this, in my opinion, is to make it incumbent upon the pursuer to set forth on record facts from which *prima facie* it may be inferred that the verbal slander complained of is a company act. The question accordingly in the present case is whether this has been done. It is to be observed that the employer who is sought to be made liable is a Company, and not an individual. A Company can only act and speak through its servants.

I think the pursuer makes a strong case on her averments, which are these:—She is a married woman, who went with her husband and two friends to the defenders' theatre in Glasgow. A box was paid for, and the party had taken their seats, when first a page boy, and then one of the defenders' attendants in uniform, came and scrutinised them. Shortly afterwards the under-manager, accompanied by the same attendant, entered the box and said: "That woman is a bad character, and must leave the theatre." The pursuer's husband explained that she was his wife, when the under-manager replied that "he had heard that story before," and that the pursuer must leave at once. Her husband then went out of the box and insisted on the defenders' manager being summoned. When he came he questioned the under-manager and the attendant. They both stated that the pursuer was a notorious prostitute, and had been thrown out of the theatre two weeks before for being drunk and disorderly. On hearing this statement the manager said to the pursuer's husband, "That is quite enough; the woman must leave at once." The pursuer and her husband thereupon left the theatre. These are the pursuer's averments.

The pursuer then avers, in Cond. V., that the defenders are a limited company, and that the whole management and conduct of the theatre is entirely left to the manager, under-manager, and attendants, who are charged by the defenders with the whole conduct of the business; that the statements complained of were made by the defenders' manager, under-manager and atten-

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dant in the course of their service with the defenders and for the defenders' benefit, and were made and persisted in most recklessly, pertinaciously, and maliciously. I agree with the defenders' counsel that the averments in Cond. V. are not sufficient by themselves to entitle the pursuer to an issue. On a question of relevancy, however, it is permissible to look at the defenders' answers. In Ans. 3 they explain that by the bye-laws made by the magistrates of Glasgow for the maintenance of order in theatres in the city, which apply to the defenders' theatre, it is provided, *inter alia*, "that the licensed manager shall not, by himself or by his servants, knowingly permit or suffer men or women of bad fame, or dissolute boys or girls, to enter any theatre as spectators or in any other capacity." Then follows the defenders' explanation of what they say actually occurred, and they aver that "the defenders' servants acted throughout in the *bona fide* exercise of their duty under the said bye-law and with the utmost discretion; and no member of the public present in the theatre was in any way aware of the incident." They no doubt in Ans. 5 deny that any slander was uttered, and say that if their servants did slander the pursuer in doing so they acted outwith the scope of their employment.

In my opinion the record discloses a *prima facie* case that it was the defenders who, by their servants, slandered the pursuer, and that the issues should be allowed in the terms proposed.

At the discussion of the issues a motion was made by the pursuers' counsel that the case should be tried with a jury, upon the record without issues, as though two issues are required there is really only one wrong complained of. I think it better that the jury should have the issues. The defenders' counsel contended that if there was to be enquiry it should be by way of proof. The case, however, seems to me one for a jury.

It was further maintained that the record shewed the case was one of privilege, and that therefore malice should be inserted in the issue. The case of *Buchanan* v. *Magistrates of Glasgow*, 1905, 7 F. 1001, was founded on. That, however, was a different case from the present. I do not consider a case of privilege is disclosed on the record, and am therefore of opinion that malice should not go into the issue.

I shall accordingly approve of the issues proposed.—25*th February* 1908.

Counsel for Pursuer, Dickson, K.C., C. D. Murray; Agents, Dove, Lockhart & Smart, S.S.C. —Counsel for Defenders, Hunter, K.C., H. P. Macmillan; Agents, Menzies, Bruce-Low & Thomson, W.S.

D. S. M'D.,
for R. C. H.

OUTER HOUSE.

(*Lord Mackenzie.*)

351. M'Gregor *v.* Sohn and Others.

Trust—Revocability—Unilateral Trust Deed Executed by a Woman Before Marriage for Behoof of the Spouses in Life-rent and the Issue in Fee Held to be Revocable—Husband and Wife.

The facts of this case and the authorities cited at the debate are given in the Lord Ordinary's Opinion.

Mr A. M. Hamilton, advocate, was appointed *curator ad litem* to Oscar Staehling Vincent Sohn.

Lord Mackenzie.—The competition in this multiplepoinding is between Mrs Mary M'Gregor or Sohn and her pupil son, Oscar Staehling Vincent Sohn, to whom a *curator ad litem* has been appointed. The question is whether Mrs Sohn can revoke a trust deed executed by her dated 3rd September 1904.

The history of this trust is that in November 1891 Mrs Sohn received as the settlement of an action of damages at her instance certain sums of money, out of which the sum of £289, 15s. was allowed by her to be invested in a hotel business which had been acquired by her father. From November 1891 she remained with her father down to the date of her marriage in August 1904, when she requested payment of this money from him. There was a difficulty in getting repayment. Mrs Sohn consulted a law agent, and the result was that the deed of trust in question was signed by her. Her husband was not a party to the deed, but homologated it on 2nd January 1905. The trustees got the money from her father in October 1904.

The trust deed proceeds on the narrative that Mrs Sohn was married, and that she was desirous of making certain provisions with reference to the sum of £289, 15s. then due to her by her father, and that for her own protection she desired to place the said sum in the hands of trustees. Then follows the conveyance to trustees for the following purposes, viz.:—(Second), for payment to her of £80 as soon as the trustees should have recovered that sum from her father; (third), that the trustees should retain the balance and pay over to her the free income therefrom during her life; (fourth), "On my decease my said trustees shall divide the free income from said sum in the clothing, maintaining, and educating the child or children of our marriage; and upon the youngest of said children attaining twenty-one years of age, the free proceeds of the said two hundred pounds shall be divided equally, share and share alike, amongst such children, the issue of any predeceasing child succeeding to the share which their deceasing parent would have taken

by survivance." (Fifth), "In the event of there being no children of the marriage, then my said trustees shall give effect to any *mortis causa* deed which I may have executed; and failing any such *mortis causa* deed, the two hundred pounds shall be divided amongst my nearest relatives." Then follows a declaration that the said deed should be absolutely irrevocable, and should be strictly construed according to the law of Scotland, and that the provisions therein made in her own favour should be a strictly alimentary provision, and should not be assignable by her, or attachable by the diligence of her creditors in any manner of way.

On 12th June 1905 she, with consent of her husband, executed a deed of revocation of the trust. On 12th April 1906 a child was born of the marriage.

The argument for Mrs Sohn is that the deed of trust being in its nature revocable, and having been revoked, she is entitled to the whole fund *in medio*. I am of opinion that Mrs Sohn is entitled to succeed. I had the benefit of an excellent argument to the contrary from Mr A. M. Hamilton, who represents the pupil child, with a full citation of the authorities bearing on the question. After giving these cases due consideration, I am unable to come to any other conclusion than that the present is not distinguishable from the case of *Watt* v. *Watson*, 1897, 24 R. 330. The deeds in the two cases are practically identical. It was argued, however, that in the present there was the element of the husband's consent, which was wanting in the case of *Watt*. The consent, however, by the husband is to what his wife had done with her own property, and does not appear to me to import any of the elements of contract into the trust deed. Further, it was maintained that the case of *Wilken's Trs.*, 1904, 6 F. 655, should be followed rather than that of *Watt*. The judgment in the latter case, however, proceeds expressly on the ground that it is distinguishable from *Watt*. The deed in *Wilken* was held to be bilateral—an agreement not merely executed in contemplation of marriage, but one which the parties agreed should be made and executed before the marriage was solemnised. It was accordingly held to be a case where the doctrine of *Menzies* v. *Murray*, 1875, 2 R. 507, should be applied. In *Watt* it was held that the trust deed was revocable by the wife, with consent of her husband, because it was unilateral and executed without reference to any contract of marriage, and because there were no beneficiaries in existence other than the spouses. The opinion of Lord Trayner seems directly applicable to the present case. It was contended that Lord M'Laren indicated the view that the principle applied in *Menzies* v. *Murray* could not be justified on the ground of contract alone, but it must be pointed out that in the same passage the learned judge also expressed the opinion that this criticism would not furnish a valid reason for extending the rule to cases to which it had not been applied; and referred to the fact that it is clear from the opinions of the majority of the judges in the case of *Mackenzie* v. *Mackenzie's Trs.*, 1878, 5 R. 1027, that they considered the decision in *Menzies* v. *Murray* inapplicable to the case of a voluntary trust.

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I have considered the other cases cited, especially those of *Low* v. *Low's Trs.*, 1877, 5 R. 185; *Peddie's Trs.* 1891, 18 R. 491; and *Barras* v. *Scottish Widows' Fund Society*, 1900, 2 F. 1094. I do not think that any of these materially aid the argument for the child.

I am of opinion that the trust deed is revocable because it is unilateral, is not a contract, and was not executed with reference to a contract of marriage, and because there was at the date of the revocation no child in existence. In these circumstances the decision in *Watt's* case is directly applicable.

As regards the declaration that the trust deed is irrevocable, reference was made to some of the opinions in the case of *Lyon* v. *Lyon's Trs.*, 1901, 3 F. 653. The question, however, is just whether the deed is *sua natura* revocable or not. If it is, then, though there be a clause declaring it to be irrevocable, this clause may be revoked along with the rest of the deed.

The result of my opinion is that the claim for Mrs Sohn will be sustained, the expenses of all parties being paid out of the fund.—*1st February* 1908.

Counsel for Mrs Sohn, Orr, K.C., Macaulay Smith; Agent, C. Strang Watson.—Counsel for the Trustees, Munro; Agents, Simpson & Marwick, W.S. R. C. H.

SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

352. Ziegler *v.* Hamilton.

Parent and Child—Access—Petition for Access by Mother—Mother Divorced for Adultery—Circumstances where Petition Refused.

Petition.

This was a petition brought by Mrs Suzanne van Valkenburg or Hamilton or Ziegler, wife of Edward Ziegler, journalist, New York, against James Neilson Hamilton, residing at the Bath Club, Dover Street, London, for access to James Hamilton.

The petitioner averred that she was married to the respondent on 11th April 1898 in New York; that there were two children of the marriage, James and Alice; that on 8th June

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1905 the marriage was dissolved by decree of the Courts of Indiana, U.S.A., at the instance of the petitioner, on the ground of the respondent's cruelty; that on 11th September 1905 the petitioner was married to the said Edward Ziegler, and now resided with him in New York; that the respondent being advised that the American divorce was ineffectual, obtained decree of divorce on the ground of adultery in the Court of Session on 20th July 1907; and that by the decree of 18th July 1905 the Courts of Indiana gave the custody of the said James Hamilton to the respondent.

The petitioner further averred:

4. Immediately after the date of said decree the respondent, who has never displayed any great affection for either of his children, handed over the boy to the care of the petitioner's mother, Mrs Peirce, along with a written mandate, dated 18th July 1905. The boy remained in charge of Mrs Peirce in America and in England until 15th June 1906, since when he has been in charge of the respondent's people in Glasgow, where he is at school at the Glasgow Academy, and at Lochgoilhead or other places during the holidays

5. The petitioner, who has always been devoted to her children, who have returned her affection, desires to have access to her son, but the respondent refuses to allow her any access at all. The petitioner is willing to come to this country for the purpose, and to see her son, at such times and places, and under such conditions, as may seem suitable to your Lordships.

6. Since an early period of their married life the respondent neglected both the petitioner and his children. Between the date of the marriage in April 1898 and the American divorce of June 1905, he spent less than two years and two months with them. Although constantly appealed to, he refused or neglected to provide them with sufficient means of maintenance, the larger part of that being borne by the petitioner's mother, Mrs Peirce. Although remonstrated with, he left the petitioner shortly before the birth of his first child, the boy, on 15th November 1900 (when the petitioner was dangerously ill), and did not return until July 1902. He left his wife and child again a few months before the birth of the second child. The respondent has at no time shewed proper affection for either of the children, and his treatment both of the petitioner and the boy has been harsh and cruel. The petitioner, on the other hand, has always been a kind and loving mother, as well as a devoted one.

The respondent lodged answers, in which he averred:

Ans. 2. . . . The respondent was not guilty of cruel and inhuman treatment of the petitioner. Explained that on 1st January 1904 and 28th March 1904 the petitioner, who, as the respondent learned long afterwards, had been living in adultery with Edward Ziegler, wrote to the respondent entreating him to consent to a divorce in order that she might marry Edward Ziegler, and on 12th April 1904 she wrote him another letter repeating the same request and adding "Incompatibility is a sufficient excuse and certainly a true one, and one that would not have to be investigated very closely." The respondent, realising that his wife had ceased to care for him and would no longer be happy with him, agreed that she should obtain divorce on the grounds suggested by her. He was quite unaware of the actual grounds put forward at the proof, and only learned at a very much later date what was said and done in said proceedings. . . .

Ans. 4. Denied. The respondent has always had the greatest affection for his son and has bestowed great attention upon him. The respondent's business at the time mentioned kept him in Bussorah in Turkish Arabia for a considerable part of the year, and he was compelled in the interests of his business, which was his only means of livelihood, to go there on the occasion mentioned by the petitioner, when he temporarily handed over the custody of the boy to the petitioner's mother, Mrs Peirce, who begged the respondent to let her have charge of the boy during his absence. Upon his return he took him back under his own care and sent him to school at the Glasgow Academy.

Ans. 5. Admitted that the respondent refuses to allow the petitioner access to his son. *Quoad ultra*, denied. After the birth of the girl, the petitioner was utterly indifferent to the boy's welfare. She persistently neglected him and frequently maltreated him, and on more than one occasion she threatened to take the life of both of her children. Since the American divorce proceedings, two and a half years ago, she has never made any enquiry regarding him. The respondent believes and avers that the petitioner is not in any way interested in her son, but that the petition has been presented at the instigation of, and on behalf of, her mother, Mrs Peirce, who is keenly desirous to have the custody of the boy. Mrs Peirce has for a considerable time endeavoured to induce the respondent to allow her to have the custody of the boy, but the respondent refused her request. To aid her in this desire she has induced the petitioner to raise this action. . . .

Ans. 6. Denied. The statement that the respondent neglected the petitioner or the children is without foundation. The petitioner is well aware that during the period of absence specified, the respondent's business kept him in Bussorah, and that she refused to accompany him there. When he left America, shortly before the birth of his son, it was in response to a cablegram to return to Bussorah to attend to his business.

Ans. 8. It is not in the interests of the child James Hamilton that he should ever see his mother again, and he is only now beginning to forget the evil impression left on his young mind by his mother's manner of life with Ziegler in New York. In the action of divorce at the instance of the respondent against the petitioner, the Lord Ordinary (Lord Guthrie) found that the petitioner had been living for some time in adultery with Edward Ziegler, with whom she is at present residing in America.

The petitioner lodged a minute, in which she stated:

Reply 5. Admitted that Mrs Peirce, who is devoted to the boy, has for a considerable time endeavoured to induce the respondent to allow her to have some custody of the boy. Further admitted that the petitioner is not at present in this country. *Quoad ultra*, the averments in answer are denied. The petitioner is willing and intends to come to this country as soon as her presence is required in course of the proceedings. The petitioner has never been anything but kind to her two children. On 19th June 1905

she wrote a letter to her mother, which is produced and referred to, in which she begs to see her boy. This letter was opened by the respondent and kept by him from Mrs Peirce until February 1906. In August 1906 the petitioner came to London in the hope of seeing her son, but was unable to do so. In April 1907 Mrs Peirce offered, on condition of being allowed a limited custody of the boy, to maintain, clothe, and educate him, and to make an *inter vivos* settlement in trust for his behoof of a sum sufficient to yield £150 to £200 per annum, the income to be paid to Mrs Peirce for her life, and the fee to be held for behoof of the boy.

Reply 6. . . . The respondent's cruelty to the boy began soon after he joined the family in New York in 1902. On one occasion he struck the boy a severe blow on the head with a beer bottle "to make him keep quiet." In the spring of 1903, in New York he administered a brutually severe whipping to the boy for a childish fault, at a time when he knew the child was slowly recovering from an attack of diphtheria and was very weak. In January 1906 he boxed the child's ears in a brutal fashion in the public dining-room of the Hotel St Lorenz in New York. When leaving New York for London with Mrs Peirce and the boy at the end of January 1906, the respondent refused to purchase any warm clothing for the boy on the voyage, with the result that Mrs Peirce had to buy it. Later, while visiting Mrs Peirce and the boy at Hastings, the respondent took the boy to a swimming pool and kept him in the water for about an hour and a half and boasted of the fact, although the child was then ailing, and under the care of a doctor. The result was a severe attack of inflammation of the bladder. These are some instances only of the respondent's systematic cruelty and indifference.

Argued for Petitioner: The petitioner was asking, not for custody but for access. The fact that the petitioner had been divorced was not conclusive against her (*Bowman* v. *Graham*, 1883, 10 R. 1234; *Symington* v. *Symington*, 1875, 2 R.(H.L.) 41). This was especially the case since the passing of the Guardianship of Infants Act, because the wishes of the mother fell to be taken into account (Guardianship of Infants Act, 1886 (49 & 50 Vict. cap. 27), sect. 5; *Mackellar* v. *Mackellar*, 1898, 25 R. 883; *Sleigh* v. *Sleigh*, 1893, 30 S.L.R. 272, per Lord M'Laren). The leading consideration was the interest of the child (Guardianship of Infants Act, sect. 5; *Stevenson* v. *Stevenson*, 1894, 21 R. (H.L.) 96). *Prima facie* it was not in his interest that he should be wholly separated from his mother, and there were no allegations against the petitioner's character and conduct apart from adultery, which took place several years ago. It was present character and present conduct which were most important (*A. C.* v. *B. C.*, 1902, 5 F. 108). *Handley* v. *Handley* ([1891], P. 124) was distinguishable, having been decided on a construction of the English Divorce Act. The petitioner was willing to come to Scotland for the purpose of seeing the child, and it was immaterial that she was ordinarily resident in America (*Allan* v. *Allan's Trs.*, 1869, 41 S.J. 617). There was no foundation for the statement that the petition was presented in the interests of the boy's grandmother.

Argued for Respondent: When a wife was divorced for adultery, the Court would not grant access against the will of the husband (*Bowman* v. *Graham*, *cit.*; *Handley* v. *Handley*, *cit.*; *Bent* v. *Bent*, 1861, 30 L.J., P. 175; *Clout* v. *Clout*, 1861, 30 L.J., P. 176). There was nothing to take the present case out of the ordinary rule. It was not in the interest of the child that he should see his mother. That was the view taken at the time of the divorce by the respondent's mother (in whose interests the present application was really brought). Sect. 5 of the Guardianship of Infants Act did not apply to the case of a wife who had been guilty of adultery. The section which truly applied was sect. 7. The cases of *Allan* v. *Allan's Trs.*, *cit.*; *Sleigh* v. *Sleigh*, *cit.*; *Stevenson* v. *Stevenson*, *cit.*, were distinguishable. In none of them had the wife been guilty of adultery.

The Court *refused* the prayer of the petition.

Lord Stormonth-Darling.—My Lords, in this case the one thing that is perfectly clear is that the interest of the child is the main question for the Court to consider. The next circumstance of importance is that the parents of this child have already agreed as to its custody; what the mother now asks is that she should be allowed access. Now I quite admit that in the ordinary case access is a thing which would not be denied a mother—that is to say, where she has been innocent of any conjugal transgression. But the law is the same as I understand it, both in England and in Scotland, where the mother has not been innocent in her conjugal relations. In Scotland the law is settled by the case of *Bowman*, 1883, 10 R. 1234 (which had reference to a case of access alone), that where the wife had been divorced for adultery the matter of access to the children ought in general to be left in the husband's hands. The law is the same in England, as is established by the case of *Handley* [1891], P. 124; and it is important to notice that that was after the passing of the Guardianship of Infants Act 1886. A strong Court there held practically to the same effect as the Court here did in *Bowman's* case, that there was no sufficient ground for interfering with the arrangements made for a child by the husband in the case of an erring mother, even when only access was asked, and that was after taking into account the passing of the Guardianship of Infants Act, which was referred to in the argument. Now, here we have indications in the shape of letters that at the time when these proceedings first had their origin in America, the grandmother of this boy was strongly of opinion that it was not in his interest that his mother (who was her own daughter) should have access to him. I do not say that that is by any means conclusive, though I must say that the evidence,

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so far as it goes, is very clear that, whoever was fond of the boy, the grandmother certainly was, and therefore any expression of opinion that came from her was deserving of the highest consideration.

It is true that if she is to have such access, and she admits it in her petition, it will be necessary for her to come over from America to this country, for it is only here that she asks or could obtain access to him. From the nature of the situation, however, it follows that access by a mother resident in America and coming over to this country for the purpose of seeing her child, would almost necessarily take the form of a temporary custody. The child is at present residing in Glasgow in the house of his paternal grandmother, and is attending the Glasgow Academy. What future arrangements shall be made for his education it lies with his father to make, and he has indicated that he may ultimately send him to an English public school, but that is of course entirely in the future. The child is at present only seven years old. I am ready to decide this case upon the footing simply that it is not for the interest of the child at present that the mother's petition for access should be granted, and that she has averred no circumstances, she being the guilty spouse, to warrant us in interfering with the husband's arrangements and with the clear rule of the Scots law.

Lord Low.—My Lords, I am of the same opinion. When, on the 8th June 1905, the decree of divorce was pronounced by the Supreme Court of the State of Indiana (which appears to have been really an arranged divorce) the order of the Court was that the husband, the present respondent, should have the custody of the son of the marriage, and the petitioner the custody of the daughter of the marriage, and neither party seeks now to alter that order. The petitioner, however, now says that she has great affection for her son, and that it is a great grief to her never to see him, and she comes to this Court to be allowed access to him in this country. Now a good deal has happened since the proceedings in the American Court. In 1907 the respondent brought in this Court an action of divorce on the ground of adultery against the petitioner, and it was proved that about the same time as the proceedings were going on in America the petitioner was living in adultery with a Mr Ziegler, and the learned judge who tried the case found that there was no evidence that the present respondent was aware that that was going on. The petitioner subsequently married Mr Ziegler, and now she is living with him in America.

I think that the natural desire of a mother to see her child is by no means to be left out of consideration in a case of this sort; and the fact that she has been divorced for adultery is not in itself a sufficient reason for refusing access. But the main consideration is the welfare of the child, and in this case I have come to the conclusion that there would be serious risk that it would be contrary to the welfare of the son that access should be granted. I do not for a moment suggest that the petitioner would intentionally, or even consciously, say or do anything which might have a demoralising effect upon the boy, although I doubt very much if he would, in any case, actually benefit by intercourse with her. What I chiefly fear, however, is the effect which she might have on his relations with his father. The upbringing, education, and settlement in life of the boy, is a duty which the father has to perform, and it is of the utmost importance that he should have the respect and confidence of his son. I greatly fear that the petitioner's influence would, almost inevitably, be in an opposite direction, because it is evident that she has very bitter, perhaps vindictive, feelings against the respondent; and her history, and what may be gleaned of her character from the correspondence, suggest that she would not be likely to exercise a wise self-control. These considerations, especially in view of the law laid down in the cases of *Bowman* and *Handley*, satisfy me that the petition should be refused.

Lord Ardwall.—I agree with what has been said by your Lordships. I think there is nothing in these proceedings to shew that it is for the welfare of the child that the relations between him and his mother, which several years ago were broken off with her full consent, should now be resumed. On the contrary, I think that it is better that he should see and know as little as possible of her in the circumstances. In the next place, with regard to the law of the matter, it is quite settled that a father is entitled to the custody of his child; it is for him to direct what shall be done with the child, and his wishes are paramount unless it can be shewn that they are unreasonable, or that there is some good and just cause for running counter to them.

The only doubt I have in this case has been raised by the conduct of the father as shewn in his letters; they seem to me to shew that he has treated most unfairly the grandmother of this child, who has behaved in a most proper and ladylike manner throughout, and who has a strong affection for the child; but this is not sufficient to affect our judgment, as the father being responsible for the education and upbringing of the child, must just take his own course.

The Lord Justice-Clerk.—If I thought that the decision of your Lordships was to be taken as meaning that a decision at a particular time on a question such as this was final, and could never be reviewed or modified by the Court at a later date, I should have great difficulty in

concurring in what is proposed to be done. The question whether a parent is to be suffered to have access to a child is one which, although decided to-day, may be varied or altered at a later date, if ground can be shewn for it. What may be unfavourable to the interests of the child at one time may not be so at a later date. Therefore the judgment your Lordships propose is upon the present state of matters, and as your Lordships all hold that the present petition must be refused, I do not dissent from that judgment. If cause can be shewn at any later date that what is now done should be recalled or modified, the Court will be bound to consider the application. That being so, I am not placed in the position of holding that a mother can never, whatever the change of circumstances, be allowed to see her child during childhood, which would be a thing I could not consent to.—*27th February* 1908.

Counsel for Petitioner, Cullen, K.C., Hon. W. Watson; Agents, J. & A. F. Adam, W.S.— Counsel for Respondent, Scott Dickson, K.C., Horne; Agent, A. C. D. Vert, S.S.C.

J. S. M.

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(*Lord Dundas.*)

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Judicial Factor — Greenock Harbour Act 1880 (43 & 44 Vict. cap. 170), sects. 69 and 70—Judicial Factor Appointed under sects. 69 and 70, on Petition of Holders of Debentures on Which Interest was in Arrears — Powers of Factor—Held that Factor not Entitled to Vary Rates Fixed by Harbour Trustees.

This was an action at the instance of the trustees of the Port and Harbour of Greenock, against Andrew Carmichael, shipowner, Greenock, as judicial factor appointed by interlocutor of the Sheriff-Substitute of Renfrew and Bute at Greenock, on 5th August 1905, to receive the whole or a competent part of the rates and duties and other revenues of the Greenock Harbour Trust until all the arrears of interest or of principal, as the case might be, due to the holders of Greenock Harbour "B" Debenture Stock, together with all costs, be fully paid. The action concluded for declarator that the defender, as judicial factor foresaid, had no power to raise or reduce, or in any way vary the rates and duties fixed by the pursuers for goods shipped or unshipped at any of the works of the pursuers, and in particular, but without prejudice to the foregoing generality, that the defender, as judicial factor foresaid, had no power to raise the rate for sugar shipped into or unshipped from vessels (foreign) at the works of the pursuers from 10d. per ton, being the rate fixed by the pursuers, to 1s. 3d. per ton; and further, that the notice issued by the defender, of which he gave intimation to the pursuers on 29th November 1907, and which notice was in the following terms:—"Greenock Harbour Acts 1866 to 1895. Notice is hereby given that on and after 1st January 1908 there will be levied, demanded, and taken for sugar shipped into or unshipped from vessels foreign, 1s. 3d. per ton, as provided in Schedule A of the Greenock Harbour Act 1880. Andrew Carmichael, judicial factor," was *ultra vires* of the defender as judicial factor foresaid, and illegal, and ought not to receive effect, and that the defender, as judicial factor foresaid, was not entitled to levy, demand, or take rates, duties, or charges in terms of said notice; and for interdict against the defender from varying any of the rates and duties fixed by the pursuers.

The pursuers were the trustees of the Port and Harbours of Greenock, incorporated under the Greenock Port and Harbours Act 1866, and the Greenock Harbour Act 1888, and as such trustees were vested with the management and control of the said port and harbours, under and in virtue of the Greenock Harbour Acts 1866 to 1895.

The pursuers averred:—

Cond. 2. By section 77 of the said Act of 1866 it is, *inter alia*, provided as follows:—"From and after this Act coming into operation it shall be lawful for the Trustees to levy, demand, and take for all goods mentioned in the Schedule (C) hereunto annexed, which shall be shipped or unshipped at any of the works of the trustees and for the use of the works and conveniences in the said Schedule mentioned, any sum not exceeding the several rates and duties specified in the said Schedule. . . ." By the said Schedule (C) the maximum rate authorised for sugar shipped and unshipped from vessels (foreign) is fixed at 1s. 3d. per ton. It is also provided by the said Schedule, under the heading of "Miscellaneous Rules and Regulations," that "the Trustees may modify all or any of the rates under the above Schedule C."

Cond. 3. By sect. 34 of the Greenock Harbour Act 1880, sect. 77 of the Act of 1866, quoted above, and Schedule (C) to that Act annexed, excepting that portion of said Schedule (C) headed "Miscellaneous Rates and Regulations," are repealed, and it is thereby provided that "it shall be lawful for the Trustees, in lieu of the rates and duties specified in the said Schedule, so far as hereby repealed, to levy, demand, and take for all goods mentioned in the Schedule (A) hereunto annexed, which shall be shipped or unshipped at any of the works of the Trustees and for the use of the works and conveniences mentioned in the unrepealed portion of the said Schedule (C) to the Act of 1866 annexed, any sum not exceeding the several rates and duties specified in said Schedule (A) and in the said unrepealed portion of the said Schedule (C) respectively. . . ." By the said Schedule (A) the maximum rate authorised for sugar shipped into or unshipped from vessels (foreign) is fixed at 1s. 3d. per ton.

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Cond. 4. By sect. 5 of the said Greenock Port and Harbours Act, 1866, the Harbours, Docks, and Piers Clauses Act 1847, so far as not altered by the said Act of 1866, is thereby incorporated therewith to the extent of the limits of the Port and Harbours of Greenock, with the exception of certain clauses with which the present case is not concerned. By sect. 30 of the said Harbours, Docks, and Piers Clauses Act 1847, thus incorporated with the said Act of 1866, it is provided as follows:—"The undertakers may from time to time vary the rates or any of them respectively, in such manner as they think expedient, by reducing or raising the same, provided that the rates do not in any case exceed the amount authorised by the special Act to be taken, and provided also that the rates be at all times charged equally to all persons in respect of the same description of vessel and the same description of goods."

Cond. 5. In the exercise of the statutory powers thus conferred upon them, the pursuers have from time to time fixed the rates exigible in respect of goods shipped and unshipped at the harbour of Greenock within the maximum limits prescribed by the said schedules. In particular, the pursuers fixed the rate exigible for sugar shipped and unshipped from vessels (foreign) at 10d. per ton, and that is the rate at present in force.

Cond. 6. By the Greenock Harbour Act 1888, the finances of the Greenock Harbour Trust were re-arranged. By sect. 4 of that Act the trustees were empowered to create and issue in lieu of the existing harbour securities, (1) A Debenture Stock to such an amount as would produce £450,000, and (2) B Debenture Stock to an amount not exceeding £1,350,000. By sect. 5 of the said Act of 1888 the rate of interest on the said A Debenture Stock was fixed at 3½ per cent. per annum, and that stock and the interest thereon were declared to be the first charge on the undertaking of the trustees. By sect. 6 of the said Act of 1888 the rate of interest on the said B Debenture Stock was fixed at 4 per cent. per annum, and that stock and the interest thereon were declared to be the second charge on the undertaking of the trustees. Under the powers conferred by the said Act of 1888, debenture stock of the said two classes has been issued in lieu of the previously existing harbour securities, and the present capital indebtedness of the pursuers to the public consists of A Debenture Stock to the amount of £398,245, and B Debenture Stock to the amount of £1,102,688.

Cond. 7. By sect. 22 of the said Act of 1888 it was provided as follows:—"In the event of the trustees failing at any time to make payment of the interest due at the expiry of any half year, it shall be lawful for any holder of A Debenture Stock, and after the expiration of a period of seven years from the passing of this Act, for any holder of B Debenture Stock, to apply to the Sheriff for the appointment of a judicial factor in manner provided by sect. 70 of the Act of 1880." The above-quoted section of the Act of 1888 was repealed by the Greenock Harbour Act 1895, which by sect. 10 enacted the following provision in lieu thereof:—"In the event of the trustees failing at any time to make payment of the interest due at the expiry of any half year, it shall be lawful for any holder of A Debenture Stock, and after the expiration of a period of ten years from the passing of this Act, for any holder of B Debenture Stock, to apply to the Sheriff for the appointment of a judicial factor in manner provided by sect. 70 of the Greenock Harbour Act 1880."

Cond. 8. By sect. 69 of the said Greenock Harbour Act of 1880, it was provided as follows:—"The mortgagees of the trustees may enforce payment of arrears of interest or principal or principal and interest due on their mortgages by the appointment of a judicial factor. In order to authorise the appointment of a judicial factor in respect of arrears of principal the amount owing to the mortgagees by whom the application for a judicial factor shall be made shall not be less than £5000 in the whole." By sect. 70 of the said Act of 1880 it was provided as follows:—"Every application for a judicial factor under the provisions of this Act shall be made to the Sheriff, and on any such application the Sheriff may by order in writing, after hearing the parties, appoint some person to receive the whole or a competent part of the rates and duties and other revenues of the trust until all the arrears of interest or of principal, as the case may be, then due on the outstanding mortgages, together with all costs, including the charges of receiving the said rates and duties and other revenues, be fully paid. Upon such appointment being made all such rates and duties and other revenues shall be paid to and received by the person so appointed, and the money so received shall be so much money received by or to the use of the mortgagees, and so soon as the full amount of any interest or principal in arrear and costs has been so received, the power of such judicial factor shall cease; provided always that such judicial factor shall distribute among all the mortgagees to whom interest or principal shall be in arrear the rates and duties and other moneys which shall come into his hands, having respect in such distribution to the priorities, if any, of such mortgagees.

Cond. 9. The interest payable by the trustees to the holders of the said B Debenture Stock having fallen into arrear, certain of the holders of that stock on 7th July 1905, being ten years after the passing of the said Act of 1895, presented a petition in the Sheriff Court of Renfrew and Bute, at Greenock, craving the Court "to appoint such person as the Court shall see fit to be judicial factor upon the whole undertaking of the trustees of the Port and Harbours of Greenock, and upon their property, estate, and effects, and upon the rates and revenues accruing therefrom, with the usual powers, and, in particular, with all the powers conferred on the trustees of the Port and Harbours of Greenock by the Greenock Harbour Acts 1866 to 1895, he always finding caution before extract; and further, and without prejudice to the foregoing generality, to ordain the said trustees to hand over to such judicial factor the whole property, estate, and effects belonging to said Trust, and all funds now in bank or in hand; or otherwise to appoint such person as to the Court shall seem fit as judicial factor to receive the whole or a competent part of the rates and duties and other revenues of the said Trust, until all arrears of interest and principal and costs due to the petitioners and the other holders of Greenock Harbour B Debenture Stock, together with all costs, including the charges of receiving the said rates and duties and other revenue, be fully paid."

Cond. 10. Parties having been heard on the said petition before the Sheriff-Substitute (Neish) at Greenock, he, on 5th August 1905, issued the following interlocutor:—"Greenock, 5th August 1905.—The Sheriff-Substitute having heard counsel and agents for the parties, and considered the petition, answers, and productions, appoints Mr Andrew Carmichael, shipowner, Geeenock, as judicial factor, he finding caution before extract in common form, to receive the

whole or a competent part of the rates and duties and other revenues of the Greenock Harbour Trust until all the arrears of interest or of principal, as the case may be, due to the petitioners and other holders of Greenock Harbour B Debenture Stock, together with all costs, including the charges of receiving the said rates and duties and other revenues, be fully paid, and decerns."

Cond. 11. The defender duly accepted office as judicial factor in terms of the above quoted interlocutor, and, having found caution, entered upon the duties of his office.

Cond. 12. On 9th October 1907 the defender addressed a letter to the pursuers' general manager suggesting that the rate on foreign sugar should be raised to 1s. 3d. per ton. This suggestion was brought before a meeting of the pursuers on 5th November 1907, when it was negatived by eleven votes to six. Thereafter, on 29th November 1907, the defender addressed a letter to the pursuers' general manager inclosing for the information of the pursuers a copy of the following notice :—

"*Greenock Harbour Acts*, 1866 *to* 1895.

"Notice is hereby given that on and after 1st January 1908 there will be levied, demanded, and taken for sugar shipped into or unshipped from vessels foreign, 1s. 3d. per ton, as provided in Schedule A of the Greenock Harbour Act, 1880.

"Andw. Carmichael.,
"Judicial Factor."

The defender also inserted in the "Greenock Telegraph" and "Glasgow Herald" a public notice in the same terms, and sent copies of the notice to shipowners, sugar-refiners, and others interested.

The pursuers pleaded, *inter alia* :—

"1. The defender having no power under the terms of his appointment as judicial factor foresaid, or of the statutes thereanent, to increase, reduce, or in any way vary at his own hand the rates and duties leviable on goods shipped and unshipped at the port and harbours of Greenock, the pursuers are entitled to decree of declarator as concluded for."

The Lord Ordinary issued the following interlocutor :—

"Finds, declares and decerns that the defender, as judicial factor foresaid, has no power at his own hand to raise or reduce, or in any way vary the rates and duties fixed by the pursuers for goods shipped or unshipped at any of the works of the pursuers, and in particular, but without prejudice to the foregoing generality, that the defender, as judicial factor foresaid, has no power at his own hand to raise the rate for sugar shipped into or unshipped from vessels (foreign) at the works of the pursuers from 10d. per ton, being the rates fixed by the pursuers, to 1s. 3d. per ton: And further, that the notice issued by the defender, of which he gave intimation to the pursuers on 29th November 1907, and which notice is in the following terms :—'Greenock Harbour Acts 1886 to 1905.—Notice is hereby given that on and after 1st January 1908 there will be levied, demanded, and taken for sugar shipped into or unshipped from vessels foreign, 1s. 3d. per ton, as provided in Schedule "A" of the Greenock Harbour Act 1880, Andrew Carmichael, judicial factor,'—is *ultra vires* of the defender, as judicial factor foresaid, is illegal, and ought not to receive effect, and that the defender, as judicial factor foresaid, is not entitled to levy, demand or take rates, duties, or charges in terms of said notice: In respect that the conclusion for interdict is not now insisted in, dismisses the same, and decerns: Finds no expenses due to or by either party."

Lord Dundas.—This action is directed by the Trustees of the Port and Harbours of Greenock against Mr Andrew Carmichael, Shipowner, Greenock, "judicial factor, appointed by interlocutor of the Sheriff-Substitute of Renfrew and Bute at Greenock, of date 5th August 1905, to receive the whole or a competent part of the rates and duties and other revenues of the Greenock Harbour Trust, until all the arrears of interest, or of principal and interest, as the case may be, due to the holders of Greenock Harbour B Debenture Stock, together with all costs, including the charges of receiving the said rates and duties and other revenues, be fully paid." Declarator is asked that the defender, as judicial factor foresaid, has no power to raise or reduce or in any way vary the rates and duties fixed by the pursuers for goods shipped into or unshipped from vessels (foreign) at the works of the pursuers; and in particular, that the defender has no power, as judicial factor foresaid, to raise the rate for sugar shipped into or unshipped from vessels (foreign) at the works of the pursuers from 10d. per ton, being the rate fixed by the pursuers, to 1s. 3d. per ton; and further, that a notice recently issued by the defender, notifying that the said sugar-rate was, on and after 1st January 1908, to be raised to 1s. 3d. per ton, is *ultra vires* of the defender, as judicial factor foresaid, and is illegal, and ought not to receive effect. The summons also contains a conclusion for interdict; but the pursuers' counsel stated that they would be content if decree were pronounced in terms of the declaratory conclusions.

The issues thus raised are interesting; and they are also of great importance, for it is obvious that the effect of the decision will not be confined to the particular rate in regard to which the conflict has arisen. The whole antecedent history, legislative and otherwise, which preceded and led up to the dispute, is clearly set forth in the pleadings of the parties; and a thorough understanding of these matters is essential to the decision of the case. It would, however, serve no good purpose that I should here repeat the record *ad longum*; and I have found it impossible, after attempting to do so, materially to abridge or curtail the history of the case as it is there set out. I propose, therefore, to start my own narrative at the point where, on 7th July 1905, a petition by certain

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holders of B Debenture Stock of the Greenock Harbour Trust was presented to the Sheriff-Substitute at Greenock, craving for the appointment of a judicial factor. The Sheriff-Substitute, by interlocutor dated 5th August, appointed the defender to be judicial factor, in terms which are accurately recited in the summons, where the defender is designed in language which I quoted at the outset. It is not surprising that these debenture-holders should have presented their petition upon the earliest possible day competent to them under the statutes, for the existing financial situation was, from their point of view, an exceedingly grave one. It appears that, in point of fact, though interest has always been paid on the A Debenture Stock, the full rate of interest has not in any year been paid on the B Stock; that last year only 1½ per cent. was paid on the latter; and that, as at 11th November 1907, there were arrears of interest on the B Stock amounting to £490,397. It is further stated that there is, apart from arrears, an annual deficiency of more than £20,000 in the revenue required to pay the interest to the stockholders of the Trust. Nor is it, in these circumstances, surprising that the defender, after his appointment, should look eagerly about him for the best means of alleviating the situation. On 9th October 1907, the defender addressed a letter to the pursuers' general manager suggesting that the said rate on foreign sugar should be raised to the maximum rate, which is 1s. 3d. per ton. The suggestion was brought before a meeting of the pursuers on 5th November, when it was negatived by eleven votes to six. On 29th November the defender wrote to the pursuers' general manager, enclosing for their information a copy of the notice which is printed in the summons, and in Article 12 of the Condescendence. The present action was raised on 18th December.

At the discussion in the Procedure Roll the pursuers' counsel maintained that the defender has no right or power, express or implied, to raise or vary this particular rate, or any other of the harbour rates. They urged that we are here dealing with a great public undertaking, incapable of earning profit, and worked for the benefit of the public, to the statutory trustees of which, and to no one else, Parliament has committed the entire management and control of the concern, including expressly power "to vary the rates . . . in such manner as they think expedient"; that the constitution of the trust has been gradually broadened by a series of legislative enactments so far as to fairly represent all the public interests associated with the undertaking; and that there is no warrant for permitting the defender, representing as he does one private and limited interest only, to supersede the trustees to any extent in their management of the concern, or to interfere with their discretion as to raising or lowering rates. They further argued that, whatever may have been the nature and extent of the security held by creditors of the trust under the earlier statutes, holders of debenture stock under the Act of 1888 are merely perpetual annuitants, with no right at all to look to the security of the rates, except in so far as actually imposed by the trustees from time to time.

To a considerable part of this argument the defender's counsel took no exception; and they especially disclaimed any intention or desire on his part to oust the pursuers from their management. They conceded also that, under normal circumstances, it would be for the trustees, and for them only, to regulate the harbour rates; but they contended that the circumstances here are obviously abnormal, because it had been found necessary to appoint a judicial factor. There is, they urged, no room for doubt as to the object of such an appointment; it is "to enforce payment of arrears"; and, in order to this end, "the whole or a competent part" (*i.e.* a part sufficient for the purpose) "of the rates, duties, and other revenues of the trust" are to be "paid to and received by" the factor; and when the end and object have been attained, and the arrears, etc., have been fully paid up (and only then), his "power" (an effective power successfully wielded) "shall cease." The defender's counsel strenuously maintained that, if the pursuers' arguments were sound, the factor's appointment could be no better than a farce; because, being appointed at a crisis when the financial position is, from the debenture-holders' point of view, a very bad one, he is (*ex hypothesi*) to have no power to alleviate it by raising rates; on the contrary, the sole discretion as to maintaining or even lowering the rates is (if the pursuers are right) left with the trustees, whose interests are adverse to those of the stockholders; and that the result must simply be that an already embarrassed situation would be burdened with the additional cost of a totally useless factory. This, it was urged, could scarcely have been the intention of Parliament; and the Court should, in construing the language of the statutes, endeavour to avoid such a result, especially where the opposite construction does no violence whatever to the words used. The defender's counsel contended that when Parliament provides, as the means of enforcing a specified purpose, the appointment of a judicial factor, the latter is by plain implication vested (even if such vesting is not expressed in so many words) with such powers, means, and privileges as are necessary for the execution of the duty or the attainment of the object which he was appointed to execute or to effect. In support of this last proposition, I was referred to text writers on the construction of statutes—Maxwell, 4th ed., 1905, pp. 534, 536; and Hardcastle, 4th ed. by Craies, p. 108 and p. 229. I think the proposition is sound enough; and it seems to be based upon the

doctrine of the Roman law (Dig. 2. 1. 2), "*Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit.*"

The defender's counsel further argued that the words "the whole or a competent part of the rates," etc., are not limited to the rates actually levied by the trustees at any given time; that the statute does not say so; and that the words, fairly construed, must include the whole rates (up to the *maxima*) which the trustees are by their acts authorised to "levy, demand, and take." The holders of debenture stock, although their position since 1888 was that of perpetual annuitants, are, it was argued, entitled to look to the security of the whole rates authorised by the statute, because their stocks were declared to be respectively "the first" and "the second charge on the undertaking."

I was much impressed at the discussion by the arguments put forward for the defender, which I have endeavoured to summarise; and by the broad common sense which appeared to underlie them. If it could be demonstrated that to deny the judicial factor power to raise rates would be to reduce his office to a nonentity, and his functions to mere formalities, one would, I think, be constrained to the conclusion that Parliament, in prescribing the appointment of a factor for the particular object specified, intended to confer, and must be held to have conferred upon him, the power which, on the assumption postulated, would be essential to the explication of his jurisdiction. But I am not convinced that this assumption, which lies at the root of the defender's argument, is well founded; and if it fails, I do not think I could construe the statutes as giving the factor implied authority at his own hand to raise or vary this, or any other rate, or to issue such a notice as that quoted in the summons. Now, it seems to me that, apart from so raising rates, there is a good deal that the factor could do towards furthering the object of his appointment. This must, of course, depend upon what the scope of his powers and duties truly is. I was not able to extract from learned counsel upon either side any precise view upon this (to my mind) crucial matter. I have come to the conclusion, upon a careful study of the statutes, that the right of the judicial factor is to receive, if necessary, the whole (*i.e.* gross) revenues of the undertaking, and apply them in his discretion towards the extinction of the arrears of interest on the stock. To what extent he may consider it prudent or advisable to exercise his right is another matter; but, if the view which I have indicated is sound, it can hardly be said that the power of the factor, though he may not be able to raise rates at his own hand, is necessarily an unreal or ineffectual one. A case to which I was referred at the discussion (*Cotton* v. *Beattie*, 1888, 17 R. 262), though it does not touch upon the factor's power to raise or vary rates, seems to me to support the view which I have just stated. It related to a judicial factor appointed under sects. 56 and 57 of the Companies Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 17), the language of which does not appear to differ in any material respect from that under construction in the present case. The Lord President (Inglis) stated in general terms (p. 268) that "the duty of the factor so appointed is to procure payment to himself as factor of so much of the tolls and other sums coming into the hands of the company as will enable him to pay the balance of interest due to the mortgagee. . . . ." Lord M'Laren went pretty fully into the matter, and expressed the opinion (at p. 271) that the factor,—though his duties are those not of a manager but of a "receiver,"—"is entitled to go directly to the cashier or officers of the company who levy the tolls and to receive from them these tolls or other sums of money, and that he is not obliged to go to the directors and take from them what they may please to give him. If he had to go to the directors, the mortgagee might not be in a better position than he was before the application, because they would just say after the appointment as they had done before, that they were without funds, that all their funds were carried away as fast as they were earned by the necessary outgoings of the company. But, being a judicial factor on the estate, he has direct access to to the funds of the company, and it is for the purpose of his having such access that the appointment is made, to enable the mortgagee to enter into possession of the revenues of the company to such extent as shall enable him to pay himself through the factor the interest of his debt." A little further on, Lord M'Laren explains how, in his view, the relations between the judicial factor and the managing body would work out from a practical point of view, and concluded that "the judicial factor would decide for himself what portion of the tolls or earnings he would draw, and what he would choose to leave for the purpose of enabling the business to be carried on." Of course, the concern under consideration in *Cotton's* case was only a tramway company, and not (as here) a great public undertaking. But the opinions expressed had regard to the construction and effect of statutory language substantially identical with that which I am now endeavouring to construe; and to that extent at least they seem to me to be in point.

I ought, at this stage, for the sake of completeness, to note the other cases, Scottish and English, to which I was referred, with such brief comments on them as are necessary. *Haldane's* case (1881, 8 R. 669) was one where a judicial factor had been appointed on the undertaking of a railway company under sect. 4 of the Railway Companies (Scotland) Act 1867 (30 & 31 Vict. cap. 126). The Lord President (Inglis) in the course of his opinion pointed out that a

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judicial factor so appointed is really a manager invested with the charge and management of the undertaking; and dealt, but only incidentally and by way of contrast, with the position of a judicial factor appointed under sects. 56 and 57 of the Companies Clauses Consolidation (Scotland) Act 1845. *The Edinburgh Northern Tramways Co.* (1888, 15 R. 641) was concerned with the appointment of Mr Cotton as judicial factor on the tramway undertaking already referred to, under the sections of the Act of 1845. The Lord President (Inglis) contrasted his position with that of Mr Haldane in the preceding case, and said "he is what is called in England a receiver, and, so far as I understand, he was appointed to receive a portion of the income of the company sufficient to pay the overdue interest upon the petitioner's mortgages. That is the whole object and aim of the appointment." I have already dealt with *Cotton's* case (1889, 17 R. 262), which was the sequel of the case just referred to, and seems to me to be much the most useful of the decisions, Scottish or English, of which I am aware. Coming now to the English cases, I think they require to be approached with considerable caution and reserve by a Scots lawyer. The name "judicial factor" is unknown in England. They have there "managers" and "receivers." I gather that the latter word is capable of a great variety of significations and applications. I understand that the English Court of Chancery originally had, and since 1873 the High Court of Justice has possessed, power to appoint a receiver wherever the circumstances appeared to the Court to make it expedient to do so. One may refer to Kerr's Law and Practice as to Receivers (5th ed., 1905), as illustrative of the different duties and functions which a receiver may in England be appointed to exercise. I have not, I confess, been able to derive much assistance from the authorities which were cited to me. These were *Gardner*, 1867, L.R. 2 Chan. 201—the well-known case which immediately preceded, and indeed was the cause of the railway legislation of that year; *Marshall*, 1895, 2 Chan. 36—a tramway case, where a receiver was appointed at the instance of debenture-holders, but the appointment of a manager was refused; *in re Manchester and Milford Railway Co.*, 1880, 14 Chan. Div. 645—a case under the English Railway Act of 1867 (30 & 31 Vict. cap. 127), where the import of the words "the appointment of a receiver or, if necessary, of a manager," were discussed and explained by the Court of Appeal; *Attree*, 1878, 9 Chan. Div. 337, referred to only for some observations by James, L.J. (at pp. 348–350), on the functions of a receiver; and *Ames* v. *Trustees of the Birkenhead Docks*, 1855, 20 Beav. 332, for similar observations by Sir J. Romilly, M.R.

I have considered the case before me to the best of my ability, and with the aid of the opinions expressed in *Cotton* v. *Beattie*. As already indicated, I do not think it can be affirmed that power to raise rates is essential to the judicial factor, in order to any effectual exercise of his office. It is not for me to consider whether or not it would have been better that Parliament should have conferred such a power upon him. If such a power is not essential to him in order to give his office any real significance, it seems to me that the defender's argument loses much of its apparent weight; for, although the possession of a power to raise rates would doubtless enhance the factor's powers, that is not *per se* a warrant for construing the statutes as impliedly conferring it upon him. I cannot assume that the trustees will act obstinately or unreasonably in their management, or decline absolutely to co-operate with the judicial factor in endeavouring to further the legitimate interests of all concerned. On the other hand, I apprehend that no prudent and reasonable factor would, in the interests of his constituents, seek to reduce the working expenses of the harbour below the minimum at which the docks (his only possible source of revenue) can be efficiently carried on. But down to that limit he can, if the views I have expressed are correct, exercise a vigilant and effective control over expenditure; as indeed I gather from his pleadings he has to some extent already done. It seems to me that much must depend upon the extent to which the judicial factor and the trustees, as practical men of business, are prepared to set themselves to co-operate in doing the best for all concerned,—the factor having, of course, due regard to the legitimate interests of the stock-holders, and the trustees to those of the harbour. I do not prejudge the question whether, under any circumstances, the Court, on competent application by a factor in the defender's position, and on being satisfied that those charged by Parliament with the management of the undertaking were acting unreasonably in refusing to raise a rate or rates, might not find a remedy by granting the factor special power to do so. All that I now decide is that in my opinion the judicial factor was not entitled, at his own hand, to raise the rate, or to issue the notice of which the pursuers now complain. Decree of declarator must therefore be pronounced; but I think the words "at his own hand," which occur in the pursuers' first plea in law, though not in the summons, should be inserted at appropriate places in the interlocutor, in view of possible eventualities in the future. — *20th February* 1908.

Counsel for Pursuers, Dickson, K.C., Macmillan; Agent, W. B. Rainnie, S.S.C.—Counsel for Defender, Clyde, K.C., Horne; Agents, J. & J. Ross, W.S.

A. M.

SECOND DIVISION.

(*Lords Stormonth-Darling, Low and Ardwall.*)

354. King and Another *v.* Johnston and Another.

I. Right in Security—Heritable Security—Extinction—Confusio—Creditor in Bond and Disposition in Security Obtaining Ex Facie Absolute Disposition of Security Subjects — Back-Letter by Creditor Acknowledging That Disposition Truly Granted in Security of Advances—Back-Letter Not Recorded — Question With Heritable Creditor Whose Security Subsequent in Date to Original Security, but Prior in Date to Absolute Disposition — Held Bond and Disposition in Security Not Extinguished Confusione in a Question With Second Heritable Creditor.

II. Ground-Annual—Extinction—Confusio—Opinion (per Lord Guthrie) That a Ground-Annual May Be Extinguished Confusione.

Reclaiming Note against an Interlocutor of Lord Guthrie.

On 14th March 1903 Robert Riddagh, builder, Airdrie, granted a bond and disposition in security for the sum of £1070 in favour of John King, 5 Burnbank Road, Hamilton, and of Mrs Helen Robb or King, his wife, over the subjects 42 to 58 Bell Street, Airdrie. The bond was recorded on 17th March 1903.

At the date of recording, the security subjects were burdened by (1) five contracts of ground-annual amounting *in cumulo* to £27, 10s. per annum; and (2) two bonds and dispositions in security, each for the sum of £350. James Aitken, writer, Glasgow was the creditor in the ground-annuals and in the bonds and dispositions in security.

By disposition dated 8th and recorded 9th May 1903, Robert Riddagh disponed the security subjects to James Aitken. The disposition was *ex facie* absolute, but on 30th May 1903 James Aitken granted a back-letter whereby he acknowledged that he held the subjects in security of advances made or to be made by him to Robert Riddagh. On 9th May 1903 James Aitken was, as shewn by the records (1) holder of the five ground-annuals; (2) holder of the two bonds for £350; and (3) owner of the security subjects.

The said bonds and dispositions in security were subsequently assigned by James Aitken to George Readman, advocate, Edinburgh, and thereafter by George Readman to the Rev. William Johnston, minister of Uphall, and his wife Mrs Eliza Arbuckle or Johnston. The ground-annuals were assigned by James Aitken to the said George Readman, and were subsequently acquired by the trustee in James Aitken's sequestration.

On 1st March 1907 the said John King and Mrs Helen Robb or King brought the present action (1) against the Rev. William Johnston and Mrs Johnston for declarator that the bonds and dispositions for £350 were extinguished as at 9th May 1903, and (2) against the trustee in James Aitken's sequestration for declarator that the ground-annuals were extinguished as at 9th May 1903.

On 30th December 1907 the Lord Ordinary (Guthrie) *assoilzied* the defenders the Rev. William Johnston and Mrs Johnston from the conclusions of the summons, and *found* that the ground-annuals were not extinguished *confusione* in the person of James Aitken.

He issued the following opinion:—

Lord Guthrie.—The pursuers are heritable creditors for £1070 over certain subjects in Ardrie. If these subjects are burdened by the two bonds and the ground-annuals mentioned in the summons, the pursuers' bonds, looking to the value of the subjects, are believed to be valueless. The pursuers seek declarator that the defenders' bonds and ground-annuals were extinguished *confusione*.

The pursuers' bond for £1070 is dated 17th March 1903. At that date Robert Riddagh was proprietor of the subjects, and the bond was granted by him.

Prior to 17th March 1903 the bonds for £350 were granted by Riddagh in favour of James Aitken. Subsequently to 17th March 1903—namely, on 9th May 1903—Aitken acquired the subjects over which both sets of bonds were placed in security, by an *ex facie* absolute disposition, under back-letters. The pursuers say that the £350 bonds were extinguished *confusione* in Aitken's person on 9th May 1903. These bonds were assigned between 1904 and 1906 to Mr George Readman, who assigned them to the defenders Johnston's trustees.

The ground-annuals mentioned in the summons were created for Aitken by Riddagh in 1901 and 1902. The pursuers say that they were also extinguished *confusione* in Aitken's person when he acquired the subjects, although only in security, on 9th May 1903 These ground-annuals are held by the defender, Aitken's trustee. . . .

The defenders deny confusion, because: 1, Aitken did not acquire the subjects on 9th May 1903 as absolute proprietor, but as a trustee for Riddagh; 2, so far as the ground-annuals are concerned, because ground-annuals cannot, like bonds, be extinguished *confusione*; and 3, because it must be presumed that Aitken's intention, when he got the conveyance of 9th May 1903, was to keep alive both the bonds for £350 and the ground-annuals.

1. The pursuers admit that if, as in a question with them, the back-letters must be recognised, then their case fails. To operate confusion, one and the same person must become both debtor and creditor. But if the back-letters receive effect, while Aitken, at the date of the conveyance, was absolute creditor under the bonds, he did not become absolute debtor under the bonds in respect of the conveyance, but only trustee for the debtor. That this was in fact his position is admitted. If so, it does not matter

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whether the back-letters were recorded or not. The pursuers' rights were fixed on 17th March 1903. At that date the bonds for £350 each and the ground-annuals existed as prior rights, coming before the pursuers' security. . . . It must be held to have been their own fault if the pursuers did not know about the bonds which were recorded, and about the ground-annuals which were mentioned in their bond. The pursuers' security might have been improved at any time by Aitken becoming absolute proprietor of the subjects. But he never did become absolute proprietor, but, by a transaction with which the pursuers had nothing to do, he came into the position of a heritable creditor, with an *ex facie* absolute disposition, qualified by back-letters. I therefore sustain the defenders' contention.

2. The defenders say that so far as the ground-annuals are concerned there could be no confusion, because *confusio* does not operate to extinguish ground-annuals. On this matter, in the case of *Murray* v. *MacEwan*, 1890, 18 R. 287, opposite opinions were expressed by Lord Rutherfurd Clark, who thought that *confusio* might operate extinction of a ground-annual, which is "nothing more than an obligation for payment of an annuity secured over the heritable estate," and by Lord Kinnear and Lord Trayner, who thought that ground-annuals, being *ex facie* irredeemable rights in land, completed by infeftment, cannot be extinguished *confusione*. I take the same view as that expressed by Lord Rutherfurd Clark. In a question of extinction, it is significant that, in ground-annuals as distinguished from feu-duties, the real security is destroyed by the negative prescription if the ground-annual is omitted from the title for forty years.

The Pursuers *reclaimed* and *argued*: Where a heritable creditor acquired the ownership of the security subjects, the security was extinguished *confusione*. Now, the disponee under an *ex facie* absolute disposition was feudal owner of the subjects disponed. The back-letter not being recorded, could not affect the feudal title (*Scottish Heritable Security Co. Ltd.* v. *Allan Campbell & Co. Ltd.*, 1876, 3 R. 333; *Union Bank of Scotland Ltd.* v. *National Bank of Scotland Ltd.*, 1886, 14 R. (H.L.) 1, per Lord Watson; *Lord Blantyre* v. *Dunn*, 1858, 20 D. 1188, per Lord Mackenzie, Ordinary, at p. 1193); *ex facie* of the records, therefore, Aitken was on 9th May 1903 both creditor in the bonds and owner of the security subjects. The pursuers were entitled to rely on the records. In questions of heritable right the strict feudal rules must be applied, and intention was immaterial (*Bald* v. *Buchannan*, 1787, 2 Ross L.C. (Land Rights) 210). Accordingly, the bonds in question were extinguished *confusione* as at 9th May 1903. *Mackenzie* v. *Gordon*, 1839, M'L. and Rob App. 117, aff. 16 S. 311, was distinguishable. There the parties pleading *confusio* were the representatives of the party in whose person *confusio* was alleged to have taken place. Further, they were held to have known the whole facts. That was enough to bar them from founding on the records (*Petrie* v. *Forsyth*, 1874, 2 R. 214; *Stodart* v. *Dalzell*, 1876, 4 R. 236). Counsel also referred to *Hogg* v. *Brack*, 1832, 11 S. 198.

Argued for the Defenders the Rev. William and Mrs Johnston: In order that *confusio* might take place it was necessary that the same person should be absolute debtor and absolute creator (Bell, Prin., sect. 580). Here Aitken was not absolute creditor because the back-letter prevented him from being absolute owner of the subjects (Bell, Lect., 3rd edition, p. 1173). It was immaterial that the back letter had not been recorded. Further, it was necessary that both properties should be held by the same person in the same character (*Lawrie* v. *Donald*, 1830, 9 S. 147). In the present case Aitken under the disposition was a *quasi* trustee. *Confusio* did not operate where the party in whom it was alleged to have taken place had an interest to keep up the debt (*Fleming* v. *Imrie*, 1868, 6 M. 363). Counsel also referred to *Murray* v. *Parlane's Tr.*, 1890, 18 R. 287.

The Court *adhered*.

Lord Low.—The question which we have to determine in this case is whether the two bonds and dispositions in security granted by Riddagh in Aitken's favour have been extinguished *confusione*? It appears that Riddagh, who is a builder, acquired certain ground which had been divided into six lots for building purposes. Aitken lent him two sums of £350 each, and in security of each loan he disponed to Aitken one lot of ground. Subsequently Aitken made further advances to Riddagh, in security of which Riddagh granted to him an *ex facie* absolute disposition of the whole ground, which was qualified by a back-letter from Aitken, acknowledging that the disposition was in security only. The disposition was duly registered, but the back-letter remained unrecorded.

It is not disputed that if the disposition had been in fact as well as in form absolute, the rights of security which Aitken had in the two lots would have been extinguished. But in fact the disposition was only in security, and if Riddagh had paid his debt Aitken would have been bound to re-convey the ground to him. If that had been done, it is plain that Riddagh would have got back the two plots under burden of Aitken's securities. Now if the securities were not extinguished in a question with Riddagh, why should they be so in a question with the pursuers, who derived their right from Riddagh, prior to the date of the *ex facie* absolute disposition to Aitken? The pursuers say that they were entitled to rely upon the records, and that as nothing appeared upon the register except the absolute disposition, it must be assumed that the property of the ground had been conveyed to Aitken. That would have been a good argument if the pursuers had acquired their title from Aitken after the registra-

tion of the absolute disposition in his favour, or even, it may be, if they had done something, or refrained from doing something, in reliance upon the register. But no considerations of that kind are present. The position of the pursuers simply is that prior to the date of the absolute disposition, they obtained a bond and disposition in security for £1070 from Riddagh, postponed to the two bonds in favour of Aitken.

In these circumstances it appears to me that no question arises involving the faith of the records. The question is really one of fact, namely, whether Aitken did or did not acquire an absolute right to the ground. For the reasons which I have given I think that it is clear that he did not do so, and accordingly the pursuers' case fails.

I am therefore of opinion that we must adhere to the Lord Ordinary's interlocutor.

Lord Ardwall.—I am of opinion that the course proposed by Lord Low is the right one, and should be followed. I think the case a clear one, and I am somewhat surprised that this plea of *confusio* was ever put forward. It is, however, the only question that has been argued. It is said that the two bonds for £350 have been extinguished *confusione*, with the result that the pursuers' bond for £1070 is now a first security over the subjects in question. Now at the time when the pursuers obtained this bond, the state of the record was that in front of the bond which they were getting there stood these two bonds for £350 each on the record, and they therefore took their bond as a security postponed to the debts represented by these two other bonds. They say that they are now entitled to stand in the position of first bondholders, because, owing to a subsequent transaction with which admittedly they had nothing to do and to which they were in no way parties, these two bonds have been extinguished *confusione*. It appears to me to be settled law that *confusio* only takes place in a case where the full and absolute right of the creditor and the full and absolute right of the debtor merge in one and the same person, and in no other circumstances.

Now what was the case here? We have not the bonds before us, but it has not been alleged that the personal obligations in the bonds have ever been discharged; and therefore Riddagh remained the debtor to Aitken in these sums throughout, and it is vain to say that Aitken ever became the debtor for them. This is sufficient, I think, to dispose of the plea of *confusio* so far as the mere debt is concerned, because, as I understand the pursuers' case, they nowhere allege that Riddagh did not remain throughout the debtor in these sums to James Aitken.

But a plea which is not in so many words stated on the record was argued upon the reclaiming note to the effect that the security title under the two bonds in which Aitken was vested at the time when the pursuers' bond was granted became merged in and extinguished by the absolute title to the subjects which he subsequently obtained from Riddagh, with the result of leaving the pursuers' bond the first security on the subjects. Now I do not think that it has been decided that if "A" holds a recorded bond and disposition in security for a certain sum over a property, and "B" subsequently obtains another bond and disposition in security over the same property, and thereafter "A" obtains an absolute disposition of the said property, the result necessarily is that A's security for his debt is postponed to B's security, or, to express it otherwise, is extinguished, in consequence of "A" having acquired the property in fee. But this general question was not argued, the defenders being content to rest their case on the safer ground that Aitken was never truly, as matter of fact or law, absolute proprietor of the subjects in question, because although he held them under an *ex facie* absolute disposition granted by Riddagh, that disposition was qualified by a back-letter. I am of opinion that this argument is well founded.

Aitken was really holding as a *quasi* trustee for behoof of Riddagh, under the obligation, if the debts in respect of which he had obtained the absolute disposition were paid off, to re-convey the property to Riddagh, or if the property were sold under the bonds, to account for the reversion of the price. And it was Riddagh who still remained the true proprietor of these subjects, because it was he who had the radical right thereto, and who had the interest in the reversion. That being so, it appears to me that *confusio* cannot be held to have taken place, because Aitken was never truly the absolute proprietor of the subjects over which the bonds were granted but only an encumbrancer. But it was argued very strenuously by Mr MacRobert that it did not matter what the nature of the transaction was, so long as on the face of the records it appeared that these two bonds had been extinguished in the person of James Aitken by the disposition in his favour. Upon that point I have only to say this, that in my opinion this is not a question depending merely on the records—it is the true state of the facts that has to be looked to. The case of *Mackenzie*, 1838, 16 Shaw 311, referred to in the debate, seems to be almost a direct authority for this proposition, that notwithstanding that it may appear on the face of the records that the characters of creditor in a heritable bond and proprietor of the subjects over which the bond was granted have become united in the same person, yet if it be the fact that the person is not truly absolute proprietor of the subjects but holds them on some lesser title, *confusio* will not take place. None of the cases quoted for the pursuers seem to me to be

2nd Div. authorities to the contrary. I accordingly think that the Lord Ordinary's judgment ought to be affirmed.

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Lord Stormonth-Darling.—I agree with both your Lordships.—28*th February* 1908.

Counsel for Pursuers, Wilson, K.C., Mac-Robert; Agents, Ross Smith & Dykes, S.S.C.—Counsel for Defenders, Horne, Strain; Agents, Drummond & Reid, W.S. J. S. M.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

355. Boal *v.* Scottish Catholic Printing Company Limited.

I. Process—Jury Trial—Application for New Trial—Power of the Court—Circumstances in which Award of Damages Reduced and New Trial Refused—Opinions that the Court Was Not Entitled to Put a Successful Pursuer to an Election Whether He Would Consent to a Reduction of an Award or a New Trial — Watt v. Watt, 1905, A.C. 115, Followed.

II. Expenses—Jury Trial—Refusal of New Trial on Successful Pursuer Consenting to Reduction of Award of Damages—Pursuer Allowed Expenses, Excluding those Connected with Motion for New Trial.

Hearing on Rule.

(*Reported supra, p.* 220.)

This was an action of damages for slander contained in an article in a newspaper of which the defenders were the proprietors. The case was tried before the Lord President and a jury on 23rd December 1907, when the jury returned a verdict for the pursuer and assessed the damages at £250.

The defenders applied for a new trial, on the ground that the damages awarded were excessive.

The following authorities were referred to in argument, viz.: *Casey* v. *United Collieries Ltd.*, 1907, S.C. 690; *Praed* v. *Graham* [1889], 24 Q.B.D. 53; *Hunter & Co.* v. *Stubbs Ltd.*, 1903, 5 F. 920; *Johnston* v. *Dilke*, 1875, 2 R. 836; *Ritchie* v. *Barton*, 1883, 10 R. 813.

The Lord President referred to *Watt* v. *Watt*, 1905, A.C. 115, in reference to the powers of the Court.

Before judgment was pronounced, counsel for both parties, in answer to the Lord President, agreed to leave themselves entirely in the hands of the Court as regards a reduction of damages and the amount to be awarded.

The Court *reduced* the amount of damages to £125; *found* the pursuer entitled to the expenses of the action other than those connected with the application for a new trial; and, *quoad ultra*, *found* no expenses due to or by either party.

The Lord President.—The finding of the Court is that the verdict be reduced to £125, which will carry the expenses of the action with the exception of those connected with the motion for a new trial, as to which no expenses will be found due to or by either party. I think it right, for the guidance of the Bar and of the profession in general, to say a few words more, for this is the first case since the decision of the House of Lords in the case of *Watt* v. *Watt* [1905], A.C. 115, in which we have had an opportunity of stating the opinion of the Court in this matter. After the judgment in that case, it is no longer possible to follow the old practice by which, in cases where the Court thought that the amount of the damages found due by the jury was excessive, but that the verdict was otherwise justified, the Court were in the habit, without consulting the defender, of giving the pursuer the alternative of accepting the amount which they thought reasonable, or of facing a new trial. The case of *Watt* seems to have laid down that the consent of the pursuer only is not enough, and that a verdict for a new amount can be pronounced by the Court only with the consent of both parties. Accordingly, in the present case we should not have done as we have done to-day had we not previously obtained the consent of both parties.

I may add that, speaking as the judge who presided at the trial, it is my opinion that, had a new trial been granted, the pursuer would again have secured a verdict; for although I do not think that any *malus animus* was proved on the part of the writer of the article, still I think that the article associated the pursuer with a somewhat doubtful transaction with which he had nothing to do, and that this had been taken advantage of to injure the pursuer in his profession. At the same time the damages found due by the jury were excessive—more than double the whole earnings of the pursuer for the year. Looking to the fact that his character has been completely cleared, we think that the sum which we have awarded is sufficient compensation.

Lord M'Laren.—I am of the same opinion. The judgment of the House of Lords in the case of *Watt* [1905], A.C. 115, is of course subject to the observation that it was pronounced in a case in England, where the conditions and rules relating to jury practice have been largely innovated by statute, while we have kept to the practice as it existed in the time of George III., when juries in civil cases were introduced into this country. But in this case I cannot think that the differences between English and Scottish

practice can prevent a decision of the House of Lords being binding on us in the Courts of Scotland. There may be cases where the defender might have good reason for refusing to consent to the assessment of damages by the Court. It might be that the verdict of the jury, in addition to being excessive in the amount of the damages awarded, was also unreasonable in the view taken of the evidence, though not so unreasonable as to warrant its being set aside as contrary to the evidence. In such a case the defender might be justified in saying, "The verdict is so absurd that I prefer to have a new trial." I may say that, if the point were open, my individual opinion would be in agreement with the judgment in the case of *Watt*.

Lord Kinnear.—I entirely agree with your Lordship. I am satisfied that the judgment of the House of Lords is binding upon us, because it proceeds upon principles which apply as much in this country as in England. I cannot doubt, after your Lordship's explanations, that the defenders in this case have exercised a wise discretion in agreeing to leave the assessment of damages to the Court, but I quite agree that we could not have compelled them to do so.—*27th February* 1908.

Counsel for Pursuer, Crabb Watt, K.C., Trotter; Agents, Bryson & Grant, S.S.C.—Counsel for Defenders, T. B. Morison, K.C., W. Findlay; Agent, E. Rolland M'Nab, S.S.C.

F. A. U.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

356. Wilson *v.* Pottinger.

I. Property — Gable — Contract — Construction—Agreement as to Building on Gable—Implied Term—Where the Owner of a Gable in a Burgh Gave Permission to an Adjoining Owner, Who Proposed to Erect a Tenement on His Own Ground, to Build on His Gable, Held That it Was an Implied Term of the Agreement That the Building Should be Subject to Conditions Imposed, and According to Plans to be Approved, by the Dean of Guild Court.

II. Property — Encroachment — Remedy — Where a Proprietor Encroached on His Neighbour's Land by Building the Gable of a Tenement Which He Erected on His Own Land, to the Extent of 4½ Inches on that of His Neighbour, Opinions (per Curiam) that the Proprietor of the Land on Which the Encroachment Was Made, Not Having Sought Interdict at the Time of the Erection, Was Not Entitled to Have the Encroaching Owner Ordained to Remove the Gable so far as Built on His Land, but Was Limited in His Right to a Claim for Compensation—Sanderson v. Geddes, 1874, 1 R. 1198, Approved—Jack v. Begg, 1875, 3 R. 35, Distinguished. 1st Div. Wilson v. Pottinger.

Reclaiming Note against an Interlocutor of Lord Guthrie.

This was an action at the instance of one proprietor against a neighbouring proprietor for declarator that the defender had illegally encroached on his property, in building on a gable separating their properties beyond the line of the gable, and to have the defender decerned to remove his building so far as it encroached on the pursuer's property.

The pursuer and defender were proprietors respectively of two adjoining house properties which were separated by a gable belonging to the pursuer. This gable was 9½ inches in thickness for a distance of 20 feet or thereby back from the front of the property, and 14 inches thick for the remaining distance, and it was two storeys in height. The defender, who proposed to erect a four-storeyed tenement on his property, asked and obtained permission from the pursuer to build upon the gable. On application to the Dean of Guild Court for a lining, that Court insisted on the gable being 14 inches in thickness, and plans approved by the Dean of Guild Court shewing the position of the tenement were signed by the pursuer.

The defender, in erecting his tenement, increased the thickness of the gable above the first storey by the insertion of an iron beam in the front of the tenement and other beams parallel thereto, all projecting over the gable, on the ends of which he rested a cross-beam, and on that beam and the gable built the remaining portion of the gable of his tenement. The effect was that the defender's gable for a distance of 20 feet or thereby projected to the extent of 4½ inches over the pursuer's property.

There were several questions of fact as to which it is unnecessary to enter in detail. These included questions whether the original plans had been altered; whether the altered plans, if they were altered, correctly shewed the position of the gable as it was in fact erected; and the state of the pursuer's knowledge when he signed certain of these plans. The Lord President held that the original plans had in fact been altered, but that the plans which were signed by the pursuer shewed the encroachment of the gable.

The Lord Ordinary *granted decree* for removal of the encroachment within three months.

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Wilson v. Pottinger.

Lord Guthrie.—The pursuer and defender are owners of adjoining buildings in Main Street, Newhaven. The pursuer built his house and shop of two storeys, with bakehouse and oven behind, in 1903, and the defender erected his four-storey premises in 1906. Both sites had been previously occupied by old buildings, jointly occupied on the lower floor, but divided by a wooden partition 9 inches thick. The pursuer's house lies to the east of the defender's.

When the defender built in 1906, he used the pursuer's west gable as his east gable to its full height, namely, two storeys. At an interview on 26th June 1906, and by letter of that date, quoted in Cond. 5, it was arranged that the defender should obtain the further height required by him on the east, by building on the top of the pursuer's west gable, compensation to be made as therein specified. Disregarding a stair, which, not being bonded into the wall, is not part of it, the breadth of the pursuer's east gable, for a distance of at least 20 feet back from the street, is 9½ inches. The defender proposed to heighten that part of the gable by building on it to the same breadth, but the Dean of Guild Court in Leith insisted, through the Burgh Surveyor, that the additional height should be 14 inches broad. Instead of the defender making the necessary projection of 4½ inches (being the difference between 9½ inches and 14 inches) on his own side of the gable, he, unfortunately, resolved to build so that, while the additional height was flush on his own side with the gable, as built by the pursuer, it projected on the pursuer's side 4½ inches—to that extent overlapping the pursuer's property. There were practical reasons in favour of this course, and the pursuer would have had no interest to refuse his consent had the matter been explained to him and his consent asked, on a proper offer of compensation. But, as I hold on the evidence, the defender, without obtaining the pursuer's consent, proceeded to build his 14-inch extension, so as to project 4½ inches beyond the original gable, and over the pursuer's property. The pursuer objected, but the defender completed his operations in October 1906.

The pursuer now asks removal of the building erected by the defender on the top of the pursuer's east gable to the extent, namely, 4½ inches, to which that building extends beyond the thickness of the pursuer's original gable, and over the pursuer's property. He, however, intimated at the proof, through his counsel, that he does not propose to enforce the decree, but desires only to obtain compensation.

The dispute is a lamentable one. The defender began the trouble by resolving to thicken the heightened part of the gable on the pursuer's side, instead of on his own, and by proceeding to begin the encroachment without obtaining the pursuer's consent; and he put himself still further in the wrong by refusing to desist, when remonstrated with by the pursuer. On the other hand, when the dispute arose, while the defender's agents accurately described it in correspondence as "a trifling affair," the pursuer and his agents, with great lack of perspective, failed to recognise how little interest the pursuer had to object to the defender's operations. Instead of endangering the stability of the pursuer's building, these operations probably made the pursuer's building more secure than if the increased breadth of the gable had been on the defender's own side, and although they involved occupation, for a breadth of 4½ inches and a length of 20 feet, of air space belonging to the pursuer, this air space would require to have been occupied whenever the pursuer's building was heightened, in which event the defender's encroachment would have been available as a mutual gable for the pursuer's heightened building. The pursuer also erred in assuming that the defender was not willing to pay for the full damage to the pursuer caused by the defender's whole operations, including the admitted encroachment of 4½ inches. As it now turns out, the decree of removing which I am asked to pronounce is only to be used as a preliminary to obtaining compensation, which the defender has all along been willing to pay. In short, the whole dispute between the parties could have been settled by arbitration in four hours instead of four days, and at an expense of as many pence as the case will cost the parties pounds. If arbitration failed before the case came into Court, the parties should have agreed to a judicial reference, or at all events to a judicial remit for a report.

But I must decide the questions brought before me on their legal merits, protesting at the same time that if it were competent, I should dismiss the summons, without costs to either party, on the principle *de minimis non curat prætor.*

The condescendence and defences raise three questions:—*First*, was there in fact an encroachment of 4½ inches? *Second*, if so, was this authorised by the pursuer? and *Third*, if not authorised, is the pursuer entitled to a decree of removing?

As explained at the proof, although the defences do not make it clear, the defender admits that the pursuer's 9½-inch gable, so far as heightened by him and thickened to 14 inches, projects, to the extent of 4½ inches, over the pursuer's property. But he disputed the pursuer's right to decree, in terms of his second declaratory conclusion, because he maintains that the encroachment was not unwarrantable or illegal.

The defender claims the pursuer's authority for his operations, first, from what passed in conversation between them on 26th June 1906; second, on the terms of the letter of that date quoted in Condescendence 5; and third, on the contents of the plans, No. 39 of process, approved by the pursuer's docquet. As to the conversation alleged by the defender, his account is directly contradicted by the pursuer. As to the letter, an arrangement for heightening a gable may, so far as consistent with safety, authorise building beyond the area of the gable, but only on the builder's own side. As to the plans, it is not proved that the alterations shewing the thickened gable were on the plans when shewn to the pursuer. But, even if they were, these alterations are not so drawn as to give reasonable notice of intended overlapping to a man like the pursuer, and the front elevation is inconsistent both with the "1, 2 and 3 flat plan," and with the roof plan.

The question of the appropriate remedy remains. Although reluctant to give decree of removal, I do not think the pursuer has done anything to bar himself from the remedy claimed. As I read the oral evidence and the correspondence, it is not proved that he ever consented to the defender's operations, or that he failed timeously to object to them, or that he led the defender to think that he would be content with compensation and would waive his legal right to removal. Thus I do not find the element of bar or acquiescence which, in one form or another, was involved in the series of cases commented on by Lord Watson in *Magistrates of Kirkcaldy* v. *Graham*, 1882, 9 R. (H.L.) 91. To refuse the pursuer the remedy of removal would be, in Lord Watson's words, "to give the wrongdoer compulsory powers to acquire

part of his neighbour's property, which, in spite of remonstrance, he had illegally appropriated. . . . "

The defender *reclaimed*.

No argument was submitted by either side as to the competency of the remedy craved, beyond the defender's contention that the maxim *de minimis non curat prætor* applied.

The Court *recalled* the interlocutor reclaimed against and *dismissed* the action.

The Lord President.—This case arose out of the heightening of a small tenement in Newhaven. In order to heighten that tenement the person who is the defender in this case had of course to submit plans to the Dean of Guild Court. He proposed to make use of the gable which was between his property and that of his next-door neighbour on the east; but he seems to have been aware that, to say the least of it, there was great doubt, indeed I would be more correct to put it more strongly, and to say he knew, that the gable in question was not a mutual gable, and accordingly he approached his next-door proprietor for permission to build upon the gable. He was going to carry his own house to a height considerably greater than that of his next-door neighbour's, which only extended to two storeys; and the parties approached each other, and their negotiations were expressed in the following letter which was addressed by the defender in this case to the pursuer on 26th June 1906: "Dear Sir,—With regard to the gable between your house and my ground that I am to build upon, I am prepared to pay you whatever you're entitled to. The amount can be agreed on between you and myself, or any other party that we may appoint, on your approving of my plans.—Yours faithfully." It is not disputed by the pursuer that to that letter, whatever it means, he agreed. There is a controversy between the parties as to whether any plans had been shewn before that letter was written or not. I do not know that it matters. It is quite clear that at the time that letter was written the plans were before the Dean of Guild Court in their original condition; and to explain what that was, I must give your Lordships a short description of them and of the gable wall in question. The gable wall in question was a 14-inch wall for a number of feet measuring from the back of the tenement towards the front, but towards the front of the tenement the wall narrowed down from 14 inches thick to 9½ inches. Now, it is undoubtedly the case that the defender's original idea was to utilise this gable wall as a medium wall to the ground storey, and also as a support to the tall gable on to which he was going to build a tenement. He undoubtedly meant originally merely to carry the gable up, that is to say that where it was 14 inches it would be 14 inches, and where it was 9½ inches it would be 9½. After he had got this consent the case proceeded before the Dean of Guild Court, who, acting upon what seems to be a general rule, insisted that, as the tenement in question was to be a four-storeyed tenement, the 9½-inch portion of the wall would not do, and that a 14-inch wall would be necessary all along. The defender inserted brackets at each end of the 9½-inch wall, on which he placed an iron beam running parallel with the top of the wall, and then he carried the gable up for the additional thickness which was necessary, making it a 14-inch wall right up to the top. Now in doing so this iron beam makes an overhang of 4½ inches, which is over the pursuer's property; and the action is raised to have it declared that these 4½ inches belonged to him, and to have the defender ordained to that extent to take away the wall of his building. The Lord Ordinary has taken a view of the import of the letter which has prevented him from arriving at the conclusion which he has plainly indicated he wished to do. He says: "As to the letter, an arrangement for heightening a gable may, so far as consistent with safety, authorise building beyond the area of the gable, but only on the builder's own side." I do not think that is the proper view to take of the letter. Its construction is plain and simple. Looking to the whole surrounding circumstances, it seems to me perfectly clear that the meaning of the consent to the building on the gable was to a building on the gable of which the Dean of Guild Court should finally provide the authorised plans. Then, there is no doubt the plans were altered, and I think it was clearly proved that the signature of the pursuer, which was adhibited to those plans, was adhibited after the alterations had been made. I agree that it may very well be that the pursuer, being a man unskilled in plans, did not, if I may use the cant expression, wake up to the fact that the alterations had been made, and that these 4½ overhanging inches were upon his property; but I do not think he can take any benefit from that. If he chooses to put his signature to a plan authorised by the Dean of Guild Court, I think he takes his chance as to what this plan precisely shewed. In other words, I do not, as the Lord Ordinary has done, first of all conclude that the agreement was for a gable wall of 9½ inches, and then that there was a new arrangement for a gable wall of 14 inches. I look upon the agreement as for such gable as the Dean of Guild authorises, and then I find that what the Dean of Guild authorised was fairly brought to the pursuer's notice by the production of the plans. It is quite true that these plans are not strictly accurate, especially they are inaccurate in two particulars. In the first place, being evidently desirous of economising space, they make one plan do for the first, second and third floors, and the one plan does not shew the condition of each floor and its flooring level; and in the second place, it is equally clear that the elevation is not accurately altered as it

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ought to have been, so as to make a corresponding alteration in the thickening of the wall. But although this minute criticism can be substantiated, at the same time I have no hesitation in saying that any man who understood a plan could see that it was meant to carry up a 14-inch wall which should overhang this space. I do not know that the pursuer understood that. He had no technical training, and plans are things that require a little training and some understanding; but if he chooses to sign a plan he takes the risk of misunderstanding it. It seems to me that that ends the case. But I wish to say that, even if I were not of that opinion, the pursuer could not succeed. When you come to such a small question as the overlapping of a boundary wall by 4½ inches, I think the jurisdiction of the Court is as has been illustrated in the leading case of *Sanderson* v. *Geddes*, 1874, 1 R. 1198. I do not find that Lord Watson throws the slightest doubt on *Sanderson* v. *Geddes* in his judgment in *Graham* v. *Magistrates of Kirkcaldy*. On the contrary, what Lord Watson did not like was *Jack* v. *Begg*, 1875, 3 R. 35, and the issue in *Jack* v. *Begg* was very different from that in *Sanderson* v. *Geddes*; and *Sanderson* v. *Geddes* was entirely different from the case of *Graham* v. *Magistrates of Kirkcaldy*, 1882, 9 R. (H.L.) 91. But the Lord Ordinary, in quoting Lord Watson's *dictum*, confuses *Sanderson* v. *Geddes*, in which there was no transference of property at all, with *Jack* v. *Begg*, where there was, and ordains the defender to take down what has been put up. I think this is one of those cases (if I could project my mind a century or so after this, or if there is an earthquake, and the buildings are demolished) in which the boundary will remain as before. This operation does not alter the boundary, and it is out of the question for the pursuer to insist that the building should be taken down. The only possible remedy was by making application for interdict, when the building was being erected, and it is no answer to that to say that the pursuer's agent was ill. Accordingly, even if I had not come to the conclusion at which I have arrived, I should have thought the remedy was not an appropriate one. I propose that we should recal the Lord Ordinary's interlocutor and dismiss the action. I think probably that is a preferable course to assoilzieing the defender. I do not wish this action to be held as fixing anything as to the rights of parties in the gable. I therefore propose that we dismiss the action, and find the defender entitled to expenses.

Lord M'Laren.—As I agree with your Lordship, I have little to add. The agreement was one which entitled the defender to build upon the pursuer's gable, that is, to derive support for his upper storeys from the pursuer's gable; and it is evident that the parties were not in a position to determine at the time of the agreement what would be the precise value of the support that was to be given or the damage that might be done, because that was left to be determined by arbitration. These are expressed conditions. There was another thing which both parties, I must assume, knew, that all building plans are subject to the control of the Dean of Guild Court, and therefore the contract must have been affected by the implied condition that the building was to be in such form as the Dean of Guild Court should order. These conditions, expressed or implied, seem to me to cover the whole ground, and to leave nothing to be pointed out, explained, or proved, supposing a proof were competent. Then, on the other branch of the case, I think there is sufficient authority in the region of decision to shew that we have to a certain extent at least adopted the principle of the Roman law, that a person who builds in good faith on another's property is not necessarily to be compelled to take down his building. If the value of the building greatly exceeds that of the ground he occupies, the case can be explicated by paying compensation, whatever may be the agreement. I should be sorry if any doubt were thrown upon the doctrine that where there is an inconsiderable encroachment upon neighbour's land by buildings which are substantially, and for all practical purposes, upon the builder's own land, the law of the land will not compel him to take it down. If the law were altered in this particular case, it would be one in which the application would be perhaps in the highest degree inequitable. To take down the gable would practically amount to the demolition of the whole house, by withdrawing from the other parts of the building the security which the gable affords, and altering the distribution of the weights and pressures of the house. It might make the house a complete wreck, and all this for 4½ inches. I most heartily endorse all that your Lordship has said upon that part of the case. I agree that the action should be dismissed.

Lord Kinnear.—I entirely agree upon this ground, that when the owner of house property within a burgh agrees to allow his neighbour to build upon the gable wall, there is a plain implication that the building is to be erected according to the conditions that may be imposed by the Dean of Guild Court. The thing cannot be done otherwise, as both parties must be supposed to have known, and therefore the pursuer, if he allows it to be done at all, allows it to be done in that way. I think the case does not rest there, because he was asked to allow the gable to be built upon according to the plans which were passing through the Dean of Guild Court, and he therefore knew they would be subject to supervision, and might be altered to satisfy the conditions which the Court might impose. On that ground I think he has failed entirely to shew that there

has been any unlawful encroachment on his property. If there had been, I agree further, for the reason your Lordship has given, that the remedy would have been altogether inappropriate, and his claim would have been for compensation for any prejudice he might suffer. I wish to add that I think it must be admitted that some proof was necessary, because the letter which the defender wrote does not bind the pursuer, unless he assented to it, and it was necessary to shew that there was an agreement upon which the one party consented that the other should act.—*7th February* 1908.

Counsel for Pursuer, C. D. Murray, W. T. Watson; Agents, M. J. Brown, Son & Co., S.S.C. —Counsel for Defender, Dean of Faculty (Campbell, K.C.), Constable; Agents, Wallace & Pennell, S.S.C. F. A. U.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

357. Rennie *v.* James.

I. Process—Decree—Decree for Expenses in Name of Agent-Disburser — Suspension on Ground that No Motion had Been Made for Such Decree—Suspension Refused.

II. Process—Competent and Omitted—Decree for Expenses in Name of Agent-Disburser — Suspension, on Ground that Person in Whose Name Decree Given was Not Agent-Disburser and Not a Qualified Law Agent, Refused.

Reclaiming Note against an Interlocutor of Lord Mackenzie.

(Reported supra, p. 56.)

The suspender reclaimed against the interlocutor of the Lord Ordinary repelling the reasons of suspension.

Argued for Suspender: (1) The Sheriff had no jurisdiction to give decree in the terms in which it was given. It was not in conformity with the motion, notice of which was given to the suspender, and which was therefore the only competent motion. (2) The plea of competent and omitted was not a competent plea in regard to Sheriff Court procedure (Ersk., IV. 3, 7; Act 1672, cap. 16, sect. 19). James could not maintain the decree, as he was not the agent for the party, and he had disbursed nothing. Disbursement was necessary (*Rennie & Playfair* v. *Aitken*, 8th June 1811, F.C.; Bell's Com., II. pp. 35, 37, n. 3. The Act of Sederunt, 10th July 1839, sect. 109, did not import any special privilege in the Sheriff Court. The word "procurator" there was used in the sense of "law agent." As to the point that James had not paid the tax payable by a law agent, counsel referred to the Stamp Act 1891 (54 & 55 Vict. cap. 39), sect. 47.

Argued for Respondent: (1) The suspender had to pay the expenses to some one, and he had shewn no prejudice to him by the decree pronounced. He knew of the decree to be moved for, because he put in a caveat. (2) The plea of competent and omitted was valid (*Ewing* v. *Wallace*, 1832, 6 W. and S. 222). The suspender should have appealed the Sheriff-Substitute's interlocutor to the Sheriff. As to the Stamp Act, in a question of this kind stamp duty was not exigible (Grierson's Law of Stamp Duties, p. 82, note to sects. 43, 44). If that was wrong he ought to have an opportunity of paying it now and having the matter put right. It would never do to reduce a decree in a long litigation on such grounds as were put forward here.

The Court *adhered.*

The Lord President.—This is a case where a gentleman, being in possession of a decree, proceeds to make it good by charging, and this is a suspension of the charge on that decree. Now I need scarcely say that a decree cannot be opened up unless there is something clearly wrong about it. What is said to be wrong with this decree is this. It is a decree which was issued for a sum of expenses in the name of an agent-disburser. The party against whom the decree is sought to be enforced says that the decree is truly a mistake, because no motion was ever properly made in the case to allow the decree to go out in the name of the agent-disburser; and then he says it is bad for two other reasons: firstly, that the gentleman who holds it was not, in fact, the agent-disburser; and secondly, that he could not enforce it because he had not paid certain stamp duties which he ought to have paid in order to have a licence to practise as an agent. I do not say that it would be impossible to suspend a decree upon averments that it had never been moved for, and that no decree had ever been in truth pronounced. If you could suppose a case where it could be clearly proved that the judge had never really pronounced any decree at all, and that the so-called decree was what might be called a figment of the clerk's imagination, and not authorised by any pronouncement of the judge, I think in such a case the decree could be suspended. But certainly, if ever there is a case where the maxim *omnia præsumuntur rite et solemniter acta esse* should apply, the proceedings of a court of law supply such a case, and it would require, to my mind, the most clear evidence to allow your Lordships to set aside a decree on such grounds. I do not propose to go through the evidence in detail, but I say without any hesitation that so far from it being clear that the motion for expenses was not made, there is, on the contrary, a great deal

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The Lord President.

of evidence to the opposite effect. The complainer may be in good faith in saying that he did not hear the motion made, but that does not shew that a motion was not made; and at any rate I think it is quite enough for the purposes of this case to hold, as the Lord Ordinary has held after proof, that the complainer has failed to prove his case. So much for the first objection. As regards the other two points, it seems to me that the objection comes too late.

I agree with the Lord Ordinary that the case of *Ewing* v. *Wallace*, 1832, 6 W. and S. 222, really covers both points here. It directly covers the point about the gentleman not having paid his proper dues. I think it covers the other point *pari ratione*. It was quite apparent when this decree was pronounced that the person who was asking for it as agent-disburser was the procurator who had conducted the case, as he was the only person who had been in court. Well, we are told, and I will assume truly, that that procurator, although he conducted the case, really only conducted it as the hand of another agent who was not a licensed procurator, and we are told that the actual disbursements came out of the pocket of this other gentleman, and not out of that of the procurator. That is as it may be; but I am quite sure that if the objection was to be taken that the man who was conducting the case was not the agent-disburser, that is an objection which ought to have been taken at once, and it is far too late to take it afterwards by way of suspension. On the whole, therefore, I am of opinion that the Lord Ordinary has decided the matter rightly, and that we should adhere to his judgment.

Lord M'Laren.—I concur.

Lord Kinnear.—I also concur.—*28th February* 1908.

Counsel for Suspender, A. M. Mackay; Agents, St Clair Swanson & Manson, W.S.—Counsel for Respondent, A. M. Anderson; Agent, Alexander Ramsay, S.S.C. F. A. U.

OUTER HOUSE.

(*Lord Dundas.*)

358. Alexander Mather & Son *v.* John Wilson & Co. Ltd. and Another.

Diligence—Arrestment—Furthcoming—Arrestment of Sum of Damages for Personal Injury Awarded by Jury to Common Debtor From Arrestee—Arrestee Insured, and Action Defended by Insurance Company in Arrestee's Name — Motion for Rule Granted—Prior to Hearing on Rule, Action Settled by Payment by Insurance Office of Modified Sum to Pursuer in Action of Damages—Held, in Action of Furthcoming by Arresting Creditor, That Arrestment Did Not Attach Sum Paid by Insurance Company.

This was an action of furthcoming in which Alexander Mather & Son, who had used arrestments in the hands of John Wilson & Co. Ltd., sued the said John Wilson & Co. Ltd. as arrestees, and John Anderson, the common debtor, for repetition of a sum alleged to have been paid to the said John Anderson in breach of the arrestments.

The facts of the case sufficiently appear from the Lord Ordinary's Opinion.

The Lord Ordinary *assoilzied* the compearing defenders, John Wilson & Co., with expenses.

Lord Dundas.—This is an action of furthcoming. The "principal debtor" is John Anderson, a contractor in Leith. The pursuers, Mather & Sons, engineers in Edinburgh, are creditors of Anderson, in virtue of a decree of this Court granted in their favour against him for a sum of money and expenses. The arrestees are John Wilson & Co. Ltd., flour merchants in Leith. The main facts are as follows: On 14th December 1906 Anderson raised an action in this Court against Wilson & Co. for damages for personal injuries. At and prior to this action, and to the accident out of which it arose, Wilson & Co. were insured against third party liability with the Employers' Mutual Insurance Association of Scotland Ltd. The policy is No. 15 of process. By one of the conditions forming part thereof it was provided: "2. The employer shall not, except at his own expense, pay or settle any claim or admit any liability . . . . but the Association may settle any claim as and when they may consider expedient; and if any proceedings be taken to enforce the claim, the Association shall have the absolute control and conduct thereof in name and on behalf of the employer to such extent as the Association may think proper. . . ." The conduct of the defence to the action *Anderson* v. *John Wilson & Co. Ltd.* was accordingly left to the Insurance Company. On 27th March 1907 the jury returned a verdict for the pursuer, with £300 of damages. On the following day, the present pursuers, Mather & Son, used arrestments (No. 6 of process) in the hands of Wilson & Co. upon the dependence of their own action against Anderson already referred to, bearing to arrest £150 sterling, more or less, due and addebted by the arrestees to Anderson. On 17th July 1907 the defenders in the action *Anderson* v. *Wilson & Co.* obtained a rule on the pursuer to shew cause why a new trial should not be granted. On 19th September 1907 the Insurance Company came to an arrangement with Anderson, the terms of which bear to be set forth in a discharge (No 14 of process) of that date,

granted by him in favour of Wilson & Co. The discharge narrates the procedure in *Anderson* v. *Wilson & Co.*, "and that in order to put an end to the said litigation, it has been agreed between me and the Insurance Company (with whom the said John Wilson & Co. Ltd. are insured against claims for damages at common law by third parties), but under reservation of the defenders' whole pleas and without prejudice in any way thereto, and particularly without admitting any liability for the injuries sustained by me, or for the claim made by me against the said John Wilson & Co. Ltd., that a sum of seventy-five pounds (£75) should be paid to me by the said Insurance Association in satisfaction of all claims for damages at my instance, of whatever kind or nature, against the said Wilson & Co. Ltd." Upon the above narrative, and in consideration of the payment to him by the Insurance Company of the said sum of £75, Anderson exonered and discharged Wilson & Co. of all claims for damages or reparation, and of all the conclusions of his action against them, and further agreed that the verdict returned by the jury should be discharged, and that decree of absolvitor should be pronounced in favour of the defenders Wilson & Co. in the said action, no expenses being found due to or by either party. On 24th October 1907 a joint minute was accordingly lodged in the said action (No. 17 of process), by which Anderson's counsel agreed that the verdict should be set aside, and absolvitor be pronounced, and counsel for both parties craved the Court to assoilzie the defenders, and to find neither party liable in expenses; and the Court interponed authority to the said minute. The present action of furthcoming was raised on 4th November 1907, the parties being as stated at the outset of this opinion.

At the debate in the Procedure Roll the pursuers' counsel restricted their demand to one for payment of the said sum of £75, which they maintained had been duly attached by their arrestment in the hands of Wilson & Co. Upon record they aver (Cond. 2) that "the alleged payment was truly made by the Insurance Company to the arrestees under and in virtue of the liability under the said policy of insurance, and by the arrestees to the principal debtor in full of the conclusions of the action at his instance against them. The form of the transaction . . . . does not affect the rights of the pursuers." I do not think that the averment just quoted is a correct representation of what happened. The salient features of the situation are (1) that there was at no time a decree against Wilson & Co. in Anderson's favour; on the contrary, the only decree ever pronounced was one of absolvitor; (2) that Wilson & Co. all along denied liability to pay Anderson anything; and (3) that they never in fact made any payment to him. Even if the payment of the £75 to Anderson had been actually made by Wilson & Co., coupled with an absolute repudiation of his claim for damages, and simply to avoid trouble and expense, I should have been disposed to hold that the arrestment attached nothing. The arrestment of a mere illiquid claim attaches nothing, I apprehend, unless a decree follows, or the debt be admitted by the debtor. But I need not decide this point, for the facts of the case do not raise it. The £75 was, in fact, paid to Anderson, not by Wilson & Co., but by the Insurance Company. The pursuers contend that the Company made the payments as agents for Wilson & Co., but I can see no ground in fact or law to warrant such a suggestion. It seems clear enough that the Insurance Company paid the money, not in respect of any admitted liability to Anderson by themselves or by Wilson & Co., which indeed they expressly repudiated; but simply to buy off the trouble and cost of a second jury trial, in which, even if successful, they would probably have failed to recover expenses from Anderson. The pursuers say this was "a collusive device." I see no ground for any suggestion of collusion, which I suppose means fraud, if it means anything at all. The Insurance Company seem to me to have acted within their rights, and in a prudent and sensible manner. I fail to see how the pursuers' arrestment in the hands of Wilson & Co. (they used none in the hands of the Insurance Company) could attach this sum of £75 which the Company chose to pay out of their own funds and in order to avoid the expenses of a second jury trial, of which they might have become liable to relieve Wilson & Co. I think the Insurance Company are really here in no different position from that of an independent third party possessing a legitimate interest to obtain, by purchase if necessary, the discontinuance of an action pending between two other persons. It seems plain enough that Anderson might, if he had chosen to do so, have abandoned his action, in which case there would have been nothing to arrest. I do not think the result was materially different when he consented to absolvitor and discharged Wilson & Co. in consideration of money paid him by a third party. The payment and the discharge seem to me to necessarily extinguish the possibility of any liability by Wilson & Co. to Anderson which could be the subject of arrestment in the hands of the former.—19*th February* 1908.

Counsel for Pursuer, Graham Stewart, K.C., D. Anderson; Agents, T. F. Weir & Robertson, S.S.C. — Counsel for Compearing Defenders, Morison, K.C., Dunbar; Agent, R. S. Rutherford, Solicitor.

W. D.,
for A. M.

Outer House. *Lord Salvesen.*

Wilson v. Scott.

OUTER HOUSE.

(*Lord Salvesen.*)

359. Wilson *v.* Scott.

I. Prescription — Triennial — Act 1579, cap. 83 — Aliment — Bastard — Claim Against Mother—Mora.

II. Process—Title to Sue—Husband and Wife—Wife an Executrix—Consent of Husband — Held That Wife as Executrix Entitled to Prosecute Claim Without Husband's Consent

III. Prescription — Triennial — Claim For Aliment—Writ—Creditor and Debtor —Writ of Debtor Not Addressed to Creditor — Prescription Elided by Writ — Extent of Claim — Proof — Parole Proof Allowed.

The pursuer in this action, who was a married woman residing with her husband, sued as executrix-dative of the late Alexander Strachan, journeyman bootmaker, Montrose. The defender, who resided in Dundee, was the administratrix of the estate of the deceased Mrs Jane Harricks or Osborne, Brighton. On 11th May 1860, Mrs Osborne, who was then a factory girl in Montrose, gave birth to an illegitimate female child. Immediately after its birth she arranged with the said Alexander Strachan to receive said child into his family and maintain and aliment it along with his own children. The pursuer now claimed the sum of £153, with interest from 1st June 1872, as the amount due to the late Alexander Strachan for the maintenance of said child for twelve years at £13 per annum, less the sum of £3 paid to account.

The pursuer averred that no rate of aliment or terms of payment were arranged; and that on or about 1st June 1860 Strachan received the child into his household and maintained her until she attained the age of twelve years. That between 1860 and 1866 Mrs Osborne was repeatedly requested to pay aliment, but that she only paid some small sums amounting to £3. That at said latter date she was living in London, and that no more was heard of her for thirty years, when in 1897 she disclosed to her friends and relatives that she was living in Brighton and was the wife of a literary man there. About the same time she wrote a letter to her illegitimate daughter dated 22nd July 1897, as follows:—

28 Great College Street,
Kemp Town, Brighton,
July 22nd, 1897.

My dear daughter,—I have only just had your address from my brother-in-law, Charley Scott, and hasten to write to you. You must have been greatly astonished to hear that I was living and well, but I hope Charley Scott broke it to you quietly, so as not to cause you any pain more than would have been caused by surprise. You may believe that during our long separation I shed many a tear at having to leave you, but I was solaced by the thought that neither my sister Margaret Scott or Mr and Mrs Strachan would fail to take care of you, when I had neither the way nor means of doing so. Though I have been the wife of a man that has loved and cared for me for nearly twenty-three years, he was not fortunate in business, and could never get his head above water, so I was unable to do anything for you, and that being so, considered it useless to write to my sister about you until now, when, thanks to my good husband having saved a few pounds since his retirement from business, offered to take me to Scotland to see my sister and you. At this kindly offer I jumped for joy, and having found out Charley Scott's address through the postmaster at Dundee, wrote to him, with the result of happily finding that you and my sister are alive and well. It is my intention to soon go to see my sister, with whom I thought you were living, and when I get to Dundee I will at once go press you once more in my arms, and see Mr and Mrs Strachan, whom I hope before being taken from this life I shall be in some measure able to repay for all their kindness to you, and with my best regards to them and love to yourself.—I am, your affectionate mother,

Jenny Osborne.

Thereafter Mrs Osborne visited Montrose, and on her return to Brighton took her daughter, known as Catherine Harricks, to reside with her.

The pursuers further averred that the Strachans were at the time of Mrs Osborne's reappearance in bad health and poor; that Mr Strachan was very weak mentally and physically and did not take legal proceedings to make good their claim, but that they continually expected it would be paid, and frequently referred to it in conversation as being due and unpaid, and relied on Mrs Osborne carrying out her intention to repay them.

The defender averred, *inter alia*, that all claims competent to the Strachans against Mrs Osborne were settled by her on the occasion of her visit to Montrose in 1897.

She pleaded, *inter alia*:

"1. The action is incompetent.

"2. No title to sue.

. . . . . .

"4. The present claim being prescribed, the pursuer's averments can only be proved by the writ or oath of the defender."

On 13th July 1907 the Lord Ordinary repelled the first and second pleas in law for the defender, and sustained her fourth plea in law. Found that the pursuer's claim could only be proved by the writ of the deceased Mrs Osborne, or by the writ or oath of the defender, and appointed the pursuer to lodge any writ or writs on which she intended to found by 15th October next.

Lord Salvesen.—This is an action for repayment of disbursements made in connection with the aliment and maintenance of an illegitimate child. The action is at the instance of the executrix-dative of the person who made the

disbursements against the executrix of the child's mother. The child herself is now a woman of 47, and she attained minority in 1872, at which date the account for aliment and maintenance ends. Part of it has therefore undergone the long prescription if the aliment falls to be calculated from year to year. The remainder has also obviously prescribed if the triennial prescription is applicable. And this was the main question that was argued.

It will be observed that this is not the case of the mother of an illegitimate child who has maintained it suing the father for a contribution towards its aliment. Here the mother is said to have arranged with Alexander Strachan, whose executrix the pursuer is, to take the child on the footing that she would pay for its aliment, although no rate of aliment was fixed. It is therefore really an action for board and lodging supplied to the child, for whose aliment the mother was liable at her request. It is difficult to see any good reason why such an account should not undergo the triennial prescription as being *ejusdem generis* of the debts enumerated in the statute. Apart from this, the matter seems to me to be finally settled by the case of *Ligertwood* v. *Brown*, 1872, 10 M. 832, which was a unanimous judgment of the First Division, and in which all the prior authorities were considered. That case is, in my opinion, indistinguishable from the present.

The pursuer, however, urged that the circumstances here were such as to elide the triennial prescription; and reference was made to the cases of *Chisholm*, 1886, 13 R. 773, and *Butchart*, 1839, 1 D. 1128. The former case no doubt decides that the triennial prescription is inapplicable where the pursuer's failure to sue timeously is due to the conduct of the defender; and it was contended that this principle applied here, because the mother of the illegitimate child is said to have disappeared from 1866 until 1897, so that Mr Strachan was unable to take any proceedings against her. The averments do not go the length of suggesting that the lady was purposely concealing herself from diligence, nor is it said that the Strachans made any enquiries to ascertain her whereabouts. I greatly doubt whether the fact that a debtor changes his address, even if it be for the purpose of evading diligence, would be a sufficient ground for holding the triennial prescription to be elided, although there is a suggestion to this effect in the rubric of the case of *Butchart*. I do not, however, require to decide this point, because on the pursuer's own averments it appears that the child's mother reappeared in 1897, and then made promises of remunerating the Strachans. Neither such promises nor the fact that the creditor is old and in bad health afford, in my judgment, a ground for eliding prescription. There are few cases in which the claim is so long delayed as the present in which the creditor has not some reason for not enforcing his claim. But the statute, where it applies, is absolute; and I am clearly of opinion that there are no averments in this case which are relevant to elide its application.

The defender further pleaded that the pursuer, being a married woman, is not entitled to sue this action without her husband's consent. In this case the plea is probably of very little moment, as no doubt the husband would readily sist himself as a consenting party. Apart from this, I do not think the plea well founded. The pursuer was duly appointed executrix of the late Alexander Strachan by the Sheriff of Forfar, on an application presented by her with the consent of her husband; and this appointment makes it her duty to ingather the debts due to the executry without regard to her husband's wishes in the matter. No case has been cited which gives the least countenance to the view that a married woman may not administer an executry estate without every act of administration being concurred in by her husband. In the analogous case of a married woman being appointed trustee under a deed of settlement, the House of Lords held, in the case of *Watson* v. *Darling*, 1825, 1 W. and S. 188, that she was entitled to act and vote as a trustee, which implied that she might vote against her husband, who was also a trustee. The doubt expressed in the subsequent case of *Laird*, 1833, 12 S. 54, does not apply here, for the husband had not consented to his wife acting as a trustee, she having been appointed to the office before her marriage.

I shall therefore repel the first two pleas in law for the defender, but sustain the fourth plea, and in terms thereof find that the pursuer's claim is prescribed, and that the averments can only be proved by the writ of the deceased Mrs Osborne or by the writ or oath of the defender. —13*th July* 1907.

Thereafter the case was of new sent to the Procedure Roll, and the question raised was whether the said letter of 22nd July 1897, written by Mrs Osborne to her daughter, was sufficient to elide prescription so as to enable the pursuer to lead supplementary evidence *prout de jure* as to the extent of her claim.

The Opinion of the Lord Ordinary sufficiently further reports the case.

The following interlocutor was pronounced:

"The Lord Ordinary having considered the cause, finds that the writ No. 11 of process imports a sufficient acknowledgment of a debt due by the late Mrs Osborne in respect of the aliment of Catherine Harricks to elide the triennial prescription: Allows parties a proof *habili modo* of their averments on record, and appoints the proof to proceed on a day to be afterwards fixed."

Lord Salvesen.—In this case I have already

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held that the triennial prescription applies to the pursuer's claim. The question now is whether this prescription is elided by a letter written by the alleged debtor on 22nd July 1897 to the effect of enabling the pursuer to lead supplementary evidence *prout de jure* of the extent of her claim.

The letter in question is dated 22nd July 1897, and is addressed by Mrs Osborne to the daughter whose aliment is the subject of the action. Twenty-five years had elapsed since this daughter had ceased to be a burden on anyone, and the letter affords *prima facie* evidence of the truth of the pursuer's statement that Mrs Osborne had disappeared during the whole of that period and for some years prior. The writer says: "You may believe that during our long separation I shed many a tear at having to leave you, but I was solaced by the thought that neither my sister Margaret Scott or Mr and Mrs Strachan would fail to take care of you when I had neither the way nor means of doing so. Though I have been the wife of a man that has loved me and cared for me for nearly twenty-three years, he was not fortunate in business, and could never get his head above water, so I was unable to do anything for you, and that being so, considered it useless to write to my sister about you until now." The writer then mentions that she was going to Scotland; and proceeds as follows: "It is my intention to go to see my sister with whom I thought you were living, and when I get to Dundee I will at once go press you once more in my arms, and see Mr and Mrs Strachan, whom I hope, before being taken from this life, I shall be in some measure able to repay for all their kindness to you." I think these passages plainly imply that Mrs Osborne had left the care of her illegitimate child to her sister and Mr and Mrs Strachan at a time when she was unable to pay for its maintenance, and that she hoped now to repay the latter in some measure for all their kindness to her child. The constitution and subsistence of the debt is thus, I think, sufficiently admitted to elide the plea of prescription. It was argued that the letter was consistent with there being only a moral obligation arising from the Strachans' kindness to the child, and did not infer the existence of any legal ground of debt. I think this would have been so if the last sentence which I have quoted had stood alone; but the kindness of Mr and Mrs Strachan plainly refers to their having taken care of the child when the mother had not the means of doing so. Now, if a stranger aliments an illegitimate child at the request of the mother, there arises, in my opinion, a legal obligation on the part of the mother to pay a reasonable sum for its aliment; and the presumption of payment which arises from the claim not having been sued for within three years after it became due is negatived by the terms of the letter. I was referred, on behalf of the defender, to the case of *Mitchells* v. *Moultrys*, 1882, 10 R. 378, where the triennial prescription was held not to have been elided by the writ produced. The ground of the decision was that the writ contained no reference to any account or debt at all, although its terms were consistent with its having been written by a person called on to pay a debt in answer to a letter which was not produced. Each case depends on its own circumstances; but the circumstances here have, in my opinion, a sufficiently close resemblance to those which occurred in the cases cited for the pursuer (*Smith* v. *Falkner*, 1831, 9 S. 474; *Stevenson*, 1849, 11 D. 1086; *Macandrew*, 1851, 13 D. 1111; *Fiske* v. *Walpole*, 1860, 22 D. 1488; and *Fife*, 1860, 23 D. 30) to warrant me in holding the writ produced as sufficient to elide prescription.

The extent of the pursuer's claim is, of course, not established by the letter in question; but it is now well settled by the cases I have referred to, that where a letter contains an admission of an unsettled claim, proof is admissible to establish its extent. In this case the facts should be easy of ascertainment notwithstanding the long period that has elapsed; and there is no hardship to the defender, for she is probably now the only person alive who must have been fully aware of all the circumstances.

The defender further argued that the letter, not being addressed to the alleged creditor, could not be founded upon as the writ of the deceased debtor. No authority was adduced in support of this proposition except the case of *Dunn's Trs.* v. *Hardy*, 1896, 23 R. 621. That was a case in which it was attempted to establish a loan of money to a truster by an entry in a state of the trust funds of the alleged loan as amongst his outstanding debts; but the ground of decision was that the writ in which the entry occurred was not delivered to the creditor as an acknowledgment by the trustees that the debt was due; and that such an acknowledgment, if delivered, would not have been binding on the trust estate. The case is therefore not an authority for the proposition referred to; and in no other case do I find that when the writ is admittedly the genuine writ of the debtor it requires to be addressed to the creditor or his agent, in order that it may be founded upon. The statute itself contains no such qualification—all that it demands is that the creditor shall prove his claim "be the writ or be aith of his partie."

I shall accordingly pronounce an interlocutor in terms of the above opinion; and I will only add that I think the amount of the claim might very well be made the subject of amicable adjustment.—19*th February* 1908.

Counsel for Pursuer, Mitchell; Agent, Charles Irvine, S.S.C.—Counsel for Defender, J. A. Christie; Agent, Walter M. Murray, S.S.C.

J. W. F.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

360. *Poor* Helen Dawson *v.* M'Kenzie.

Parent and Child—Bastard—Filiation—Proof—Evidence of Paternity—Corroboration of Pursuer's Statement—Remarks by the Court as to Effect of False Statements by Defender on Evidence of Opportunity—Dicta in Macpherson v. Largue, 1896, 23 R. 785, Approved.

Appeal from the Sheriff Court of Lanarkshire at Glasgow.

This was an action in which the pursuer claimed aliment for her illegitimate child, of which she alleged that the defender was father. The defender denied paternity of the child. The case is sufficiently reported in the Sheriff's Notes. The Sheriff-Substitute (Davidson) *assoilzied* the defender.

Note.—I consider this a very narrow case. The evidence shews that the pursuer and defender became acquainted at Arbuckle's marriage in March 1905; that they left the house in which the wedding festivities were held about 3 or 4 the next morning; that they walked about together till after 7, when the pursuer went home; that thereafter they met with some frequency at Arbuckle's house and elsewhere, generally by appointment; that they took walks together, and that some correspondence passed between them; that the last occasion on which they met and walked together was on 3rd June 1905, after a picnic; and that on 12th March 1906 the pursuer's child was born. She charged the defender with the paternity in the end of June 1905; she has never charged anybody else, and he has always unequivocally denied it. There is absolutely no evidence (apart from the pursuer's own) of any sort of familiarity, or even affectionate address, between the parties. The earlier of the two letters from the pursuer which the defender produces no doubt points to considerable intimacy; but it must be observed that that letter was written after the meetings between the parties had ceased, and that it is not evidence against the defender. The second letter certainly does not read as if it embodied a false charge; but it too is not evidence against the defender. My conclusion is that though there is strong reason for suspicion in the case set forth by the pursuer, it lacks that element afforded by evidence of familiar relations existing between the parties which is essential to turn suspicion into proof.

This interlocutor was recalled by the Sheriff Principal (Guthrie), who delivered the following opinion:

The case is narrow and has, as too frequently happens, been starved in proof. But I am constrained to differ from the learned Sheriff-Substitute. The defender denies too much, and his own friends, the Arbuckles, tell us that appointments were made and meetings took place between the parties during several months in 1905. I also think that the defender's possession of pursuer's letter of 12th June, written about a week after a meeting in Arbuckle's, from which he saw her home at a late hour, is not an insignificant fact. It does not go very far by itself, and would count for nothing if the defender's suggestion, that the pursuer was hunting him down, were supported. But that is a mere suggestion, and though no doubt the pursuer was rather forward and affectionate, the defender does not seem to have shunned her till danger appeared. But when I consider that there were a number of meetings, and such a letter, I cannot but conclude that, though no familiarities are proved, yet there was a courtship going on with more than sufficient opportunity for copulation. There is thus such corroboration of the pursuer's evidence as has in the cases been held sufficient, and her testimony is not, I think, open to the remark above made on that of the defender.

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The Defender *appealed* and *argued*: The pursuer had failed to prove her case, as her evidence was not corroborated. No corroboration could be derived from evidence of the defender which shewed that he was not speaking the truth (*M'Bayne* v. *Davidson*, 1860, 22 D. 738; *M'Kinven* v. *M'Millan*, 1892, 19 R. 369; *Young* v. *Nicol*, 1893, 20 R. 768; *Macpherson* v. *Largue*, 1896, 23 R. 785; *Harvey* v. *Brownlie*, 1908, 15 S.L.T. 740). Even if such evidence might amount to corroboration, the defender here had not made false statements, his evidence, as far as it went, agreeing with that of the pursuer in all respects other than that regarding the paternity of the child.

Argued for the Respondent: There was sufficient corroboration here in the denial by the pursuer upon record of meetings which were undoubtedly proved, and in the letters produced.

The Court *recalled* the Sheriff's interlocutor and *assoilzied* the defender.

The Lord President.—In a case like this I am afraid that the Court will always be left with the feeling that possibly it may not have arrived at the real truth. Yet, none the less, in the consideration of such delicate circumstances it is absolutely necessary for the security of people in general that the Court should not be moved by sympathy or by moral inferences to depart from the rules already laid down, by which evidence must be judged. I do not think it necessary to say more as to the rules which prevail in regard to such cases as this than has been said already. The modern doctrine—and the modern doctrine owed its introduction to the alteration of the old law, under which the parties were not competent witnesses — the modern doctrine was first laid down in the case of *M'Bayne*, 22 D. 738, and perhaps the best expression of it was that given in a more recent decision by the Lord Justice-Clerk and Lord Trayner, in the case of *Macpherson*, 23 R. 785, with which I entirely concur. The outcome of it is this, that there must be something more than the pursuer's own statement, and that that

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something must amount to corroboration. Now the mistake which the learned Sheriff has made here is in taking the mere proof of opportunity as amounting to corroboration. Mere opportunity alone does not amount to corroboration; but two things may be said about it. One is that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration. The other is that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made. I am really only repeating in other words what was said by the Lord Justice-Clerk in the case of *Macpherson*. He there said: "No corroboration can be derived from evidence of the defender which shews he is not speaking the truth. If his evidence is not to be believed, it must be taken out of the case altogether, and the case must be treated as if he had not been examined." He then refers to the facts in the case before him, and continues: "But if these facts were capable of leading to a certain inference, and if the defender made no answer when that inference was suggested, it is then that that absence of explanation by the defender's evidence would come to be of importance; and in the same way his denial of these facts, which are held to be proved, is significant, as it gives a complexion to them which they might not otherwise bear if explained." Accordingly, if I had found, or could have found, from the evidence here that the defender had denied things—possibly innocent in themselves—which were affirmed by other witnesses, that might have afforded the amount of corroboration necessary to establish the pursuer's case. That would have brought it within the same class of facts that were present in the case of *M'Bayne*, 22 D. 738, when the thing that turned the scale was that the defender denied ever having seen the pursuer before the occasion when she stopped him in the street and charged him with being the father of her child, while it was held to be established that he had twice met her before, though in circumstances which could not in themselves give rise to suspicion. Those facts seem to me to be an illustration of the minimum that will suffice as corroboration, and it does not appear to me that that minimum is afforded by the facts of the present case.

There is also this, that there appears to be something here which might have been brought out at the proof, but which has not been brought out. There are certain letters, the second of which seems to me to have a strong ring of truth about it. But these are not evidence against the defender, though they might have been made available as evidence had they been put to the defender in his cross-examination. That, however, as I say, has not been done.

On the whole matter, therefore, I think that the pursuer has not made out her case, and that the only course open to us is to recal the interlocutor of the Sheriff and restore the judgment of the Sheriff-Substitute.

Lord M'Laren.—I concur in your Lordship's opinion, and it is hardly necessary to add anything. It is a very common state of the evidence in such cases as this that the pursuer's case depends only upon her own evidence with a certain amount of corroboration as to opportunities, and then the question of fact arises whether these opportunities were such as to raise legal grounds of suspicion, or were merely of the nature of innocent meetings between man and woman. I think that in this class of cases the law laid down by the Lord Justice-Clerk in the case of *Macpherson* comes to be of importance, because I agree with his Lordship that it is not sufficient corroboration if you merely displace the evidence of the defender and shew that he has made false statements. There must be corroboration of the pursuer's evidence; yet when the effect of the defender's false evidence — *i.e.* his denial of circumstances which are otherwise proved—is to shew that there is something of which he is ashamed, or something the admission of which he conceived would throw suspicion upon himself, this will put a different complexion on what the Court might otherwise be disposed to regard as innocent intimacy between the parties.

Here there is nothing that is calculated to throw doubt on the truth of the defender's statements. Although there is no evidence tending to shew to what other person the paternity of the pursuer's child should be attributed, yet I think the pursuer has not established her case against the defender, and the Sheriff-Substitute's judgment is right.

Lord Kinnear.—I am of the same opinion. I think the learned Sheriff proceeds on a combination of two grounds, both of which are grounds of inference of fact and not of legal opinion, namely: first, that there was opportunity; and, second, that the defender denies too much.

Now I think only the first of these two grounds can reasonably be accepted as made out, for when the defender's evidence is compared with the evidence against him, one cannot find that he denies anything which has been really proved, and therefore I think we reach the question whether the bare statement of the pursuer herself, coupled with evidence of opportunity in the sense that both were together in circumstances in which connection was not impossible, is

sufficient to prove the pursuer's case. It is not proved that they were alone together in such circumstances as to give rise to suspicion or reproach; and there is no evidence of opportunity in any other sense than that it was not physically or morally impossible that connection might have taken place, and the result therefore is that there is no evidence on which the Court can proceed other than the pursuer's own statement, which of course is not enough.—22*nd February* 1908.

Counsel for Pursuer, R. C. Henderson; Agent, Alex. White, W.S.—Counsel for Defender, Orr Deas; Agent, R. M. Scott, Solicitor.

W. A. R.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

361. The Aberdeen Master Masons Incorporation Limited *v.* Smith.

I. Friendly Society—Trade Union—Restraint Upon Trade—Incorporation to Promote the Study of Science and Art, Especially in Relation to Building—Title to Sue—Validity of Registration Under Companies Act—Trade Union Act 1871 (34 & 35 Vict. cap. 31), sect. 5—Trade Union Amendment Act 1876 (39 & 40 Vict. cap. 22), sect. 16—Terms of Constituting Documents From Which Held That Incorporation Was Not Trade Union, and Registration Valid.

II. Friendly Society—Member—Qualifications Prescribed by Articles of Association — Action Against Alleged Member Not Possessing These Qualifications — Agreement to Become a Member—Homologation of Agreement by Society — Defender Held to be Member.

Reclaiming Note against an Interlocutor of Lord Guthrie.

(*Reported ante, Vol. XIV. p.* 822.)

In this action the pursuers sought (1) that the defender should be ordained to produce certain accounts in order that the sum payable as subscription by the defender as a member of the pursuers' Corporation in terms of their Articles of Association might be ascertained, and (2) decree for the sum so ascertained. The Lord Ordinary (Lord Ardwall) *repelled* the defences on the grounds above reported, and decerned in terms of the first conclusion of the summons.

The Lord Ordinary having refused leave to reclaim, the defender, under protest, produced accounts in terms of the said interlocutor, after consideration of which the Lord Ordinary (Lord Guthrie) decerned against the defender for the sum of £51, 12s. 6d.

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The defender *reclaimed.*

The argument of counsel was the same as that submitted in the Outer House, and appears sufficiently from the previous report.

The Court *adhered.*

The Lord President.—In this case I agree with the Lord Ordinary, and really have nothing to add to what his Lordship says. It seems to me that, first of all, looking at the constituting documents of the Association, it is impossible to find that this is a trades union. Secondly, as regards the other question of liability, it seems to me that the only objections to receiving the defender as a member of the Association were objections which were pleadable by the Company and by no one else; he cannot take advantage of them on his own behalf. In other words, I think this class of question has been decided again and again in liquidation cases; and if the matter had been tested by the Company being wound up, there is no doubt whatsoever in my mind that this gentleman would have been put upon the list as a contributor. That really ends the matter, because whether there would or would not have been a question as to whether he could get out of the Company by the simple act of resignation, that question is not raised in this proceeding, as the sum for which he is sued is a sum entirely due before the date of his resignation. I am for adhering.

Lord M'Laren.—I concur.

Lord Kinnear.—I am of the same opinion. I think the defender is liable upon his own agreement with the Company for the sum sued for, whether he is technically a member or not.—27*th February* 1908.

Counsel for Pursuers, Hunter, K.C., A. R. Brown; Agents, Alex. Morison & Co., W.S.—Counsel for Defender, Scott Dickson, K.C., Chree; Agents, Henry & Scott, W.S.

W. A. R.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

362. Wishart *v.* West Regent Investment Company Limited.

I. Company—Liquidation—Resolution for Voluntary Winding Up by Company's Nominee — Application by Creditor for Continuation of Voluntary Winding Up Under Supervision by Company's Nominee and Creditor's Nomi-

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Wishart v. West Regent Investment Co. Ltd.

NEE JOINTLY—CIRCUMSTANCES IN WHICH APPLICATION REFUSED AND NEUTRAL LIQUIDATOR APPOINTED.

II. EXPENSES — COMPANY — LIQUIDATION — OBSERVATIONS PER THE LORD PRESIDENT AS TO EXCESSIVE EXPENSES INCURRED IN LIQUIDATIONS, AND INTENDED PRACTICE OF COURT WITH REGARD TO SUCH EXPENSES.

This was a note in the liquidation of the West Regent Investment Co. Ltd. The Company passed a resolution for voluntary winding up and appointed Mr John Meikle, an accountant, formerly auditor to the Company, to be liquidator. Wishart, a creditor, first presented a petition for the compulsory winding up of the Company, and for appointment of Mr Joseph Patrick, C.A., as liquidator, or alternatively for the continuation of the voluntary winding up under the supervision of the Court with Mr Patrick as liquidator. The petitioner subsequently presented this note, in which he asked for the continuation of the voluntary winding up, under the supervision of the Court, with Messrs Meikle and Patrick as joint liquidators.

The Court made a supervision order, *removed* the present liquidator, and *appointed* Mr John M. Macleod, C.A., Glasgow, as liquidator, and allowed the petitioner the expenses of the original petition.

The Lord President.—I will take this opportunity of intimating for the information of counsel that we are going to alter the practice of granting expenses to petitioners in such cases as a matter of course, and to leave that to the Lord Ordinary to whom the liquidation is remitted, and who has a knowledge of the facts. In this case it is all very well to say that two liquidators are required, but I see no reason why there should be two horses in this one-horse concern. This is a Company of which we are told the capital is £5000, and the total capital subscribed £42, 4s. The Company passed a resolution for voluntary winding up and the appointing of a liquidator, and then there was a creditor's petition. The parties seem to have come together and agreed that the liquidation should be continued under the supervision of the Court, and that a liquidator nominated by the creditors should be conjoined with the liquidator appointed by the Company. It has been brought under the notice of the Court that in a great many liquidations there is really almost a scandalous amount spent in expenses, and the Court are resolved to do what they can to prevent this abuse. It seems to me that the proposition made here is an abuse on the face of it, and although in ordinary cases the wishes of the creditors will be consulted as to who should be appointed as liquidator, it seems that the arrangement here is so objectionable that the only course for your Lordships to take, and the one I propose, is to pronounce a supervision order, remove the present liquidator, and appoint an entirely new liquidator who is not proposed by any of the parties.

Lords M'Laren and *Kinnear* concurred.—*4th March* 1908.

Counsel for Petitioner, D. M. Wilson; Agents, Adamson, Gulland & Stuart, S.S.C.

W. A. R.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

363. Stagg & Robson Limited *v.* Scott, Stirling & Company Limited.

BILL OF EXCHANGE—PROOF—PAROLE—COMPETENCY—BILLS OF EXCHANGE ACT 1882 (45 & 46 VICT. CAP. 61), SECT. 100.

Reclaiming Note against an Interlocutor of Lord Dundas.

This was an action for payment of sums due under three bills of exchange drawn by the pursuers on and accepted by the defenders.

The circumstances in which the action was raised were described in the Lord Ordinary's Opinion as follows:—

"The pursuers, van and waggon makers at Selby in Yorkshire, sue the defenders, who carry on business as carriage builders, etc., at Hamilton, for payment of various sums of money contained in bills drawn by the pursuers upon and accepted by the defenders, which the pursuers say are overdue. The case is the sequel of a former action which the pursuers raised against the defenders on 28th January 1907 for payment of a sum of money as the balance due in respect of goods supplied to the defenders in connection with certain double-decked motor omnibuses. A few days before the diet appointed for proof in that action, the managing directors of the parties respectively met and arranged terms of settlement, and a written agreement entitled 'Heads of Settlement' was subscribed by them, which is produced in this action. It provided, *inter alia*, that the defenders should 'pay' to the pursuers 'the sum of £2250 in the following manner:—By £250 cash forthwith. £500 bill at one month. £500 bill at three months. £500 bill at four months. £500 bill at five months'; that each of the bills should be guaranteed personally by the managing director and two other directors of the defenders' Company; and that 'on payment of the £250 cash, three of the bodies are to be delivered; the remainder of the bodies undelivered are to be delivered, if required, to Scott, Stirling & Co.

Ltd., when the first bill for £500 is met.' In accordance with these 'Heads of Settlement,' the pursuers received from the defenders their cheque for £250, and four bills of £500 each at one, three, four, and five months' date respectively; and the case was taken out of Court by joint minute. The first bill was duly honoured by the defenders; the second to the extent of £100 only; and the sums now sued for are the £400 balance of that bill and the sums of £500 contained in each of the third and fourth bills (which were dishonoured when presented), all which sums the defenders decline to pay. The defenders explain that the account sued on in the former action included the price of certain omnibuses and other goods which had not been delivered by the pursuers to the defenders, and which the pursuers alleged, and the defenders denied, the latter were bound to accept and pay for. The defenders say they were willing to purchase said goods as they required them in the ordinary course of business. Their account of what passed at the meeting when the 'Heads of Settlement' were drawn up and signed is that 'it was agreed that the defenders should take delivery of said goods as they require them, and that they should grant the bills now sued on. It was further agreed that the bills should be renewed at maturity in the event of the defenders not having taken delivery of goods to the amount of the cash paid by the defenders, and of the bills which had fallen due,' and the defenders say that the whole goods of which they have taken delivery are covered by the sums of £250, £500, and £100 already paid by them to the pursuers; and that the latter, being bound to renew the bills in terms of the agreement above set forth, are not entitled to decree for the sum sued for. The defenders moved for a proof of their averments."

The "Heads of Agreement" were as follows:—

Heads of Settlement, Stagg & Robson Ltd. *v.* Scott, Stirling & Co. Ltd., dated 16th May 1907.

This action in the Scotch Courts is to be withdrawn on the following terms, which are to be drawn up by the parties' Scotch solicitors respectively in accordance with Scotch law:—

Scott, Stirling & Co. Ltd. to pay to Stagg & Robson Ltd. the sum of £2250 in the following manner:—

By £250 cash forthwith.
£500 bill at one month.
£500 bill at three months.
£500 bill at four months.
£500 bill at five months.

Scott, Stirling & Co. Ltd. to pay the usual bank rate discount, and each of the bills are to be guaranteed personally, jointly, and severally by James Scott of Burnbank, Carluke, N.B., John Stirling of Twickenham, and Laurence Miles of Twickenham.

On payment of the £250 cash, three of the bodies are to be delivered; the remainder of the bodies undelivered are to be delivered, if required, to Scott, Stirling & Co. Ltd., when the first bill for £500 is met. The bodies to be finished in accordance with Scott, Stirling & Co. Ltd.'s order and specification in first-class style, subject to ordinary storage depreciation.

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The costs of the above action are to be borne by each party paying its own.

The Lord Ordinary *allowed* parties a proof before answer of their respective averments.

Lord Dundas [after narrating the facts as above quoted].—The defenders claimed that they are entitled to prove by parole evidence the verbal terms of agreement which they allege, in virtue of sect. 100 of the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61). That section provides that "in any judicial proceedings in Scotland any fact relating to a bill of exchange . . . . which is relevant to any question of liability thereon, may be proved by parole evidence." Now this action is a "judicial proceeding in Scotland," and the facts which the defenders allege appear *prima facie* to be quite relevant to the question of their liability under the bills mentioned in the summons. I may refer to two recent decisions as illustrating the wide scope and effect which sect. 100 has been held to possess. The first of these (*Drybrough & Co. Ltd.*, 1903, 5 F. 665) has features strongly resembling the present case. The defender there was allowed parole proof of an alleged verbal agreement to the effect that the bill on which he was being sued would be renewed from time to time by the pursuers, subject to certain conditions which the defender said he had fulfilled. This decision was approved and followed in *Viani & Co.*, 1904, 6 F. 989, where the defender was allowed a proof that the pursuer (indorsee and holder of the bill) had verbally agreed that if the bill was in his hands at maturity he would not call upon the defender (the acceptor) to retire it. At the discussion in the Procedure Roll I heard a forcible argument by the pursuers' counsel to the effect that, while he fully accepted the authority of the decisions, the proof sought by the defenders should not be allowed: because the language of the written "Heads of Settlement" is unambiguous, and absolutely inconsistent with the terms of agreement which the defenders allege to have been verbally adjected; that the defenders' averments, therefore, were, in face of the written agreement, palpably irrelevant; and that nothing in the Bills of Exchange Act warranted an attempt to contradict by parole proof the written agreement of parties as evidenced, not by the bills themselves, but by the "Heads of Settlement." I do not think these contentions are sound. I do not consider that the language of the "Heads of Settlement" is such as necessarily to exclude or negative the defenders' statement of the agreement as a whole. It certainly seems singular, if the latter is true, that no allusion to renewal is made either in the "heads" themselves or in the separate guarantee which was granted in pursuance thereof. But the idea of renewal is not expressly negatived; and the fourth paragraph of the "Heads of Settlement" seems to square in some measure with the defenders' averment about taking delivery of the goods only as they required them. It is also to be observed that the written agreement does not provide that the pursuers are to receive certain payments at stipulated times, and that bills are to be granted for these; but only that the defender shall "pay" the pursuers "in the following manner," viz. by a payment in cash (which was duly made), and granting four bills at such and such dates (which were duly granted). It seems, therefore, that the pursuers' action must rest, not on the "Heads of Settlement," but on the bills them-

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selves; and it is in fact so laid. Upon the whole matter I think I must allow a proof before answer, the defenders to lead.

The pursuers *reclaimed.*

The following authorities were cited in argument, viz.: *Drybrough & Co. Ltd.* v. *Roy*, 1903, 5 F. 665; *Viani & Co.* v. *Gunn & Co.*, 1904, 6 F. 989; *Gibson's Trs.* v. *Galloway*, 1893, 23 R. 414; *National Bank of Australasia* v. *Turnbull & Co.*, 1891, 18 R. 629.

The Court *recalled* the interlocutor reclaimed against, and *pronounced* decree as concluded for.

The Lord President.—In this case the Lord Ordinary has allowed a proof, and it is against that interlocutor that the reclaiming note has been taken. The pursuers had raised an action against the defenders for goods supplied, and that action was settled upon terms which were embodied in a written document, regularly signed before witnesses, and called "Heads of Settlement." These heads of settlement settled that the action in the Scottish Courts was "to be withdrawn on the following terms," and then it was provided that Scott, Stirling & Co. were to pay Stagg & Robson Ltd., the pursuers, the sum of £2250 in the following manner: £250 in cash, £500 by bill at one month, and three other bills for a like sum of £500 at three, four, and five months respectively. Then there was a further stipulation that the bills were to be guaranteed personally, jointly and severally, by three persons mentioned, and after that there were certain stipulations as to the time within which the goods were to be delivered. Now the bills as they became due were not all honoured. The first was paid, but the second only partly and the others not at all, and the present action is raised to recover the amount. The Lord Ordinary has allowed a proof of an averment which really comes to this, that there was a verbal agreement at the same time that these bills should be renewed when they fell due, and he has felt himself bound to do that because of the one hundredth section of the Bills of Exchange Act, which provides that "in any judicial proceedings in Scotland any fact relating to a bill of exchange, which is relevant to any question of liability thereon, may be proved by parole evidence." I am bound to say that I do not think that that provision of the statute has any application to the matter in hand. It does not mean that there is a sort of magic in the word "bill," and that the moment you allege anything with regard to a bill you at once upset the whole law of evidence. The meaning of the provision, I think, was clear enough to allow you to prove by parole what the rules of law might not allow to be proved by parole, namely, the true relations to each other of the parties upon the bill; that is to say, that the indebtedness which, *prima facie* on the bill, is upon the acceptor, might be shewn to be not really upon the acceptor; or, in other words, that the true position of the names on the bill might be proved. But I do not think that that section has anything to do with the general rule of law, which is that you cannot alter a written agreement by parole evidence. The result, I think, would be almost fantastic, because the provision in the agreement that these bills were to be guaranteed by certain persons would be practically swept out of existence. They would only, of course, be bound to guarantee the particular bills which are there mentioned, and if these bills were renewed and represented by other bills, then the guarantee would fly off. I am therefore of opinion that there is no relevant defence to the action, and that decree should be pronounced in terms of the conclusions of the summons.

Lord M'Laren.—I think it is settled that the time-honoured defence that a bill was merely a matter of form and was not intended to impose liability on anyone, is not admissible under the Bills of Exchange Act any more than it was at common law. In one of the first cases that came before this Court under the Bills of Exchange Act (*The National Bank of Australasia* v. *Turnbull & Co.*, 1891, 18 R. 629), we found that there was no relevant allegation of any contract of which the bills formed a term, but only a general statement that the acceptor was not intended to be liable, and it was held that the Legislature could not have intended that the question whether a bill was an obligatory document or not was to be tried upon parole evidence. In the present case the allegation is not very different. It is in substance that there was an express or implied obligation to renew the bills when they fell due. Now, my opinion is that wherever it can be shewn that a bill is one ingredient of a contract, then you are entitled to prove the contract, and it may be that under some condition of the contract the bill is not enforcible. Again, as a bill is in form a unilateral document although it is always stated to be for value received, any question relative to the consideration of the bill may under the statute be proved by parole evidence, and we have examples in our practice at common law of allowing a proof on a question of no value, although that is not invariably done, and in fact is only done in exceptional cases. But what makes it clear in the present case that the defence is impossible is this, that the drawer of the bill stipulated that he should have the personal guarantee, jointly and severally, of the directors of the company for payment of the bill, and there is no stipulation that that guarantee should be renewed or made applicable to any substituted bill that might afterwards be granted. Now, can anything be more absurd than to suppose that while stipulating for a personal guarantee for the payment of these

bills, it was at the same time agreed that the bills should be renewed and that the guarantee should then cease to be binding? It is evident here that the guarantee would be altogether futile if this defence could be received, and if proof were admissible to shew that the bills were renewable. I therefore agree with your Lordship.

Lord Kinnear.—I am of the same opinion. The old rule of our law, which has been displaced by the 100th section of the Bills of Exchange Act, created a presumption of onerosity so strong that, although it might be contradicted, it was not allowed to be disproved except by the writ of the party seeking to enforce liability on the bill, or else by a reference to his deposition on oath. That rule was supposed to be supported by favour to trade, but in comparatively recent cases it was seen that it might operate very unjustly, and yet the rule was so well settled that the Court could not disregard it. Now, I apprehend that the main purpose of the section in question was to remedy that injustice, but I think it is extremely probable that the language of the clause went somewhat beyond what was required to remedy the particular mischief to which I have referred, and it may be that it would allow parole evidence being admitted with reference to other questions of liability than those which depend on mere presumption of onerosity. However that may be, I am certainly of opinion that it can only apply to cases where the alleged liability is rested exclusively upon a bill, and not upon a bill as the mere method of carrying into effect a written contract. Now, in the present case the bills were granted for the purpose of working out a contract which is expressed in writing, and the terms upon which the bills were to be drawn and accepted are not therefore to be gathered from the mere terms of the bill itself, but from the agreement which was carried into execution by their being accepted. I think it is contrary to perfectly well-settled rules of evidence to allow the terms of that agreement to be altered or enlarged by parole evidence, and I therefore agree with your Lordships that there is no relevant case to be sent to proof.—28*th February* 1908.

Counsel for Pursuers, Scott Dickson, K.C., Hon. W. Watson; Agents, Webster, Will & Co., S.S.C. —Counsel for Defenders, T. B. Morison, K.C., J. S. Mackay; Agents, Deas & Co., S.S.C.

F. A. U.

OUTER HOUSE.

(*Lord Guthrie.*)

364. Cass *v.* Edinburgh and District Tramways Company Limited.

Outer House. *Lord Guthrie.*

Cass v. Edinburgh and District Tramways Co. Ltd.

I. Process—Proof or Jury Trial—Reparation for Personal Injury—Issues Refused and Proof Ordered—Doubtful Relevancy—Contributory Negligence of Child or of Parent—Question of Expert Evidence — Construction of Statutory Regulations.

II. Process—Pleading—Alternative Averments Inconsistent With Each Other —Information Available to Pursuer —Opinion by Lord Ordinary That Pursuer Must Found on One or Other, Not Both.

This was an action by a father on behalf of his pupil son against a tramway company for reparation for personal injuries. The pursuer's son, who was four years and eight months old, was run over by a cable tramway car and severely injured. The facts of the case and the allegation of fault against the defenders are contained in the following averments for the pursuer:—

Cond. 2. About four o'clock on the afternoon of Saturday, 16th November 1907, the pursuer's said son, who was four years and eight months old at the time of the accident described below, left his father's house to buy nuts at the shop of William Lumsden, grocer, 1 Inverleith Terrace, which is in the immediate vicinity. Eildon Street, where the pursuer resides, is on the east side, while Inverleith Terrace is on the west side of Inverleith Row, and about 150 yards south of Eildon Street. One of the defenders' lines of tramway runs along Inverleith Row, to and from the terminus at Goldenacre. The pursuer's said son duly made his purchase, and proceeded to return home along the west or Inverleith Terrace side of Inverleith Row. When he had reached a point about 20 to 25 yards northwards of Inverleith Terrace, he left the pavement, and was in the act of walking across Inverleith Row to reach his father's house in Eildon Street, when, without any warning, he was suddenly knocked down and run over by one of the defenders' cable cars, No. 127, which came up from the south and was running towards Goldenacre.

Cond 3. . . . . The said car, No. 127, forms one of a series of eight running on the same route. . . . Said cars are provided with a stair at each end, by which passengers ascend to the top of the car. Said stair is built on a dangerous and obsolete system. It starts from the left front of the platform, and in gradually rising to the level of the top of the car it passes obliquely in front of the driver of the car in such a manner as to completely obscure his vision to the front and left front of the direction in which the car is travelling. . . . Or otherwise, if it was at all possible for the driver to see what was in front or to his left front, he negligently and culpably failed to keep a proper lookout when the car was travelling. Had the car been constructed (as it ought to have been) so as to allow the driver a clear and unobstructed view of the road to his front and left front, and had he kept a proper lookout so as to avoid foot passengers and traffic, the accident to the pursuer's son would not have happened. . . . . The said accident was thus due either to the faulty and dangerous construction of said car, in that it prevented the driver from having a proper view of the road in front and on the left front in the direction in which the car was travelling, or to the culpable failure of the driver to keep a good lookout and

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warn foot-passengers crossing the street of the approach of his car. . . .

The pursuer also founded upon a Board of Trade regulation to the effect that "every car shall be so constructed as to enable the driver to command the fullest possible view of the road. . . ."

The defenders maintained, firstly, that the action was irrelevant; secondly, that the pursuer was not entitled to present his case in an alternative form, but must stand by his averment on construction, because it negatived the averment of want of lookout by the driver, and there was no averment of reckless speed (*M'Sourley* v. *Magistrates of Paisley*, 1902, 10 S.L.T. 86); thirdly, that the case was more suitable for proof before a judge than jury trial, because of (1) the doubtful relevancy of the case; this could only be a relevant case if a child is entitled to greater consideration than an adult in crossing a road; the pursuer's case as stated would constitute contributory negligence against an adult (*Barclay* v. *M'Alpine & Sons*, 1904, 12 S.L.T. 45; *Cooke* v. *Leith Dock Commissioners*, 1905, 13 S.L.T. 536; *Hastie* v. *Magistrates of Edinburgh*, 1907, S.C. 1102; *Vallery* v. *M'Alpine & Sons*, 1905, 12 S.L.T. 828; *Jack* v. *The Rivet, Bolt and Nut Co. Ltd.*, 1904, 6 F. 572; *Crawford* v. *Magistrates of Edinburgh*, 1906, 14 S.L.T. 383). (2) The attack upon the construction of the cars depended upon the interpretation of the Board of Trade Regulations (*M'Lean* v. *Johnstone*, 1906, 8 F. 836; *Kerr* v. *Screw Collier Co. Ltd.*, 1907, 15 S.L.T. 444), and was a question of expert evidence more suitable for a judge than a jury.

The pursuer maintained that he was entitled to the verdict of a jury unless very special cause was shewn (*M'Intosh* v. *Commissioners of Lochgelly*, 1897, 25 R. 32; *Jamieson* v. *Hartil*, 1898, 25 R. 551; *Grieve* v. *Turbine Steamers Ltd.*, 1903, 11 S.L.T. 379; *Smith* v. *Magistrates of Edinburgh*, 1891, 28 S.L.R. 637; *Glass* v. *Leitch and Others*, 1902, 5 F. 14), and submitted that no such case was made out here: it was a plain issue of fact.

The Lord Ordinary *held* that the case was one for proof, not jury trial; he expressed the opinion in his note that the pursuer was not entitled to present his case in an alternative form, and issued the following interlocutor:—

The Lord Ordinary having heard counsel on the proposed issue for the pursuer, No. 10 of process, and considered the question as to the mode of proof to be allowed in this case: Finds that the cause is more suitable to be disposed of by way of proof before his Lordship than by a jury: Therefore disallows the issue; repels the defenders' first plea in law; allows to the parties a proof of their averments on record.

Lord Guthrie.—The pursuer's case is alternative. Either the car which knocked down and ran over his pupil son was so badly constructed that the driver could not have seen the child, so as to avoid knocking him down and running him over, or, if these averments are unfounded, then the accident was due to the driver's failure to keep a proper lookout. I do not think the pursuer is entitled so to state his case. The faulty condition of the car was of a permanent nature; and the identical car, according to him, is still running unaltered, as well as seven others of the same construction. His experts must know whether it is the fact, as alleged by him, that the stair of the car is so constructed "as to completely obscure his (the driver's) vision to the front and left front of the direction in which the car is travelling" (page 5 foot), and that "the driver did not and could not see the boy or know that he was there till the car was upon him" (page 6, middle). If permission to examine and test the car was refused, the pursuer could have got an order. The right to state alternative cases must be subject to some limitation. Obviously a pursuer would not be entitled to say, in the case of an existing and unaltered carriage, that it had no brake, or, if it had a brake, it was not applied. For the same reason, namely, that the alternatives are mutually inconsistent, I hold the pursuer to his primary averment of bad construction of the car, completely obscuring the driver's vision to his front and left front, so that he did not and could not see the boy, or know that he was there, till the car was upon him. If that averment is well founded, the accident could not have any connection with want of proper lookout on the driver's part, and the case made on record against the defenders, as being responsible for the driver's want of lookout, is irrelevant, on the pursuer's averments.

In the absence of any specialty, the result would be to send the case to jury trial, on the question of the faulty construction of the car. But the defenders maintain that, on the pursuer's averments, properly construed, it is clear that the proximate cause of the accident was, first, the action of the parents in allowing so young a child to go about unattended; and second, the action of the child in stepping in front of a moving car. They found on the averment in Cond. 2 to the effect that the child, going unattended, after walking some distance along the pavement on the west side of Inverleith Row, left the pavement and was "in the act of walking across Inverleith Row" when he was knocked down by a car, travelling northwards, but not at excessive speed, on the westmost pair of rails. As stated in Cond. 2, the averments, so far as any explanation is given of the conduct of the child, resemble the facts as they came out in the case of *Fraser* v. *Edinburgh Tramways Company*, 1882, 10 R. 264. But the pursuer explains that the child did not walk straight across but was going in a slanting direction, the result being that the car was coming up behind

him, so that he could not see the car, nor could he hear it, through the strong north wind and the noiseless running of the car produced by the greasiness of the rails. The pursuer, who declined to amend, thus seems to me to table a case of such doubtful relevancy that although, with his counsel's explanation, I am not prepared to throw it out, I think it ought to be sent to proof and not to jury trial. The reason for sending the case to proof is strengthened by these circumstances: first, the delicate nature of all questions of contributory negligence in the case of children; second, the effect of the Board of Trade Regulations relied on by the pursuer, if they go beyond a mere statement of the defenders' common law liability; and third, because the question of the proper construction of cars, depending as it does on expert evidence, is better fitted for trial before a judge than for jury trial. —6*th March* 1908.

Counsel for Pursuer, Orr, K.C., Kemp; Agent, F. S. Cownie, S.S.C.—Counsel for Defenders, G. Watt, K.C., Munro; Agents, Macpherson & Mackay, S.S.C. A. S. P.

SECOND DIVISION.

(*Lords Stormonth-Darling, Low and Ardwall.*)

365. Dempster *v.* William Baird & Company Limited.

Expenses—Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37)—Stated Case—"Expenses of the Stated Case"—£3, 3s. Allowed, Which Includes the £1 to Sheriff-Clerk.

Objections to Auditor's Report.

(*Reported supra*, p. 881.)

The Court having found the appellant entitled to the expenses of the stated case, an account was duly lodged and taxed. The Auditor fixed the amount due at £5, 0s. 8d. The respondents lodged objections, and maintained that the Court having in *London and Edinburgh Shipping Co.* v. *Brown*, 1905, 7 F. 488, fixed £2, 2s. as a reasonable amount for adjusting the stated case, that sum only ought to be allowed. Counsel referred also to *M'Govern* v. *Cooper & Co.*, 1901, 4 F. 249.

Counsel for the appellant maintained that in *Brown's* case what was laid down was that the party found entitled to expenses was to be allowed whatever in the circumstances was fair and reasonable. Two guineas was clearly too little if that was to include the £1 paid to the sheriff-clerk, which was included in *Brown's* case. What was disallowed in *Brown's* case was expenses in connection with counsel's assistance in regard to revising and adjusting the case.

The account in the present case contained no charge with reference to counsel's assistance. It included the £1 paid in terms of the Act of Sederunt of 3rd June 1898, and charges with reference to drawing minute to Sheriff to state a case; attendance receiving draft; attendance on respondent's agent with a view to having case adjusted; attendance on sheriff-clerk with draft case and making representation against question of law, etc.; correspondence and attendance as to the amount of wages, and similar charges.

2nd Div. — Dempster v. William Baird & Co. Ltd.

Lord Stormonth-Darling.—We shall adopt the practice in *Brown's* case, to the extent of modifying the fee to be allowed to the appellant at three guineas, which includes the one pound paid to the sheriff-clerk.—7*th March* 1908.

Counsel for Appellant, G. Watt, K.C., Spens; Agent, J. A. Kessen, S.S.C.—Counsel for Respondent, M'Clure, K.C., Horne; Agents, M. J. Brown, Son & Co., S.S.C. F. A. U.

OUTER HOUSE.

(*Lord Guthrie.*)

366. Allan *v.* Dunfermline District Committee of the Fife County Council.

Reparation — Negligence — Relevancy—Safety of Children — Sewage Tanks in Private Ground—Child Drowned—Circumstances in Which Held No Duty to Fence.

The pursuer was the father of a child of six years of age who fell into and was drowned in a sewage tank, the property of the defenders. On record he averred that the defenders were responsible, firstly, as the public authority having control of public roads and footpaths, because they had failed to fence off a public footpath from said settling tank; and secondly, because, as proprietors of the settling tank and of the ground in which it was located, they had failed "(1) to fence the said ground adjoining said path and (2) to fence the said settling tanks." The pursuer, however, did not press the first ground of liability, but rested his case upon the second only. The circumstances in which the accident to the pursuer's child was said to have taken place and the fault alleged against the defenders, are set forth in the following averments.

Cond. 2. The pursuer's dwelling-house is a top flat, and is situated at the back and on the north side of Middleton Place aforesaid. It is entered by an outside stair, which opens upon a roadway running north of and parallel to Middleton Place, and leading to a grass park belonging to the Carron Company Limited. This grass park opens upon the public road that runs in a north-easterly direction from Middleton Place, and is contiguous to ground upon which settling tanks have been erected by the defenders in connection with the drainage scheme of Crossgates. The said ground and settling tanks belong to the defenders. On 21st June 1907 the grass park belonging to the Carron Company

Outer House. *Lord Guthrie.*

Allan v. Dunfermline District Committee of the Fife County Council.

Limited had no gate, and its fencing was completely broken down and useless. This park was then open to the public, who used it daily without check or hindrance as after mentioned. On said date there was no fence on the east side of the defenders' ground between the defenders' ground and the said grass park. There was thus free and unhampered access to and past the defenders' said settling tanks for all who wished to go, and there is a well-beaten footpath used by miners going to their work at certain of the pits belonging to the Fife Coal Company Limited, and by other members of the public. . . . By the footpath mentioned, adults and children had free access, uninterruped by fence or otherwise, and the pursuer believes and avers that said footpath was, prior to the date of said accident, used by members of the public constantly without let or hindrance, and since that date has been used by members of the public notwithstanding the erection of a fence on the east side of the defenders' said ground. . . . Said footpath runs within two or three feet of said tanks. . . .

Cond. 4. . . . . The tanks on said ground are six in number, but form one oblong structure, and are enclosed by flat-topped walls, which on the west are flush or level with the ground for a number of feet. At the north-west corner there is also access by means of a gangway. At the north-east corner the ground reaches to within a foot or thereby of the top of the tanks. . . . The flat-topped nature of the walls, the said gangways, and the ground level with them on their south-west and north-east sides, permit children to run about the said tanks, which are not protected in any way whatever, and this was well known to the defenders prior to 21st June 1907. . . . Many accidents have happened to children at said tanks, and in particular a young girl fell into them about two years ago. . . . These accidents were or ought to have been known to the defenders. . . .

Cond. 5. On 21st June 1907 the said Peter Baxter Allan, along with some other children, went along said open path . . . . and . . . . stopped to play there. While playing at said tanks the said Peter Baxter Allan fell into and was drowned in the centre tank situated at the north-east of said structure.

Cond. 6. The death of the pursuer's son was due to the fault and negligence of the defenders in respect that they failed—(1) to fence the said ground adjoining the said path, and (2) to fence the said settling tanks. It was their duty, both as proprietors of the said ground and as the District Committee of the County Council, to see that the ground on which the tanks are situated was properly fenced or that the tanks were properly fenced in, but this duty they failed to perform, and their negligence caused the said accident. The defenders were aware of the dangerous and unfenced condition of the ground and of the tanks, and that the said footpath and stile were habitually used by miners and other members of the public, but they never stopped or tried to prevent any person from using the said footpath, or children from frequenting the said path, ground and settling tanks, and they did not put up any notice warning the public of the nature of the ground or the danger arising from the settling tanks, although it was their duty to do so. The defenders were, on said date, aware that their ground was only fenced on the north, at which point they had put up a stile to give access to it. They knew that the ground was bounded on the north by the public road, and that children and others had free access to the tanks from that direction and from the south, but they used no means to prevent children or members of the public from falling or stumbling into said tanks until after the date of the said accident. They have, however, since the accident, put up barbed-wire cattle-fencing on the south and the south-east ends of said path, and have removed the said stile at the north end, except its top step, and have heavily re-wired the fence where it had been, with barbed wire. If they had taken these precautions prior to the accident, as it was their duty to do, the pursuer's son would not have been drowned, and thus they are responsible to the pursuer in reparation for his death. Moreover, the accident would not have happened if they had put a fence round and in close proximity to the said tanks. This could have been easily and cheaply done, and would not have interfered in any way with their utility, but this they did not do, although they ought to have done so. The tanks are situated between and in close proximity to both Middleton Place, which is part of the public road leading from Crossgates to Dunfermline, and the public road leading from Main Street, Crossgates, to the said manse, and there are many dwelling-houses in their immediate neighbourhood. Had the fencing, which has been erected since the date of the accident, been in existence prior thereto, the pursuer's son could not have entered the ground, and he would not have been drowned, or if he had entered the ground by way of the stile, he would not have been drowned had the tanks themselves been fenced. The defenders are thus responsible in reparation to the pursuer for the death of his said son. The averments in answer are denied. The distance from the pursuer's house to the scene of the accident is less than a quarter of a mile.

The pursuer therefore maintained that in these circumstances the defenders were bound to anticipate that children would stop and play at said tanks, and to provide against danger to them by fencing. In addition to the cases referred to by the Lord Ordinary the pursuer cited *Black* v. *Caddell*, M. 13,905; *Green* v. *Stirling Road Trs.*, 1882, 9 R. 1069; *Waugh* v. *City of Glasgow Union Railway Co.*, 1883, 20 S.L.R. 585; *Findlay* v. *Angus*, 1887, 14 R. 312.

The defenders maintained that the action should be dismissed as irrelevant. This was not a case of a dangerous place near a public road; the child was a trespasser, and there was no averment even of implied invitation.

The Lord Ordinary *dismissed* the action.

Lord Guthrie.—The fault alleged against the defenders is failure either to fence the path alleged to run alongside the tanks where the pursuer's child was drowned, or to fence the tanks themselves. It was admitted that, if the pursuer has a case, it is against the defenders as proprietors of the ground, and not as a public road authority.

It is not alleged that there is any public right of way along the path in question said to run past the tanks on the defenders' ground. But it is alleged that, prior to the accident (for how long it is not said), the public, including children, have, in the defenders' knowledge, used this path as a means of going from the Dunfermline

to Crossgates Road on the south to the road to Crossgates on the north. Had the pursuer's case been that his child, while proceeding along the path from end to end—that is, from one public place to another—accidentally strayed off the path into a tank in immediate proximity to the path, the question would have arisen whether such an averment was a relevant foundation for a claim of damages, in the absence of any averment either that the child was at the time of the accident engaged on business in which the defenders had an interest (as, for instance, taking food to its father working on the defenders' ground), or at least that the child was passing from end to end on business, as, for instance, going a message or to school. I had a full citation of the cases bearing on issues of those kinds. The pursuer quoted *Gavin*, 1889, 16 R. 509; *Gibson*, 1893, 20 R. 466; *Hamilton*, 1893, 20 R. 995; *Haughton*, 1892, 20 R. 113; *Messer*, 1897, 25 R. 7; *Laughlan*, 1895, 3 S.L.T. p. 209; *Gillespie*, 1906, 14 S.L.T. 85; and the defenders quoted *Prentice*, 1889, 17 R. 484; *Devlin*, 1902, 5 F. 130; *Cummings*, 1903, 5 F. 513; and *Hastie*, 1907, S.C. 1102.

But no such case is made here. The child, at the time of the accident, had left the path, with its companions, for the purpose of playing at the tanks, and while so engaged the unfortunate accident happened. Had the improbable averment been made that the tanks were habitually used, with the defenders' knowledge and approval, by children as a playground, it might have been argued that an invitation was thereby given by the defenders; and the same argument might have been maintained, under certain cases of doubtful authority, even if the averment had only come up to knowledge without objection. But the pursuer makes no such case, and stated that he was not prepared to amend to raise any such case. I therefore hold his averments irrelevant.—6*th March* 1908.

Counsel for Pursuer, M'Lennan, K.C., A. A. Fraser; Agent, Isaac Furst, S.S.C.—Counsel for Defenders, Morison, K.C., Hon. Wm. Watson; Agent, A. V. Begg, W.S. A. S. P.

OUTER HOUSE.

(*Lord Mackenzie.*)

367. Horne *v.* Macgregor.

Post Office — Delivery of Letters — —Interdict—Held that an Action Against a Local Postmaster to Have Him Interdicted From Dealing With Letters in Accordance With Instructions From His Official Superior Was Irrelevant.

In this action Alfred Horne, 58 High Street, Dunbar, sought interdict and decree against Patrick Macgregor, postmaster, Dunbar, in the terms given in the Lord Ordinary's Opinion.

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The pursuer's averments are also given in the Lord Ordinary's opinion. In Cond. 7 the pursuer averred that he had requested the defender to deliver to him the letters, telegrams and other communications addressed to and intended for him under the name Horne, but that on 2nd October 1907 the defender, through the medium of the Secretary of the General Post Office, Edinburgh, intimated to the pursuer's agent that all letters addressed "Horne, Livery Stables (or Stables), Dunbar"; "Horne, Postmaster, Dunbar"; "A. Horne, Dunbar," etc., etc., were to be treated as undeliverable. The pursuer further averred (but this was not admitted by the defender) that he was the only person bearing the name of "Mr Horne," or "Alfred Horne," or "A. Horne," in Dunbar, and that he was the only person in Dunbar bearing the name of "Horne," other than his niece, Miss E. Horne, whose business he managed; and that George Wilson Burnett did not purchase the right to use or trade under the name of "Horne," and had used his own name, "G. W. Burnett," only in connection with his business.

The defender in Answer 9 referred to the terms of sect. 63 of the Act 3 & 4 Vict. cap. 96; the Telegraph Acts and, in particular, sect. 15 of the Act 31 & 32 Vict. cap. 110, and sect. 2 of the Act 48 & 49 Vict. cap. 58. In Statement 3 of his Statement of Facts the defender set forth the instructions received by him from the Secretary of the General Post Office, Edinburgh, and averred that he had acted upon these instructions and had given directions accordingly. The defender also averred that he had received a letter from George Wilson Burnett in which he intimated that he had purchased the pursuer's business, and had since carried on that business under the name of "A. Horne," and in which he requested that all letters addressed to "A. Horne, or Alfred Horne, hirer or postmaster, or A. Horne or Alfred Horne, Stables, Dunbar, with the exception of those addressed to A. Horne, 58 High Street, Dunbar, should be delivered at the St George Stables."

The pursuer cited *Rowning*, 2 William Blackstone 906; *Whitfield* v. *Lord Le Despencer*, 1778, 2 Cowp. 754; *Lane* v. *Cotton*, 1701, 1 Lord Raymond's Reports 646; *Raleigh* v. *Goschen*, [1898], 1 Ch. 73; *Feather* v. *The Queen*, 1865, 35 L.J. (Q.B.) 200; *Tobin* v. *Reg.*, 1864, 16 C.B. (N.S.) 310; *Bainbridge* v. *The Postmaster-General* [1906], 1 K.B. 178; *Barnes* v. *Foley*, 1776, 5 Burr. 2711; *Stock* v. *Harris*, 1771, 5 Burr. 2709; Addison on Torts (8th ed.), 19, 153; Beavan on Negligence (3rd ed.), Vol. I. p. 240.

The defender cited *Stapleton* v. *The Foreign Vineyard Association*, 1864, 11 L.T. 77.

Lord Mackenzie.—The pursuer here, who is

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an undischarged bankrupt, for some time carried on a posting business in Dunbar, at the St George's Stables there. In January 1907 George Wilson Burnett bought the business, and has since carried it on (the pursuer says under the name of Burnett) at the St George Posting and Livery Stables. The pursuer remained with him as manager till August 1907, when he left. The pursuer then went to be manager of a posting business and livery stables in Dunbar, carried on by his niece, E. Horne. This business is carried on at 54 High Street, Dunbar. The pursuer's residence is at 58 High Street. The pursuer avers in Conds. 4 and 5, that after leaving the St George's Stables, one letter and two telegrams which were addressed to him were not delivered to him. He then sets out that he requested the defender, who is the local postmaster of Dunbar, to deliver to him the letters, telegrams and other communications addressed to and intended for him under the name of Horne. The pursuer then avers that on 2nd October 1907, through the medium of the Secretary to the General Post Office, Edinburgh, the defender intimated to the pursuer's agent that all letters addressed "Horne, Livery Stables" (or "Stables"), Dunbar; "Horne, Postmaster, Dunbar"; "A. Horne, Dunbar," etc., etc., were to be treated as undeliverable. He then sets out that on 19th October 1907 a telegram addressed "Horne," jobmaster, Dunbar, which was intended for him, was not delivered, and that other telegrams and letters, the dates of which are not specified, addressed to or intended for him, had not been delivered to him but had been delivered to George Wilson Burnett.

It is in these circumstances that the present action has been brought by the pursuer against the defender to have him interdicted from delivering to any person other than the pursuer all letters, telegrams, postcards, circulars, parcels or other communications bearing the addresses "Horne, Livery Stables, Dunbar"; "Horne, Stables, Dunbar;" "Horne, Postmaster, Dunbar"; "A. Horne, Dunbar"; "Horne, Dunbar," or addressed in such other manner or way as to shew that they are intended for the pursuer. Then follows a conclusion that the defender should be ordained to deliver all such letters, telegrams, etc., addressed to him as aforesaid or in such manner or way so as to shew that they are intended for the pursuer, either to him personally or at the premises of E. Horne, livery stable keeper and cab-hirer, No. 54 High Street, Dunbar, or at his dwelling-house, No. 58 High Street, Dunbar.

The summons contains a demand upon the defender to act otherwise than in accordance with the instructions given by the Secretary to the General Post Office, as set out by the pursuer himself in Cond. 7. Now, it appears to me that there is sufficient on the pursuer's side of the record to enable this question to be disposed of upon relevancy. The averments of the defender, contained in Answer 9 and Statement 3, are not admitted, and therefore it would not be possible to proceed upon these without a proof. I think, however, it sufficiently appears from what the pursuer himself says that what he wishes the Court to do is first to interdict the defender from acting in accordance with the intimation of his official superior; and, in the next place, to ordain him to do something which would be equivalent to disobeying the instruction so given. It may be that if what the defender was doing was of the nature of a delict it would be no protection for him to say that he was acting in accordance with the instructions of his official superior. Bnt none of the cases cited by the pursuer warrant the proposition that a local postmaster is bound, in consequence of some implied contract with the addressee of a letter, to disregard the orders of his superior. The defender founds upon certain statutes, among others 3 & 4 Vict. cap. 96, sect. 63, and 48 & 49 Vict. cap. 58, sect. 2, which provide that the Postmaster-General may make regulations for the delivery of letters and for the general conduct of telegraphic business. It is not said by the pursuer that the defender has been acting contrary to any regulation. So far as appears, he has been acting entirely in accordance with the directions given by the Secretary to the General Post Office in Edinburgh. In these circumstances I think it would be most unfortunate to comply with the pursuer's request that there should be an enquiry in order that the Court may decide whether the instructions given are reasonable or not in the circumstances. There was an attempt of a similar kind in the case of *Stapleton* v. *The Foreign Vineyard Association*, 1864, 11 L.T. 77, in which Wood, V.C., refused an injunction which was asked against the Postmaster-General, his agents, servants, etc. So far as appears, the Post Office officials seem to have done their duty in the present case, and the pursuer's ground of complaint ought not to be against the postmaster but against Burnett. The pursuer founded upon the case of *Bainbridge* [1906], 1 K.B. 178. The judgment in that case was that the Postmaster-General was not liable in an action of damages for personal injuries alleged to have been caused by the act of one of his subordinates without fault on his part. The ground of judgment was that the subordinate in question was a servant of the Crown, and was not in the employment of the Postmaster-General. I am unable to see that this is an authority for the proposition that the Court, in an action to which the subordinate alone is made a party, is to enquire whether the orders given to him are reasonable or not, and, if it is considered they are unreasonable, then to ordain him to disobey them. There was also a reference made to several old cases decided in England in the middle and latter part of the

eighteenth century, dealing with a controversy which then existed between postmasters and the public, as to whether a postmaster was bound to deliver letters without extra charge within his district. These cases, however, do not support the contention of the pursuer that a postmaster is bound to deliver otherwise than in accordance with the instructions given him.

The conclusion to which I come is that it sufficiently appears from the pursuer's averments what the instructions were in regard to these letters. I am of opinion that there is no implied contract binding the defender to deliver otherwise than in accordance with the orders he receives from his superiors. The pursuer has no right to litigate with the defender the question whether the instructions given him were proper in the circumstances or not. I am accordingly of opinion that the pursuer's averments are irrelevant, and that the action should be dismissed, with expenses.—*8th Februrary* 1908.

Counsel for Pursuer, Orr, K.C., Findlay; Agents, Clark & Macdonald, S.S.C.—Counsel for Defender, Dickson, K.C., Pitman; Agent, J. S. Pitman, W.S. R. C. H.

OUTER HOUSE.

(*Lord Johnston.*)

368. Liquidator of the Ballachulish Slate Quarries Company Limited *v.* Malcolm and Others.

I. Company—Capital—Unpaid Capital—Assignation of Uncalled Capital in Security—Held That an Assignation of Uncalled Capital Intimated to Shareholders Gives Assignees a Valid Security.

II. Company—Borrowing Powers—Ultra Vires—Security—Power in Memorandum to Borrow and "as Security to Dispose" Uncalled Capital—Power in Articles "to Secure Repayment" of Borrowed Moneys by Granting Assignations in Security of Uncalled Capital—Money Borrowed from Bank on Overdraft Without Security—Subsequent Guarantee of Overdraft by Some of Directors to Bank—Subsequent Assignation of Uncalled Capital in Security to Guarantors Intimated to Shareholders—Held, in Competition between Guarantors and Liquidator of Company, that Guarantors Had a Valid Security Over Uncalled Capital.

Petition and Answers.

The facts of this case and the contentions of parties sufficiently appear from the Lord Ordinary's Note.

The Lord Ordinary *held* that the respondents Colonel Malcolm and others were entitled to have the sums realised from uncalled capital set aside and retained for security of their obligations.

Outer House. *Lord Johnston.*

Liquidator of the Ballachulish Slate Quarries Co. Ltd. v. Malcolm and Others.

Lord Johnston.—The Ballachulish Slate Quarries Company was incorporated in 1893, with a capital of £30,000 divided into 600 ordinary shares of £50 each, the whole of which have been issued. It went into voluntary liquidation on 13th August 1907, and the liquidation was thereafter at once placed under the supervision of the Court.

In order to carry on its business it obtained an overdraft from the Bank of Scotland on 8th January 1901 for £3000. This was increased on 7th September 1901 to £5000, but the nominal amount of the overdraft was very much exceeded, and towards the end of 1904 it had reached about £13,000. At this point the bank demanded either reduction of the overdraft or security, and on 12th and 13th October 1904 a letter of guarantee, No. 67 of process, limited to £8500, was granted in the bank's favour by Colonel Edward D. Malcolm, C.B., of Poltalloch, and three others, some, if not all, of whom were directors of the Company, to the terms of which I shall afterwards refer. It is stated, and I think admitted, that the guarantee was intended to be temporary merely, pending a call being made on the shares of the Company, which were then only £24, 10s. paid. But however this may be, at the date when the letter of guarantee was granted, the guarantors did not stipulate for any security from the Company. In December following, however, the proposal to make an immediate call having apparently been departed from, the guarantors demanded that a bond of relief and assignation in security of the uncalled capital of the Company should be granted in their favour, and this was acceded to (see directors' minutes of 14th December 1904, and 20th, 25th and 30th January 1905), and accordingly the bond of relief and assignation of uncalled capital in security, No. 68 of process, was granted of the last mentioned date in favour of the guarantors, and it was intimated to the shareholders on 6th March 1905.

The call of £7, 10s. per share which had been contemplated in the end of 1904, was made on 5th June 1905 and produced £4500, and the guarantors did not interpose to impound the proceeds, but permitted them to be applied with other monies in reduction of the overdraft; and accordingly in November 1905 the overdraft had been reduced to between £9000 and £10,000. At this stage pressure was brought on the Company, both by the bank and the guarantors, the result of which was that by their Minute of 14th November, as modified by that of 28th November 1906, the directors resolved on a further call of £5 on the Company's shares, which was made payable

OUTER HOUSE. *Lord Johnston.*

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£2, 10s. at 31st December 1906 and £2, 10s. at 31st January 1907, "the above calls to be made payable to Messrs Menzies, Bruce-Low & Thomson, as agents for the guarantors, to whom the uncalled capital has been hypothecated, and applied by them in partial discharge of the sum guaranteed." On this call being made there remained £13 per share still to call, and on 12th December 1906 the directors minuted that they "resolved to make, and hereby make, a call of £10 per share, payable in two instalments of £5 each at the end of March 1907 and at Whitsunday 1907 respectively, the proceeds to be payable to Messrs Menzies, Bruce-Low & Thomson, W.S., to be placed to the credit of a deposit or other separate bank account in name of Messrs Macandrew, Wright & Murray, W.S., and Messrs Inglis, Orr & Bruce, W.S., on behalf of the guarantors, or otherwise as may be hereafter arranged." Although this last-mentioned call of £10 was made, so far as the resolution of the directors went, it does not appear to have been intimated to the shareholders, and certainly it was not carried into effect. I gather that the reason of this was that the bank had at once made it clear that, in respect of these calls having been made in November and December 1906, they would require a further guarantee or other security for the unsecured portion of the overdraft. Accordingly, when the Company went into liquidation, there was still £13 per share uncalled, and this amount has been made a call in the liquidation by the liquidator.

The sums which require to be dealt with in this note are the following:—

1. A sum of £540, being payment by Mr Edward Bruce, one of the guarantors, of the £5 call of 28th November 1906 on his holding of thirty shares in the Company, together with payment in advance of the £13 per share then remaining to be called on his said shares.

2. The sum of £2493, being the proceeds of the call of £5 per share made on 28th November 1906, from the whole shares of the Company, other than Mr Bruce's said thirty shares.

These two sums were deposited, not in the name of Messrs Menzies, Bruce-Low & Thomson, as had been originally arranged, but in the joint names of Messrs Macandrew, Wright & Murray, and Messrs Inglis, Orr & Bruce, on behalf of the guarantors.

3. The sum of £357, being the balance of the last mentioned call, which had not been recovered by the directors, but which has been or is to be paid to the liquidator.

4. The sum of £7410, being the proceeds of the call of £13 per share made in the liquidation, under deduction of the £390 prepaid by Mr Bruce on his thirty shares, and which is included in the sum first above mentioned.

The guarantors claim that they are entitled to the whole of these sums so far as necessary to secure their relief of their obligation to the bank under the letter of guarantee. The liquidator, on the other hand, maintains:

First, That no effectual assignation of uncalled capital, or at least of capital remaining uncalled at the date when a company goes into liquidation, can be made; and

Second, That no such assignation has in the circumstances of the present case effectually been made.

The first question is therefore a general question, and assumes power in the Company by its Memorandum and Articles, and in the directors by the Articles, to borrow money and to pledge the uncalled capital of the Company. The question has not arisen for decision in Scotland, but assuming the above, I have no hesitation in saying that it must be decided here, as in England, in the affirmative. There is in England a series of authorities which has established this. I refer to *Stanley's* case (1864), 4 De G., J. and S. 407; *Sankey Brook Coal Co.* (No. 2), (1870), 10 Eq. 381; *Bank of South Australia* v. *Abrahams* (1875), L.R. 6 P.C. 265; *Phœnix Bessemer Steel Co.* (1875), 44 L.J. Ch. 683; *In re Pyle Works* (No. 1), (1890), L.R. 44 Ch. D. 534; and *Newton* v. *Anglo-Australian Co.*, L.R. 1895, A.C. 244. The latter case, though not decided in the House of Lords, was decided by the Privy Council, upon the New South Wales Companies Act of 1874, which for the purposes of the case is identical with the Companies Act 1862 of the United Kingdom. As the Privy Council, on which sat five members of the then House of Lords, were interpreting a legislative enactment which applies to Scotland as well as to England and to some at least of the Colonies, I do not think that I could with propriety do otherwise than simply accept their judgment and apply it in Scotland. But I would venture to quote the following passage from Lord Macnaghten, who delivered their Lordships' judgment. Referring to the case of *In re Pyle Works* (*supra*), his Lordship says (p. 248): "The main argument against the validity of the charge was that it seemed to contravene the directions of the Act in regard to the application of moneys recovered from contributories in the winding up. But the answer was obvious. The liability of a contributory as a present member to pay calls in the winding up, is not a liability springing into existence for the first time on the company going into liquidation. It is merely the ripening of that liability which the contributory undertook when he became a member. The liquidator, no doubt, is bound to distribute what belongs to the company in the manner prescribed by the Act. But after all the question is, What does belong to the company? What are its assets or its property? That must depend upon what dispositions have been made, and what charges have been validly created while the company acting within its powers was free to deal as it pleased with its own.

"Their Lordships see no reason to differ from the conclusion at which the Court of Appeal arrived in the case of *In re Pyle Works*. But they desire to add that if they felt any doubt about the matter, they would have been most reluctant to introduce into the administration of company law in a colony which has adopted the Act of 1862 a rule different to that established by judicial decisions in this country. There is no case in which uniformity of practice is more important or more desirable."

I conclude therefore that a charge on the uncalled capital of the Company is just as competent in Scotland as in England. But then, in order that it may be effectual, it is necessary that it should be effected according to the law of Scotland—that is, that the law of Scotland, which requires intimation of an assignation, should be attended to (*In re Queensland Mercantile and Agency Co.*, L.R. 1892, 1 Chan. 219; *Liquidator of Union Club Ltd.* v. *Edinburgh Life Assurance Co.*, 1906, 8 F. 1143). But this has been done in the present case, as the bond of relief and assignation in security was intimated to each shareholder of the Company at the time it was granted, and I am not informed that there has been any change on the register of shareholders.

It remains therefore to consider the second question, Whether in the circumstances of the present case the charge is good? Now I do not think that it can be seriously disputed that both the Company and the directors of the Company were empowered to borrow and to pledge the uncalled capital in security. The power is taken by the Company expressly and not as matter of implication in Article 3 (*e*) of the Memorandum, and although the language of Article 53 of the Articles of Association is a little more confused, I have no doubt that the power is equally expressly conferred upon the directors. But it was strongly contended on behalf of the liquidator that the directors had not borrowed money and granted an assignation in security thereof in terms of the power conferred upon them, and that what they actually did was therefore *ultra vires*.

It is said that the Memorandum empowers the Company to borrow money by the issue of debentures and other documents of debt, as, for instance, "bonds and dispositions and assignations in security, bills of exchange, obligations and other securities for money, and by way of such security to dispose of absolutely or in trust, mortgage, pledge or charge all or any part of the Company's undertakings, assets, revenue, works, subjects and property, including uncalled capital, or to borrow money as aforesaid without any security." There can be no doubt therefore that under their Memorandum the Company had power to assign by way of security its uncalled capital. Turning, then, to the 53rd head of the Articles of Association, the directors are thereby authorised at their discretion to borrow moneys for the purposes of the Company and to "raise or secure the repayment of such moneys in such manner and upon such terms and conditions in all respects as they think fit"; and in particular by the issue of debentures charged upon "the property and rights of the Company, both present and future, including the uncalled capital thereof," or by granting bills, mortgages, bonds and dispositions and assignations in security (including therein bonds of cash credit) over all property of the Company, "including the uncalled capital thereof." It is therefore clear that the directors are empowered on behalf of the Company to exercise the Company's power under their Memorandum, by borrowing and assigning in security, *inter alia*, the uncalled capital of the Company.

But then it is said that the directors have not done what the Memorandum and Articles authorised them to do; that they have not borrowed on the security of the Company's uncalled capital; that they have borrowed from the bank and given the bank no security over the uncalled capital or over any other assets of the Company; but having borrowed from the bank they have given a security to persons from whom they have borrowed nothing, but who have only given to the bank a guarantee of their advances to the Company, which guarantee involves merely a contingent obligation and may never ripen into an actual one. It is said that for such an assignation neither the Memorandum nor the Articles give any authority. I think that such construction is not warranted by any reasonable reading of the documents in question. In the first place, I do not think that there is any obligation on the Company or its directors to give the security *unico contextu* with raising the money. An advance may be made without security, but the time may come when, if the advance is to be continued, security must be found. In such case, if security is found, the money is virtually paid off on the original footing, and re-borrowed on the new footing. And in the second place, I see no necessity for the security being given directly to the lender, and not indirectly through a guarantor. Nor do I see any necessity for the security being for an absolute obligation to the lender, and not merely for a contingent obligation to the guarantor. I think that the course which has been taken here is not only amply covered by the spirit of the Memorandum and Articles, but even by their letter. The borrowing has been by a composite arrangement — an advance by the bank, a guarantee by Colonel Malcolm and others, and an assignation in relief to the guarantors. Now, though the arrangement be composite, it surely comes within the express power of the directors "to secure the repayment of such moneys" as they borrow, "in such manner, and upon such terms and conditions, in all respects as they think fit," and in particular by assigning un-

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called capital. And equally does it come under the express description in the Memorandum of "other securities for money" when that is read along with the context, and is just one of those securities by way of which the Company is empowered to charge its uncalled capital. I may refer to the case of *In re Pyle Works* (No. 2), L.R. (1891), 1 Ch. 173, where the circumstances, though not identical, were very similar.

But then the guarantors' claim against the Company is contingent merely, and they are entitled to recover what under their letter of guarantee they are called upon to pay to the bank. This is expressed in the letter of guarantee, No. 67 of process, "not to exceed £8500 sterling, and interest from the date or dates of advance." When read in connection with the subsequent provision, "that this guarantee shall apply to and secure any ultimate balance of the sums that shall remain due to you (the bank) after applying any dividends, compositions or payments which we may receive," the obligation to pay interest from the date or dates of advance is one difficult of practical interpretation. But I understand it to be accepted at any rate that the guarantors are bound in payment of the last end of the bank's advances after the bank has applied in their reduction all recoveries, including dividends in liquidation, from the Company, the limit of their guarantee, however, being £8500 of principal, whatever may be the obligation as regards interest. If, however, there is any dubiety about this, or any question of the meaning of the obligation as to interest, the parties may require to be further heard.—*6th March* 1908.

Counsel for Petitioner, Orr, K.C., J. A. T. Robertson; Agents, Inglis, Orr & Bruce, W.S.—Counsel for Respondents Colonel Malcolm and Others, Blackburn, K.C., Maitland; Agents, Macandrew, Wright & Murray, W.S.

R. S. B.

OUTER HOUSE.

(*Lord Mackenzie.*)

369. Inverness County Council *v.* Burgh of Inverness.

I. Local Government—Extension of Burgh—Assessment—Transference of Area from County to Burgh—Adjustment of Liability for Proportion, Effeiring to such Area, of Loans for County Purposes Secured on County Assessments—Held that a Burgh Taking in, Under the Burgh Police (Scotland) Act 1892, an Area Formerly in a County Was Not Liable to the County in Payment of a Proportional Part of Loans by the County Secured on the Assessment of the County or of the Division of the County in which the Area was Formerly Included—The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sect. 11.

II. Public Authorities Protection Act 1893 (56 & 57 Vict. cap. 61)—Expenses as Between Agent and Client—Motion for Expenses on this Scale Refused.

In this action at the instance of the County Council of the County of Inverness against the Provost, Magistrates, and Town Council of the Royal Burgh of Inverness, the pursuers sought to have it found and declared that "the defenders are liable in repayment of a rateable or proportionate share of all loans effected by the pursuers the said County Council for the general purposes of the County of Inverness, or for the purposes of the First or Inverness District of said County, and existing at 11th May 1903, and secured on assessments leviable by the pursuers the said County Council on said County or said District respectively, said share being the proportion of the amount of said loans respectively which the assessable rental as existing at said date of that area of said County and District, which was transferred on said date by interlocutor of the Sheriff of the County of Inverness to the Burgh of Inverness, bore to the assessable rental of said County at said date in the case of loans secured on assessments leviable by the pursuers the County Council on said County, and to the assessable rental of said District at said date in the case of loans secured on assessments leviable by the pursuers the County Council on said District; and it having been so found and declared, or whether it shall be so found and declared or not, the defenders ought and should be decerned and ordained by decree foresaid to make payment to the pursuers" of three sums which were the proportions exigible from the transferred area of the balance unpaid on three loans raised by the pursuers for general county purposes, and of three sums being the proportion of balance unpaid on three loans raised by the pursuers for the purposes of the First or Inverness District of the County, or alternatively for six sums being the proportions of the annual instalments payable in repayment of the said loans.

The nature of these loans is given in the Lord Ordinary's opinion.

The Pursuers pleaded:

1. The defenders having taken over the administration of the area in question, are liable for its debts and liabilities existing at the date of transference, and the pursuers are accordingly entitled to decree of declarator as concluded for, and to decree in terms of one or other of the alternative petitory conclusions of the summons, with expenses.

2. The area in question having become liable in repayment of a *pro rata* share of the loans referred to on record until said loans are repaid, and the said liability subsisting at the date when said area was trans-

ferred as condescended on, the pursuers are entitled to decree of declarator as concluded for, and to decree in terms of one or other of the alternative petitory conclusions of the summons, with expenses.

The Defenders pleaded, *inter alia*:

4. The defenders are entitled to absolvitor in respect that—

(*a*) The loans condescended on were effected by the pursuers upon the security of rates leviable by them within the area comprised for the time being within the county of Inverness, or within the first district thereof, exclusive of any royal or parliamentary burgh situate therein, according to the boundaries of such burgh for police purposes;

(*b*) The transferred area in question ceased upon the extension of the burgh boundaries to be within the county of Inverness as above defined;

(*c*) No real security affecting any part of said transferred area was constituted by any of the mortgages or bonds and assignations in security founded on by the pursuers;

(*d*) No rates affected by any of the said mortgages or bonds and assignations in security are levied or leviable by the defenders within the transferred area;

(*e*) The statute under which the transference of said area from the county to the burgh took place contained no provision for adjustment of debts and liabilities between the county and the burgh consequent upon such transference.

The Burgh Police (Scotland) Act 1892 (55 & 56 Vict. cap. 55), sect. 11, enacts that "upon the application of the Commissioners or of the Council of any burgh," and after intimation and, if necessary, enquiry, "it shall be lawful for the Sheriff, after hearing all parties interested, from time to time to revise, alter, extend, or contract the boundaries of such burgh for the purposes of this Act, but so as not to encroach on the boundaries of any other burgh," and to divide the same into wards, "and the Sheriff shall define, in a written deliverance on such application, the new boundaries of such burgh and wards, for the purposes of this Act; and such deliverance, unless appealed against (in manner hereinafter provided, shall be final; and when recorded along with the application on which it proceeds in the Sheriff Court books of the county, shall fix and determine the boundaries of such burgh and wards for the purposes of this Act. . . ."

Sect. 21 of the said Act provides that "wherever the boundaries of any burgh have been determined in terms of this Act, the whole powers and duties (including the rights to levy assessments) exerciseable by any local authority acting under the Public Health (Scotland) Act 1867, and Acts amending the same, within the district or districts comprehended within such burgh shall cease and determine, and the same shall be transferred to and vested in the Commissioners under this Act, and all drainage, water, and other works executed in such district or districts by such local authority in the performance of its powers and duties under the said Acts shall be taken over by the Commissioners under this Act, who shall be liable for the whole debts and obligations of such local authority applicable to such district or districts. . . ."

Sect. 22 of the said Act provides that where under the Act any area of a county is annexed to a burgh, "the Commissioners of such burgh shall pay annually to the County Council of such county from which such area is taken such proportion of the expenses payable by the County Council for the preparation of the register of parliamentary voters for such county or division thereof, as the case may be, as the number of voters in the said area shall bear to the total number of voters in such county or division thereof."

The Lord Ordinary *found* that the pursuers' averments were irrelevant, and *dismissed* the action.

Lord Mackenzie.—On 11th May 1903, by interlocutor of the Sheriff of the County of Inverness, the boundaries of the Burgh of Inverness were extended, under the provisions of the Burgh Police (Scotland) Act 1892, sect. 11, so as to include an area of ground which prior to that date had formed part of the County, and which was situated within the First or Inverness District of the County.

This is an action at the instance of the County Council to have it declared that the Burgh are liable in repayment of a rateable or proportionate share of all loans effected by the pursuers, for the general purposes of the County of Inverness, or for the purposes of the First or Inverness District of the County as the same existed at 11th May 1903, which were secured on assessments leviable by the pursuers on the County or District respectively.

Now, in order to judge of the soundness of the pursuers' demand, it is necessary, in the first place, to consider what the loans are of which the Burgh of Inverness are asked to bear a rateable or proportionate share. To take first the loans raised by the pursuers for general county purposes, these are (*a*) loan of £2600, dated 18th October 1894; (*b*) loan of £1400, dated 23rd May 1898; and (*c*) loan of £5150, dated 3rd February 1903. No. 6 of process deals with the loan of £2600. It is a bond by the County Council of Inverness in favour of the Scottish Legal Life Assurance Society. It bears that by virtue of (1) the Police (Scotland) Act 1857, and (2) the Local Government (Scotland) Act 1889, and by virtue of the consent of the Standing Joint Committee, the County Council, in consideration of the advance of £2600 as a loan for the purpose of erecting new police houses within the county, bound and obliged themselves and their successors in office and representatives whomsoever, out of the moneys to be raised under the annual assessments by the said Acts authorised to be imposed and levied within the county, and designated the police assessment, and all other rates and assessments which they could competently charge with repayment of the said loan, to repay the sum borrowed to the lenders, and that by thirty equal yearly instalments. Then follows an assignation in security of all and whole the foresaid

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police assessment and all other assessments as the same should become due and payable from time to time. There was also an obligation on the borrowers to impose and levy such assessments as should be sufficient to provide for due payment of the principal, interest and penalties. No. 7 of process is a bond and assignation in security by the County Council of Inverness in favour of the Parish Savings Bank of Dumfries for the loan of £1400, which was obtained in order to provide for the cost of new police stations and the balance of the cost of those already built. The terms of this bond are practically the same as those of No. 6 of process above referred to. No. 8 of process is a bond and assignation in security by the County Council in favour of the Savings Investment Trust (Limited) for the loan of £5150 which, as the bond narrates, was obtained to pay the price of the building at Inverness purchased from the Prison Commissioners for the purpose of providing accommodation and rooms for the transaction of the business of the County Council, and also to provide certain police accommodation. The only difference between this bond and the two foregoing is that there is in it an assignation in security not only of the Police Assessment but also of the County General Assessment leviable under the Local Government (Scotland) Act 1889.

Turning now to the loans raised by the pursuers for the purposes of the First or Inverness District of the County, these are (*a*) a loan of £3000, dated 2nd April 1894, and (*b*) a loan of £500, dated 13th October 1899. No. 9 of process is a mortgage to secure the loan of £3000, and sets out that the County Council had resolved to borrow that sum under the powers contained in the Roads and Bridges (Scotland) Act 1878, sect. 58, and in the Local Government (Scotland) Act 1889, sect. 67, for the purpose of defraying the cost of the construction of new roads and bridges in the First or Inverness District of the County of Inverness, under the powers contained in the said Acts; that they had borrowed the said sum from William Carson, repayable by thirty equal instalments. The security for the loan was an assignation of the assessment for maintenance, management, and repair of highways leviable in the First or Inverness District of the County of Inverness, under the Roads and Bridges (Scotland) Act 1878, and the Local Government (Scotland) Act 1889, and of all other moneys, assessments, and rates which the County Council had power to levy within the said First or Inverness District and charge for the purposes of the said security. No. 10 of process is a bond and assignation in security by the County Council in favour of the trustees for the Ardrie Savings Bank for the loan of £500, which was obtained for the payment of the expense of constructing a new bridge across the Craggie Burn, near Craggie Inn, in the First or Inverness District of the County, under the provision of the Roads and Bridges (Scotland) Act 1878, and the Local Government (Scotland) Act 1889. The assignation in security was of all assessments to be raised and paid within the First or Inverness District of the County, for payment of the expense of new roads and bridges under sect. 58 of the Roads and Bridges (Scotland) Act 1878, as amended by sect. 16 of the Local Government (Scotland) Act 1889, being the road maintenance rate of the said district, and that by thirty equal annual instalments.

Now, what is the theory upon which the pursuers seek to make the defenders liable for portions of these loans as concluded for in the summons? Is it because there is a contract, statutory or otherwise? There is certainly no contract under the Burgh Police Act of 1892, which is the statute under which the Sheriff extended the boundaries of the burgh. That Act contains no provision for the apportionment of debts and obligations except in the two cases dealt with by sects. 21 and 22, dealing respectively with matters pertaining to public health and registration. The legislature in 1892 having dealt expressly with the adjustment of certain debts and obligations, and said nothing about any other, must, in my opinion, be held, on the ground of *expressio unius*, to have intended that there should be adjustment only in the two cases expressly dealt with. In 1903 a different view seems to have been taken, because, in the Burgh Police Act of that year, sect. 96 incorporates sect. 50 of the Local Government (Scotland) Act 1889. If the boundaries of the burgh had been extended subsequent to the Act of 1903 having come into operation, it is conceded that the pursuers would have had a title, failing agreement, to apply to the Sheriff to adjust their respective liabilities for the debts in question. There is, however, no provision in the Act of 1892 similar to that contained in sect. 96 of the Act of 1903, and I am unable to read into the Act of 1892 a section which it does not contain. I am accordingly of opinion that plea 4 (*e*) for the defenders is well-founded.

The pursuers, however, urge that they have a claim in equity. They contend, as I understand their argument, that anyone who takes land must take it *cum onere*; that it was incumbent upon the burgh to have got from the Sheriff a declaration that the area in question should cease to be burdened with any portion of the debts for which it was liable at the date of the transference, and that, as they failed to do this, the debt still affected the transferred area. They founded upon the cases of *Caterham Urban Council* [1904], A.C. 171, and *West Hartlepool Corporation* [1907], A.C. 246, in support of this contention. All that these cases decided was that, on a construction of certain statutory provisions, a rural district in the one case and a county in the other were not entitled to com-

pensation for any loss of assessment in respect of areas transferred from them. Certain expressions in the judgments were founded upon, particularly in the opinion of Lord Davey in the *Caterham* case, to the effect that, when a severance takes place of an administrative unit, some adjustment is necessary. It has to be observed, however, that this opinion was expressed in a case where the statute under consideration contained careful provision for such adjustment. It was urged for the pursuers here that in the *Caterham* case it was recognised there is a right to adjustment independent of these provisions. This, however, does not appear to me to affect the defenders' argument above referred to, that, as regards the Burgh Police Act of 1892, the legislature must be held to have made provision for all that was then considered necessary in the way of adjustment. A reference may be made to the *Govan* case, 1902, 4 F. 479, in which the Lord President pointed out that a County Council has no *jus quæsitum* to a valuable rate-producing area, so as to entitle them on that ground to object to the area being withdrawn from them.

It was argued, however, for the pursuers that the burdens in question were inherent in the transferred area. The answer contained in the defenders' plea 4 (*a*) and (*c*) appears to me to be conclusive upon this point. The loans in question were effected by the pursuers upon the security of the rates leviable by them within the area comprised for the time being within the county, or within the district, exclusive of any royal or parliamentary burgh situate therein, according to the boundaries of such burgh, for police purposes, and no real security affecting any part of the transferred area was constituted by any of the mortgages or bonds and assignations in security above referred to.

An examination of the statutes makes this clear. Under the Police Act of 1857 (20 & 21 Vict. cap. 72), sects. 28 and 29 shew that the police assessment is to be imposed upon all lands and heritages within a county. Sect. 78 defines the word "county" as being exclusive of a burgh which has a Police Act or an establishment of police of its own. Inverness is a royal burgh having a separate establishment of police of its own. The section which confers power on the Commissioners of Supply to borrow is sect. 57, and this confers power to charge the future police assessments with the amount of the loan. It is only necessary to notice in passing sects. 13 and 60 of the Local Government Act of 1889, in order to say that these do not affect the question here.

As regards the county general assessment, which, as above stated, is assigned in security by No. 8 of process (the bond for £5150), this is dealt with by sects. 26 and 27 of the Local Government Act 1889. Sect. 27 (1) and (3) shew that this rate is to be imposed upon all lands and heritages within the county. Sects. 44 and 105 show that the expression "county" is exclusive of any burgh wholly or partly situate herein. The County Council's borrowing powers are contained in sect. 67 of the Local Government Act of 1889, and the only security they can give is that of any rate leviable by the Council.

Dealing next with the road assessment, the management and maintenance of the roads in each county is vested, by sect. 11 of the Roads and Bridges Act of 1878, in the County Road Trustees, the transfer to the County Council of these duties being contained in sect. 16 of the Local Government Act of 1889. Sect. 52 provides for the assessment in counties; sect. 54 for the assessment in burghs. "County" means, except where otherwise expressly provided, the county exclusive of any burgh wholly or partly situate therein, as provided by sect. 3, and "burgh" includes, *inter alia*, royal burghs. In sect. 58, the section referred to in the loans in the present case, there is the same limitation of the assessment to the county; and sects. 74 and 75 shew that the county and burgh authorities have power to levy assessment within their respective boundaries.

The result of all this is to shew that it is incompetent for a burgh to levy assessments to pay any portion of a county debt, or for a county to levy any assessments within a burgh. Reference, in this connection, may be made to the case of *MacArthur* v. *County Council of Argyll*, 1898, 25 R. 829. Moreover, the creditors in these loans contracted to take as their security assessments leviable from a restrictible area.

It was said by the pursuers that if the debt attaches to the area transferred it was no concern of theirs to point out the fund out of which the debtor ought to make payment. In my opinion, the absence of any statutory authority either to levy assessment or to borrow money to pay any part of the loans in question goes far to shew that Parliament did not intend, in 1892, to saddle the burgh with this obligation. The section which provides for the general purposes assessment in the Burgh Police Act of 1892 is sect. 340, but that only empowers the Commissioners to levy assessments for the general purposes of the Act. The payment of a debt incurred by the county would not be one of these purposes. Sect. 374 gives the Commissioners power to borrow, but here, again, the same observation applies, because it is only for any of the purposes of the Act. Under the combined effect of sect. 96 of the Burgh Police Act of 1903, and sect. 50 of the Local Government Act of 1889, it would now be competent for the burgh to borrow any sum required to be paid for the purpose of any adjustment. The want of such statutory authority in the Act of 1892 appears to me to emphasise the strength of the

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defenders' position in the present case. The pursuers founded upon the case of *Conn* v. *The Corporation of Renfrew*, 1906, 8 F. 905, as an authority that the defenders might apply the funds belonging to the common good, which it is alleged they possess, to pay their share of the debt in question. The possession, however, by a burgh of such a fund is an entirely fortuitous circumstance, and does not seem to me to affect the present question.

It does not appear to be necessary to decide which side is supported by the stronger equitable considerations. The fact that Parliament, in the Act of 1903, made provision for adjustment, may be taken as a recognition that, in certain cases, equity requires this. Dealing, however, as I have to do in the present case, solely with the Act of 1892, I am unable to read into it any such provision as that for which the pursuers contend.

Upon the whole matter, I am of opinion that the pursuers have set forth no relevant case, and that the action should be dismissed, with expenses.

The defenders moved that they should be found entitled to expenses as between agent and client in virtue of the Public Authorities Protection Act 1893 (56 & 57 Vict. cap. 61), and cited *Aird* v. *Tarbert School Board*, 1907, S.C. 305; *Greenwell* v. *Howell* [1900], 1 Q.B. 535; *Fielding* v. *Morley Corporation* [1899], 1 Ch. 1, [1900], A.C. 133; *Cree* v. *St Pancras Vestry* [1899], 1 Q.B. 693; *Pearson & Son Ltd.* v. *Dublin Corporation* [1907], A.C. 351; *Sharpington* v. *Fulham Guardians* [1904], 2 Ch. 449; *Holsworthy Urban Council* v. *Holsworthy Rural Council* [1907], 2 Ch. 62. The Lord Ordinary *refused* the motion.—18*th February* 1908.

Counsel for Pursuers, Dickson, K.C., Malcolm; Agents, Baillie & Gifford, W.S.—Counsel for Defenders, Clyde, K.C., Maclennan, K.C., Murray; Agents, Skene, Edwards & Garson, W.S. R. C. H.

LANDS VALUATION APPEAL COURT.

(*Lords Low and Dundas.*)

370. The Assessor for the County of Lanark *v.* The Clyde Navigation Trustees.

I. VALUATION—PRINCIPLE—CONTRACTOR'S OR REVENUE — GLASGOW HARBOUR — CONTRACTOR'S PRINCIPLE HELD TO BE INAPPROPRIATE AS A METHOD OF VALUATION.

II. VALUATION—GLASGOW HARBOUR—METHOD OF VALUATION DETERMINED IN 1866—RES JUDICATA — CHANGE OF CIRCUMSTANCES—DREDGING — HELD THAT, IN THE ABSENCE OF PROOF OF A MATERIAL CHANGE OF CIRCUMSTANCES, THE METHOD LAID DOWN IN 1866 SHOULD BE ADHERED TO—CLYDE NAVIGATION TRUSTEES, 1866, 4 M. 1143, FOLLOWED.

Case.

An an adjourned meeting of the Lands Valuation Committee for the Lower Ward of the county of Lanark, held at Glasgow upon the 26th day of September 1907, the Clyde Navigation Trustees appealed against entries in the Valuation Roll for the county of Lanark of Prince's Dock, quays, sheds, etc.; Quays, etc., Plantation; Mavisbank Quay, etc.; Quays at Graving Docks and Shieldhall Wharves, at a rent of £75,991, and craved that the valuations of the subjects be restricted to £43,502.

The facts and the determination of the Valuation Committee were set forth in the case as follows:

The appellants put in copies of their printed statements of accounts for the years ending 30th June 1905, 30th June 1906, and 30th June 1907, and a statement of the total valuation prepared by the Assessor for the burgh of Glasgow, bringing out the above sum of £43,502 as applicable to the subjects under discussion.

The Trustees of the Clyde Navigation are a body of statutory trustees incorporated under the Clyde Navigation Consolidation Act 1858, as amended by subsequent Acts, and having the power and duty of carrying into effect the provisions of these Acts.

The limits of the harbour of Glasgow were defined in sect. 74 of the said Act of 1858, but that section has been repealed, and the limits of the harbour are now defined by sect. 43 of the Clyde Navigation Act 1904, which is in the following terms:

"43. Section 74 of the Act of 1858, section 32 of the Act of 1883, and section 12 of the Act of 1884, are hereby repealed, and in lieu thereof the following provisions shall have effect: the harbour of Glasgow shall for all purposes (including the rating purposes of the Trustees) mean and include the river Clyde between Albert Bridge (formerly Hutchesontown Bridge) and a line drawn across the river Clyde in line with the western termination of the Shieldhall Wharf, as authorised by and delineated on the plans deposited relative to the Act of 1884, and also the whole docks, quays, wharves, piers, yards, buildings, erections, and other works and conveniences belonging to the Trustees, constructed or which may hereafter be constructed or used in connection therewith, within the said limits for the purposes of their undertaking; and the byelaws, rules, and regulations of the Trustees are hereby extended, and shall apply to the harbour as in this section defined."

Section 75 of the Act of 1858, which defines the limits of the river Clyde, is as follows:

"75. The limits of the river Clyde shall include the whole channel or waterway of the said river forming the harbour, and as far down the said river as to a straight line drawn from the eastern end of Newark Castle on the south shore of the said river to the mouth of Cardross Burn on the north shore of the said river, and the whole works within the said limits for the improvement of the navigation of the river constructed or authorised to be constructed by or under charge of the Clyde Trustees or the Trustees

appointed by this Act, and the whole lands acquired for the purposes of such works, or occupied by the Trustees in connection with the navigation of the said river."

Section 97 of the Act of 1858 is as follows:

"Subject to the provisions of this Act, it shall be lawful for the Trustees to levy on and in respect of all vessels entering or using the river or harbour the rates specified in the schedule (G) to this Act annexed, and all such rates shall be paid by the owner, agent, master, consignee or other person in charge of such vessels."

Section 98 of the Act of 1858 is as follows:

"Subject to the provisions of this Act, it shall be lawful for the Trustees to levy on and in respect of all goods shipped or unshipped in the river or harbour the rates specified in the first and second columns of part 1 of the schedule (H) to this Act annexed, and on all animals and carriages shipped or unshipped in the river or harbour, the rates specified in part 2 of the said schedule (H), and all such rates shall be paid by the owner of such goods, animals, and carriages."

Section 19 of the Clyde Navigation Act 1884 provides:

"That section 98 of the Act of 1858 and schedule (H) referred to in and annexed to that Act shall be read and have effect as if the same, subject to the provisions of this section contained, authorised the Trustees to levy the rate specified in such schedule on and in respect of all goods, animals, and carriages conveyed upon, or otherwise passing up or down the river or any part thereof, or into or out of the harbour (including timber floated)."

Section 99 of the Act of 1858 is in the following terms:

"For the more equitable payment of the rates hereinbefore granted leviable below the Stockwell Bridge, formerly called the Old Glasgow Bridge, that part of the river shall be divided into three stages, *videlicet*:—The first stage, comprehending that part of the river lying above the Old Ferry of Renfrew, being about 660 yards to the east of the present Ferry; the second stage, extending from the said Old Ferry of Renfrew to the mouth of Dalmuir Burn; and the third stage, extending from the mouth of the said Dalmuir Burn to the Castle of Newark; and all vessels and goods, animals and carriages whatsoever, passing in or upon the river or any part thereof within the limits aforesaid shall pay the said rates in manner and in the proportions following, and at such stations on the river as the Trustees shall appoint,—that is to say, in passing upon or going down the river on any part of the first stage as aforesaid, two-third parts of the aforesaid rates; on any part of the second stage as aforesaid, one-sixth part of the aforesaid rates; and on any part of the third stage as aforesaid, one-sixth part of the aforesaid rates, and shall pay the same proportion of the rates aforesaid on passing upon or coming up the river; provided that the Trustees shall be entitled to levy the whole amount of the said rates on all vessels, goods, animals and carriages passing or being conveyed along or into the said three stages or any parts thereof."

Section 46 (application of money) of the Clyde Navigation Act 1883 provides:— . . . "and all tolls, rates, and charges levied by the Trustees under the authority of this Act, and all other money in the nature of revenue received by the Trustees, shall be applied in or towards carrying into execution the purposes of the recited Acts and this Act, and the undertakings thereby authorised, to which revenue is properly applicable, and to no other purpose whatsoever."

A similar provision is contained in section 15 of the Clyde Navigation Act 1884, section 31 of the Clyde Navigation Act of 1899, section 40 of the Clyde Navigation Act of 1904, and section 22 of the Clyde Navigation Act of 1907.

Section 96 of the Clyde Navigation Act of 1858, after empowering the Trustees to sell surplus lands, proceeds as follows: . . . "Provided that nothing herein contained shall authorise the Trustees to sell or dispose of any land which now is or heretofore was within or part of the alveus or channel of the river or of the shores thereof below high-water mark, without the consent, in writing, of the commissioner or commissioners for the time being in charge of Her Majesty's Land Revenues in Scotland; and in the event of any such consent being given, the said commissioner or commissioners shall, from time to time, be a party or parties to the deed or conveyance or disposition for the purpose of granting to the purchaser the estate and interest of Her Majesty in the land sold or disposed of, and the purchase or consideration money arising from any such sale or disposition shall, upon or previously to the execution of any such deed, be from time to time paid into the Royal Bank of Scotland to the account of the Commissioners of Her Majesty's Woods, Forests, and Land Revenues."

In a series of actions extending from 1857 till 1866, the question as to the liability of the Clyde Trustees to pay poor rates in respect of the lands and heritages belonging to and occupied by them under their Acts of Parliament was under the consideration of the Court. These actions were as follows:—

Adamson v. *Clyde Navigation Trs.*, 27th January 1860, 22 D. 606.

Adamson v. *Clyde Navigation Trs.*, 26th June 1863, 1 M. 974.

Clyde Navigation Trs. v. *Adamson*, 22nd June 1865, 3 M. H.L. 100.

Clyde Navigation Trs. (valuation case), 25th July 1866, 4 M. 1143.

Under these cases the Clyde Trustees are liable to be assessed in respect of the quays, wharves, buildings, and other heritable subjects belonging to and occupied by them; they are not liable to be assesssed as proprietors or occupants of the river Clyde in respect of dues payable for the navigation or use of the said river, and they are not owners or occupiers of the river Clyde, or of any other lands and heritages, except specific wharfage ground, quays, wharves, sheds, cranes, ferry, and house property.

The decision of the Court of Session was appealed to the House of Lords by the Clyde Trustees so far as it determined their liability to be assessed, but the pursuer, Adamson, representing the City of Glasgow Parochial Board, did not appeal against the other findings of the Court, and the interlocutors, so far as appealed, were affirmed.

In the valuation case *Clyde Navigation Trs.*, 25th July 1866 (4 Macph. 1143), the Valuation Judges, on an appeal from the local commissioners, applied the decision of the Court of Session. They adopted, what they considered, in reference to the whole circumstances of the case, an equitable principle of adjustment, viz.—to deduct from the proportion of the dues applicable to the first (or upper) stage (being that containing the wharves, etc.) one-third thereof, as being fairly assignable to that portion of the subjects which is not assessable. They thus wholly

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excluded the two-sixths of the dues applicable under the Act of 1858 to the use of the waterway of the two lower stages, extending from Renfrew Old Ferry to Port-Glasgow, and assigned two-thirds of the remaining two-thirds, being the dues for the first (or upper) stage to the use of the quays and wharves, which were lands and heritages owned and occupied by the Trustees. This decision has been given effect to and acted upon by the various assessors and local authorities since 1866.

The valuation put forward by the Clyde Trustees is the proportion of the total valuation on that basis, as ascertained for convenience and with the acquiescence of other assessors by the assessor for the city of Glasgow to be applicable on an apportionment according to the length of quayage to the quays and wharves within the county of Lanark and beyond the city of Glasgow.

There are eleven separate subjects belonging to the Trustees in the county of Lanark, against the valuation of which by the assessor the Trustees appealed. The valuations of six of these subjects, consisting of graving docks, timber yards, works, and a new quay, which were not affected by the *cumulo* valuation of the Trustees' quays and wharves, were adjusted between the assessor and the Trustees at £20,320, and the valuations so adjusted have been given effect to by the County Valuation Committee, and are not included in this case.

The apportionment of the valuation according to length of quayage as followed since 1866 is also approximately in accordance with the revenue derived from the parts of the harbour in separate jurisdictions.

There has, the Clyde Trustees contended, been no alteration in the circumstances since the Court of Session found that the Clyde Trustees were not owners or occupiers of the waterway of the river Clyde within their jurisdiction, and that the dues payable for the use of that waterway by ships and goods passing upon it could not be taken into account in valuing the quays, wharves, etc. It is therefore submitted by the Clyde Trustees that the proper method to value the Trustees' quays and wharves is to take the revenue of the trust remaining after excluding the proportion of the dues applicable to the two lower stages, and at least one-third of the dues applicable to the upper stage, and to make the appropriate deductions from the revenue as so ascertained in accordance with the Lands Valuation Acts as interpreted by the valuation judges in a series of decisions. It was further submitted that there is no justification for the assessor adopting any new or different method of valuation. It was explained that the assessors had from time to time taken an average of the revenue of three years, but that the Trustees had no responsibility therefor, and it did not affect the amount of the valuation appealed against.

The assessor stated that the valuation of the artificial works other than certain subjects, such as graving docks and timber yards in the harbour of Glasgow, has for a number of years been prepared by the assessor for the burgh of Glasgow *in cumulo*, and allocated among the various areas solely with reference to the length of quayage in each area; that the practice has been to fix the valuation on the revenue and expenditure for three years to 30th June in the year of valuation; that this course appeared to be objectionable, as it is plainly impossible for the hypothetical tenant to take into consideration the revenue of the year ending 30th June after Whitsunday of his hypothetical entry, and also because in practice the valuation is not completed at a date which enabled him or any other person interested to properly examine it; that the allocation by quayage only also appeared to him to be unsound, as it does not take into account either the large water area in the docks or the value of the large two-storied sheds, power station, and other costly works at the Princes Dock; that in the *Ayr* case, 25th May 1894, 21 R. 807, that harbour was held to be *unum quid*, but apportionment by exact length of quayage was not adopted, some weight being given to the greater extent of artificial works in Newton parish, but he stated that the harbour of Glasgow had never been treated as *unum quid*, the harbour proper having been excluded from valuation altogether. He also stated that in the case of large systems of docks in England, the courts there have held that the docks in different parishes should be treated separately (*Mersey Docks* v. *Liverpool*, 1872, L.R. 7 Q.B. 643; *Hull Dock Co.* v. *Sculcoates Union*, L.R. [1895], A.C. 136).

The assessor further stated that the valuations of the subjects in question have hitherto been based to a considerable extent on the decision in the *Clyde Navigation* case in the Valuation Appeal Court in 1866, 4 M. 1143, but one-half of the dredging in the whole 18½ miles of river has been deducted, although this was claimed but not allowed by the judges in that case; that in the *Mavisbank* valuation case decided in 1866, 4 M. 1143, the decision in *Adamson* v. *Clyde Trs.* (Court of Session, 26th June 1863), 1 M. 975, 4 Macq. 931, was founded on, and that this decision was stated to have been confirmed on appeal by the House of Lords, but that it appeared from the judgment in the case of *Gardner* v. *Leith Harbour Co.*, 1866, 2 M. 1234, that the House of Lords had only before them the general question of the liability to rating of the Clyde Trustees' undertaking, and that on the question of the treatment of the dues they did not agree with the decision in *Adamson's* case, 4 M. (H.L.) 14; *Irvine Harbour Trs.*, 1893, 30 S.L.R. 660.

The assessor maintained that if the decision stands the true reading of the judgment of the Court of Session in *Adamson* v. *The Clyde Trustees*, 1 M. 986, is that resort should be had to the contractor's principle, since it is impossible for the assessor to shew what parts of the dues, rates, etc. are payable in return for the use of and accommodation afforded by the quays; that it appeared also from the interlocutor deciding the valuation case of 1866 that the judges called for particulars of the expenditure on the quays presumably with the view of applying the contractor's principle of valuation, but, probably from insufficiency of information, finally had recourse to taking a proportion of the dues as the basis of valuation.

The assessor contended that although this might have been an equitable solution of the problem in 1866, it is not necessarily so at the present time, when very large extensions of the quayage have been made, and the water area in docks, which did not exist in 1866, has to be dealt with. He stated that under that method the amount deducted as applicable to the lower 13 miles of river had grown from £33,011 to £134,838, and the amount for the waterway in the upper stage from £22,007 to £89,892, a total of £224,730, the increase of nearly £170,000 being out of all proportion to the expenditure on the waterway in the interval. He also objected to the deduction in respect of the 2nd and 3rd stages of the river of one-third of the dues levied, and of a further proportionate deduction for the waterway in the first stage.

The assessor stated that he had made a survey and

valuation of the subjects situated in the county, and estimated the cost of the Prince's Dock and accessories, including the *solum*, at . . . £1,125,230
Mavisbank Quay at . . . 70,240
Plantation Quays, ... 205,240
Graving Dock Quay, . . . 24,700
Shieldhall Wharves, . . . 94,520
on which sums his valuations were based at 5 per cent. The assessor considered that it was incumbent on him to show that the subjects produced a revenue sufficient to pay these rents, and stated that he had prepared from the accounts of the trustees for the year ending 30th June 1906 a statement, which, after disallowing certain expenditure which would fall on the trustees as proprietors of the heritable subjects, brought out a balance of £367,090, and from the account of capital expenditure to the same date a statement showing that 5 per cent. on the capital expenditure of the trustees in respect of the heritable properties producing this revenue did not nearly exhaust that balance.

The assessor referred to Lord Wellwood's remarks in the *Irvine* case in 1893, and stated that if, in view of the reference to the decision in *Adamson* v. *The Clyde Trustees* in *Gardner* v. *Leith Dock Commissioners*, that decision is not to be taken as authoritative, and therefore the subjects are to be dealt with as *unum quid*, the Clyde Navigation Trustees' undertaking is one which extends into more than one parish, and it would therefore be competent for them to apply, under section 23 of the Valuation Act, 1854, for a valuation of the undertaking by the assessor of railways and canals; that they had not exercised their power of making this application, and that in these circumstances it is proper for the local assessor to apply the rules laid down in the Valuation Act for valuing such subjects. He further stated that the statement prepared by him already referred to brings out a balance available for the valuation of the whole undertaking, excluding the graving docks, timber yards and let subjects, which are separately entered in the valuation rolls of the several parishes, of £367,090; that he had also inquired into the cost of the several subjects in the parish of Govan (outwith the burgh of Glasgow), and estimated the cost, including the *solum*, at the sums previously stated, on which amounts the valuations are calculated at 5 per cent. in accordance with sections 21 and 22 of the Valuation Act, 1854, and that from the printed statement of capital expenditure by the trustees, he had also prepared a statement of the value of the various works over which the valuation falls to be spread, bringing out a value of £3,931,751, 5 per cent. on which is £196,587, leaving a balance of £170,503 from the rental £367,090 arrived at in his previous statement.

The appellants led evidence as to the methods of valuation adopted by the assessor of railways and canals, and as to the cost of dredging in the harbour, but did not lead evidence as to the assessor's estimates of the capital cost of the several subjects, as the appellants disputed entirely the contractor's principle on which the assessor had proceeded.

The committee having considered the evidence and the statements for the parties, found:—

1. That while from their personal knowledge of the subjects they considered that their cost was moderately estimated at the sums stated by the assessor, there was no authority for adoption of the "contractor's" principle by the assessor in valuing these subjects.

2. That while they were of opinion, looking to the altered circumstances since 1866, that there was no equitable reason why from the total dues paid by ships using the harbour of Glasgow the proportion of the dues, which would have been paid had they not entered into the upper stage of the river, should be wholly excluded in computing the revenue of the undertaking, the assessor was not, standing the decisions upon which the appellants rely, entitled to adopt the rules laid down in sections 21 and 22 of the Valuation Act, 1854, but was bound to follow the method adopted by the judges in the *Mavisbank* valuation case, 1866.

3. That the valuation and allocation prepared by the assessor for the burgh of Glasgow were in general conformity with the method adopted in that case.

The Committee accordingly sustained the appeals and restricted the valuations as craved. It was agreed, at the request of both parties, that the *cumulo* valuation of £43,502 should be divided as follows, and the committee found accordingly, viz:—

Princes Dock, quays, sheds, &c. .	£31,336
Quays, &c, plantation, . .	7521
Mavisbank quay, &c. . . .	2591
Quays at graving docks, . .	1015
Shieldhall Wharves, . . .	1039
	£43,502

The Assessor obtained a case for the opinion of the Valuation Judges.

The contentions of the parties were set out *inter alia* as follows:—

1. (*a*) The assessor contends that the Clyde Navigation undertaking has never been treated as *unum quid*, the lower stages of the river and the waterway in the upper stage having always been excluded from valuation by the deduction from the dues received from vessels using the harbour of Glasgow of the proportion (one-third) fixed by the Clyde Acts, for the entirely different purpose of settling the proportion of the dues payable by vessels which use only the lower stages of the river, and by the further deduction of two-ninths of the said dues in respect of the waterway in the upper stage, being the proportion which the judges stated in the interlocutor in the *Clyde Navigation* valuation case in 1866 (4 M. 1143) they were obliged to adopt.

1. (*b*) That it is competent for the assessor to make his valuations of these subjects on the contractor's principle, as he is unable to show what sums are payable in name of rates or dues in respect of these subjects; that this method of valuation is clearly contemplated by the judgment delivered by the Lord Justice-Clerk in *Adamson* v. *Clyde Navigation Trs.*, 1863, 1 M. 989, and by the *Clyde* valuation case, 1866; and that the English decisions that where the harbour dues do not inhere in the subjects under valuation, they are not to be taken into account in valuing these subjects, are in support of the adoption of the contractor's principle (*New Shoreham Harbour Commissioners* (1870), 5 Q.B. 489; *Blyth Harbour Commissioners*, L.R. (1894), 2 Q.B. 675).

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2. The assessor maintains that although, as stated in the interlocutor in the *Clyde Navigation* case in 1866, being unable to come to a satisfactory conclusion from the materials as to the expenditure on the quays, etc., supplied to them, the judges adopted the deduction of certain proportions of the dues, amounting in 1866 to £55,018, it does not follow that a proper result is produced by adopting a similar apportionment at the present date, involving the deduction of no less than £224,730 for the same length of river, and that the increase in the dues should to a larger extent be considered as the result of the great expenditure since 1866 in the construction of docks and other works in the harbour itself.

3. The assessor contends that if the decision in *Adamson* v. *Clyde Trs.*, 2 M. 1234, is held to be overruled by the case of *Miles* v. *Leith Dock Commissioners*, 4 M. (H.L.), 14, referred to by Lord Wellwood in the *Irvine* valuation case, and the whole undertaking is to be dealt with as *unum quid*, this should be done under the rules laid down in sections 21 and 22 of the Valuation Act, 1854, and that 5 per cent. on the cost of the docks, wharves, etc., should be allocated to the several parishes, the balance of the net revenue being distributed over the length of the navigation.

. . . . . .

5. The assessor maintains that in any case the deduction of one-half of the whole dredging (other than the dredging for deepening) in the navigation, including 18½ miles of river, is greatly in excess of the fair proportion which might be held as falling on a tenant for cleansing purposes, as distinguished from the owner's duty of maintaining the subjects in a state to command the rent (*Leith Dock Commissioners* v. *Assessor for Leith*, 1907, S.C. 751).

With reference to the contentions of the assessor, the trustees submit:—

1. (*a*) The undertaking of the Clyde Trustees, so far as consisting of lands and heritages forming continuous quays and wharves of which they are owners or tenants, has been treated since the decision of 1866 as a *unum quid*. It is apparent that the object of the assessor is to have set aside the judgment of the Court of Session finding that the River Clyde is not the property of the Clyde Trustees, and that the statutory dues payable in respect of its use cannot be taken into account in ascertaining the valuation of the quays, wharves, etc.

(*b*) No difficulty has arisen during the last forty years in ascertaining the proper valuation of the lands and heritages belonging to the Clyde Trustees on the general principles adopted by the valuation judges in 1866. Since that date the revenue principle followed in that case has been confirmed and extended in an unbroken series of decisions. The Valuation Judges did not contemplate valuing these subjects on the contractor's principle.

(*c*) The effect of the English decisions referred to would be to exclude the whole of the dues from vessels and goods in ascertaining the valuation of the quays and wharves. The assessor is in error in suggesting that these cases are in any way authorities in favour of the adoption of the contractor's principle of valuation. In these cases the valuation has been made solely with reference to the revenue derived from the actual subjects of valuation.

2. The assessor has misunderstood the effect of the decision of the valuation judges in 1866. What the Court then adopted was an equitable principle of adjustment following that adopted by the legislature. The proportion of valuation to gross revenue is greater to-day than it was in 1866, when the valuation judges fixed the details of the system on which the valuation should be ascertained. . . .

3. The decision of the Court of Session in *Adamson* v. *Clyde Trs.*, 1863, is not in conflict with the decision in the case of *Gardner* v. *Leith Dock Commissioners*. The facts in the *Irvine* harbour case were entirely different from those affecting the Clyde, and the *obiter dicta* in that case are inapplicable. Sections 21 and 22 of the Valuation Act 1854 refer to the valuation of railways, and the taking of a percentage on the cost of stations, wharves, etc., belonging to the railway is merely for the purpose of apportioning, among various parishes, a total valuation ascertained wholly on the revenue principle. There is no authority for applying a percentage to wharves, docks, etc., such as those of the Clyde Trustees. Few, if any, docks in Scotland have such earnings as would give a valuation of anything like 5 per cent. upon their cost.

. . . . . .

5. In the statement of the valuation put forward by the trustees (state A), a deduction is made under dredging in proportion to the revenue included in the valuation. State A proceeds on the principle that tenants' profits are inadmissible, in which case, according to the decisions of the Court, no distinction falls to be made between landlords' and tenants' expenditure (except rates and taxes), and accordingly the cost of dredging proportionate to the revenue applicable to the subjects of assessment is claimed.

On the assumption that the trustees are to be allowed tenants' profits (state B) the amount taken for dredging is less than the amount which has been actually expended in maintaining the water at the river-side berths and docks at the depth previously attained by expenditure out of capital. If the subjects had been let to a tenant under the ordinary obligation to maintain them in the state in which they were handed over to him, he would have had to incur the expenditure so deducted.

It is explained that while the valuation judges did not allow a deduction for dredging, they gave a deduction of 20 per cent. for tenants' profits, and that the assessors at some time subsequent to that date agreed to allow a deduction for dredging, but to disallow the tenants' profits formerly given.

At the hearing counsel cited, in addition to the cases above mentioned, *Burghead Harbour Co.* v. *George*, 1906, 8 F. 982, per Lord Kinnear at 987, as to the meaning of the case of *Adamson* in 1 M., and *St Cuthbert's Co-operative Association* v. *Assessor for Edinburgh*, 1896, 23 R. 681; *Edinburgh Parish Council* v. *Assessor for Edinburgh*, 1906, 8 F. 521, as to the application of the contractor's principle.

The Valuation Judges *were of opinion* that the determination of the Valuation Committee was right.

Lord Low.—The main question in this case appears to me to be whether the judgment in *Adamson* v. *Clyde Navigation Trs.*, 1 M. 974, was overruled by the House of Lords in *Leith Dock Commissioners* v. *Miles*, 4 M. (H.L.) 14, in so far as it was held in the former case that the trustees were not assessable as proprietors of the port and harbour of Glasgow as something separate and distinct from the wharfs, quays, and

other structures of which physically the harbour consisted.

I am of opinion that that question must be answered in the negative. The report of the *Leith Docks* case in the House of Lords does suggest that the noble and learned Lords were under the impression that the Second Division had held in *Adamson's* case that a harbour was not an assessable subject. That, however, was a misapprehension. What was decided was that upon a sound construction of the Clyde statutes there was not (I quote from the opinion of Lord Justice-Clerk Inglis) "any *jus incorporale* vested in the defenders" (the Clyde Navigation Trustees) "by which they can be said to be, in the common law sense, the proprietors of the right of harbour. . . . I think that the subjects in respect of which the defenders are liable to be assessed as constituting the port or harbour of Glasgow are the subjects embraced in the minute" (that is, the wharfs, quays, and other structures), "and that there is no other subject in respect of which they can be assessed under the name of the port and harbour of Glasgow."

It seems to me that the Lord Justice-Clerk there plainly recognises that a harbour is an assessable subject, but that his view was that, apart from the quays and other works, the trustees were not owners of any harbour. Therefore, in my opinion the judgment in *Adamson* was in no way inconsistent with that of the House of Lords in the *Leith Docks* case, or in the *Mersey Docks* case, 3 M. (H.L.) 102, which was there followed.

The reason why the appellants attempted to shew that the judgment in *Adamson* had been overruled by the subsequent decisions in the House of Lords was that it was held in *Adamson* that the rates and dues, which the Clyde trustees were by these statutes authorised to levy, could not be taken into account in estimating the yearly value of the subjects in respect of which they were assessable, in so far as these rates and dues were paid for the navigation of the river, including that part of it which the statutes described as being within the limits of the harbour of Glasgow. The appellants' argument accordingly was that, *Adamson* having been overruled by the *Mersey Docks* case and the *Leith Docks* case, and it having been held in the latter cases that a harbour was an assessable subject, the rates and dues paid for the navigation of that part of the Clyde within the statutory limits of the Glasgow harbour should be brought into computation.

It seems to me to be a complete answer to that argument that the judgment in *Adamson* has never been overruled; that it was a judgment pronounced by the Inner House in an action of declarator brought for the very purpose of determining the rights and obligations of the parties in regard to assessment for poor rates; and that it has been acted on, so far as I know, without challenge for more than forty years.

The case of *Adamson* was decided in 1863, and in 1866 the question of valuation came before this Court. The learned judges who then constituted the Court, in fixing the yearly value of the undertaking, gave effect to the decree of declarator which had been pronounced, and they did so by deducting from the proportion of the dues applicable to the first of the three stages into which the Clyde is divided by the statutes (that being the stage with which alone we are concerned in this appeal) one-third thereof as being fairly assignable to that portion of the subjects which the Second Division had held not to be assessable. The rule so laid down has been followed until the present time as the basis upon which the subjects fall to be valued, but I do not say that the apportionment of the dues made in 1866 must be regarded as *res judicata*, and cannot be revised. If it could be shewn that, owing to a material change of circumstances, the apportionment was no longer fair and reasonable, I think that it would be quite competent for this Court to reconsider it. But no such question was submitted for our determination, although the appellants' counsel did refer to the great change which had taken place during the last forty years, both as regards the extent of the works and the amount of the dues.

I have already said that the main contention of the appellant was that the whole dues should be taken into account in estimating the yearly value, and I have expressed the opinion which I have formed upon that point. The appellant, however, contended alternatively that instead of the principle of valuation which has hitherto been followed, what has come to be known as the contractor's principle should be adopted—that is to say, that the yearly value should be arrived at by taking a percentage upon the structural cost of the quays and other works. That appears to me to be a method of valuation which is not appropriate to the kind of subject in question. Indeed the only reason which can be suggested, so far as I can see, for adopting the contractor's principle is that it would get rid of the limitation placed by the judgment in *Adamson* upon the revenue which may be taken into account, and would make it possible to value the subjects at a much higher amount than under the method which has all along been followed, and which I take to be the approved method of valuing such subjects. I have therefore no hesitation in rejecting the argument that the contractor's method of valuation should be adopted.

A question was also raised in regard to the cost of dredging, but upon that I need only say that we were furnished with no materials to enable us to form an opinion the one way or the other.

Upon the whole matter, therefore, I am of

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Lord Dundas.

opinion that we must hold that the determination of the Valuation Committee was right.

Lord Dundas.—In the year 1866 our predecessors in this Court (Lord Kinloch and Lord Ormidale) laid down a rule for the valuation of the Undertaking of the Clyde Navigation Trustees (4 M. 1143), which has ever since been acted upon by the various assessors and local authorities. It is obvious that strong grounds would be required to warrant us in now upsetting this uniform practice of about forty years, following upon the decision to which I have referred. But the appellant's counsel undertook to establish the existence of such grounds. They maintained that the Valuation Court in 1866 merely followed a judgment of the Second Division, which the House of Lords subsequently declared to be erroneous. It is true that the decision of the Valuation Judges was really executory of the interlocutor of the Second Division in the declarator *Adamson* v. *Clyde Navigation Trustees*, 1863, 1 M. 974. But I am satisfied that, as your Lordship has pointed out, the appellant's argument proceeds upon a misapprehension; and that nothing was said or done in the *Leith* case (4 M. (H.L.) 14, reported also L.R. 1. Sc. and Div. App. 17) to warrant the assertion that the House of Lords expressed or entertained any opinion adverse to what was really decided by the Second Division in 1863, as explained in the clear opinion of Lord Justice-Clerk Inglis. It may be worth while to point out that the same Lord Ordinary (Jerviswoode) decided in the Outer House the case of *Adamson* (1 M. 974) and the *Leith* case (2 M. 1234); and that, looking to the respective dates of decision, it would appear that the Valuation Judges on 25th July 1866 (4 M. 1143) must have had in contemplation the judgment of the First Division in the *Leith* case (17th June 1864, 2 M. 1234), if not also that of the House of Lords in the same case (12th March 1866, 4 M. (H.L.) 14). Having said this much, I need say no more, except that I have had an opportunity of reading the opinion which your Lordship has just delivered, and entirely concur with all that you have said in it in regard to the various points upon which we heard argument.—*4th March* 1908.

Counsel for Appellant, Cooper, K.C., Dunbar; Agents, Ross Smith & Dykes, S.S.C.—Counsel for Respondents, Dean of Faculty (Campbell, K.C.), Hunter, K.C., Black; Agents, Webster, Will & Co., S.S.C. F. A. U.

HOUSE OF LORDS.

(*The Lord Chancellor* (*Lord Loreburn*), *Lords Macnaghten, Robertson, Atkinson and Collins.*)

371. Cameron and Others *v.* Young and Another.

Title to Sue — Reparation — Personal Injury — Landlord and Tenant — Injury Through Insanitary Condition of House—Held that Wife and Children of Tenant Living in Family With Him had No Title to Sue Landlord for Damages Sustained Through Insanitary Condition of House—Cavalier v. Pope [1906], A.C. 428, Followed—Shields v. Dalziel, 1897, 24 R. 849, Commented on—Hall v. Hubner, 1897, 24 R. 875, Overruled.

Reported ante, Vol. XIV. p. 739; 1907, *S.C.* 475.

(*Appeal against an Interlocutor of the First Division* (*Lords M'Laren, Kinnear and Pearson*) *affirming an interlocutor of the Sheriff of Stirling.*)

After the decision in the First Division the claim by Robert Cameron, the tenant, was settled. The appellants, his wife and children, appealed against the judgment of the Division, which held that they had no title to sue.

The House *dismissed* the appeal.

The Lord Chancellor.—I have had the advantage of reading the opinion about to be delivered by my noble and learned friend Lord Robertson. I agree with it, and have nothing to add.

Lord Macnaghten.—I have had the same advantage, and I also concur and have nothing to add.

Lord Robertson.—The facts giving rise to the important question now before the House are of the simplest. The respondents let to one Robert Cameron, the husband and father of the appellants, a dwelling-house at Crieff. The house was allowed to get out of repair in the matter of drains; disease was generated owing to this neglect, and Cameron and his family, the appellants, suffered accordingly. Cameron's own claim for damages was sued by him in this action, but he has been settled with and is out of the case. The question is whether the appellants, who are not parties to the contract of lease, have a good ground of action against the landlord.

It seems to me perfectly clear that they have not, and I rest my opinion not alone on the authority of *Cavalier* v. *Pope*, but on principle common to the laws of Scotland and of England which *Cavalier* applied.

These respondents were perfectly entitled to

let this house or not to let it, and in either case they were entitled to allow the house to fall to pieces and the drains with it so long as they did not injure any neighbour (by which I of course mean any neighbour in vicinage whether the title of that neighbour was of property or of passage), or violate any existing law of nuisance, the only restraint on their action being obligations of contract with their tenant. Now it happens that in the present instance they were under such obligation to their tenant, by virtue of a condition which the Scotch law implies in leases of urban houses, that the landlord shall not only give the tenant a habitable house but maintain it in that state. It ought to be, but apparently is not, superfluous to say that if the law implies this condition it is because this is the customary arrangement in Scotch towns, and therefore when nothing is said to the contrary, parties are taken to have agreed to it. That an obligation to maintain a house habitable is not an essential term or obligation of the tenure of real property in Scotland but a matter of agreement is indeed most strikingly proved by the fact that in the case of farmhouses the contrary is the presumption of liability; for there it is the tenant and not the landlord on whom this duty of maintenance falls. It thus appears that the landlord's liability is conventional and contractual, and not the less so where it is implied by law and not written in the contract.

The argument for the appellants has indeed rested on invoking principles of the law of neighbours which have nothing to do with the rights of inhabitants of the house. Those principles are embodied in a distinct chapter of Scotch law, and are concerned with what may be called the external or foreign relations of the owner of a house. There he is liable, because the maxim *sic utere tuo ut alienum non lædas* necessarily imposes on the proprietor the duty of exercising that measure of care which will avoid injury accruing to his neighbour from his house. He must not allow his house to get into such disrepair that it falls down on his neighbour's house or injures the passer-by in the street. In all those cases the person injured and claiming damages stands on his own rights, and his relation to the offending or negligent proprietor is not constituted or measured by any voluntary contract.

These principles have no application at all to persons who are within the house, for they have and can have no right to be there except by the licence of the owner, given by the owner on certain terms to the person with whom he chooses to contract. Nor can it be omitted from notice that if the appellants' contention were sound the liability of the landlord may be indefinitely increased or diminished according to the domestic or social relations or tastes of the tenant, over which the landlord has no control.

I have examined all the cases prior to *Cavalier* which were cited at the Bar, and with one apparent but not real exception, and one real exception, there is none which conflicts with that decision. All fall within the category of external relations which I have discussed.

The apparent exception is the case of *Shields* v. *Dalziel*, 24 R. 849, in the First Division. There it is quite true that the claim which the Court allowed was that of the wife of the tenant and not of the tenant. I must, however, point out that neither in the written pleadings nor in the oral argument did the landlord question or object to the title or instance of the wife, the defence being rested on totally different grounds. The pleadings were written and the argument was conducted by very able counsel, and presumably they deliberately abstained from stating this plea. Suffice it to say that the present question was not before the Court, and the decision in *Shields* v. *Dalziel* is not a judgment adverse to the doctrine of *Cavalier* v. *Pope*.

The other case which I have called an exception is *Hall* v. *Hubner*, 24 R. 875, decided by the Second Division. There the landlord argued that the pursuer being the tenant's wife was . . . . a stranger to the landlord, and must seek her remedy, not against him but the tenant. The learned judges in their reported opinions take no notice of this argument, but their judgment allowing issues to be lodged amounted to its rejection. This decision I therefore think cannot be supported, but this is the only and the slender support of the appellants' case to be found in the Scotch cases prior to *Cavalier* v. *Pope*.

I am of opinion that the appeal ought to be dismissed.

Lord Atkinson.—I concur.

Lord Collins.—I concur.—27*th February* 1908.

Counsel for Pursuers (Appellants), C. D. Murray; Agents, Murray Lawson & Darling, S.S.C.; Walter H. Guthrie, London.—Counsel for Defenders (Respondents), Macmillan, Beveridge; Agents, Mathie, Macluskie & Lupton, Stirling; Morton, Smart, Macdonald & Prosser, W.S.; A. & W. Beveridge, Westminster.

SECOND DIVISION.

(*Lords Stormonth-Darling, Low and Ardwall.*)

372. Wallace *v.* R. and W. Hawthorne Leslie & Company Limited.

Workmen's Compensation Act 1906 (6 Edw. VII. cap. 58), sects. 3 (1) and 15—Contracting Out — Scheme — Scheme Under 1897 Act in Force at Commencement of 1906 Act—Workman Entering Employment Subsequent to Commencement of 1906 Act, and Agreeing to Accept Compensation

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PROVIDED BY SCHEME IN LIEU OF COMPENSATION PROVIDED BY ACT — ACCIDENT TAKING PLACE PRIOR TO SCHEME BEING RE-CERTIFIED AS A SCHEME UNDER 1906 ACT—SCHEME SUBSEQUENTLY RE-CERTIFIED — HELD WORKMAN NOT BOUND BY AGREEMENT TO ACCEPT COMPENSATION PROVIDED BY SCHEME, BUT ENTITLED TO CLAIM COMPENSATION UNDER 1906 ACT.

Stated Case under the Workmen's Compensation Act 1906.

This was an appeal by way of stated case from the judgment of the Sheriff-Substitute (Neish) at Greenock, in an arbitration under the Workmen's Compensation Act 1906.

The case stated:

On 15th August 1907 the appellant was employed by the respondents on board H.M.S. "Agamemnon," which was then lying at the Tail-of-the-Bank opposite Greenock, for the purpose of undergoing official trials.

On said date the appellant was injured on board said ship by an accident arising out of and in the course of his employment.

The appellant entered the respondents' employment on 9th August 1907, and agreed to accept the scale of compensation provided by the St Peter's Works, Newcastle-on-Tyne, Accident Compensation Fund Scheme, which is marked A, is produced herewith, and forms part of this case.

The said scheme was certified as Scheme No. 7 by the Registrar of Friendly Societies on 10th December 1903, and the certificate did not expire till 31st December 1908.

On 18th October 1907 the said Scheme No. 7 was re-certified as Scheme No. 107 by the Registrar of Friendly Societies, in accordance with the provisions of sect. 15 of the Workmen's Compensation Act 1906.

The said Scheme No. 107, marked B, is produced herewith, and forms part of this case. [Said scheme marked B was certified by the Registrar of Friendly Societies, in terms of sect. 3 of the Workmen's Compensation Act 1906, on 18th October 1907.]

I held (1) that the appellant's claim for compensation under the Workmen's Compensation Act 1906 was excluded by his having agreed to accept the scale of compensation provided by the Scheme No. 7, marked A; and (2) that the appellant was not entitled to the increased compensation provided by the Scheme No. 107, marked B.

The following Question of Law was, *inter alia*, stated:

(1) Is the appellant entitled to compensation under the Workmen's Compensation Act 1906?

The Workmen's Compensation Act 1906 (6 Edw. VII. cap. 58) provides:

Sect. 3. (1) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in this Act, and that where the scheme provides for contributions by the workmen the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under this Act, and that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are in favour of such scheme, the employer may, whilst the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme; but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act.

Sect. 15. (1) Any contract (other than a contract substituting the provisions of a scheme certified under the Workmen's Compensation Act 1897 for the provisions of that Act) whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act.

(2) Every scheme under the Workmen's Compensation Act 1897 in force at the commencement of this Act shall, if re-certified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act.

(3) The Registrar shall re-certify any such scheme if it is proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of this Act as to schemes.

(4) If any such scheme has not been so re-certified before the expiration of six months from the commencement of this Act, the certificate thereof shall be revoked.

Sect. 16. (1) This Act shall come into operation on the first day of July 1907. . . .

Argued for the Appellant: The accident took place subsequent to the date when the Act of 1906 came into operation. Scheme A, therefore, being a scheme under the Act of 1897, did not apply. But further, Scheme A was not a subsisting scheme at the date of the accident. A scheme under the 1897 Act fell on the passing of the 1906 Act unless it was expressly saved (Workmen's Compensation Act 1906, sect. 3), and it was saved only if it were re-certified (sect. 15 (2)). In the present case Scheme A had not been re-certified at the date of the accident. If there were any scheme in existence it was Scheme B. But the sound view was that there was no scheme in existence, and that the appellant was entitled to compensation under the Act.

Argued for the Respondents: If the appellant's argument were sound, it followed that, on the 1906 Act coming into operation, there would be a period of six months during which it might be impossible for an employer and his workman to contract out of the Act. That was not to be presumed, and was not the sound construction of sect. 3. That section

provided that unless there was in existence a scheme under the Act of 1906 the Act should apply, notwithstanding any contract to the contrary. That brought in the whole provisions of the Act, including sect. 15. Under that section a scheme under the Act of 1897 remained in force until it was re-certified under the Act of 1906, or until the expiry of six months from the date when the Act came into operation. Scheme A was therefore in existence at the date of the accident, and the appellant's claim was for compensation under that scheme, and not for compensation under the Act. Scheme B was out of the case; it did not come into operation until after the date of the accident.

The Court *answered* the first question of law in the affirmative.

Lord Low.—The appellant entered the employment of the respondents on 9th August 1907, and he agreed to accept the scale of compensation provided by a scheme which had been certified under the Workmen's Compensation Act 1897, by the Registrar of Friendly Societies, as Scheme No. 7, on 10th December 1903. The certificate bore that the scheme was to expire on 31st December 1908, and accordingly it had not expired when the Workmen's Compensation Act 1906 came into operation on 1st July 1907. On 18th October 1907 Scheme No. 7 was, with certain modifications, re-certified by the Registrar of Friendly Societies in accordance with the provisions of sect. 15 (3) of the Workmen's Compensation Act 1906 as Scheme No. 107.

The appellant was injured on 15th August 1907 by an accident arising out of and in the course of his employment, and the question is whether he is entitled to compensation under the Workmen's Compensation Act 1906 or only under Scheme No. 7?

The answer to that question depends upon the construction of sects. 3 and 15 of the Act of 1906.

By sect. 3 it is provided that "If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation" satisfies certain requirements, "the employer may, whilst the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act."

Now the initial words of that section providing for certification of the scheme by the Registrar of Friendly Societies, plainly refer to what may be done after the commencement of the Act, and accordingly, under the final clause in the section, a workman cannot be deprived, after the commencement of the Act, of his right to compensation under the Act by entering into a contract to the contrary, unless it be a contract to substitute for the provisions of the Act the provisions of a scheme of compensation certified by the Registrar after the commencement of the Act.

Now the scheme of compensation which the appellant agreed to accept was not a scheme which had, at the time when the agreement was made, been certified by the Registrar after the commencement of the Act; and accordingly, if the question raised depended only upon the 3rd section, it is clear that the appellant would not be barred by the agreement from claiming compensation under the Act.

The 15th section, however, which deals with contracts and schemes existing at the commencement of the Act, requires to be considered.

Sub-sect. (1) provides that any contract whereby a workman relinquishes any right to compensation existing at the commencement of the Act, "other than a contract substituting the provisions of a scheme certified under the Workmen's Compensation Act 1897, for the provisions of that Act," shall not, for the purposes of the Act (of 1906), be deemed to continue after the time at which the workman's contract of service would determine if notice were given at the commencement of this Act.

Then by sub-sect. (4) it is provided that any scheme under the Act of 1897 in force at the commencement of the Act of 1906 which has not been re-certified before the expiration of six months from the commencement of that Act, shall be revoked. Accordingly, if a workman had before 1st July 1907, the date of the commencement of the Act of 1906, agreed to accept the provisions of a scheme certified under the Act of 1897, and if this scheme was still in force at the commencement of the new Act, it would regulate the right of the workman to compensation for a period of six months after the commencement of the Act.

That, of course, does not precisely meet the present case, because the appellant agreed to accept the provisions of a scheme (namely, Scheme No. 7) certified under the Act of 1897 after the commencement of the Act of 1906, but it to some extent aids the respondents' contention that the appellant is bound to accept compensation under that scheme.

The respondents' argument was that sub-sects. (1) and (4) of sect. 15 when read together shewed that a scheme certified under the Act of 1897, the period of which had not expired at the commencement of the Act of 1906, continued, at all events for the period of six months, to be an operative scheme under the latter Act, and that such a scheme continued to regulate the rights of a workman who had agreed to it before the commencement of the new Act. That being so, there was, it was contended, no reason why the scheme should not have the same effect in regard

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to a workman who had agreed to it while it was still in operation although after the commencement of the new Act.

I recognise the force of that argument, but I do not think that it can be sustained in face of the provisions of sub-sect. (2) of sect. 15. That sub-section provides that "Every scheme under the Workmen's Compensation Act 1897 in force at the commencement of this Act shall, if re-certified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act."

Now at the time when the appellant agreed to accept the provisions of Scheme No. 7 it had not been re-certified by the Registrar, and therefore could not receive effect as if it had been a scheme under the Act. What is meant by a scheme under the Act is plainly a scheme certified by the Registrar in terms of sect. 3 after the commencement of the Act, and, as I have already pointed out, that section declares in unequivocal terms that no contract, except a contract to accept the provisions of such a scheme, shall bar a workman from claiming the compensation provided by the Act. No doubt if the construction which I put upon sub-sects. (1) and (4) of sect. 15 be sound, an exception to the rule laid down in the third section is made in the case of a workman who at the commencement of the Act was under contract to accept the provisions of a scheme certified under the Act of 1897, but that is the only exception which I can find.

I have therefore arrived at a different conclusion from that of the learned Sheriff-Substitute, and am of opinion that the appellant is not excluded, by having agreed to accept the provisions of Scheme No. 7, from claiming compensation under the Act. I accordingly think that the first question should be answered in the affirmative, and that being so, the second question does not arise.

Lord Ardwall.—I concur in the course which is proposed by Lord Low. I am of opinion that the appellant is entitled to compensation under the Workmen's Compensation Act 1906, and that the Sheriff's decision ought to be recalled. I do not think that the appellant's claim for compensation under the Act is excluded by his having agreed to accept the scale of compensation provided by the Scheme No. 7 marked "A". That scheme had been certified in terms of the Workmen's Compensation Act 1897, on 10th December 1903, but at the time the appellant signed it it had not been re-certified after the passing of the Act of 1906, as provided by sect. 15, sub-sects. (2) and (3) of that Act, and although subsequently the scheme is said to have been re-certified, yet that re-certification only took place after material alterations had been made upon it. The question is whether by signing the said Scheme "A" after the Act of 1906 had come into operation, the appellant has contracted himself out of the operation of that statute. I am of opinion that he has not. Sect. 3 of the said Act of 1906 deals with the question of contracting out, and provides that that can only be done if the Registrar of Friendly Societies, after taking steps to ascertain the views of the employers and workmen, certifies that any scheme of compensation provides certain benefits therein specified; and if that shall have been done, the Act goes on to provide as follows: "The employer may, while the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme; but saving as aforesaid, the Act shall apply, notwithstanding any contract to the contrary made after the commencement of this Act." Now upon the facts stated in this case it appears that the contract signed by the appellant had not been certified by the Registrar of Friendly Societies in terms of this section. Accordingly, as provided by the clause above quoted, the Act of 1906 applies, notwithstanding the contract in question, which was made after the commencement of the Act. This matter is, in my opinion, quite clear so far as sect. 3 is concerned.

But it is said that the provisions of sect. 15 have the effect of rendering the scheme under the Workmen's Compensation Act of 1897, in force at the commencement of the Act of 1906, a valid scheme under the Act of 1906 if it is re-certified at any time before the expiration of six months from the commencement of the said Act, and in the present case this has been done. I cannot accept this reasoning. I think the result of sub-sect. 2 of sect. 15 is that until what one may call an old scheme is re-certified by the Registrar of Friendly Societies, it has not effect as if it were a new scheme under the Act of 1906 as far as regards workmen signing it after the commencement of that Act are concerned. Accordingly the scheme signed by the appellant was not at the time he signed it equivalent to a new scheme under sect. 3 of the Act of 1906. It was argued that if this be so, the Act of 1906 makes it impossible for workmen or employers to enter into a contract taking themselves out of the Act during the period elapsing between the commencement of the Act and the adjustment of a scheme under sect. 3, or the re-certifying of an existing scheme under the Act of 1897. It is, I think, possible that this is the effect of the Act of 1906, but this defect is not of much moment, for it only affects workmen who are entering an employment for the first time between the passing of the Act and the certification or re-certification of a scheme, and does not prevent even them contracting themselves out of the Act so soon as a new scheme shall have beeen certified or an old one recertified. The terms of sect. 3 are quite absolute, and in my opinion they are not altered by the provisions of sub-sects. (2), (3) and

(4) of sect. 15, which are intended to save contracts current at the commencement of the Act, and also under certain conditions to utilise in whole or part schemes then in force as schemes under the 1906 Act.

Lord Stormonth-Darling.—I agree with both your Lordships.—*7th March* 1908.

Counsel for Appellant, Craigie, K.C., A. M. Stuart; Agents, Balfour & Manson, S.S.C.—Counsel for Respondents, Murray, J. H. Henderson; Agents, Morton, Smart, Macdonald & Prosser, W.S. J. S. M.

SECOND DIVISION.

(*Lords Stormonth-Darling, Low and Ardwall.*)

373. Lawrie *v.* James Brown & Company Limited.

I. Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), Schedule II. (8)—Agreement to Pay Compensation under the Act — Memorandum Recorded—Agreement Containing Undertaking to Give Employment—Breach of Agreement to Employ—Enforcement—Common Law Action of Damages—Held Action Incompetent.

II. Master and Servant—Contract to Give Regular Employment — Employment for a Period of Two and a Half Years — Dismissal—Breach of Contract—Held no Relevant Averment of Breach.

Reclaiming Note against an Interlocutor of Lord Guthrie.

(*Reported supra*, p. 109.)

The pursuer reclaimed against the interlocutor of the Lord Ordinary assoilzieing the defenders from the conclusions of the summons.

Argued for Pursuer: (1) On competency. The agreement was not under the Act *quoad* the stipulation for regular employment, because the Act dealt with money compensation and nothing else (*Cochrane* v. *Traill & Sons*, 1900, 2 F. 794). Registering a memorandum did not make it such an agreement if it was not such otherwise. Recording was only for execution. It was incompetent to charge on such an agreement *ad factum præstandum*, because the Court would not enforce specific performance of a contract to employ. The only method of enforcement was by action of damages. Recording did not take away any remedy which was open to the pursuer without it. In *Robertson* v. *Henderson*, 1904, 6 F. 770, it was held that a common law action of reduction of an agreement was competent. (2) On relevancy. The defenders were bound to employ the pursuer under the agreement so long as he was able and willing to work. That was the meaning of the word "regular." Short of his lifetime, the contract was valid for any period. But the contract had, according to the averments, been broken from the beginning. The pursuer had never got the kind of employment stipulated.

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Argued for Defenders: (1) The pursuer's remedy was to charge on the recorded agreement for the 23s. a week, and tender his services. The agreement was one for compensation, and could not be split up. The recorded memorandum was equivalent to a decree; and an action at common law for non-implement of a decree was incompetent. It could not be in part a decree and in part not, with a charge alone competent on the decree portion and an action *quoad* the rest. If the decree could not be enforced by charge, then the pursuer simply would have an agreement which was unenforceable. Counsel referred to *Robertson* v. *Henderson*, 1905, 7 F. 776. (2) This agreement to give employment was of an indefinite character, and, short of a charge of *mala fides*, could not be enforced. It was for employment during pleasure, and could be put an end to at any time. Here employment was given for two and a half years, and was terminated for disobedience.

The Court *adhered.*

Lord Stormonth-Darling.—My Lords, I agree with the Lord Ordinary upon both points. He has decided the case by finding that the action is bad, both as being incompetent and irrelevant. Now nothing is better settled than that you cannot proceed both under the Workmen's Compensation Act and also independently of it, and the Workmen's Compensation Act provides for workmen a short and simple remedy, where there has been an agreement between the parties, for working out that agreement, first, by registering the agreement, and then by making it enforceable as a Sheriff Court decree to all effects. The agreement here was signed by both parties, and from the first it seems to have been determined that it should be registered under the Act. Now when that is so I think that all other remedy is excluded. I quite agree that the judgment in the case of *Robertson* v. *S. Henderson & Sons Ltd.*, 1904, 6 F. 770, settles that in certain circumstances there may be an action at common law. There, an agreement had been made between a minor and his employers, and it was held that it was reducible by the workman on the ground of minority and lesion, but the ground of that decision on the competency was stated by Lord Kinnear in these words: "The Act of Parliament gives compensation in certain circumstances, and allows it to be fixed either by agreement or by arbitration. But when it allows the compensation to be fixed by agreement it assumes that the agreement is valid and binding according to law." Now, of

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course, an agreement under the head of minority and lesion can only be reduced by an action at common law. Now what is the agreement here, and what are the circumstances of this case? The agreement was a mixed one: in the first place, it provided what the compensation to which the applicant was entitled under the Act would have been, and as to that the parties are agreed. It said that the average weekly earnings were 30s. and that the maximum compensation would therefore have been 17s. 6d., being the half thereof and an added sum for average overtime. And then it went on to agree that in lieu of such compensation the respondents were to give the applicant regular employment as a foreman over the workers at the settling ponds in connection with their works at Esk Mills, and to pay him the fixed weekly wage of 23s. with the usual additional pay for extra work, and also to pay him, on the date hereof, the sum of £90 sterling, and in full of all his claims for compensation under the said Act in respect of the said injury.

Well, now, the compensation which is here referred to covers all the stipulations in his favour—that is to say, those stipulations which the respondents agreed to pay in lieu of compensation are the £90 down and the undertaking to give regular employment as foreman over the workers at the settling ponds in connection with their works at Esk Mills, at a weekly wage, with a certain additional pay for extra work. It was these things which he agreed to accept as compensation under the Act, and that agreement was, as I have said, duly signed and recorded. It seems to me that the Lord Ordinary is quite right in saying that you cannot split an agreement of that kind into two. The compensation for the accident was a composite thing, part of which, I quite agree, would not have been enforceable at all, and so the Lord Ordinary held on the question of relevancy. But still I do not see how it was competent to split it into two as the workman proposes to do. He says, I have got my £90—and that is all that was, strictly speaking, money compensation for the injury I received—but I propose to treat that separately altogether from the obligation to give regular employment in a certain capacity, which I see is not enforceable under the agreement because it was open to a number of objections, and I can only enforce it at common law. Now I think that is an illegitimate way of dealing with the agreement, and it was so held, as I read the agreement, in the subsequent case of *Robertson* v. *Henderson & Sons* (namely, a report in 7 F. 776), because there the Court undoubtedly viewed the compensation as consisting partly of the promise or undertaking by the employers to give employment, although they admitted it was not enforceable at all.

Well, then, here the workman agreed to that, and it was a term of the agreement which he made under the Act, and the Lord Ordinary has held that you cannot split it into two parts and treat the one part as compensation and the other not. I think it was all compensation, and the workman took it for what it was worth, and was bound to proceed as the Act directed, namely, by registering the agreement, which he did, and by charging upon it as a Sheriff Court decree. I agree with Mr Lees that it is impossible to treat a Sheriff Court decree as a thing which is to be split into its parts and treated differently according as one part was and the other was not, strictly speaking, enforceable.

That concludes the Lord Ordinary's mode of dealing with the plea of incompetency, and then he goes on to deal with the relevancy, and there again he holds that the pursuer's averments are objectionable as being not relevant, because his complaint is merely that the employers failed to give him regular employment as he considers it. Now what is the fact? They took him on as foreman over the workers at the settling ponds and kept him there for two years and a half. However, there arose a dispute between them owing to his failure to obey the orders of the foreman over the whole workers, which undoubtedly he was bound to obey. It is not said that he was not put as foreman over the workers at the settling ponds, but it cannot be contended that he was not bound to obey the foreman over the whole workers. There also I think the Lord Ordinary was perfectly right, and therefore what I propose to your Lordships is to adhere to the interlocutor which the Lord Ordinary has pronounced in both branches.

Lord Low.—My Lords, I concur. I think that when the parties recorded the agreement under sect. 8 of the Second Schedule of the Act, they elected to abide by the Act, because the effect of recording the agreement was that, as it is put in the eighth section, they obtained what was equivalent to a County Court judgment in terms of the agreement; or if we take the words of sub-section (*b*) of the 14th section of the Schedule, what was equivalent to a recorded decree arbitral in terms of the agreement. The pursuer having therefore chosen to take a decree which he can enforce, it seems to me that he must abide by the remedy which he has chosen, and cannot throw over the registration and appeal to this Court on the ground that this is a contract having nothing to do with the Workmen's Compensation Act at all. But even if that view were not maintainable, I agree with the Lord Ordinary that the action falls to be thrown out on the ground that no relevant averment has been made. Under the agreement no doubt the employers bound themselves to give the workman regular employment as foreman over the workers at the settling pond, but no term of endurance of the employment is fixed. It was argued that the use of the word "regular" implied a term of endurance, but I do not think

that is so, because I think that the word "regular" is used as distinguished from "occasional," or "intermittent," "regular" employment being employment which will enable the workman to earn wages regularly week by week. But as no term of endurance is fixed, I take it that the employment was necessarily employment at pleasure, and that is a contract which, in my judgment, cannot be enforced, because I do not think that the Court will ordain that to be done which may immediately be undone.

But I do not think it is necessary to go as far as that, because, assuming that the employers were bound, at all events, to give the workman employment for some time, they have done so. They have given him the stipulated employment and paid him regularly the stipulated wages for two and a half years, and it is perfectly plain that the reason why they dismissed him in the end was that there was a dispute about the kind of work he was to perform. In these circumstances I think that it is plain that the claim of damages for breach of contract is untenable. On both branches of the case, therefore, I agree with your Lordship in the chair and with the Lord Ordinary.

Lord Ardwall.—My Lords, I agree with the result at which your Lordships have arrived, that we should affirm the judgment of the Lord Ordinary, but I do so only on the question of relevancy, and that for the reasons stated by my brother Lord Low.

There was no duration here, and where this is so in a contract of service, it is well settled that the duration of such contracts is what is customary in the employment. In the case of gamekeepers and gardeners, etc., it is usually held that the engagement is for six months or a year according to the custom of the country. With regard to workmen in a work of this kind, they usually are employed for the term of a single pay, which is generally a fortnight. I think therefore it is absurd to say that after the pursuer had been three years or so in the defenders' service, and the parties having fallen out about the nature of the employment, and the defenders having dismissed the pursuer, there is any relevant averment entitling him to damages, and accordingly on that ground I think the action is irrelevant, and that the defenders must be assoilzied.

But I must say that I am not, without much further consideration, prepared to agree in holding that this action is incompetent. I am not convinced that it is illegal to insert an undertaking to give employment as part of a contract for compensation under the Workmen's Compensation Act. If it is not illegal to do so, the question comes to be, How is such an agreement to be enforced? It is said, "Just register your memorandum, and go on and charge upon it." Now that is all very well; but a contract of service, as is pretty well settled, is not a contract of which a court of law will decern specific implement. But the service has come to an end, and the man has been discharged. What, then, does the pursuer's claim resolve into? If a relevant case had been stated, it would resolve into a claim of damages, but there is no procedure prescribed by the Workmen's Compensation Act for enforcing such a claim, and therefore I must say I am disposed to think, if there had been a relevant case here, it was not incompetent to ask in an ordinary court of law a remedy which could not be worked out under the Workmen's Compensation Act. We, however, have not a relevant action here, and accordingly I refrain from expressing a definite opinion on the question of competency. —*6th March* 1908.

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Lawrie v. James Brown & Co. Ltd.
Lord Ardwall.

Counsel for Pursuer, T. B. Morison, K.C., Gillon; Agents, Kirk Mackie & Elliot, S.S.C.—Counsel for Defenders, Lees, K.C., Burn Murdoch; Agents, Hagart & Burn Murdoch, W.S.

F. A. U.

FIRST DIVISION.

(*The Lord President, Lords M'Laren, Kinnear and Pearson.*)

374. Ramsay *v.* Howison *et e contra.*

Landlord and Tenant — Reparation — Mora—Lease of Moorland Pastoral Farm —Heather-Burning—Stipulation in Lease as to Annual Proportion of Heather to be Burned—Claim by Tenant for Damages Suffered in Tenth Year of Lease Owing to Insufficient Heather-Burning—Defence of Mora—Clean Receipts Granted by Tenant for Rent Down to Year of Claim—Circumstances in Which Held that Tenant's Claim Not Barred by Mora—Rule in Broadwood v. Hunter, 1855, 17 D. 340, Discussed.

Appeal from the Sheriff Court of Perthshire.

These were cross actions, to which the parties were Sir James Ramsay of Bamff and John Howison, his tenant in a moorland grazing farm. The question at issue was a claim by the tenant of damages arising from the alleged failure of the landlord to burn sufficient heather upon the farm. Both actions dealt with other questions in dispute between the parties with regard to certain repairs and fencing stipulated for in the lease, but for the purposes of this report it is not necessary to refer to these more particularly. The tenant entered into possession of the farm at Martinmas 1895, upon conditions of a lease verbally arranged between him and Mr Panton, the landlord's factor, since deceased, for a term of nineteen years from that date. The

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terms of the lease were not finally adjusted until July 1902, when an approved draft lease was signed by the parties. No formal lease was entered into. At this time Mr Claude Ralston was factor to the estate, Mr Panton having died in 1892; in 1902 Mr T. P. Laird succeeded Mr Ralston as factor. By the terms of the approved draft lease the proprietor agreed to let to the tenant the lands in question "all as presently possessed by the said John Howison . . . . and that for a period of nineteen years from and after the term of Martinmas 1895, which, notwithstanding the date hereof, is declared to be the term of entry hereunder." The rent of the subjects was fixed at £315, payable half-yearly, the first half-year's rent being payable one year after entry—that is, payable at Martinmas 1896 for possession to Whitsunday 1896, and so forth. The stipulation as regards heather-burning upon the farm was in these terms:

> And with regard to heather-burning on the moorland of the farm hereby let, it is agreed upon, and the proprietor hereby undertakes to burn, weather permitting (except during the statutory close time from the eleventh day of April to the first day of November), one year with another, one-twelfth part more or less thereof during each year of the lease, the said heather-burning to be carried out under the supervision of the proprietor's head gamekeeper, the tenant giving the assistance of his shepherds in connection therewith: Declaring that no heather shall be burned on the lands hereby let except as herein provided for, under the penalty of Two pounds sterling per imperial acre, and at that rate for any part of an acre of additional rent.

The acreage of the farm was not made matter of agreement in the approved draft lease, nor was it agreed upon in the pleadings. The tenant stated it to be about 3000 acres, of which two-thirds were under heather, the landlord at some 2700 acres, of which two-thirds were under heather.

The tenant paid the rent half-yearly up to and including that payable at Martinmas 1904 for possession to Whitsunday 1904, but retained the rent payable at Whitsunday 1905 for possession to Martinmas 1904. On 7th July 1905 the landlord raised an action for payment of this half-year's rent, which action the tenant resisted, on the ground that the landlord had failed to perform material stipulations of the lease, including that with regard to heather-burning above set forth, and that he (the tenant) was entitled to abatement of rent or set-off of damages in consequence of the said breach of contract. On 21st September of the same year the tenant raised an action against the landlord in which he claimed, *inter alia*, two sums of £100 each as representing the damage which he had sustained in the years 1904 and 1905 respectively, owing to the landlord's failure to burn sufficient heather in terms of the obligation above set forth.

The tenant made the following averments:

COND. 3. A main condition on which the pursuer offered for and agreed to become tenant of the said subjects was that heather should be burned by the proprietor to the extent of one-tenth part yearly. (This was afterwards modified to one-twelfth part yearly as after mentioned.) The defender's factor gave that assurance before the pursuer would consent to offer, and the pursuer, in reliance thereon, agreed to give £315 of yearly rent for the subjects, being £25 more than had been paid for the subjects previously. . . .

COND. 4. The said factor had and acted upon the defender's authority in making the said bargain. He informed his principal (the defender) of the foresaid conditions, and the defender consented thereto.

COND. 6. . . . . The defender has not implemented his obligation, although he was well aware that the pursuer regarded it as of primary importance, and insisted upon its fulfilment. In 1896, indeed, the defender burned a little of the heather, but in the following year he burned none, and so anxious was the pursuer to have it done that he employed his shepherds to do it that year. The defender, however, objected, and threatened interdict. Since then the defender has burned little or no heather on the subjects let. In the ten years since the pursuer's entry, about 150 acres only of heather have been burned. Particularly in the years 1903 and 1904 the defender has burned no heather, and in the year 1905 no more than about 10 acres of heather on the said subjects. The pursuer made complaint of the want of heather-burning to the defender's successive factors, including the present factor, Mr T. P. Laird, C.A., Edinburgh, but without effect. The pursuer told Mr Laird that he would withhold rent until fulfilment of the defender's part of the lease, and he has retained the rent of the second half of crop 1904, which would have become payable at the term of Whitsunday 1905 had the defender performed his share of the contract.

In answer the landlord admitted that he knew of a bargain between pursuer and the said John Panton, but denied the conditions as stated. *Quoad ultra*, he denied these averments, under reference to the following:

STAT. 2. In the year 1895 the late Mr John Panton, solicitor, Blairgowrie, was factor for defender, and had a general authority to negotiate for the letting of farms. The defender was made acquainted at the time with the rent offered by pursuer.

STAT. 3. Defender knew that it had been arranged that about one-twelfth part of the heather portion should be burned yearly, one year with another, weather permitting, and explained that, as far as possible, the defender has fulfilled that part of the bargain. Explained that in the year 1896, the year after pursuer's entry to the holding, a very much larger proportion of heather was burned than bargained for, in order to give the moor a good start for grass, and it is averred that about one-sixth part of the whole moor was burned in that year. Since then about 1000 acres of heather have been burned from time to time. Explained, however, that in the years 1903 and 1904, in consequence of the very wet seasons, it was impossible to burn any heather, and consequently none was burned. Explained that in the year 1905 about fifty acres of heather were burned, and that more would have been burned if weather had permitted.

The landlord, *inter alia*, pleaded:

In any event, pursuer having paid his rent for the period of his possession up to Martinmas 1904 without specific reservation of any claim for compensation, cannot now maintain such claim, so far as arising prior to the said term of Martinmas 1904.

In the first action the rent was consigned. After sundry procedure the Sheriff (Johnston) ordered the consigned sum to be paid over to the landlord, conjoined the actions, and allowed proof in the conjoined actions. After proof the Sheriff-Substitute (Sym) pronounced an interlocutor in which he found, *inter alia*, as follows:

(3) That prior to his (the tenant's) obtaining entry, the lands had been held by a Mr Ferguson, and that there had been a want of attention to sufficient heather-burning, and that there was consequently a good deal of old heather upon the lands. . . . (17) finds with regard to heather-burning that, in the season 1896, a considerable amount of heather-burning was done and the moor was partially broken up, and that in 1906, after the present dispute was going on, a considerable amount of heather-burning was done, but that in the intervening years, notwithstanding complaint and objection on the part of the tenant Howison, the landlord failed to perform, taking these years together, the obligation of burning, one year with another, one-twelfth of the heather each heather-burning season. (18) That the seasons of 1903 and 1904, and to a considerable extent that of 1905, were wet and unsuitable for heather-burning, but the other seasons between 1897 and 1902 were more suitable, and the obligation, making proper allowance for the bad years, was capable of fulfilment. . . . (20) That during the earlier years of the agreement the terms of the heather-burning obligation had not been adjusted, because for some time the landlord had objected to bind himself to any definite amount of muirburn, and that, though this may have been earlier overcome (as appears from the communication of Mr Claude Ralston with the tenant, in process), the draft lease was not adjusted and approved till 11th July 1902. . . . Therefore with these findings of fact, finds in law in the conjoined actions, (1) with regard to heather-burning, that the tenant is not disentitled—having regard to the nature of the obligation, the uncertainty for some years of its position owing to the landlord's action, and the manner in which it is to be fulfilled on an average of years—from seeking damages for its breach; assesses the damages at £100. . . .

Note. . . .—The parties have caused serious difficulties about matters which ought to be plain. The contract between them was not adjusted till long after the possession of the farm was entered on. It still stands on an approved draft lease. Sir James Ramsay had, so late as 31st December 1898, a strong objection to agreeing to any definite amount of muirburn. He wrote of that date, "I will not sign any lease which binds me to a definite amount in each year," and "there are other clauses that I cannot accept." If one is to regard as settling the matter that copy of the draft lease on which Sir James founds, it could not have been till after the heather-burning season of 1902 that Sir James was induced to agree that a proportion of one-twelfth on an average should be burned each year. But perhaps before 1900 he had come round to agree to one-twelfth. On his part the tenant has not, all necessary allowance being made, so acted as to make his position safe. The acreage of the subjects let has never been agreed on. It was apparently not known to the tenant, who, when he took the lease, acted on his general knowledge of the place, and on an estimate of what stock he thought it would carry. A measurement has been made on the part of Sir James since the action was in Court. On what standard he and his advisers acted, after he came to agree that one-twelfth of the heather be burned each year, as to the amount which should be burned in any year, it is not easy to say, unless it be that, as before that time, "it depends very much on the assistance you give my keeper."

It may be said that in each year in which burning was possible some burning was done. Nearly always it was in small patches, which seems to be the practice on the Bamff estate. In the first year (1896) a good deal of burning seems to have been done. The only year in which anything of a like amount was done, viz. 1906, requires, owing to the date of the litigation, to be excluded from consideration.

For the first few years, 1896 to 1902, the tenant could hardly make a stand. For an average of one year with another has to be considered, and besides there was no agreement as to what should be burned until after several years had run. Though the lease may now shew what must be held to have been agreed upon at the beginning, the question is one of the tenant's conduct. He had no bargain on which to take his stand for a definite proportion. So he must for a time stand excused for not insisting, as a condition of paying rent, on one-twelfth being burned on an average.

In 1903 and 1904 there was no burning. But for these years the landlord stands excused. Burning was impossible to any serious extent, because a cycle of very wet years had begun. The year 1905, though a better year, was a wet year too. As has been said, an average has to be considered. It is thought that in 1905 it was not too late for the tenant to take up the ground of maintaining that he could withhold rent which had become due for possession in 1904 unless more heather-burning were done. Whether he could do so depends, of course, upon the facts. The Sheriff-Substitute is quite of opinion that it will not do for a tenant simply to complain or grumble and at the same time make payment on clean receipts without reserving his claim. If he do so he may exclude himself from remedy, because he will have led his opponent to think that the claim is passed from and, most likely, to lose evidence which would meet it. . . . .

[After reviewing the evidence and expressing the opinion that it would not be consistent with the result thereof to hold that there had been, one year with another, one-twelfth burned throughout the lease, the Sheriff-Substitute proceeds:]

His verdict on the whole proof is that the obligation has not been fulfilled, taking the years 1897 to 1905, and making allowance for the bad years. It is thought that the damages ought to be assessed on this head at £100. This sum is made up on the consideration that the tenant might have kept additional stock, and that prices have of late been good. Nothing has been allowed for the alleged loss of sheep by their falling into wet holes among the heather and being drowned.

The landlord *appealed* to the Sheriff, who pronounced the following interlocutor:

The Sheriff recalls the 17th and 18th findings in fact in the Sheriff-Substitute's interlocutor of

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26th December 1906, and in place thereof finds in fact: (16) That having regard to the state of the weather in the years 1903, 1904, and 1905, and the amount of heather burned in 1906, no failure upon the part of the landlord to burn heather in accordance with the provisions of the lease is proved to have occurred subsequent to the spring of 1902; (17) that the tenant claims damages in respect of the failure of the landlord to burn sufficient heather in each of the years from 1897 to 1902 inclusive; (18) that the tenant paid his rent in full, without demanding any reservation in the receipt or intimating any claim for neglect of heather-burning, down to the term of Whitsunday 1905, when he consigned the half-year's rent then due: recals the first finding in law in the said interlocutor and the relative decerniture, and in place thereof, finds that the tenant is barred by delay in intimating his claim from any claim of damages in respect of failure to burn sufficient heather: Assoilzies the landlord from the conclusions for damages in respect of insufficient heather-burning.

Note.—The tenant entered into possession at Martinmas 1895. The formal lease was not executed until July 1902. The tenant maintains that the terms upon which he took the farm, as arranged between him and Mr Panton, the landlord's factor, were that one-tenth of the heather was to be burned annually, and that one-twelfth was ultimately substituted in the formal lease, reluctantly, on his part. The landlord's case I understand to be, that the question of what was to be the arrangement as to heather-burning was a matter of open negotiation down to the adjustment of the formal lease. I hold that the lease must be treated as speaking from the date of entry so far as fixing the landlord's obligation in the matter. But for the purposes of the present case, I do not think that the date of execution of the lease can be altogether ignored. According to the Sheriff-Substitute's view of the evidence, with which I do not differ, there was no default on the landlord's part after the spring of 1902. 1903, 1904, and 1905 were bad seasons, and there was much burning in 1906. Accordingly, when the lease was signed, all the failure which can be complained of had already occurred. But the lease, which is now appealed to as the record of the terms of the contract said to have been broken, was executed without any intimation of a claim upon the tenant's part. That is a circumstance which cannot be altogether overlooked in determining whether the tenant waived his claim in respect of prior default. Under the lease the tenant is made liable in pactional rent throughout the tenancy for any heather burned by himself without the keepers. Prior to the date of the execution of the lease, he had on three occasions so burned heather. It would not, I think, have been easy for the landlord, after signing this lease, without any intimation of a claim already accrued, thereafter to have insisted in a claim in respect of such bygone breach. Where two parties negotiate in a friendly way as to the adjustment of a lease, and then amicably sign the same when adjusted, it seems hardly consonant with what was their reasonable understanding of these parties at the time of such negotiation, adjustment, and execution, that, after the lease is signed, its terms should be appealed to, to liquidate a claim for damages said to have been incurred before its date, of which claim no hint was given until after the lease was signed. However that may be, the tenant paid his rent until Whitsunday 1905 without reservation or intimation of such claim. At Whitsunday 1905, being three years after the last act of default (if there was default) on the part of the landlord, the tenant retained his rent, and intimated a claim. According to the authorities on this branch of the law, this delay is a conclusive answer to the tenant's claim, unless he can find some special circumstance which takes the case out of the general rule (*Emslie* v. *Young's Trs.*, 1894, 21 R. 710; *Broadwood* v. *Hunter*, 1855, 17 D. 340). The learned Sheriff-Substitute finds such circumstances, viz.: —(1) The lease had not been finally adjusted until 1902. Now, it is perhaps somewhat difficult for the tenant to maintain, on the one hand, that the lease shall be treated as a record of the original contract, and as speaking from the date of entry, but that, on the other hand, his conduct during the intervening period shall be judged upon the footing that there was no obligation to which he could appeal. I am not disposed, however, to apply this strict logic in the matter. I proceed upon a more general ground. The tenant was not to burn heather himself, the landlord was to burn it, and to burn it to an extent to meet the reasonable requirements of good farming. That was a special point according to the tenant when he took the farm, and, according to his own evidence, that duty was being neglected between 1896 and 1902. But he intimated no claim, and made no reservation in paying his rent. The difficulty about the adjustment of the lease might very well have justified a claim of merely a round sum, or it may be a claim or reservation of a still more general character. But I do not think that it was impossible or difficult for him to give the landlord clearly to understand that he was holding him responsible in damages for the neglect which he complains of. Further, there were five termly payments of rent after the lease was signed. There does not therefore appear to me to be anything in this aspect of the matter which interferes with the application of the principle upon which the Court proceeded in the cases above referred to; (2) the second specially is that the obligation was to a certain extent ambulatory, "one year with another." There would be weight in this consideration if only one or two years were in question, but according to the tenant, there had been default in six successive years, 1897–1902 inclusive, and thereafter, when the rent was paid without reservation, that default was irremediable, and the consequences of it were being felt by the tenant.

It is suggested that even if all claim is barred in respect of loss suffered before the tenant withheld his rent, still he is entitled to damages for loss suffered since that date in respect of prior default. But where there is action imputing waiver of claim after loss has begun to accrue, I think that this imports waiver of the whole claim in respect of the default. To hold otherwise would be inconsistent with the principle of timeous notice, upon which the cases proceed.

In the view I take of the law, it is unnecessary, and would not indeed be proper, for me to determine the question whether there was default upon the part of the landlord. The evidence upon the matter, however, goes to confirm my conviction of the propriety of the rule which requires notice *de recenti* of claims of this kind. The amount burned in the immediately preceding years could, in 1902, have been determined with an approximate precision, which is now impossible, and other evidence now lost would have been available.

The tenant *appealed* and *argued*: (1) The

landlord's obligation must be taken as dating from 1895 and not from 1902, as contended by the appellant. The signature of the approved draft lease did not make a fresh contract between the parties, but only formally embodied the terms of lease already agreed upon (*Foulis* v. *M'Whirter*, 1841, 3 D. 343). (2) The Sheriff was wrong in holding that the claim was barred. The decision in *Emslie* v. *Young's Trs.*, 1894, 21 R. 710, could not be applied to the facts of the present case. There the claim was for damages suffered three years before the claim and in a year for the rents of which clean receipts had been granted. There was no authority for holding that a claim for damage suffered in years for which the rent had been retained and after a claim had been formulated should be barred by the granting of clean receipts in previous years. The rule laid down in *Broadwood*, 1855, 17 D. 340, and followed in *Emslie*, 1894, 21 R. 700, amounted to no more than this, that the circumstances of each case should be taken into consideration in deciding whether or not there had been waiver, and the decisions had varied accordingly (*Baird*, *Eliott* and *Mount*, *infra*, and *M'Donald* v. *Johnstone*, 1883, 10 R. 959; *Hardie* v. *Duke of Hamilton*, 1878, 15 S.L.R. 329; *Johnstone* v. *Hughan*, 1894, 21 R. 777). In the present case no presumption of waiver was to be drawn from the delay of the tenant in intimating his claim. The landlord was entitled to perform his obligation on the average of a series of years and the tenant would not be safe in making a claim until sufficient time had elapsed to make it plain that breach had occurred. In the circumstances the tenant was not barred from claiming for damage, which according to the evidence he had in fact suffered.

Argued for the Respondent: (1) There was no obligation upon the landlord to burn any definite amount of heather until 1902, when the terms of the obligation, hitherto in dispute, were finally adjusted. The signed draft lease no doubt confirmed that part of the bargain which had been settled in 1895 beyond dispute, but as regards conditions hitherto not agreed upon it must be regarded as a new bargain. In this respect the present case differed from that of *M'Whirter*, for there the terms of the lease as eventually signed agreed with those of the missives upon which it proceeded, and which had never been in dispute. If this view were correct then the tenant had no claim, as according to the findings of both Sheriffs the landlord was excused after 1902 owing to the weather conditions. (2) Assuming the lease to speak from 1895 the Sheriff was right in holding that the tenant's claim was barred. In cases such as the present the law required that the party claiming should intimate his claim as the damage arose, and should intimate it specifically as a claim of damages; waiver would be assumed from the absence of such a specific claim. The *ratio* of this rule was that otherwise the party claimed against would suffer prejudice in preserving evidence for his defence. Accordingly in *Broadwood*, *sup.* followed in *Emslie*, *sup.*; *Baird* v. *Mount*, 1874, 2 R. 101; *Eliott's Trs.* v. *Eliott*, 1894, 21 R. 863; and *Hamilton* v. *Duke of Montrose*, 1906, 8 F. 1026, it had been held that the granting of clean receipts was a circumstance from which to infer waiver. *Esto* that the circumstances of *Broadwood* and of *Emslie* differed from those of the present case, the *ratio* of the rule to be applied was the same. In this case the presumption of waiver was stronger than that in *Emslie's* case in respect of the signature of the approved draft in 1902, an act entirely inconsistent with the subsistence of a claim. Any breach of obligation must have occurred prior to that date, as in subsequent years the landlord was held to be excused, and must have been known to the tenant. Mutual waiver of all claims must be presumed from this act, the alternative presumption being that each party thereby admitted liability, the landlord for damages owing to failure to burn, and the tenant for pactional damages for having burned in contravention of the agreement. In any view the various circumstances founded on in support of the plea of bar were evidence in support of the landlord's contention upon the facts that no damage had been suffered and no complaint made by the tenant in respect of insufficient heather-burning.

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The Court *recalled* the interlocutor appealed against, and reverted to that of the Sheriff-Substitute.

Lord M'Laren.—This case comes before us on an appeal from the Sheriff Court of Perthshire in conjoined actions. In the first action Sir James Ramsay sued the appellant for £157, 10s., being half-year's rent due at Whitsunday 1905, and was met by a claim to retain the rent against a larger sum of damages said to be incurred in the year 1904, chiefly in respect of insufficient heather-burning.

The second action was instituted by the appellant, and in it he claims damages incurred in the year 1905. There is also a claim for repairs to the house and fences, but this part of the case was not brought under review in the Court of Session. The actions were conjoined in the Sheriff Court.

The Sheriff-Substitute awarded £100 of damage in respect of insufficient heather-burning, stating in his note that his award was made on the consideration that the tenant might have kept additional stock, and that prices of late had been good.

The Sheriff found "that the tenant is barred by delay in intimating his claim from any claim of damages in respect of failure to burn sufficient heather," and therefore assoilzied Sir James

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Ramsay from the conclusions under this head. In the note to his interlocutor the learned Sheriff states that in his view it is unnecessary for him to determine the question whether there was default on the part of the landlord.

It appears to me, however, that we cannot with advantage consider whether there was such delay in making a definite claim as would amount to a legal bar, until we have mastered the facts of the case, including such elements as the amount of heather burned from year to year, the state of the weather in the spring months in so far as it has interfered with burning of heather, and the condition of the moor at the time when the claim was made as compared with its condition when the tenant first entered on the possession of the farm.

The omission to burn the proper quantity for two or three years might not sensibly affect the value of the farm for grazing, and again, the inability to burn heather during, say, two consecutive seasons, even if it did affect the value of the farm, would not give the tenant a claim for damage.

But the effect of the heather being allowed to grow unchecked for a series of years is cumulative, and, *prima facie*, it is only when the tenant begins to suffer from the abnormal growth of the heather that his claim arises. In any view, it is only then that the attention of the tenant is directed to the subject, and that he is in a position to estimate the damage and to formulate a claim. For this reason I think we shall best get at the justice of the case if we begin by considering whether there was, in fact, a failure on the part of the respondent to keep down the heather to the proper extent.

The case is further complicated by reason of the parties being at variance as to the extent of the landlord's obligation to burn the moor. There is a concurrence of testimony that in 1895, when the appellant got possession of the farm of Craighead, the moor was not in good order, and the appellant would not have taken the farm except on the condition that it was to be made suitable for pasture by yearly heather-burning. But the terms of the lease, as often happens, were not arranged when the tenant got possession, and, as matter of fact, the lease was not executed until July 1902, the chief cause of the delay being the difference of view between landlord and tenant as to the extent to which the burning of the heather was to be carried. The appellant claimed that one-tenth of the moorland should be burned in each year. The respondent would only undertake to burn one-fourteenth. (See the evidence of Mr Ralston, factor in the intermediate years of the tenancy.) Eventually the figure of one-twelfth was agreed on, and that figure was inserted in the lease executed in 1902.

It is maintained for the proprietor that this figure ought not to be applied retrospectively, in estimating the damage under the present claim, but in my opinion there is not much substance in the argument. If the terms of the lease had been varied; if, for example, the original agreement had been to burn to the extent of one-fourteenth, and if after the lapse of say seven years, the proprietor had agreed to the proportion of one-twelfth, plainly there would be no breach of contract in past years if the burning had been carried out in terms of the original agreement. But in the actual case there was no variation of the original contract. The contract was (by legal implication) that the moor should be burned annually to a reasonable extent. The parties were not at first agreed as to what should be considered a reasonable proportion, but eventually they agreed that one-twelfth of the whole moor should be taken as a reasonable amount of burning in fulfilment of the proprietor's obligation, and this quantity was inserted in a lease which, although only executed in 1902, gave entry as at Martinmas 1895. I think this must be taken to be an estimate on which the parties were agreed and meant to be bound, of what they considered a fair fulfilment of the proprietor's obligation to burn reasonably. When, two years after the execution of the lease, it was found that the pasturage had deteriorated, I think the measure of damage is the loss the tenant proves that he has suffered from the neglect to burn to the extent of one-twelfth from the beginning. In that sense I see no difficulty in giving a retrospective effect to the clause in the lease, because it was not a variation, but an interpretation by joint consent of the original obligation. . . .

[After reviewing the evidence as to insufficient heather-burning, his Lordship proceeded:]

I agree with the Sheriff-Substitute that the respondent, or his gamekeeper, for whom he is of course responsible, has not fairly carried out the agreement with the appellant as to burning, and that the damage for the two years to which the actions relate is proved to amount to £100.

There remains for consideration the ground of the Sheriff's judgment, which is that the appellant by paying his rent for a series of years before making a specific claim, has departed from his claim of damage for future years.

Now I think that in applying the principle of decision in such cases as *Broadwood* v. *Hunter* to a case in which the uses of the land are different, and the conditions which determine liability are different, some caution is requisite; and it is proper to consider the principle which underlies the decisions, and to apply it, with the necessary reserve, to the altered conditions. There are two principles to be considered. The first is that where a proprietor is in breach of the contract of location, the tenant, and no other person, is the party entitled to sue for reparation, a principle which has lately been called in question, but may now, I hope, be held

to be established. The other is, that a tenant may waive his claim, and that such a waiver may be inferred from his acts, even when he has not granted an express discharge. Whether in any particular case the tenant has waived his claim is a question of fact in which all the circumstances have to be considered. In this case, and according to the agreement, the tenant entered upon the occupation of a farm which was in very bad condition, with a legal expectation that in the course of his tenure the sheep-carrying capacity of the farm would be improved. But it was quite impossible to forecast the time when the expected improvement would be realised, because this depended partly on the weather conditions being favourable for burning, and partly on the system of burning, which to some extent was in the proprietor's discretion. If the burning was done in considerable tracts at a time, there would be a sensible improvement as soon as the grass began to grow, but if it were done in small patches scattered over the moor the benefit might be eventually the same, but it would be longer in coming into operation. In any case, as the tenant entered upon an improving lease, he could not reasonably make a claim of damage until after the lapse of such a period of years as would be necessary to give the system a fair trial. The most he could do would be to insist on the agreement as to burning being carried out. In consequence of the death of Mr Panton, the first factor, we have not the advantage of his evidence, but I see no reason for doubting the accuracy of the appellant's statement that he complained to Mr Panton, year by year, of the inefficient way in which the burning was carried out, and pressed for a more speedy fulfilment of the landlord's undertaking in this respect. In the year after Panton's death, the parties were negotiating as to the terms of the written lease, and it was not until 1902, when the lease was executed, and when there had been a six years' trial of the proprietor's system of burning, that the tenant can be said to be in a condition to judge for himself whether he had the materials for a specific claim. Up to this time the utmost effect that could be given to his omission to make a claim would be that he could not claim damage for any inconvenience he had suffered in the years that were past.

Then, after 1902, the case was further complicated by the occurrence of two unfavourable years for burning; but in 1904 the appellant had satisfied himself that the respondent did not mean, unless compelled by legal means, to carry out fairly his undertaking as to heather-burning. In this conclusion I think he is justified by the attitude taken up by the respondent's advisers at the proof, and also by the circumstance that in the year following the action the heather-burning was, for the first time, carried out in an efficient way.

Now, if the appellant had brought his action at an earlier period, he would very likely have been met by the defence that the heather-burning had not had a sufficient trial, and that he could not expect in so short a time to have the farm in good condition. There is really no criterion for determining at what particular year the damage had declared itself so as to put the tenant to an election, either to waive his claim altogether or to enforce it. In all the circumstances I see no sufficient evidence of waiver, and I cannot think it would be a just or equitable result that the tenant must submit during the remaining years of his lease (for this is the Sheriff's judgment) to an actual refusal on the part of the landlord to fulfil his contract, because he has not enforced his rights with the utmost strictness in the past. I am therefore of opinion that we should sustain the appeal and restore the judgment of the Sheriff-Substitute, that the appellant is entitled to £100 as damage sustained during the years 1904 and 1905 through the negligent performance of the respondent's obligation to burn a fair proportion of the heather year by year in terms of the lease.

The Lord President and *Lord Kinnear* concurred. (*Lord Pearson* was absent from the advising.)—*5th March* 1908.

Counsel for the Appellant, Dean of Faculty (Campbell, K.C.), Macmillan; Agents, Carmichael & Miller, S.S.C.—Counsel for the Respondent, Constable, Ramsay; Agents, Gillespie & Paterson, W.S. W. A. R.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

375. Hunter *v.* Downie.

Succession—Testament—Words Importing Gift of Heritage — Titles to Land Consolidation Act 1868 (31 & 32 Vict. cap. 101), sect. 20—Bequest to Executor of "All My Estate" With Direction to Realise—Bequest Held to Include Heritage—Observations per Lord M'Laren on Grant v. Morren, 1893, 20 R. 404.

This was a special case, to which the parties were Archibald Hunter, the sole executor under the testamentary settlement of the late David Jack, of the first part, and Robert Downie, a purchaser from the first party, as executor aforesaid, of certain heritable property, of the second part. The said David Jack died in Dublin, leaving a last will and testament, of which probate was obtained in the High Court of Justice in Ireland. The will contained the following provisions:

I appoint Archibald Hunter of Roselea Drive, Dennistoun, in the City of Glasgow, to be the sole

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executor of this my last Will and Testament. I direct my said executor immediately after my death to realise all my estate and pay all my just debts and testamentary expenses. [After directing the payment of certain legacies, the will proceeds.] I direct that the residue of my estate, after the payment of the aforesaid legacies, shall be divided equally between my wife, Lucy Annie Jack, my son, James Jack, and my son, David Jack. I desire that my said wife, Lucy Annie Jack, shall have the choice of any of the furniture and books which she may desire, all remaining furniture or effects to be realised as aforesaid. I direct my said executor to place the realisation of my estate in the hands of Mr John Brown of 23 Exchequer Street, in the City of Dublin.

It was stated in the case that the estate of deceased consisted of certain moveable property in Dublin of the value of £326, and of heritable property in Glasgow. That the first party, desiring to realise the heritable estate belonging to the deceased, exposed the said property for sale at the upset price of £1750, and that the second party, the only offerer, was declared the purchaser. The case proceeded as follows:

4. The second party refused to accept the title offered by the first party, and questions have arisen with regard to the first party's title to said heritable property, and his power to sell the same.

5. The first party maintains that the whole estate, heritable and moveable, which belonged to the testator, was validly and effectually conveyed to him by said will and testament, and that there is an implied power of sale therein.

6. The second party maintains that the first party has no title to said heritable property, as it was not conveyed to him by said will and testament; that the said will and testament deals only with moveable estate, and that there are no words of direction or conveyance therein applicable to heritage in virtue of which a notarial instrument can be expede thereon in terms of the Titles to Land Consolidation (Scotland) Act 1868. He further maintains that even if the property were effectively conveyed to the first party under the said will and testament, there is no power of sale given to him therein.

The following Questions of Law were submitted:

1. Has the said heritable property which belonged to the deceased been validly conveyed under said will and testament to his said executor, the first party hereto?
2. In the event of the foregoing question being answered in the affirmative, is it competent to expede a notarial instrument in favour of the first party on the foresaid will and testament in the form of Schedule L of the Titles to Land Consolidation (Scotland) Act 1868?
3. In the event of the first question being answered in the affirmative, has the first party, as executor foresaid, power to sell said heritable property?

Argued for the First Party: No special form of words was required in order to convey heritage, provided the words were sufficient to carry moveables (Titles to Land Consolidation Act 1868, sect. 20). All that was necessary was that the intention of the testator to convey heritage should be plain from the terms of the deed (*Aim's Tr.* v. *Aim*, 1880, 8 R. 294; *M'Leod's Tr.* v. *M'Luckie*, 1883, 10 R. 1056; *Forsyth* v. *Turnbull*, 1887, 15 R. 172). Here such an intention must be drawn from the universal expression "all my estate." The word "estate" was suitable for the conveyance of heritage; and the absence of limitation, especially where, as here, the main portion of the estate was heritable, must be held as conclusive.

Argued for the Second Party: An intention to convey heritage must clearly be inferred from the language used, otherwise the Court will confine its application to moveable estate (*Grant* v. *Morren*, 1893, 20 R. 404; *Urquhart* v. *Dewar*, 1879, 6 R. 1026). Here there was ambiguity in respect that, first, the appointment was one of an executor *prima facie* for the administration of moveable estate; second, no words in the deed other than the words "all my estate" could be interpreted as including heritage, and the word estate had been refused such effect (*Grant, sup.*); third, the direction with regard to the realisation of the estate in Ireland, though appropriate to the moveable property which was situated there, was quite inappropriate to the heritable property which was situated in Scotland.

The Court *answered* the first and third questions in the affirmative, but did not answer the second question.

The Lord President.—The question before us is whether the executor of the late Mr Jack is in a position to give a good title to certain heritable property sold by him as executor, and that depends, in the first place, on whether the executor had right to the subjects in question; and, secondly, whether he had power to sell them. The first of these questions depends on the terms of the will and on the 20th section of the Titles to Land Act 1868. I need not quote the section, for your Lordships are familiar with its terms. The whole point of the section turns on the question whether the words used by the testator shew an intention to deal with heritable estate. If they do so, then the section provides that the mere absence of technical terms will not matter.

I think, looking to the terms of the will before us, there is no doubt that Mr Jack meant to dispose of his heritable estate, for he says: "I direct my said executor . . . . to realise all my estate"; and then after leaving various legacies, he goes on to direct him to divide the residue of the estate between his wife Lucy Jack and his sons James and David Jack.

Now, whether the use of the word "estate" would or would not in itself be sufficient to indicate that the will was meant to apply to heritable property, I think it is perfectly clear that when the words used are "all my estate," the whole estate, both real and personal, was meant to be conveyed. If that is so, it is obvious that the executor has right to the heritable estate, and

that he has power to sell it. It would be absurd to suppose that the testator meant that the heritage was not to be realised, but to be conveyed *pro indiviso* to the beneficiaries under the will. If the executor has power to sell, it follows that he can give a good title to the purchaser.

I propose accordingly that we should answer the first and third questions in the affirmative. The second question is not one which should have been put to the Court.

Lord M'Laren.—The 20th section of the Titles to Land Consolidation Act 1868 deals with the language necessary to pass estates from the dead to the living, and for the purpose of abolishing the peculiarity which existed in the old law with reference to heritable estate the statute made the provision that the language used to pass moveable estate should now be sufficient to pass heritable estate if it is used with reference to heritable estate. But the 20th section does not profess to solve the question what actual words will suffice to shew that the testator intended to dispose of his heritable estate by will. Now I think the decisions upon the latter point are on the whole consistent, and they proceed upon the principle of ascertaining whether the testator had heritage in view when he made his will. In one case the word "property" was held to be sufficient to pass heritage, and the word "estate" seems to me to be quite as general and as sufficient to pass heritage unless when it is used in a more limited sense. I observe that in the case of *Grant* v. *Morren*, 1893, 20 R. 404, where it was held that the will was not *habile* to convey heritage, I expressed the view that the "estate" there conveyed was confined in meaning to such estate as an executor might administer. But that case is distinguished in two important elements from the case before us. First there was in *Grant's* case no formal gift or direction, but only a bare appointment of an executor to perform the duties of an executor; while here, after appointing an executor, the testator goes on to bequeath legacies and to direct that his estate shall be realised and divided. But I also agree with your Lordship in holding that the word "all" is important. In cases like that of *Grant* the words "my estate" may be controlled by subsequent expressions and by the terms of directions given to the executor, but that is only if the words themselves are ambiguous; and where, as in the present case, the word "estate" is joined with the word "all" there is no ambiguity, and there is no necessity of drawing inferences from other parts of the deed to explain what is already clear, and still less to limit the generality of a clause which on the face of it is a universal bequest of the testator's estate.

Lord Kinnear.—I think that the first question in this case is solved by a consideration of two propositions, both of which have been stated by Lord President Inglis in two different cases, viz. (1) that the first question in cases of this kind is whether words importing a gift have been used in a will or testament with reference to land; and (2) that that question must be answered in the affirmative if the words employed describe either heritable estate in particular, or the testator's whole estate, without distinguishing between heritable and moveable. If this is sound, the application is easy, because the testator here directs that "all" his "estate" is to be realised, and then, after certain legacies have been paid, that the residue of "my estate" is to be divided between his wife and his sons. I do not think it can be disputed that if he had said in terms, "all my estate, heritable and moveable," his intention would have been quite plain, in spite of the appointment only of an executor. It is just as plain in the will as it stands, because, if a man has heritable as well as moveable estate, the direction to realise "all my estate" is not carried out if only his moveable estate is realised.

Upon the question of the power to sell, I think that follows as a matter of course, for the reasons stated by your Lordship.—*7th March* 1908.

Counsel for First Party, A. M. Anderson; Agent, C. Strang Watson, Solicitor.—Counsel for Second Party, Wark; Agent, W. J. Haig Scott, S.S.C. W. A. R.

HIGH COURT OF JUSTICIARY.

(Full Bench.)

(*The Lord Justice-General, The Lord Justice-Clerk, Lords M'Laren, Kinnear, Stormonth-Darling, Low, and Ardwall.*)

376. Middleton *v.* Tough.

Justiciary Cases—Fishing—Salmon Fishing—Weekly Close Time—Sunday Labour—Reasonable Excuse — Salmon Fisheries (Scotland) Act 1868 (31 & 32 Vict. cap. 123), sect. 24, Bye-law, Schedule D, sect. 3—When it Was Impossible, Owing to the Weather, to Remove Leaders on Saturday Night, but it Might be Done With Safety on Sunday, Held that the Fact that it Was Sunday Labour Was Not a Reasonable Excuse—Middleton v. Paterson, 1904, 6 F., J.C. 27, Disapproved.

Stated case.

This was an appeal against a judgment of the Sheriff-Substitute at Tain (Hay MacWatt) refusing to convict the respondent on a complaint which charged

That Mrs Margaret Anderson Tough, widow, residing in Portmahomack, in the county of Ross and

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Cromarty, occupier of the Geanies Salmon Fishery in the parish of Tarbat and said county of Ross and Cromarty, being a fishery at which bag-nets are used, has contravened the Salmon Fisheries (Scotland) Act 1868, sect. 24, and the bye-law, Schedule D, sect. 3, annexed to the said Act, in so far as between six o'clock p.m. on Saturday the third day of August nineteen hundred and seven, and six o'clock a.m. on Monday the fifth day of August nineteen hundred and seven, and within or during the weekly close time for the district of the river Conon, under the salmon fishery statutes, the said Mrs Margaret Anderson or Tough did omit or fail entirely to remove and take out of the water the netting of the leaders of five bag-nets belonging to her on said fishery, all placed in the sea *ex adverso* of the lands of Geanies, belonging to Lieutenant-Colonel William Hugh Eric Murray of Geanies, in said parish of Tarbat and county of Ross and Cromarty, and within the said district of the river Conon, contrary to said Act and bye-law.

The facts were set forth in the stated case as follows:

The cause was tried at Tain on 23rd October 1907, and the respondent pleaded not guilty.

At the trial the evidence led established the following facts:—

That the respondent is the occupier of the salmon fishings specified; that she failed to remove and take out of the water the netting of the leaders of said five bag-nets belonging to her on the Saturday night in question; that owing to a strong wind and rough sea it was dangerous for the respondent or her men to remove the leaders on the Saturday night; that the leaders could have been removed without danger on Sunday, and that one of said leaders was in fact removed about eight o'clock that morning by bailiffs in the employment of the Fishery Board; that no attempt was made on the part of the respondent or her men to remove the leaders referred to on the Sunday in question, but they were removed as soon as possible on Monday morning.

It was proved that the appellant wrote to the respondent on 22nd March 1906, intimating that the Board held her bound to remove leaders on Sunday, when it was impossible to do so on the Saturday night. There was no evidence that the respondent's men were ever asked by her, or that they refused to remove leaders on Sundays, or that it was impossible for the respondent to hire men willing to remove leaders on a Sunday.

On these facts the Sheriff-Substitute held that there was no contravention of the statute by the failure to remove the leaders on the Saturday night; and in respect of the decision in *Middleton* v. *Paterson*, 6 F., J.C. 27, he refused to convict on account of the failure to remove on the Sunday.

The Question of Law for the opinion of the High Court of Justiciary was: Whether—the weather having been suitable—the respondent was bound, on the Sunday in question, to entirely remove and take out of the water the netting of the leaders of the five bag-nets specified?

Argued for the Appellant: The statute of 1868 had been held to be imperative as regards the mode prescribed of observing the weekly close time (*Irving* v. *Phyn*, 14th Dec. 1891, 3 W. 46, 19 R. (J.) 7; *Osborne* v. *Anderson*, 3rd Nov. 1887, 1 W. 497, 15 R. (J.) 12; *Parr* v. *Mitchell*, 24th Feb. 1890, 2 W. 434; *Middleton* v. *Paterson*, *supra*. *Macrorie* v. *Forman*, 17th Nov. 1905, 8 F., J.C. 23, was wrongly decided. Contrary to the view expressed there by Lord Trayner, the law was that every servant was bound to do necessary work on Sunday, unless the terms of his engagements expressly stipulated the contrary. The work in question here was one of emergency, and was on all fours with a case of a farm servant attending a sick animal on a Sunday, which he would be bound to do. It was not stated that the respondent had made any attempts to get the nets lifted on Sunday, and *Macrorie* v. *Forman*, *supra*, established that where an accused was *prima facie* in the wrong he must establish his excuse. The case of *Phillips* v. *Innes*, 19th May 1835, 13 S. 778, 2 S. and M. 465, was not a case of emergency, but of ordinary every-day work carried on on Sunday, and did not apply here. In *Bute* v. *More*, 26th Nov. 1870, 1 C. 495, 9 M. 182, and *Nichol* v. *M'Neill*, 13th July 1887, 14 R. (J.) 47, all that was decided was that a charge of keeping a shop open on Sunday under the Act of 1661, cap. 18, could not be tried summarily. Counsel also referred to *Wilson* v. *Simson*, 11th July 1844, 6 D. 1256.

Argued for the Respondent: The real question here was whether the decision in *Middleton* v. *Paterson*, *supra*, was sound. That case recognised that it was the custom of the Highlands that no work should be done on Sunday, and approved of that custom as a sufficient excuse for not putting the nets out of fishing order on that day. It was unnecessary to prove here that the fishermen would not do the work, as it was a matter of common knowledge that they would not do so. Further, such work was illegal under statutes 1579, c. 70, 1661, c. 18, and 1690, c. 5, which all dealt with Sunday working and trading. These statutes were not in desuetude as shewn by *Phillips* v. *Innes*, *supra*; *Jennings* v. *Burnet*, 18th Dec. 1852, 1 Irvine 115, and by the fact that they are not included among the statutes of a similar kind abrogated by 6 Edw. VII. c. 38. It was enough for the tacksman to shew that Sunday labour was illegal, and that he could only lift his nets by getting men to break the law. *Her Majesty's Advocate* v. *Gollan*, 23rd July 1883, 5 C. 317, showed that it was impossible to make people work on Sunday. The Salmon Fisheries Act of 1868 must be read along with the other Acts prohibiting Sunday labour.

The Court *answered* the question in the affirmative.

The Lord Justice-General.—My Lords, the question brought before your Lordships is whether there ought to have been a conviction on the following facts as stated by the learned Sheriff-Substitute who states the case.

In the county of Ross and Cromarty at the Geanies salmon fishery there is in operation by force of law the bye-law contained in Schedule D of the Salmon Fisheries (Scotland) Act of 1868. The section of that statute which imposes the penalty is the 24th, and it puts upon the proprietor or occupier of every fishery the obligation of doing all acts for the due observance of the weekly close time required by any bye-law in force within the district. The bye-law imposed by Schedule D provides that with regard to the due observance of the weekly close time, which is a close time imposed from six o'clock on Saturday afternoon till six o'clock on Monday morning, "the netting of the leader of each and every bag net shall be entirely removed and taken out of the water." Your Lordships will therefore observe that a positive duty is put upon the owner or the occupier of every fishing. The occupier, who is the respondent in this case, is a Mrs Tough, and she admittedly upon the occasion specified did not take out the leaders of her bag nets during the whole of the specified period, but left them there from six o'clock on Saturday evening till a very early period on Monday morning. *Prima facie*, therefore, it is quite clear that she has contravened the statute, and consequently is liable to conviction. What, then, is her excuse? She says, and the learned Sheriff-Substitute holds that it is proved, that at six o'clock on Saturday evening the state of the weather was such that it was a physical impossibility to remove the leaders. Then he goes on to say that the leaders could have been removed without danger on Sunday—as a matter of fact, one of them was removed by the Fishery Board people on that day—and he further finds that there was no evidence that the respondent's men were ever asked by her to remove the leaders on the Sunday, or that they refused to do so, or that it was impossible for the respondent to hire men willing to remove leaders on the Sunday.

Upon that state of the facts I think there must be a conviction here, because the *onus* upon the prosecutor is satisfied as soon as he shews that there was a contravention of the bye-law. That he does by shewing that the leaders were not removed. No doubt there may be an answer to that which has always been held as an answer satisfactory to avoid conviction, namely, that there was impossibility. Physical impossibility there undoubtedly was at six o'clock on Saturday evening, by reason of the weather, but it was not according to the stated facts impossible on the Sunday morning. Therefore, there must have been some other class of impossibility which the respondent was bound to table, and she had not proved either that she took the slightest trouble to try and get her men to remove the leaders, or failing them, that she could not get others. Practically speaking, that is enough for the decision of the case.

But Mr Hunter has appealed to us not to decide the case upon that matter alone, because I understand that this case has been brought up in order to review the decision in *Middleton* v. *Paterson*. I have no hesitation in saying that I agree with the opinion of Lord Moncreiff in *Middleton* v. *Paterson*, and that I do not think that case was rightly decided. There are various grounds for my opinion. The argument for inability is admittedly entirely based upon the old Scottish statutes against Sunday labour. These are certain old statutes of the Scottish Parliament. I am bound to say that for myself I am greatly in doubt whether these statutes are still in operation, or whether they have not fallen into desuetude. But I do not think it is necessary to decide that question, as I shall presently explain. *Prima facie*, I do not think that these statutes have anything to do with it, because the question is not as to whether a conviction could be secured under these statutes for doing a certain thing, but whether this person was prevented from doing what she should otherwise have done by *vis major*. I use that expression because it comprehends laws of every kind, physical or otherwise. It may be that you could find persons who would be content to work on the Sunday and take their risk of a conviction under the statutes, and looking at the general state of affairs as matters go now a days, I do not think the risk would be a very great one. But it was argued that this was so clearly against the statutes that really it becomes tantamount to an impossibility, because if you engage anybody to do that thing you would be engaging him to do a thing which was in itself unlawful. My Lords, I cannot follow that, because, assuming as I do for the moment, that the statutes are still in observance and not in desuetude, I cannot say that the Act here would ever be struck at by the statutes. What may be called the leading case for the statutes is that of *Phillips* v. *Innes*, where it was held that looking to the prohibitions of the statutes, a barber's apprentice in Dundee, who had been engaged to do his master's work, holidays excepted, was justified in refusing to shave customers as an ordinary business on Sunday before ten o'clock in the morning. The one point was that shaving customers before ten o'clock on Sundays was ordinary work, and that if he had been obliged to do it, he would have had to shave Sunday after Sunday just as on other days. In point of fact, he might have had to shave more than on ordinary days, because there are men of peculiar habits who prefer shaving on Sundays rather than on other days. But the learned Lords who decided that case seem to have been very careful to distinguish between ordinary and regular labour, and labour of a casual sort, which might be called for in an emergency, because the Lord Ordinary and one of the noble and learned Lords, Lord Wynford, put as an exception the particular case of a man being called upon to shave someone suffering

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from acute illness, and the shaving of whose head became more or less a work of necessity. I am of opinion that this particular operation of taking up the leaders on a Sunday, when it has been rendered impossible on Saturday by the state of the weather, is just such a work of necessity, and there again I agree with the opinion of Lord Moncreiff in *Middleton* v. *Paterson*. Mr Hunter read a passage in Lord Brougham's opinion in *Phillips*' case, in which the noble and learned Lord used some expressions which seem to mean that the necessity must be that of the person called upon to work and not that of the person whom he serves. That view, I think, is absolutely untenable. It is perfectly evident that you cannot so limit it, for it is possible, not only to have works of necessity where the necessity is for the weal of the public in general, but also to identify the interests of the master and servant. If it were not so, the feeding of cattle, *e.g.*, would not be lawful, because there is no necessity, so far as the servant is concerned, it being the master's loss, not his, if the cattle die.

But the matter does not end there, because I think there is another ground which takes this case out of the decision in the case of *Phillips*, and it is this. These old statutes may not be in desuetude, but they certainly are not, to say the least of it, rigorously enforced. Then in 1868, Parliament passed another Act which shows upon the face of it that something must be done by somebody on Sunday, because Parliament must be held to have had the common sense to know that occasionally there would be states of the weather which would make it impossible to remove the leaders on Saturday. Still, Parliament has held that the leaders must be taken out of the water during the weekly close time. That is equivalent to a positive enactment not necessarily repealing the old statutes, but holding that such a work is a work of necessity. Upon that ground I come to the opinion clearly that there was here no justifiable excuse for not complying with the Act of Parliament. Of course, whether a person could get a servant or not to do the work is another matter. The duty is put upon the occupier or owners, and if they cannot do it themselves they must get someone who will. You might find certain persons who would not work for you on Mondays, but you may contract with those who will. Or take one religion, and you will find a person who refuses to work on a Saturday. But that is your affair. All that it is necessary to say here is that such an excuse is not *vis major*. Whether you can get a servant to do the work or not is simply a matter of contract. That is sufficient, I think; but I ought also to say that *Osborne's* case was overruled by the case of *Irvine*; and on the whole matter I come to the conclusion that in this case there ought to have been a conviction.

The Lord Justice-Clerk.—I entirely concur with your Lordships. The statute providing the weekly close time is imperative, and lays upon the occupiers of salmon fisheries a positive duty to throw their nets out of gear by removing the leaders. I do not consider that the existence of those old Scots Acts dealing with Sunday labour provides any excuse for not obeying the directions contained in an Imperial Act of recent date.

It is of course quite true that there may be cases where a servant by refusing to carry out the instructions of his employer may put his employer unavoidably in the position of contravention of a statutory enactment, but that is a question of fact, and there is no suggestion in the case before us that that was what happened here. This case differs from that of *Middleton* v. *Paterson*, 6 F. (J.) 27, because here it is expressly said that the respondent's servants were never asked to remove the leaders on the Sunday in question, while there it did appear that there had been an attempt made to get the work done and that there was a refusal to do it.

With regard to the case of *Middleton* v. *Paterson*, where the judgment seems to be in conflict with what we are deciding here, I should like to say that I was very doubtful about that case at the time, but in my position at the hearing I had no vote in the decision, except in the case of disagreement between my brethren, which in fact was what occurred. In that case there was this peculiarity, that there was an official of the Fishery Board present, and that he did not require that the leaders should be removed. In these circumstances I felt constrained to concur with Lord Trayner in a conclusion which meant acquittal, rather than with the conclusion of Lord Moncreiff which meant conviction.

I may add that it seems to me that in the case of *Osborne* v. *Anderson* the majority of the Court proceeded on a fallacy. It appeared that, owing to the tide at the particular time and place, the nets could not be put out of fishing order until several hours after the appointed time on the Saturday, and that, similarly, they could not be put again in fishing order on the Monday until some hours after the lawful time, and that the nets were out of fishing order for the full period of thirty-six hours, although not precisely between the times prescribed in the statute. Now I agree with Lord Rutherfurd Clark, who dissented there, that such acting was not an admissible construction of the Act, which plainly intends that all nets should be out of action during the fixed time—Saturday night at a fixed hour, and Monday morning at a fixed hour. The object aimed at is to give the fish a free run for the specified period past all nets, and that object would obviously be defeated if the result was that fish which passed nets the leaders of which had been lifted were in risk of

being caught in those which had been left down.

Lord M'Laren.—I also concur with your Lordship in the chair. So far as the question is affected by authority, I think the explanation given by the Lord Justice-Clerk of the case of *Middleton* v. *Paterson* is very important, because I understand that in that case, and according to the constitution of this Court, his Lordship only gave a casting vote, and it is well known that in such circumstances considerations are taken into account which would not affect a vote given under ordinary conditions. In any case this question has been remitted to a Full Bench of Judges, and it is for us to decide the matter now.

Even supposing the earlier statutes relating to Sunday trading and Sunday labour to be in observance to certain effects, it is the fact that a later statute has been passed by the Imperial Parliament imposing the duty of putting the salmon nets out of fishing order during the whole period from Saturday evening until Monday morning. This consideration, in my judgment, is sufficient for the decision of the case. As, however, the whole law of the subject has been discussed, I think it desirable that we should also consider how far the old statutory law opposes obstacles to the performance of what most people would regard as necessary and suitable Sunday labour. There may be a difficulty, in consequence of the case of *Phillips*, in holding that the statutes are altogether in desuetude. But in the case of *Bute* v. *More* no precedent could be found for a conviction under these Acts, and neither the ingenuity of counsel nor the experience of the judges composing the Court was able to discover any form of process under which a person might be penalised for the contravention of these statutes. Therefore it is not saying too much when I conclude that these statutes are not likely to be again enforced. Indeed, without doing any violence to authorised expositions of the law, it may very well be held that the statutes have gone out of use altogether. But without entering further into that question, we know that it was the practice of the Scottish legislature to pass statutes which were expressed in very general terms, which were not always workable without the aid of judicial construction, and which were intended to be worked out by the courts of law applying common sense principles to their interpretation. Both before and after the passing of these Scottish statutes it is needless to say that there were certain descriptions of labour which had to be regularly performed on Sundays. Domestic service and a considerable portion of the work of farm service had to be carried on upon the first day of the week. Horses had to be fed, cows had to be milked, cattle had to be driven out to pasture in the morning and brought home at night. The statutes never were understood to prohibit anything except such work as was ordinarily carried on during week days and could be as well done on any other day as on the Sunday. The tailor or bootmaker was not to work at his trade nor to require his men to work for him on Sundays. The case of fishing for salmon, with all its statutory obligations, and the work of putting nets out of gear, must be held to be *ejusdem generis* with these kinds of work which have to be carried on upon Sundays; and as the Act of Parliament makes it necessary that the leaders should be removed either at six o'clock on the Saturday evening or as soon thereafter as the state of the weather permits, that is a sufficient reason why the lessee of such fisheries should be held bound to engage men who are willing to do this trifling amount of Sunday work when occasion requires. I have no conception that there would be any difficulty in finding men willing, when necessary, to perform these services on Sunday, just as servants can be found to undertake other services which are usually performed on Sundays as well as week-days. I agree with your Lordship in the chair that we should answer the question by holding that the person accused was liable to be convicted.

Lord Kinnear.—I agree entirely with the Lord Justice-General, and I only add, since this case has been brought for the purpose of reviewing the decision in *Middleton* v. *Paterson*, that I agree with the opinion of Lord Moncreiff in that case, and that my only difficulty in doing so has been removed by what the Lord Justice-Clerk has said.

Lord Stormonth-Darling.—I concur in the opinion of your Lordship in the chair, and particularly in your Lordship's agreement with the dissent of Lord Moncreiff in the case of *Middleton* v. *Paterson*. He there points out at 6 F., J.C. 31, that "Sunday constitutes two-thirds of the weekly close time, and the regulations contain no sanction for non-observance of them on that day, on any ground whatever."

Lord Low.—I concur.

Lord Ardwall.—My Lords, on the application of the statute and the general law of the case, I entirely agree with your Lordship in the chair and with Lord Moncreiff's opinion in the case which has been cited. I should be very sorry if anything that we are deciding should seem in any way to derogate from the proper observance of Sunday. And I recommend the following view of the matter to these worthy people in Ross-shire who, greatly as I think to their credit, are desirous of avoiding unnecessary labour on the first day of the week. In the first place, I would point out that by leaving the nets set for fishing all Sunday, the people who

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fail to remove the leaders are truly guilty of engaging in the industry of fishing the whole of the Sabbath day. In the next place, it may well be considered a work of necessity or mercy to lift the leaders of the nets on the Sabbath day. The phrase "work of necessity or mercy," though embodied in a statute, is taken from the Confession of Faith and the Shorter Catechism, and these excellent documents profess to be founded on and only binding so far as founded on Scripture. Now in Scripture I find direct authority to the effect that if a sheep fall into a pit on the Sabbath day, it is lawful to lay hold on it and lift it out (see Matt. xii. 11). I hold it is an analogous act to take up the leaders of salmon nets on the Sabbath day, and let out the unfortunate salmon which have been entrapped by an illegal net, and mercifully to restore them to their native freedom.—10*th March* 1908.

Counsel for Appellant, Dean of Faculty (Campbell, K.C.), Chree; Agents, John C. Brodie & Sons, W.S.—Counsel for Respondent, Hunter, K.C., Munro; Agent, Alexander Ross, S.S.C.

F. A. U.

LANDS VALUATION APPEAL COURT.

(*Lords Low and Dundas.*)

377. Francis Webster & Sons and Others *v.* Assessor for Arbroath.

Valuation — Rent — Spinning Mills — Great Depreciation in Selling Value of this Class of Property—Number of Sales—Effect of Sales in Reducing Rental Valuation—Francis Webster & Sons v. Assessor for Arbroath, 1902, 4 F. 539, Commented on.

Case.

At a meeting of the Valuation Committee of the Royal Burgh of Arbroath, held in the town hall of Arbroath on the 11th day of September 1907, for the purpose of hearing the appeals against the valuation of property made by the Assessor for the year from Whitsunday 1907 to Whitsunday 1908, in terms of the Lands Valuation (Scotland) Acts, there were submitted the following appeals against the Burgh Assessor's valuation of the appellants' premises for the year, viz.:—

1. Francis Webster & Sons, Alma Works, Arbroath;
2. The Netherward Spinning and Weaving Company, Netherward Works, Arbroath;
3. Anderson & Chalmers, Brothock Mill, Arbroath.

The following are the particulars of the subjects belonging to the several appellants as valued and entered by the Assessor:

1. Alma Works, at a rent of £1293, 5s. consisting of, *inter alia*:

1. Mill and factory, Alma Works, Millgate, at a rent of . .	£900	0	0
12. Warehouse, Park Street, at a rent of	130	0	0
13. Hackling Shop, Park Street, at a rent of	60	0	0

The appellants, the said Francis Webster & Sons, maintained that this valuation should be reduced to £783, 5s., consisting of, *inter alia*:

1. Mill and factory, Alma Works, Millgate, at a rent of . .	£480	0	0
12. Warehouse, Park Street, at a rent of	65	0	0
13. Hackling Shop, Park Street, at a rent of	35	0	0

2. Netherward Works, at a rent of £730.

The appellants, the said The Netherward Spinning and Weaving Company, maintained that the valuation should be reduced to £260.

3. Brothock Mill, at a rent of £808.

The appellants, the said Anderson & Chalmers, maintained that the valuation should be reduced to £337, 10s.

The case set forth:

The contention of the appellants the said Francis Webster & Sons and the said The Netherward Spinning and Weaving Company was—

1. That the method of valuation adopted by the Assessor was not in accordance with the true meaning of the Valuation Acts.

2. That the true annual value of the subjects cannot be ascertained by taking a percentage on the structural cost, or by placing an arbitrary rate on the floorage, or number of spindles and looms in the concern.

3. That the true method of valuing the subjects in question was by ascertaining their annual value as compared with other buildings admittedly similar, whose value had been fixed by sales or leases in the open market.

4. That the assumed capital values on which the valuation of the Assessor is based are inconsistent with every case of a long series of sales and leases in the open market of similar subjects extending over the last twenty years, and including a number of recent transactions.

5. That the method of valuation by the Assessor was contrary to the principle of valuation fixed by the Court with reference to the subjects of Andrew Lowson, Limited (*Andrew Lowson, Limited* v. *Assessor for Arbroath*, 13th February 1901, 3 F. 466).

6. That the valuation of the Assessor was excessive and contrary to the evidence led.

The contention of the Assessor was—

That the particular circumstances attending the sale of the mill properties, which had recently changed hands, were such as to render the prices an unreliable basis for valuing the subjects of these appeals; *inter alia*, both the Brothock Mill and the Burnside Works had been standing idle for some time before they were sold. The latter had been depleted of machinery, and the former was largely fitted with a class of machinery for which there was little demand at the time. That the Assessor's method of valuation was in accordance with usage in the centres of the flax trade and with the Valuation Acts.

The principle laid down in *Andrew Lowson, Ltd.* v. *The Assessor for Arbroath*, 13th February 1901, 3 F. 466, did not apply, the case being ruled by *Francis Webster & Sons* v. *The Assessor for Arbroath*, 4th February 1902, 4 F. 539, which was an appeal dealing with the same subjects as the present ones. In that case the valuation of the Committee was sustained on appeal, and the principle of valuation adopted by the Assessor was upheld. That no material change affecting the value of the subjects had occurred since 1902.

The contention of the appellants, the said Anderson & Chalmers, was—

1. That the method of valuation adopted by the Assessor was not in accordance with the true meaning of the Valuation Acts.

2. That the true annual value of the subjects cannot be ascertained by taking a percentage on the structural cost, or by placing an arbitrary rate on the floorage, or number of spindles in the concern.

3. That the subjects having been sold in open market (after being duly advertised for private and public sale) for £8000, and this price being consistent with the other transactions which have taken place in the open market, the price must be held to be the full capital value of the subjects, and should be taken as the basis for arriving at the annual value.

4. That it having been agreed that $\frac{1}{32}$nds of the total capital value of the subjects shall be taken as the proportion applicable to heritage, £4500 (being $\frac{1}{32}$nds of £8000) is the capital value in the present case, and this, at 7½ per cent., being admittedly the highest percentage charged, shews the annual value to be £337, 10s.

5. That the assumed capital value, on which the valuations of the Assessor are based, was inconsistent, not only with the price at which the subjects were purchased in the open market, but also with every case of a long series of sales and leases in the open market of similar subjects, extending over the last twenty years.

6. That the method of valuation by the Assessor was contrary to the principle of valuation fixed by the Court with reference to the subjects of Andrew Lowson Ltd. (*Andrew Lowson Ltd.* v. *Assessor for Arbroath*, 13th February 1901).

7. That the valuation of the Assessor was excessive and contrary to the evidence.

The contention of the Assessor was—

That in the case of the Brothock Mill the purchase price, while it ought to be considered *quantum valeat*, was not, taken by itself, a reliable basis on which to value the works of the appellants Messrs Anderson & Chalmers, but that there should be taken into consideration the recent history of the subjects and all the other available data. That the circumstances under which the sale took place were such that the sale price did not reflect the true value of the subjects for the purposes of the Valuation Acts. That the market for mill property in Arbroath is a very small one, being confined to the manufacturers carrying on business within the burgh, and having the requisite technical knowledge and capital. That a period of dull trade had diminished the demand for mill property, and that, on the other hand, two or three mills had come into the market at the same time. That the effect of this was the absence of that competition among purchasers which would be found attending an exposure to public auction under normal conditions. That while trade had begun to improve when the purchase took place, this improvement had not had time to affect the purchase price, and that the position of the sellers, a body of private trustees, disabled them from taking advantage of the improvement and gave the purchasers an undue advantage over them. That the purchase price was lowered owing to the subjects standing idle. That the history of the subjects afforded other data which ought to be taken into consideration. In particular, the rent at which the subjects were formerly let, the amount spent after the fire in rebuilding and restoring them to their present state, and the amount for which they are at present insured ought to be kept in view. The Assessor's method of valuation was not inconsistent with the principles laid down by the Court in the case of *Andrew Lowson Ltd.* v. *The Assessor for Arbroath*, 13th February 1901, 3 F. 466. If due weight were given to all the circumstances his valuation would be found to be a fair one.

At an adjourned Court on 28th September the Committee gave the following judgments :—

"*Arbroath, 28th September* 1907.—These appeals by the appellants Francis Webster & Sons and The Netherward Spinning and Weaving Company appear to the Valuation Committee to be on all fours, and they have therefore been considered and dealt with together.

"The Alma Works and the Netherward Works have, for many years, been in possession of the present proprietors, who appealed against the Burgh Assessor's valuation of the respective premises in 1901, and their appeals being refused by the Valuation Committee, the appellants craved a case for the opinion of His Majesty's judges, and on 11th February 1902 the judges were of opinion that the determination of the Valuation Committee was right, and that the appeals should be refused. A good deal of evidence was adduced before the Committee in reference to the declining state of the flax industry in Arbroath, and the Committee are satisfied that the Arbroath flax and linen trade as a whole has, for several years, not been prosperous. In the case of these particular works, however, there has been no evidence placed before the Committee to shew that there has been any change of circumstances to warrant the Valuation Committee in departing from the existing valuation, as confirmed by the judges in 1902, with the exception that, in one respect, there is some depreciation of the subjects which may be properly kept in view. From the evidence led the Committee are satisfied that the engine and boilers in the Alma Works, and also, though to a smaller extent, in the Netherward Works, are now of considerable age, and are not up to date in efficiency, and for that reason the Committee think it right to give partial effect to the appeals, and to reduce the valuation of the Alma Works to the extent of £130, and the works of the Netherward Spinning and Weaving Company to the extent of £100.

"In the case of this appeal by Messrs Anderson & Chalmers the valuation of the Brothock Mill, etc., was £808, being the amount at which it had stood for many years when belonging to the late Mr David Corsar, and tenanted or occupied by the firm of Corsar Brothers, and subsequently when the property of Mr David Corsar's trustees. The mill had been unoccupied from February 1904 to the date of Mr Corsar's death in December 1904, and from that date till February 1907, when it was purchased by Messrs Anderson & Chalmers, the appellants, at the price of £8000. The Valuation Committee had evidence before them that the main part of the property, the spinning mill, was partially injured by fire in the year 1899, and was thereafter partly rebuilt and, to a considerable extent, reconstructed, by the late Mr

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Corsar in 1899 and following year. From the Minute of Admissions by the parties it appears that Mr Corsar's expenditure amounted to upwards of £16,000, although it has not been ascertained how much of that expenditure applied to the heritable portion of the property and how much to the moveable machinery. It did not appear that any material addition was made to the previously existing valuation in consequence of Mr Corsar's expenditure, and therefore this expenditure does not appear to have, in Mr Corsar's view, led to an inflated valuation.

"It appears from the evidence placed before the Committee that Mr Corsar's trustees, after his death, used every endeavour to realise the property, but the state of trade was such that no one was found to make any offer for it. An improvement in the Arbroath trade began to appear about September 1906, and this improvement having continued, Messrs Anderson & Chalmers, the appellants, made, in January 1907, an offer to purchase the property at the price of £8000. Mr Corsar's trustees resolved to accept that offer. From their knowledge of the local trade the Valuation Committee believe that if Mr Corsar's trustees had been less anxious to sell, they could have got a considerably better price by waiting a few months longer; but as they did not feel in a position to work the mill themselves, and as to hold it implied a very considerable loss in interest, exclusive of the actual outlay in keeping a mill with valuable machinery in good order, it is not surprising that when they got an actual offer they resolved to accept it. The appellants Messrs Anderson & Chalmers have asked that the valuation of £808 be reduced to £337, 10s. The Assessor has been unable to accept this, and the Committee are of opinion that the Assessor is to a large extent correct; but looking to all the circumstances of the case, and to the evidence which was submitted in regard to the trade of Arbroath, the Committee do not think that the valuation of £808 can be properly continued. The Committee have not overlooked the decision of the judges in the case of *Andrew Lowson, Ltd.*, decided in 1901, but in their view there is a material difference in the present case.

"In the present case the Brothock Mill had been standing for upwards of two years; the workpeople had been all dispersed, and could not easily be brought together again, or their places filled by others. The Committee are satisfied that in normal circumstances such a mill as the Brothock Mill, after being closed for some time, the connection broken up, and the workpeople dispersed and probably removed elsewhere, could not be worked during the first year except at a loss, and as it was not suggested that the mill was being worked at a loss, the Committee take that as further evidence of the very great improvement which has taken place in the spinning trade in Arbroath. On the other hand, there is the fact that these works were formerly let at £850, and that the appellants Messrs Anderson & Chalmers did not contradict the suggestion made by the Assessor, that, although they had acquired the property for £8000 they had now insured the buildings and machinery against loss by fire for £20,000 or upwards. Taking all the circumstances into consideration, the Committee came to the conclusion that the Brothock Mill properties should be valued on the same basis as the Applegate Works, which also belonged to the late Mr Corsar, and were sold after his death to Mr Corsar Pirret, now carrying on the business of Corsar Brothers, the valuation of which was adjusted between the Assessor and Mr Pirret in September 1906 at £500. On this footing the Committee fix the valuation of the whole Brothock Mill properties at £600, and remitted to the Assessor to adjust an apportionment of the valuation on this basis."

The appellants obtained a case for the opinion of the Valuation Judges.

Argued for Appellants: This was a case of a declining industry. All the mills in the town except two had been sold, and none realised 50 per cent. of the capital value on which the Assessor's rental was based. The *dictum* of Lord Kyllachy in *Francis Webster & Sons* v. *Assessor for Arbroath*, 1902, 4 F. 539, applied. There had been a general depreciation of mill property; and in the light of that the old valuations ought to be greatly reduced. Counsel referred to *Lowson's Judicial Factor* v. *Assessor for Arbroath*, 1900, 2 F. 608, and *Lowson Ltd.* v. *Assessor for Arbroath*, 1901, 3 F. 466.

Argued for Respondent: There was no evidence of general depreciation, because there was no open market for such property. There had been a time of bad trade after the South African war, but business had improved. The whole circumstances of the sales must be taken into account, and the recent sales, so far as their circumstances were in evidence, had been forced sales. Selling price was no criterion of letting value. The letting value was more constant than the selling price.

The Valuation Judges *were of opinion* (1) that the determination of the Valuation Committee as regards the Brothock Mill was right; (2) that their determination as regards the Netherward Works and Alma Works was wrong; (3) that the valuation of the Netherward Works should be reduced to £500; and (4) that the valuation of the Alma Works should be reduced to £923, 5s., the valuation of the first item thereof being reduced to £577, 10s., that of the twelfth item to £97, 10s., and that of the thirteenth item to £45.

Lord Low.—There is no doubt that the evidence upon which the appellants mainly found is very striking. It appears that all the spinning mills in Arbroath, except apparently two, have been the subject of sales, and that in no case has the price actually obtained been within 50 per cent. of the capital value estimated by the Assessor. It is true that two of the sales took place many years ago, one being in 1888 and the other in 1892. All the other sales, however, have taken place since 1900, and therefore, in my judgment, furnish important evidence of the market value of spinning mills in Arbroath at the present time.

It was said that in the autumn of 1906 there was an improvement in the trade, and that seems to have been the case, but whether it has continued or not is doubtful. It was also said that while trade was very good during the continuance of the South African war, there was great

depression when the war came to an end. That may be so, but it is significant that sales made during the war in 1900 shew substantially the same result as sales made after the war, namely, that the price actually obtained was at least 50 per cent. below the Assessor's estimate.

It is, however, to be remembered that we do not know the precise circumstances of all the sales, but several of them were more or less forced sales of mills which had ceased working. I therefore do not think that it would be safe to take the actual prices as fixing the capital value for the purpose of ascertaining the yearly rent. I mean that the capital value must be taken at something more than the prices; but, on the other hand, the result of the sales seems to me to shew that the capital value estimated by the Assessor is much too high.

That is the view which has been taken by the Valuation Committee in regard to the Brothock Mill, and accordingly they have reduced the Assessor's valuation of £808 to £600. If the Committee had fixed the value at a still lower figure I should have agreed with them, but (especially in view of the fact that they have local knowledge which we have not) I am not prepared to say that the amount at which they have valued the mill is not reasonable, and therefore I do not think that we would be justified in interfering with their determination.

In regard to the Alma Works and the Netherward Works the Committee have reduced the Assessor's valuation in respect of depreciation of engines and boilers, but otherwise they have allowed the valuations to stand. The chief ground upon which the Committee have proceeded is that these works were the subject of an appeal in 1902, when this Court sustained the determination of the then Committee, fixing the yearly value of the works at the amount at which they have ever since appeared in the Valuation Roll. The Committee in the present case say that no evidence has been placed before them to shew that there has been any change of circumstances to warrant them in departing from the existing valuation as confirmed by the judges in 1902, except as regards the engines and boilers.

Perhaps no substantial change of circumstances has been proved, but I think that we have evidence before us which was not before the learned judges in 1902, especially in regard to the sales which have taken place. Accordingly I think that it is quite competent for us to reconsider the valuation of 1902.

I am not sure how many cases of sales of mills were brought to the notice of the Court in 1902; but however that may be, Lord Kyllachy, after saying that if a "multitude" of sales had been before the Court a general depreciation of mill property might have been made out, proceeded to describe the actual evidence thus: "But that is a different thing from having before us—which is all we have here—one or two isolated cases of leases or sales—some of them as far back as in 1888, others of them in 1892, and I think two more recently."

I do not think that a similar description could be given of the evidence adduced in this case, which includes sales which have taken place since 1902, and which, as I have already indicated, appears to me to be entitled to great weight; and I repeat that the fact that additional and apparently more precise evidence has been led, justifies us in reconsidering the value of the mills in question.

Of course the allowance which the Committee have made in respect of depreciated plant and machinery must receive effect, but in addition to that I am satisfied that the appellants are entitled to a substantial reduction of the valuation. I therefore propose that the value of the Netherward Works should be reduced to £500, of the Alma Works to £923, 5s., that is, to £577, 10s. for the first item and £97, 10s. and £45 for the twelfth and thirteenth items respectively, which is a reduction very nearly proportionate to that allowed by the Committee in the case of the Brothock Mill.

Lord Dundas.—Having consulted with your Lordship, and having since then had an opportunity of reading your opinion, I entirely concur. —11*th March* 1908.

Counsel for Appellants, Hunter, K.C., Munro; Agents, Gordon, Falconer & Fairweather, W.S.—Counsel for Respondent, Dean of Faculty (Campbell, K.C.), Chapel; Agents, Webster, Will & Co., S.S.C. F. A. U.

Lands Valuation Appeal Court.

Francis Webster & Sons and Others v. Assessor for Arbroath.

Lord Low.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

378. Bruce Peebles & Company Limited *v.* Sheills and Others.

Company — Liquidation — Liquidator — Director — Appointment by Company of Director Residing in London as Voluntary Liquidator—Competency of Appointment—Application by Majority of Creditors and of Shareholders to Continue Voluntary Winding up Under Supervision of Court by Voluntary Liquidator in Association with Neutral Liquidator—Circumstances in which Application Granted.

This was a petition for the winding up under the supervision of the Court of Bruce Peebles & Co. Ltd., a Company carrying on the business of electrical and mechanical engineers, and having its registered office at East Pilton, Edinburgh. The Company appointed as provisional liquidator Mr A. W. Tait, a director of the Company resident in London, and applied to the Court for

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the continuation of the voluntary liquidation under a supervision order. The Lord Ordinary on 14th February ordered intimation of the petition, and in the meantime confirmed the appointment of Mr Tait as provisional liquidator. After this application was made, and in consequence of the representations of certain creditors of the Company, another special resolution was passed to the effect that Mr J. A. Robertson-Durham, C.A., Edinburgh, be associated with Mr Tait as liquidator. A note was presented for the joint liquidators, praying the Court to order the voluntary winding up to be continued under the supervision of the Court, and for confirmation of their appointment as joint liquidators.

Answers were lodged for Messrs Krauss & Sons, creditors of the Company, and for Mr Sheills, a preference shareholder, in which objection was taken to the appointment of Mr Tait as liquidator on the grounds that he was (1) a director of the Company, and (2) not subject to the jurisdiction of the Court, and a compulsory liquidation under a neutral liquidator was asked for.

The application was supported by a very considerable majority of the creditors, shareholders and debenture-holders of the company, whilst the objectors were supported by a certain number of other creditors and shareholders and a small number of debenture-holders.

Argued for the Applicants: There were very special circumstances which made it of importance to the company that Mr Tait should be liquidator. (These circumstances are set forth in the Lord President's judgment, *inf.*) There was no invariable rule or practice against the appointment of a director as liquidator. *Sanderson & Muirhead*, 1884, 21 S.L.R. 766; *M'Knight & Co.* v. *Montgomerie*, 1892, 19 R. 501. The majority of the persons interested are those to be considered and consulted. Those persons were the creditors and the shareholders, and in this case there was no conflict of interest between these two bodies, their majority promoting the application. It was in the hands of the Court to protect minorities, and to see that no injustice was done even by very powerful majorities; here nothing had been shown to displace the special considerations upon which the order was asked by the majority of those interested.

Argued for the Objectors: The appointment of a director of the Company as its liquidator was most undesirable, as questions might arise in the course of the liquidation as to the conduct of the Company's business by its officials (*In re Gold Co.*, 1878, 11 Ch. Div. 701). Nor should one be appointed who was not subject to the jurisdiction of the Court) *Brightwen & Others* v. *City of Glasgow Bank*, 1878, 6 R. 244; *Baberton Development Syndicate Co.*, 1898, 25 R. 654.)

The Court *ordered* that the voluntary winding up be continued under supervision of the Court, confirmed the appointment of Mr A. W. Tait and Mr J. A. Robertson Durham as joint liquidators, found the petitioners and the liquidators entitled to expenses of the petition and note, taxed as between agent and client, as expenses in the liquidation; *quoad ultra*, found no expenses due to or by any of the respondents or compearers.

The Lord President.—In the application that is before us, we have to first of all decide whether this should be a compulsory winding up, or whether the voluntary winding up which has already been started by the Company should be continued under the supervision of the Court. There has been scarcely any argument upon that point, and at any rate it is sufficient to say that there is no reason why we should disturb the liquidation at present going on. The Court will accordingly pronounce the ordinary form continuing the winding up under the supervision of the Court.

The real question, however, which has been argued before your Lordships is the question who the liquidators are to be. The provisional liquidator, who was appointed only the other day, is Mr Tait, who is a chartered accountant resident in London, and also was a director of the Company. The application of the Company, who are the presenters of the petition, was originally intended to be an application to get the order which has just been made by the Court, and to confirm the appointment of Mr Tait as liquidator; but after the prayer had actually been framed, they were approached by several of the creditors who said that they objected to having a director of the Company appointed as sole liquidator, but indicated that they would be perfectly contented if an independent liquidator was appointed in conjunction with Mr Tait, and the name suggested was that of Mr Robertson-Durham. Accordingly, before your Lordships to-day, the position taken up by the Company has been that the liquidators ought to be Mr Tait, and associated with him, Mr Robertson-Durham. The application is opposed by certain parties who, through the counsel who appeared, represent in all £7000 worth of creditors, 1600 shares and £1000 worth of debenture debt. The total figures which might be represented under these three heads are, for creditors—I give the figures of course roughly—£200,000; for debentures £75,000; and for shareholders £290,000—58,000 odd shares. Now the objections that have been made by the compearing parties are really reduced to two heads alone. They objected to Mr Tait, first, in respect that he is domiciled in England, and not subject to the jurisdiction of the Court; and secondly, that he has been, and was at the moment of the liquidation, a Director of the Company. On the other hand, the Company have given special reasons, as they say, why Mr Tait's appointment should be confirmed. These

special reasons are as follows: They explain that the Company has been brought into the difficulties which necessitate its liquidation because of the tightness of money in the money market, and that assuming its business may go on it is not certain that it will prove insolvent. Whether that is the case or not, it is true that the Company at this moment, in the course of its business, is engaged in carrying out a great many important and lucrative contracts. Therefore it is in the interests of all concerned that the benefit of these contracts should not be lost, because, even apart from the question of the relinquishment of profit from these contracts, there would be a very severe loss to the Company in respect that under the forfeiture clauses which are common enough in such contracts, they would lose a great deal of their plant in various parts of the world by that plant being seized by the persons with whom they had contracted. They further explained that there are in several of these contracts clauses of what we call in Scots law irritancy, by which the contracts may be brought to an end by the liquidation of the company, and they go on to say that the continued presence of Mr Tait in the active management of the business as a going concern is really a *sine qua non* in the negotiations which must necessarily ensue with the various parties with whom they have these contracts. That is a story which, upon the face of it, appears to have quite the impress of truth and probability. It is not admitted to the full by all the parties who are here compearing, and of course it is impossible for your Lordships sitting here to have an enquiry in order to get at the absolute truth of the state of facts. In regard to these matters, your Lordships are bound to deal in a case of this sort with the *prima facie* view, and all I say is that the story as told seems to me to bear the impress of truth. But your Lordships, I think, in such a case, where it is found that averments made on one side are not admitted on the other, have pointed out to you by the terms of the statute what is the proper method of solution. You are in all these matters, the statute says, to have regard to the wishes of the creditors and of the contributories. I have already given the figures of the compearing and objecting persons, and I have given the figures of the total compearers. In every such case, of course, it is not to be expected that we should have everybody here; but for the petitioners we have here, so far as the creditors are concerned, about £124,000 out of £200,000, and we have to notice that one very large creditor, the Royal Bank, who has over £43,000, is neutral, but neutral in such a way as practically to belong to the petitioners, because the Royal Bank, following its usual practice, did not take any part in determining the course to be taken by the creditors, but intimated that it would leave the decision to the trade creditors, which is tantamount to voting with the majority. Accordingly, you have here a sum of something like 160 odd thousand pounds, and you have on the other side practically about £40,000 worth out of the whole shareholding, and the petitioners have through a separate appearance practically the whole of the debenture-holders. My Lords, I need scarcely say when these figures are compared with the figures of the compearing objectors, that there is absolutely an overwhelming majority in favour of the demand by the petitioners. Therefore I think your Lordships should have little hesitation in supposing that the particular reasons which have been given for appointing this gentleman are true, seeing that the belief that these reasons are true is a belief that commends itself to the enormous majority of the shareholders, and still more of the creditors, who are, of course, the persons most to be thought of. Accordingly, it seems to me that everything points to granting the prayer of the petition in this matter, unless there is some real objection in law. Now, it is no objection in law to the appointment of the gentleman that he is not at this moment subject to the jurisdiction of the Court. It seems to me that he subjects himself most clearly by consenting to become an officer of this Court; and subject to the difficulty of arresting him in England, I cannot help thinking we should have every power against him, if such a thing were necessary—a contingency which is, I am glad to think, most improbable—that we would have against a Scotch liquidator. Nor do I find it has been ever laid down that it is impossible for the Court to appoint liquidators not subject to its jurisdiction. On the contrary, Lord President Robertson, in the case of *The Baberton Development Syndicate Ltd.*, 1898, 25 R. 654, seems to me to have been particularly careful to bar the idea that such a course was incompetent, although it goes without saying that in ninety-nine cases out of a hundred it is much more convenient in practice for the Court to appoint a gentleman in their own jurisdiction, for this reason, that it is better to have the man who conducts it there also. And the considerations which guided the Court in the well-known case of the City of Glasgow Bank (*Brightwen and Others* v. *City of Glasgow Bank*, 1878, 6 R. 244), are really too obvious to require stating. In that case there was nothing to be done but to distribute the assets of the City of Glasgow Bank. There were four men, capable gentlemen in Scotland, who had been appointed, and the man proposed to be added to these four was a gentleman who was in England—really, if I may use the expression, clearly a case of a fifth wheel to the coach. Here the reason for asking that Mr Tait should be a liquidator is not really connected with the distribution of the assets of the Company, but is connected with the weighty consideration of being able to continue this business as a going

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business at present, and consequently making the most money out of it for both creditors and shareholders. Well, then, possibly the only other matter is, that it is said Mr Tait was a director, and it is hinted or said that questions may arise as to the conduct of the directors in the past. My Lords, that may be so, and I think it would be a very weighty consideration against the appointment of Mr Tait as the sole liquidator. But it is not now proposed that Mr Tait should be sole liquidator. I do not wish to say anything peculiarly personal in the matter, but it is only fair to Mr Robertson-Durham to say that he, the gentleman selected and put before us, is a gentleman well known to this Court, and one at the head of his profession, and one in whom the Court has every confidence. It is perfectly absurd to think that Mr Robertson-Durham, knowing his duties as an officer of this Court, would ever allow to remain uninvestigated any transaction in the past, because he thought it might eventually go against the interests of Mr Tait. If such things are unfortunately discovered I conceive it would be a duty which he would perform, to call attention to the matter, to say to Mr Tait that the time had now come in which his interests became conflicting, and to call upon him to resign; and if he did not do so, it would be Mr Robertson-Durham's duty to bring the matter before the Court; and in such circumstances as I have put I do not think it is doubtful what the Court would do. All that is speculation as to the future, and all that does not touch the real crucial point of the matter, viz. the extreme desirability of keeping these contracts running. Accordingly, I am of opinion here—it is a peculiar and, in many respects, a unique case—that the petitioners have really made out the position they have put before us. Upon this matter of conflicting interests, there, again, it seems to me your Lordships' action is really backed up by the action of the persons to be considered, the creditors. As soon as it was known that Mr Tait was to lodge a petition to appoint him liquidator, the creditors said "No," and the moment it was proposed to have Mr Robertson-Durham along with him the creditors said "Yes," and they are saying "Yes" before your Lordships to-day. I am therefore of opinion that the prayer of the note should be granted.

Lords M'Laren and *Kinnear* concurred.—*5th March* 1908.

Counsel for the Liquidators, Dean of Faculty (Campbell, K.C.), Clyde, K.C., Sandeman; Agents, Davidson & Syme, W.S.—Counsel for the Debenture-holders, Maitland; Agents, Macandrew, Wright & Murray, W.S.—Counsel for C. J. Sheills, Munro; Agents, W. & F. Haldane, W.S.—Counsel for Krauss & Sons, Macmillan; Agents, Gardiner & M'Phee, S.S.C.—Counsel for Certain Shareholders, Lyon Mackenzie; Agent, Norman M. Macpherson, S.S.C.—Counsel for Other Preference Shareholders, F. C. Thomson; Agents, G. M. Wood & Robertson, W.S.

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FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

379. Buckle and Another *v.* Kirk (Buckle's Curator) and Others.

Expenses—Trustees—Personal Liability—Trustees Defend Action Acting on Advice of Counsel—Circumstances in Which Interlocutor of Lord Ordinary Finding Trustees Personally Liable in Expenses Reversed.

(Reported supra, p. 98.)

Reclaiming Note against an Interlocutor of Lord Johnston.

The defenders, Mr Buckle's trustees, reclaimed against the finding of the Lord Ordinary as to expenses which was in the following terms:

Finds the defenders the trustees of the deceased Mrs Dorothea Blackwell or Buckle personally liable to the pursuers in the expenses caused to them by the appearance of the said defenders in the cause, and finds that they are not entitled to charge their own expenses against the residue of the estate of the said Mrs Buckle, in which the pursuers are solely interested.

The Court *recalled* the portion of the interlocutor reclaimed against.

The Lord President.—My Lords, in this case I confess I have had considerable difficulty in seeing how the Lord Ordinary could possibly arrive at the conclusion at which he has arrived.

This lady died, leaving trustees who were, of course, in the possession of her funds for certain trust purposes, the eventual one of which was to convey funds to the residuary legatee. The lady left a son, who unfortunately being in an afflicted state of health, had appointed to him a *curator bonis*. One of the investments left at the lady's death was one of some Cape of Good Hope stock, the title of which is vouched by what is called an inscription, lodged in a London bank, and the terms of the inscription were in the names of the deceased lady and this afflicted son, and the survivor.

Two questions accordingly were mooted after the lady's death. The first question was whether this Cape of Good Hope stock was *in bonis* of the lady herself, and accordingly fell to the trustees to be distributed by them according to the terms of the settlement; or whether, by force of what I may call the destination in the investment, it went to the son by reason of his survivorship,

and accordingly went to his *curator bonis*. The other question was whether it was the *curator bonis*' right and his duty to claim legitim against the mother's estate under the recent Act. But that question was complicated by certain terms of the father's settlement, which in a certain reading of them might be held to put the son to his election. Of course the contending parties on the one side and on the other in both of these questions were the *curator bonis*, as representing the afflicted son, and the trustees, or practically the residuary legatees, because it was upon them that the loss would fall, or to them the gain would accrue. The trustees very properly did the only thing they could do, which was to consult counsel, and they consulted counsel of the highest standing, namely the Dean of Faculty, and the Dean of Faculty gave them his advice upon the situation as it was. The *curator bonis* also independently consulted his counsel, and the result was not exactly the same, although I do not think that the opinions given very much differed. The trustees proceeded to take the next step, of a most sensible character. They tabled the opinion which they had got from the Dean of Faculty, and they said to the residuary legatees —"Now, what would you like us to do?"—because the outcome of the opinion, roughly speaking, was that upon one of the questions it was supposed that the residuary legatees had the better chance, and upon the other the worse; and there was, of course, the very practical proposal that instead of litigating and fighting these things out to the bitter end, it might be possible to make a compromise by setting the one against the other. Accordingly the trustees said—"What would you like us to do; in other words, would you allow us to compromise the question?" The residuary legatees did not give a decided answer to that, but said—"We should like to consult our own counsel." Eventually, after they had consulted their own counsel, there were attempts made at a settlement between the residuary legatees and the *curator bonis*, but unfortunately the advice which the residuary legatees had got in England was not eye to eye with the advice which the *curator bonis* had got, and consequently they could not effect a settlement. The next question was, how was it to be tried. Attempts were made to adjust a special case, but unfortunately the parties could not come to one view about the precise adjustment of the facts as regards the precise position of the document of inscription by which this stock was held, and that, of course, put an end to the special case, in which it is necessary that parties must be at one as to the facts. The residuary legatees next said to the trustees—"Well, then, lend us your names and we will raise an action." The trustees seem to have had some doubt about that, because their position in the action of claiming the stock must have been in the teeth of the opinion they had got, which told them they had no real claim to the stock. Accordingly, they said—"We should like to consult our counsel again."

The residuary legatees had got impatient, and without saying anything more they raised this action, in which they called as their true contradictor the *curator bonis*, and called the trustees for any interest they might have, and they put in a conclusion against the trustees for expenses, but only in the event of their appearing and opposing the conclusions thereof. Then the trustees did the only thing they could do, they went back to the Dean of Faculty, who advised them and said—"You have no reason, of course, to take any part in this matter upon the merits, but inasmuch as you are the people who are in possession of the facts to a great extent as to what has happened, you must go to the Court and lodge a formal defence, making a clean breast of everything that has happened." That the trustees did.

Now, my Lords, I do not mean to say that that was the only opinion which might have been given. As matter of fact, I think the Dean of Faculty might have advised them to make no appearance at all, and to wait until they were sent for. That would have been equally good advice to the advice given. But the advice given was not far different, and it was obviously very honest advice, and the trustees followed it. They accordingly put in a statement of facts, in which they stated all they knew, and they naturally sent counsel along with it. But that counsel took no part in the discussion on the questions of law which arose. These questions of law not being determined in the long-run without a proof, he did not even appear at the proof, and eventually the Lord Ordinary decided the question upon the merits. And now it is said, and it is said in the Lord Ordinary's interlocutor, that the pursuer is entitled to expenses in so far as these expenses have been made greater by the appearance of the trustees. Now, the only way in which the pursuer has been hurt is that he has been made to print three or four more pages of the record than he would otherwise have had to print. Well, my Lords, *de minimus* as regards that. If that was done, it does not seem to me to make much difference whether you get it in the form of a statement of facts or whether you get it in the proof, as you certainly would have had to get it before the Lord Ordinary decided the case, because the Lord Ordinary could not possibly decide the case without hearing what the trustees had to say. That disposes of that part of the case.

Then the Lord Ordinary goes on to find that the trustees are not entitled to charge the expenses of their appearance against the trust estate, and that has been argued or supported by the learned counsel for the respondent here

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upon the view of the case of *Anderson*, 1901, 4 F. 96. That, I think, is an entire confusion. The case of *Anderson* is a decision of what I hope is perfectly well settled, which is that if trustees choose to fight beneficiaries upon the merits and are beaten, they are not to charge these expenses, which they have incurred by their unsuccessful appearance against them, against a share which goes to these beneficiaries. That is quite plain, and that, of course, has no application to the question of whether the trustees can charge against the estate a perfectly proper compearance—proper not because in itself it was proper, but because it was a compearance made by the trustees in consonance with the best advice they could get. Really, if trustees cannot go to the Dean of Faculty and follow his advice without having it afterwards said that they have done something improper and must forfeit their expenses and pay personally, nobody would be a trustee at all.

I cannot imagine how the Lord Ordinary came to any such result, and I have no hesitation in moving that your Lordships should recal that portion of the interlocutor. The respondents here might, if they had chosen, when they got the interlocutor, have said—"We won't enforce it." On the contrary, they have been too anxious to persuade us, through their junior counsel, that it was upon his motion that the interlocutor was granted, and the consequence is that the extra expense of printing the long correspondence must deservedly fall upon their own shoulders.

Lord M'Laren.—I concur. I think the Lord Ordinary has been rather strict in dealing with these trustees in regard to their appearance in Court, for they only appeared for the purpose of explaining that they had no interest in the decision. It is perhaps not always necessary, but it is often very useful, that trustees should appear and make such a statement, if they do not identify their case with that of one of the parties.

As to the correspondence, it is perhaps unfortunate that this case should have first been discussed at considerable length upon the correspondence and then discussed again in Court. But it is matter of common experience that cases begin with what is possibly an amicable correspondence, and the correspondence may afterwards become more hostile and lead to final disagreement. I cannot see that the trustees are specially responsible for this correspondence. I think that the real controversy was between the *curator bonis* and the residuary legatee, and I see no reason why a body of trustees who have no personal interests in the matter, and who seem to have been guided by the best advice of counsel they could get, should be subjected to the hardship of being obliged to pay expenses incurred for the benefit of the trust out of their own pockets, because that is what the Lord Ordinary's interlocutor comes to. I agree with your Lordship that that part of the interlocutor should be recalled.

Lord Kinnear concurred.—*5th March* 1908.

Counsel for the Reclaimers, Clyde, K.C., Spens; Agents, Hope, Tod & Kirk, W.S.—Counsel for the Respondents, Maclennan, K.C., Lippe; Agents, J. Miller Thomson & Co., W.S.

W. A. R.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Ardwall.*)

380. Somerville and Others v. Commissioners for the Harbour and Docks of Leith.

Harbour — Dock — Charges—Leith Harbour and Docks Act 1892 (55 & 56 Vict. cap. 177), sects. 58 and 60, and Schedule B—Special Charge Imposed by Harbour-Commissioners for Locking Vessels In or Out of Docks—Held That Vessels Entitled to Access To and Egress From Docks Free of Any Rates Other Than Rate Payable Under sect. 58 and Schedule B of Act of 1892, at All Times When Access and Egress Could be Safely Given by Means of Locks or Otherwise, but Without Prejudice to Powers of Harbour-Master to Give Directions Under Harbours, Docks and Piers Clauses Act 1847 (10 Vict. cap. 27), and Without Prejudice to Powers of Harbour Authority to Make Bye-Laws Under Harbour, Docks and Piers Clauses Act and Special Acts.

(*Reported supra*, p. 183.)

Reclaiming Note against an Interlocutor of Lord Dundas.

The facts of the case, the statutory enactments referred to, and the terms of the Lord Ordinary's interlocutor, are sufficiently set forth in the previous report.

The Defenders *reclaimed* and *argued*: Under sect. 33 of the Harbours, Docks and Piers Clauses Act 1847 (10 Vict. cap. 27), the pursuers had a right of access to the docks. But that right was subject to the whole provisions of the Act of 1847, and of the special Act. Now under sect. 60 of the Leith Harbour and Docks Act 1892, the defenders were entitled to make charges for all services rendered and facilities afforded by them. Locking ships in and out was a facility for which the defenders were entitled to charge. In the ordinary case ships arriving at Leith were willing to wait until the locks were opened in the ordinary course of harbour management. By

means of locking in and out, it was possible to add four hours per day to the time during which the pursuers' ships could enter or leave. Locking in and out imposed an extra strain on the locks, and involved the defenders in expense which they would not otherwise have incurred. Locking in and out, therefore, was a special service which the defenders were not bound to render, and for which they were entitled to make a special charge (Leith Harbour and Docks Act 1892, 55 & 56 Vict. cap. 177, sect. 60; Leith Harbour and Docks Act 1875, 38 & 39 Vict. cap. 160, sect. 76), just as they were entitled to make a special charge for assigning special berths to regular traders (Leith Harbour and Docks Act 1875, sect. 60). To render the service without charging would be to give a preference to the pursuers. No doubt the defenders were not entitled to impose any rate which the statutes did not impose (Leith Harbour and Docks Act 1892, sect. 58, Schedules A, B, C, D, E). But they had not done so. What they had done was to make a charge for services rendered, and that was competent under sect. 60 of the Act of 1892. It was not necessary to proceed by way of bye-law. The matter was one of contract between the pursuers and the defenders, and procedure by way of bye-law was inappropriate (Harbours, Docks and Piers Clauses Act 1847, sects. 83–88; Leith Harbour and Docks Act 1875, sect. 71; Leith Harbour and Docks Act 1892, sect. 58). In any view the Lord Ordinary's judgment could not be supported. He had held that the pursuers had an absolute right of access, subject only to the conditions of safety and room. That was inconsistent with the defenders' rights as harbour authority, and in particular with the powers of regulating the mode of entry, etc., of ships conferred on the harbour-master by sect. 52 of the Harbours, Docks and Piers Clauses Act 1847. This was not a mere criticism of the form of the interlocutor. Any new qualification would go to the root of the Lord Ordinary's ground of judgment.

Argued for the Pursuers: The Leith Docks were a public undertaking—an *opus manufactum* constructed under statutory powers. Under sect. 33 of the Harbours, Docks and Piers Clauses Act 1847, the public (and the pursuers as members of the public) had a right of access to every part of the public undertaking on payment of the rates specified in sect. 58 of the Leith Harbour and Docks Act 1892. They were entitled to the use of the dock as it stood with all its natural advantages, and of course they must take it subject to all its natural disadvantages. In the present case the *opus manufactum* was the dock *plus* the lock. The locks were part of the undertaking which the defenders were bound to make available to the public on payment of the ordinary rates. The defenders' right under sect. 60 of the Act of 1892 was to make a special charge in respect of the services which the defenders were under no statutory obligation to render. Locking in and out, therefore, was not a service for which a special charge could be made. The defenders could not refuse to lock ships in and out, because that would be a refusal to use a part of a public undertaking for the purpose for which it was designed. The new charges were therefore *ultra vires* of the defenders. In any view, if the defenders had power to impose the charges complained of, they could only exercise that power by enacting a bye-law. In that case the pursuers would have an opportunity of stating their objections to the Sheriff. The pursuers' contention as to the unqualified nature of their right of access was not inconsistent with the defenders' rights as the harbour authority or the powers of the harbour-master under sect. 52 of the Act of 1847. While the pursuers had a right of access whenever it was safe and practicable, the exercise of that right was subject to the control of the defenders as the harbour authority.

The following is a list of the statutory enactments referred to:—Harbours, Docks and Piers Clauses Act 1847 (10 Vict. cap. 27), sects. 2, 3, 30, 33, 34, 35, 47, 51, 52, 83 to 88; Leith Harbour and Docks Act 1875 (38 & 39 Vict. cap. 160), sects. 3, 4, 7, 41 (2) and (3), 52, 60, 71,75, 76; The Leith Harbour and Docks Act 1892 (55 & 56 Vict. cap. 177), sects. 3, 58, 59, 60, Schedules A, B, C, D, and E.

The Court pronounced the following interlocutor:

"Refuse the reclaiming note; adhere to the . . . . interlocutor reclaimed against with the following addition thereto—viz. 'but without prejudice to the right of the harbour-master to give directions for all or any of the purposes set out in the Harbours, Docks and Piers Clauses Act 1847, and also without prejudice to the right of the defenders to make bye-laws as allowed by the same Act or by either of the Special Acts,' and with the foregoing variation affirm the said interlocutor, reclaimed against and decern."

Lord Stormonth-Darling.—The harbour and docks of Leith are under the administration of a body of statutory Commissioners, whose powers and duties are regulated by two local Acts (of 1875 and 1892) with which is incorporated a public Act—the Harbours, Docks and Piers Clauses Act of 1847. By the latter Act, section 33, it is provided that "upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers." The rates here referred to, so far as applicable to rates on vessels, are those specified in section 58 of the special Act of 1892 and Schedule B appended thereto. It is proper to add that by section 59

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of the same special Act the Commissioners have power from time to time to vary the rates thereby authorised to be levied, by reducing or raising the same to such an extent as they may deem expedient or necessary, under a certain restriction as to the amount of such increase, and with a proviso that such rates shall at all times be charged equally to all persons in respect of vessels of the same class or description; and also that before any increase on the rates shall take effect, at least twenty-one days' previous notice thereof shall be given in at least one newspaper published in Edinburgh or Leith. It is, further, proper to add that, by sect. 60 of the same special Act, power is given to the Commissioners "to make all reasonable charges for work done, services rendered, facilities afforded, and use of plant, machinery, or appliances provided by them for the despatch of business at the harbour and docks or the convenience of shipmasters, merchants and others concerned with the traffic thereat, in so far as such charges are not expressly provided for by this Act."

The pursuers are owners of a fleet of steamships trading regularly between Leith and ports in England and on the Continent. They complain of a certain resolution passed by the Commissioners on 8th September 1905, by which for the first time, as regards the three newest and largest docks in Leith, a change was attempted to be made in the practice of the Commissioners with respect to the admission of vessels to and from these docks, by limiting the locking in and out of vessels to two hours after high water, by imposing a charge of £2 (afterwards reduced to £1) against each vessel arranging to be locked in or out, and by making other less important charges. These resolutions are said to have been passed without notice in any newspaper, without being posted up as a rate in some conspicuous part of the harbour, and without having been embodied in any bye-law. On the whole matter it is pleaded that the Commissioners being bound, on a just construction of the statutes, to afford the pursuers' vessels access to and egress from the whole harbour and docks on payment of the statutory rates, are not entitled to make these new and unauthorised charges, and that the resolutions professing to allow them are illegal and *ultra vires*. The Lord Ordinary has sustained this view, and I think he is right. In pronouncing decree in terms of the first declaratory conclusion of the summons, his Lordship has adopted the final words of that conclusion: "And that at all times when access to and egress from the said harbour and docks can be given with safety, either by means of the said locks in the said harbour or otherwise, and when accommodation is available." That is a qualification in favour of the defenders; but they say there ought to be a further qualification, in order to save the right of the harbourmaster to give all lawful directions, and also the right of the defenders themselves to make bye-laws. It may be said that these rights are sufficiently secured by statute (particularly sections 52 and 83 of the Public Act of 1847). But Mr Clyde, for the pursuers, did not object to these rights being expressly reserved, and I think that our decree should contain some such additional words as these: "And without prejudice to the right of the harbour-master to give directions for all or any of the purposes set out in the Harbours, Docks and Piers Clauses Act 1847, and also without prejudice to the right of the defenders to make bye-laws as allowed by the same Act or by either of the special Acts."

The defenders do not attempt to explain why the statutes give no express right to charge for locking vessels in or out, nor why it was not till 1905 that they themselves attempted to impose such a charge. They say a good deal about the additional expenditure which they will have to incur, if the pursuers' contention is given effect to, in wear and tear of dock gates, and in keeping a large staff of experienced men to work those gates. But they say nothing to displace the pursuers' argument upon the statutes, an argument which I think Mr Macmillan put very tersely when he mentioned that, once the pursuers had paid their rates under section 58, they were enfranchised of the whole harbour. At least the only counter-argument which the defenders urge upon the statutes is to refer to section 60 of the Special Act of 1892, which I have already recited. Now, the Lord Ordinary's criticism on section 60, with which I entirely agree, is that it deals, not with charges for "work done," or "services rendered," or "facilities afforded," or "use of plant, machinery or appliances provided by the Commissioners," but to special facilities which may be asked and received after the vessel has obtained due access to the harbour and docks, and for which (I may add) no charges are expressly provided by the Act. One has only to look at the schedules appended to the Act of 1892 to see how many different kinds of special facilities are afforded in those docks, for all of which there are special rates. I may only mention graving docks, cranes, rails, steelyards, and sheds for different kinds of goods. For all of these it is quite right that special rates should be provided, because only special ships require to make use of them. In like manner, according to the progress of mechanical invention, new kinds of appliances may come into use, for which it may be reasonable that the Commissioners should make a special charge, as, for instance, if they make a new installation of electric lighting in a particular part of the docks and allow its use for the convenience of merchants concerned with the traffic thereat. That is the kind of charge which section 60 contemplates, and not the use of a lock which is truly part of the dock accommodation, and is

intended for "all persons" who may frequent the docks on payment of the scheduled rates.

If the Lord Ordinary is right as to the first declaratory conclusion, it was not contended that the rest of the interlocutor could be successfully challenged, and I am therefore for adhering (with the addition which I have suggested), with expenses.

Lord Ardwall. — I agree with the opinion which has been delivered by Lord Stormonth-Darling. There is certainly an appearance of equity in the defenders' resolution of 8th September 1905, because undoubtedly the entrance or egress of vessels to and from the docks by means of the locks after the lock gates have been closed for the time imposes work upon the defenders' servants beyond that which is necessary when the locks are open for three hours before each high tide, when of course vessels pass in and out without causing any more trouble than is involved in the regular opening of the dock gates previous to high tide once every twelve hours or thereby. But this fact does not necessarily entitle the defenders to make an extra charge in respect of the passage of the vessel in or out of the docks by means of the locks after the level of the water in the outer harbour has fallen below the level of the water in the docks. They must shew that the pursuers are obtaining some privilege over and above the rights conferred on them by statute in return for payment of harbour dues, or otherwise they must shew that there is a special provision in the Harbour Acts entitling them to make the extra charge of £1 per vessel.

In considering this case it must be observed that the locks and gates are part of the harbour works specially authorised to be made in virtue of the powers contained in the Acts empowering their construction just as much as are the docks themselves, and the water lying between the gates of the locks is as much part of the harbour as the water in the outer harbour or the water in the docks. This being so, I think it follows that all vessels are entitled to the use of the locks and the water therein on payment of the statutory harbour dues entitling them to the use of the harbour in terms of sect. 33 of the Harbours Act of 1847.

The defenders obtained powers to make these docks and locks, presumably with the view to making the harbour of Leith more available for commerce and more attractive to shipping, and, *inter alia*, to shipping consisting of steamers sailing as regular liners at stated periods to and from Continental ports; and I think it is contrary to the policy of the Harbour Acts as well as to sound considerations of public policy that the advantage afforded to steamers of a certain size of being able to get in and out of the docks at any suitable state of the tide should form the subject of a special impost. I am of opinion that it must be held that such extra labour as may be necessary for working the dock gates is labour necessary to render available the ordinary harbour waterways, and therefore should not form the basis of a claim for an extra charge on vessels taking advantage of the convenience afforded by the locks.

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Lord Ardwall.

Defenders' counsel, however, founded strongly upon sect. 76 of the Leith Harbour and Docks Act 1875, and sect. 60 of the subsequent Act of 1892, which are in similar terms, and which authorise certain charges to be made. In my opinion these sections do not apply to a charge such as the present, but to charges for work done, services rendered, and facilities afforded, and the use of plant after a vessel has got to her berth in the harbour, and do not apply to the use of the harbour itself or any of the waterways forming part thereof. I accordingly think that the interlocutor of the Lord Ordinary is well founded, but I agree with the opinion that both the conclusion of the summons and the portion of the interlocutor are too wide when they declare that the pursuers are entitled to have access and egress "at all times when access to and egress from the said harbour and docks can be given with safety, either by means of locks in the said harbour or otherwise."

Nothing is said in this case as to the engineering questions involved in the use of the locks for the passage of vessels when the level of the water in the outer harbour has fallen to a certain number of feet below the level of the water in the respective docks, or whether the locks may be safely used at all states of the tide provided there is water sufficient in the outer harbour for the passage of vessels, and so on. These matters are not before us, and in fact it was not until the debate had proceeded a considerable length that the Court were given to understand that there was really any question at issue except the right of the defenders to make the extra charge of £1 for the right of passage through the locks when they were not open at any rate. I accordingly concur with Lord Stormonth-Darling that there should be a qualification inserted in the Lord Ordinary's interlocutor in case of possible difficulties in the working of the locks at all times of the day and night.

The Lord Justice-Clerk. — I concur in the judgment of Lord Stormonth-Darling. — 17*th March* 1908.

Counsel for Pursuers, Clyde, K.C., Macmillan; Agents, Beveridge, Sutherland & Smith, S.S.C.— Counsel for Defenders, Scott Dickson, K.C., J. H. Millar; Agent, Victor A. Noël Paton, W.S.

J. S. M.

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Beveridge's Trustee v. Beveridge.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.*)

381. Beveridge's Trustee *v.* Beveridge.

I. Trust—Investment—Local Authorities Loans (Scotland) Act 1891 (54 & 55 Vict. cap. 34), sect. 44—Corporation Stock Bought at a Price Exceeding Redemption Value—Whole Price Paid Out of Trust Funds—Arrangement with Liferenter that a Deduction Should be Made from Revenue to Form a Sinking Fund to Replace Premium—Held Purchase of Corporation Stock Ultra Vires of Trustees.

II. Guarantee—Construction—Guarantee by Liferenter in Favour of Trustees Making Ultra Vires Investment—Investment Ultra Vires Because Price Above Redemption Value Paid on Stock—Terms of Guarantee which Held to Cover Difference Between Price of Stock and Redemption Value but Not Depreciation Below Redemption Value.

Special Case.

The late James Adamson Beveridge, Esquire of Brucefield, Dunfermline, died at Edinburgh on 16th November 1887, leaving a trust disposition and settlement, dated 20th April 1883, and two relative codicils, dated respectively 13th September 1883 and 10th October 1884. By his trust disposition and settlement and first codicil, the deceased conveyed his whole estate and effects, heritable and moveable, to, *inter alios*, James Beveridge, farmer, Crombie, in the parish of Torryburn, and Robert Methven Heron, Fife Potteries, Gallatown, near Kirkcaldy, as trustees for the purposes therein mentioned. By the trust disposition and settlement, the testator directed his trustees to convey the residue of his estate to his sister Elizabeth Mary Beveridge, wife of Dr Alexander Watt Beveridge, Edinburgh.

By the second codicil, dated 10th October 1884, the testator, *inter alia* . . . . left to the said Robert Methven Heron, and others, and the survivors and survivor of them, the liferent of a sum of £20,000, free of legacy duty, and directed his trustees to set aside and invest in their names, for behoof of the said Robert Methven Heron and others, for liferent use only, the said sum of £20,000 on the securities authorised by the Acts of Parliament relating to the investment of trust funds . . . . and on the death of the survivor, the said capital sum of £20,000 was to revert to and form part of the residue of his means and estate. In consequence of the deaths of the other parties interested, the sole right to the liferent vested in Robert Methven Heron as at 2nd September 1896.

In November 1895 Erskine Beveridge of Brucefield was assumed as a trustee. James Beveridge died on 14th February 1903, and Robert Methven Heron on 23rd June 1906, and at the date of the case Erskine Beveridge was the sole surviving trustee.

The first party to the case was the said Erskine Beveridge, the sole acting and surviving trustee of the said deceased James Adamson Beveridge. The second parties were the executors of the said deceased James Beveridge, and the third parties are the trustees of the said deceased Robert Methven Heron, both of whom were trustees of the said James Adamson Beveridge. The fourth party was the said Mrs Elizabeth Mary Beveridge, the residuary legatee of the said James Adamson Beveridge.

At Whitsunday 1897 it became necessary to find a new investment for the sum of £9560, a portion of the liferented funds. The trustees, in March 1897, proposed to invest this sum in three per cent. stock about to be issued by the Burgh of Dunfermline. The fourth party refused to consent to the proposed investment. Ultimately the trustees resolved to make the investment proposed, and for that purpose they entered into an arrangement with the liferenter, Robert Methven Heron, which was set forth in a letter of guarantee which was granted on 21st April 1897 by Robert M. Heron in favour of the trustees as follows:

To

The Trustees of the late James Adamson Beveridge, Esquire of Brucefield.

Gentlemen,

I, Robert Methven Heron, sole surviving liferenter of the fund of £20,000 directed by the late Mr Beveridge, the truster, to be held in trust for the liferent use of me [and others], and the survivors and survivor of us, approve of your proposal to invest the sum of £9649, 4s., part of the capital of the said fund, in the purchase, at the price of £102 per cent. (that being the minimum price of issue), of £9460 of the redeemable three per cent. stock about to be issued by the Corporation of Dunfermline; and I further agree to accept interest on the said sum of £9460 at the rate of two and three-quarters per cent. per annum—the difference between such interest and the interest payable by the Corporation to be set aside by you as a sinking fund to meet the premium of £189, 4s., being the difference between the amount payable for the stock and the par value at which the same is redeemable, or such proportion thereof as may be lost when the said stock falls to be realised, or has been redeemed by the Corporation, such sinking fund, in the event of the said stock not being realised at a loss, to be payable to me or my heirs: And in the event of the said sinking fund not being sufficient to meet any loss that may be made on the realisation or redemption of the stock, I hereby agree and declare that the deficiency shall form a charge against my estate.

The special case stated:

10. The said £9460 of Dunfermline Corporation Stock was purchased by the trustees at Whitsunday 1897, at 102 per cent., the whole price being paid out of the trust funds, and the dividends received on said stock (less the deduction hereinafter referred to) were regularly remitted to Mr Heron by the factor and law agent of the trustees, accompanied by a statement shewing the details thereof. These remittances continued to be made up to the term of Witsunday 1906, being the last half-yearly term before Mr Heron's death. From each half-yearly remittance of the said dividends, ¼ per cent. was deducted and retained by the factor and law agent, in accordance with the terms of the guarantee by Mr Heron referred to. . . . At the date of Mr Heron's death, the sinking fund accumulated from such deductions amounted to £213, 18s. 11d., including bank deposit interest. This sum is more than sufficient to meet the premium of 2 per cent. originally paid on the stock, which amounted to £189, 4s.

11. The said stock was issued by the Burgh of Dunfermline under and in terms of the Local Authorities Loans (Scotland) Act 1891. The dividends thereon are secured upon rates or taxes levied by the said Corporation under authority of Act of Parliament, and the stock itself is redeemable at par on 15th May 1947, or, in the option of the Corporation, at the term of Whitsunday 1917, or any term of Whitsunday or Martinmas thereafter, on three months' notice to the holder. The whole stock falls to be redeemed on or before Whitsunday 1947. Since the date when the investment was made, it has fallen in value in common with other Corporation stocks. At Mr Heron's death the market price was 89½, and it is now quoted at 88⅛. The total depreciation at the present time, on the price originally paid, is thus £1123, 7s. 6d., or, deducting the amount of the original premium, £934, 3s. 6d.

12. In consequence of the death of the said Robert Methven Heron, the capital of the said sum of £20,000, liferented by him, now falls to be paid over to the fourth party, as residuary legatee of the said deceased James Adamson Beveridge. In the circumstances above set forth, she has intimated that she holds the first party, as trustee of the said deceased James Adamson Beveridge, and the second and third parties, as representatives of deceased trustees of the said James Adamson Beveridge, liable for the whole of the depreciation on the said Dunfermline Corporation Stock; the first, second and third parties agree to pay to the fourth party the premium of two per cent. originally paid on the stock, amounting to £189, 4s., but they refuse to pay the rest of the amount by which the stock has been depreciated.

The following Questions of Law were stated:

1. Are the first, second, and third parties jointly and severally liable to make good to the fourth party the difference between the redemption value of the said Dunfermline Corporation Stock and the amount which it yields on realisation?

2. In the event of the first question being answered in the affirmative, are the third parties bound to relieve the first and second parties of such liability?

The Local Authorities Loans (Scotland) Act 1891 (54 & 55 Vict. cap. 34) provides:—

Sect. 44 (1) Trustees or other persons for the time being authorised to invest money in the mortgages, debentures, or debenture stock of any railway or other company, shall, unless the contrary is provided by the instrument authorising the investment, have the same power of investing money in stock issued under the provisions of this Act . . . . as they have of investing it in the mortgages, debentures, or debenture stock aforesaid.

(2) Provided that when two or more persons are successively interested in money left subject to a trust, no investment thereof shall be made in stock at a price exceeding the redemption value of the stock, unless the instrument creating the trust shall otherwise expressly provide.

It was not disputed that the trustees were authorised to invest money on the debentures of a railway company.

Argued for the First and Second Parties: (1) Under sect. 44 of the Local Authorities Loans (Scotland) Act 1891, the trustees were entitled to make the investment in question provided they did not pay more than the redemption value of the stock out of the trust funds. Here they had not paid more than the redemption value, because the difference between the redemption value and the price paid to the purchaser was paid by the liferenter. The case was substantially the same as if the trustees had bought the stock above redemption value in the market and had sold it to the trust estate at redemption value. The investment therefore was valid. (2) If the investment were invalid, then the guarantee on its sound construction covered all loss which might result to the trustees from the investment — not only the difference between the cost price and the redemption value, but also the difference between the redemption value and the present price of the stock.

Argued for the Third Parties: (1) On the question as to the validity of the investment, these parties adopted the argument of the first and second parties as to the construction of section 44. Further, the trustees had an unqualified power to make the investment in question under sect. 3 (*a*) of the Trusts Act, 1898 (61 & 62 Vict. cap. 42). That enactment swept away the proviso in sect. 44. (2) The guarantee should be construed favourably to the cautioner (Bell, Prin., sects. 251, 285; *Baird* v. *Corbett*, 1835, 14 S. 41; *Napier & Co.* v. *Bruce*, 1840, 22 D. 556, affd. 1 Bell, App. 78); it covered only the difference between the actual price and the redemption value.

Argued for the Fourth Party: The investment in question was absolutely forbidden by sect. 44 if the trustees had to pay more than the redemption value. Here they had done so, for the whole price came out of the trust funds. The investment was therefore invalid under sect. 44. The Trusts Act 1898 could not help the trustees, because it had not been passed at the date of the purchase.

The Court *answered* the first question in the affirmative and the second in the negative.

2ND DIV.

Beveridge's Trustee v. Beveridge.

Lord Low.

Lord Low.—At the time when the testamentary trustees of the deceased Mr James Adamson Beveridge invested part of the trust funds in Dunfermline Corporation Stock, their only authority for so doing was the power conferred upon trustees to invest trust funds in such stocks by the 44th section of the Local Authorities Loans (Scotland) Act 1891. The power conferred by the statute is, however, subject to the following proviso: "Provided that when two or more persons are successively interested in money left subject to a trust, no investment thereof shall be made in stock at a price exceeding the redemption value of the stock, unless the instrument creating the trust shall otherwise expressly provide."

It is admitted that that proviso was applicable to the investment in question, because there were two or more persons—liferenters and fiars—successively interested in the money, and there was nothing in the trust deed which authorised the trustees to go beyond the powers conferred by the statute. Now it appears to me that the language of the proviso is unambiguous and imperative. "No investment shall be made in stock at a price exceeding the redemption value of the stock." Nothing could be clearer than these words, and the fact is that the trustees did invest trust funds in stock of the kind referred to in the statute at a price of 102 per cent., while the redemption value was only 100 per cent. It is, therefore, clear that upon the face of the transaction the investment was one which the statute declares trustees shall not make, and was therefore *ultra vires*. The trustees, however, say that although the full price was in the first instance paid out of trust funds, they made an arrangement with the liferenter whereby the excess of the price was restored to the trust estate, with the result that ultimately, and before the expiry of the liferent, the investment had cost the trust estate only 100 per cent., or the redemption value. They argued that the plain object of the proviso was to prevent trustees expending more money in the purchase of stock than the ultimate fiar would get back when the stock came to be redeemed, and that as the trust estate had in fact only been diminished by the investment to the extent of the redemption value, the mischief struck at by the proviso had not arisen, and they (the trustees) could not be held to have contravened the enactment.

The argument is plausible, but I do not think that it is sound. The trustees unquestionably invested trust funds in the purchase of the stock at a price exceeding the redemption value, and they must, in my opinion, take the consequences. It seems to me that the arrangement which they made with the liferenter was for their own protection, and cannot be pleaded against the residuary legatee, seeing that not only was she no party to the arrangement, but that she expressly refused to consent to trust funds being invested in the stock at £102.

Accordingly the trustees are, in my opinion, in the position of having made an investment of trust funds which was *ultra vires* of them, and consequently they are liable to restore to the trust estate the loss which it has thereby sustained. The first question therefore must, in my judgment, be answered in the affirmative.

The only other question is whether the late Mr Heron—who was the last of the liferenters of the fund in question—by a letter of guarantee which he granted to Mr Beveridge's trustees, became bound to make good any loss which might be sustained on the investment, whatever that loss might be, or only to the extent of the premium—that is to say, the amount by which the price paid for the stock exceeded the redemption value.

The answer to that question depends upon the construction of the letter. In it, after approving of the proposal to invest part of the trust funds in the Dunfermline Stock at the price of £102, Mr Heron agreed to accept interest on the money invested at the rate of $2\frac{3}{4}$ per cent. only, and that the balance of the interest actually paid should be set aside by the trustees to form a sinking fund to meet the premium, "or" (I now quote the precise words used) "such proportion thereof as may be lost when the said stock falls to be realised, or has been redeemed by the Corporation, such sinking fund, in the event of the said stock not being realised at a loss, to be payable to me and my heirs."

I think that the words "when the said stock falls to be realised" refer to the expiry of the liferent, when the sum invested fell to be paid to the residuary legatee. That was the event which happened, because Mr Heron died in 1906, which was prior to the date when the stock might be redeemed. At Mr Heron's death the sinking fund was more than sufficient to meet the difference between the price at which the stock had been purchased and the redemption value. Accordingly, if there had been nothing more in the agreement than the clause which I have quoted, I would not, I think, have been doubtful that the trustees could only have claimed the sinking fund to the extent of the difference between the purchase price and the redemption value, and that the balance would have belonged to Mr Heron's representatives.

The letter, however, contains another clause in the following terms: "And in the event of the said sinking fund not being sufficient to meet any loss that may be made on the realisation or redemption of the stock, I hereby agree and declare that the deficiency shall form a charge against my estate."

The whole difficulty appears to me to arise from the use of the words "any loss." If the expression had been "such loss" it would, I think, have been clear that what was meant was

the loss of the premium or any part of it, because that is the only loss which is referred to in the previous part of the letter. When, however, the letter is read as a whole, I think that it becomes sufficiently plain that that was truly the extent of the obligation. It is evident that the letter proceeded upon the view (as I think an erroneous view) that if the premium was restored to the trust estate, the investment would not be challengeable under the statute. Accordingly a sinking fund was established for the purpose of restoring the premium out of surplus interest, but in order to meet the possible event of Mr Heron's death before the sinking fund had attained the requisite amount, he came under an obligation that any sum required, in addition to the sinking fund, to make good loss of premium should be a charge upon his estate. I do not think that it can be disputed that that was the scheme of the letter, and therefore I am of opinion that the words "any loss" must be construed (as I think they are quite capable of being construed) as meaning any loss to the extent of that which alone was the subject-matter of the letter, namely, the premium.

I am therefore for answering the second question in the negative.

Lord Stormonth-Darling.—I concur in the opinion of Lord Low.

Lord Ardwall.—I concur in the opinion delivered by Lord Low; but I confess I have found the case to be one of some difficulty. I think it is obvious that the intention of the proviso of subsection 2 of section 44 of the Local Authorities Loans (Scotland) Act 1891 was to prevent loss falling to the ultimate beneficiary when the stock came to be redeemed at par value in cases were persons were successively interested in an investment. Indeed, so far as I can see, the statute can have no other object, because it authorises the purchase of the same stocks at par value. Now, if any stock happens to stand at more than par value, the only inference to be drawn from that would be that it is a very good security, and commands a premium because of its superiority to other stocks of the same description. Therefore, so far as the safety of trust investments is concerned, there is no reason whatever for the provision of the subsection in question.

But I think it must be held that in dealing with statutes a court of law is not entitled, in considering a prohibition contained in a statute, to enquire what the object of the prohibition is, and should the object be the prevention of a loss of some kind, to hold that if the possibility of that loss is obviated the prohibition of the statute may be disregarded. Such a method of reasoning, if generally applied, would make wild work with the application of statutes, and, in my opinion, is not permissible.

I think that in this case we must confine ourselves to a consideration of the plain question whether the investment made by the trustees in Dunfermline Corporation Stock was an investment which as trustees they were entitled to make at the time, and at the price they did. To this there can be only one answer, to the effect that it was not. The result is that the trustees' actings must be held to have been *ultra vires*, and that they are liable for all loss resulting therefrom, and are not entitled, in response to the fourth party's request for payment of £20,000, to tender as part thereof the investment in question, but that they are bound to replace in the trust the price originally paid for the said stock.

I therefore concur in holding that the first question should be answered in the affirmative.

With regard to the second question, I think it is quite clear upon the facts stated in the case that at the time the letter of guarantee of date 21st April 1897 was granted, neither Mr Beveridge's trustees nor Mr Heron had in contemplation any other possible loss than the difference between the par value of the stock and the price paid for it, namely, £102, and that the letter of guarantee was intended to cover only that loss. The clause of obligation, it is true, is ambiguous, but I think it is capable of being read as limited to the loss I have just referred to; and the intention of the parties being, as I think, evident from the rest of the letter of guarantee, as well as from the facts agreed on in the case, I think the second question ought to be answered in the negative.

The Lord Justice-Clerk. — I concur. — 17*th March* 1908.

Counsel for the First and Second Parties, Blackburn, K.C., Lippe; Agents, Erskine Dods & Rhind, S.S.C.—Counsel for the Third Parties, Solicitor-General (Ure, K.C.), Constable; Agents, Watt & Williamson, S.S.C.—Counsel for the Fourth Party, Scott Dickson, K.C., Macmillan; Agents, Mackenzie, Innes & Logan, W.S.

J. S. M.

SECOND DIVISION.

(Lords Stormonth-Darling, Low, and Ardwall.)

382. Lindsay *v.* Stewart M'Glashen & Son Limited.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 7 (2)—Dependants—Wife and Pupil Child Living Apart From Deceased—Deceased Not Contributing to Support of Wife and Child—Circumstances Where Held Wife and Child Not Dependent on Deceased's Earnings at the Time of His Death.

Stated Case under the Workmen's Compensation Act 1897.

This was an arbitration in the Sheriff Court at Edinburgh under the Workmen's Compensa-

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tion Act 1897, in which compensation was claimed from Stewart M'Glashen & Son Ltd., sculptors, Warriston Road, Edinburgh, on account of the death of William Jamieson Lindsay, 15 Cumberland Street, Edinburgh. The claimant was Mrs Alexandrina Allan M'Inroy or Lindsay, his widow, for herself, and as tutor and administrator in law for their pupil child, Isabella Walker Lindsay.

The Sheriff-Substitute (Guy) refused compensation, and, at the request of the claimant, stated a case.

The case stated:

(1) On 13th June 1907 the said William Jamieson Lindsay was a workman in the employment of the respondents, and on that day he met with an accident arising out of and in the course of his employment with them at their yard at Warriston Road, Edinburgh, which is a factory within the meaning of said Act, by being crushed against a wall of the yard by a block of stone which was being raised by a crane, and he died almost instantaneously; (2) the appellant, Mrs Alexandrina Allan M'Inroy or Lindsay, is the widow of the said William Jamieson Lindsay, and her pupil child, the said Isabella Walker Lindsay, who was born on 8th January 1896, is the only child of the deceased and her . . . .; (4) the deceased and the appellant, the said Alexandrina Allan M'Inroy or Lindsay, were married on 26th August 1895; (5) that in December 1895, and shortly before the birth of the said Isabella Walker Lindsay, the said Alexandrina Allan M'Inroy or Lindsay left her husband, and went to reside with her mother and brothers in Dundee; (6) that the said Alexandrina Allan M'Inroy or Lindsay stated her reason for leaving her husband to be his cruelty, but she led no evidence corroborative of this, and she took no proceedings against her husband; (7) since leaving her husband the appellant has worked as a weaver, and by this means, and with assistance from her mother and brothers, has maintained herself and her said pupil child, born on 8th January 1896, and an illegitimate child, to which she gave birth on or about 30th January 1903; (8) that since the separation neither the said Alexandrina Allan M'Inroy or Lindsay nor her daughter, Isabella Walker Lindsay, received any aliment or support from the deceased; (9) that at the date of the said William Jamieson Lindsay's death neither the said Alexandrina Allan M'Inroy or Lindsay nor her child, the said Isabella Walker Lindsay, was in fact dependent, either wholly or partially, upon his earnings

On 27th December 1907 I issued my award refusing the claim for compensation by the said Alexandrina Allan M'Inroy or Lindsay and her pupil child, Isabella Walker Lindsay, with expenses against the former; and I found in law that, according to the facts before stated, the appellants were not dependants within the meaning of the Workmen's Compensation Act 1897.

The Question of Law for the opinion of the Court was: Whether the said Mrs Alexandrina Allan M'Inroy or Lindsay and her pupil child, or either of them, were wholly or in part dependent upon the earnings of the deceased at the time of his death, within the meaning of the Workmen's Compensation Act 1897?

Argued for the Appellant: A husband was under a legal obligation to support his wife (*Main Colliery Co. Ltd.* v. *Davies* [1900], A.C. 358. There was a presumption of law that a wife was dependent on her husband's earnings (*Cunningham* v. *M'Gregor & Co.*, 1901, 3 F. 775; *Sneddon* v. *Addie & Sons' Collieries Ltd.* 1904, 6 F. 992; *Coulthard* v. *Consett Iron Co. Ltd.* [1905], 2 K.B. 869; *Williams* v. *Ocean Coal Co. Ltd.* [1907], 2 K.B. 422; *Queen* v. *Clarke* [1906], 2 I.R. 135). The *dictum* of the Lord President in *Baird & Co. Ltd.* v. *Birsztan* (1906, 8 F. 438), was inconsistent with the other authorities, and was unsound. In the present case the presumption was not overcome. It was not enough that the wife was living apart, that the deceased had not, in fact, contributed to her support, and that the wife had picked up a livelihood by casual labour eked out by the charity of her relatives (*Cunningham* v. *M'Gregor & Co.*, *cit.*; *Sneddon* v. *Addie & Sons' Collieries Ltd.*, *cit.*; *Williams* v. *Ocean Coal Co. Ltd.*, *cit.*). To overcome the presumption it was necessary that the wife should have ceased to rely on her husband for support, as in the case of *Turners Ltd.* v. *Whitefield* (1904, 6 F. 822). There was no such element in the present case, and accordingly the wife was entitled to compensation. *Addie & Sons' Collieries Ltd.* v. *Trainer* (1904, 7 F. 115) was distinguishable. In any view, the child was entitled to compensation. While the wife might discharge her claim by looking elsewhere for support, a pupil child could not discharge its claim. The case of the child was therefore even stronger than that of the wife.

Argued for the Respondents: The question was whether the wife was in fact dependent on her husband's earnings at the time of his death (*Moyes* v. *William Dixon Ltd.*, 1905, 7 F. 386). There was no presumption of law requiring to be rebutted by evidence (*Baird & Co. Ltd.* v. *Birsztan*, *cit.*). No doubt it was not necessary that the husband should have been supporting his wife at the precise date of his death. But the wife must at least be looking to her husband for support, and here it was plain that she was not looking to her husband. So far as one case could be ruled by another, the present case was ruled by *Turners Ltd.* v. *Whitefield* (*cit.*). The cases relied on by the appellant (*Cunningham* v. *M'Gregor & Co.*, *cit.*; *Sneddon* v. *Addie & Sons' Collieries Ltd.*, *cit.*; *Coulthard* v. *Consett Iron Co. Ltd.*, *cit.*; *Williams* v. *Ocean Coal Co. Ltd.*, *cit.*) were distinguishable. They were all cases where the wife was in fact relying on her husband for support. There was no distinction between the case of the child and the case of the wife (*Addie & Sons' Collieries Ltd.* v. *Trainer*, *cit.*; *Rees* v. *Penrikyber Navigation Colliery Co.* [1903], 1 K.B. 259). The question was exactly the same—whether the child was dependent on the deceased's earnings at the time of the death.

Here it was plain that the child was not dependent.

The Court *answered* the question of law in the negative.

Lord Stormonth-Darling.—So far as one case can be an authority for the decision of another, I think that the nearest case to the present is the case of *Turners Limited* v. *Whitefield* (6 F. 822). In that case a wife had been living apart from her husband for fourteen years, and was not, in fact, supported by him at the time of his death, but by an illegitimate son. In these circumstances it was held that she was not dependent on her husband's earnings, and was not entitled to compensation. Mr Orr has pointed out that in that case there was no formal severing of the family tie such as by a deed of separation; but neither is there here. In fact, the separation took place by the wife leaving the husband and going to reside with her mother and brothers in Dundee about four months after the marriage, and about eleven years and a half before the husband met with his fatal accident in the respondents' works in Edinburgh, which occurred on 13th June 1907. The Sheriff does not say that the wife was in desertion. She stated her reason for leaving her husband to be his cruelty, but she led no evidence corroborative of this, and she took no proceedings against her husband. The Sheriff had therefore no means of judging whether her reasons were good or bad. But whatever they were, all we know is that she left him voluntarily, and that at the time of his death they had been living apart since December 1895, a period of time nearly corresponding to the period of separation in *Turners Limited* v. *Whitefield*. That being so, I take the case simply upon the footing that the wife's action in leaving her husband was voluntary and unexplained. Shortly after the separation she gave birth to a child by the husband, and on 30th January 1903 she gave birth to an illegitimate child. Since leaving her husband the appellant has worked as a weaver, and by this means, and with the assistance of her mother and brothers, she has maintained herself and her two children.

The Sheriff has found that since the separation neither the wife nor the child has received any aliment or support from the deceased, and that at the date of his death neither the wife nor the child was in fact dependent on his earnings. Now the question which the Sheriff has decided by the first of these findings was a question purely of fact, but the question on which the second finding was pronounced was a question of mixed fact and law, and I quite concede that that question can be brought before this Court, because it is ultimately a question on the construction of the Act, and therefore a question of law. The Sheriff seems to have been satisfied that the claimants were persons who would have been entitled to sue for solatium and damages in respect of the death of the workman. But he had also to consider the question whether they were wholly or in part dependent on the earnings of the deceased, and he has decided that question by holding that they were not so dependent at the time of his death. There I am of opinion that the Sheriff is right, or, to put the matter as it would be put in England, that he has properly directed himself. I think that there is no flaw in the conclusion which he has drawn from the facts he has found.

A number of cases were cited to us which I do not propose to go over. I proceed on the broad facts of the case—on the fact that the spouses voluntarily separated nearly twelve years ago, on the fact that the husband was never made liable (because, as I gather, he was never asked) to support his wife and child, and on the further fact that he did not contribute a single penny to their support down to the day of his death. Now, in these circumstances, can it be said that the Sheriff was wrong in the conclusion to which he has come? I think not.

It was argued by Mr Orr that the husband was liable in law to support his wife. Now it is true that he might, in certain circumstances, have been called on. But does the husband's legal obligation affect the matter at all? I agree with the opinions expressed by Lord Adam and Lord Kinnear in the case of *Turners Limited* v. *Whitefield*, that the fact of the husband being under a legal obligation to support his wife does not alter the fact that she was not dependent on him at the time of his death. Lord Adam says: "The facts found shew that she separated from her husband some fourteen years ago, when she cast in her lot with some illegitimate children of her own, by whom, and partially by her own exertions, she was being maintained at the time of the death. I do not think that the fact that the husband was under a legal obligation to support her makes any difference. It does not alter the fact that she was not dependent on his earnings at the time of his death." Lord Kinnear agrees with Lord Adam, for he says: "I agree with what has been said by Lord Adam, that the question does not depend merely upon the legal liability of a husband to support his wife, because the section in question requires that two conditions shall have been satisfied. In the first place, it is provided that the person said to be a dependant shall be a person 'entitled, according to the law of Scotland, to sue the employer for damages or *solatium* in respect of the death of the workman.' That condition is satisfied when the woman claiming compensation is in the position of a wife who is legally entitled to be supported by her husband. But then the statute goes on to prescribe as a second condition that the claimant must be such a person among those already described as was 'wholly or in part dependent upon the earnings

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Lord Stormonth-Darling.

of the workman at the time of his death.' I do not think it necessary to define the word 'dependent' more exactly than the statute defines it. But I am not prepared to say that its meaning is exhausted when it is said to cover those who were in fact supported by the deceased workman up to the time of his death." I agree with every word of that; I think that the Sheriff was right in holding that while the claimants here answer the description of persons "entitled, according to the law of Scotland, to sue the employer for damages or *solatium* in respect of the death of the workman," they do not, either of them, answer the description of persons dependent on the earnings of the deceased at the time of his death.

Lord Low.—The deceased William Lindsay was in the employment of Stewart M'Glashen & Son Ltd., sculptors, and on 13th June 1907 he met with an accident, arising out of and in the course of his employment, which resulted in his death. In consequence of that his widow, for herself and for their pupil child, claims compensation, and whether they are entitled to compensation or not depends upon whether, in the language of the seventh section of the Workmen's Compensation Act 1897, they were wholly or in part dependent on the earnings of the deceased at the time of his death. The material facts are these. The claimant Mrs Lindsay and the deceased were married in August 1895. She voluntarily, whether for good reason or not we do not know, left her husband in December 1895, and has never lived with him since. After she left him, namely, in January 1896, the child for which she now claims compensation was born, and, as I have said, Lindsay was not killed till June 1907. The Sheriff-Substitute tells us that when Mrs Lindsay left her husband in December 1895 she went to reside with her mother and brothers in Dundee, and that since leaving her husband she has worked as a weaver, and by that means, and with the assistance of her mother and brothers, with whom she was living in family, she has maintained herself and her pupil child. Further, since the separation neither she nor her daughter have received any aliment or support from the deceased. Now I think that as regards the widow the case is a very plain one. As I have said, she voluntarily left her husband some eleven years before his death. She never received, or apparently asked, any aliment from him during that period, but supported herself. Now I think if a wife voluntarily leaves her husband and chooses her own line of life, and supports herself by her own earnings, it is impossible to say that in any reasonable sense she is either wholly or partially dependent on his earnings at the time of his death, so I have no doubt that the Sheriff-Substitute is right in his view about the widow.

The case of the child is more difficult, because a pupil child cannot choose his own line of life, and cannot earn his own livelihood, and there is no doubt that in one sense every pupil child may be said to be dependent on its father, because the father is under an obligation to support it. Now if a father deserted a pupil child and refused to support it, and if that child were kept from starvation only by charity from others, I would have no hesitation in saying that although the father was not in fact supporting it at the time of his death, yet the child was, within the meaning of the statute, dependent on the earnings of the father. That, however, is an extreme case in one direction, and I think an equally extreme case in the other direction might be supposed; for instance, if a child had independent means which were administered by trustees, and which were ample for his support, and by which he was in fact supported, it is plain that he would not be dependent on the earnings of his father. But between such extreme cases there may be a great variety of circumstances where the question whether or not a pupil child was dependent on the earnings of the father at the time of his death would be attended with considerable difficulty. It is perhaps impossible to lay down a rule which will be applicable to every case, but I am inclined to think that as good a test as can be found is that given by Lord Moncreiff in the case of *Cunninghan* v. *Macgregor & Co.* (3 F. 775). That was the case of a wife, but I think the case of a child is substantially the same, and what Lord Moncreiff said was that the question whether a wife was or was not entitled to claim compensation depended on whether she had at her husband's death means of support of a more or less permanent and substantial character. Now, applying that test here, we find that this pupil child had been supported by his mother for very nearly eleven years prior to the father's death, which gives the support the character of substantial permanency, and there is nothing to suggest that at the time of the father's death the support which the pupil child was receiving had come to be of a precarious character. I am therefore of opinion that in the case of the child, as in the case of the mother, the determination of the Sheriff-Substitute was right, and accordingly I concur that the question of law should be answered in the negative.

Lord Ardwall.—I concur with both your Lordships. This is a Compensation Act, and its purpose is to give compensation to workmen and also to dependants of workmen who may have suffered by their deaths or disability. Now, that being the purpose of the Act, we must start with this, that it is only actual loss for which compensation is to be awarded and not prospective or possible loss, and accordingly the Act provides that the dependants who are to be entitled to compensation are such of the persons

entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman "as were wholly or in part dependent upon the earnings of the workman at the time of his death." Now it appears to me that that definition excludes altogether the idea that a legal right to support from a person killed by an accident on the part of a person surviving him can by itself constitute the latter a dependant of the deceased in the sense of the Act; it concentrates the attention of any Court which has to decide a case like the present on these points: *first*, whether the person claiming compensation was in fact dependent upon the earnings of the workman; and *second*, whether he or she was so at the time of the workman's death. Now it has been decided in the case of the *Main Coal Company* in the House of Lords, and in the cases of *Turner*, *Baird*, and *Moyes* in the First Division of this Court, that the question raised by this definition is primarily one of fact, and if I may humbly say so, I think that that is the true view of the matter. Of course every question of fact under a statute may become a question of law in so far as a question may arise whether certain circumstances bring a person within a certain category laid down in the statute; for instance, whether certain facts render or do not render a person a dependant within the meaning of the Act, and so far that may be said to be a question of mixed fact and law, but being so, it is primarily a matter of fact that has to be decided. Now after what your Lordships have said, I do not think I need to say more, except that I desire to express my concurrence with what was said by the Lord President on the construction of this Act in the case of *Baird* (8 F. 438), and in particular I concur in his criticism of Lord Young's judgment in the case of *Sneddon* v. *Addie*.

I accordingly agree with your Lordships that we should affirm the judgment of the Sheriff-Substitute.—14*th March* 1908.

Counsel for Appellant, Orr, K.C., D. P. Fleming; Agents, Clark & Macdonald, S.S.C.—Counsel for Respondents, Murray, MacRobert; Agents, Cadell, Wilson & Morton, W.S.

J. S. M.

BILL CHAMBER.

(*Lord Guthrie.*)

383. Somervell *v.* Tait and Others.

Expenses—Payment a Condition of Proceeding — Petition Incompetent Under Bankruptcy (Scotland) Act 1856 (19 & 20 Vict. cap. 79), sect. 86—Dismissed With Expenses—New Petition Presented—Consideration Superseded Until Expenses in Former Petition Paid.

Bill Chamber. *Lord Guthrie.* Somervell v. Tait and Others.

(*See report of former petition, supra, p.* 588.)

In October 1907 James Somervell of Sorn, an undischarged bankrupt, brought a petition under section 86 of the Bankruptcy (Scotland) Act 1856, in which he prayed the Court to ordain the Trustee and Commissioners in his bankruptcy, and also certain other parties, whom he alleged to be identified with the Commissioners and responsible for their actings, to account for their intromissions with his estate and to make payment to him of "a sum of £150,000, or such other sum as may be ascertained in the proceedings to follow hereon to be the true sum due to the petitioner."

Section 86 of the Bankruptcy (Scotland) Act 1856 (19 & 20 Vict. cap. 79) enacts as follows:

> The judicial factor, the trustee and commissioners, shall be amenable to the Lord Ordinary . . . . at the instance of any party interested, to account for their intromissions and management by petition served on them.

The Lord Ordinary held that this petition was incompetent, in so far as concluding for a payment to the petitioner. The petitioner was given an opportunity to amend, but refused to do so. The Lord Ordinary therefore dismissed the petition and found the petitioner liable in expenses. The Lord Ordinary indicated in his note the opinion that the petition was incompetent in so far as directed against other parties than the Trustee and Commissioners in bankruptcy, although it was unnecessary to decide the point.

The petitioner did not pay the expenses awarded against him, but brought the present petition, which was in identical terms to the former, but omitted the crave for payment to himself, and was only directed against the Trustee and Commissioners. The respondents in their third plea in law maintained, *inter alia*, that this petition should not be heard until the expenses awarded in the former petition were paid. The arguments of parties appear sufficiently from the Lord Ordinary's note.

His Lordship *sustained* the contention of the respondents, and therefore superseded consideration of the petition until the expenses awarded in the former petition were paid.

Lord Guthrie.—The respondents, the petitioner's trustee and the commissioners on his sequestrated estate, plead that the petitioner is not entitled to proceed with this petition until the expenses found due to them in a previous petition brought by the petitioner against them and certain others have been paid.

That previous petition was brought under the same section of the Bankruptcy Act 1856, namely, sect. 86, as the present petition; the averments were substantially the same; but certain persons were sought to be made liable

BILL CHAMBER. *Lord Guthrie.*

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who are now only called for their interest, and the prayer contained a crave for payment of sums of money to the petitioner which is omitted in the prayer of the present petition.

In these circumstances I am of opinion that the respondents' third plea, so far as it refers to the expenses found due in the previous petition to them, is well founded. I am unable to distinguish the present case from the case of *Irvine* v. *Kinloch*, 1885, 13 R. 172, and *M'Murchy* v. *M'Lullich*, 1889, 16 R. 678, relied on by the respondents. The petitioner pointed out four distinctions: *first*, in these cases the pursuers were solvent; *second*, the actions were against third parties, not, as here, against the trustee of the person complaining; *third*, the condescendences in the second action contained additional matter, and did not, as here, differ from the actions first instituted merely in omissions; and *fourth*, in these cases the parties concluded against were identical in both sets of proceedings. I do not think there is any substance in these distinctions. The determining points are: *first*, that the respondents are in no way responsible for the failure of the petitioner's first petition; *second*, that they cannot be made to bear the cost of the petitioner's petition being licked into relevancy, either now or in the future, should the petitioner find it necessary to bring a series of petitions with the same parties and variously modified averments and prayers; and *third*, that the petitioner had an opportunity in the previous petition of curing the defect on account of which it was thrown out, and declined to do so.—6*th March* 1908.

For Petitioner, Party.—Counsel for Respondents, Macphail; Agents, R. R. Simpson & Lawson, W.S. A. S. P.

OUTER HOUSE.

(*Lord Mackenzie.*)

384. Mayberry *v.* Mayberry.

INTERNATIONAL LAW—DOMICILE—JURISDICTION—HUSBAND AND WIFE—DIVORCE.

A man whose domicile of origin was Irish, came to Glasgow at the age of eighteen, and after seven years' residence there as a journeyman tailor he married a Scotswoman, the daughter of parents in whose house he had lodged for five years. He had been back to Ireland only on one occasion, namely, when he went for a week to visit his mother. The spouses lived together in Glasgow for over two years, partly in houses which they rented and partly with the wife's parents. The husband, who worked irregularly, disappeared on two occasions for periods of several weeks, and eventually deserted his wife. She stated in evidence that he always considered Scotland to be his home. During the five years following the desertion he was seen from time to time in Glasgow and the neighbourhood, and he served in a Scottish militia regiment. He then returned to Ireland, and had been living there for five years when the summons of divorce was served upon him personally. The action was undefended.

At the hearing the following cases were cited by counsel: *Pabst* v. *Pabst*, 1898, 6 S.L.T. 117; *Vincent* v. *Earl of Buchan*, 1889, 16 R. 637 [645]; *Carswell*, 1881, 8 R. 901; *Dombrowitzki*, 1895, 22 R. 906.

The Lord Ordinary *found* desertion proved, and *sustained* the jurisdiction on the ground that the defender had acquired a Scots domicile which he had not abandoned when the four years of desertion were completed.—14*th March* 1908.

Counsel for Pursuer, Inglis; Agent, Alexander White, W.S.

J. A. I.,
for R. C. H.

SHERIFF COURT.

(*Sheriff-Substitute Guy in Small Debt Court in Edinburgh.*)

385. Ritchie *v.* Duke of Richmond and Gordon.

EXPENSES—ACTION IN ENGLISH COURTS—ADVOCATE ACTING AS ADVISER AND AS EXPERT WITNESS—ADVOCATE'S CLERK'S FEES.

This was an action at the instance of Mr J. R. S. Ritchie, clerk to Mr J. Avon Clyde, K.C., against the Duke of Richmond and Gordon, for payment of clerk's fees on fees amounting to two hundred guineas and fifty guineas paid to Mr Clyde for attendance in the Court of the King's Bench in London on behalf of the defender. Evidence was led, and the facts and arguments of parties sufficiently appear from the Sheriff-Substitute's opinion.

Sheriff Guy, in granting decree, said:—Part of the difficulty in this case arises from the fact that the Attorney-General for England saw fit, because he had personal jurisdiction over the Duke of Richmond and Gordon in England, to sue his Lordship in an English Court on a question which depended largely upon the construction of the entail statutes which are peculiarly Scottish. In these circumstances it is not to be wondered at that the noble defender in the action should apply to his Scottish solicitors, and that they in turn should go to eminent counsel of the Scottish Bar to assist the English agents and counsel whom he had necessarily to instruct in the action. From the beginning of the case it was a necessity that the Duke of Richmond and Gordon should have

skilled advice in Scots law, and it was also a necessity of the case that the English judge who tried it should have the assistance of Scottish counsel in the witness-box to instruct him in the intracacies of these difficult points of Scots law. Mr Clyde, along with Mr Chree, was instructed in the ordinary way to advise and make suggestions for revisal of papers and pleadings in connection with the case, and so long as he was instructed and consulted here, it was not disputed that his clerk was entitled to have his fee in the ordinary course as if he had been instructed as Scottish counsel to give his opinion or to appear and conduct a case in the Courts of Scotland. Mr Ritchie was paid his ordinary fees in relation to the fees of counsel in all consultations, etc., which preceded the hearing of the case in London. When the hearing of the case was imminent, it was thought right that Mr Clyde, along with the junior counsel who had been with him in the prior consultations, should go to London. Accordingly the defender's agents, through their Parliament House clerk, arranged for Mr Clyde's attendance in London through the agency of his clerk here (the pursuer in this action), and between these two the fees were arranged that should be sent to Mr Clyde. The letter instructing Mr Clyde to attend in London was sent to him by Mr Mounsey, W.S., the agent in Scotland for the defender, and he informed Mr Clyde that the case would be heard in the King's Bench Division on 8th July 1907, and stated, "I shall be obliged for your attending as arranged." The question now arises as to whether the fee in this case is not a fee sent to Mr Clyde in his capacity as a lawyer. As to this there can be no doubt. It is quite true that a W.S. or an S.S.C., or a law agent, or any other person skilled in the law of Scotland, might have attended and deponed on oath as to the law of Scotland. But the Duke of Richmond wished Mr Clyde to go. Mr Clyde went as a lawyer, and as a lawyer in the only proper sense of the old use of that word, namely, an advocate of the Scottish Bar, and it was as such that the Duke of Richmond and Gordon wished his services. Mr Clyde was instructed to go to London and give his assistance as an advocate of the Scottish Bar. As to the relation of the advocate and his clerk, it is to be remembered that from a very early period these two have been constantly associated with each other. An advocate, the very day he becomes a member of the Faculty, appoints his clerk, and although it may be years before he gets a guinea, he has his clerk, who will earn half a crown whenever he gets his first guinea. In England the same arrangement does not obtain. The two countries are alike in this, that in both counsel are supposed to have a clerk, but in England counsel does not always have a clerk. In England fees are sent direct to counsel, and these fees include clerk's fees. It is common in England for counsel to appoint a clerk on a salary and to obtain the benefit, if he has a large practice, of the difference between clerk's fees and the salary he pays to his clerk. That practice does not obtain in Scotland. In Scotland clerks are not paid by counsel, nor do counsel receive clerk's fees. Counsel receive only their own fees, and when they receive a fee there is set up immediately a contractual relation between counsel's clerk and the client and his agent under which the counsel's clerk is entitled to a fee in proportion to the fee sent to counsel, and so much is this a matter of implied contract that the agent is liable personally and may be sued for the fee. It is well known that opinions not connected with judicial proceedings at all carry with them in practice a fee to the counsel's clerk, and the fee is based upon a scale laid down in the Act of Sederunt, and is regulated by the amount of the fee sent for the opinion, an additional fee for writings being also provided for. If a fee is due to counsel's clerk for a written extra-judicial opinion as an advocate, it would be an extraordinary thing if that fee were to be held not payable for the reason that the opinion was deponed to on oath. It would be different altogether if the advocate were deponing on oath merely to a fact and not to an opinion as an expert in law. The view I take in this case is, however, that Mr Clyde was sent to London in a case in which the services of some person eminently skilled in the law of Scotland were required. Mr Clyde had been instructed in all the earlier stages of the case as counsel. When he was instructed to go to the trial of the case in London he went as an advocate, got his fee as an advocate, and the relation between him and his clerk was not disturbed by the fact that he was made a witness in the case. Without deciding the point, I am of opinion that if an advocate were called simply as a witness in his capacity as an expert in law, even in that case the clerk would be entitled to his fee, but in this case Mr Clyde was instructed from the outset as advisor and consultor. I think the case should be treated in the same way as if Mr Clyde had been sent as an advocate to plead in the House of Lords, and accordingly I find for pursuer with expenses.—*9th March* 1908.

Agent for Pursuer, J. Ferguson Reekie, Solicitor; Agent for Defender, R. S. Sharpe, Solicitor.

A. J. L. L.

Sheriff Court.

Ritchie v. Duke of Richmond and Gordon.

SHERIFF COURT.

(*Sheriff-Substitute Hay Shennan at Dunfermline.*)

386. Thomson *v.* The Fife Coal Company Limited.

Workmen's Compensation Act 1897 (60 & 61 Vict. cap. 37), sect. 2 (1)—Notice of Accident—Want of Notice—Circumstances in which Held That the Defenders Had

SHERIFF COURT.

Thomson v. The Fife Coal Co. Ltd.

NOT BEEN PREJUDICED IN THEIR DEFENCE BY THE DELAY ON THE PART OF THE PURSUER IN GIVING NOTICE.

This was an action under the Workmen's Compensation Act 1897 at the instance of the widow of the deceased Michael Thomson, who, while employed by defenders as a miner at their Benarty pit in the county of Fife, sustained, on 28th December 1906, severe injuries which incapacitated him for work until 9th January 1907, when he resumed work with the defenders. Thomson, however, died on 24th April 1907, and as the result of a post-mortem examination the pursuer alleged that his death was the result of the accident he had sustained on 28th December 1906. The defenders were not represented at the post-mortem examination, and their defence was that Thomson's death was not the result of the injuries he sustained on 28th December 1906.

Sect. 2 (1) of the Workmen's Compensation Act 1897, after declaring that notice shall be given by the workman injured to his employer, provided that "the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause." The Workmen's Compensation Act 1906, sect. 2 (1) (*a*), contains a similar proviso.

The Sheriff-Substitute, after proof, by interlocutor dated 5th December 1907, found in fact, *inter alia*, ". . . . (6) The cause of Thomson's death was suppurative meningitis, due to septic poisoning from the wound on the head received on 28th December 1906, and Thomson's death was the result of the accident on that date. (7) Thomson never gave notice of the accident to defenders. He did not associate his illness with the accident, and although he was urged to claim compensation, he was too independent to do so. Defenders first received notice of the accident when the claim was intimated to them by pursuer's agent on 2nd May 1907—eight days after the death. Pursuer's agent, on being consulted on the evening of 26th April, the day before the funeral, instructed Dr Carment and Dr Craig to make a post-mortem examination of the deceased, but he did not inform defenders of this at the time. It did not occur to him to do so. Pursuer herself stated that she was too much put about to think of giving notice. (8) The want of notice has not deprived defenders of any essential evidence relating to the accident itself. It deprived them of the opportunity of satisfying themselves at the post-mortem examination as to the cause of death. The terms of the post-mortem report have misled defenders into stating a defence which they would probably not have done if they had been represented at the post-mortem examination."

On these facts the Sheriff-Substitute found in law, *inter alia*, ". . . . (2) that the defenders were not prejudiced in their defence by the want of notice of the accident." He added a note in which he, *inter alia*, dealt with the alleged want of notice as follows: "My great difficulty in the case has been on the question of notice. So far as Thomson himself is concerned the case of *Rankine* v. *Alloa Coal Co. Ltd.*, 16th February 1904, 6 F. 375, is sufficient to justify me in holding that his failure to give notice was occasioned by mistake But I must say I can see no reasonable cause for the omission of pursuer's agent to give notice on 26th April, when the post-mortem examination was instructed, or for the delay till 2nd May. It was of great importance to defenders to have the opportunity of being represented at the post-mortem examination. Taking this view, I am bound to consider whether it is proved that defenders were not 'prejudiced in their defence' by the want of notice. I take these words to mean that there has been caused by the lapse of time some difficulty in establishing the defence—*e.g.*, through loss of evidence. If, for instance, the cause of death here was doubtful, and I had to balance probabilities, it might reasonably be argued that there would have been no such difficulty, if defenders had had the opportunity of clearing it up at the post-mortem examination. But in this case the cause of death is so clearly shewn that it seems to me unreasonable to conjecture that defenders' doctors might have discovered another cause at the post mortem examination. I am satisfied that defenders were 'prejudiced' in this sense that they would probably never have resisted pursuer's claim if they had been represented at that examination. But the words of the Act are 'prejudiced in his defence.' One must find some meaning for the words 'prejudiced in his defence,' and it is the necessity for doing so that leads me to the conclusion that the prejudice referred to is of the character above indicated. The prejudice to defenders was that they were deprived of information which would have been of importance to them when they were considering whether they should state a defence or not. Notice on 26th April would in fact have disabled defenders from stating a defence at all. The proper way to deal with such prejudice as defenders here received is to allow them expenses. But I have only allowed these down to and including the first day of proof, because defenders were responsible for the adjournment to a second day." —*5th December* 1907.

Agents for Pursuer, Macbeth & MacBain, Dunfermline; Agent for Defenders, W. T. Craig, Glasgow. A. J. L. L.

HOUSE OF LORDS.

(The Lord Chancellor (Lord Loreburn) and Lords Robertson and Collins.)

387. Arnot *v.* The Dunlop Pneumatic Tyre Company Limited.

Patent — Infringement — Anticipation — New Invention or New Mode Merely — Driving Aprons — "Protection Combined with Freedom."

(Reported ante, Vol. XII. p. 496; Vol. XIII. p. 193.)

Appeal against an Interlocutor of the First Division (The Lord President (Lord Dunedin), Lords Adam and Kinnear), reversing judgment of the Lord Ordinary (Kyllachy).

In this action by Robert Arnot against the Dunlop Pneumatic Tyre Co. Ltd., the Lord Ordinary (Kyllachy), on 1st December 1904, found that the defenders had infringed certain letters-patent, and granted interdict against the defenders in certain terms (see Vol. XII. p. 496). On 22nd June 1905 the First Division recalled the Lord Ordinary's interlocutor and assoilzied the defenders. The following is the opinion of the Lord President, which was concurred in by Lords Adam and Kinnear:—

The Lord President.—This case turns on a very small point. The action is one brought by those in right of letters-patent granted in favour of David Lenson, and they seek to prevent the defenders from infringing those letters-patent by the manufacture of certain driving aprons alleged to be made according to the specification annexed to the letters-patent. As regards the infringement there cannot be doubt. You have only got to look at the articles to see that there is really no difference, and that being so, I think there was nothing in the argument of the defenders that the pursuer was the user of a particular way of making a gusset which forms a projecting foothold, and the defenders here employ another method of making that gusset projection. I think that it is not a fair construction of the specification. I think what he has done was quite what a patentee ought to do. While not tying himself down to a particular method, he has shewn one way in which it could be done. On that point I agree with the pursuer. But the point on which I am constrained to differ with the Lord Ordinary is the point which arises on the prior specification of Parnall, because if the prior specification of Parnall really disclosed the so-called invention of Lenson, for which he got his letters-patent, then, of course, the case must be at an end, because the patent is bad. I am of the opinion that the invention, such as it is, was entirely disclosed by the prior specification of Parnall, and that anyone having Parnall's specification before him could construct what I may term the Lenson covering without the addition of any inventive faculty at all. They are both coverings for the feet, legs and knees, and are meant for the purposes of warmth and for use in travelling of whatsoever description. They have both got the peculiarity which really constitutes the only possibility of any patent in this matter at all, of these projecting footholds which have a double purpose, although one of them is not particularly specified by either inventor—the one I allude to in that matter being for the purpose of allowing the foot to be more or less free, and to be used as a foot, while at the same time not exposed to the weather. The other purpose is that by this foothold they assist in keeping the covering down, preventing its being blown off their lower limbs. The pursuer here says that the discriminating distinction between what is disclosed in Parnall's specification and what is shewn in Lenson's is that Parnall's is a sack formation and Lenson's is a rug. It is noticeable that Parnall does not mention the word sack from beginning to end. What Parnall says is this: "We form of thick woollen or other suitable fabric or material a covering for the lower part of the body and knees."

That is just as applicable to what you call a rug as to what you call a sack. Parnall further says: "It is continued down to the feet, where it is adapted to receive and enclose them, opening thence above the heels on the under side upwards, yet so that the parts may meet and overlap, and be held together by elastic or other loops." It is true that in his drawing he shews that particular opening as not beginning exactly at the heel, but opening at a place which one would guess, from looking at the print, is about the middle of the calf. But that is just an illustration of how it would be carried out, and I cannot doubt that anyone looking at the specification would have had the right to make his covering exactly as carried out in the specification—that is to say, immediately above the heels. If it is made opening immediately above the heels, then the whole difference between the two garments is gone, with this sole exception, that in *Parnall's* case there is, from the way in which it is described, an underneath platform—that is to say, the two feet are connected not only in the front by the piece of material which extends between the ankles and shins, but also underneath by the material which is underneath the soles of the feet. In *Lenson's* case that underneath platform does not exist, although, of course, there is the same underneath material extending between the shins and the ankles. I cannot think there was patentable material in, so to speak, cutting that away. In everything else the two garments are exactly the same. Parnall's garment is not in any necessary sense of the word a sack. It is a sack-like projection in which you put the feet, but so to a very appreciable extent is Lenson's, because there you put the feet into a projection, and that projection is an embryo sack with which you are wrapped round, like you are by Parnall's covering. If that is so, I do not think there is any invention on which to found letters-patent for Lenson, and I think the defenders are entitled to be assoilzied.

The pursuer *appealed*.

The House, without calling on counsel for the respondents, *dismissed* the appeal.

The Lord Chancellor.—My Lords, this case has been presented to your Lordships with most commendable brevity and clearness, but I think that there is no ground at all for this appeal.

It seems to me that the Lord President puts

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the case in one sentence. He says: "I am of the opinion that the invention, such as it is, was entirely disclosed by the prior specification of Parnall, and that any one having Parnall's specification before him could construct what I may term the Lenson covering without the addition of any inventive faculty at all." I do not think that the difference, which is a diminutive difference, between the two constitutes any real invention. I adopt what is said by the Lord President, and I am of opinion that this appeal ought to be dismissed.

Lord Robertson.—My Lords, I concur.

Lord Collins.—My Lords, I concur.—20*th February* 1908.

Counsel for the Appellants, Sandeman, Ballingall; Agents, Galbraith-Stewart & Reid, S.S.C.; Herbert G. Davis, London.—Counsel for Respondents, A. J. Walter, K.C., J. H. Gray; Agents, Deas & Co., W.S.; John B. & F. Purchase, London.

COURT OF SEVEN JUDGES.

(First Division.)

(*The Lord President, The Lord Justice-Clerk, Lords M'Laren, Kinnear, Stormonth-Darling, Ardwall and Guthrie.*)

383. The Parish Council of Paisley *v.* The Parish Councils of Row and Glasgow.

Poor Law—Settlement—Deserted Wife—Capacity to Lose Derivative Residential Settlement — Husband with Residential Settlement in Row Parish Deserts Wife—Wife Removes to Paisley Parish, where She Became and Remained for More than Three Years Continuously Chargeable—Husband Unheard of—Held that Parish of Row Did Not at End of Three Years From Desertion Cease to be Liable.

Appeal from the Sheriff Court of Lanarkshire at Glasgow.

(*Reported ante, Vol. XIV.* p. 853.)

This was an action at the instance of the Parish Council of Paisley, to whom a pauper, Mrs Wright, and her three children, were chargeable, for relief against one or other of the Parish Councils of Row and Glasgow.

The facts, which were not in dispute, were stated by the Sheriff-Substitute (Fyfe) as follows:—

Daniel Wright was born in Glasgow in 1859, but he resided at Shandon for thirteen years prior to October 1901, thereby acquiring a residential settlement in Row Parish. In October 1901 he disappeared, and has not since been heard of. He left his wife and family at Shandon. The deserted wife and three dependent children went to Paisley, where they seemed to have struggled along without parish aid till April 1902. The wife then applied to Paisley parish, and, she being a proper subject for relief, Paisley, on 22nd April 1902, granted her relief. Paisley parish gave statutory relief notice to Row parish on 14th May 1902, and Row recognised liability. Row reimbursed Paisley down to January 1905. Row then declined to pay, upon the ground that the settlement of the wife in Row was only a derivative settlement following that of her husband, and that the husband's settlement in Row (which was only a residential settlement) had lapsed in October 1904, that is, when he had ceased to reside in the parish for three years, the wife's settlement lapsing with it.

Paisley then, in January 1905, gave statutory notice of chargeability to Glasgow, the parish of the husband's birth.

It is clear that Paisley must be relieved, and the question is whether liability rests with Row or Glasgow.

The Sheriff-Substitute held the Parish Council of Row liable in relief, and dismissed the action *quoad* the Parish Council of Glasgow.

On appeal the Sheriff (Guthrie) *adhered.*

The Parish Council of Row appealed to the Court of Session.

The First Division appointed the case to be heard before Seven Judges.

Argued for the Parish Council of Row: Although a person with a residential settlement of his own and in receipt of relief might not acquire a settlement, that rule had no application to a person who was a member of a family of one who had a settlement, and who was dependent on him, in fact, to the case of a derivative settlement. If the husband here had died when he deserted, the wife would have taken his settlement in Row, and, having that settlement when she became chargeable, would have retained it, because she never ceased to be chargeable (*Rutherglen* v. *Glasgow*, 1902, 4 F. (H.L.) 19, [1902], A.C. 360). But though chargeability continued, the settlement might change if the settlement was derivative, and, if it did, the liability transmitted (*Wallace* v. *Turnbull*, 1872, 10 M. 675, per Lord Justice-Clerk (Moncreiff) at 677). *Palmer* v. *Russell*, 1871, 10 M. 185, was distinguished in this respect, that the wife was a lunatic, and a provision in the Lunacy Act applied. The *dictum* of the Lord President Inglis in that case (p. 189) supported the contention for Row. Counsel also cited *Hunter* v. *Henderson*, 1895, 22 R. 331; *Anderson* v. *Paterson*, 1878, 5 R. 904. *Beattie* v. *Adamson*, 1866, 5 M. 47, was the authority for the proposition that a settlement did not change during chargeability. But that case was decided on the ground of the health of the person relieved. Had it not been for the state of her health she would not have been a pauper. It proceeded on a minute and the construction which the Lord Justice-Clerk put on that minute (*vide* p. 52).

The Parish of Row did not need to produce the husband and shew he was alive. The ordinary presumption was for life, not death; and if he was said to be dead, that should be averred and proved by the Parish of Glasgow. Glasgow could only get free from Paisley by shewing that Row was liable, and therefore the *onus* was on Glasgow. To make Row liable the Court must come to the conclusion that within the statutory period of leaving Row the husband had died. And there must be evidence of that. Otherwise it must be assumed that he was alive (Dickson on Evidence, I. 116). In answer to the Lord President, the Dean of Faculty stated that according to his contention the wife was the pauper, not the deserting husband.

Argued for the Parish Council of Glasgow: The wife's settlement, although derivative, was her own. The real question was not whether a settlement in Row was lost, but whether a settlement in Glasgow was obtained. It must be shewn that the wife's settlement was changed. *Hunter* v. *Henderson*, *cit. supra*, was consistent with *Beattie* v. *Adamson*, *cit. supra*, because Prestonpans shewed that the husband had settled in Ormiston, and was able-bodied. It was not enough to shew that the husband had lost his settlement in Row. [Lord Stormonth-Darling referred to *Gray* v. *Fowlie*, 1847, 9 D. 811; and the Dean of Faculty said that under the old poor law one could not lose a residential settlement by mere absence.] The matter depended on who was the pauper. If the husband turned up and was able to support his wife and family, the question of pauperism disappeared. If he was not so able, then he became the pauper, and his dependants were only pauper derivatively. There was a change in the person who was the pauper. But so long as a person was a pauper, his settlement could not change (*Beattie* v. *Adamson*, *cit. supra*). It could only change on him ceasing to be a pauper, and this might be through his pauperism shifting to some one else on whom he was dependent. The only thing which could change the wife's settlement was by Row shewing that the husband had become pauperised. Presumption of life had nothing to do with the question. There was no room for considering any presumption at all (*Greig* v. *Simpson & Craig*, 1876, 3 R. 642, per Lord Deas at 644). The *onus* of proving loss of settlement was on the parish of settlement; there was no *onus* on the birth parish at all (*Greig* v. *M'Leod*, 1860, Poor Law Magazine, Vol. II. p. 593; Graham's Poor Law, p. 98). Therefore the *onus* lay on the parish which proposed to make the change.

The Court *affirmed* the judgments of the Sheriffs.

The Lord President.—In April 1902 Daniel Wright, who was by trade a gardener, and was living in Paisley with his wife and three dependent children, deserted his family, who thereupon became chargeable to the parish. His birth parish was Glasgow, where he was born on 11th July 1859. He had, however, acquired a settlement by residence in the parish of Row, when he left it in October 1901, to take up house in Paisley. In these circumstances Paisley sent notice to Row, claiming relief from that parish in respect of the settlement by residence. Row admitted liability, and continued to maintain the widow and children down to January 1905. At that date Row notified Paisley that the deserting husband had lost his settlement in Row by non-residence, repudiated liability for further advances, and called upon Paisley to claim against Glasgow, the husband's birth parish. Paisley notified Glasgow accordingly, but was by them referred back to Row as the parish still liable. It is matter of admission that liability is upon one or other of the defenders. It is further admitted (1) that there has been no break in the chargeability of the wife since relief was first given by Paisley in 1902; and (2) that from the date of his leaving Row in October 1901 the husband has not been back in that parish. It is not admitted that no settlement has meantime been acquired by him in any other parish; and the case must be decided on the footing that he has simply not been heard of since he deserted his family in 1902.

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Had this case come up for decision before the case of *Rutherglen* (4 F. (H.L.) 19) was decided in the House of Lords, the solution would have been easy. The deserted wife had no husband, for desertion was equivalent to death. Being therefore the pauper there could obviously be no change in her settlement during the continuance or chargeability. But the *Rutherglen* case destroyed the doctrine of desertion being equivalent to death, and the real question argued in this case is whether the House of Lords judgment carries as a corollary the deciding of this case in favour of Row. Technically speaking, the House of Lords decided no more than this, that a deserted wife whose husband was still known to be alive could not acquire an industrial settlement for herself, and that consequently on her relapse into pauperism her settlement was as it had always been, *i.e.* her husband's settlement. But I need scarcely say that if I thought the opinions of the noble and learned Lords, or the logical deduction to be drawn from these opinions, lead to a certain conclusion, I should hold myself bound to follow them. I am, however, of opinion that the House of Lords judgment in the *Rutherglen* case does not really touch the considerations on which this case must be decided. The whole difficulty, I think, arises from not distinguishing between derivative pauperism (if I may coin an expression to make my meaning clear) which is one thing, and derivative settlement, which is another. It is necessary for me

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to press this point, because the learned Sheriff-Substitute whose judgment, affirmed by the Sheriff, is under appeal, and whose conclusions I agree with, begins his opinion with a proposition which, if true, would, I think, entirely vitiate the conclusions which follow. He says in his interlocutor: "It is important to observe that the wife never was a pauper in her own right." If she was not, then her husband was the pauper at the moment she became chargeable. And just as by working elsewhere he can acquire a new residential settlement although his wife is getting relief (*Wallace* v. *Turnbull*, 10 M. 675), so also by his absence merely he can (the doctrine of desertion as equivalent to death being exploded) lose the residential settlement he acquired, and revert to his birth settlement. Indeed, it would come to this, that unless you could presume him dead (for which upon the dates there is certainly no ground) he might have a settlement in any parish in Scotland except only Row, where alone it is positively known he has not been for the last three years. This argument, upon the assumption made, seems to me irresistible. But, my Lords, I think the assumption is clearly wrong. When a wife is found deserted and unable to support herself, it is she who is a proper object of parochial relief, and it is she who is the pauper. If this were not so, then *Wallace* v. *Turnbull* would be bad law, because a man cannot be a pauper and at the same time acquire a residential settlement. Then comes the question: What is her settlement? Being a wife, her settlement is necessarily derivative from her husband—it is a mere accident whether at the moment when the wife's settlement has to be sought for the husband's settlement is his birth settlement or a residential settlement. In either case it fixes the settlement of the pauper, the deserted wife. Nothing after that can, I think, happen until there is a change of circumstances. Putting out of view the possibility of some extraneous aid being given to the wife, which of course would put an end *de facto* to her chargeability, the only change of circumstances must consist in the discovery of the husband alive, for, if he is dead, it is clear that the settlement of the widow, as she now is, continues what it has been all through the period of chargeability. If the husband is discovered alive, then, if he is able-bodied, it is he who is bound to support his wife, and if he is not, then he becomes the pauper, and the wife a dependant on him, her relief being his relief, and the parish ultimately liable being the parish of the settlement of the pauper, the husband, as that settlement is then discovered to be. All this seems to me really decided in terms by the case of *Beattie* v. *Adamson*, 5 M. 47. There a pupil child subject to fits was held in fact to be a proper object of relief in its own right. Its settlement was necessarily the settlement of its father, which happened at the time of the inception of relief to be a residential settlement. The father subsequently lost that residential settlement. The child received continuous relief. It was held that the parish of the residential settlement was still liable notwithstanding that the father, from whom the settlement was originally derived, had admittedly lost his own settlement therein, and had either acquired a new residential settlement, or reverted to his birth settlement. I can see no difference in principle between that case and this. The effect of the discovery of the father alive is different because, although able-bodied, he was poor and was not liable to support a child in the state of health that this one was. Whereas in this case, the husband, if able-bodied, however poor, is liable to support the wife. But in that case, if the father had been in affluent circumstances the child would have ceased to be in a position *de jure* to receive relief, the chargeability would have ended, and the settlement of the child would then have followed the settlement of the father, just as here the settlement of the wife would follow that of the husband if discovered.

The fallacy of the opposite argument may, I think, be tested in another way. It is said that the husband has certainly lost his settlement in Row. Now that is necessarily based on the assumption that he lived for three years after he disappeared, for, if he died within the three years, then his settlement in Row remains a historic fact unaltered, and the case comes to be the ordinary one of a widow who at the moment of pauperism still retains the derivative residential settlement of her husband, and it is well settled that so long as she remains a pauper no change takes place. Now while I agree that there is no presumption that the disappeared man is dead, yet, if Erskine's view be the true one (see Inst., 4, 2, 36), the presumption of life would not be available where the person pleading it did not do so in defence but needed it *positivé* whereon to found his plea. In one of the cases Lord Deas, although he does not express it in the same words, seems to have held the same opinion, because he said he did not think the presumption of life was applicable to poor law cases (*Greig* v. *Simpson & Craig*, 16th May 1876, 3 R. 642 at p. 644).

For these reasons I am of opinion, though on grounds differently expressed, that the decision of the Sheriffs is right and should be affirmed.

The Lord Justice-Clerk.—I concur.

Lord M'Laren.—I concur in your Lordship's opinion. I will only add that the first principle to be applied to cases of this kind is that every pauper who has a claim for relief must continue to be supported by the parish of settlement until that parish can establish a claim against some other parish. If the husband of this

woman could be traced, it would either be found that he had acquired a settlement in some other parish, or that he had not. If he had another settlement, then of course the woman would be entitled to relief from that quarter, and the new settlement would be liable on exactly the same ground as Row is at present liable, viz. the ground of derivative settlement. But the case is that nothing whatever is known about the deserting husband, and it cannot be assumed that he has acquired a new settlement, or that he has reverted to his birth settlement, or that he has any settlement in this world at all. He may be dead for anything we know to the contrary.

While I agree with your Lordship that this is a case of a pauper receiving relief in her own right because her husband is not a pauper—has never applied for relief—that does not seem to me really to be decisive of the question, which I think depends upon the principle that Row must continue to be liable until it is able to show that there is another parish against whom a preferable claim can be made.

Lord Kinnear.—I agree with the Lord President.

Lord Stormonth-Darling.—I am of the same opinion.

Lord Ardwall.—I concur.

Lord Guthrie.—I concur.—11*th March* 1908.

Counsel for Paisley, Macrobert; Agent, A. C. D. Vert, S.S.C.—Counsel for Row, Dean of Faculty (Campbell, K.C.), Orr Deas, Carmont; Agents, Reid & Crow, Solicitors.—Counsel for Glasgow, Clyde, K.C., W. Thomson; Agents, Mackenzie, Innes & Logan, W.S. F. A. U.

COURT OF SEVEN JUDGES.

(First Division.)

(*The Lord President, the Lord Justice-Clerk, Lords M'Laren, Kinnear, Stormonth-Darling, Ardwall and Guthrie.*)

389. M'Arthur's Executors *v.* Guild and Others.

Succession — Legacy — Ademption — Bequest of Licensed Premises—Contract Made by Testator for Sale of Premises—Contract Subject to Condition as to Transfer of License Not Purified at Date of Death—Held No Ademption—Pollock's Trustees v. Anderson, 1902, 4 F. 455, Approved.

Special Case.

This was a special case presented for the opinion of the Court on a question as to the ademption of a legacy of licensed premises bequeathed by the late Peter M'Arthur to his daughter, Mrs Guild.

Court of Seven Judges.

M'Arthur's Executors v. Guild and Others.

The facts were set forth in the special case as follows:

1. On 16th April 1906 Peter M'Arthur died in Perth, leaving a trust disposition and settlement dated 28th July with two relative codicils. Under the said trust disposition and settlement two of the testator's sons, James Fenton M'Arthur and John Duncan M'Arthur, were appointed his executors, and after various special bequests the testator conveyed to them the whole residue of his means and estate, with power to realise and divide the same among the parties therein mentioned. By one of the codicils William Neil M'Arthur, another son of the testator, was appointed an executor to act along with James Fenton M'Arthur and John Duncan M'Arthur. William Neil M'Arthur has since resigned office. James Fenton M'Arthur and John Duncan M'Arthur, as executors foresaid, are the first parties to this case.

2. James Fenton M'Arthur, John Duncan M'Arthur, and William Neil M'Arthur are the whole surviving sons, and are also residuary legatees of the testator, and as such they are the second parties to this case. Mrs Margaret Anderson [M'Arthur or Guild, wife of James Guild, spirit dealer, Perth, is the only daughter, and is also one of the residuary legatees of the testator. She is the third party to this case. Eleanor Margaret M'Arthur is the daughter and only child of the late Alexander Simpson M'Arthur, another son of the testator. The said Eleanor Margaret M'Arthur, who is in pupillarity, is one of the residuary legatees, and her mother, Mrs M'Arthur, as her guardian, is the fourth party to this case.

3. By article third of his said trust disposition and settlement the testator bequeathed to his daughter, the said Mrs Guild, whom failing, to her child or children in equal right, *inter alia*, "the property in Strathmiglo, consisting of the Royal Hotel and premises therewith connected, with the pertinents and the writs and title-deeds thereof."

4. By Minute of Sale dated 5th March 1906 the testator sold to William Steven, Kinross, the said property known as the Royal Hotel, Strathmiglo, with stabling, outhouses, garden ground, and other premises thereto belonging, together with the whole grates, gasfittings, and bar fittings ("exclusive of the beer pumps, which belong to Mrs Guild, the present tenant"), at the price of £1400 sterling, with entry at Whitsunday (15th May) 1906, at which date the price was declared payable. It was declared to be a condition of the agreement of sale that the said William Steven should apply for and obtain a transfer of the licence certificate for the said hotel. It was also provided that the said William Steven, the purchaser, should, within seven days from the date of the Minute of Sale, consign £400 in the Bank of Scotland in Perth on deposit receipt in the joint names of the testator and himself, in part payment of the purchase price. The said Minute of Sale is signed by the said William Steven and the testator. The said sum of £400 was consigned in said bank upon 12th March 1906, "to await the settlement of the price of the Royal Hotel, Strathmiglo, repayable on the joint endorsement of the said William Steven, Esq., and Peter M'Arthur, Esq. A transfer of the licence certificate in favour of Mr Steven was obtained at the Licensing Court held on 17th April 1906, and a formal conveyance of the property was thereafter executed in his favour.

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6. The first, second and fourth parties maintain that the bequest of the said Royal Hotel to the third party was adeemed by the sale thereof concluded between the testator and the said purchaser thereof under and by virtue of the said Minute of Sale and consignation of part of the price, and that the said £400 consigned in the bank as aforesaid, together with the balance of the said price of £1400, forms part of the residue estate of the testator. The third party, on the other hand, contends that the said bequest was not adeemed, in respect that the testator had executed no conveyance thereof prior to his death, in favour of the purchaser, and was then still feudally vest therein as proprietor thereof.

The Question of Law for the opinion of the Court was:

Was the bequest by the testator to the third party of the said heritable property known as the Royal Hotel, Strathmiglo, adeemed?

Argued for the First, Second and Fourth Parties: If an owner of heritage sold it and died before executing the conveyance, he left only moveable property. (Bell. Com. II. 6; *M'Farlane* v. *Greig*, 1895, 22 R. 405 per Lord M'Laren; *Chiesley* v. *his Sisters*, 1704, M. 5531; *Wilson* v. *Wilson*, 29th November 1808, F.C.; *Heron* v. *Espie*, 1856, 18 D. 917; *Ramsay* v. *Ramsay*, 1887, 15 R. 25). In *Heron* the only question was whether the fact of the sale being compulsory made any difference; and all the judges accepted the law laid down in *Chiesley* that when the sale was voluntary the testator only left a claim to the price which was moveable. Where a special legacy was bequeathed, if the subject ceased to exist before the testator's death, or was converted, the legacy was adeemed (*Jack* v. *Lauder*, 1742, M. 11357; *Pagan* v. *Pagan*, 1838, 16 S. 383; *Chalmers* v. *Chalmers*, 1851, 14 D. 57, per L.J.C. Hope at 60; *Congreve's Exrs.* v. *Congreve*, 1874, 1 R. 1102 per Lord Ormidale at 1106; *Anderson* v. *Thomson*, 1877, 4 R. 1101). The testator's intention was to be gathered solely from what he did and not from anything else. There must be no speculating as to intention. *Pollock's Trs.* v. *Anderson*, 1902, 4 F. 455, could not stand with *Heron* v. *Espie*, *cit. supra*. A legatee of a specific property never could have the price of that property paid to him if it was sold before the testator's death, because it was the property, not the money, which was specifically bequeathed. At this testator's death, he owned, not the property, but a claim to the price. That being so, the condition in the contract of sale was immaterial. It was a resolutive, not a suspensive condition. Counsel also quoted *Watts* v. *Watts*, 1873, L.R. 17 Eq. 217; *Farrar* v. *Earl of Winterton*, 1842, 5 Beavan 1; *Currie* v. *Bowyer*, 5 Beavan 6, note, as supporting the contention that there had been ademption, and that this must be decided by what the testator had actually done, not what he seemed to have intended.

Argued for the Third Party: The question in the case was decided in *Pollock's Trs.* v. *Anderson*, *cit. supra*, the only difference being that in that case there were trustees, while here there were none, and here the sale was conditional while there it was unconditional. The law of conversion, which was here the basis of argument of the other side, was there founded on and rejected. *Chiesley* was a case of intestate succession, and it appears from the argument (although little was said in the judgment about it) the question was solely one as to intention. *Wilson's* case proceeded entirely on this, that questions of the kind were questions of intention. *Ramsay* was a case of intestate succession of the purchaser, and the question was whether the heir was to get the price. Cases of conversion had no bearing on the question of ademption. *Heron* v. *Espie*, *cit. supra*, was not trenched on by *Pollock's Trs.*, because the former of these cases was one of conversion, and these cases were decided in *Pollock's Trs.* not to be applicable. Ademption had regard only to the state of the property at the actual time of death. If it was then *in bonis* of the testator, it was not competent to refer to extrinsic obligations of the testator to determine whether the bequest had been adeemed. The condition here was not purified till after death. It was a suspensive condition, and at his death the testator was still owner of the property. By the common law of Scotland, as in England by the Wills Act of 1837, a testament spoke as from the date of death, although it was made some time prior thereto (Bell, Prin., sect. 1864; *Hyslop* v. *Maxwell's Trs.*, 1834, 12 S. 413; *Nimmo* v. *Murray's Trs.*, 1864, 2 M. 1144; *Denholm's Trs.* v. *Denholm*, 1907, 15 S.L.T. 429). This will must be read as if made after the contract of sale. As to the principle of ademption, counsel referred to M'Laren on Wills, I. 406, sects. 738–40. The criterion was—Had the testator property of that description? If he had, it was carried by the will. The question whether he had the property could not be determined by enquiring what obligations he had entered into with regard to it (*Emslie* v. *Grote*, 1817, Hume 197). *Jack* v. *Lauder*, *cit. supra*, was a legacy of a bill, and the thing had ceased to exist altogether. In *Pagan* v. *Pagan*, *cit. supra*, a conveyance had been granted, and the property was away. Similarly in *Chalmers* v. *Chalmers*, *cit. supra*, the house had been conveyed and the price paid. In *Heron* v. *Espie* the deceased left a settlement which did not mention the subject; it was a general conveyance, not a specific bequest. There might be conversion here, but that did not matter. Conversion depended on intention (Ersk. II. 2, 14, and 17; *Anderson* v. *Thomson*, 1877, 4 R. 1101, per L.J.C. Moncreiff): ademption had nothing to do with intention. That shewed that conversion had nothing to do with ademption. Ademption was based on a passage in Justinian's Institutes (II. 20, 12). *Bell's Trs.* v. *Bell*,

1884, 12 R. 85. The English cases were of no value in this connection. By English law a contract of sale passed the property (*Inglis* v. *Mansfield*, 1835, 1 S. and M'L. 203, per Lord Brougham at 338; *In re Bridle*, 1879, 4 C.P.D. 336). That distinction was brought out in *Chalmers* v. *Chalmers*, *cit. supra*. As to the effect of intention in cases of conversion, counsel referred to M'Laren on Wills, p. 228, sect. 428, and *Buchanan* v. *Angus*, 1862, 4 Macq. 374, where the effect of a conditional sale was dealt with.

The Court *answered* the question in the negative.

The Lord President.—The late Mr M'Arthur, of Perth, left a trust disposition and settlement in which he disposed of the whole of his property, and by the third head of his will provided as follows:—"*Thirdly*, I dispone to my daughter, Mrs Margaret Anderson M'Arthur or Guild, (*first*) the property in Strathmiglo consisting of the Royal Hotel and premises therewith connected, with the pertinents and the writs and title deeds thereof." He afterwards went on to make other bequests, and left a residuary clause. Accordingly, there was no doubt that the Royal Hotel was a special bequest. Shortly before his death he executed a minute of sale with a Mr Steven, of Kinross, under the terms of which he sold to Steven the said hotel at the price of £1400, and by the 7th article of the deed provided that "it is to be a condition of this agreement being binding on both parties that Mr Steven applies for and obtains a transfer of the licence certificate for the said Royal Hotel, Strathmiglo." Mr Steven accordingly made the application for the transfer of the licence to the licensing authority, but the day before the Court met Mr M'Arthur died. The Court met and granted the transfer of the licence, and accordingly there is no doubt that Mr Steven is entitled to a conveyance, and he has consigned the £1400. The question arising in this special case is whether the £1400 belongs—as representing the hotel—to the special legatee, or whether it falls into residue, the special legacy having been adeemed. At one time or another there has been a good deal of discussion as to what amounts to proof of ademption, but the leading authority is the judgment of Lord Thurlow in the case of *Ashburton* v. *Macguire*, 2 Br. C.C. 108, repeated in the subsequent case of *Stanley* v. *Potter*, 2 Cox 182, where, after remarking that the test of ademption was whether the thing remained at the testator's death, he continued, "the idea of proceeding on the *animus ademendi* has introduced a degree of confusion into the cases which is inexplicable, and I can make out no precise rule from them upon that ground. It will be a safer and clearer way to adhere to the plain rule before mentioned, which is to enquire whether the specific thing given remains or not." That doctrine has been fully adopted in the law of Scotland, and there is no clearer proof of this than is given by the case of *Anderson* v. *Thomson*, 17th July 1877, 4 R. 1101, where the late Lord Justice-Clerk Moncreiff acknowledges that doctrine, and says that, although in his opinion it is utterly at variance with any principle of jurisprudence, it is so firmly established that he has no alternative but to apply it. I need scarcely say that no more striking proof can be given of the authority of a rule than its acceptance by a judge who, personally, is convinced that it is a bad rule. Now, taking that doctrine as settled, it seems to me that the decision of this case is not doubtful. We have to look to see whether the trustees at the moment of death could find the thing in the truster's estate. I think it is quite clear here that at the moment of death the truster was still the proprietor of the subject. He had entered into an agreement that if a certain condition were purified he would be bound to sell the subject, but at the moment no one could know whether the condition would be purified. I think the condition was purely suspensive. Upon that simple ground I think there can be no doubt that there was no ademption of this legacy. The property accordingly, when it came to be sold, was the property of the legatee, and consequently the price belongs to her because it was her property that was sold.

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But I do not want to stop here, although this is enough for the decision of the case, for there is no doubt that this case was taken to test whether the decision of the Second Division in *Pollock's Trs.* v. *Anderson*, 22nd January 1902, 4 F. 455, really conflicts with the decision of the whole Court in *Heron* v. *Espie*, 3rd June 1856, 18 D. 917. *Pollock's Trs.* was not the same as this case, as it did not involve the question of a suspensive condition. It was the case of a voluntary sale, where missives had been signed, but the testator had died without having executed a conveyance to the purchaser. The Second Division found that the property belonged to the testator at the time of his death, and that the legacy had not been adeemed. It is argued that this decision cannot stand with *Heron* v. *Espie*. At the first hearing of this case I was inclined to agree with this, but I have now come to be clearly of opinion that *Pollock's Trs.* was quite rightly decided, and that *Heron*, so far from being in opposition, really supports the views upon which *Pollock's Trs.* was decided. In *Heron* v. *Espie* a property had been taken by means of compulsory notice by a railway company. The company had consigned a sum and entered into possession. An arbitration had taken place and the actual price had been fixed, and all that remained to be done was to grant a conveyance. In that position of matters the quondam owner of the property died and left a general settlement covering both his heritable

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and moveable property. This settlement was reduced *ex capite lecti quoad* the heritable property and the point was whether the heir or the executor took the consigned price. Now, had it been a voluntary sale there could have been no question. There would have been conversion, upon the authority of *Chiesley*, 1704, M. 5531, and all the cases that have followed since. But here there was no conversion by the act of the owner, and accordingly the doctrine was pressed that the infeftment of the quondam owner was still undisturbed by any new infeftment in favour of the company. The minority held that the price ought to go to the heir, and the majority only came to the opposite conclusion because they held that the effect of what had happened was to effect a statutory transference which transferred the land without infeftment, and left the right in the quondam owner, as not a right of property, but only a right to receive the price, which, being moveable *in se*, could not go to the heir. As the Lord Justice-Clerk expressed it, p. 922: "I hold that to be real corporal and complete possession of the lands, as much as if infeftment had been taken." Lord Wood says, p. 939, "The seller was dispossessed of the lands, and had no interest in them remaining in him, his right having been absolutely converted into a direct right to payment of a fixed price only." The contrary view, that there was no such divestiture, and that consequently the subject remained heritable in the *hereditas* of the seller, is developed by Lord Deas. Now, it matters not for the moment which of the conflicting views was right. Either it remained heritable, or if it did not, it did not because something had occurred which transferred the property in the land itself in spite of the standing infeftment in the quondam owner, a result which could not have occurred in a voluntary sale. If it had been a voluntary sale, of course the property would have been moveable, but only on the principle of conversion, which depends on the will of the owner and testator. It seems to me that the moment that you settle that intention is neither here nor there in a question of ademption, *Heron* v. *Espie* becomes really an authority, not at variance with, but in favour of *Pollock's Trs.* v. *Anderson.*

I would further add that the English authorities quoted to us do not seem to me to touch the question, for the simple reason that by English law the contract of sale passes the property—the exact opposite being true by the law of Scotland, and the law not having been altered as to heritable property, though it has been as to moveable.

I am therefore for answering the question of law in the negative.

The Lord Justice-Clerk.—I concur.

Lord M'Laren.—If this had been an unconditional sale I should have been disposed to say that the legacy was adeemed, for though this is heritable property I think the question properly falls to be tested by the doctrine of ademption, because that doctrine comes from the Roman law, which recognised no difference between moveable and immoveable estate. Both are covered by the same principle, viz. that if the testator after making a special legacy by will has parted with the subject, it is no longer in the power of the testamentary representatives to make over the property, and therefore the legacy ceases to have effect. The only difference in the case of a conditional sale is that there is no sale until the condition is purified. There might be cases in which a personal right to the land effeired to the purchaser from the moment the contract of sale was made, subject to a resolutive condition, and in such a case I might be disposed to think that the personal right was a sufficient withdrawal of the property from the testator's estate so as to lead to the conclusion that the legacy had been adeemed. But it is not necessary to consider that question, which might come to be important in reference to the peculiarity of our law as to heritable and moveable estate. For the decision of this case I think it is enough to say that it was a conditional sale, and that there was not even a personal right in the purchaser to the property at the date of the testator's death. The testator was the undivested owner of the subject of a contract, which contract his representatives would be bound to fulfil. So I think the legatee took the property subject of course to the terms of the contract.

Lord Kinnear.—I am of the same opinion. I agree with what your Lordship has said in reference to the case of *Pollock*, which we are directly invited to reconsider. But for my own part I think that even if that case had been decided differently I should still have come to the same conclusion upon the question now before us, because there was a much more plausible argument for ademption in the case of *Pollock* than in the present. In *Pollock* the testator had directed his trustees to convey certain subjects to certain persons, but before his death he had sold them with entry at a certain term. He died before a conveyance was executed, but undoubtedly under an absolute obligation to convey, which neither he nor his representatives could have refused to implement. But the present testator was under no absolute obligation to convey the subjects. He had entered into a contract for the sale of the subjects, subject to a condition that the intending purchaser should apply for and obtain a licence certificate. The testator died before the application was made, and therefore at the date of his death it was quite uncertain whether the contract would become binding or not. I think that constitutes a material distinction between the two cases. For

similar reason I think the case of *Heron* v. *Espie* has no application. In that case a railway mpany had taken possession of lands under atutory powers, and had consigned a sum of oney to meet the price. The true amount of e price had been ascertained by arbitration, d the proprietor of the land died before the sposition to the Railway Company had been gned. There is a great deal of learned discus-on in the opinions of the judges, but I ink the material point is that throughout e discussion the assumption was that the ansaction of purchase and sale had come to end, and that there was no question as to y right in the lands but only with reference the money. This is clearly brought out in e terms of the interlocutor, because the judg-ent of the Court "finds that the right to mand payment of the price due by the Railway mpany for the strip of ground referred to was personal right in the person of the deceased illiam Simpson, and was part of his moveable tate." The result of the whole discussion, erefore, was to find that the price of land sold as personal and not heritable property. For e actual decision of the present case I agree th your Lordship in the chair that we must ok to the doctrine of ademption as laid down Lord Thurlow in the case of *Ashburton* v. *acquire*, and repeated in the case of *Stanley* v. *otter*. The principle is that when a particular ing has been specifically bequeathed the claim the special legatee will be defeated if the thing question is not in existence or not within reach the testator's executors at his death. The ason is, as his Lordship expressed it in the cond of the two cases mentioned above, that one must consider it in the same manner as if estator had given a particular horse to A B; if at horse died in the testator's lifetime or was sposed of by him, then there is nothing on which e bequest can operate." And then he goes to say that the idea of proceeding upon the sup-sed *animus adimendi* leads to confusion, and that rule can be safely adopted except to enquire whether there is a special legacy; and (2) hether the thing bequeathed remained at the stator's death. I think that doctrine has been llowed too consistently to be called in question w, and I cannot say that my reliance on it is aken even by the criticism of so very eminent judge as Lord Justice-Clerk Moncreiff in the se of *Anderson*. His Lordship thought the ctrine contrary to principle, because it dis-aced what ought to be the sole rule in the con-ruction of wills, viz., to ascertain and give fect to the intention of the testator. But I nnot see that the case of *Ashburton* throws any ubt on this cardinal rule of construction, or fects it in any way. For the doctrine comes to operation only after the will has been con-rued. The first question, and the question hich Lord Thurlow thought was generally the question of difficulty is whether there is a special legacy, and that is a question of construction in which the intention of the testator is the proper subject for enquiry. The question whether the thing bequeathed remains or not, is a question of fact, not a question of intention. Applying that rule in the present case it appears to me that the testamentary gift of the hotel was a bequest of a specific subject, and the only question which we have to consider is whether that subject remained a part of the deceased's estate at his death. For the reasons given by your Lordship, I think it did remain. It remained subject to a contract which bound the testator, but at the date of the death it was a contract which was still in suspense; when it did come into operation the legatee was bound also as a gratuitous taker under her father's will, but her obligation was to complete the sale by conveying the property in return for payment of the price.

COURT OF SEVEN JUDGES.

M'ARTHUR'S EXECUTORS v. GUILD AND OTHERS.

Lord Kinnear.

Lord Stormonth-Darling. — I concur in the opinion of your Lordship in the chair.

Lord Ardwall.—I am of opinion that the bequest of the Royal Hotel, Strathmiglo, in favour of the party of the third part did not, in the circumstances set forth in the special case, suffer ademption.

Any apparent difficulties that arise on the authorities can, I think, be satisfactorily explained if care is taken to distinguish between cases of conversion and cases of ademption. *Heron* v. *Espie*, 18 D. 917, does not appear to me to conflict with the decision which it is proposed to pronounce; and the case of *Chalmers*, 14 D. 57, which was a case of ademption, was very different from the present, for in that case the house bequeathed to the pursuer had been taken by a railway company, the price thereof paid, and a disposition thereof in favour of the railway company granted two months before the testator's death. Accordingly, at that date the testator had been absolutely divested of all right to the house in question. The case of *Pollock's Trs.* v. *Anderson*, 4 F. 455, is an authority directly applicable to the present case, but the present case is, I think, *a fortiori* of that one. The question whether or not ademption of a bequest of a specific subject has taken place depends solely upon this other question, whether or not the subject of the bequest was at the date of the testator's death in existence, and formed part of his estate? In the present case, although a minute of sale had been entered into between the testator and a person of the name of William Steven, yet the contract thereby concluded was subject to a suspensive condition, and was not binding upon both parties unless and until (1) the purchaser applied for and (2) obtained a transfer of the licence for the hotel, the second of these conditions depending upon third parties for its fulfilment. The testator died on 16th April 1906, and at that

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date the transfer of the licence had not been granted, and of course the price had not been paid, nor had a conveyance of the subjects been executed. Accordingly, the subject of the bequest formed part of the testator's estate at the time of his death, and was carried by his settlement directly to the party of the third part, subject to her obligation to carry out the contract of sale and her right to receive the stipulated price in return for a conveyance of the property.

Lord Guthrie.—I concur in the opinion of your Lordship in the chair.—10*th March* 1908.

Counsel for the First, Second, and Fourth Parties, Solicitor-General (Ure, K.C.), Wilton; Agents, Mackay & Hay, W.S.—Counsel for the Third Party, Scott Dickson, K.C., Chree; Agent, W. J. Lewis, S.S.C. F. A. U.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

390. Sime *v.* The Merchant Banking Company Limited.

Company — Capital — Memorandum and Articles of Association — Ordinary and Deferred Shares—Winding Up—Claim by Deferred Shareholders to Pari Passu Ranking With Ordinary Shareholders in Distribution of Company's Assets—Circumstances in which Claim Disallowed, Although No Preference in Favour of Ordinary Shareholders Provided for in Memorandum of Association.

This was an application by Mr W. Sime, C.A., the liquidator of the Humboldt Redwood Co. Ltd., under sect. 138 of the Companies Act 1862 (25 & 26 Vict. cap. 89), for the directions of the Court as to the distribution of the assets of the Company.

The Memorandum of Association of the Company provided:

Article 5. The capital of the Company is £250,000 divided into 139,092 ordinary shares of £1 each, and 110,908 deferred shares of £1 each.

The capital of the Company was subsequently increased by special resolution to £260,000, 10,000 preference shares of £1 each being created, such shares to rank for dividend immediately before the ordinary shares of the Company, to be preferable as regards repayment of capital to all existing shares and entitled to a cumulative preferential dividend of 10 per cent.

The capital of the Company actually issued was as follows:

Preferred shares . .	5,498
Ordinary shares . .	83,998
Deferred shares . .	105,908

These shares were fully paid up.

The Articles of Association provided as follows:

Article 43. The holders of ordinary shares of the Company shall be entitled to receive out of the profits of each year a cumulative preferential dividend at the rate of 10 per cent. per annum on the amount for the time being paid up on the ordinary shares held by them respectively, and the surplus profits in each year shall belong to the holders of the deferred shares.

Article 137. In the event of the Company being dissolved and wound up, the different shares or stocks of the Company shall be repaid out of the assets of the Company as realised, in the order in which the shares or stocks are entitled to rank for payment of dividend.

The Company having passed a resolution for voluntary winding up, appointed the petitioner as liquidator. After realisation of the whole assets of the Company and paying all debts due, there remained in the hands of the liquidator a balance of £14,653, 14s. 1d. An ultimate balance of £9000 remained for distribution after payment of the preference shareholders in full.

It was as to this balance that the present question arose, the ordinary shareholders maintaining that they were entitled to payment in preference to any payment to the deferred shareholders, the latter claiming a *pari passu* ranking with the former.

The question put to the Court was: Whether the ordinary shareholders are entitled to receive payment of their capital in full before the deferred shareholders receive anything on account of their capital or not?

Answers were lodged for Archibald Coats and others, holders of both ordinary and deferred shares, who supported the contention of the ordinary shareholders, and by the liquidators of the Merchant Banking Co. Ltd., holders of some 30,000 deferred shares, who supported the opposite contention.

It was *argued* for the ordinary shareholders: The ordinary shareholders were entitled to a preferential ranking in terms of Article 137 of the Articles of Association. This article was good, despite the fact that no provision on the subject was contained in the Memorandum of Association. It was competent to regulate the conditions of the repayment of capital by provision in the Articles of Association alone (*Andrews* v. *Gas Meter Co.*, L.R. [1897], 1 Ch 361; *Bangor Slab Co.*, 1875, 20 Eq. Ca. 59).

Argued for the deferred shareholders: The Articles of Association were not valid so far as they were inconsistent with the provisions of the Memorandum (*Guiness* v. *Land Corporation of Ireland*, 1882, 22 Ch. Div. 349). Here there was no provision in the Memorandum for any preference in the matter of distribution of capital; under Article 5 the two classes of shares were submitted to equal treatment *quoad* capital. Articles 43 and 137 might validly create a pre

erence in regard to dividends, but could not be iven effect to as regulating the repayment of apital in conflict with Article 5.

The Court *answered* the question in the ffirmative.

The Lord President.—The first matter that is efore your Lordships in this case is the deter-ination of a question which has arisen in the inding up of the Humboldt Redwood Company, nd which is brought before your Lordships by Ir Sime, the liquidator in the voluntary winding p of that Company. The question as put by he liquidator is this: "Whether the ordinary hareholders are entitled to receive payment of heir capital in full before the deferred share-olders receive anything on account of their apital or not?" That question is one of the implest, and must be solved by reference to the onstituting documents of the Company. The Memorandum of Association provides in Article that "The capital of the Company is £250,000, ivided into 139,092 ordinary shares of £1 each, nd 110,908 deferred shares of £1 each." The rticles of Association provide by Article 137 hat "in the event of the Company being issolved and wound up, the different shares or tocks of the Company shall be repaid out of the ssets of the Company as realised, in the order in hich the shares or stocks are entitled to rank or payment of dividend." And by the 43rd rticle it is provided that "the holders of ordinary hares of the Company shall be entitled to receive ut of the profits of each year a cumulative referential dividend at the rate of 10 per cent. er annum on the amount for the time being aid up on the ordinary shares held by them espectively, and the surplus profits in each year hall belong to the holders of the deferred hares."

Now there can only be one meaning to these ords. It is too clear to admit of argument that he ordinary shareholders are to be paid in full efore the deferred shareholders get anything. But the argument is that these provisions in he Articles of Association are bad, as being ontrary to the terms of the Memorandum, and he well-known doctrine is invoked that the Memorandum is the ruling document and over-ides anything in the Articles of Association hat may be contrary to its provisions.

As far as I can see there is no inconsistency etween the two documents here. The Memo-andum only states that the capital of the Company is to be divided in certain proportions etween two classes of shares. Mr Hunter says he inference from that is that these shares are to ank equally both as to dividend and as to livision of assets. There is no authority for hat proposition, and I think the matter is letermined by the decision in *Andrews* v. *Gas Meter Co.*, L.R. [1897], 1 Ch. 361, where Lord Justice Lindley says: "These decisions turned upon the principle that although by sect. 8 of the Act the memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet in other respects the rights of the shareholders in respect of their shares and the terms on which additional capital may be raised are matters to be regulated by the Articles of Association rather than by the Memorandum, and are therefore matters which (unless provided for by the memorandum as in *Ashbury* v. *Watson*, 30 Ch. Div. 376) may be determined by the Company from time to time by special resolution pursuant to sect. 50 of the Act. This view, however, clearly negatives the doctrine that there is a condition in the Memorandum of Association that all shareholders are to be on an equality unless the Memorandum itself shews the contrary. That proposition is, in our opinion, unsound. Its unsoundness was distinctly pointed out by Lord Macnaghten in *British and American Trustee and Finance Corporation* v. *Couper*, L.R. [1894], A.C. 416, 417." To all there said I respectfully subscribe. All that the Memorandum does here is to say that there shall be two classes of shareholders, but it leaves it to the Articles of Association to prescribe their respective rights. The answer therefore to the question put by the liquidator must be in the affirmative.

[His Lordship then proceeded to deal with the second matter before the Court, which is not now reported.]

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The Lord President.

Lord M'Laren and *Lord Kinnear* concurred.—13*th March* 1908.

Counsel for the Humboldt Redwood Co., and the Liquidator, Grainger Stewart; Agents, W. & F. Haldane, W.S.—Counsel for Archibald Coats and Others, Macmillan; Agents, Graham, Johnston & Fleming, W.S.—Counsel for the Liquidator of the Merchant Banking Co., Hunter, K.C., Horne; Agents, Tods, Murray & Jamieson, W.S.—Counsel for other Shareholders, Hon. W. Watson; Agents, Alan L. Menzies, W.S., and A. Thomson Clay, W.S. W. A. R.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

391. **Gourlay** *v.* **Murray.**

I. WORKMEN'S COMPENSATION ACT 1906 (6 EDW. VII. CAP. 58), SCHEDULE I, 1 (A) (1) AND (2) — PARTIAL DEPENDENCY — ILLEGITIMATE CHILD—SUM "REASONABLE AND PROPORTIONATE TO INJURY"—ARBITRATION — AWARD BY SHERIFF OF MAXIMUM SUM AVAILABLE UNDER ACT, EXCEEDING AMOUNT OF SUM DE-

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cerned For in Decree of Aliment Against Deceased — Held That Act Does Not Prescribe Award of Maximum Sum Available in Every Case—Circumstances in which Remitted to Sheriff to Put a Value on the Prospective Contributions Which Deceased Would Probably have made had he Lived.

II. Workmen's Compensation Act 1906 (6 Edw. VII. cap. 58), Schedule I, 1 (a) (1) —Funeral Expenses—Father, Though Not Dependent on Earnings of Deceased, Found Entitled to Repayment of Funeral Expenses out of Fund Available for Compensation.

Appeal from the Sheriff Court of Forfarshire at Arbroath.

Stated Case under the Workmen's Compensation Act 1906.

This was a stated case on an arbitration in which Margaret Ann Murray, the pupil and illegitimate child of and residing with her mother Helen Murray, in Arbroath, and of John Farquharson Murray, sought to have determined the compensation payable to her on account of the death of her father the said John Farquharson Murray, who was killed whilst in the employment of Gourlay, the appellant, and the joint arbitration at the instance of James Murray, the father of the deceased, who claimed compensation for the death of his son.

The Workmen's Compensation Act provides, First Schedule:

(1) The amount of compensation under this Act shall be (*a*) where death results from the injury— (1) If the workman leaves any dependants wholly dependent upon his earnings, ... [a sum defined by the provisions of that sub-section] and (ii) If the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants. . . .

The facts as stated were as follows:

The Sheriff-Substitute, as arbitrator, in his award of date 23rd December 1907, found in fact that it is admitted that the deceased John Farquharson Murray was killed on 9th August 1907 by accident arising out of and in the course of his employment, and that his average weekly earnings were 18s. 6d. Found further in fact that the claimant Margaret Ann Murray is the illegitimate daughter of the said deceased, conform to extract decree of affiliation and aliment obtained on 17th July 1907, and that she was at the time of his death partially dependent upon his earnings; that the deceased for some time immediately preceding his decease boarded with his father, the claimant James Murray; that he paid his said father at the rate of 12s. per week; that the said weekly sum was not fixed under any definite arrangement as to the price payable by the decease for his board; that 12s. is a full but not an unusu sum for a person in the deceased's position to pay f his weekly board; that the said claimant Jam Murray is an able-bodied labourer in receipt regular wages, and that he was not, at the time deceased's death, either wholly or partially d pendent upon the deceased's earnings. Foun further, in fact that the deceased's funeral expense amounting to £5, 10s. or thereby, have been paid t the claimant James Murray. Found that the su available for compensation in terms of the Workmer Compensation Act 1906 is £150. Found in law th the claimant James Murray, not having been d pendent on the deceased, had no claim to compens tion under the Act, but is entitled, out of the su available for compensation, to repayment of th amount paid by him for funeral expenses; and th the claimant Margaret Ann Murray, having bee partially dependent on the deceased, is entitled to reasonable sum proportionate to the injury to h through the deceased's death as compensation therefo Assessed the compensation due to the said claima at £144, 10s.

Found the defender and the claimant Jam Murray each liable to the claimant Margaret An Murray in £5, 11s. of expenses.

The Question of Law submitted to the Cou was:

Whether the sum assessed is reasonable and pr portionate to the injury to the claimant Ma garet Ann Murray in so far that it exceeds amount the aggregate of the alimentary co tributions in which the deceased workma would have been liable had he lived?

Argued for the Appellant: The Sheriff was wro in awarding the total sum available as compens tion under the Act in a case where admitted there was only partial dependency. He w bound to take into consideration the amount aliment due to the respondent by her mothe (2) The measure of the respondent's dependen upon her father was fixed by the decree of alime already pronounced. The capitalised value the sum due, according to the terms of th decree, was, at the time of the father's death, £7 The Sheriff was wrong in so far as he had award a sum in excess of this amount.

Argued for the Respondent: The Sheriff w entitled in his discretion to award any su which he considered reasonable and proportiona to the respondent's injury up to the limit allow by the Act (*Bevan* v. *Crawshay Brothers* [190 1 K.B. 25, per Collins, M.R., at p. 29; *Baird Co.* v. *Birsztan*, 1906, 8 F. 438). The amount aliment as fixed by previous decree did not nec sarily rule the amount to be considered reas able and proportionate to the injury at the ti of the death. The Sheriff was entitled to co sider all the circumstances which might affe the father's liability for aliment at any ti (*Oncken's Factor* v. *Reimers*, 1892, 19 R. 51 *A. B.* v. *C. D.*, 1900, 2 F. 610).

The Court remitted back to the Sher

Substitute with instructions to him to put a value on the prospective contributions which if he had lived the deceased John Murray would probably have made towards the support of his illegitimate child, and found it unnecessary further to answer the question of law.

Lord M'Laren.—In this case the important facts are that the deceased John Murray was killed by an accident arising out of and in the course of his employment, and that he left an illegitimate child, Margaret Ann Murray, who was partially dependent on his earnings. The Sheriff-Substitute, acting as arbitrator under the Workmen's Compensation Act 1906, has found that the sum available for compensation is £150, and he has awarded this sum, less £5, 10s. for funeral expenses, as the compensation due to the child. I may here notice that it has been held in England (*Bevan*, [1902], 1 K.B. 25) that in such a case reasonable funeral expenses are a proper charge on the available fund, and I propose that we should follow this decision. The question then remains, whether the Sheriff-Substitute was right in awarding the balance of the available fund to the child as compensation?

The Act of 1906 puts illegitimate children and grandchildren into the category of dependants, and in their case, just as in the case of lawful children, the question must be, What is the measure of the parent's obligation to maintain the child?

According to the judgment of the House of Lords in *Main Colliery Co.* v. *Davies* [1900], A.C. 358, this is a question of fact in each case, to be determined neither by strictly legal considerations nor by any supposed standard of living in the class to which the workman belongs, but by taking into consideration the extent to which the applicant was in fact dependent on the injured workman, and putting a value upon the benefit which the applicant derived from being so dependent.

In the question put to us it is stated (inferentially) that the sum assessed "exceeds in amount the aggregate of the alimentary contributions in which the deceased workman would have been liable had he lived." Now, it is evident that the deceased was not a willing contributor to the support of his illegitimate child, because he allowed a decree of affiliation and aliment to go out against him, and no facts are stated which warrant the inference that the deceased would have contributed anything in excess of what he could be compelled by law to pay. If there are grounds for holding that the deceased voluntarily recognised an obligation to contribute to a larger extent than he was legally bound to do, the arbitrator would be right in taking such evidence into account. But I think that in awarding the whole available fund, less funeral expenses, the Sheriff-Substitute has proceeded on a wrong principle, because the Act of Parliament does not prescribe that the maximum sum available for compensation should be awarded in every case, but only that reasonable compensation within that limit should be paid. We cannot in this Court determine the amount, because we are not judges of the issue of fact in such cases, though we may in some cases be under the necessity of determining such subordinate facts as raise a question of law for our decision. All that we can do in this case is to remit to the Sheriff, with instructions to put a value on the prospective contributions which the deceased would probably have made, if he had lived, keeping in mind that an exact estimate of the deceased's responsibility is seldom possible, and is not required by the statute.

The Lord President and *Lord Kinnear* concurred.—17*th March* 1908.

Counsel for Appellant, Orr, K.C., J. D. Miller; Agents, Inglis, Bruce & Orr, W.S.—Counsel for Respondent, Wilton, Chapel; Agents, Armstrong & Hay, S.S.C. W. A. R.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

392. Gordon *v.* Smith.

393. Yeats *v.* Russell.

Expenses—Decree in Name of Agents-Disbursers—(1) Decree Granted in Name of Country Agents for Expenses in Court of Session and in Sheriff Court; (2) Decree Granted in Name of Country Agent for Sheriff Court Expenses, and of Town Agent for Court of Session Expenses.

The first of these actions was an appeal from the Sheriff Court by John Gordon in an action of interdict against J. A. Smith. Gordon was successful in the First Division, and was found entitled to expenses in the Court of Session and in the Sheriff Court. After the expenses had been taxed, Counsel for Gordon moved that decree should go out for the whole sum in name of Gordon's country agent as agent-disburser, and stated, in answer to the Court, that his Edinburgh agent instructed him to make the motion and that notice had been given to the defender's agents, who did not appear.

The Court *decerned* as craved.—10*th March* 1908.

Counsel for Appellant, Lippe; Agent, W. Croft Gray, S.S.C.

The second action was an action of affiliation and aliment by Marion Russell against Robert Yeats. The pursuer obtained decree from the Sheriff-Substitute, and the Sheriff adhered. On

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appeal the First Division of the Court of Session refused the appeal, with expenses. The expenses in both Courts were taxed at £79, 12s. 6d. On the Auditor's report counsel for the pursuer moved for approval, and craved the Court to decern for the sum of £46, 9s. 4d. in name of the agent who conducted the case in the Sheriff Court as agent-disburser, and for the sum of £33, 6s. 2d. in name of the agent who had charge of the case in the Court of Session as agent-disburser. Intimation of this motion was given to the appellants, who did not appear.

The Court *decerned* as craved.—19*th March* 1908.

Counsel for Respondent, W. D. Watson; Agents, Galbraith-Stewart & Reid, S.S.C. W. A. R.

SECOND DIVISION.

(*The Lord Justice-Clerk, Lords Stormonth-Darling and Ardwall.*)

394. Sinclair *v.* Moulin School Board.

I. EDUCATION — SCHOOL BOARD — DUTY TO PROVIDE EDUCATION — TITLE TO SUE — ACTION BY PUPIL CHILD TO OBTAIN ADMITTANCE TO SCHOOL, OR ALTERNATIVELY SPECIAL INSTRUCTION — EDUCATION (SCOTLAND) ACT 1901 (1 EDW. VII. CAP. 9), SECT. 1—HELD PUPIL CHILD HAD NO TITLE TO SUE, BUT THAT TITLE TO SUE WAS IN PARENT.

II. EDUCATION — DEFECTIVE CHILD — EDUCATION OF DEFECTIVE CHILDREN (SCOTLAND) ACT 1906 (6 EDW. VII. CAP. 10), SECTS. 1 AND 2—ACTION BY DEFECTIVE CHILD TO OBTAIN ADMITTANCE TO ORDINARY SCHOOL, OR ALTERNATIVELY SPECIAL INSTRUCTION —OPINIONS THAT SCHOOL BOARD NOT BOUND TO ADMIT CHILD TO ORDINARY SCHOOL OR TO PROVIDE SPECIAL INSTRUCTION.

Appeal from the Sheriff Court of Perthshire at Perth.

This was an action brought by James M. Sinclair, residing in the parish of Moulin, Perthshire, against the School Board of Moulin, and also against William MacGowan, schoolmaster, Pitlochry. The pursuer prayed the Court—

"To interdict, prohibit and discharge the defenders, and each of them, and all persons acting under the authority or upon the instructions of them, or either of them, from refusing to enrol the pursuer as a pupil at Pitlochry Public School, and from preventing him entering, or excluding or expelling him from, said school, or in any other way obstructing his attendance as a pupil at said school during school hours; and to grant interim interdict, or otherwise; and alternatively to decern and ordain the defenders the School Board of the parish of Moulin to make sufficient and available provision elsewhere for the efficient education of the pursuer."

The pursuer averred:

COND. 1. The pursuer is an illegitimate child, and resides with his grandfather, James Sinclair, at Cloichard Cottages, Pitlochry, in the parish of Moulin, Perthshire. He was born in Pitlochry on 5th June 1896. The defender William MacGowan is headmaster of Pitlochry Public School, which is vested in and is under the control and management of the defenders the School Board of the parish of Moulin.

COND. 2. Since he was six years of age the pursuer has attended Pitlochry Public School. On or about December 1906 the defender William MacGowan, without assigning any reason, turned him out of school, and told him to go home and stay there.

COND. 4. On 12th January 1907 the pursuer was examined by Dr Robert Stirling, Perth, who granted a certificate in the following terms:—"James Sinclair is a backward child, but not, in my opinion, unfit for education, though probably unfit to keep pace with the average schoolboy. He requires special consideration on account of physical weakness."

COND. 5. Subsequently, on the suggestion of the Scotch Education Department, the pursuer was examined on behalf of the School Board by Dr Ash, medical adviser to the Carnegie Trust, Dunfermline, who reported of date 6th May 1907 that the pursuer not being imbecile, is by reason of mental defect incapable of receiving proper benefit from the instruction in ordinary schools, but capable of receiving instruction in special classes. The pursuer denies that he is incapable of receiving benefit from the instruction in Pitlochry Public School. The defenders the School Board have not tendered him instruction in special classes, and he believes and avers that they have not provided any such classes. Denied that Dr Ash was accepted by the pursuer or on his behalf as medical referee.

In a statement of facts, the defenders the School Board of Moulin stated:

STAT. 2. In September 1906 the pursuer was transferred to the junior department of the school, not as in the usual course because he was qualified to leave the infant department, but because it was thought unreasonable that he should remain any longer in the infant department to associate with children much younger than himself, and to continue to be a source of annoyance to class after class.

STAT. 3. The pursuer attended school most irregularly because of frequent illnesses, chiefly violent headaches. Great difficulty was found in teaching him. He had no power of concentration, and was very restless. Lessons caused him cerebral excitement, bringing on violent headaches and vomiting, and his frequent illnesses were really the result of attempting to teach him. He could repeat words or figures after a teacher, but could not recognise them when written or printed. His restlessness disturbed the teaching of the other pupils, and he could not be punished, as he was not mentally or physically fit. The efficiency of the school suffered from his disturbing influence.

STAT. 4. Little or no improvement resulted from the long-continued efforts to educate the pursuer in school, and in December 1906 these defenders, having fully considered the circumstances, deemed it unreasonable and inexpedient that he should be longer received as a pupil in school.

The pursuer denied the statements as to his conduct and as to his physical and mental condition.

The defenders the School Board pleaded *inter alia*: "1.: No title to sue."

On 13th August 1907 the Sheriff-Substitute (Sym) repelled the first plea in law for the defenders the School Board, and dismissed the action so far as laid against the defender MacGowan.

On 28th October 1907 the Sheriff-Substitute allowed a proof.

The defenders the School Board appealed to the Sheriff (Johnston), who on 6th December 1907 recalled the interlocutor of 28th October 1907, found in law that the defenders were not bound to admit the pursuer as an ordinary pupil at Pitlochry school, or to provide special arrangements for his instruction, and dismissed the action.

The Education (Scotland) Act 1901 (1 Edw. VII. cap. 9) provides:

Sect. 1. It shall be the duty of every parent to provide efficient elementary education in reading, writing and arithmetic for his children who are between five and fourteen years of age.

The Education of Defective Children (Scotland) Act 1906 (6 Edw. VII. cap. 10) provides:

Sect. 1. From and after the commencement of this Act it shall be lawful for a school board in Scotland, if they think fit, either alone or in combination with one or more school boards, to make special provision for the education, medical inspection, and, where required, for the conveyance to and from school of epileptic or crippled or defective children between five and sixteen years of age, within their education district, and to defray the cost thereof out of the school rate.

Sect. 2. The expression "defective children" means children who, not being imbecile, and not being merely dull or backward, are, by reason of mental or physical defect, incapable of receiving proper benefit from the instruction in the ordinary schools.

The Pursuer *appealed* and *argued*: Every child resident in a parish, not being a lunatic, had an absolute right to be educated in the public school (*Barr* v. *Smith*, 1903, 5 F. J.C. 24, per Lord Young). This was a necessary corollary of the provisions which imposed on parents the duty of providing elementary education (Education (Scotland) Act 1872, 35 & 36 Vict. cap. 62, sects. 69, 70; Education (Scotland) Act 1883, 46 & 47 Vict. cap. 56, sect. 4; Education (Scotland) Act 1901, 1 Edw. VII., cap. 9, sects. 1, 4). The scheme of the Education Acts was that every child in the country should be educated (Education (Scotland) Act 1878, 41 & 42 Vict. cap. 78, sect. 22; Education (Scotland) Act 1883, sects. 6, 9; Education of Blind and Deaf-mute Children (Scotland) Act 1890, 53 & 54 Vict. cap. 43, sect. 3; Education of Defective Children (Scotland) Act 1906, 6 Edw. VII. cap. 10, sect. 1). The duties of the School Board were to provide sufficient school accommodation, to maintain the schools in an efficient condition, to appoint and dismiss teachers, and to safeguard the interest of the ratepayers (Education (Scotland) Act 1872, sect. 36; *Kelso School Board* v. *Hunter*, 1874, 2 R. 228, per L. P. Inglis at p. 230; *Morison* v. *Glenshiel School Board*, 1875, 2 R. 715, per Lord Young, Ordinary, at pp. 718 and 719). But they had no jurisdiction to exclude from the public school any child whose parent was bound to provide elementary education. If they attempted to do so, they went outwith their statutory powers and might be set right by the Court. The argument that the pursuer must be excluded in the interests of efficiency was unsound, because the defenders had the alternative of exercising their powers to make special provision in the case of defective children (Education of Defective Children Act 1906, sect. 1). The defenders were not bound to make special provision, but if they did not do so they must admit the pursuer into the public school. *Haddow* v. *Glasgow School Board* (1898, 25 R. 988) was distinguishable. It was held there that the Board might exclude a child whose parents refused to provide books. The decision must have been different if the parents had been unable to pay for books, and that was the case which would be truly analogous to the present. Accordingly the pursuer was entitled to decree *de plano*. Alternatively he was entitled to a proof, because it was averred that he was not defective, but only dull and backward. If that averment were true it was clear that he could not be excluded. The pursuer had a title to sue. Title to sue depended mainly on interest, and the pursuer had plainly an interest in receiving education.

Argued for the Defenders: There was no absolute obligation on the defenders to admit the pursuer into the public school (*Haddow* v. *Glasgow School Board*, *cit.*; *M'Fadzean* v. *Kilmalcolm School Board*, 1903, 5 F. 600). The defenders had a statutory duty to keep the school efficient (Education Act 1872, sect. 36), and were entitled to exclude the pursuer if they thought it necessary to do so in the interests of efficiency. In the present case it was necessary, because it was plain that the pursuer was not fit to attend school, and that his presence was inconsistent with the maintenance of discipline. The question whether the pursuer should be admitted or excluded was a question for the defenders, who had been entrusted with the administration of the Education Acts in the district in question. The defenders were subject only to the control of the Education Department, and their decision on an administrative question could not be reviewed by the Court (*M'Fadzean* v. *Kilmalcolm School Board*, *cit.*; *Lord Advocate* v. *Stow School Board*, 1876, 3 R. 469; *Barr* v. *Smith*, *cit.*). The defenders were not bound to make special provision for the pursuer. The Education of

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Defective Children Act 1906 was permissive. The pursuer had no title to sue. The duty of providing education was laid upon the parent or guardian of the child (Education Act 1872, sect. 69, Education Act 1901, sect. 1), and it was for the parent, not for the child, to select the place of education (Education Act 1883, sect. 9). The title to sue, therefore, was not in the child but in the parent or guardian.

The Court *recalled* the interlocutors of the Sheriff and the Sheriff-Substitute, *sustained* the first plea in law for the defenders the School Board, *dismissed* the action, and found the defenders entitled to the expenses of the appeal.

The Lord Justice-Clerk.—The pursuer in this case is a child, and the purpose of the case is at the instance of the child to interdict the Moulin School Board from preventing him from attending their school, and from obstructing his attendance at school, and alternatively to ordain the School Board to make sufficient provision elsewhere for his efficient education. I have no doubt that such an action by a child is incompetent. The duty of education lies upon the parent or the person who is *in loco parentis*, and he has the right to demand education. It is not a right given to the child to demand education in its own name. I do not enlarge upon this, as I concur in Lord Stormonth-Darling's opinion, which I have seen. But even if the action were competent in the form in which it is laid, I am of opinion that the Sheriff has rightly decided the case.

The facts are that the School Board have decided that the child is "mentally incapable of receiving instruction in a Board School"—giving great trouble, and being incapable of learning anything and interfering by his conduct with the proper conducting of the class in which he was. They accordingly decided that until they received a certificate of improvement in his condition from a medical man he could not be allowed to attend the school. A medical man who was consulted gave a certificate, that special requirements being attended to, the child might be taught. The Board having considered the matter, held that this could not be done with justice to the school as a whole. Accordingly the matter was brought before the Board of Education, which obtained a report from a skilled physician of their own choice. His report was quite decided as to the unfitness of the child to receive education in the Board School. This child is thus certified to be a "defective child" in the sense of the Education Act.

These being the facts, they seem to me to be conclusive. To allow a proof whether the Board's discretion has been rightly exercised, I hold to be quite out of the question. They are the proper tribunal, subject to review of the Education Department, and without some relevant allegation of *mala fides* there is no room for further judicial enquiry.

Finally, as to the demand that they shall find another place for the child's education, it is sufficient to say that the statute lays no obligation upon the Board in the case of such a child. It confers a power on the Board "if they see fit" to make special arrangements. It is obvious that in some circumstances such action may be reasonably feasible, and in other circumstances it may be impracticable. Of this they must judge. There is nothing in this case which tends towards the conclusion that they have not exercised their judgment fairly and reasonably.

I would therefore move your Lordships to affirm the Sheriff's judgment.

Lord Stormonth-Darling.—This is an action at the instance of a pupil child (of the age of eleven at the date when the action was raised) against the School Board of the parish of Moulin in Perthshire, to have the defenders interdicted from excluding the pursuer from the public school of Pitlochry, and alternatively to have the School Board ordained to make sufficient and available provision elsewhere for the efficient education of the pursuer. Pupillarity being, in contemplation of the law, a state of absolute incapacity, it was clear that the action could not proceed as it stood; and the pursuer being illegitimate, and having no legal guardian, the Sheriff-Substitute adopted the expedient of appointing Mr Gordon, a solicitor in Perth, to be curator *ad litem* to the pursuer, and by a later interlocutor repelled the plea of "no title to sue." It seems to me that, however unobjectionable the course adopted by the Sheriff-Substitute would have been in an ordinary action, it was not the proper course to take when it was brought under his notice by both parties that the pursuer resided with his grandfather, who had the actual custody of the child and was therefore undeniably his "parent" within the meaning of section 1 of the Education (Scotland) Act 1872. In such a case as this I hold that the plea of "no title to sue" should have been sustained and not repelled, for the proper person to raise any question as to the duty of a School Board to receive any particular child is, in my opinion, not the child himself, but the parent of the child, or the person having the actual custody of the child, on whom the duty of providing efficient elementary education in reading, writing and arithmetic for children between five and fourteen years of age was laid by section 1 of the Education (Scotland) Act 1901. And it is to be observed that the definition which I have quoted above from the Act of 1872 is read into the Act of 1901, because by section 7 all the Education Acts from 1872 to 1901 are to be construed as one Act. In short, there are only two legal *personae*—the School Board and the parent as defined in the Act of 1872—standing

towards each other with correlative rights and duties. It is said that the child himself has an interest; and I admit that he will ultimately have the highest interest of all. But for the time being he has no interest, because he has no duty, except the passive one of imbibing the instruction which he receives. Certainly he has no interest on which, even apart from his status of pupillarity, he can sue, and no rights which he can enforce.

I therefore think that we ought to sustain the plea of "no title to sue" which the Sheriff-Substitute repelled by the interlocutor of 13th August 1907. But since we had an interesting argument on the question whether even the grandfather, having the actual custody of the child, could insist on the child being received by the School Board into the public school, or else on their making sufficient provision elsewhere for his efficient education, it is, I think, desirable to take the case upon the footing that the action had been brought at his instance, and not at the child's. Now, the whole difficulty here is personal to the boy. After doing their best for his education since he was six years of age the School Board, through their clerk, intimated to the boy's grandfather that he was mentally incapable of receiving instruction in a board school, that he was a source of great trouble in the class, as he was quite incapable of learning anything, and could not sit still, but wandered about the room, thus distracting the attention of the class; and for other reasons which are fully set out in their letter of 27th December 1906, they concluded by intimating that the boy could not be permitted to enter Pitlochry school unless the grandfather produced a certificate from a duly qualified medical man that the boy was so far improved mentally as to be capable of receiving instruction at a Board school in the usual way. The grandfather then had him examined by Dr Stirling of Perth (a medical practioner of good standing) who granted a rather inconclusive certificate. This certificate was intimated to and considered by the School Board, and their reply was that, as they had no school staff sufficient to have the boy specially taught, and as the teacher could not neglect the other children in the class in order to give special teaching to this boy, they must adhere to their former determination not to admit him to Pitlochry school.

The matter then seems to have been brought under the notice of the Scotch Education Department, at the instance of the boy's legal adviser. But I am quite willing to accept the view taken by the Sheriff-Substitute that the pursuer and his advisers had done nothing to justify what might be called a "reference" of the child's capacity to attend school to Dr Ash of Dunfermline; but it is certain that Dr Ash was selected on the suggestion of the Department. That gentleman visited Pitlochry and examined the boy in the presence of his grandparents and his legal adviser on 3rd May 1907. Three days afterwards he made a careful and detailed report, which was forwarded to the Department by the School Board. The practical conclusion of it was that "in any case instruction could only be carried out in special schools. In my opinion, therefore, the boy, not being imbecile, is by reason of mental defect incapable of receiving proper benefit from the instruction in ordinary schools, but capable of receiving instruction in special classes." These words are an echo of sect. 2 of the Education of Defective Children (Scotland) Act 1906, which defines defective children thus:—"The expression 'defective children' means children who, not being imbecile, and not being merely dull and backward, are, by reason of mental or physical defect, incapable of receiving proper benefit from the instruction in the ordinary schools." And by sect. 3 of the same Act it is enacted that "this Act shall be construed as one with the Education (Scotland) Acts 1872 to 1906." To complete the narrative of this correspondence (which is all admitted and referred to), it is proper to add that it ended with a letter from the Department of 10th May 1907, saying that "the boy in question would appear to belong to the category of 'defective children,' for whom special provisions may be made by a school board in terms of the Education of Defective Children (Scotland) Act 1906." And it is important to note that the power to make this "special provision" is all qualified by the words "if they think fit."

Accordingly the question comes to be, Has the grandfather, as the actual custodier of the boy, and therefore as being, for the purposes of the Education Acts from 1872 downwards, in the position of his parent, any right in the circumstances to insist in either alternative of this petition? He is not bound to send him to a public school; his duty is discharged if he has him efficiently educated in reading, writing and arithmetic, in any school of his selection. If the boy is, "by reason of mental defect, incapable of receiving proper benefit from the instruction in ordinary schools," as Dr Ash's report and the letter of the Department says he is, it would undoubtedly be unfortunate for the poor boy that he should be debarred from receiving the little instruction of which he is capable. But, on the other hand, why should the whole order and discipline of the school and the efficient education of the other children in the school, for which the School Board are responsible, be upset by the presence of this hapless lad? It is no question of mere dulness and backwardness. For the exclusion of a case of that kind from its provisions the statute of 1906 makes careful provision, no doubt for the reason that there would be a certain danger in allowing such a case to come within the category of mental defect. But, literally, the only averment in the

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condescendence of which the proof allowed by the Sheriff-Substitute (though rather unwillingly, as I gather) could take note is the averment in Cond. 5: "The pursuer denies that he is incapable of receiving benefit from the instructions in Pitlochry public school." Is that a kind of averment which a court of law can be asked to send to proof? It is always within the competency and duty of a court of law to enquire whether a public body to which has been committed a certain duty of enquiring into facts, have acted reasonably and within the powers entrusted to them, or capriciously and in disregard of those powers (see observations of Lord President Inglis in *Lord Advocate* v. *Stow School Board*, 1876, 3 R. at p. 473). But here it is not suggested that any such disregard of statutory powers has occurred, either on the part of the School Board or the Education Department. And if these two public bodies have acted within their powers, can it be said that they are not, each in its own sphere, the proper judges of this boy's fitness for receiving benefit from the ordinary instruction in a public school, and next whether the School Board can be called upon, in justice to the other interests involved, to make special provision for the efficient education of the particular boy? If this latter demand is to be open to any parent, or person *in loco parentis*, I confess I do not see why the legislature was careful, after referring to a School Board in Scotland, to insert the words "if they think fit."

It therefore seems to me that the Sheriff has decided the case upon perfectly right grounds (except only, as I have explained, that he ought to have sustained the plea of "no title to sue"). He has found no expenses due to or by either party in the Sheriff Court, and as this was an action against a public body on the construction of a recent statute, I think this may pass. But I also think that the pursuer and his advisers, having got a sound judgment against them from the Sheriff, were not entitled to carry the case further, except on penalty of bearing the expenses of the appeal, and I am therefore in favour of finding the School Board entitled to the expenses of this appeal.

Lord Ardwall.—I concur in the opinion which has just been delivered by Lord Stormonth-Darling. I am of opinion that the Sheriff-Substitute erred in repelling the plea of no title to sue. Under the Education Acts the two parties concerned in attending to the education of a child are, on the one hand, the parent, and on the other hand the School Board, the parent being bound to see to it that the child goes to school, and the School Board, under sect. 26 of the Education Act of 1872, being bound to provide efficient schools. "Parent" is defined by sect. 1 of the said Act to include "guardian, and any person who is liable to maintain or has the actual custody of any child." In the present case the parent in the sense of the Act is the pupil's grandfather, in whose custody he is and with whom he resides, and he was the proper person to raise an action against the School Board regarding the education of the pursuer if such action were justifiable. A pupil child does not appear to me to have, under the Education Acts or at common law, any title to sue an action of this kind, and it would be exposing School Boards to a risk of vexatious litigation were they liable to have actions raised against them nominally at the instance of pupil children but of course at the instigation of older people, who might be possibly moved thereto by motives not of the best description.

In the next place, and supposing that the action had been at the instance of the pursuer's grandfather, I am of opinion that the Sheriff-Substitute made a mistake in allowing a proof, I suppose with the object of enabling himself to determine the question whether the defenders were justified in excluding the pursuer from their school owing to his mental condition; and it seems to have been in the contemplation of the Sheriff-Substitute that after evidence of the kind usually given in cases involving enquiries of this kind, which as every one knows is generally lengthy and conflicting, he should then decide whether the pursuer was entitled to be educated at the Pitlochry Public School or elsewhere. Now it appears to me that under the Education Acts School Boards are the proper judges of questions of this kind, and that their actings ought not to be interfered with unless, as the Sheriff puts it, their decision is capricious or unconscionable, or founded on an erroneous view of the law, and I might add, or if their conduct has been oppressive. But there is no suggestion in the whole proceedings in this matter that the School Board have acted otherwise than regularly and fairly; and not only have they, after careful investigation, determined this question in the way they have done, but the matter has been investigated by the Scotch Education Department with the assistance of an able expert in such matters, and I think it is out of the question to propose that there should now be a proof, and that the Sheriff-Substitute should upon that proof review the resolution that has been come to by the School Board and has been approved of by the Board of Education.

By sect. 26 of the Education (Scotland) Act 1872, it is provided that all public schools shall be under the management of the School Board of the parish or burgh in which they are situated. The exercise of their discretion in regard to the management of the school, including of course the question of the exclusion or admission of any pupil, forms part of the functions of the School Board as managers of the school; and resolutions arrived at by them with regard to such matters ought not, in my opinion, to be interfered with

except on very weighty grounds, and none such exist here.

As I agree with what has been said by the Lord Justice-Clerk, by Lord Stormonth-Darling, and by the Sheriff in his note, it is unnecessary for me to add more.—17*th March* 1908.

Counsel for Pursuer, T. B. Morison, K.C., Macdonald; Agent, John C. Sturrock, Solicitor. —Counsel for Defenders, Hunter, K.C., Jameson; Agents, Carmichael & Miller, W.S.

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SECOND DIVISION.

(The Lord Justice-Clerk, Lords Stormonth-Darling, Low and Ardwall.)

395. Robert Muir & Company Limited *v.* United Collieries Limited.

Expenses — Arrestment Used on Dependence of Action—Motion for Recal of Arrestments Made by Defenders Prior to Lodging of Defences—Motion Refused by Lord Ordinary as Incompetent—Pursuers Found Entitled to Expenses of Action—Held Pursuers Entitled to Expenses of Opposing Motion for Recal of Arrestments.

Note of Objections to Auditor's Report.

Robert Muir & Co. Ltd. brought an action against the United Collieries Ltd. and used arrestments on the dependence.

Before defences were lodged, the defenders, without presenting a petition under the Personal Diligence Act 1838, sect. 20, moved the Lord Ordinary (Low) to recal the arrestments. The pursuers resisted the motion, on the ground that it was incompetent, and also on the merits. The Lord Ordinary *refused* the motion as incompetent.

The pursuers were ultimately successful in the action, and were found entitled to expenses.

On taxation the Auditor disallowed the expense of opposing the motion for the recal of the arrestments. The pursuers lodged a note of objections to the Auditor's report, in which they objected to, *inter alia*, this disallowance.

The Personal Diligence Act 1838 (1 & 2 Vict. cap. 114) provides:

> Sect. 20. And be it enacted, that . . . . it shall be competent to the Lord Ordinary in the Court of Session before whom any summons containing warrant of arrestment shall be enrolled as judge therein, or before whom any action on the dependence whereof letters of arrestment have been executed has been or shall be enrolled as judge therein, and to the Lord Ordinary on the bills in time of vacation, on the application of the debtor or defender by petition duly intimated to the creditor or pursuer, to which answers may be ordered, to recal or to restrict such arrestment, on caution or without caution, and to dispose of the question of expenses, as shall appear just. . . .

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Argued for the Pursuers: No doubt where there was a petition for recal of arrestments that was a separate process, and the question of expenses must be decided or reserved in that process. But here the application was made by motion before the Lord Ordinary. That was a part of the process in which the pursuers had been found entitled to expenses, and, moreover, a part of the case in which the pursuers had been completely successful. The objection should therefore be sustained.

Argued for the Defenders: Prior to the Personal Diligence Act 1838 (1 & 2 Vict. cap. 114), arrestments could be recalled only by bill or petition in the Inner House. Under sect. 20 of the Personal Diligence Act arrestments could be recalled by petition presented to the Lord Ordinary, and that had in practice been held to include a motion before the Lord Ordinary. But a petition was necessarily a separate process, and as a motion to the Lord Ordinary was competent only because it was covered by the word petition, the motion must also be deemed to be a separate process, and if expenses were to be recovered the question must be disposed of or reserved at the time (Graham Stewart, Diligence, p. 213).

The Court *sustained* the objection to the extent of £3, 3s.—17*th March* 1908.

Counsel for Pursuers, Macmillan; Agents, Hamilton, Kinnear & Beatson, W.S.—Counsel for Defenders, Murray; Agents, R. H. Miller & Co., S.S.C.

J. S. M.

HIGH COURT OF JUSTICIARY.

(The Lord Justice-Clerk, Lords Low and Ardwall.)

396. Turnbull *v.* H.M. Advocate.

Justiciary Cases—Appeal—Merchandise Marks Act 1887 (50 & 51 Vict. cap. 28), sects. 1 (5) and 21—Held that There is No Appeal from the Sheriff Court to a Court of Quarter Sessions under the Merchandise Marks Act 1887.

Bill of Suspension and Liberation.

This was a bill of suspension and liberation for John Turnbull, residing at 110 Houston Street, Glasgow, in which he sought to suspend a conviction dated on or about 16th March 1908, whereby the Sheriff (Chisholm) of Roxburgh, Berwick, and Selkirk found the complainer guilty of a contravention of the Merchandise Marks Act 1887.

The complainer stated various objections to the regularity of the conviction, but the only question now reported was whether he was en-

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titled to interim liberation pending an appeal to a Court of Quarter Sessions.

The complainer prayed the Court to suspend the said pretended conviction and sentence *simpliciter*; and to ordain the complainer to be immediately set at liberty, if not already liberated, *ad interim*.

The Merchandise Marks Act 1887 (50 & 51 Vict. cap. 28) provides:

Sect. 1 (5). If any person feels aggrieved by any conviction made by a Court of Summary Jurisdiction, he may appeal therefrom to a Court of Quarter Sessions.

Sect. 21. In the application of this Act to Scotland the following modifications shall be made:—

The expression "Court of Summary Jurisdiction" means the Sheriff Court, and all jurisdiction necessary for the purpose of this Act is hereby conferred on Sheriffs.

Argued for the Complainer: The complainer was entitled to appeal from the Sheriff to a Court of Quarter Sessions (Merchandise Marks Act 1887, 50 & 51 Vict. cap. 28, sects. 1 (5) and 21). Pending the appeal the Court would grant *interim* liberation. It was clear on the terms of the Act that the appeal was competent, but in any view the question should be decided in the first instance by the tribunal to which the appeal was taken (*Pirrie* v. *List*, 1867, 5 Irvine 433).

Argued for the Respondent: Even if an appeal to a Court of Quarter Sessions were competent, no appeal had been taken in the present case. Therefore there could be no liberation pending appeal. But in truth such an appeal was not competent. Appeal from the Sheriff to a Court of Quarter Sessions was unknown in Scots practice, and sect. 1 (5) of the Merchandise Marks Act applied only to England (*Dunbar* v. *Johnstone*, 1904, 4 Adam 505). Appeal was competent by way of Stated Case under sect. 3 of the Summary Prosecutions Appeals Act 1875 (38 & 39 Vict. cap. 62).

The Court *refused* the prayer of the bill of suspension and liberation.

The Lord Justice-Clerk.—The complainer here asks for interim liberation, pending an appeal to a Court of Quarter Sessions of a case which was tried before the Sheriff. Such an appeal would be an absolute novelty in procedure. In a case in which jurisdiction is committed to the Sheriff, it is absurd to say that he should have his decision reviewed by a Court of Quarter Sessions, and not by this Court, which usually has the power of review. This Act of Parliament was originally framed as an English Act, in which the original proceedings were before the justices, and gives an appeal to Quarter Sessions, which is the usual court of appeal in that country. But the Legislature, in applying the Act to Scotland, saw fit to exclude the jurisdiction of the justices, and to give the jurisdiction to the Sheriff. I think the sound view is, that if the justices are not to try the case in the first instance, the Court of Quarter Sessions cannot be the court of review. It must be borne in mind that a proceeding before a Court of Quarter Sessions is not a process of review, but a new trial from the beginning, the proceedings before the justices in Petty Sessions being nullified by the appeal. It is inconceivable if the Legislature had intended to bring about this extraordinary result of a new trial by justices of a case dealt with by the Sheriff, that they should do it by a side wind, and should have left open two alternative modes of review—first, an appeal to a Court of Quarter Sessions; and second, an appeal by way of stated case to the High Court of Justiciary under sect. 3 of the Summary Appeals Act 1875. If the complainer here had brought an appeal by way of stated case instead of a suspension, he would have been in a more favourable position, for he would then have been heard on the merits. I hold that the suggestion of an appeal to a Court of Quarter Sessions is quite out of the question. I adopt what Lord Kinnear says in the following passage from his judgment in the case of *Dunbar* v. *Johnston* (4 Adam 505): "There are Summary Jurisdiction Acts in England and also in Scotland. Trial in the manner provided by the Summary Jurisdiction Acts means trial in the manner provided by the Summary Jurisdiction Acts in force in either country according as the trial takes place in the one or the other." [His Lordship then adverted to points not now reported]. I am of opinion that the suspension should be refused.

Lords Low and *Ardwall* concurred.—*20th March* 1908.

Counsel for Complainer, Crabb Watt, K.C., Trotter; Agent, James D. Turnbull, S.S.C.—Counsel for Respondent, Solicitor-General (Ure, K.C.), Lyon Mackenzie; Agent, W. S. Haldane, W.S., Crown Agent.

J. S. M.,
for F. A. U.

HIGH COURT OF JUSTICIARY.

(*The Lord Justice-Clerk, Lords Low and Ardwall.*)

397. Falconer *v.* Whyte.

Justiciary Cases — Sale of Food and Drugs—Prosecution at Instance of Officer of Department of Agriculture and Technical Instruction for Ireland—Sale of Food and Drugs Act 1899 (62 & 63 Vict. cap. 51), sects. 2 and 3—Samples—Notice to Local Authority — Procedure Under Sale of Food and Drugs Act 1875 (38 & 39 Vict. cap. 63), Followed—Held Conviction Valid Although Procedure Prescribed by Sale of Food and Drugs Act 1899, sect. 2, Not Followed.

Bill of Suspension.

This was a bill of suspension in which Patrick Falconer, provision merchant, Gorbals, Glasgow, prayed the Court to suspend a sentence dated on or about the 21st day of November 1907, whereby the Sheriff-Substitute of Lanarkshire at Glasgow (Mackenzie) found the complainer guilty of selling, in his shop at 70 Main Street, Gorbals, Glasgow, on the 24th day of August 1907, to the prejudice of the respondent, half a pound of Irish butter which was not of the nature, substance, and quality demanded by the respondent, in respect that the respondent demanded Irish butter, and that the article sold to him did not consist of genuine Irish butter, in respect that it contained foreign fat to the extent of 74·30 per cent. or thereby, contrary to the Sale of Food and Drugs Acts 1875 to 1899, particularly the Sale of Food and Drugs Act 1875, sect. 6, and adjudged him to forfeit and pay the sum of £10 of penalty.

The complainer stated:

STAT. II. The oral evidence at the trial consisted solely of the evidence of the respondent and of a man named Frank David Doyle. The respondent is Chief Inspector for Great Britain, employed by the Department of Agriculture and Technical Instruction for Ireland, and part of his duties as such inspector is to look after the sale of Irish produce in Great Britain and to see that it is sold as such. Some months before the date of the prosecution he was instructed by the Irish Department of Agriculture to go to Glasgow and make investigations about the sale of Irish produce there, and as the result of these investigations he received further instructions to again visit Glasgow and make purchases with the object of prosecuting the sellers. Those instructions were given by the said Board in the interest of the consumer and of agriculture in the United Kingdom. On 24th August last, in fulfilment of these instructions, he made four purchases of Irish butter, including the purchase from the complainer. When making said purchases, and, in particular, the purchase from the complainer, upon which the prosecution was instituted, the respondent stated he was making such purchase on behalf of the Irish Board of Agriculture for analysis.

STAT. V. After purchasing said butter from the complainer the respondent divided it into three parts: one of which he kept for himself, another of which he gave to the complainer, and the third part he sent to be analysed by Mr F. W. Harris, one of the city analysts for Glasgow. When the respondent received the analyst's certificate he handed it to Lord Ikerrin, the British Commissioner upon the Department of Agriculture and Technical Instruction for Ireland. The said certificate was considered by Lord Ikerrin and by the Department of Agriculture and Technical Instruction for Ireland.

STAT. VI. . . . . No communication was sent to the Local Authority in Glasgow with regard to the purchase of said butter by respondent or by the said Department of Agriculture and Technical Instruction for Ireland or with regard to the analysis of it by Mr Harris, and no request was made by the respondent or by or on behalf of the said Board to the said Local Authority that they should enforce the provisions of the Sale of Food and Drugs Acts.

STAT. VIII. The respondent when procuring the sample did not divide the same into four parts, and did not deal with the same in the manner provided by the sub-sect. A of sub-sect. 1 of sect. 2 of the Sale of Food and Drugs Act 1899, in respect that no fourth part was transmitted by him to the Board under whose instructions he was acting.

STAT. IX. In convicting the complainer the Sheriff-Substitute stated that he held it proved that the respondent had been instructed to prosecute, and did prosecute by direction of the Board of Agriculture and Technical Instruction for Ireland, but that nevertheless he was in the same position as any other private person who made a purchase on his own behalf and for his own purposes in a Glasgow shop and submitted the same for analysis. The contention of the complainer, on the other hand, is that the respondent having prosecuted as an Inspector of and by direction, and for and on behalf of the Board of Agriculture and Technical Instruction for Ireland, the provisions of the Sale of Food and Drugs Acts applicable to a prosecution by said Board ought to have been observed [*infra*]. In point of fact they were not.

The complainer pleaded, *inter alia*:

"1. The conviction and sentence complained of having been obtained upon a complaint brought by the respondent on behalf and by direction of the Department of Agriculture and Technical Instruction for Ireland, and said complaint having been brought without an analysis of the butter complained of and a request to prosecute having first been communicated to the Local Authority at Glasgow, said conviction and sentence are invalid and ought to be suspended.

2. The conviction and sentence complained of having been obtained upon a complaint brought by the respondent on behalf and by direction of the Department of Agriculture and Technical Instruction for Ireland, and the butter referred to in said complaint having been divided into three instead of into four parts, contrary to the provisions of the Sale of Food and Drugs Acts relative to a prosecution on behalf of said Department, said conviction and sentence are invalid, and ought to be suspended with expenses.

The Sale of Food and Drugs Act 1875 (38 & 39 Vict. cap. 63) provides:

Sect. 6. No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds. . . .

Sect. 12. Any purchaser of an article of food or of a drug in any place being a district, county, city or burgh where there is any analyst appointed under this or any Act hereby repealed shall be entitled, on payment to such analyst of a sum not exceeding ten shillings and sixpence, or if there be no such analyst then acting for such place, to the analyst of another place of such sum as may be agreed upon between such person and the analyst, to have such article analysed by such analyst and to receive from him a certificate of the result of his analysis.

Sect. 14 (as amended by sect. 13 of the Sale of

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Food and Drugs Act 1899). The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, deliver one of the parts to the seller or his agent.

He shall afterwards retain one of the said parts for future comparison and submit the third part, if he deems it right to have the article analysed, to the analyst.

The Sale of Food and Drugs Act 1899 (62 & 63 Vict. cap. 51) provides:

Sect. 2. (1) The Local Government Board may in relation to any matter appearing to that Board to affect the general interest of the consumer, and the Board of Agriculture may in relation to any matter appearing to that Board to affect the general interests of agriculture in the United Kingdom, direct an officer of the Board to procure for analysis samples of any article of food, and thereupon the officer shall have all the powers of procuring samples conferred by the Sale of Food and Drugs Acts, and those Acts shall apply as if the officer were an officer authorised to procure samples under the Sale of Food and Drugs Act 1875, except that (*a*) the officer procuring the sample shall divide the same into four parts and shall deal with three of such parts in the manner directed by sect. 14 of the Sale of Food and Drugs Act 1875, as amended by this Act, and shall send the fourth part to the Board, and (*b*) the fee for analysis shall be payable to the analyst by the local authority of the place where the sample is procured.

(2) The Board shall communicate the result of the analysis of any such sample to the local authority, and thereupon there shall be the like duty and power on the part of the local authority to cause proceedings to be taken as if the local authority had caused the analysis to be made.

Sect. 3. (1) It shall be the duty of every local authority entrusted with the execution of the laws relating to the Sale of Food and Drugs to appoint a public analyst, and put in force from time to time, as occasion may arise, the powers with which they are invested, so as to provide proper securities for the Sale of Food and Drugs in a pure and genuine condition, and in particular to direct their officers to take samples for analysis.

(2) If the Local Government Board or Board of Agriculture, after communication with the local authority, are of opinion that the local authority have failed to execute or enforce any of the provisions of the Sale of Food and Drugs Acts in relation to any article of food, and that their failure affects the general interest of the consumer or the general interest of agriculture in the United Kingdom as the case may be, the Board concerned may, by order, empower an officer of the Board to execute and enforce these provisions or to procure the execution and enforcement thereof in relation to any article of food mentioned in the order.

Sect. 24. This Act shall apply to Ireland with the substitution for "The Board of Agriculture" of "The Department of Agriculture and Technical Instruction for Ireland," and for "The Local Government Board" of "The Local Government Board of Ireland. . . ."

Argued for Complainer: Under the Sale of Food and Drugs Acts there were three different classes of prosecutors: (1) private purchasers; (2) officers of the Local Authority, who must adopt the procedure prescribed by the 1875 Act (sects. 13 and 14); and (3) officers of the Board of Agriculture, etc., who must adopt the procedure prescribed by the Act of 1899 (sects. 2 and 3). Here the prosecutor was acting on behalf of the Department of Agriculture in Ireland. He must therefore comply with the requirements of the Act of 1899. Now this had not been done, because the Department had not communicated with the Local Authority, and the sample had been divided into three instead of into four parts. The conviction was therefore bad.

Argued for Respondent: The Act of 1899 did not apply. The complaint proceeded under the Act of 1875. Any member of the public was entitled to make use of the procedure set out in sect. 14 of that Act. It followed that the respondent as a member of the public was entitled to use that procedure. It was admitted that all the formalities prescribed by the Act of 1875 had been complied with. It followed that the conviction was valid under the 1875 Act. The fact that an enabling Act had been passed in 1899 could not affect the question.

The Court *refused* the prayer of the bill of suspension.

The Lord Justice-Clerk.—My Lords, it has been frankly admitted by Mr Morton that if the Act of 1875 had stood by itself then he could not have made any objection to this complaint on any ground which he has now stated. Under that Act a person purchasing any article, no matter who he is, is entitled to state, after he gets the article, that he intends to use that article for analysis in order to test whether it is genuine or not. And if he does that—if he announces that he is to take that specific course—he must divide the sample that he takes into three parts, one of which he hands to the seller, another of which he keeps to himself, and the third of which he must submit to a public analyst. If he gets a certificate from the public analyst, which is to be evidence under the Act, he is entitled to prosecute the person who sold him the article if he finds cause. A difficulty thereafter arose as to whether or not a public official going to buy an article of that kind could prosecute in respect that he was not *bona fide* purchasing the article for his own consumption, but specially and solely for the purposes of analysis. That difficulty was put right by special enactment which prohibited the sellers from refusing to sell a specimen of any of the goods they had falling under the Act to a person coming officially and asking for it.

Now, therefore, we are in this position. Mr Whyte, who comes from Ireland in the interests of the Local Government Board, purchased a

sample of butter, taking the course prescribed by the Act of 1875 and dividing it into three parts and distributing them as he was required to do by the Act. He proceeded to get an analysis from the public analyst, which justified a prosecution. He instituted his prosecution, and he was successful in obtaining a conviction. In that I can see nothing that was in the least degree irregular. Mr Morton says that since the Act of 1899 Mr Whyte, being an Inspector of the Department in Ireland, could no longer proceed under the Act of 1875, and he founded upon sect. 3 of the Act of 1899, which gives the Board of Agriculture in Ireland certain powers which it had not before; *inter alia*, that where the Board is not satisfied that the Act has been carried out efficiently by the local authority the Board can, after certain procedure, empower one of its own officers to execute and enforce the provisions of the Act, and, if necessary, prosecute at the local authority's expense.

Now, there can be no doubt that, if the Board avails itself of the special powers conferred by the Act, it must also carry out its other provisions, including the division of the sample taken into four parts (a proceeding which seems to be solely for its own information), or possibly to keep a sample for the local authority on which the expense of the proceeding is to be put. If, however, the Board does not think it feasible or necessary to avail itself of these special powers, but instead chooses itself to use the machinery provided by the Act of 1875, as it has done in the present case, at its own expense, I can see nothing in the Act of 1899 to forbid it to do so. What it could have done before, it can do still. It has, it is true, certain additional advantages under the Act of 1899, but it may consider that in certain circumstances it is better not to make use of these advantages but to proceed in the ordinary way. My Lords, I have no difficulty in holding that this suspension must be refused.

Lord Low.—My Lords, I am of the same opinion. It is conceded, and is clear, that if it was competent for the respondent in this suspension (the complainer in the Sheriff Court) to proceed under the Act of 1875, the whole proceedings were regular and cannot be objected to. But it was argued that, the respondent being the Chief Inspector for Great Britain of the Board of Agriculture for Ireland, and having acted under the instructions of that Board, proceedings could only be taken in terms of the provisions of the 2nd and 3rd sections of the Sale of Food and Drugs Act of 1899. I confess that I was at first impressed by that argument upon reading the parts of these sections which alone are set forth in the case, because if that were all that these sections contained, it would look very like a code regulating the procedure which must be followed if the Board in Ireland chose to raise questions in Scotland through one of their inspectors. But I think that, when the whole sections are read, it becomes plain what the object of these enactments was. It was to enable the Board in Ireland to carry through proceedings in Scotland at the expense of the local authority within whose jurisdiction the offence had been committed, and that explains why there are all these careful provisions. That being so, if the Board in Ireland choose to bear their own expenses, I see no reason why their inspector should not proceed as an ordinary purchaser under the Act of 1875. And therefore I have no doubt that the Sheriff was right here.

Lord Ardwall.—My Lords, when I learned at a very early stage in this debate that the complainer in the suspension had no objections to the instance of the original complaint, I at once came to the conclusion that this suspension must fail, because the first and second pleas in law are founded upon this, that certain procedure prescribed by the Sale of Food and Drugs Act 1899, when proceedings are initiated by the Department of Agriculture and Technical Instruction for Ireland, had not been followed, that was all. Now, that Act was passed for the purpose of giving additional powers to central authorities, and did not in the least detract from remedies provided by the Act of 1875; and Mr Morton's argument resolved into this amazing series of propositions: he argued that the respondent, instead of proceeding as if this complaint were at his own instance, which it is, ought to have proceeded under the powers and privileges given to the Department of Agriculture in Ireland under the Act of 1899; and in the next place, that if he had done so he would have required to have done certain things which he has not done; and therefore the whole of the proceedings complained of must be quashed. Now, it is very considerate of an accused person in a case of this sort to suggest the procedure the prosecutor ought to have followed, but a complainer can adopt what procedure he likes provided he keeps within the terms of the statutes, and the procedure in this case was properly conducted under the Act of 1875. Respondent was under no obligation whatever to take advantage of the Act of 1899. I am accordingly of opinion that this bill of suspension should be refused.—20*th March* 1908.

Counsel for Complainer, Morton; Agent, Norman M. Macpherson, S.S.C.—Counsel for Respondent, Cooper, K.C., Murray; Agents, Erskine Dods & Rhind, S.S.C. J. S. M.

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Forbes v. Main.

HIGH COURT OF JUSTICIARY.

(The Lord Justice-Clerk, Lords Low and Ardwall.)

398. Forbes *v.* Main.

Justiciary Cases—Suspension—Warrant to Examine Witnesses In Precognition on Oath—Alleged Contravention of Lotteries Act 1823 (4 Geo. IV. cap. 60)—No Averment That Any Person Arrested or Suspected of Contravention—Circumstances Where Warrant Suspended — Observations per Lord Justice-Clerk as to Circumstances in Which Procedure by Warrant Should be Resorted To.

Bill of Suspension.

This was a bill of suspension for Alexander Forbes, road surveyor, Linlithgow, in which he prayed the Court to suspend a warrant granted by the Sheriff-Substitute (Macleod) at Linlithgow, at the instance of John Main, Procurator-Fiscal for the county of Linlithgow, and also a citation and charge following thereon.

The complainer stated:

1. Upon 3rd December 1907 the respondent, as Procurator-Fiscal of Court for the public interest, presented a petition to the Sheriff of the Lothians and Peebles at Linlithgow, craving warrant to cite witnesses to be examined in precognition on oath if considered necessary, at the respondent's instance, anent contravention of the Lotteries Act 1823, at the Masonic Bazaar, Linlithgow, on 3rd, 4th and 5th October 1907; and upon the same date, the said Sheriff granted warrant on said petition as craved. . . .

2. No previous notice of said application was given to the complainer, and no copy thereof has been served upon him. Immediately after the respondent had obtained the said warrant, the complainer was, by his instructions, served with a citation and charge in the following terms:—

"*County of Linlithgow.*

"I, William Ingram, constable, in name and authority and by warrant of the Sheriff of the Lothians and Peebles, hereby lawfully summon, warn, and charge you, Alexander Forbes, road surveyor, Royal Terrace, Linlithgow, to compear within the Sheriff-Court House, Linlithgow, upon the sixth day of December 1907 years, at ten o'clock forenoon, to be examined in precognition on oath if considered necessary, at the instance of the Procurator-Fiscal of Court for the public interest, anent contraventions of the Lotteries Act 1823 at the Masonic Bazaar, Linlithgow, on 3rd, 4th, and 5th October 1907, with certification. This I do upon the third day of December 1907 years.

"Witnesses who fail to appear may be apprehended, and if they refuse to speak out, or prevaricate on oath, may be committed to prison.

"William Ingram,
"*Constable.*"

3. The said application does not set forth that any person has been arrested, or is suspected of any offence or contravention of any statute, or that any charge of any kind has been made against any person whatsoever. It further does not state what provisions, if any, of the said Lotteries Act have been contravened.

4. It is believed and averred that the sole object of the respondent is illegally and unwarrantably to endeavour to coerce the complainer into making statements on oath, in the hope that he may thereby obtain information to enable him to take proceedings against some person or persons unknown, and the complainer is under the necessity of applying to your Lordships for redress.

Counsel for the complainer moved the Court to suspend the proceedings complained of.

Counsel for the respondent did not oppose the motion.

The Court *suspended* the warrant, citation and charge complained of.

The Lord Justice-Clerk.—There is no doubt whatever that these warrants ought to be quashed. I can conceive that in very serious cases what was done here might be resorted to, and might be useful, but it is quite inapplicable to such a case as that with which we are dealing. This is certainly a proceeding which has not been taken before in our time in ordinary cases, and I think it might tend to a very evil practice on the part of those investigating crime, to sanction it in such a case as this.

Lords Low and *Ardwall* concurred. — *20th March* 1908.

Counsel for Complainer, Macphail; Agents, Cornillon, Craig & Thomas, W.S.—Counsel for Respondent, A. M. Anderson, A.-D.; Agent, W. S. Haldane, W.S., Crown Agent. J. S. M.

BILL CHAMBER.

(Lord Guthrie.)

399. Gilligan's Curator.

Curator — Minor — Curator Chosen — Powers—Petition For Power to Sell Heritage—Competency—Curator Under Supervision of Accountant of Court—Petition Held Competent, and Powers Granted.

In October 1900, in a process of choosing curators, the petitioner was nominated by the ward Miss Wilhelmina Gilligan to be her curator during her minority, and the nomination was duly sustained by the Court. By minute lodged in the process the petitioner craved the Court to authorise the Accountant of Court to audit the curatorial accounts of the petitioner annually in the manner provided by the Pupils Protection Act 1849 (12 & 13 Vict. cap. 51), and warrant was granted by the Court accordingly (*reported ante*, 8 S.L.T. 187). The petitioner's accounts were thereafter regularly audited by the Accountant of Court.

In the present petition the curator asked

power, *inter alia*, to sell certain heritable properties belonging to the ward. The Lord Ordinary, on 2nd July 1907, remitted the petition to the Accountant of Court to report as to the special powers craved.

On 14th November 1907 the Accountant of Court reported that in his opinion the powers craved should be refused—"(1) As the powers craved are to the curator himself and the petition is at his own instance; and (2) as the ward, with his consent and approval, has power to do what is craved without obtaining special powers from the Court."

The Accountant of Court referred to the powers of a ward with consent of a curator chosen as laid down in Bell's Principles, sect. 2096; Thoms on Judicial Factors, 2nd edition, VIII. (1) 13, p. 251; and Fraser on Parent and Child, 3rd edition, p. 483; and maintained that sect. 6 of the Judicial Factors (Scotland) Act 1889 (52 & 53, Vict. cap. 39), which enacts—

". . . . the Accountant shall superintend the conduct of all other factors and persons already appointed or to be appointed by the Court of Session, or any of the Lords Ordinary in the said Court . . . . to hold, administer, or protect any property or funds belonging to persons or estates in Scotland,"

did not apply to a "curator chosen." In a former application by the petitioner in the same curatory in December 1905 for authority to apply income of the trust, the Accountant of Court took similar objections to the competency of the application, in spite of which the Lord Ordinary on the Bills, Lord Mackenzie, granted the powers craved, and authorised the petitioner to charge the expenses of the application against the estate.

For the petitioner it was argued that the terms of the interlocutor of Court sustaining his nomination as curator, and the fact that his accounts were placed under the supervision of the Accountant of Court, put him in the position of a factor appointed by the Court within the meaning of sect. 6 of the Judicial Factors (Scotland) Act 1889. The petition was therefore competent and necessary. It was in the interest of the ward that the power craved should be granted, as any doubt as to her title to sell would affect the value of the property in the market.

The Lord Ordinary *granted* the powers craved, and pronounced the following interlocutor:

"The Lord Ordinary having resumed consideration of the petition and proceedings, together with the report by the Accountant of Court, No. 18 of process, authorises the curator to expose the heritable subjects . . . . for sale by public roup in Glasgow . . . .; and upon a sale and payment of the price, to grant a disposition or dispositions to the purchaser or purchasers, and to execute all deeds usual and necessary; and decerns; . . . ."

—*2nd December* 1907.

Counsel for Petitioner, Macmillan; Agents, Dove, Lockhart & Smart, S.S.C. A. S. P.

BILL CHAMBER.

(*Lord Guthrie.*)

Bill Chamber. *Lord Guthrie.* — Gillam's Curator.

400. Gillam's Curator.

Curator — Minor — Curator Chosen — Powers—Petition for Power to Sell Heritage—Curator Not Under Supervision of Accountant of Court—Petition Dismissed as Unnecessary.

In October 1906, in a process of choosing curators, the petitioner was nominated by the wards Mary Jane Gillam and Robert Gillam, residing in New York, U.S.A., and Helene Gillam, residing in Edinburgh, all minors, to be their curator during their respective minorities, and the nomination was duly sustained by the Court. The wards desired to sell certain heritable subjects in Berlin. The German purchasers would not accept a conveyance without the authority of an interlocutor of the Scottish Court which would satisfy them that the curator could give them a title.

The petitioner therefore made this application for authority to sell. The petitioner in this case had not been placed under the supervision of the Accountant of Court as in the case of *Gilligan's Curator* (reported *supra*). The Lord Ordinary remitted to a man of business to enquire into the facts and report.

The reporter considered that the petition was unnecessary, as the wards, with consent of their curator, had power to sell at common law.

The Lord Ordinary agreed with the reporter, and pronounced the following interlocutor: "The Lord Ordinary having resumed consideration of the petition and proceedings, with the report by Mr Alexander Wallace, W.S., No. 9 of process, finds the petition unnecessary, in respect the wards, with consent and concurrence of the petitioner, have at common law the power craved in the petition, and decerns."—*21st February* 1908.

Counsel for Petitioner, Armit; Agents, Scott & Glover, W.S. A. S. P.

BILL CHAMBER.

(*Lord Guthrie.*)

401. Bryson *v.* The Belhaven Engineering and Motors Limited.

Process — Sheriff Court — Appeal — Suspension of Charge on Sheriff Court Undefended Decree — Sheriff Courts (Scotland) Act 1907 (7 Edw. VII. cap. 51), sect. 7—Value of Cause Not Exceeding £50—Suspension Held Incompetent.

This was a note of suspension and interdict in which the complainer prayed the Court to suspend

Bill Chamber. *Lord Guthrie.*

Bryson v. The Belhaven Engineering and Motors Ltd.

a decree of the Sheriff Court of Ayrshire at Ayr and charge thereon, and to interdict the respondents from following forth a poinding and a petition for cessio in respect of said decree and charge.

The decree complained of was a decree in absence in the Sheriff Court for £39, 18s. 5d., with interest and expenses.

The respondents maintained that the suspension was incompetent and excluded by sect. 7 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII. cap. 51), which enacts as follows: "Subject to the provisions of this Act and of the Small Debt Acts, all causes not exceeding fifty pounds in value, exclusive of interest and expenses competent in the Sheriff Court, shall be brought and followed forth in the Sheriff Court only, and shall not be subject to review by the Court of Session."

The Respondent *argued* that this section had the same effect as sect. 22 of the Sheriff Court Act 1853 (16 & 17 Vict. cap. 80), which excluded review in any cause not exceeding £25 in value by "advocation, appeal, suspension or reduction, or in any other manner of way," and pointed out that the Legislature had provided for the case in question by Rule 123 in the First Schedule to the Sheriff Courts Act 1907, which enacts: "Where a charge has been given on a decree of Court granted by the Sheriff . . . . for payment of any sum of money not exceeding fifty pounds sterling, exclusive of interest and expenses, the person so charged may apply in the Sheriff Court of his domicile for suspension on caution of such charge and diligence."

The Complainer *argued* that the statute did not expressly exclude review by suspension in the Court of Session, and therefore could not be extended to do so.

The Lord Ordinary, without delivering any opinion, *refused* the note, with expenses.—17*th March* 1908.

Counsel for Complainer, Constable; Agents, Wallace & Pennell, W.S.—Counsel for Respondents, Mitchell; Agents, Kinmont & Maxwell, W.S.

A. S. P.

OUTER HOUSE.

(*Lord Salvesen.*)

402. Lindoe *v.* Reid and Another, and Lindoe *v.* Geddes and Another.

Process—Competency of Two Actions For Wrongs Arising out of the Same Fault—Collision Between Two Fishing Boats and a Steamer—Actions Against Each of Fishing Boat Owners—Harbour Trustees Made Defenders in Each Action, on the Ground That They Were Also Responsible for the Collision.

The following statement of the circumstances under which these two actions were raised is taken from the opinion of the Lord Ordinary.

"These two actions arise in the following circumstances: The s.s. 'Adria,' belonging to the pursuer, was leaving Peterhead on 26th June 1907, and was engaged in swinging round, preparatory to leaving the harbour. To aid her in doing so a rope had been run from her port bow to the east end of the lighthouse quay. While so engaged she was run into successively by two fishing boats, the 'Elsie Reid' and the 'Strathlene.'

"The pursuer accordingly, on 31st October 1907, raised separate actions against the owners of the two fishing boats, concluding for the amount of damage done by each respectively to his vessel. It was conceded that as the fishing boats belonged to different owners, the pursuer could not competently have called them in one action.

"In their defences both defenders suggested that they were not to blame for entering the harbour at the time when the 'Adria' was swinging, on the ground that it was the duty of the harbour authorities to prevent fishing boats from entering when the entrance to the harbour was blocked, there being recognised signals for the purpose. The pursuer accordingly amended his record, and called the Trustees of the Harbour of Peterhead as additional defenders in each action."

The record in each action as amended was served on the Peterhead Harbour Trustees. They lodged defences in each action and pleaded, *inter alia*:

"2. The action so far as directed against these defenders is incompetent, in respect the pursuer has elected to sue these defenders in another action for damages arising out of the same allegations of fault as are made in the present case."

On 15th January 1908 the Lord Ordinary in each action of new closed the record, and on the motion of the defenders the Trustees of the Harbour of Peterhead, appointed the cause to be put to the Procedure Roll.

After debate, the Lord Ordinary in each action *repelled* the second plea in law for these defenders, and *allowed* the parties a proof of their respective averments on record.

Lord Salvesen.—The pursuer seeks decree against the defenders jointly and severally, or against one or other of them. The Peterhead Trustees now maintain that one of the actions is incompetent, in respect that it was the duty of the pursuer, as in a question with them, to raise only one action, as the damages for which they are sought to be made liable in each action arose out of the same allegations of fault. I am unable to sustain this plea. I do not see how, in the circumstances, the pursuer could have adopted any other course than the one he has taken. There were two wrongs caused by two different vessels, and it is the misfortune of the

Peterhead Trustees that they are concerned in both. No doubt if they had been the only defenders, one action would have served to try the question of their liability to the pursuer for both wrongs; and in such a case I should have deprecated two actions being raised where one would have sufficed. Even in that case, however, I do not think there would have been any incompetency in raising two actions; but the Court would have taken care that the defenders should not be subjected in more expenses, in the event of their being unsuccessful, than if only one action had been raised. Here, however, the case is complicated by the fact that the pursuer still holds the fishing boats responsible to him as well as the Harbour Trustees; and in these circumstances the only competent procedure is by means of two separate actions. I shall accordingly repel the second plea in law for the Peterhead Trustees, and allow parties a proof of their averments.—30*th January* 1908.

Counsel for Pursuer, Spens, C. M. Aitchison; Agents, Boyd, Jameson & Young, W.S.—Counsel for Fishing Boat Owners, Wark, D. P. Fleming; Agents, Alex. Morrison & Co., W.S.—Counsel for Peterhead Harbour Trustees, Lippe; Agents, Alex. Morrison & Co., W.S. J. W. F.

[*Note.*—This case was subsequently reclaimed to the Second Division on a question of expenses, which is not reported. The question of competency was not raised. J. W. F.]

OUTER HOUSE.

(*Lord Guthrie.*)

403. Scott *v.* Lunn.

Process—Petition for New Trustees—Competency—Trusts (Scotland) Act 1867 (30 & 31 Vict. cap. 97), sect. 12—Sole Surviving Trustee—"Two a Quorum"—Petition Dismissed as Unnecessary — The Trustee Held to have Power to Assume New Trustees.

John Lunn was sole surviving trustee under a trust disposition in which the clause constituting the trust was in the following terms: "I, Thomas Scott, formerly game dealer, and now or lately residing at High Street, Jedburgh, do hereby give, grant, assign, dispone, convey and make over to and in favour of Alexander Wilson, farmer, Hundale Mill, Roxburghshire; John Lunn, farmer, Cowbog, Roxburghshire; and Boswell Colthert, farmer, Dolphinstone, Roxburghshire, two a quorum, and such other person or persons as may be assumed to act in the trust hereby created, and the acceptors and acceptor, survivors and survivor of the persons above named or assumed as aforesaid (the said persons and their foresaids being hereafter denominated 'said trustees') of the sum of eleven hundred pounds sterling."

Outer House. *Lord Guthrie.* Scott v. Lunn.

This was a petition by Mrs Rachel Huggan or Scott and her daughter, the principal beneficiaries under the said trust, for the appointment of new trustees to act in place of or along with the said John Lunn. The petitioners brought the petition under sect. 12 of the Trusts (Scotland) Act 1867 (30 & 31 Vict. cap. 97), which enacts as follows:

> When trustees cannot be assumed under any trust deed . . . . the Court may, upon the application of any party having interest in the trust estate, after such intimation and enquiry as may be thought necessary, appoint a trustee or trustees under such trust deed, with all the powers incident to that office. . . .

The petitioners maintained that two being declared a quorum of the trustees, Mr Lunn could not lawfully carry on the trust or assume new trustees, and therefore the petition was competent and necessary.

The respondent, Mr Lunn, maintained that the clause in the trust deed above quoted did not deprive him of the right to carry on the trust or assume new trustees; therefore the right and the duty to do so rested entirely with him, and the petition was incompetent under the section of the statute founded on.

The Lord Ordinary *found* that the petition was unnecessary, and therefore *dismissed* the same, but did not find expenses due by the petitioner to the trustee.

Lord Guthrie.—The petitioner's case, as explained at the bar, is that the respondent Mr Lunn, the sole surviving trustee, has no power by himself to assume new trustees or to perform any other act of trust administration. If he has power to assume new trustees, then no case is presented of refusal to assume new trustees, such as would warrant the Court's interference.

I am of opinion that Mr Lunn has power to assume new trustees. The opposite view is founded on the words "two a quorum" contained in the following clause of the trust disposition in question. [His Lordship quoted the clause as given above, and went on to say:]

I do not read the words "two a quorum" as of universal application. The truster contemplated that only one of the persons nominated might accept, and that, even if more accepted or were assumed, the trust might come to be in the hands of one of these persons as the survivor. I cannot suppose that, in these cases, he meant the acceptor or survivor to be a trustee unable to discharge any part of a trustee's duties—to be, in short, a trustee only in name. The words are "two a quorum," not "two always a quorum"; and I read them as applicable only to the immediately preceding part of the clause, and therefore limited in their application to the case of the three persons named accepting and acting.

Outer House. *Lord Guthrie.*

Scott v. Lunn.

But the question seems to me not free from difficulty, and, keeping in view that the probable result of the petition will be to secure the assumption of new trustees, I do not think it a case where the petitioner should be subjected in expenses.—17*th March* 1908.

Counsel for Petitioner, A. M. Anderson; Agent, Richard Mulcaster, S.S.C.—Counsel for Respondent, Hamilton; Agents, Murray Lawson & Darling, S.S.C. A. S. P.

OUTER HOUSE.

(*Lord Salvesen.*)

404. Brack-Boyd-Wilson *v.* Pearson.

Husband and Wife—Marriage Contract—Provision to Wife — Annuity Payable After Husband's Death—Real Burden—Divorce of Husband by Wife—Effect of Divorce Against Singular Successor in Lands Burdened With Annuity—Lands Not Chargeable With Annuity Till Husband's Decease—Somervell's Tr. v. Dawes, 1903, 5 F. 1065, Followed.

The Opinion of the Lord Ordinary sufficiently reports this case.

Lord Salvesen.—The pursuer was married to Mr Adam Brack-Boyd-Wilson on 22nd August 1889. On the day preceding the marriage she and her intended husband signed an antenuptial contract of marriage. By this contract Mr Wilson "provided and disponed to her in liferent, during all the days of her life after his decease, in case she should survive him, a free liferent annuity or jointure of three hundred and fifty pounds sterling per annum"; and he provided and disponed the lands of Otterburn, of which he was then proprietor, and the rights, rents, profits and duties of the same in so far as necessary to satisfy the said annuity as the same should fall due. He also bound and obliged himself and his heirs, executors, and successors in the lands and successors in the lands and estate, and *subsidiariæ* his other heirs, successors and representatives whomsoever, to make payment of the said annuity to the pursuer; commencing the first term's payment at the term of Whitsunday or Martinmas which should first happen after the decease of the husband. The pursuer was duly infeft in said lands in security of her said annuity.

On 14th May 1896 Mr Wilson disponed the lands of Otterburn to the late William Scott Pearson, and the defender has now succeeded to these lands. He admits that on the death of Mr Wilson the pursuer's annuity becomes payable out of the rents of the lands conveyed to her. The question in the case is whether, in a question with him, the divorce which the pursuer obtained against her husband on 21st December 1907 is to be held as equivalent to his death.

In my opinion, this question has already been decided adversely to the pursuer in the case of *Somervell's Tr.* v. *Dawes*, 1903, 5 F. 1065. It is quite true that, as between the husband and wife, the divorce of the husband has the same effect as his death, so far as the provisions granted by the marriage contract in her favour are concerned. The personal obligation which the husband undertook in the marriage contract could therefore, I presume, now be enforced against his general estate if he had any. But it is an entirely different question whether a real security can be enlarged or extended in this way. In *Somervell's* case Lord Kinnear, who gave the leading judgment, held that it could not, and pointed out that it is a fundamental and elementary rule of the law affecting rights in land that a real burden must be fixed and definite. As against the defender the pursuer's right rests upon the infeftment, and must be measured by its terms; and the lands of Otterburn are not charged with an annuity until the death of the husband. If I have interpreted the decision correctly, it follows that the pursuer is not entitled to the decree which she seeks; and the claim in the present action is an excellent illustration of the injustice which a purchaser of a heritable estate would suffer if any other rule were adopted. The pursuer must therefore wait till her husband's death before she can make any valid claim upon the defender in virtue of her infeftment in security. On any other view the obligation which the purchaser undertook would be entirely uncertain in amount, and would depend, not upon a contingency against which he could ensure, but on the conduct and relations of the spouses to each other, and would therefore be neither fixed nor definite.—4*th March* 1908.

Counsel for Pursuer, W. J. Robertson; Agent, James Ayton, S.S.C. — Counsel for Defender, MacRobert; Agents, Crawford & Crawford, S.S.C. J. W. F.

OUTER HOUSE.

(*Lord Salvesen.*)

405. Dampskibsselskabet Neptune (Owners of s.s. "Dansborg") and Mandatories *v.* Blasquez.

Process—Mandatory—Defender—Party Leaving Country—Discretion of Court—Ordained to Sist a Mandatory.

The pursuers were shipowners in Copenhagen and owners of the s.s. "Dansborg." In January 1907 the said vessel had been chartered to load a cargo of ore at Aguilas, in Spain, for West Hartlepool. In connection with the loading of

he vessel the pursuers employed the defender o act as the ship's agent. His duties included he checking and paying of the various accounts ncurred in connection with the loading and learing of the ship. The defender's account ncurred on the pursuers' behalf amounted in English money to £192, 7s. 1d., and in terms f the charter-party this was deducted from the reight at the port of discharge, and received by he defender. The pursuers now sued the de- ender for the sum of £103, 13s. 2d., in respect hat to this amount the defender's account for isbursements and expenses for the ship was rossly overcharged.

Defences were lodged by the defender, in vhich, *inter alia*, he admitted he had been resi- lent in Scotland for forty days, but explained hat he was of Spanish nationality, and had been or many years, and was at present, carrying on usiness in Aguilas.

At the closing of the record counsel for the ursuers moved that the defender be ordained o sist a mandatory. The motion was opposed.

Argued for Pursuer: The defender had gone o Spain during the dependence of the action. There was nothing to take the case out of the rule hat a person abroad must sist a mandatory. The lefender had engaged in prior litigations in this Court both as pursuer and defender, and in the circumstances the motion should be granted (*Sandilands*, 1848, 10 D. 1091; *D'Ernesti*, 1882, 9 R. 655; *Bracken* v. *Blasquez*, 1891, 18 R. 819; *Young* v. *Carter*, 1906, 14 S.L.T. 411).

Argued for Defender: The matter was for dis- cretion of the Court, and the tendency has been not to ordain a defender to sist. It was not a sufficient reason that the defender had left the country. The pursuers were suing for a debt incurred in Spain, and defender's ordinary residence was in that country (*Simla Bank*, 1870, 8 M. 781; *Morton* v. *Smith*, 1902, 9 S.L.T. 396.)

The Lord Ordinary *ordained* the defender to sist a mandatory.

Lord Salvesen.—The defender was resident in this country at the time when the proceedings against him were raised, and while there is a plea that the *forum* is not a convenient one in which to try the action, there is no plea that the Court did not possess, at the date of the action, jurisdiction over the defender. In these circum- stances the defender leaves for Spain during the dependence of the action. Judging from the materials put before me, the defender seems to have divided his residence between Spain and Scotland for a good many years past. I do not know how long he has been resident in Scotland on the various occasions when he has either raised actions or been himself sued as a defender, but it is obvious, as the jurisdiction was sustained against him in the case where he was sued as defender, that he must have been resident for some time, and in the case in which he was pursuer he designed himself as carrying on a commission business in this country. Now when a defender has resided in this country, and is sued in this country, because apparently it is the only country in which he can be sued, and chooses to leave during the dependence of the action, I think the Court ought to ordain the defender to sist a mandatory. I am quite aware that it is always a matter of discretion, but I think the circumstances here point to the discretion being exercised in favour of ordaining the defender to sist a mandatory. If jurisdiction had been founded against the defender by arrestments of moveables which chanced to be within the juris- diction, different considerations would have been applicable, because there the *forum* has been selected by the alleged creditor, at his own hand, when the proper *forum* to have selected was the residence of the defender. I shall accordingly ordain the defender to sist a mandatory, but as he is in Spain I shall allow him to the second box day in the ensuing vacation in which to implement the order.—14*th March* 1908.

Counsel for Pursuers, Jameson; Agents, Boyd, Jameson & Young, W.S.—Counsel for Defender, W Thomson, Lyell Grant; Agent, A. W. Gordon, Solicitor. J. W. F.

OUTER HOUSE. *Lord Salvesen.*

Dampskibs- selskabet Neptune (Owners of s.s. "Dans- borg") and Mandat- ories v. Blasquez.

OUTER HOUSE.

(*Lord Dundas.*)

406. Parish Council of Dundonald and Others *v.* Board of Management of Cuninghame Combination Poorhouse and Others.

I. POOR LAW — COMBINATION POORHOUSE— APPOINTMENT OF OFFICERS—BOARD OF MANAGEMENT — POWER TO COMBINE OFFICES OF HOUSE GOVERNER AND MEDICAL OFFICER OF POORHOUSE — AGREEMENT DEFINING BOARD'S POWERS — CONSTRUCTION — EXPRESSIO UNIUS EXCLUSIO ALTERIUS — HELD THAT EX- PRESSION OF POWER TO COMBINE CERTAIN OFFICES DID NOT IMPLY PROHIBITION AGAINST COMBINING OFFICES OF HOUSE GOVERNOR AND MEDICAL OFFICER.

II. POOR LAW—MEDICAL OFFICER OF POOR- HOUSE—DISMISSAL—POWER OF BOARD OF MANAGEMENT TO DISMISS—AGREEMENT DEFINING BOARD'S POWERS—CONSTRUC- TION—NECESSITY FOR SANCTION OF LOCAL GOVERNMENT BOARD AND GENERAL BOARD OF LUNACY — HELD THAT BOARD OF MANAGEMENT ENTITLED TO DISMISS MEDICAL OFFICER OF POORHOUSE WITH- OUT OBTAINING SANCTION OF LOCAL GOVERNMENT BOARD AND GENERAL BOARD OF LUNACY.

Outer House. *Lord Dundas.*

Parish Council of Dundonald and Others v. Board of Management of Cuninghame Combination Poorhouse and Others.

The facts of the case sufficiently appear from the Lord Ordinary's Opinion.

The Lord Ordinary *assoilzied* the defenders from the conclusions of the summons.

Lord Dundas.—The questions to be decided in this case relate principally to the proper construction to be put upon certain clauses in a contract and agreement, dated in 1857 and 1858, whereby eleven Parochial Boards agreed to erect, for the benefit and accommodation of all of them, a poorhouse to be designated "The Cuninghame Combination or Union Poor's House," under the powers contained in sects. 60 & 61 of the Poor Law (Scotland) Act 1845. Subsequently to the execution of the agreement, seven additional parishes joined the combination, under and in virtue of the fifteenth rule contained in the said deed. The pursuers of this action are four of the eighteen Parish Councils which form the constituent members of the combination. They call as defenders the whole members of the House Committee or Board of Management of the said poorhouse, and its secretary; and also the remaining fourteen Parish Councils. Declarator is sought to the effect (1) that the said Board of Management has no power under the said contract and agreement to combine the offices of house governor and medical officer of the said poorhouse, by appointing the same person to hold both of the said offices; and (2) that the said Board has no power to dismiss the medical officer of the said poorhouse without the sanction of the Local Government Board for Scotland and the General Board of Lunacy for Scotland previously had and obtained. Conclusions follow for reduction, "if need be," of Minutes of the Board purporting to record resolutions affirming the existence of these powers which the declaratory conclusions seek to negative. The summons further concludes for interdict.

Upon the first of the two questions thus raised I am of opinion that the defenders are entitled to succeed. I can find nothing in the Poor Law Act or in the agreement to prevent the Board from combining, if so advised, in one person the offices of house governor and medical officer. The fourth article, or "rule," of the agreement provides for the constitution of the Board of Management, "for the superintendence, conducting, management and control of the affairs of the poorhouse, and all matters and things connected therewith," and confers upon it power, *inter alia*, "to act in all matters falling under or proper to the province, and subject to the administration, of the House Committee or Board of Management." By the eleventh rule, more specific powers are conferred upon the Board as to the appointment of the various officials necessary for the establishment. The pursuers' counsel pointed out that in some instances power is expressly given to the Board to combine offices, viz. "a chaplain or teacher, or a chaplain and teacher . . . . a treasurer, a secretary, or a treasurer and secretary . . . . and the House Committee, if it see fit, may appoint the same person to the offices of governor and secretary"; and they argued that the expression of such power in certain cases negatived by implication its existence in any others, and in particular as regards the offices of governor and medical officer. My opinion is adverse to this argument, as matter of construction; and I think that the maxim *expressio unius est exclusio alterius*, though sound enough within its proper limits, is one which can easily be pushed too far.

The second question in the case, viz. as to the Board's power to dismiss the medical officer without the sanction of the two authorities already referred to previously had and obtained, is, in my judgment, attended with more difficulty than that with which I have just dealt. But in regard to it also my opinion is in favour of the defenders and against the pursuers. The eleventh rule, already referred to, expressly gives the Board power "to remove all such officials or any one or more of them from time to time at the discretion of the said House Committee or Board of Management, and without being bound to assign any reason for such removals, and to supply all vacancies that may occur from time to time in any of the aforesaid offices, either by death, resignation, removal, or any other cause." But it was suggested that these powers, and indeed, I apprehend, the whole preceding portion of the eleventh rule, are controlled by the words which occur shortly after, viz. "and subject always to the approbation of the foresaid Board of Supervision." I do not agree with this view. I think the words just quoted relate exclusively to the power conferred (immediately before their occurrence) "to prescribe the duties and make rules for the government and guidance of the said several officials in their several departments, in terms of the foresaid statute," *i.e.* the Poor Law (Scotland) Act 1845, which by sect. 64 (expressly referred to in the same part of the said eleventh rule) ordains Parochial Boards to frame rules and regulations for the management of the poorhouse, which are to be submitted to the Board of Supervision "for approval." This is, I think, the proper construction of the eleventh rule, although it is not very artistically framed; and my impression is confirmed by looking at the twelfth rule, which gives power to the Visiting Committee of the Board "to suspend any one or more of the officials to be appointed under article eleventh, until the opinion of the House Committee or Board of Management can be obtained on the cause of such suspension." But the pursuers' counsel further relied upon the eighteenth rule as importing by implication into the language of the eleventh rule, in regard to the Board's power of dismissal, sect. 66 of the Poor Law (Scotland)

Act 1845. The argument does not, in my opinion, advance the pursuers' case; for that section, as I read it, merely confers upon the Board of Supervision power in certain cases to suspend or remove a medical man whom the Parochial Board had appointed in a poorhouse, but does not override or negative the power of that Board to dismiss, if they see fit, the man whom they themselves appointed. I should say that my attention was called to the view expressed by the Secretary to the Local Government Board in one of the letters produced, that "the medical officer of a poorhouse is appointed under statute, and cannot be dismissed at the will and pleasure of the directors of the poorhouse," and to the reference he makes to a Departmental Report in 1904. In that report the statement is made that "it is considered that medical officers of poorhouses have the same tenure of office as inspectors of poor; that is, they can be dismissed only by the Local Government Board." The authority for that statement is noted as sects. 56 and 66 of the Poor Law Act 1845, and the *Old Monkland* case, 1880, 7 R. 469. I am, with the greatest respect, unable to concur in the views thus indicated. The cases about inspectors, of which *Clark*, 1873, 1 R. 261, is one of the most important, seem to me scarcely to warrant the statement in question, and I observe that the Departmental Report, quoting from an earlier report in 1895–96, announces that "the claim," *i.e.* that such medical officers should not be removable without the sanction of the Local Government Board, "has been frequently preferred by the representatives of the parochial medical officers, and clauses have been introduced into Bills with the view of giving effect to the claim, but from one cause or another the Bills have failed to pass." This account of the matter accords with the view which I take of sect. 66 as it stands, and the construction I am disposed to put upon it; and seems to infer that, if medical officers of poorhouses are to be placed in the position desired, that end must be achieved by legislation. For the reasons I have now expressed, I do not think that there is any need for the Board of Management to obtain the sanction of the Local Government Board as a condition precedent to the dismissal of the medical officer. As regards the alleged necessity for obtaining the antecedent sanction of the General Board of Lunacy, it seems enough to observe (1) that the eighteenth rule, referring as it does only to the sanction of the Board of Supervision under the Poor Law Act of 1845, cannot, so far as I see, aid the pursuers upon the point in question; and (2) that I am unable to find upon the record any averments of fact by which the case is brought in any way within the scope of the third section of the Lunacy (Scotland) Act 1862, or the Rules and Conditions prescribed thereunder, particularly Rule XVI.

For these reasons I think the defenders are entitled to succeed in the action. I propose to repel the whole pleas in law stated for the pursuers, and to grant decree of absolvitor.—*3rd March* 1908.

Counsel for Pursuers, The Dean of Faculty (Campbell, K.C.), Macmillan; Agents, W. & J. Burness, W.S.—Counsel for Defenders, Hunter, K.C., Munro; Agents, Macpherson & Mackay, S.S.C. A. M.

Outer House. *Lord Dundas.*

Parish Council of Dundonald and Others v. Board of Management of Cuninghame Combination Poorhouse and Others.

HOUSE OF LORDS.

(*The Lord Chancellor* (*Lord Loreburn*), *Earl of Halsbury, Lords Macnaghten, James of Hereford, Robertson, Atkinson and Collins.*)

407. Colquhoun and Others *v.* The Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow and Others.

Insurance—Widows' Fund—Act of the Widows' Fund of the Faculty of Procurators of Glasgow, 1833 (3 Will. IV. cap. lxiv.)—Glasgow Faculty of Procurators Act 1875 (38 Vict. cap. vi.)—Held (Dissenting the Earl of Halsbury, Lords Robertson and Collins) That a Contributor to the Widows' Fund of the Faculty of Procurators of Glasgow, Who Had Ceased to be a Member of the Faculty, Was Entitled to Remain a Contributor to the Widows' Fund.

(*Reported ante, Vol. XII. pp.* 159 *and* 617.)

Appeal against a Judgment of the First Division (*The Lord President* (*Lord Kinross*), *Lords Adam, M'Laren and Kinnear* (*Lord M'Laren dissenting*)), *affirming a judgment of Lord Low.*

The pursuers James Colquhoun and others *appealed.*

The facts of the case appear from the previous report.

The House (*dissenting* the Earl of Halsbury, Lords Robertson and Collins) *allowed* the appeal, and reversed the judgments appealed against.

The Lord Chancellor.—My Lords, this case has been twice argued.

Mr Colquhoun, the appellant in this appeal, became a member of the Faculty of Procurators of Glasgow in 1870. Under an Act of Parliament then in force he was obliged to join, and did join, the Society of Contributors, which was a mutual insurance society for members of the Faculty, regulated by that Act. He paid a considerable entrance fee and an annual subscription down to the year 1899. Subsequently he was expelled from the Faculty for misconduct, and the Society claim that they also were en-

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titled to expel him and to deprive him of all the benefits derived from his membership and past subscriptions. The question for your Lordships is whether this Society was so entitled; and that question must be solved by reference to the Act itself, which is the third of Will. IV. cap. lxiv.

To begin with, this much is clear, Mr Colquhoun cannot be deprived of these benefits as a punishment for his misconduct. There is not a word in the Act which, upon any construction, can authorise the Society to deprive on the ground of delinquency where they could not otherwise deprive. If Mr Colquhoun is to lose the fruit of his insurance, it must be on the ground that he is no longer a member of the Faculty, a ground which would apply whatsoever may have been the cause of his ceasing to be a member. And so it comes to this: Ought we to construe this Act of Parliament as meaning that whenever a member of the Faculty ceases to be a member he must necessarily also cease to be a member of and contributor to the insurance society?

It is a question of contract. What were the terms on which Mr Colquhoun became a contributor to this Society? I think this is to be settled by the Act alone, and that no help can be gained by referring to anything beyond it.

Under the scheme of the Act any Procurator who joins the Faculty is compelled to join the insurance society also, and thenceforward to subscribe to it as long as he lives, not, be it observed, for so long as he remains a member of the Faculty. He is allowed to renounce the benefits in due form, and will thereupon cease to have any interest in the fund. Also he may forfeit them by specified acts or omissions, all of which relate to some default relative to the fund itself. There is no provision that ceasing to be a member of the Faculty shall entail consequences so serious, and I cannot see any sufficient reason for implying such a provision.

It would operate very harshly upon those who had compounded for, or, to use the language of sect. 27, "redeemed" their annual contributions; also upon any member of the Faculty who, having for many years paid to this fund, desired to quit the Faculty for another profession.

Between two equally admissible interpretations the more reasonable should be preferred. And if an Act will read equally well whether or not an unexpressed condition be implied, a Court ought surely not to imply a condition that works hardship. In my view this Act set up a statutory contract of insurance. Even if I thought the Act admitted of it, I would not imply a condition most onerous to the assured unless the Act also required it. But in the present case I do not think there is an ambiguity.

I am of opinion that, according to the letter of the Act, any member of the Faculty who once becomes a contributor to the fund is entitled to continue a contributor, and is entitled to the benefits offered in exchange even though he ceases to be a member of the Faculty.

Under sect. 16, on payment of his entry money a member of the Faculty becomes a contributor to the fund "and entitled to the benefit thereof under the provisions of this Act." Under sect. 18, such person is bound to pay the Society an annual contribution "during his life." And under sect. 9, one of the purposes of the fund is "payment to the widows and children of the members of said Faculty who now are or may hereafter become entitled to the benefit of the fund under the provisions of this Act as hereinafter specified." All that is required is that the person entering the Society should be a member of the Faculty when he enters it. In my opinion, the position of any member of the Faculty who has paid his entry money is as follows: He may renounce; he may redeem; he may forfeit the benefits for some cause specified in the Act. But if none of these things happen he is required to keep up his annual contributions whether he remains a member of the Faculty or not, and is entitled in return to the benefits like any other contributor.

Accordingly, with the utmost respect, I am unable to agree with the judgment of the First Division.

The Earl of Halsbury.—My Lords, I think it is a very relevant consideration that the corporate body we are now dealing with has from its earliest institution been confined to a separate professional class, and that from the year 1796 till 1833 and 1875 it has continued to be so confined, and to the present day is undoubtedly so confined that no one can demand to be admitted within it unless he is a member of the class in question.

It is not denied that for entry into the Corporation and its ancillary charitable provisions a person must be a member of the Faculty of Procurators. If he is, he may take a part in its government and, among other things, has his chance of being entrusted with the management and distribution of its funds.

By the second section of the Act of 1833, which is described as an Act for the better establishing and securing a fund for providing annuities to the widows and children of the members of the Faculty of Procurators of Glasgow, a scheme for the election of its officers is enacted which is described to be for the proper administration of the funds of the Society and management of the affairs thereof, and it provides that any member of the Society may be re-elected, or any other member may be elected also by the 11th section; former regulations as to the fund are cancelled by the statute, and it is enacted that in future the funds shall be administered in pursuance of the new enactment. Up to the passing of the Act a person to be admitted was required to serve a regular apprenticeship for five years with one of the members of the Faculty,

but by the 15th section of the Act the Faculty was authorised to receive and admit any person who should be found duly qualified "in terms of the original charter, and upon such terms as to payments as the said Faculty and the said Society hereby constituted shall from time to time appoint."

I presume doubt had been raised as to the lawfulness of some of the appropriations of a portion of the funds, since by the 8th section the appropriation of certain portions of "the funds of the said Faculty of Procurators" was declared to be lawful, and by the 9th section the declaration of the object of the trust, after providing for the necessary charges, goes on to declare what is relevant to the present questions before your Lordships for provision and payment of an annuity to the widows severally and children of deceased members of the said Faculty.

The concluding words of that section seem to me most important: "And in the last place, for provision and payment of an annuity to the widows severally and children of deceased members of the said Faculty contributors to the fund and Society hereby established, and for payment to the widows and children of the members of said Faculty who now are or may hereafter become entitled to the benefit of the fund under the provisions of this Act as hereinafter specified. And it shall not be lawful to apply the said fund to any other use or purpose whatsoever."

Now it will be observed that this is the section which defines the object of the trust and which prohibits any other disposition of its funds. That part of it which is relevant to the discussion defines the object as widows of members of the Faculty who were contributors, and must have been both members and contributors—in the latter part of the section it says: "Members of the said Faculty contributors to the fund and Society hereby established."

It seems to me impossible to construe the words here used as if it permitted the qualification for an annuity to cover the case of a widow who did not fill the character of a widow who became a widow by the death of her husband while he was a member of the Faculty, and besides being a member of the Faculty had also been a contributor to the fund.

I do not think the question of forfeiture or loss of money comes into the question of construction. It is a question of what this definition of the object of the trust means, and with all respect for those who think differently I cannot doubt what the true construction is, much as I respect the views of those who differ. It may, of course, present a case calculated to raise a feeling that some injustice is being done when a man who has paid this contribution for nineteen years is refused permission to continue his contributions and thus loses for his wife and children a provision intended for them; but upon the question of construction it is immaterial whether it was nineteen years or nineteen days. If the contributor died within the first year and was a detected thief the day after his entry the construction must be the same.

For my own part I cannot understand why such a Society, which means to confine those who enter it to those possessing a particular professional qualification, is not supposed to possess throughout the qualification without which he could not have entered the Society.

Neither am I much impressed by the absence of a distinct provision that where such a qualification is taken away by the person being detected as a thief, and as I understand the argument, it is not now denied that, quite apart from the express power by later legislation, it was quite within the powers of the governing body to deprive the appellant of his character of procurator, yet because of his having contributed to the Society, which is simply ancillary to it, it is argued he is still entitled to become a contributor.

I am not quite certain that I understand Lord M'Laren's objection to that power which every corporation possesses both of disfranchisement and amotion for heinous crimes, such as embezzlement undoubtedly is (*see* Lord Mansfield's Judgment in 2 Burrows, 723), and though the loss of pecuniary profit may follow as a consequence, it seems to me fallacious to treat as itself a penalty what is the consequence of a loss of qualification; and the whole question seems to me to depend upon whether being a Glasgow procurator is, or is not, a qualification for joining in the Society for providing funds for the widows and children of Glasgow procurators.

I have hitherto referred to the section which declares the object of the trust, but there is nothing in the rest of the Act which seems to me to militate against the construction I put upon that section. On the contrary, the title and preamble of the Act of 1833 seem to me to disclose with some distinctness the purpose of the Act, and certainly I should not suppose from the language used it was contemplated to erect two different societies, since the objects sought to be attained are to be "the objects of *the said* Incorporation." The charter granted, and the Act referred to, or said to be the Act, is said to be for the better and more convenient distribution of the funds *thereof*; still, be it observed, it is assumed to be the same Corporation, and the Act is for the better and more convenient distribution of the funds *thereof*.

The preamble proceeds to recite that the said Faculty appropriated certain sums of money from the *said* funds, and other contributions from the then present members *and future members of the said* Faculty, for establishing a fund or scheme for members and widows and children of the said Faculty contributors—observe it is still members who are within this description, but they must also be contributors.

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It goes on to mention that at a meeting of the members on the 5th of February 1827 amended regulations were made and approved of by the said Faculty at the time.

It then recites several alterations and amendments in the said scheme that members of the said Faculty made—certain alterations for the better management and distribution of the said fund. It then recites the great increase of the said fund by the contribution of the members of the said Faculty. It declares that it is expedient, without prejudice to what has been done, that the said Faculty should be enabled more effectually to manage the said fund, and to extend the usefulness thereof by making provision for more ample annuities to the widows and children of the members of the said Faculty who may be willing to contribute for that purpose, and to adopt certain regulations for the more sure establishment and better administration of the said fund, and for the continuance of the benefits thereof, but which objects cannot be carried into effect without the authority of Parliament.

It then proceeds to enact that all and each of the members of the Faculty of Procurators in Glasgow, and every other person who shall hereafter become members of and contributors to the said fund in manner after mentioned, shall be and are hereby declared to be members of and contributors to such fund established under the provisions of this Act, and shall be called the Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow.

It is an old observation that in construing an Act of this character it is not the language of the legislature itself, but the language which the promoters have used and to which the legislature has assented.

I say this because the words I have quoted are, in some respects, slipshod and inaccurate. I do not know, speaking accurately, what is the meaning of the words "members of a fund," but it is impossible not to see what the draftsman intended. He has throughout referred to the Faculty and its members in respect of the greatly increased contributions by the Faculty, the enabling of the said Faculty effectively to manage and to extend its usefulness, and for giving more ample annuities to widows and children of "the members of the said Faculty who may be willing to contribute for that purpose."

From first to last I can find no trace of any intention to establish a fund independent of and not for the benefit of the profession of the Faculty of Procurators. That some words were necessary when the rule of compulsory contribution was abolished is plain enough, and that they only should be entitled who contributed is one thing, but that people who were not members of the Faculty should be entitled to contribute is another and a very different thing.

I do not think it is very relevant to the matter now in hand to consider the cases where by voluntary retirement the contributions should cease; they are provided for.

The very last words of the first section quoted by some of your Lordships describes the Widows' Fund of the Faculty of Procurators in Glasgow.

It is in view of the preamble and the enacting part of the 1st section that I think the 29th and 30th sections so important. It does not appear to me that there was ever any intention to alter the constitution of the Society, but the abolition of the compulsory contribution rendered appropriate an alteration of the phraseology, which, however, has not throughout been observed with strict accuracy, but the language appears to me to be sufficiently plain that while only the contributory members of the Society should receive the benefit, it is assumed all through that they must be members of the Faculty.

I am afraid I do not follow the argument derived from the statement that the relations between the Corporation and its members is that of contract. There is no other contract than that of becoming a member of the Corporation, and as such liable to all the incidents which belong to an individual corporator.

Lord Mansfield said the causes of the amotion of a corporator are, first, offences against the duties of his office as a corporator; second, crimes in their own nature heinous and against the offender's general duty as a subject, yet not particularly relating to his corporate office as a duty.

It can hardly be doubted that the offence of embezzlement comes within Lord Mansfield's second category, and requires no express contract that he should be removeable for such a cause.

It would be intolerable that because a man was once a corporator, the non-criminal corporators should be compelled to associate with and take part in the business of the Corporation with a person who had been convicted of theft and suffered the punishment of penal servitude.

It is by the act of the person thus guilty that what is called his loss is incurred, and, indeed, it is not quite accurate to describe it as if his investment was entirely lost. During the nineteen years he had the security of his investment for his wife and children, if at any time he had died during the period, and if in the end the pension has been lost, it is because he has committed a crime which involved the loss of his qualification when he was found out.

For these reasons I am of opinion that the judgment below was right and ought to be affirmed.

Lord Macnaghten.—My Lords, in 1870 the appellant, James Colquhoun, became a member of "The Faculty of Procurators in Glasgow"—a Corporation established in 1796 by Royal Charter. At the same time he became a

member of a mutual insurance society styled "The Society of the Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow." This Society was constituted by Act of Parliament in 1833. The Act provides in sect. 16 that no person shall be admitted a member of the Faculty of Procurators without first paying entry money to the Widows' Fund, and that after such payment the person admitted as a member of Faculty of Procurators shall be "held and deemed a contributor to or member of the fund and entitled to the benefits thereof under the provisions of this Act."

In March 1900 Colquhoun having been convicted of embezzlement was struck off the roll of the Faculty. The trustees of the insurance society then removed his name from the list of the Society. It is not suggested that their action was justified by the crime which Colquhoun had committed. Misconduct has nothing whatever to do with the position taken up by the respondents. Their attitude apparently would have been just the same if Colquhoun had left the Faculty with an unblemished character and of his own free will. Their contention is that if a person becomes a member of the Society and so by statute entitled to the benefits of its fund, and afterwards, from any cause or for any reason, ceases to be a member of the Faculty of Procurators, his statutory rights as member of the insurance society are at once extinguished, and all his contributions confiscated for the benefit of the Society. Is that contention sound?

The question, as it seems to me, depends on the meaning and effect of the Act of 1833 and on nothing else. Except so far as may be gathered from the recitals in the Act, the charter of 1796 and the regulations in force under it are, in my opinion, irrelevant. Equally irrelevant, I think, is any reference to a subsequent Act passed in 1875 for winding up the affairs of the Society. The question is simply a question of contract, and the contract is to be found within the four corners of the Act of 1833.

The Widows' Fund had its origin in certain provisions made by the Faculty of Procurators for the benefit of the widows and children of members. Before the Act of 1833 everything was in the hands of the Faculty. The allocation and distribution of its funds was a matter of domestic arrangement and regulation. By the Act of 1833 the condition of things was altered. The old Widows' Fund with its existing liabilities was handed over to the insurance society, which was to have no claim on the Faculty fund in respect of new members. The Society from its inception was a body separate and distinct from the Faculty. Even the members were not identical, for no one who became a member of the Faculty after reaching a certain age could enter the Society, and members of the Society might leave that body and still continue members of the Faculty. The Society had its own treasurer and was under the control of its own officers. It had no disciplinary powers. It had no function but that of an insurance society. It was a purely business association of a common type intended to be conducted on sound actuarial principles, subject to periodical investigation in accordance with the most approved tables of mortality, "taken in connection," as the Act itself declares, "with the experience of this and similar schemes." It is quite true that entrance to the Society could only be gained through admission to the Faculty of Procurators. Membership of the Faculty was the only passport to the Society. So far, but no further, the Faculty and the Society were linked together. When once the entrance gate was passed and a person became "a contributor to the Widows' Fund and entitled to the benefits thereof," his only statutory obligation to the Society, besides payment of a marriage tax, if exigible, was to contribute during the whole of his life unless and until he purchased exemption by compounding or by contributing for a period fixed by the Act, or unless and until he renounced in due form for himself and for his widow and children all interest in the Society and its funds.

The argument of the respondents, if I understood it aright, was founded partly on the language of the declaration of trust contained in the Act of 1833, and partly on inferences derived from the circumstances and position of the Widows' Fund before the Act.

The latter branch of the argument, which, at first sight, seems the more formidable, and on which much stress was laid, is, I think, displaced and excluded by the Act itself. In sect. 2 it was enacted that the regulations in force before the passing of the Act should be annulled, and that the fund as vested in the officers of the insurance society with the whole increase thereof, should be administered under the provisions of the Act of 1833.

The declaration of trust on which the respondents rely is to be found in sect. 9. That section declares that the uses and purposes of the Society and of the funds vested and to become vested in it or in the trustees thereof, shall, after satisfying certain prior charges, be "for provision and payment of an annuity to the widows severally, and children of deceased members of the Faculty, contributors to the Fund and Society hereby established." Then follow these words dealing with present and future contributors: "And for payment to the widows and children of the members of the said Faculty who now are or may hereafter become entitled to the benefit of the fund under the provisions of this Act as hereinafter specified." What is the meaning of these latter words? In construing them you must, I think, bear in mind two things. In the

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first place, a person could only enter the Society as a member of the Faculty. The Society was formed for the purpose of insuring members of the Faculty and no others. In the next place, a member of the Society, in the view of the framers of the Act became "entitled" to the benefits of the Society's Fund immediately on his admission. That is plain enough from the language of this section. It is plainer still from the language of sect. 16, which has been referred to already Now, the learned counsel for the respondents in construing the clause under consideration seemed to omit, or leave out of sight, the most important part of it. They read the clause as if the declared purpose of the fund was "for payment to the widows and children of the members of the said Faculty," without anything further in the way of defining the class of persons intended to be benefited. I venture to think that is not quite right. If I might paraphrase the sentence I should say the true meaning is, "for payment to the widows and children of persons who, being members of the Faculty, are, or may hereafter be, admitted to the Society, and by virtue of their admission become entitled to the benefit of the fund." This construction is consistent with what is found in subsequent sections, where the phraseology is varied and the persons entitled to the benefits of the fund are described sometimes as "contributors" simply, and sometimes as "members of the fund," without any reference to membership of the Faculty. What is more important is that it is consistent with the fundamental constitution of the Society as declared in sect. 1. The constituents of the Society, besides the then members of the Widows' Fund, are to be "all and every other person or persons who shall hereafter become members of and contributors to said fund in manner after mentioned." The only conditions of membership of the Society are entrance in the prescribed manner and contribution — not contribution plus continued membership of the Faculty of Procurators.

The construction for which the respondents contend would certainly lead to strange and harsh results. A person might be a member of the Faculty of Procurators and also a member of the insurance society; he might have compounded for all future contributions to the Widows' Fund and thus have purchased for his wife and children the benefit of the annuity by payment in full. Suppose he were then struck off the roll of procurators in order to enable him to join the Bar or some other profession, membership of which might be incompatible with membership of the Faculty, it would be a strange thing that he, or rather his wife and children, should lose the benefit of his purchase. It would be a strange thing, too—unheard of, I should think, in the practice of insurance societies—that this insurance society, without making any refund, should appropriate a windfall which the actuarial calculations of an insurance society would not, I suppose, take into account. But however that may be, I rest my judgment simply and solely on the Act of 1833. It seems to me that when a person is declared by Act of Parliament to have become a member of a statutory body, and to be entitled to the benefit of a certain fund, his status and rights are not to be destroyed or taken away without plain language. An implied power of expulsion seems to me something of a novelty. Forfeitures, as a great judge has said, "are not favoured in the law."

I think the Order appealed from ought to be reversed.

Lord James of Hereford. — My Lords, the question raised in this case can easily be stated.

The Faculty of Procurators in Glasgow are a Corporation existing under a charter. In 1833 an Act of Parliament was passed for the better establishing and securing a fund for providing annuities to the widows and children of the members of the Faculty. The general effect of the statute is that persons becoming in the future members of the Faculty had to contribute to the Widows' Fund, and, upon making certain payments, would be entitled to certain benefits. By the concluding words of the first section of the Act the position of such contributors is thus defined: "Shall be called the Society of Contributors to the Widows' Fund of the Faculty of Procurators of Glasgow."

The pursuer, J. Colquhoun, being a member of the Faculty, became in 1872 a contributor to the Widows' Fund, making payment by way of entrance and subscription amounting to £179. He was always ready and offered to continue to pay the subscriptions due from him.

In 1899, J. Colquhoun pleaded guilty to a charge of embezzlement, and the Faculty, acting within their powers, expelled him. The question before your Lordships is, What are the effects of that expulsion? Does it carry with it any forfeiture or loss of the benefits under the Widows' Fund to which Colquhoun was entitled by virtue of his contributions? I think that it does not.

The argument of the respondents is that inasmuch as no one could become a contributor to the fund unless he were a member of the Faculty, in like manner he lost his rights under his contributorship if he ceased to be such member of Faculty.

But such argument cannot be supported by anything expressed in the statute; it is by force of inference only that such contention can prevail.

Where, as in this case, it is sought to effect a loss of moneys paid, surely there ought to be clear and distinct grounds for drawing such inference. I cannot find them. On the contrary, I think the provisions of the statute shew that it was intended to protect the interests of the con-

tributor. He is entitled to renounce or to redeem under sects. 27 and 28, and is liable to forfeiture only for non-payment of contributions under sect. 26 of the Act.

It is true that in the first instance a contributor to the fund must be a member of the Faculty, but obligations are imposed upon him by the statute to make certain payments, not only whilst he is a member of the Faculty, "but during the period that each of such contributors respectively shall use and be a member of such Society."

Now a member of the Faculty may desire to resign such position—as, for instance, if he sought to become a member of the Bar of England or Scotland—and the respondents' argument must go to the extent of saying that in such a case all right to the benefits resulting from the contribution would be lost. No reliance is placed upon the fact that in this case misconduct has occurred. It is the absence of the pursuer's name from the roll that is relied upon. If this were sufficient to cause the forfeiture the statute may well have said so, but it has not; and in the absence of any express declaration that only members of the Faculty can be allowed to remain members of the Contribution Fund, I come to the conclusion that the appellant's contention is correct, and ought to prevail.

Lord Robertson.—My Lords, the judgment which I am now to read was written after the first hearing, and I have nothing to add.

I am of opinion, and, as there is a difference of opinion, it is right to say, clearly of opinion, that the judgment appealed against is right.

The claim of the appellant is that, albeit he is not a member of the Faculty of Procurators, he is entitled to contribute to their Widows' Fund and to receive the benefits of that institution. It seems to me that from the beginning, and of its essence, this fund has been one purely domestic to the Faculty, and that none of the modifications of the institution have impaired this essential characteristic and condition. Nor do I find in the successive charters and statutes anything to afford the smallest countenance to the idea that the fact that a man, while a member of the Faculty, has been a contributor to the fund, gives him any right to contribute to the fund when he has ceased to be a member. The nature of all such insurance exposes it to the risk that the contributions of years may be lost if a man has not the money or has not the qualification to contribute in later years. But I hope that I need not remind your Lordships that hardship will not supply a ground of decision which the contract does not supply, and that it would be at least as irrelevant to deplore Mr Colquhoun's loss as to reflect on his fraud.

Now I do not intend to rehearse the developments of this fund, for this has been done very adequately. But I take the several stages.

I should have thought it past all doubt that the claim of the appellant would have been impossible if the Act of 1833 had stood alone. The preamble and the enacting sect. 1 make membership of the Faculty the qualification of contributing to the new fund; and when we come to sect. 9, the Act declares the purposes of the trust to be the payment of annuities to the widows and children of members of the Faculty; "and it shall not be lawful to apply the said fund to any other use or purpose whatever."

Now I turn to the Act of 1875, which, as has been said with substantial accuracy, provides for the winding up of the fund. I must own that, this being so, it would be a singular occasion for increasing the number of contributors by bringing in persons who *ex hypothesi* were hitherto outsiders, or by abolishing a condition which on the same hypothesis had hitherto attached to existing contributors. In truth, however, the negative words of sect. 3 do not contain any such implication.

In what I have said, I assume the right of the Faculty to remove from their membership persons disqualified from membership, and such is a person convicted of the crime of embezzlement. I do not suppose that this was a new power conferred by the supplementary charter; but it is there in black and white. The truth is that membership of any such body is precarious to this extent, that it is not the fact of a man having been honest at the time of his admission that will retain his position, if in the sequel he is found dishonest. The same kind and degree of precariousness attend the corresponding investment of money by contributing to a professional widows' fund; that and nothing more.

On these grounds I am for affirming the judgment of the First Division.

Lord Atkinson.—My Lords, whatever may have been the true relation between the "Faculty of Procurators in Glasgow" and the contributors to the Widows' Fund before 1833, the statute of that year, in my opinion, entirely altered their relative positions, and gave to those contributors a corporate existence, distinct from, and to a certain extent independent of, the older Corporation. It was by the first section of that Act provided that those persons who were at the passing of the Act members or contributors to the Widows' Fund, together with all other persons who should thereafter become members or contributors to the fund, "in manner thereafter provided," should form the Corporation. From that time forward the new Corporation stood by the old very much, I think, in the position of an insurance company. Every member under 50 years of age admitted to the Faculty was bound to become a contributor to this fund, whereby, in consideration of the payment of a lump sum, varying from £25 upwards in an ascending scale according to his age, plus an

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annual contribution or premium during his life of £3, 10s., or such larger sum as the Society should have theretofore fixed, together with interest and penalties as in the statute provided, certain annuities were, after his death, to be paid to his widow or children. Every member of the Society could redeem, *i.e.* compound for, his annual contribution, and thus, if he were so minded, pay a lump sum at once. And none but members of the Faculty could become contributors.

Lord Atkinson.

It was not disputed, as I understood, that the relations between the contributors and the new Corporation became, from 1833, a contractual relation. And the point for your Lordships' decision is, in my view, this: whether it is an implied term of this statutory contract—it is certainly not an express one—that the insurer must continue to be a member of the Faculty until his death, so that if for any reason he, during his life, should cease to be a member of the Faculty, he should, *ipso facto*, forfeit everything he had paid, and the Society be relieved from every obligation to pay anything whatever to his widow or children.

This contingency, as appears from the actuarial tables used, was not taken into account in fixing the amount of the contribution. The latter is uniform, and the lump sum varies with the age of the insurer, and that alone.

Sect. 13 provides for the restoration of members of the Faculty whose interest in the fund shall have been forfeited, and sect. 14 enacts that on being restored they shall become members of the Society, "and each pay to the treasurer £1, 10s. *during his natural life.*" Sect. 21 enacts that the customary payments of £1 in respect of every contributor who was admitted to the benefit of the fund before 7th February 1814, and of £1, 10s. in respect of every contributor admitted after that date, shall continue to be paid by the Faculty "during the period *that each of the said* contributors respectively shall live and continue to be a member of the Society," not, be it observed, continue to be a member of the Faculty.

Sect. 18 provides that every person who should thereafter be admitted to the Faculty should be bound to pay to the treasurer of the Society for its benefit annually "*during his life*" the sum of £3, 10s., or such larger sum as the Society shall have theretofore fixed and appointed.

All these sections apparently contemplate that the annual payment should continue to be made *during* the life of the contributor, and that this is their true meaning is, I think, enforced by the fact that special provision is made for the cessation of this payment in three particular instances, and those alone, namely (1) where the contributor has paid for forty years (sect. 27); (2) where he has renounced all benefits of the fund (sect. 28); and (3) where his interest in the fund has been forfeited by reason of his having been guilty of one of the several acts or defaults specified in the various sections, each of which is in its nature injurious to the interests of the fund. No provision whatever is made for the cessation of the contributions, expressly made payable *for life*, on the happening of such a probable event as the contributor's ceasing, for any reason, to be a member of the Faculty. *Prima facie* it must, I think, strike one as strange that such a contingency was not expressly provided for, if it was the intention of the legislature that forfeiture should follow upon its occurrence. It has been urged on behalf of the respondents that the omission is accounted for by the history of the fund, and by the special wording of several sections of the Act, notably the 9th, 29th, and 30th, which shew that the *widows* or children who are to receive annuities are the widows and children of persons who at the time of their decease were members of the Faculty, and that anything in the nature of a forfeiture clause, such as is above suggested, is therefore unnecessary.

The past history of the fund cannot, in my opinion, furnish any key to the meaning of the language of a statute which so fundamentally altered the previous position of things as did the Act of 1833, while the words used in the several sections relied upon do not, I think, when examined lead to the conclusion contended for.

The words occur in sect. 29, "there shall be paid out of the funds of the said Society to each of the widows of the deceased members of the said Faculty whose names are specified in Schedule A"; and the words occur in sect. 30, "there shall be paid out of the funds of the said Society to the widow of every member of the Faculty who shall have contributed to the said Fund." It is to be observed, however, that in both sects. 29 and 30, where the payment of annuities to children is dealt with, the words used are "deceased contributor" and "in case any member of the said Society shall die," and "widow of a contributor," while in sect. 31 the events, of the proof of which the trustees are empowered to call for evidence, are described as the "death of contributors." Again, in sect. 33 the phrase used is "widow of more than one contributor in succession." And in sect. 34 the word "contributor" is used throughout the section, the words "member of the Faculty" never, while the phrase "widow or children of such contributor" frequently occurs. It is clear therefore that under all the sections the essential fact which must be proved in order to entitle a widow, or a child, to an annuity is, that the husband of the widow, or father of the child, must have been a contributor at the date of his death, unless he had already redeemed or paid his contribution for forty years. These are the only exceptions. In the face of the clear provisions of sects. 9 and 16, which have already been quoted, I think the

words "widows of deceased members of the Faculty," or words of the like kind, may, when used in the three sections above mentioned, well be held to mean the widows of men who were members of the Faculty, and who consequently became contributors, but subsequently ceased to be members of that Faculty but continued to be contributors; so that one is not constrained to adopt a construction which, at all events in the case of men who have paid their contributions for forty years, or who redeemed them, and thus purchased the benefits provided for their widows and children, if not in the case of others, would work the most gross injustice. Neither will this construction prejudice the interest of the Faculty or of the Society, while in my view it reconciles the several sections of the statute of 1833, and makes them consistent with each other. If it be the correct construction, as it appears to me to be, then I think Colquhoun has not forfeited his interest in the fund, and the respondents were not justified in the course they took. The decision of the First Division was wrong and should be reversed, and this appeal allowed with costs.

Lord Collins.—My Lords, at the close of the first hearing I arrived at the conclusion that the decision of the Court below was right. Afterwards I had the opportunity of reading in print the opinion of Lord Robertson. I did not attempt the superfluous task of trying to modify or improve upon that opinion, for I frankly felt I could not. Since then the case has been reargued, and I am bound to say that the reargument tended to confirm my original opinion. Since then again that opinion has been reenforced by that of my noble and learned friend Lord Halsbury, with the result that, with all deference to those who hold the opposite view, I am compelled to give my opinion that the judgment of the Court below is right, and that this appeal ought to be dismissed.

The Lord Chancellor.—My Lords, as the majority of your Lordships are in favour of allowing this appeal I shall propose the following order: "That the Minute or Resolution of the 4th February 1901 be reduced, and that it be found and declared as concluded for." I apprehend if any question arises in the drawing up of this order the parties will settle it themselves. Failing that, it will be possible to submit it for your Lordships' consideration.—17*th March* 1908.

Counsel for Appellants, Macmillan, Maitland; Agents, J. Gordon Mason, S.S.C., Edinburgh; A. & W. Beveridge, Westminster.—Counsel for Respondents, Sir Robert Finlay, K.C., Hunter, K.C., Hon. W. Watson; Agents, Webster, Will & Co., S.S.C., Edinburgh; Grahames, Currey & Spens, Westminster.

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Lindsay and Others v. Summerlee Iron Company.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

408. Lindsay and Others *v.* Summerlee Iron Company.

Burgh—Dean of Guild—Glasgow Building Regulations Act 1900 (63 & 64 Vict. cap. cl.), sect. 60 (3)—Consent by Corporation to Erection of Building of Greater Height Than That Prescribed by Act—Appeal Against Consent to Dean of Guild—Observation by the Court as to Scope of Dean of Guild's Power of Review.

Appeal from the Dean of Guild Court at Glasgow.

(*Reported supra*, p. 306.)

Following upon the interlocutor reported *supra*, the Dean of Guild appointed the petitioners to intimate the said interlocutor to the Corporation of the City of Glasgow and to obtain from and lodge in process a Minute of said Corporation stating whether, as a matter of fact, the consent of the Corporation had been knowingly given to a building which, under sect. 62 of the Glasgow Buildings Regulation Act 1900, must be held as abutting on two streets. The Corporation having reported that such consent had not been knowingly given, the petitioners again applied for consent, and, after hearing the petitioners, the present respondents and another objector, the Corporation issued the following Minute:

The Corporation of the City of Glasgow intimate their consent, in terms of sect. 60 (1) of the Glasgow Building Regulations Act 1900, to the proposal of the petitioners to erect the building situated at 172–176 West George Street, extending from said street to West Regent Lane, as shown on the plans lodged in Court relative to said petition.

The present respondents appealed against this consent to the Dean of Guild in terms of the Glasgow Buildings Regulation Act 1900, sect. 60 (3). They stated that they were aggrieved by the said consent, *inter alia*, in the following respects:

. . . . (3) The erection of the buildings to the height proposed would be detrimental to the interest of adjoining proprietors and occupiers by unnecessarily restricting air space and light, and in the event of fire would become a serious danger to adjoining proprietors.

(4) No reasons exist on account of site or otherwise for relaxing the statutory height of the building, and the fact of its being more remunerative to the Summerlee Iron Company Limited to have increased height is no reason for such consent being granted.

(5) The granting of consent has resulted in the Corporation conferring an unnecessary pecuniary advantage on the Summerlee Iron Com-

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pany Limited, to the detriment of adjoining proprietors, and the amenity, health, and safety of the neighbourhood.

The Dean of Guild pronounced the following interlocutor:

Having heard parties upon the conjoined processes, the Dean of Guild, before answer, allows to the objectors a proof of their averments in Article 9 (3), (4) and (5) of their Note of Appeal, and to the petitioners a conjunct probation; appoints the evidence to be led on a day to be afterwards fixed, and, on the motion of the petitioners, and if and in so far as such leave may be necessary, and he has power to grant it, the Dean grants leave to appeal.

Note.—It appears to the Dean of Guild that his duty in the present position of this case is obvious from two sentences in the opinion of the Lord President. In remitting the case his Lordship said: "That if consent (*i.e.* the consent of the Corporation) had been given, and the Dean of Guild sees no reason to interfere with it, then all is right. If that consent has not been knowingly given, then of course the Dean of Guild in his turn would send it back to the Corporation, in order that they should consider the matter for the first time." By Minute No. 17 of process the Corporation stated that their consent had not been knowingly given to a building which under sect. 62 of the Act must be held as abutting on two streets. But by Minute No. 19/6 of process the Corporation intimate their consent to the proposal of the petitioners to erect the building situated at 172–176 West George Street, extending from said street to West Regent Lane, as shewn on the plans. That consent being now in process, the duty of the Dean is to say whether or not he sees any reason to interfere with it. The objectors take exception to the consent on several grounds. Some are technical; the others deal with what may be said to be the practical side of the matter. The Dean thinks it would be unfortunate if by any pronouncement of his upon the technical pleas the case would reach the court of review without all the relevant considerations upon the practical side of the matter having been ascertained. He has therefore before answer allowed a proof of the averments as to the detriment which the objectors would suffer by the building proposed to be erected by the petitioners being authorised.

The petitioners *appealed* to the Court of Session and *argued*: The Dean of Guild had already repelled the objections of the appellants on their merits, and as no new ground of objection was advanced, he was not entitled to reconsider his decision. Further, the consent of the Corporation, given after due hearing and consideration of the objections now urged, was not open to review by the Dean of Guild.

As regards the findings of the Dean of Guild, the fourth and fifth objections were irrelevant and should not be admitted to proof, and the third objection was such as should be disposed of by the Dean of Guild as a man of skill and without proof.

Argued for the Respondents: The review of the Dean of Guild under sect. 60 (3) was not similar to that of a Sheriff or Judge. His function was not that of deciding whether the Corporation had decided wrongly; he was entitled to take all considerations into view, whether these had been advanced before the Corporation or not. In the present case he was entitled to have the assistance of a proof in considering whether injury would be inflicted on neighbouring proprietors by the erection of buildings of the height proposed.

The Court *recalled* the interlocutor appealed against, *sustained* the appeal, and remitted to the Dean of Guild to proceed.

The Lord President.—My Lords, when this case was before us in this Division on the former occasion, we pronounced an interlocutor to this effect: "Recal *in hoc statu* the interlocutors of the Dean of Guild, dated 3rd June 1907, in the respective processes, and remit to him to consider whether as a matter of fact the consent of the Corporation has been knowingly given to a building which, under sect. 62 of the foresaid Act, must be held as abutting on two streets; and if he is satisfied that such consent has been so given, and does not propose to recal that consent in virtue of the powers given to him by said sub-sect. 3 of sect. 60 of the said Act, to dismiss the appeal taken to him, with or without expenses as to him shall seem just, and to grant the lining in the petition therefor." The case went back to the Dean of Guild, and, as the Dean of Guild was not certain as to whether, as a matter of fact, the consent of the Corporation had been knowingly given to a building which must be held as abutting on two streets, he asked the Corporation to that effect, as, indeed, was indicated as the appropriate course by the opinion pronounced by myself in that case. The result of that was that the Corporation confessed that they had not viewed the case from that standpoint, and therefore they quite rightly again considered the matter from the standpoint which the Court had given them, namely, that this was a building which was to be held as abutting upon two streets. Having done so, they then again gave their consent. Against that consent an appeal was again taken to the Dean of Guild so that he might, as it is expressed in the interlocutor, "recal that consent," if he wished to do so, under the powers of sub-sect. 3 of sect. 60.

Now, it is quite true that the Dean of Guild had already pronounced, so to speak, an opinion on the merits of this matter when the former consent was given, but I have no doubt whatsoever that technically the Dean of Guild was perfectly entitled, if he wished, to reconsider the matter, because the old consent was gone as inapplicable and this was a new consent; and I do not say a word against the technical propriety of the appeal being taken, in order that the Dean of Guild might this time refuse his consent if so advised. The Dean of Guild, however, upon that matter, has not, as yet, indicated

whether he consents or not, but he has pronounced an interlocutor to this effect: "Before answer, allows to the objectors a proof of their averments in Article 9 (3), (4) and (5) of their note of appeal." Now, the articles there referred to, of which proof has been allowed, are as follows: "(3) The erection of the buildings to the height proposed would be detrimental to the interest of the adjoining proprietors and occupiers, by unnecessarily restricting air space and light, and, in the event of fire, would become a serious danger to adjoining proprietors. (4) No reasons exist, on account of site or otherwise, for relaxing the statutory height of the building, and the fact of its being more remunerative to the Summerlee Iron Co. Ltd. to have increased height is no reason for such consent being granted. (5) The granting of consent has resulted in the Corporation conferring an unnecessary pecuniary advantage on the Summerlee Iron Co. Ltd. to the detriment of adjoining proprietors, and the amenity, health, and safety of the neighbourhood."

Before I deal with these averments perhaps it may be as well to say a word upon what I think the Dean of Guild has got to consider upon this matter. The section which gives the Dean of Guild appeal is the 3rd sub-section of the 60th section of the Glasgow Building Regulations Act (63 & 64 Vict. cap. cl.), which, after providing that the Corporation's consent shall be advertised, says it "shall not be acted on till twenty-one days after such publication; and the owner or lessee of any lands and heritages within one hundred yards of the site of any intended building who may deem himself aggrieved by the grant of such consent, may, within twenty-one days of such publication, appeal to the Dean of Guild, who shall have power to deal with the case as shall seem to him just." Now, the Dean of Guild made certain observations—not in this case, but in the last—as to what that appeal really meant, and we had not occasion on the last occasion to deal with that, so I shall deal with it now.

I do not think that the view that the Dean of Guild there took is quite correct. I think he took too restricted a view of his own powers. He seemed to think that, because the appeal was given from a public body to one person, namely, himself, all that he had to do was to see that the public body had not acted capriciously, or in any way *ultra vires*, but that he could not consider the matter on the merits. I do not think that there is necessarily any such limit. Nor do I think that there is anything to be surprised at in the legislature giving an appeal from a public body to one person, seeing that that public body fails in two respects: first, it is not a judicial body, and secondly, it is not a body that necessarily has among its numbers any member practically skilled in these matters—and seeing that the Dean of Guild enjoys both those advantages. The scheme of the statute seems to me clear enough. There are certain restrictions made upon height which are, I suppose, for the good of everyone concerned. Well, then, these restrictions are allowed to be dispensed with by the Corporation; and I think the matter which the Corporation in that question has to decide is a question, so to speak, of public policy. If they think that, in their view as custodiers of the town, it is a bad thing that the restriction should be dispensed with, then they will not give their consent; on the other hand, if they think there is no harm from the public point of view, they may dispense with the restriction and give their consent.

But then comes in the question of individuals; because there is no doubt that one person may have, from his local situation, a great deal more interest than another, even although the thing which is being dealt with is, so to speak, a matter of public interest. A very obvious illustration is this: it is a matter of public interest whether a certain street should be shut up, but it is very much more a matter of interest to the man who lives in a house near the street, and perhaps uses that street every day as a convenient way of getting to his business, than to somebody else, who is equally a citizen, but who lives two miles away at the other end of Glasgow. And therefore, I think quite properly, the statute said: "We must have a secondary consideration in the light of how this is going to affect private people." But then, my Lords, I think it is very necessary to say that I do not think this has anything to do with what may be called private people's legal rights. Private people's legal rights—rights of servitude, rights of prospect, and so on—have nothing to do with this matter, because they are, of course, perfectly safeguarded in the process of lining, which this is not. If a person has a servitude of light which is going to be affected by the building which is proposed to be put up, the proper place for him to appear is not in this question as to height, but in a question of decree for lining, and there he will have his right made good if he can. It must be remembered that these restrictions are purely statutory restrictions, and not under the common law at all. A man at the common law, if he is not restrained by other rights in his neighbour—of servitude or building conditions or something of that sort, all of which, as I have said, can be made good in the decree of lining—of course may build his house as high as the Tower of Babel. But then comes in this Building Regulations Act which says that, except on certain conditions, he shall not. Well, then, after the Town Council consents, the neighbour says: "But, then, this is going to affect me in a peculiar way." I think he has got a right to say so, and I think it falls within the province of the Dean of Guild to consider his objection in an appeal under sect. 60, sub-sect. (3); but I

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think he must show his hurt, not upon any ground of private injury—for that he must do in the lining—but upon what I may call the public ground, which he says presses upon him more severely than it would do upon other people.

I now revert to the Dean of Guild's interlocutor, and I first take the averments upon which he has allowed proof. I think that the third is in itself a good averment, that is to say: "The erection of the buildings to the height proposed would be detrimental to the interest of adjoining proprietors and occupiers by unnecessarily restricting air, space and light." I can imagine that a building could be so high and so big that it would, as a public matter, really hurt the air and light of the neighbourhood, and I think the adjoining proprietor should be able to say: "Well, that is so, and I am one of the people who would be specially hurt by it." I again call attention to the fact that a restriction of light does not mean a question of servitude. If he has got that, he must make it good in the lining. This must be a public detriment, but one which a particular person feels more than others. But it seems to me that averment 4 is no averment at all. Really, if I may say so without offence, it is ridiculous to allow proof upon averment 4, to prove a negative—"That no reasons exist." I cross that averment out altogether. Averment 5 seems to me to be, as to part of it, entirely irrelevant—the part where it talks about conferring unnecessary pecuniary advantages on the Summerlee Iron Company, for that is neither here nor there—and, so far as it is relevant at all, it seems to me nothing more than a repetition of averment 3 without the specification given in averment 3, because, whereas the detriment is explained in averment 3, it is not explained in averment 5 at all. I therefore cross out averment 5, because I think it has not added anything to averment 3. And that leaves averment 3 alone.

Now, as to the allowance of proof itself; while I want to make it perfectly clear to the Dean of Guild that we should certainly never interfere with him in taking the best means he can for the expiscation of a case, and while I also want to make it clear that there might be such specific averments as to particular things as, if not admitted, might make it perfectly proper for him to have a proof before he comes to his decision, yet it seems to me perfectly clear that the class of averment that is made in Article 3 is an averment which is not meant to be expiscated by putting people in the witness box; it is meant to be decided by the Dean of Guild himself as a practical man, for which reason it is that he is selected. Holding these views and expressing them so, I wish to say that I hope the Dean of Guild will not misunderstand me. I propose that we should recal the Dean of Guild's interlocutor and remit to him to pronounce his judgment, whether he thinks there is any reason for interfering with the consent which has been granted by the Corporation.

Lord M'Laren.—My Lords, I think it is necessary to keep in view that this is an appeal in a process which is preliminary to the regular application to the Dean of Guild Court for authority to build. I should have thought that it would be a more convenient mode of procedure if it had been enacted that the Dean of Guild, when the case comes before him for hearing, should be entitled, notwithstanding the consent given by the Town Council, to refuse the additional height upon public grounds. But that is not done; the provision is that there may be an appeal from the authority given by the Town Council to exceed the height prescribed for ordinary uses. Now I think, although this is not the ordinary Dean of Guild jurisdiction, it must have been intended that the Dean of Guild should proceed according to the same methods of enquiry and procedure as in his ordinary jurisdiction, because, if it had been an appeal in which the parties were expected to adduce expert evidence on either side, it would, I venture to think, be more convenient if that appeal had been to the Sheriff rather than to the Dean of Guild. The Dean of Guild, in his note, remarks that he considers it a somewhat anomalous thing that there should be an appeal from the whole Council to a single member of it, and so it would be if this were an appeal in which evidence were to be taken and dealt with as in a regular action. But then, in my view, that is not the intention of the legislature. In the present case it happens that the parties were heard before a committee of the Town Council upon the question whether the necessary consent should be given, but that was owing to the peculiar position into which the case had got. In the ordinary case, I take it, when the applicant goes to the Town Council in the first instance, there is no argument, and, if he makes a *prima facie* case before the committee of the Town Council, he may get their consent to the extension of the height of his building; and then that is safeguarded by the provision that there may be an appeal to the Dean of Guild Court at the instance of other parties. Now, that is not like an ordinary appeal from a whole body to one of its members, because the consent given in the first instance is given upon an *ex parte* application. I suppose it is thought more convenient that the hearing should be before a single member of the Town Council, and one who is specially conversant with these questions, rather than before the Town Council or its committee. In any case, as the appeal is given to the Dean of Guild, I think it must have been intended that he should proceed in the summary manner which is appropriate to his jurisdiction.

It would be very much to be regretted if in these applications the case should go through all the stages of an ordinary action.

I cannot help thinking that in allowing a proof the Dean of Guild was largely influenced by a consideration which he mentions in his note, that the proof might be useful in the event of the case going to a higher Court. There have been previous appeals in this case—I think this is Appeal C—and probably he contemplated that there would be appeals with other letters, and that the Court might need evidence to enable the point to be decided finally. But in the view which your Lordship has taken—in which I entirely concur—that this is to be treated as summary procedure, if cause can be shewn against the decision which the Dean of Guild has given, with the aid of the expert members of his council, we have always power to remit to a man of skill to give us such information as to enable us to check the conclusions to which the Dean of Guild has come. That is a power we have rarely had occasion to exercise, but it exists. And it is a better mode of dealing with these questions than by having a proof with half a dozen experts on each side coming to different conclusions. I therefore agree that this case should be remitted back for the purpose of having it decided by the Dean of Guild in a summary manner, in accordance with the practice of his Court.

Lord Kinnear.—My Lords, I agree with your Lordship in the chair, and I only desire to add a single observation with reference to the future procedure. I agree that the Court ought to be very slow to interfere with the discretion of the Dean of Guild, or any other magistrate, in the course of procedure which he has thought necessary to adopt in order to inform his own mind. But then I think that, on the remit which your Lordship proposes, the Dean of Guild will have a different question to consider from that which he disposed of in the interlocutor under appeal, because it is now fixed that two out of three of the averments which he thought ought to go to proof are irrelevant. The remaining averment raises a question of fact, but one on which the Dean of Guild himself is an expert authority. According to the ordinary course of procedure in this Court, in an appeal from the Dean of Guild Court, the usual method for reaching a decision of practical questions in this Court is to remit to the Dean of Guild to decide on an inspection of the premises, or on upon a consideration of the plans, if he thinks an inspection unnecessary. The question being limited, as it will now be by the judgment proposed, the Dean of Guild will not be precluded by his former judgment from taking the course which seems most expedient under the altered circumstances of the case. It will be for him to consider whether he is, or is not, in a position to pronounce his own opinion without extrinsic evidence. I therefore agree in the course your Lordship proposes.—13*th March* 1908.

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Lindsay and Others v. Summerlee Iron Company.

Lord Kinnear.

Counsel for Appellants, C. S. Dickson, K.C., Hon. W. Watson; Agents, Webster, Will & Co., S.S.C.—Counsel for Respondents, Cooper, K.C., Lippe; Agents, Erskine Dods & Rhind, S.S.C.

W. A. R.

FIRST DIVISION.

(The Lord President, Lords M'Laren and Kinnear.)

409. Watson's Executor *v.* Allan and Others.

I. Trust — Charitable Bequest — Uncertainty — Executor — Bequest to "Foreign Missions" in Five Separate Countries, "or Any Other in the Foreign Field Suitable" — Appointment of Executor — Provision Sustained as Direction to Executor to Select Foreign Missions on Which Benefit of Bequest Was to be Conferred—Dundas v. Dundas, 1837, 15 S. 427, Followed.

II. Trust — Charitable Bequest — Foreign Missions—Bequest to "Foreign Missions" Held to be Charitable Bequest —Wilson's Executors v. The Scottish Society for the Conversion of Israel, 1869, 8 M. 233, Commented On.

Reclaiming Note against an Interlocutor of Lord Mackenzie.

(Reported supra, p. 540.)

The claimants Robert Allan and others, the next of kin of the testator, reclaimed and *argued*: This was not a case of imperfect designation of a definite legatee where proof of the identity of the legatee was admissible. The terms of the bequest were too vague and general, and the bequest was therefore void through uncertainty. Nor should it be treated as a case where the testator had delegated to a trustee the power of selection of certain objects from a specified class, as the class of object intended was not sufficiently specified (*Crichton* v. *Grierson*, 1828, 3 W. and S. 329; *Dundas* v. *Dundas*, 1837, 15 S. 427; *Scottish Missionary Society* v. *Home Mission Committee*, 1858, 20 D. 634; *Blair* v. *Duncan*, 1901, 4 F. (H.L.) 1; *Macintyre* v. *Grimond's Trs.*, 1904, 6 F. 285, and 1905, 7 F. (H.L.) 90). The disjunctive clause "or any other in the foreign field suitable" gave an extension to the class of object inconsistent with the contention of the respondents. This was a bequest for religious purposes, and could not have the benefit of construction enjoyed by charitable bequests (*Blair* and *Macintyre*, *cit.*; *Murdoch's Trs.* v. *Weir*,

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1905, 13 S.L.T. 777; 1906, 14 S.L.T. 515; and 1908 (H.L.), 15 S.L.T. 515). *Esto* that the description of the class of object was sufficiently specific, the bequest still fell, as there was not sufficient delegation to a trustee of the power of selection. The appointment of Mr Watson was simply as the testator's executor, and no delegation of such power was expressed in the will, nor could such be implied from its terms (*Robbie's Judicial Factor* v. *Macrae and Others*, 1893, 20 R. 358).

Argued for the Respondents: There was a case of imperfect designation of a definite legatee or legatees, and the Lord Ordinary was right in allowing the respondents to prove that they were the actual legatees, intended to be benefited. There was no element of uncertainty, as the expression "Foreign Missions" had a plain meaning which gave sense to the will, and to which effect should be given by the Court (*Whicker* v. *Hume*, 1858, 7 Clark 124; *Scottish Missionary Society, sup.*; *Wilson's Exrs.* v. *Scottish Society for the Conversion of Israel*, 1869, 8 M. 233; *Miller's Trs.* v. *Kirkaldy*, 1905, 13 S.L.T. 73 and 454). The disjunctive clause did not extend the class of object which it was intended to benefit, or interfere with the identification of the class; it merely extended the field within which the benefit might be administered. In any event, the bequest should be treated as a delegation to the executor of the duty of selection amongst the class of object named. The identification of the class was sufficient (*Crichton* v. *Grierson*, and *Blair* v. *Duncan*, *cit.*) The bequest though not charitable *eo nomine*, was *de facto* charitable and should be construed as such (*Magistrates of Dundee* v. *Morris*, 1858, 3 M'Queen 134; *Pemsel* [1891], A.C. 531, per Lord Watson at p. 561), and there was a suitable appointment of a trustee to exercise the power of selection (*Low's Exr.*, 1873, 11 M. 744; *Scott* v. *Sceals*, 1865, 3 M. 1130).

The Court *recalled* the Lord Ordinary's interlocutor and *remitted* to the Lord Ordinary to allow the real raiser, if so advised, to lodge a condescendence and claim in order to the execution of the provisions of the will, and thereafter to proceed as accords.

Lord Kinnear.—The question in this case is whether a certain bequest is void by reason of uncertainty. The will is a very simple one, and whatever doubt may arise as to the efficacy of the bequest in dispute, its mere interpretation, in my opinion, does not present any serious difficulty.

The testator leaves certain legacies of no great amount to relations, and a legacy of £10 to a servant, and then he proceeds: "The residue of my property I give and bequeath for the benefit of Foreign Missions in India, China, Africa and South America, or any in the foreign field suitable. I appoint the Rev. W. Watson, Kiltearn, as my executor, at a remuneration of £20 stg." It appears to me that there can be no uncertainty as to the meaning of these words. I cannot think it doubtful that "Foreign Missions" in the mouth of a Scottish testator means an enterprise conducted by some church or association in this country for the propagation of the Gospel in foreign parts. The bequest, therefore, is, in my opinion, very clearly a bequest for the benefit of Foreign Missions. But then the testator does not define the particular missions which are to be benefited, nor the particular church or association by which these missions are to be conducted. It is a bequest in favour of Foreign Missions in general; and so considering it, I should agree with the observation of the Lord Ordinary that it is not sufficiently specific to be supported unless the testator has given a power to a trustee acting for him to select among the class of Foreign Missions those to which the bequest is to go. But then immediately following the bequest to the Foreign Missions there is the appointment of the Rev. W. Watson to be the testator's executor. This is a will in ordinary language, written by a layman, and in ascertaining what he means by appointing an executor I do not think that we are concerned at all with any technical difficulties arising from the distinction, if there be such in the present state of the law, between the office of a trustee and the office of an executor strictly so called. What the testator means is to appoint somebody who is to carry out the purposes of his will, and as mere matter of construction it appears to me that when he says "I give certain legacies to certain people, and give the residue for Foreign Missions, and appoint Mr Watson to be my executor," he means that Mr Watson is to execute all the provisions of the will, not only by paying the legacies to the persons named, but also by carrying out what is really in point of money the largest interest in the will, and so giving effect to the provision for the benefit of Foreign Missions.

As matter of construction that appears to me to follow, because I cannot imagine that the testator intended to appoint an executor to carry out the provisions of his will, and to exclude from the provisions which are so to be executed any one of those which the will contains. He is to carry into execution the will and every part of it, and that imports in my opinion a power to the executor to do whatever is requisite in order to carry out these provisions. I put this as mere matter of construction, but I add that since the passing of the Executors Act of 1900 the argument founded upon the difference between trustee and executor is no longer maintainable, because under that Act an executor has all the powers of a trustee.

The point, however, appears to me to be directly decided in the case of *Dundas* v. *Dundas*, 1837, 15 S. 427, which I think is entirely in point.

In that case, after leaving certain legacies, the testatrix provided as follows: "Any money left after paying all expenses I wish may be laid out on charities. I leave and bequeath to my nephew, John Dundas, the sum of £200 sterling, with power to see this will executed." It was held that the bequest, when combined with the appointment of the defender as executor, imported a discretionary power on his part to select the charities upon which the benefit was to be conferred. Lord Fullarton (Ordinary) says: "That in sound construction this must be held to import a discretionary power in the executor to make that selection of charities without which her will in regard to the immediately preceding legacy could not be carried into effect." Then he adds: "This construction, of course, brings the case within the rule established in the case of *Crichton* v. *Grierson* (1828), 3 Wilson and Shaw 329." Following that decision it appears to me that the question we have to determine is whether the bequest to Foreign Missions, with an appointment of executor which implies the power to carry out all the directions of the will, does or does not fall within the rule which the Lord Ordinary cites in *Crichton* v. *Grierson*, where the Lord Chancellor (Lord Lyndhurst) says, as quoted in *Blair* v. *Duncan*, 1901, 4 F. (H.L.) 1, per Lord Robertson at p. 5: "According to the authorities in the law of Scotland it is quite clear that a man may, in the disposition of his property, select particular classes of individuals and objects, and then give to some particular individual a power after his death of appropriating the property or applying any part of his property to any particular individuals among that class whom that person may select." The Lord Ordinary observes that giving effect to that rule the bequest in question is not sufficiently specific to be supported, and adds: "A bequest for religious purposes is not in Scotland construed as meaning a bequest for charitable purposes." There can be no doubt that these two words have different significations, but they are not mutually exclusive. A bequest for religious purposes may very well be a bequest for charitable purposes, and if there were any question as to the meaning of the words it appears to me that that is not a question which requires to be considered in this case. It is not necessary that we should define either the one or the other of these expressions exactly. If it were necessary, I myself think that since the decision of the House of Lords in the case of *Pemsel*, I should not be able to admit that the meaning of the word "charity" has been in this country so narrowed by popular usage as the learned judges who decided the case of *Baird's Trs.* v. *The Lord Advocate*, 1888, 15 R. 682, held that it was. But then, as I have said, I do not think that is a question we need to determine. It may very well be that a bequest for religious purposes in general could not be sustained as sufficiently specific even although a bequest for charitable purposes could be made effectual. But it does not follow that a will for a special purpose is the less capable of being sustained because that special purpose falls within the general description of religious purposes. The rule for the application of the doctrine laid down in *Crichton* v. *Grierson* appears to me to be found in a comparison of the recent decisions of the House of Lords — the cases of *Blair* v. *Duncan*, 1901, 4 F. (H.L.) 1; *Macintyre* v. *Grimond's Trs.*, 1904, 6 F. 285, and 1905, 7 F. (H.L.) 90; and *Murdoch's Trs.* v. *Weir*, 1908 (H.L.), 15 S.L.T. 857; 1906, 13 S.L.T. 777, and 14 S.L.T. 515. In the first of these cases the rule is stated with great precision by Lord Robertson, who says: "What has been established as regards the intervention of a trustee is thus stated by Lord Lyndhurst in *Crichton* v. *Grierson*, and the passage touches the very core of the present case." His Lordship then goes on to cite the passage quoted by the Lord Ordinary, and adds: "This is the rule which is to be applied in the present case, and the question is, has this testatrix done what Lord Lyndhurst describes: has she selected the particular class or the particular classes of objects among which her trustees are to select?" Applying that test to the will before them in which a bequest had been made for charitable or public purposes, Lord Robertson was of opinion, and the House was of the same opinion, that in making this bequest "this testatrix has done nothing like selecting a particular class or particular classes of objects. She excludes individuals, and then leaves the trustee at large with the whole world to choose from. There is nothing affecting any community on the globe which is outside the ambit of his choice." Therefore, in the application of the rule to that case the bequest was held to be too wide, because there was nothing approaching the particularisation of the class to be benefited.

A similar decision was given in the later case of *Macintyre* v. *Grimond's Trs.* The question concerned a bequest for religious purposes, which was also held to be too wide as embracing a great variety of possible objects without particularisation of the class. On the other hand, in the last case of all, in *Murdoch's Trs.* v. *Weir and Others*, the House of Lords came to a different decision, and the bequest was sustained, the Lord Chancellor putting the rule in this way: he says, with respect to the criticisms which are applied to charitable bequests: "All that can be required is that the description of the class to be benefited shall be sufficiently certain to enable men of common sense to carry out the express wishes of the testator." That is, therefore, the rule which is held to be established by *Crichton* v. *Grierson* and the subsequent cases, and the question to be put in each particular case is whether the description of the class to be bene-

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fited is sufficiently exact to enable an executor of common sense to carry out the express wishes of the testator. I cannot entertain any doubt that an executor of reasonable common sense and reasonable knowledge of such affairs as the will deals with will have no difficulty in determining whether any particular purpose is, or is not, a purpose falling within the class to be benefited by the bequest to Foreign Missions.

It is said that in order to have the benefit of the general rule the bequest must be what has been described as a charitable bequest. I do not think that is the true deduction from the leading decision of *Crichton* v. *Grierson*, because the Lord Chancellor in examining the whole series of the decisions cites a great number of cases which have no relation to charity at all. But if there be any particular favour which the law requires courts to shew in construing charitable bequests, then I am of opinion that this particular bequest now in question falls within that class. I think that is the necessary conclusion from the judgment of Lord Watson in the case of *Pemsel* (1891), A.C. 531, where his Lordship, after narrating the considerable number of legislative provisions, goes on to say "that Scotch trusts which are *ejusdem generis* with trusts falling within the statute of Elizabeth in England are charitable in this sense, that they are all governed by the same rules which are applicable to charitable trusts in England" (page 561). That a trust for the benefit of Foreign Missions falls within the description of "pious and godly uses," which, Lord Watson says, is equivalent to charitable uses, seems to me beyond all reasonable doubt.

But I think that has been directly decided by this Court in the case of *Wilson's Exrs.* v. *The Scottish Society for the Conversion of Israel*, 1869, 8 Macph. 233. The precise question to be determined in that case was different from that with which we are now concerned, because the testator had certainly designated the particular association to be benefited by the bequest, and did not merely bequeath, as I think this testator does, to a class of associations among which his trustee is to select. But the point for which I cite the decision is that in considering how far effect should be given to the evidence adduced for the purpose of identifying the particular Society as that which the testatrix intended to benefit, the Lord President treated the case as a charitable bequest, and upon that ground only finds it possible to give weight to evidence which, if he were dealing with another class of bequests, he would not have thought sufficient. His Lordship says: "Having arrived at the conclusion that the testatrix, in making a charitable bequest of this kind, intended to give her money to some society for promoting the conversion of the Jews, and that there are several societies more or less nearly answering to the description in the will, it is the duty of the Court to decide which of them shall gain, even though they are not all claiming in this process, and although we can only arrive at a decision by reasonable conjecture as to her probable meaning"; and on that principle, which, in the last sentence of his opinion, he says is not entirely satisfactory to his mind as a lawyer, he nevertheless founds his judgment. It is to be observed that notwithstanding the somewhat restricted meaning which he found it necessary to put upon the word "charity" in construing the Income Tax Acts, the Lord President has no hesitation in describing the bequest for the conversion of the Jews as a "charitable bequest"; and on that ground he thinks it proper to follow the course of the decisions requiring bequests for charities to be favourably interpreted by the Courts.

I think we ought to follow the same rule in this case, and that we must therefore find that the residuary bequest of the testator when it is combined with the appointment of the real raiser as executor, imports a discretionary power on his part to select the missions on which the benefit of the bequest is to be conferred. He is of course to exercise his discretion as a trust committed to him, and not merely according to his own favour for one or other association for prosecuting Foreign Missions. It is a discretion which, as I read the will, the testator intended to confer upon him, and which he is therefore empowered to exercise. Taking this view, I think it follows that the Lord Ordinary's interlocutor ought to be recalled. The Lord Ordinary has allowed parties a proof of their averments. Now the averments to be proved are averments made by the Established Church of Scotland on the one hand and the United Free Church on the other as to certain circumstances in the history of this testator which are supposed to indicate a favour on his part either for the Established Church or for the United Free Church. If the question were whether this testator intended to benefit one or other of these Churches to the exclusion of the other or to the exclusion of other missionary associations, I am not persuaded that the facts specified would aid the Court very much in forming a judgment upon that question. They would come to nothing more than evidence which might suggest to the mind of a judge a conjecture in favour of one or other of the Churches. But since I hold that the testator did not intend to favour either Church to the exclusion of the other, but Foreign Missions generally, it is obvious that the proof allowed could not assist the Court in coming to a conclusion.

I do not think it would be proper at this stage to repel the claims of these two Churches. While each has stated its own case they have combined to state a case as against the next of kin in support of the validity of the bequest, however it is to be administered, and I think it would be

premature to pronounce any judgment which would put them out of Court at any further stage which must be reached before final judgment can be given.

I suggest that it would be proper to recal the Lord Ordinary's interlocutor and to remit to him to allow the real raiser, if so advised, to lodge a claim in order that the trusts of the will may be executed, and thereafter to proceed as shall be just. The parties are in Court, and I think they ought to be allowed to remain in the process until we see what course the real raiser may be advised to take.

The Lord President.—I agree entirely with the opinion which Lord Kinnear has just delivered, and I only propose to add a very few words. It is impossible, in my opinion, to read the will and to suppose, as the Lord Ordinary has done, that this is a case of a certain scheme, or schemes, insufficiently designed, and that the claimants are entitled to prove whom the testator intended to benefit. My reason is that the phrase "or any other in the foreign field suitable" clearly points, I think, to a power of selection somewhere. Accordingly I cannot agree with the propriety of allowing a proof to substantiate the averments to which Lord Kinnear has alluded, because I do not think it would forward the case one iota. The general question is, whether the bequest shall stand. Now as to the general rule, of course, there is no doubt. It is the rule laid down by the Lord Chancellor in *Crichton* v. *Grierson*, 1828, 3 W. and S. 329. But then it was argued that this bequest fails in two particulars.

It was said that there was not a selection of a particular class of objects, not a sufficient specification. I think there is, because I agree with what Lord Kinnear says, that Foreign Missions in the mind of a Scottish testator has a perfectly well understood meaning. It does not seem to me to help the matter to introduce the discussion which was handled by the House of Lords in *Blair* v. *Duncan* and *Macintyre* v. *Grimond's Trs.*, because there is here no question as to the interpretation of "religious." Of course it has now been decided that a bequest for "religious purposes" is too wide to be given effect to. That does not mean that you may not have a perfectly well defined purpose which might be properly characterised as a religious purpose. And accordingly it seems to me that a bequest to Foreign Missions is sufficiently defined, and that it is not hurt by saying that it is a religious purpose. Then comes the second alleged defect, that there is here no power of selection. But there is the appointment of an executor. It is quite true that it is not said that that executor is to do the choosing, but then there comes in the other canon, namely, that the Court will always help the execution of a charitable bequest. There again I agree with Lord Kinnear that a bequest of which it is possible to say that it is a religious bequest may also be a charitable bequest. I have no doubt that this is a charitable bequest, and if that is so, then the Court will be helpful, so far as machinery is concerned, to have the purpose carried out. In other words, we have a direct application of the old authority of *The Magistrates of Dundee* v. *Morris*, 1858, 3 Macq. 134, a Dundee charity, and I think the very recent case of *Murdoch's Trs.* v. *Weir*. Accordingly I concur with what your Lordship has proposed. But in case there is any doubt about it, I should like to explain that the pursuer and real raiser should be allowed to lodge a claim, and it follows that if he does lodge a claim in accordance with the judgment pronounced his claim will be sustained. It is not because there is any doubt about that that Lord Kinnear proposes at this stage not to repel the claims of the two Churches. It is only because one cannot force Mr Watson to make a claim, and it would not be right to have the multiplepoinding disappear altogether. Should Mr Watson not do so, it would then be for the Churches to make some other proposition, such as to move for the appointment of a judicial factor. There is no doubt that the effect of this judgment is that if Mr Watson puts in a claim his claim will be sustained.

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Watson's Executor v. Allan and Others.

The Lord President.

Lord M'Laren. — I agree in the judgment proposed. Apart from the power of selection, I should not have been disposed to sustain the bequest to Foreign Missions as sufficiently precise to satisfy the rule which has been laid down in many cases, that there must be not only specification of a definite class representing the object, but also a power of selection amongst the various bodies professing to carry out the object which the testator had in view. I should have great hesitation in expressing an opinion which differs from that of Lord President Inglis; but so far as his Lordship, in the case relating to the *Society for the Conversion of Israel*, 1869, 8 Macph. 233, professes to apply the principles of interpretation applicable to charitable trusts to a Society whose object was solely the conversion of people from one form of religion to another, I should wish, at all events, to reserve my opinion: first, because his Lordship says that these considerations were not altogether satisfactory to his own mind; and secondly, because it does not appear to me that the case in question was one in which the principle of the special construction of charitable trusts would arise. It was a case of the identification of a particular Society which was described in general terms, and was not a case of the determination amongst a class of objects indicated in general terms of the particular object to which the fund was to be appropriated.

While I should not be of opinion that a bequest for purely religious purposes was entitled to the benefit of the benignant construction

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accorded to charitable trusts, it may very well be that the objects indicated are partly charitable and partly religious, or partly secular objects other than charity. I suppose it is generally known that the Foreign Missions of the Scottish Churches have education as one of their principal motives, and in Africa especially they have been very successful, whether for good or for harm, in educating the Kaffir races to the ordinary standard of education which prevails amongst the European population. It may very well be that so far as the educational purpose is concerned a bequest of this kind might receive favourable interpretation, and I should certainly not hesitate to say, where the primary object was charity or education, such as a school or college, that the institution would be entitled to the benefit of the "charitable" rule of construction, although it was required that there should be religious services conducted, or even a chaplain appointed. Each case must, of course, depend upon its special circumstances, and the character of the body or class of bodies indicated by the testator. In the present case I think there is no difficulty whatever, because missions, in the sense in which the testator has obviously used the word, are a sufficient limitation of a definite class; and then of course there is the appointment of an executor, which is equivalent to the power of selection. I therefore agree that if a claim is put in by the executor, it must be sustained.—17*th March* 1908.

Counsel for Robert Allan and Others, Claimants and Reclaimers, Dickson, K.C., Macmillan; Agent, Alex. Ross, S.S.C.—Counsel for The Church of Scotland, Claimants and Respondents, Clyde, K.C., Hon. W. Watson; Agent, Alan L. Menzies, W.S. —Counsel for the United Free Church of Scotland, Claimants and Respondents, Clyde, K.C., Cowan; Agents, Cowan & Dalmahoy, W.S.—Counsel for Pursuers and Real Raisers, Chree; Agent, Harry H. M'Bean, W.S. W. A. R.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

410. Pybus *v.* Mackinnon.

Slander — Relevancy — Factor Accused of Being "Unfaithful" — "The Unjust Steward" — Innuendo of Dishonesty — Privilege—Master and Servant—Malice —Relevancy of Averments of Malice— Issue of Slander Disallowed.

Reclaiming Note against an Interlocutor of Lord Guthrie.

(*Reported supra, p.* 846.)

This was an action of damages brought by a factor against his employer for slander, and *separatim* for assault. The issues of slander allowed by Lord Guthrie appear in the previous report.

The pursuer, by minute, withdrew the second and third issues.

The Defender *reclaimed*, and *argued* that the remaining issue of slander should be disallowed. The words complained of would not bear the innuendo of dishonesty; in any event the words were spoken on a privileged occasion; there was no relevant averment shewing malice. The mere insertion of the word "maliciously" would not make a relevant case of malicious slander (*Ingram* v. *Russell*, 1893, 20 R. 771). The subsequent charges founded upon by pursuer were too remote, being made long after the charge founded on in the issue, to shew malice at the time the latter was uttered. The defender also referred to the authorities cited in the last report.

The Pursuer *argued* that the words could bear the innuendo of dishonesty, and that the averments in Conds. 2, 4 and 5 were sufficient to infer malice. These were to the effect that in 1905 the defender had conceived an animus against all the servants who had worked for him, including the pursuer, and that in 1907 he invented imaginary grievances against the pursuer and abused him in general terms, culminating with the incident founded on in the issue. He further argued that the averments in the subsequent condescendences, shewing that the defender had repeated his accusations of infidelity to various third parties, threw a light upon his conduct and attitude of mind at the time of that incident, and were therefore relevant to prove malice.

The Court *recalled* the interlocutor of the Lord Ordinary in so far as allowing an issue of slander, and *approved* the issue of assault, which was not disputed.

The Lord President.—An issue of assault has been allowed here, and the only question is whether there is to be an issue of slander as well. The statement complained of was uttered to the pursuer alone, and it has often been observed that the law of Scotland differs from other systems in allowing actions of slander in such circumstances. But while that is so, it is by no means expedient that vague averments as to what was said should be admitted to probation.

I think the statements of the pursuer here are much too vague, and while I am not to be taken as laying down that to call a man an unjust steward—especially a man who has acted in the capacity of a steward or factor—is not slander, the charge that was made here was so mixed up with the parable that it is really quite impossible to hold it as tantamount to conveying any imputation of dishonesty. I think, therefore, that the pursuer's averments are too vague to be admitted to probation.

I also think they fail in another respect—

they have no sufficient substratum of malice, the occasion on which the statement was made being clearly privileged. I entirely agree with the view expressed by Lord M'Laren in the case of *Ingram* v. *Russell*, 20 R. 771, that it is not enough to use the word maliciously to make a relevant case of malicious slander, but that a circumstantial case of some kind must be set forth.

On both grounds, therefore, I am of opinion that the issue should be disallowed.

Lord M'Laren.—I concur. I would only add that while the law of Scotland does allow an action of slander for defamatory statements made to the pursuer himself, we apply to such cases a different standard of comparison from that which is applicable where the language complained of is spoken in the presence of others, who might take the words used seriously.

I have never known an issue allowed in relation to language such as was used here except when other persons were present who might be led to form an unfavourable opinion of the pursuer's character.

Lord Kinnear.—I agree with your Lordship. The allusion complained of conveys no definite imputation of a slanderous character. It might have different meanings to different minds; and the pursuer cannot prove his innuendo by evidence of the impression conveyed to persons who heard it, because nobody heard it except himself. I also agree that if this were doubtful, there is no relevant averment of malice.—19*th March* 1908.

Counsel for Defender and Reclaimer, Horne; Agents, Carmichael & Miller, W.S.—Counsel for Pursuer and Respondent, G. Watt, K.C., Constable; Agents, Oliphant & Murray, W.S.

A. S. P.

OUTER HOUSE.

(*Lord Johnston.*)

411. Robertson (Official Liquidator of R. & W. Falconer Ltd.) v. Drummond and Others.

Company — Liquidation — Preferential Claims—Order of Priority in Ranking Preferential Claims — Insufficiency of Assets—Postponement of Liquidator's Remuneration to Parochial Rates, Servants' Wages, Law Expenses, etc.—Companies Act 1862 (25 & 26 Vict. cap. 89), sect. 110.

Petition and Answers.

R. & W. Falconer Ltd., tinplate manufacturers in Edinburgh, went into voluntary liquidation on 3rd November 1906, and Mr Allan Drummond, accountant, was appointed liquidator. Immediately thereafter a petition was presented to the Court by certain creditors for compulsory winding up, and by interlocutor of the First Division, dated 13th November 1906, the Court continued the voluntary liquidation under supervision, superseded the voluntary liquidator, and appointed Mr George Allan Robertson, C.A., as liquidator in his place. The official liquidator realised the whole assets of the Company, amounting to £549, 0s. 1d., a sum insufficient to pay the preferential claims.

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On 5th February 1908 the liquidator presented to the Court a scheme of ranking in which he proposed the following order:

A. Expenses of realisation of the assets of the liquidation:
   (1) Legal expenses incurred by the liquidator to his law agents.
   (2) Liquidator's remuneration.

B. Expenses of the liquidation ranking *pari passu*:
   (1) Estimated legal expenses incurred or still to be incurred by the liquidator.
   (2) Legal expenses of the petitioner and respondents to the petition of winding up the Company.

C. Preferable claims in the liquidation:
   (1) Parochial and other rates.
   (2) Wages of servants and employees of the Company.
   (3) Trade accounts for goods supplied to the order of the voluntary liquidator.
   (4) A sum due to the British Linen Bank on an account-current opened by the voluntary liquidator in name of the Company in liquidation.

This scheme of ranking was objected to by the other parties, and the following authorities were quoted at the hearing: *Edinburgh Pavilion Co. Ltd.* (*in liquidation*); *Whigham* v. *Walker*, 1906, 14 S.L.T. 61; *Scottish Drug Depôt* v. *Fraser*, 1905, 7 F. 646; *Northern Distilleries Co.*, 1901, 9 S.L.T. 213; *London Metallurgical Co.* [1895], 1 Ch. 758; *Audley Hall Cotton Spinning Co.*, L.R. (1868), 6 Eq. 245.

The Lord Ordinary *ranked* the claims in the following order, after deducting the sum of £74, 13s. 11d., which he held to be the expenses of the liquidator's law agents incurred in connection with the liquidator obtaining full possession of the Company's estate: (1) The expenses of the petitioning creditor and respondents to the petition for winding up *pari passu*; (2) the sums found to be due to trade creditors of the voluntary liquidator and to the British Linen Bank *pari passu*; (3) the account of the liquidator's law agents, after crediting thereto the above-mentioned sum of £74, 13s. 11d.; (4) local rates and taxes and wages due to employees.

Lord Johnston (after ranking the claims in the order above given).—As these rankings will more

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than exhaust the funds in the liquidator's hands, it would be futile to remit his accounts for audit or to fix his remuneration, and he must be content to forego remuneration; the creditors must be content to forego an audit of his accounts unless they are prepared to provide the necessary cost of this.—*7th February* 1908.

Counsel for the Liquidator, Cooper, K.C., Mackintosh; Agents, Pearson, Robertson & Findlay, W.S.—Counsel for Petitioning Creditors (Fallons & Co.), Lippe; Agents, Scott & Glover, W.S.—Counsel for R. & W. Falconer Ltd., D. Anderson; Agents, J. F. Weir & Robertson, S.S.C. —Counsel for the Voluntary Liquidator, J. R. Christie; Agent, H. L. Warden, S.S.C.—Counsel for Trade Creditors of Voluntary Liquidator, Wilton; Agent, R. H. Wood, S.S.C.

R. S. B.

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(*Lord Guthrie.*)

412. Tait *v.* Gray.

I. EXPENSES—JUDICIAL FACTOR—CLAIM BY BANKRUPT ON ESTATE UNDER JUDICIAL FACTOR—TRUSTEE IN BANKRUPTCY SUCCESSFULLY OPPOSED BANKRUPT'S TITLE TO CLAIM—EXPENSES FOUND DUE AGAINST FACTORY ESTATE.

II. JUDICIAL FACTOR—DUTIES—PROCESS CONCERNING FACTORY ESTATE—COMPETING PARTIES—DUTY OF JUDICIAL FACTOR TO INFORM HIMSELF OF STEPS IN THE PROCESS, ALTHOUGH NO DIRECT INTEREST TO FACTORY ESTATE.

This was an action wherein reduction was sought of interlocutors finding expenses due by a judicial factor who was respondent in a note in the Bill Chamber in the factory process, but had lodged no answers, to another respondent who had lodged answers and successfully opposed the conclusions of the note.

On 19th July 1901, John Scott Tait, C.A., was appointed judicial factor on the estate of the Incorporation of Tailors of Edinburgh. Robert Gillespie Muir was entitled to and in receipt of an annuity from the funds of the Incorporation, and on 7th January 1907 he presented a note in the factory process claiming to have that annuity increased to a sum of £330. The note was served upon the judicial factor, who accepted service thereof and appeared by counsel at the first subsequent enrolment of the note, but only to object to an inaccuracy in the designation of the said R. G. Muir. He did not lodge answers or dispute Mr Muir's right to an increased annuity. Answers were, however, lodged by John Bird Gray, C.A., the trustee in bankruptcy of the said R. G. Muir, who disputed Mr Muir's title to uplift said annuity. The judicial factor having no interest in the decision of the question whether Mr Muir or his trustee in bankruptcy was entitled to uplift said annuity, made no further appearance in the proceedings following on the note.

On 21st March 1907 the Lord Ordinary on the Bills pronounced the following interlocutor:

The Lord Ordinary officiating on the Bills having resumed consideration of the note for Robert Gillespie Muir, No. 58 of process, and minute and answers for John Bird Gray, C.A., trustee on the sequestrated estate of the said Robert Gillespie Muir, Nos. 60 and 63 of process, and heard counsel thereon, refuses the note, and decerns; finds the respondent, the said John Bird Gray, entitled to expenses out of the estate of the Edinburgh Tailors' Incorporation mentioned in the note, and remits the account thereof, when lodged, to the Auditor to tax and to report.

(Signed) CHARLES J. GUTHRIE.

The present action was brought by the judicial factor to reduce said interlocutor in so far as it found the respondent entitled to expenses against the estate under his charge, and also a subsequent interlocutor approving the Auditor's report on the account of expenses of the said respondent and decerning against the present pursuer for payment thereof as judicial factor foresaid.

There was no crave for expenses as against the estate of the Incorporation of Tailors in the note, and no notice was given to the judicial factor personally that a motion was to be made for a decree of expenses against the estate.

The Pursuer *argued* that he had received no notice of the motion asking for expenses against the factory estate, and that as there was no crave for such expenses in the note, and as he did not lodge any answers to or oppose the conclusions of the note, the interlocutor should be reduced. The Court was not entitled to give expenses where an action was undefended and there was no crave for expenses in the summons (Lord Glenlee in *Heggie & Co.* v. *Stark*, 1826, 4 S. 518, new edition, p. 518). The position here was exactly analogous, the factor having lodged no answers and there being no crave for expenses against the factory estate. In this case the question argued before the Lord Ordinary was which of two parties was entitled to payment of the increased annuity. The judicial factor having no interest in that question, the expense of watching these proceedings would not have been a proper charge against the estate.

The Defender *argued* that it was the duty of the judicial factor as an officer of Court to be represented at all hearings which affected or might have affected the estate; the Court has absolute discretion with regard to expenses and can grant them without hearing parties (*Kerr* v. *Employers' Liability Assurance Corporation*, 1899, 2 F. 17).

The Lord Ordinary *repelled* the reasons of reduction, and *found* the defender entitled to expenses against the pursuer as judicial factor,

and authorised him to charge these expenses and his own expenses against the factory funds under his charge.

Lord Guthrie. — Neither side moved for a proof. I must, therefore, take this case on the footing that the interlocutors of 21st March and 6th June 1907 under reduction were not expressed in the way complained of as the result of any blunder or misapprehension, but were duly considered. Further, it is admitted that no special notice was sent to the complainer of the diet on 21st March 1907, when the first interlocutor in question was pronounced, and that no intimation was given to him at any time that expenses would be moved for out of the estate of the Edinburgh Tailors' Incorporation, in charge of the pursuer as judicial factor.

In these circumstances, the pursuer's first plea is as follows: "The said pretended decree or interlocutor, having been obtained or issued without any notice or intimation to the pursuer, to which notice or intimation he was legally entitled, decree of reduction should pass as concluded for."

I negative the pursuer's contention, *first*, because he was not legally entitled to any special notice or intimation; and *second*, because, if he was, he was bound to have informed himself of the terms of the interlocutors in question in time to have reclaimed against them, and, not having reclaimed, he is now barred from questioning them.

On the first point, I cannot assent to the view that a judicial factor is not bound, as the officer of Court in charge of the estate, to keep himself informed, both of what is proposed to be done, and of what is actually done, in all matters directly or indirectly concerning the estate. In this particular case a note was presented in the petition under which the pursuer was appointed; he accepted service of that note, and he actually appeared on at least one of the enrolments. I think the pursuer was bound to watch the whole proceedings in connection with that note, and, when an application was made in general terms for expenses, he was bound to have seen that any objection he had to expenses being charged against the estate under his charge was duly stated. Had such an objection been stated, it might or might not have been favourably entertained. Looking to the fact that the bankrupt was, in one view, the only beneficiary entitled to the income of the estate, there was at least room for maintaining, in a matter so entirely in the Lord Ordinary's discretion, that the convenient and reasonable course was to charge the expenses in question on the estate of the Incorporation.

But if the pursuer had any right to notice before the interlocutor was pronounced, he had an opportunity of stating this objection to the Inner House, and he failed to avail himself of it. I cannot doubt that a judicial factor is bound to make himself acquainted, as soon as it is pronounced, with every interlocutor relating to the estate under his charge. I agree in this matter with the view presented in Answer 9 [viz. That it was pursuer's duty to have informed himself of the terms of the judgment by procuring a copy of the interlocutor]. The pursuer makes no answer to that statement. If he did not see the interlocutors in time to reclaim, that was his own fault, for which he alleges no excuse; if he did see them, then he must be held to have waived any objection he may have had.—20*th March* 1908.

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Counsel for Pursuer, Mackay; Agents, W. & F. Haldane, W.S.—Counsel for Defender, Graham Stewart, K.C., J. H. Henderson; Agent, W. Considine, S.S.C. A. S. P.

FIRST DIVISION.

(*The Lord President, Lords M'Laren and Kinnear.*)

413. Gillespie *v.* Riddell.

I. ENTAIL—LEASE — SHEEP FARM — OBLIGATION BY HEIR OF ENTAIL IN POSSESSION GRANTING LEASE OF ENTAILED LANDS TO TAKE OVER SHEEP STOCK AT TERMINATION OF LEASE—OBLIGATION HELD NOT BINDING ON SUCCEEDING HEIR—PANTON v. MACKINTOSH, 1903, 10 S.L.T. 763, FOLLOWED.

II. SUCCESSION — LIABILITY FOR TESTATOR'S DEBTS — SUBSIDIARY LIABILITY OF SPECIAL LEGATEE—DECLARATOR AGAINST SPECIAL LEGATEE HELD INCOMPETENT WHERE GENERAL REPRESENTATIVES OF TESTATOR DOMICILED ABROAD HAVE NOT BEEN DISCUSSED.

Reclaiming Note against an Interlocutor of Lord Salvesen.

(*Reported supra*, p. 678.)

The Defender *reclaimed* and *argued*: This obligation was not one which was prestable against an heir of entail in possession. It sought to put upon the entailed estate a debt which was not covered by the exception to the prohibition against contracting debt provided by the entail. Such a debt was a personal debt of the granter of the lease, and transmitted only against his singular successors. The heir of entail in possession stood in the relation of singular successor to the granter of the entail, but not to any other heir of entail. An obligation undertaken by one heir of entail must, in order to transmit against subsequent heirs of entail, be capable of being made, and must have been made, by possession, a real right. This rule had been applied to the analogous case of stipulations as to meliorations, which it was settled did not transmit against an

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heir of entail (*Dillon* v. *Campbell*, 1780, M. 15,432; *Webster* v. *Farquhar*, 1791, Bell, 8vo Ca. 207; *Taylor* v. *Bethune*, 1791, Bell, 8vo Ca. 214; *Moncreiff* v. *Tod & Skene*, 1825, 2 S. 113 and 1 W. & S. 217; *Fraser* v. *Fraser*, 1825, 4 S. 73, 1827, 5 S. 722, 1830, 8 S. 409, and 1831, 5 W. & S. 69; *Breadalbane* v. *Jamieson*, 1877, 4 R. 667, per Lord Deas at p. 675 and Lord Shand at p. 684; *Learmonth* v. *Sinclair's Trs.*, 1878, 5 R. 548; *Fraser* v. *Maitland*, 1824, 2 S. App. 37). Nor was an heir of entail adopting his predecessor's lease bound by those stipulations which it contained which could not validly be made to affect the entailed estate (*Kerr* v. *Redhead*, 1792, Bell, 8vo Ca. 202, rev. 1794, 3 P. App. 309; *Mackenzie* v. *Mackenzie*, 1849, 11 D. 596, per Lord Fullerton at p. 600). The terms of the Entail Amendment Act 1878, which in sect. 1 provides for the relief of the executor by the succeeding heir of entail of certain obligations undertaken to tenants with regard to expenditure upon the entailed estate, imply that no such obligation of relief exists apart from the statute, and that such obligation is confined to the objects of expenditure there enumerated, of which the present is not one.

Argued for the Respondent: The binding force of the stipulation in question did not depend upon the power of an heir of entail to burden, or on the liability of a succeeding heir of entail for his predecessor's obligations, but depended upon the relation of landlord and tenant validly created by the lease. Granted that the heir of entail in possession has power to grant leases which create the relation of landlord and tenant between a succeeding heir and the tenant, then he can bind the succeeding heir with all the stipulations necessary for the creation of that relationship. The present stipulation was one *ex necessitate* of the lease. The decisions upon meliorations had no application. Stipulations as to meliorations were not common, still less universal, whilst the respondents were prepared to prove that such a stipulation as the present was necessary, and was by invariable custom inserted in all leases on this estate. The obligation was such as would transmit against a singular successor of the granter (*Fraser* v. *Maitland*, *cit.*; *Bell* v. *Lamont*, 14th June 1814, F.C.; *Maclaine* v. *Stewart*, 1898, 36 S.L.R. 233, 1899, 37 S.L.R. 623), and where such an obligation was of the nature of an ordinary act of administration, customary and necessary for the reasonable enjoyment of the estate, it would transmit against heirs of entail (*Queensberry Leases*, 1819, 1 Bligh 339, per Lord Eldon at pp. 459, 461, and Lord Redesdale at p. 502; *Waterson* v. *Stewart*, 1881, 9 R. 155; *Queensberry* v. *Montgomery*, 18th Feb. 1814, F.C.; *Learmonth* v. *Sinclair's Trs.*, *cit.*, at p. 560; *Breadalbane* v. *Jamieson*, *cit.*). The Lord Ordinary was wrong in dismissing the third and fourth conclusions. The rule that general disponees must be discussed before special legatees (Erskine, III. 8, 52) was merely one of convenience. General disponees and special legatees have been sued together (*Weir* v. *Parkhill*, 1738, M. 5857), and a declaratory decree as to the liability of a special legatee was competent (*Burnet* v. *Burnet*, 1854, 16 D. 780). In any event, in view of the special hardship of the case, the respondent should be granted this declarator in order that he might know his right and be able to take the necessary steps with regard to his sheep stock.

The Court *recalled* the Lord Ordinary's interlocutor, *assoilzied* the defender from the declaratory conclusion that the obligation in question was binding upon her as heiress of entail in possession, and *quoad ultra* dismissed the other conclusions of the summons.

Lord Kinnear.—This is an action at the instance of the tenant of a sheep farm on the entailed estate of Sunart in Argyllshire, for the enforcement of an obligation undertaken by the lessor, the late Sir Rodney Riddell, the heir of entail in possession at the date of the lease. The lease was for fifteen years from Whitsunday 1903, with an option to either party to terminate at the end of the fifth year; the defender, Miss Louisa Riddell, who is now heir in possession, has given notice to terminate at Whitsunday next; and the pursuer maintains that by force of the obligation in question she is bound, as heir of entail in possession, to take over his sheep stock at the same price as he paid on his entry for the sheep stock then on the farm. The primary conclusions of the summons are thus directed against the present heir of entail. But there are two subsidiary conclusions for declarator: first, that the whole heritable and moveable estate of the late Sir Rodney is liable for the obligation; and, secondly, that Miss Riddell is liable as a special legatee under his will, to the extent of the value of her special legacy. These last conclusions, the third and fourth, the Lord Ordinary has dismissed as incompetent; and I believe that all your Lordships are satisfied of the soundness of that judgment. If a debt is to be made good against the estate of Sir Rodney Riddell, the proper contradictors are his testamentary trustees and executors, and an individual legatee cannot be called upon to discuss the validity of a claim against the general estate, which may or may not affect her particular legacy, in an action to which the general representatives of the testator have not been made parties. The Lord Ordinary's observation appears to be perfectly just, when he says that the pursuer's proper course, if he has a claim against the estate, is to sue the trustees and executors in their own *forum*.

We can therefore express no opinion in this case as to the liability of Sir Rodney's personal

representatives. They are not called as defenders, and no judgment we could pronounce in this action would be *res judicata* against them. The only question with which we are concerned is the liability of the heir of entail.

The Lord Ordinary says it is singular that this question has not hitherto been made the subject of direct decision; and observes that it may be assumed in the pursuer's favour that heirs of entail in possession have not hitherto disputed the binding character of similar obligations. This is not, perhaps, a very safe method of reasoning, because it is as easy to assume that claims against heirs of entail have never been pressed, as that they have always been conceded. But the question arose directly for decision in *Panton* v. *Mackintosh* (1903, 10 S.L.T. 763), and was decided by Lord Kyllachy in favour of the heir of entail. This is an authority which we regard with the highest respect; but since it is not binding on this Court, it will be proper to consider, in the first place, how the law stands, apart from Lord Kyllachy's decision.

If this question is to be considered a novel one, it is, however, to be solved by principles that are well settled. The general rule is established by a great mass of authority, that the personal contracts and obligations of heirs of entail are not binding on their successors in the entailed estate; and this rests on the obvious principle that a succeeding heir who takes his interest in the estate from the entailer alone, does not represent a preceding heir from whom he takes nothing whatever. It is true that, subject to certain limitations, leases granted by an heir in possession are binding on his successor. But this does not depend on contract or obligation. It is because the lessor in the lawful administration of his own property has given the lessee a real right which will be effectual against all subsequent owners. But to make it valid it must be made real, or, in other words, the tenant must have entered on possession according to the general rule of law, which is thus stated by Lord Westbury in *Campbell* v. *M'Lean*, 1870, 8 M. (H.L.) 40: "To make it valid as against the singular successor, the grant must be brought within the operation of the statute of 1449—that is, it must be shewn to be a real right. A lease, by the law of Scotland, is a personal contract; and the entry of the intended tenant upon the property intended to be demised is equivalent to seisin, and the right thenceforth becomes a real right." Accordingly, it was held in *Kerr* v. *Redhead*, 1792, Bell's 8vo Ca. 202, rev. 1794, 3 Pat. 309, that while a lease followed by possession is effectual, a contract to grant a lease is not binding upon the next heir. "If he had lived," says Lord Thurlow, speaking of the contracting heir, "he must have fulfilled his agreement; but as he did not live it cannot be transferred against a singular successor, which is precisely the character of an heir of entail." So also in his judgment as to the *Queensberry Leases* (1819, 1 Bligh 339) Lord Eldon, after shewing that a lease containing a covenant to renew from time to time might be perfectly good for the term current at the granter's death, that being otherwise a competent term, goes on to say: "With respect to the covenant for another lease it is a mere personal contract, upon which it appears to me there could be no possession"; and refers to *Leslie* v. *Orme* (1779 M. 15,530, aff. 2 Dow 112, 1 Bligh 510, 2 Pat. 533), where, he says, upon the main question, a lease for four nineteen years was sustained, and yet with regard to a reversionary lease, where no possession had been had, the House held it to be bad. The principle is, and it is trite law, that the heir of entail in possession is fiar of the estate, and as free to deal with it as any other fiar except in so far as he is restrained by the conditions of the entail. It follows that the leases he may have granted, if they have been made real by possession, will be good against his successors in so far, but only in so far, as they do not contravene the cardinal prohibitions. It was at one time a difficulty in the application of this doctrine that, just because it creates a real right in the land, every lease is an alienation and therefore a contravention of the prohibition to alienate or dispone. But that problem was finally solved by the judgment of the House of Lords in the "Queensberry Leases"; and it is now settled that while long leases are void as contraventions of the entail, short leases, which may now be taken as those which do not exceed the period allowed by the Rosebery Act or by the deed of entail, may be sustained. But this is a relaxation admitted only because it was held to be indispensable for the reasonable enjoyment of the estate which the entailer intended for all his heirs on succession; and Lord Redesdale observes: "It seems to me that a power thus yielded to necessity, and only to necessity, ought to be bounded by the necessity which compels it to be yielded—that is, which is compatible with the future as well as with the present enjoyment of the estate." No lease can be sustained, therefore, which exceeds the necessary term, or which infringes otherwise the rights of an heir who may succeed during its currency.

I have dwelt on this point because, as Lord President Inglis has said, the proposition that the heir in possession is fiar of the estate, but subject to the prohibitions and conditions of the entail, is the foundation of all the law applicable to questions of this kind. It follows that each heir in his turn takes the estate subject to the real rights and burdens which have been validly laid upon it by his predecessor, and entirely free from all such as are invalidated by the fettering clauses, and also from all liabilities which stand upon personal obligation and have not been made to affect the estate itself. The point to be determined, therefore, is to which of these classes the obligation in question belongs. There is apparent force in the contention, favoured by the Lord

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Ordinary, that if leases are allowed, all stipulations which are reasonable and customary as between landlord and tenant must be admitted, as conditions without which a good tenant could hardly be obtained. But the conditions of the lease must be controlled by the limitations of the lessor's power to dispose of the estate; and I am unable to assent to the Lord Ordinary's conclusion, because it disregards this overruling principle, and is thus, in my opinion, irreconcilable with a long series of decisions which have been accepted by the House of Lords as fixing the law.

The cases, or most of them, are, as the Lord Ordinary observes, collected in the opinion of Lord Deas in *Breadalbane* v. *Jamieson*, 1877, 4 R. 667. What he regards as the leading case is *Dillon* v. *Campbell*, 1780, M. 15,432. It was stipulated in a lease granted by an heir of entail in possession that the tenant should be entitled at the end of the lease to the value of building to be erected by him. The granter of the lease died during its currency, and at its expiration the tenant brought an action for the value of the buildings against the succeeding heir, and pleaded that the estate had benefited by the expenditure. The report bears that the Lords were at first moved by the equitable nature of the demand; but the answer which ultimately prevailed was that no debt could be made to affect the heir of entail which could not also be made to affect the estate, and consequently that to bind the next heir for improvement debts would infer a contravention of the prohibition against the contraction of debt. The ground of judgment is very clearly brought out in the interlocutor of Lord Braxfield, Ordinary, to which the Court in the end adhered, and by which the defender was assoilzied "in respect he did not represent the granter of the lease otherwise than as heir of entail, which entail contained the usual prohibitory irritant and resolutive clauses '*de non alienando vel contrahendo debita.*'" The same principle received effect in *Webster* v. *Farquhar*, 1791 (Bell's 8vo Cases 207); *Taylor* v. *Bethune of Balfour*, 1791 (Bell's 8vo Cases 218). The question came before the House of Lords in *Moncreiff* v. *Tod & Skene*, 1823, 2 S. 113, and 1825, 1 W. and S. 217. In that case an heir of entail in possession had granted a lease, by which she bound herself or the proprietor of the lands at the end of the lease to pay to the tenant a sum of £625, which the latter had agreed to expend in erecting a new steading on the farm. The tenant brought an action for payment of this sum against the executor of the granter of the lease, who by that time had died, and the executor in his turn brought an action of relief against the new heir of entail, who was then in possession.

All the parties interested were thus before the Court; and the judgment was that the executor was bound and that no liability attached to the heir of entail. The argument for the executor was the obvious one that the obligation was imposed in terms on the proprietor of the lands for the time being, who, moreover, would alone derive benefit from the expenditure. The answer which prevailed was that the obligation being personal must be enforceable against the granter and her personal representatives, and could not affect the heir of entail, because the entail contained a prohibition against contracting debt or burdening the lands with sums of money. The decision of this Court was affirmed in the House of Lords, with a variation which does not affect the question in hand, and Lord Gifford says in moving the affirmance: "It is hardly necessary for me to state that in cases of this nature it is certainly not competent for the heir of entail in possession to erect farmhouses and other buildings upon the farm and to throw any of the expense to be incurred upon the succeeding heir of entail." He points out that under the Montgomery Act the estate may be burdened with a certain proportion of the expense necessarily incurred; and observes that but for the aid of that statute the incapacity of an heir of entail to build farmhouses without taking the whole expense upon himself might be very prejudicial to all the succeeding heirs. But in that case the heir in possession had not resorted to the statute; and Lord Gifford appears to have had no doubt that except in the mode prescribed by the statute she could throw no part of the burden, and even with the aid of the statute could not throw the whole burden, on the succeeding heir. "On the general point," he says, "the decisions appear to be conclusive." A similar decision was pronounced, and the determining principle was again affirmed, in *Fraser* v. *Fraser*, 1825, 4 S. 73, 1827, 5 S. 722, 1830, 8 S. 409, and 1831, 5 W. and S. 69. But I may observe, in passing, that this case, while it is entirely in accordance with previous decisions, brings out very clearly a distinction which, however obvious, was, I think, overlooked in the discussion of the authorities—the distinction between obligations created by an entailer and those created by an heir of entail. General Fraser, the maker of an entail, granted, or, which is the same thing, authorised his trustees to grant, leases containing obligations on the landlord to pay the tenant for meliorations. His brother, Archibald Fraser, succeeded as first heir of entail, while the leases were still current. There could be no question that as a gratuitous taker he was liable for the entailer's debts and obligations, and among the rest for the stipulated payment for meliorations. But instead of performing his obligation according to its terms at the end of the lease, he made an agreement with the tenants by which he granted new leases for nineteen years on their renouncing the existing leases and postponing their claims for meliorations till the expiration of the new period, when he bound himself and his heirs to pay these and also certain other

meliorations to be undertaken by the tenants. In an action at the instance of a tenant against the next succeeding heir, it was held that Archibald Fraser had no power to transfer to the next heir obligations created by the entailer which had become exigible during his own possession, nor to burden either that heir or the estate with the new obligations undertaken in the leases granted by himself.

The obligation in question in *Mackenzie* v. *Mackenzie*, 1849, 11 D. 596, was of a somewhat different character, but it fell within the same rule. An heir in possession bound himself in a lease of a farm to trench, drain, and lime a part of it. This was held to be a personal obligation which did not transmit against subsequent heirs of entail. It was not considered as a contravention, because it neither was nor could have been made a real burden on the land; and it made no difference that it was inserted in a lease, because the real right acquired under a lease is a right to possession of the land, and stipulations engrafted on the lease by which the landlord undertakes to pay money or perform an obligation are purely personal. The decision therefore illustrates another aspect of the general doctrine laid down in *Dillon* v. *Campbell*, that an heir of entail is not bound by the obligations of a preceding heir, except in so far as they may have been made validly to affect the entailed estate, without involving a contravention.

Three cases were cited by the pursuer's counsel for the purpose of shewing that what he described as ordinary acts of management customary in a district are binding on subsequent heirs of entail, even to their prejudice. This is exactly the argument which was urged unsuccessfully in the House of Lords against the heir of entail in *Fraser* v. *Fraser*, except that in that case the transaction was said to be beneficial. But there is nothing in the cases cited inconsistent with the general doctrine as I have stated it. In the case of *Lord Queensberry* v. *Montgomery*, 18th February 1814, F.C., it was held competent for an heir of entail to stipulate for forehand rents in corn farms, so as to secure for his own executor a term's rent, which, if the legal and conventional terms had been the same, would have gone to the next heir. But the point of the case is that the system of management under which corn farms were forerented was not introduced by the deceased heir, but had been established before his succession by the entailer. The Lord Ordinary observes that the succeeding heir was deprived of a benefit which would otherwise have belonged to him. But the argument for the successful executors was that the deceased heir would have lost half a year's rent if he had altered the entailer's system; and it is evident that if, when a deed of entail comes into operation, the farms are let for forehand rents, the only possible way of equalising the interests of all the succeeding heirs is to continue the system unaltered, because the heir during whose possession the rule might be changed could never recover a half year's rent which had been paid to the entailer's executors. The argument in the case of *Lord Queensberry*, therefore, was that the rule as to forehand rent is regulated by the will of the entailer, and an heir of entail is not bound to alter the rule to his own prejudice and against the entailer's practice. It was conceded that "an heir of entail is not entitled to alter the terms of payment of rent and to substitute others so as to give a privilege to his executors over the heir"; and the law is distinctly laid down to that effect by Lord President Inglis in *Lord Herries* v. *Maxwell's Curator*, 1873, 11 M. 396. The case related to the apportionment of rents under the Act of 1870, and it was necessary to determine whether a rent payable at a certain term "for the half year preceding," during which no crop had been sown or reaped, belonged to the heir or to the executor. The Lord President, after laying down the rule that rents which were due and exigible must go to the executor, whether forehand or not, goes on to say: "This rule would not have been applicable to an entailed estate if forehand rents were a novelty on that estate—if, for example, the last heir who died had introduced forehand rents, having found a different system in existence at his succession. That would have been taking undue advantage of the next heir of entail; but that is not the case here, for it is stated that forehand rents were the law of the estate. It was both the custom of the district and the rule had been adopted by the entailer and continued in all subsequent leases." The principle seems to me to be very clear, that while an absolute owner may choose between his heir and his executor, an heir of entail cannot in any way prejudice the succeeding heir's right.

Learmonth v. *Sinclair's Trs.*, 1878, 5 R. 548, is, in my opinion, inapposite. It was held that an heir of entail was liable, by virtue of a custom having the force of law, to pay the tenant the value of certain woodwork in houses erected by him. But the liability was not rested upon contract, but upon a general rule of law, applicable to all landlords, whether their lands were entailed or not, and whether they were heirs or singular successors. Lord Gifford treats it as a question of tenants' fixtures. He says, "Such woodwork, though fixed, remains in that district the tenant's property, and the landlord must pay for it as such—that is, whoever is landlord at the ish must pay for it if he retains it." Lord Justice-Clerk Moncreiff thought the question whether the obligation to pay transmitted against a succeeding heir of entail or against the executor of the original lessor did not arise, firstly, because in the particular case the deceased heir of entail never undertook any obligation whatever to the outgoing tenant in regard to the right of tenancy on

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which the claim was founded; and secondly, because the immemorial custom or usage in the county of Caithness, which the Court held to be effectual, operated not by implied paction or contract, but by law, and therefore, said his lordship, "is as good against the landlord, whether he be owner in fee simple or under an entail, as if a statute had been passed to that effect." The case is therefore no authority on the transmissibility of obligations between heirs of entail.

The third case relied on by the pursuer, *Breadalbane* v. *Jamieson*, 1877, 4 R. 667, in so far as it has any bearing, is only another illustration of the general principle. The Marquis of Breadalbane had pulled down the old house of Ardmaddy in order to build a new mansion house more suitable to the estate, and died before the new house was finished. It was held in an action at the instance of the next heir that his executors and his general estate were not liable to a pecuniary claim of an amount requisite to complete the mansion. It is true, as the Lord Ordinary observes, that this left the heir of entail under a disadvantage. But the ground on which it was found that he could not be relieved at the expense of the executors is perfectly consistent with the former decisions. To destroy or alienate the mansion house would have been a contravention of the prohibitions; but to pull it down in order to reconstruct it was a lawful exercise of the powers of a fiar who was not in that particular subject to any restriction. The deceased marquis had therefore done no wrong; and if he died before his purpose to rebuild had been carried out, the succeeding heir took the estate in a condition which had been brought about without any contravention. In those circumstances, the Lord President says there can be no implied obligation between the successive heirs, and no liability except what is created by the fetters of the entail. The only measure of their rights and liabilities is the deed of entail; and no pecuniary liability can be imposed either on a subsequent heir or on the general estate of his predecessor except what the deed of entail authorises. I may add to this discussion of the authorities that of the two recent cases between the *Earl of Galloway* and the *Duke of Bedford* (1902, 4 F. 851; 1904, 6 F. 971), to which the Lord Ordinary refers. The first is, in my judgment, entirely in accordance with the whole series of decisions from *Dillon* v. *Campbell* downwards. The second is, I think, distinguishable from *Moncrieff* v. *Tod & Skene* and the other cases in which liability has been fixed upon executors. But however that may be, it has no bearing on the question now to be decided.

If my view of the general rule of law is correct, its application to the particular contract before us is evident. The obligation which the pursuer seeks to enforce is that the tenant "shall deliver at the end of the lease to the landlord or incoming tenant, as far as possible, not more than the same number of sheep and the same classes as he receives on his entry, and the proprietor agrees that the second party"—*i.e.* the tenant—"or his representatives shall receive the same prices as he paid on his entry." The question is whether such a stipulation as that can be made good against the defender on the only ground which could enable the granter of the lease to create any liability as against the next heir of entail; to wit, that he was in his time the proprietor of the land, and free to deal with it, except in so far as he was restrained by the fetters. By a restricted construction of the fetters, he was enabled to grant a lease which might be valid as a real right. But that will not support an obligation which, although contained in a lease, cannot be made real. It appears to me impossible to make such an obligation as this a real burden upon land, consistently with the principles laid down in *The Tailors of Aberdeen* v. *Coutts*, 1840, 1 Rob. 296. But if it were possible it would involve a contravention, because it is a stipulation for the payment of money, or, in other words, it would affect the estate with debt, and therefore it would be made void and null by force of the irritant clause. But in its true character it is, in my opinion, a personal contract over and above the lease, and therefore it is ineffectual as against the defender, who does not represent the contracting owner. It is, as Lord Kyllachy points out in *Panton* v. *Mackintosh*, very much more onerous than the obligations for meliorations, which have over and over again been found to be ineffectual against heirs of entail. There would seem to be two ways, in one or other of which it must be performed. Either the heir must find a new tenant at whatever cost, ready to take over the sheep stock at the pursuer's price, or else he must pay the price and take the stock himself. In the first view, the heir in possession undertakes to regulate the terms of a lease to be granted by his successor after his own possession has come to an end, and that cannot be supported consistently with the decisions of the House of Lords in *Kerr* v. *Redhead* and in the *Queensberry Leases*. In the second view, it imposes upon the heir a contract to purchase a stock of sheep at a price which the pursuer alleges upon record is above their value; and that is just as inconsistent as the first alternative with the principles which have regulated such questions for more than a hundred years. For these reasons I agree entirely with the judgment of Lord Kyllachy in *Panton* v. *Mackintosh*, and I think we ought to follow his decision.

We ought not, however, to pass unnoticed the argument for the pursuer, that in equity his claim ought to be sustained. If he is right in his allegation that he has a good claim in law against the general estate of the lessor, I am unable to

see any equity in imposing upon the defender a liability which does not properly attach to her, in order to relieve him of the inconvenience of suing his true debtor in another Court. But if it were assumed that the executors are not liable, the equity is by no means so obvious as in the cases with reference to meliorations, for in these cases the heir of entail had benefit from the expenditure on farms and buildings. The defender, on the other hand, does not take the sheep stock, for which she declines to pay. But the true answer is to be found in the opinion of Lord Thurlow in *Kerr* v. *Redhead*, and in accordance with that judgment we must hold that the tenant has no right in equity if he has no right in law.

The Lord President.—I agree entirely with the opinion which my brother Lord Kinnear has just delivered, and as he has gone into the matter so fully, I only intend to add a few words. The key to the solution of this question seems to me to consist in one or two well-known and old-established propositions. When you seek to enforce the personal contract of one man against another man, you must shew that that other man represents him. An heir of entail taking in succession to another heir of entail does not represent the prior heir of entail at all; he takes from the entailer. A lease in its origin is a personal contract, and accordingly a lease entered into by the proprietor of an estate, whether he was heir of entail or whether he was a person holding the estate in fee simple, would not be binding upon anyone who did not represent that man—and so of course it would not be binding against an ordinary purchaser or a singular successor—were it not for the old statute which made leases of a certain duration real rights. Accordingly, the efficacy of a lease against a person who does not represent the granter of the lease is always due to the fact of its being made a real right by statute, and not to the fact of its being a personal contract. Now, when yon come to deal with leases in the case of heirs of entail you of course come athwart the conditions of the entail itself. There is no doubt that a lease is an alienation of the estate, because in so far as it is a real right it is a giving away of the estate, no doubt temporarily, but still a giving it away for the time being to someone else. Accordingly if the matter had been treated *strictissimi juris*, there can, I think, be no doubt that no lease would have been good as against an heir of entail as being an alienation. It was held to be an alienation in the well-known set of cases which are known by the general name of the *Queensberry Leases*, but it was held at the same time that it was a necessity of the situation that a certain relaxation should be made, and the rule of relaxation that was made was that a lease should not be treated as an alienation where it was of such duration that it could be held to enure to the benefit, not of one heir of entail, but of the whole heirs of entail as a body. I think it is quite clear, when you come to a stipulation of the sort that we are dealing with here, that it will not fall within that exception; and I entirely agree with what Lord Kinnear said in the course of his opinion, that there arises a very necessary difference between the obligation upon an heir of entail where all that the heir of entail for the time being has to submit to is the taking away of his land for a temporary period under the condition of being paid therefor, and where the thing he has to submit to is, not the enforcement of a real right, but the payment of a sum of money. I agree with the doubt which his Lordship indicated, but which he passed over—namely, the doubt whether anything that is a payment of money of uncertain amount to be recovered as being a real right, can ever square with the well-known canon of rules which Lord Corehouse laid down in the *Tailors of Aberdeen*, 1837, 2 S. and M'L. 609. Accordingly I also agree with the conclusion which Lord Kinnear came to, that you will find, on looking at the sum total of the cases, that nothing has ever been enforced against an heir of entail except the mere giving up of land—nothing in the way of making him perform some other obligation which may mean more than the giving up of land.

I think this will become even more clear if one tests it for the moment by the remedy. Supposing that an heir of entail in possession, against whom an obligation of this kind was sought to be enforced, was entirely impecunious; how are you going to work it out by diligence? Of course, as far as ordinary possession upon a lease is concerned that is simple enough. All you have got to do, supposing the new landlord drove forth the tenant by force out of his farm, would be to interdict the heir of entail, and the tenant would be restored to the occupation of his farm. That is the protection which the Court would give. But supposing the heir of entail refuses to pay the sum which is the true value of the sheep and has no money, what is to be done? If you set to work by adjudication, which on the expiry of the legal might take away the estate altogether, that surely would be alienation with a vengeance. In other words, it would be a sort of alienation which certainly would not fall within the exception which was laid down by the House of Lords in the *Queensberry Lease* cases. If you did not proceed by adjudication, but proceeded by the other well-known diligence of poinding the ground, you would not get any more satisfactory result, because it is perfectly clear that the consequences of poinding the ground would fall entirely upon the back of one heir of entail in the succession of heirs taking the land, whereas the whole idea of the exception laid down in the *Queensberry Leases* is that the thing is for the benefit of the whole heirs of entail. Upon these

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grounds—and I have merely added a very few words to what was so well explained by Lord Kinnear—I am of opinion that the Lord Ordinary's judgment here cannot stand.

Lord M'Laren.—I cannot usefully add anything to the opinion which Lord Kinnear has delivered and in which I concur on all points. In listening to the opinion, one observation did occur to me, not altogether independent but rather supplementary, to what has been said, to the effect that however this claim is put—if it were clearly expressed as a real burden in the lease—it would amount to an alienation of the estate, and therefore to a contravention of the prohibitions in the entail. In the record the material clauses of the lease are set out, and in the clause in question the obligation is—"that the proprietor agrees that the second party or his representatives shall receive the same price for the sheep as he paid on entry." It is not said from whom he is to receive the money. The obligation may either mean that the granter of the lease binds himself and his heirs and executors to pay this price at the expiration of the lease, or it may mean that he proposes that his successor in the entail shall pay the price of the stock out of his private means, or it may mean that he would transmit this obligation, supposed to be for the benefit of the estate, as a real burden affecting the entailed estate. As to the first alternative I need say nothing, for the reasons expressed by the Lord Ordinary and Lord Kinnear, that neither the heir at law nor the personal representatives are parties to this action. As to the second alternative, the conclusion of the summons is just as ambiguous as the lease itself is in regard to the nature of the obligation or the persons affected by it. We are asked to make a declaratory finding that the obligation is binding on the defender as heiress of entail in possession of the said lands, and that may either mean that she is to pay the money out of other sources than the estate, or that she is in some way or other compelled to fulfil the obligation out of the estate. I agree with your Lordship that the real test, or a very convincing test, of the efficacy of the obligation is to bring it to the test of diligence. Supposing that the pursuer had taken the view that the heiress of entail was personally liable, and had concluded for payment of the same price, or value of the sheep stock, as he had himself paid to the tenant on his entry to the farm, if he had gone on to formulate a petitory conclusion for the payment of that sum of money, what would the answer of the defender be? She would say: "I am not confirmed in the personal estate, nor have I made up a title by service as heir in general; what I have done is to obtain service as heir of provision, which has the effect of establishing that I am the person pointed out in the destination as heir of entail, and entitles me to have an entry from the Crown or the superior as the case may be, which will put me in possession of this estate." There is nothing in such an entry that could possibly subject the defender to take over the debts of the previous heir in possession, and I do not suppose that such a proceeding was contemplated by the pursuer, because nothing was suggested in argument about it. What was really maintained to us was that in some way or other the obligation was one attaching to the estate and for the benefit of the estate, the fulfilment of which was therefore obligatory on the heirs of entail in their order. Supposing that the defender takes up a position of passive resistance, as she is quite entitled to do, then there is no other way of making the pursuer's theory effective and recovering the money out of the land than by adjudication of the entailed estate. If the adjudication had been brought in the lifetime of the granter of the obligation, could it for a moment be doubted that this would be a contravention of the prohibition against contracting debt whereby the estate should be evicted? Is it less so, when the proceeding is taken after his death with relation to the same subject and with the same result? I think when the case is looked at in this way the essential unsoundness of the argument becomes very evident, because it is then seen that what has been done or attempted is really a diminution of the capital value of the estate to all future heirs of entail, and therefore a contravention of the conditions of the entail. I do not add anything further, except that I agree that it is wholly unnecessary that there should be a proof in this case, because such a proof, in the view I take, could not possibly affect our decision. Subject to anything that may be said as to the form of the judgment, I think we must reverse the decision of the Lord Ordinary upon the main question, but of course I agree that we should adhere as to the conclusions involving the liability of the personal representatives.—20*th February* 1908.

Counsel for Pursuer and Respondent, Hunter, K.C., Constable; Agents, Macrae, Flett & Rennie, W.S.—Counsel for Defender and Appellant, Dickson, K.C., Hon. W. Watson; Agents, Hamilton, Kinnear & Beatson, W.S. W. A. R.

SHERIFF COURT.

(*Sheriff-Substitute Glegg, at Airdrie.*)

414. M'Quade *v.* The Summerlee and Mossend Iron and Steel Company Limited.

WORKMEN'S COMPENSATION ACT 1906 (6 EDW. 7, CAP. 58), SECT. 1 (3); SECOND SCHEDULE, SECTS. (1), (2) AND 17 (B)—ACT OF SEDERUNT 26TH JUNE 1907, SECTS. 1 (B), 2, 3 AND 4—SHERIFF COURTS (SCOTLAND) ACT 1907 (7 EDW. 7, CAP. 51), SECTS. 3 (D) AND (P), 50 AND 52, AND FIRST SCHEDULE, RULES 1 AND 4 (A) AND FORM A—SHERIFF COURTS (SCOTLAND)

Act 1876 (39 & 40 Vict. cap. 70), sect. 52, and Schedule A—Form of Initiating Proceedings under the Workmen's Compensation Act 1906—Held That it is Incompetent to Commence Proceedings under the Workmen's Compensation Act 1906 by "Initial Writ" in Form A Provided by the Sheriff Courts (Scotland) Act 1907.

This was a petition under the Workmen's Compensation Act 1906, brought by the pursuer against the defender, on the ground that he, while in their employment as a miner, sustained injuries in respect of which he was entitled to compensation. The proceedings were commenced by the presentation to the Sheriff as arbitrator under the Act of a petition in the form of the "initial writ" provided for by the Sheriff Courts (Scotland) Act 1907, and a warrant to cite the defenders was craved. The Sheriff-Substitute (Glegg), by interlocutor dated 17th March 1908, refused to grant the warrant to cite craved.

He added the following note:

The question is whether the form of application on which a deliverance is sought is authorised by the Sheriff Courts (Scotland) Act of 1907. To determine this the nature of the application must be considered.

The Workmen's Compensation Act 1906 provides sect. 1 (3) that "if any question arises in any proceedings under this Act as to the liability to pay compensation under this Act the question shall be settled by arbitration, in accordance with the Second Schedule to this Act." The Second Schedule, by paragraphs (1) and (2), provides, "any matter which under this Act is to be settled by arbitration shall be settled by the judge of the County Court, according to the procedure prescribed by rules of Court." Paragraph 17 (*b*) provides that any application to the Sheriff as arbitrator shall be heard, tried and determined summarily in the manner provided by sect. 52 of the Sheriff Courts (Scotland) Act 1876, save only that parties may be represented by any person authorised in writing to appear for them. Said sect. 52 directs that the application may be in one of the forms as nearly as may be contained in Schedule A, and that the Sheriff shall appoint the application to be served and the parties to be heard, etc. The form referred to requires a condescendence stating articulately the grounds of action, and pleas in law stated articulately. These requirements appear to be peremptory, the latitude allowed applying to the conclusions.

The Act of Sederunt of 26th June 1907, sect. 1 (*b*), provides that any party to an arbitration may be represented by a member of his family or any other person. Sect. 2 provides that an application for the settlement by arbitration of any claim for compensation shall not be made unless some question has arisen between the parties, and "the application shall state concisely the question which has arisen." The next section requires the applicant to state in his application all the dependants, including those claiming to rank as dependants. Sect. 4 provides for applications being made to the Sheriff Court of a district where the accident happened, and otherwise where the Sheriff has not jurisdiction, while the following section, following apparently on paragraph (6) of the First Schedule to the Act, provides for the transfer of application and money to Courts in England and Ireland.

It appears from the above, without quoting more fully from the Act, that an application for settlement by arbitration though made to a Sheriff is not an application to him as Sheriff. He does not exercise his ordinary jurisdiction either as to parties or as to subject-matter. The Act might have nominated as arbitrator any one whose commission required him to undertake the duty. What the parties get under the Act are an arbitrator and arbitrator's clerk, who must act, and act gratuitously. But the proceedings do not cease to be an arbitration because the Sheriff is arbitrator, and he acts as an arbitrator, and not as Sheriff. He cannot, for instance, give decree by default or on account of absence of one of the parties. This has been clearly established by the case of the *United Collieries Ltd.* v. *Gavin*, 1899, 2 F. 60.

The applicant maintains that the form of his application is authorised, indeed imposed, by the Sheriff Court Act of 1907. That his application contains what is required by Form A of the First Schedule to that Act seems correct, and that it omits matter required by the Act of 1876 and the Act of Sederunt of 1907 is obvious. He must accordingly shew that these provisions have been superseded by the recent Act.

Form A of the Sheriff Courts Act of 1907 is introduced by Rule 1 of the First Schedule, which says: "All actions shall be commenced by writ as nearly as may be in the Form A hereto annexed." The term action is defined in sect. 3 (*d*) of that Act, which is "action includes every civil proceeding competent in the ordinary Sheriff Court." From what has been said above it seems clear that this arbitration is not a civil proceeding competent in the ordinary Sheriff Court, but is a proceeding in a special statutory tribunal. Consequently it is not expressly included by the terms of this definition. Nor does it seem to be included otherwise. It is not an action in the ordinary sense of the word, but an arbitration, both in name and in fact. See *The United Collieries Ltd.* v. *Gavin*, 1899, 2 F. 60, and particularly the Lord President's opinion, p. 65.

Nor does the present application come under said rule (1) in virtue of being a "summary application." Rule (1) does not apply to summary applications unless they are actions. Further, this does not seem to be a summary application in the sense of the Act, which

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defines these in sect. 3 (*p*). It is plainly not brought under the common law jurisdiction of the Sheriff, nor does it appear to be an application brought under an "Act of Parliament which provides that the same shall be disposed of in a summary manner, but which does not more particularly define in what form the same shall be heard, tried and determined." The Workmen's Compensation Act does provide a form, namely, that in Schedule A of the Sheriff Court Act of 1876, amplified by sects. 2 and 3 of the Act of Sederunt of 1907. If "form" in said sect. 3 (*p*) includes form of application, then a form is clearly provided; if it does not, but refers only to subsequent hearing, trying and determining, the Workmen's Compensation Act seems to define these "more particularly" than by being "in a summary manner," since it directs that the proceedings are to be by way of arbitration.

Sect. 50 of the Sheriff Court Act of 1907 does not assist the applicant's case. In the first place it is under the heading (not rubric) Summary Applications, and these are those defined by the same Act, and already dealt with. In the next place, it says that when any Act of Parliament invokes sect. 52 of the Sheriff Courts Act of 1876, such direction shall be read as if it referred to "this section of this Act." All that this section of this Act provides is that where a hearing is necessary, "the Sheriff shall appoint the application to be heard at a diet to be fixed by him, and at that or any subsequent diet (without record of the evidence unless the Sheriff shall order a record) shall summarily dispose of the matter and give his judgment in writing." This all refers to things to be done after an application has been presented, and does not deal with the form of the writ of application. It re-enacts, with differences immaterial here, the enactment of sect. 52 of the Act of 1876 as to an oral hearing, but contains no direction as to the form of writ. If it had also referred to "Rule 1 of this Act" the question would be different, but the limited reference to "this section" excludes the importing of Rule 1.

The next provision of the Sheriff Court Act of 1907 which requires notice is peculiar. It is Rule 4 (*a*). It says that in summary applications, "and in cases under the Workmen's Compensation Act," the warrant of citation shall be as nearly as may be in Form B annexed. This seems to recognise the distinction between summary applications and applications (called cases) under the Workmen's Compensation Act, and so far is free from difficulty, but if the warrant is considered the matter is puzzling. It seems strange that the only mention of the Workmen's Compensation Act should be with regard to service. The natural implication is that applications under that Act are also dealt with in this Act, and the applicant's contention receives its chief support from this reference. That inference is not strong enough, however, to extend the construction of the sections dealt with, and the provision must be held to be simply a direction as to service. Another difficulty arises here, for the warrant of citation ends with the expression "under certification of being held as confessed." The practice hitherto has always been to appoint parties to be heard, and if the defender does not appear, to order and take a proof. To hold a party as confessed at a first diet seems to be as inconsonant with the directions of the Workmen's Compensation Act as to hold him confessed at any other, and this phrase should therefore be omitted from the warrant, in exercise of the power contained in the proviso "as nearly as may be." If that omission is made the warrant is practically in the old form, and there is no reason for introducing workmen's compensation applications in this connection. The Act contains a specific direction on this point, however, and must be given effect to. There is no difficulty in framing an appropriate deliverance, but this does not solve the question what kind of writ is entitled to it.

The last section of the Sheriff Courts Act 1907 which requires to be noticed is sect. 52, which repeals sect. 52 of the 1876 Act, "and all laws, statutes, Acts of Sederunt, orders and usages now in force so far as the same are inconsistent with the provisions of this Act." This, of course, does not repeal a reference to a provision of the 1876 Act which is not re-enacted or altered or for which some other provision is not substituted. And this is the position of the direction as to the form of application, for no other form than that of the 1876 Act is provided. But another answer is that there is no inconsistency if the present Sheriff Court Act does not apply. If it does not deal with applications under the Workmen's Compensation Act, and is not suitable for proceedings thereunder, there is no inconsistency in treating these under the suitable provisions already existing, and no necessity to hold those provisions as repealed by construction.

It is necessary to point out that the question is not merely technical but is of some materiality. Under the present procedure the arbitrator is informed at once of the question or questions in dispute, and immediate progress is made. If a writ in the form of the First Schedule of the Sheriff Court Act of 1907 were permitted he has practically no information except the amount of the claim. It results that he must order a condescendence, which means delay, and also expense, both of which are to be avoided always, and particularly in this class of proceedings. However suitable Form A may be for an ordinary petitory action to which no defence is anticipated, it is not suitable to an application for arbitration on a question which has already been raised and on which there has been a failure to agree.—17*th March* 1908.

Agent for Pursuer, W. T. Hay, Writer, Hamilton. A. J. L. L.

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ERRATA.

Page 296. First column, third line from bottom—*for* "ordinary" *read* "ordering."

„ 413. *Heading in* Kirkwood & Sons *v.* Clydesdale Bank—*for* "19 & 20 Vict. cap. 60" *read* "45 & 46 Vict. cap. 61."

„ 437. First column, 9th and 13th lines from bottom—*for* "pursuer" *read* "defender."

„ 498. First column, end of first paragraph—*for* "539" *read* "53."

„ 544. *Heading in* Lochgelly Iron, etc. Co. Ltd. *v.* Sinclair, last line—*for* "Sched. I. sects. (8) and (12)" *read* "Sched. I. sect. (12); Sched. II. sect. (8)."

„ 550. First column, fourth line from top—*for* "defender" *read* "pursuer."

„ 709. Second column, fifteenth line from top—*for* "most" *read* "more."

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THE SCOTS LAW TIMES STATUTES

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PASSED IN THE SEVENTH YEAR

OF THE REIGN OF HIS MAJESTY

KING EDWARD THE SEVENTH,

TOGETHER WITH THE TITLES OF ALL THE PUBLIC GENERAL STATUTES PASSED DURING THE SAID YEAR.

CHAPTER I.

An Act to apply certain sums out of the Consolidated Fund to the service of the years ending on the thirty-first day of March one thousand nine hundred and seven and one thousand nine hundred and eight. [22*nd March* 1907.]

Most Gracious Sovereign,

WE, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled, towards making good the supply which we have cheerfully granted to Your Majesty in this session of Parliament, have resolved to grant unto Your Majesty the sums hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. ISSUE OF £71,715 OUT OF THE CONSOLIDATED FUND FOR THE SERVICE OF THE YEAR ENDING 31ST MARCH 1907.—The Treasury may issue out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland, and apply towards making good the supply granted to His Majesty for the service of the year ending on the thirty-first day of March one thousand nine hundred and seven, the sum of seventy-one thousand seven hundred and fifteen pounds.

2. ISSUE OF £38,114,700 OUT OF THE CONSOLIDATED FUND FOR THE SERVICE OF THE YEAR ENDING 31ST MARCH 1908.—The Treasury may issue out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland, and apply towards making good the supply granted to His Majesty for the service of the year ending on the thirty-first day of March one thousand nine hundred and eight, the sum of thirty-eight million one hundred and fourteen thousand seven hundred pounds.

3. POWER FOR THE TREASURY TO BORROW.—(1) The Treasury may borrow from any person, by the issue of Treasury Bills or otherwise, and the Bank of England and the Bank of Ireland may advance to the Treasury on the credit of the said sums, any sum or sums not exceeding in the whole thirty-eight million one hundred and eighty-six thousand four hundred and fifteen pounds.

(2) The date of payment of any Treasury Bills issued under this section shall be a date not later than the thirty-first day of March nineteen hundred and eight, and section six of the Treasury Bills Act, 1877 (40 and 41 Vict. c. 2) (which relates to the renewal of bills), shall not apply with respect to those bills.

(3) Any money borrowed otherwise than on Treasury Bills shall be repaid, with

interest not exceeding five pounds per cent. per annum, out of the growing produce of the Consolidated Fund, at any period not later than the next succeeding quarter to that in which the money was borrowed.

(4) Any money borrowed under this section shall be placed to the credit of the account of the Exchequer, and shall form part of the said Consolidated Fund, and be available in any manner in which such Fund is available.

4. Short Title.—This Act may be cited as the Consolidated Fund (No. 1) Act, 1907.

CHAPTER II.

ARMY (ANNUAL) ACT, 1907.

[7 Edw. 7. Ch. 2.]

ARRANGEMENT OF SECTIONS.

Section.
1. Short title.
2. Army Act to be in force for specified times.
3. Prices in respect of billeting.

Amendments of Army Act.

4. Amendment of Army Act as to complaint by a soldier.
5. Amendment of Army Act as to taking of evidence before a commanding officer.
6. Amendment of Army Act as to rules relating to military prisons and prisoners.
7. Amendment of Army Act as to sentences on officers of Indian Staff Corps.
8. Amendment of Army Act as to billeting.
9. Adaptation of provision of Army Act to punishment of detention.
10. Provisions as to punishments on active service.

Schedules.

CHAPTER II.

An Act to provide, during Twelve Months, for the Discipline and Regulation of the Army. [29*th April* 1907.]

Whereas the raising or keeping of a standing army within the United Kingdom of Great Britain and Ireland in time of peace, unless it be with the consent of Parliament, is against law:

And whereas it is adjudged necessary by His Majesty and this present Parliament that a body of forces should be continued for the safety of the United Kingdom and the defence of the possessions of His Majesty's Crown, and that the whole number of such forces should consist of one hundred and ninety thousand including those to be employed at the depôts in the United Kingdom of Great Britain and Ireland for the training of recruits for service at home and abroad, but exclusive of the numbers actually serving within His Majesty's Indian possessions:

And whereas it is also judged necessary for the safety of the United Kingdom, and the defence of the possessions of this realm, that a body of Royal Marine forces should be employed in His Majesty's fleet and naval service, under the direction of the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral aforesaid:

And whereas the said marine forces may frequently be quartered or be on shore, or sent to do duty or be on board transport ships or vessels, merchant ships or vessels, or other ships or vessels, or they may be under other circumstances in which they will not be subject to the laws relating to the government of His Majesty's forces by sea:

And whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm; yet nevertheless, it being requisite, for the retaining all the before-mentioned forces, and other persons subject to military law, in their duty, that an exact discipline be observed, and that persons belonging to the said forces who

ARMY (ANNUAL) ACT, 1907.

mutiny or stir up sedition, or desert His Majesty's service, or are guilty of crimes and offences to the prejudice of good order and military discipline, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow:

And whereas the Army Act 44 and 45 Vict. c. 58 will expire in the year one thousand nine hundred and seven on the following days:—

(*a*) In the United Kingdom, the Channel Islands, and the Isle of Man, on the thirtieth day of April; and

(*b*) Elsewhere in Europe, inclusive of Malta, also in the West Indies and America, on the thirty-first day of July; and

(*c*) Elsewhere, whether within or without His Majesty's dominions, on the thirty-first day of December:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. SHORT TITLE.—This Act may be cited as the Army (Annual) Act, 1907.

2. ARMY ACT TO BE IN FORCE FOR SPECIFIED TIMES.—(1) The Army Act shall be and remain in force during the periods hereinafter mentioned, and no longer, unless otherwise provided by Parliament (that is to say):—

(*a*) Within the United Kingdom, the Channel Islands, and the Isle of Man, from the thirtieth day of April one thousand nine hundred and seven to the thirtieth day of April one thousand nine hundred and eight, both inclusive; and

(*b*) Elsewhere in Europe, inclusive of Malta, also in the West Indies and America, from the thirty-first day of July one thousand nine hundred and seven to the thirty-first day of July one thousand nine hundred and eight, both inclusive; and

(*c*) Elsewhere, whether within or without His Majesty's dominions, from the thirty-first day of December one thousand nine hundred and seven to the thirty-first day of July one thousand nine hundred and eight, both inclusive.

(2) The Army Act, while in force, shall apply to persons subject to military law, whether within or without His Majesty's dominions.

(3) A person subject to military law shall not be exempted from the provisions of the Army Act by reason only that the number of the forces for the time being in the service of His Majesty, exclusive of the marine forces, is either greater or less than the number hereinbefore mentioned.

3. PRICES IN RESPECT OF BILLETING.—There shall be paid to the keeper of a victualling house for the accommodation provided by him in pursuance of the Army Act the prices specified in the First Schedule to this Act.

AMENDMENTS OF ARMY ACT.

4. AMENDMENT OF ARMY ACT AS TO COMPLAINT BY A SOLDIER.—In section forty-three of the Army Act (which deals with the mode of complaint by a soldier), after the words "to the prescribed general officer" there shall be inserted the words "or in the case of a soldier serving in India to such officer as the Commander-in-Chief of the forces in India with the approval of the Governor-General of India in Council may appoint."

5. AMENDMENT OF ARMY ACT AS TO TAKING OF EVIDENCE BEFORE A COMMANDING OFFICER.—In subsection (6) of section forty-six of the Army Act (which enables the accused person to demand that the evidence taken against him before the commanding officer shall be taken on oath), for the words "where the power of summary award by a commanding officer exceeds a sentence of seven days' detention" there shall be substituted the words "where the commanding officer has power to deal with the case summarily."

6. AMENDMENT OF ARMY ACT AS TO RULES RELATING TO MILITARY PRISONS AND PRISONERS.—In subsection (2) of section one hundred and thirty-three of the Army Act (which relates to the power of a Secretary of State to make rules with respect to military prisons and prisoners), for the words "military prisoners" there shall be substituted the words "military or other prisoners."

7. AMENDMENT OF ARMY ACT AS TO SENTENCES ON OFFICERS OF INDIAN STAFF CORPS.—Paragraph (*e*) of subsection (2) of section one hundred and eighty of the Army Act (which relates to sentences on officers of the Indian Staff Corps) shall be repealed.

8. AMENDMENT OF ARMY ACT AS TO BILLETING.—For paragraph (2) of Part I. of the Second Schedule to the Army Act (which relates to billeting) there shall be substituted the paragraph set forth in the Second Schedule to this Act, and in the third paragraph of the said part of the said Schedule to the Army Act for the words "a hot meal" there shall be substituted the words "a meal."

9. ADAPTATION OF PROVISION OF ARMY ACT TO PUNISHMENT OF DETENTION.—(1) For the purpose of giving effect to the provisions of the Army (Annual) Act, 1906, relating to the punishment of detention, the modifications set out in the Third Schedule to this Act shall be made in the Army Act.

(2) Section 135A of the Army Act is hereby repealed.

10. PROVISIONS AS TO PUNISHMENTS ON ACTIVE SERVICE.—In the provisions of the Army Act relating to punishments on active service, the following amendments shall be made:—

(1) In section forty-four (which relates to the scale of punishments by courts-martial)—

(*a*) There shall be substituted for proviso (5) the following proviso:

"(5) Where a soldier on active service is guilty of any offence it shall be lawful for a court-martial to award for that offence such field punishment other than flogging as may be directed by rules to be made from time to time by a Secretary of State, and such field punishment shall be of the character of personal restraint or of hard labour, but shall not be of a nature to cause injury to life or limb";

(*b*) The words "field punishment" shall be substituted for the words "summary punishment" wherever those words occur in provisos (9) and (10);

(*c*) Provisos (6), (7), and (8) shall be repealed;

(*d*) The following proviso shall be added as a new proviso after proviso (5):—

"(6) In addition to or without any other punishment in respect of an offence committed by a soldier on active service, it shall be lawful for a court-martial to order that the offender forfeit all ordinary pay for a period commencing on the day of the sentence and not exceeding three months."

(2) In section forty-six (which relates to the powers of commanding officers)—

(*a*) At the end of subsection (2) there shall be added the following paragraph:—

"and

"(*d*) In the case of an offence by a soldier (not being a non-commissioned officer) on active service, may award to the offender field punishment within the meaning of section forty-four of this Act for any period not exceeding twenty-eight days, and may in addition to or without any other punishment order that the offender forfeit all ordinary pay for a period commencing on the day of the sentence and not exceeding twenty-eight days";

(*b*) In subsection (3) the words "not on duty, and it is not an aggravated offence of drunkenness within the meaning of section forty-four of this Act" shall be repealed, and after the word "unless" there shall be added the words "the offence was committed on active service or on duty, or after the offender was warned for duty, or unless by reason of the drunkenness the offender was found unfit for duty, or unless."

(3) In paragraph (*d*) of subsection (1) of section forty-nine (which relates to field general courts-martial) the words "field punishment" shall be substituted for the words "summary punishment."

(4) At the end of section seventy-four (which relates to provost marshals) the following proviso shall be added:—

"Provided that a provost marshal and his assistants shall, as respects

any soldier in his or their custody and undergoing field punishment, have the same powers as the governor of a military prison."

(5) At the end of section one hundred and thirty-three (which relates to the establishment and regulation of military prisons) there shall be added as a new subsection:—

"(7) In any country in which operations against the enemy are being conducted the powers of a Secretary of State under this section with respect to military prisons and detention barracks shall be exerciseable by the officer commanding-in-chief in the field, and shall include a power of declaring any place to be a military prison or a detention barrack, and the limitations on the power of making rules as to the punishment of prisoners and soldiers undergoing detention and as to the severity of imprisonment and detention shall not apply: Provided that nothing in this subsection, or in any rules made thereunder, shall authorise flogging or other corporal punishment to be inflicted for any offence."

(6) In section one hundred and thirty-eight (which relates to penal stoppages from ordinary pay of soldiers)—

(*a*) In paragraph (1), after the word "detention," in both places where it occurs, there shall be inserted the words "or field punishment";

(*b*) At the end the following proviso shall be added:—

"and

"(*c*) where a soldier who is sentenced or ordered in respect of an offence on active service to forfeit all ordinary pay is liable to any other penal deductions from pay, the sentence or order shall apply only to so much of his ordinary pay as remains after those other deductions have been made."

(7) In section one hundred and eighty-three of the Army Act (which contains special provisions as to non-commissioned officers)—

(*a*) In paragraph (2) after the words "may appoint," there shall be inserted the words, "and on active service the officer commanding-in-chief in the field and any general officer he may appoint";

(*b*) In paragraph (4) after the words "penal servitude" there shall be inserted the words "field punishment."

SCHEDULES.

FIRST SCHEDULE (s. 3).

Accommodation to be provided.	Maximum Price.
Lodging and attendance for soldier where meals furnished . .	Sixpence per night.
Breakfast as specified in Part I. of the Second Schedule to the Army Act.	Fourpence each.
Hot dinner as so specified	Elevenpence halfpenny each.
Supper as so specified	Twopence halfpenny each.
Where no meals furnished, lodging and attendance, and candles, vinegar, salt, and the use of fire, and the necessary utensils for dressing and eating his meat.	Sixpence per day.
Ten pounds of oats, twelve pounds of hay, and eight pounds of straw per day for each horse.	One shilling and ninepence per day.
Lodging and attendance for officer	Two shillings per night.

Note.—An officer shall pay for his food.

SECOND SCHEDULE (s. 8).

Paragraph to be substituted for paragraph (2) of Part I. of Second Schedule to Army Act.

"(2) Shall, if required by the soldier, furnish him for every day of the march, and for not more than two days, if the soldier is halted at an intermediate place on the march for more than two days, and on the day of arrival at the place of final destination, with breakfast, hot dinner, and supper on each day, such meals to consist of such quantities of food and drink as may from time to time be fixed by His Majesty's Regulations, not exceeding—

"(*a*) For breakfast, six ounces of bread, one pint of tea with milk and sugar, four ounces of bacon;

(*b*) For hot dinner, one pound of meat previous to being dressed, eight ounces of bread, eight ounces of potatoes or other vegetables, one pint of beer or mineral water of equal value;

"(*c*) For supper, six ounces of bread, one pint of tea with milk and sugar, two ounces of cheese; and"

THIRD SCHEDULE.

MODIFICATIONS OF ARMY ACT (s. 9).

Modification to be made.	Provisions of Army Act to be modified.
I.	
The following substitution of words shall be made:—	
"person" for "prisoner"	Sections twenty; twenty-one; sixty-eight, subsection (1); one hundred and thirty, subsection (5); and one hundred and thirty-one, subsection (2).
"imprisonment or detention" for "or imprisonment."	Sections fifty-seven; sixty-eight, subsection (1); seventy; one hundred and fifty-eight, subsection (2); one hundred and eighty-three, subsection (4) and proviso (*a*); and one hundred and eighty-seven.
"that person's" for "the prisoner's."	Section twenty-one.
"order the offender" for "commit such offender to prison there."	Section twenty-eight.
"accused persons" for "accuseds."	Section fifty-two, subsection (1).
"detention" for "imprisonment."	Section eighty-three, subsection (7).
II.	
The following insertion of words shall be made:—	
"or soldier" . . .	After the words "such prisoner" in section sixty-seven, subsection (1). After the word "prisoner" in section sixty-seven, subsections (2) and (3). After the word "prisoner" (except where that word follows the word "military") in section one hundred and seventy-two.
"or detention barrack" .	After the word "prison" in sections sixty-seven, subsection (2); one hundred and thirty, subsection (5); and one hundred and thirty-one, subsection (2). After the words "a military prison" in section one hundred and thirty-three, subsection (1). After the words "military prison" in section one hundred and thirty-three, subsection (3).

ARMY (ANNUAL) ACT, 1907.

Modification to be made.	Provisions of Army Act to be modified.
"and detention barracks" .	After the word "prisons" in sections one hundred and thirty-three, subsections (2) and (5); and one hundred and eighty-seven.
"or detention, as the case may be."	After the words "for the purposes of the provisions of this Act relating to imprisonment" in sections sixty-four and sixty-five.
"or detention" . . .	After the words "of imprisonment" in sections sixty-four, sixty-five, sixty-six, and sixty-seven. After the word "imprisonment" in sections sixty-eight, one hundred and thirty, one hundred and thirty-one, one hundred and thirty-three, subsection (2), and one hundred and forty.
"or soldier undergoing detention."	After the word "prisoner" in sections sixty-four, paras. (2) (*d*), (3) (*c*), and (4) (*c*); sixty-five, paras. (4) (*c*), (5) (*a*) and (6) (*b*); and sixty-six. After the words "military prisoner" in sections sixty-seven, subsection (1); and one hundred and seventy-two, subsections (2) and (4).
"or, in the case of a soldier to undergo detention."	After the word "labour" in section twenty-eight.
"or undergoing detention."	After the word "imprisoned" in section one hundred and thirty, subsection (5).
"and soldiers undergoing detention."	Before the word "therein" in section one hundred and thirty-three, subsection (2).
"or soldiers" . . .	After the words "such prisoners" in section one hundred and thirty-three, subsection (2).
"made to undergo detention."	After the word "imprisoned" in section one hundred and fifty-eight, subsection (2).
"or a soldier undergoing detention."	After the words "military prisoner" in section one hundred and seventy-two, subsection (5).

III.

The following section shall be substituted for section sixty-three:—

"63.—EXECUTION SENTENCES OF IMPRISONMENT AND DETENTION.—(1) Where a "sentence of imprisonment is passed by court-martial, the person on whom that sentence "has been passed (in the provisions of this Act relating to imprisonment referred to as a "military prisoner) shall undergo the term of his imprisonment either in military custody "or in a detention barrack or in a public prison, or partly in one way and partly in "another; and, where a sentence of detention is passed by a court-martial or a commanding "officer, the person on whom that sentence has been passed (in the provisions of this Act "relating to detention referred to as a soldier undergoing detention) shall undergo the "term of his detention either in military custody or in a detention barrack, or partly in "one way and partly in the other, but not in a prison.

"(2) Any person liable to be imprisoned in a military prison may be confined in a "detention barrack.

"(3) The order of the committing authority hereafter mentioned shall be a sufficient "warrant for the transfer of a military prisoner to a public prison or a detention barrack, "or a soldier undergoing detention to a detention barrack.

"(4) A military prisoner while in a public prison shall be confined, kept to hard "labour, and otherwise dealt with in the like manner as an ordinary prisoner under a like "sentence of imprisonment; and, where the hospital or place for the reception of sick "persons in a public prison or a detention barrack is detached from the prison or detention "barrack, a military prisoner or a soldier undergoing detention may be detained in that "hospital or place, and conveyed to or from the same as circumstances require.

"(5) A military prisoner or a soldier undergoing detention, during his conveyance "from place to place, or when on board ship or otherwise, may be subjected to such "restraint as is necessary for his safe custody and removal.

"(6) The discharging authority hereafter mentioned may, at any time during the "period of the imprisonment of a military prisoner, or of the detention of a soldier under-"going detention, by order discharge the prisoner or soldier.

"(7) The committing authority or any other prescribed authority may at any time "by order remove a military prisoner from one public prison or detention barrack "to another prison or detention barrack, or a soldier undergoing detention from one "detention barrack to another, so that he be not removed from a prison or detention "barrack in the United Kingdom to a prison or detention barrack elsewhere.

"(8) The removing authority hereafter mentioned may, at any time during the "period of the imprisonment of a military prisoner or of the detention of a soldier under-"going detention, from time to time by order provide for his being brought before a "court-martial, or any civil court, either as a witness, or for trial or otherwise; and an "order of such authority shall be a sufficient warrant for delivering him into military "custody and detaining him in custody until he can be returned, and for returning him to "the place from whence he is brought, or to such other place as may be determined by "the removing authority."

CHAPTER III.

An Act to repeal the Law which prohibits the Growing of Tobacco in Ireland.

[*4th July* 1907.]

CHAPTER IV.

An Act to extend the Destructive Insects Act, 1877, *to all Pests Destructive to Crops, Trees, or Bushes.* [*4th July* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Extension of 40 and 41 Vict. c. 68 to all Pests.—(1) The Board of Agriculture and Fisheries may, for the purpose of preventing the introduction into Great Britain of any insect, fungus, or other pest destructive to agricultural or horticultural crops or to trees or bushes, and for preventing the spreading in Great Britain of any such insect, fungus, or other pest, exercise all such powers as may be exercised by the Board in relation to the Colorado beetle under the Destructive Insects Act, 1877; and that Act shall apply accordingly as if in that Act the expression "insect" included all such insects, fungi, and other pests, and the expression "crop" included all such crops, trees, and bushes:

Provided that the Board shall not make an order directing the payment of compensation by any local authority for the removal or destruction of any crop or any trees or bushes unless the local authority consent to make the payment.

(2) Section one of the Rules Publication Act, 1893 (56 and 57 Vict. c. 66), shall not apply to any order made under the Destructive Insects Act, 1877, or this Act.

(3) This Act shall apply to Ireland as if Ireland were named therein instead of Great Britain, and with the substitution of the Department of Agriculture and Technical Instruction for Ireland for the Board of Agriculture and Fisheries.

2. This Act may be cited as the Destructive Insects and Pests Act, 1907, and the Destructive Insects Act, 1877; and this Act may be cited together as the Destructive Insects and Pests Acts, 1877 and 1907.

CHAPTER V.

An Act to re-enact with amendments the Injured Animals Act, 1894. [*26th July* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Slaughter of Injured Animals by or by Order of Police.—(1) If a police constable finds any animal so diseased or so severely injured or in such a physical condition that it cannot without cruelty be removed, he shall, if the owner is absent or refuses to consent to the destruction of the animal, at once summon a duly registered

veterinary surgeon, if any such veterinary surgeon resides within a reasonable distance; and if it appears by the certificate of such veterinary surgeon that the animal is mortally injured or so severely injured or so diseased or in such a physical condition that it is cruel to keep it alive, it shall be lawful for the police constable, without the consent of the owner, to slaughter the animal or cause it to be slaughtered with such instruments or appliances, and with such precautions, and in such manner, as to inflict as little pain and suffering as practicable; and if the slaughter takes place in a street or public place, to remove the carcase or cause it to be removed therefrom.

(2) Any reasonable expense which may be incurred by any constable in carrying out the provisions of this Act may be recovered from the owner summarily as a civil debt, and, subject thereto, any such expense shall be defrayed out of the fund from which the expenses of the police are payable in the area in which the animal is found.

2. DEFINITION OF ANIMAL.—For the purposes of this Act the word "animal" means any horse, mule, ass, bull, cow, ox, heifer, calf, sheep, goat, or swine.

3. SHORT TITLE AND REPEAL.—(1) This Act may be cited for all purposes as the Injured Animals Act, 1907.

(2) The Injured Animals Act, 1894 (57 and 58 Vict. c. 22), is hereby repealed.

CHAPTER VI.

An Act to provide for raising further Money for the purpose of the Telegraph Acts, 1863 to 1906. [2*nd August* 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. GRANT OF £6,000,000 FOR THE PURPOSE OF THE TELEGRAPH ACTS.—(1) The Treasury may, with a view to the development of that part of the telegraphic system of the United Kingdom which is called the telephonic system, without prejudice to the exercise of any powers previously given for the like purpose, issue out of the Consolidated Fund, or the growing produce thereof, such sums, not exceeding in the whole the sum of six million pounds, as may be required by the Postmaster-General for the purpose of developing the telephonic system aforesaid according to estimates approved by the Treasury.

(2) The Treasury may, if they think fit, with a view to provide money for sums so authorised to be issued out of the Consolidated Fund, or for repaying to that fund all or any part of the sums so issued, borrow by means of terminable annuities for a term not exceeding twenty years, and all sums so borrowed shall be paid into the Exchequer.

(3) The said annuities shall be paid out of moneys provided by Parliament for the service of the Post Office, and, if those moneys are insufficient, shall be charged on and paid out of the Consolidated Fund of the United Kingdom or the growing produce thereof at such times in each year as may be fixed by the Treasury.

2. SHORT TITLE.—This Act may be cited as the Telegraph (Money) Act, 1907, and may be cited with the Telegraph Acts, 1863 to 1906.

CHAPTER VII.

An Act to amend the Law relating to the Reservation for His Majesty's pleasure of Bills passed by the Legislatures of the States forming part of the Commonwealth of Australia, and to confirm certain Acts passed by those Legislatures. [2*nd August* 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. RESERVATION OF BILLS.—(1) There shall be reserved, for the signification of His Majesty's pleasure thereon, every Bill passed by the Legislature of any State forming part of the Commonwealth of Australia which—

(*a*) alters the constitution of the Legislature of the State or of either House thereof; or

(*b*) affects the salary of the Governor of the State; or

(*c*) is, under any Act of the Legislature of the State passed after the passing of this Act, or under any provision contained in the Bill itself, required to be reserved;

but, save as aforesaid, it shall not be necessary to so reserve any Bill passed by any such Legislature:

Provided that—

(*a*) nothing in this Act shall affect the reservation of Bills in accordance with any instructions given to the Governor of the State by His Majesty; and

(*b*) it shall not be necessary to reserve a Bill for a temporary law which the Governor expressly declares necessary to be assented to forthwith by reason of some public and pressing emergency; and

(*c*) it shall not be necessary to reserve any Bill if the Governor declares that he withholds His Majesty's assent, or if he has previously received instructions from His Majesty to assent and does assent accordingly to the Bill.

(2) For the purposes of this section a Bill shall not be treated as a Bill altering the constitution of the Legislature of a State or of either House thereof by reason only that the Bill—

(*a*) creates, alters, or affects any province, district, or town, or division of a province, district, or town, which returns one or more members to either House of the Legislature; or

(*b*) fixes or alters the number of members to be elected for any such province, district, or town, or division of a province, district, or town; or

(*c*) increases or decreases the total number of elective members of either House of the Legislature; or

(*d*) concerns the election of the elective members of the Legislature, or either House thereof, or the qualifications of electors or elective members.

(3) Section thirty-three of the Australian Constitutions Act, 1842 (5 and 6 Vict. c. 76), shall apply to Bills reserved under this Act in like manner as it applies to Bills reserved under that Act with the substitution of references to a State forming part of the Commonwealth of Australia for references to the colony of New South Wales, and of references to both Houses of the Legislature of the State for references to the Legislative Council.

(4) So much of any Act of Parliament or Order in Council as requires any Bill passed by the Legislature of any such State to be reserved for the signification of His Majesty's pleasure thereon, or to be laid before the Houses of Parliament before His Majesty's pleasure is signified, and, in particular, the enactments mentioned in the Schedule to this Act, to the extent specified in the third column of that Schedule, shall be repealed both as originally enacted and as incorporated in or applied by any other Act of Parliament or any Order in Council or letters patent.

2. CONFIRMATION OF CERTAIN AUSTRALIAN ACTS.—(1) Any Act passed by the Legislature of any such State, and assented to in the name of His Majesty by the Governor and not disallowed by His Majesty before the passing of this Act, shall, notwithstanding that the Bill for the Act ought to have been but was not reserved for the signification of His Majesty's pleasure thereon, and notwithstanding that it ought to have been but was not duly laid before both Houses of Parliament, be deemed to be and to have been as from the date of that assent as valid as if the Bill had been so reserved and as if it had been laid before both Houses of Parliament, and as if His Majesty's assent to the Bill had been duly given and signified in the State at the date aforesaid.

(2) For the purposes of this section references to Acts passed by the Legislature of a State shall be construed as including references to Acts passed before the establishment of the Commonwealth of Australia by the Legislature of any colony which now forms part of that Commonwealth, and references to His Majesty shall be construed as including references to Her late Majesty.

3. SHORT TITLE.—This Act may be cited as the Australian States Constitution Act, 1907.

SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
5 and 6 Vict. c. 76.	The Australian Constitutions Act, 1842.	Section thirty-one, from "and all Bills altering" to the end of the section.
7 and 8 Vict. c. 74.	The Australian Constitutions Act, 1844.	Sections seven and eight.
13 and 14 Vict. c. 59.	The Australian Constitutions Act, 1850.	In section twelve, the words "and the reservation of Bills for the signification of Her Majesty's pleasure thereon, and the Bills so reserved." Section thirty-two, from "Provided always" to the end of the section. Section thirty-three.
18 and 19 Vict. c. 54.	The New South Wales Constitution Act, 1855.	In section three, the words "and the reservation of Bills for the signification of Her Majesty's pleasure thereon."
18 and 19 Vict. c. 55.	The Victoria Constitution Act, 1855.	In section three, the words "and the reservation of Bills for the signification of Her Majesty's pleasure thereon."
25 and 26 Vict. c. 11.	The Australian Constitutions Act, 1862.	Section two.
53 and 54 Vict. c. 26.	The Western Australia Constitution Act, 1890.	In section two, the words "and the reservation of Bills for the signification of Her Majesty's pleasure thereon."

CHAPTER VIII.

An Act to exempt from Assay Foreign Watch-Cases imported into the United Kingdom before the first day of June nineteen hundred and seven. [*2nd August* 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. FOREIGN WATCH-CASES IMPORTED BEFORE CERTAIN DATE EXEMPT FROM ASSAY.—(1) All watch-cases imported from foreign parts into the United Kingdom at any time before the first day of June nineteen hundred and seven shall be exempted from assay in the United Kingdom, and shall accordingly not be subject to the provisions of section fifty-nine of the Customs Act, 1842 (5 and 6 Vict. c. 47), or section ten of the Revenue Act, 1883 (46 and 47 Vict. c. 55); but, if on any proceedings a question arises whether any watch-case is exempted from assay under the provisions of this Act, it shall lie on the person alleging that the watch-case is exempted to prove that it is so exempted.

(2) Where any watch-case to which this Act applies is exported from and subsequently reimported into the United Kingdom, the exemption from assay conferred by this Act shall not be allowed unless the watch-case is identified in the prescribed manner at the prescribed assay office as a watch-case to which such exemption attaches.

In this provision "prescribed" means prescribed by regulations made for the purpose by the Commissioners of Customs, and the regulations so made may provide for the removal of any watch-case in respect of which exemption is claimed to the prescribed assay office and for the payment of fees.

2. SHORT TITLE.—This Act may be cited as the Assay of Imported Watch-Cases (Existing Stocks Exemption) Act, 1907.

CHAPTER IX.

TERRITORIAL AND RESERVE FORCES ACT, 1907.

[7 EDW. 7. CH. 9.]

ARRANGEMENT OF SECTIONS.

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COUNTY ASSOCIATIONS.

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1. Establishment of associations.
2. Powers and duties of associations.
3. Expenses of association.
4. Regulations.
5. Joint committees of associations.

PART II.

TERRITORIAL FORCE.

Raising and Maintenance of Force.

6. Raising and number of Territorial Force.

Government, Discipline, and Pay.

7. Government, discipline, and pay of Territorial Force.
8. First appointments to lowest rank of officers of the Territorial Force.

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9. Enlistment, term of service, and discharge.
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20. Punishment for failure to attend on embodiment.
21. Punishment for failure to fulfil training conditions.
22. Wrongful sale, &c. of public property.

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23. Civil rights and exemptions.

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24. Trial of offences and application of penalties.
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TERRITORIAL AND RESERVE FORCES ACT, 1907.

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38. Definitions.
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40. Application to Scotland and the Isle of Man.
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CHAPTER IX.

An Act to provide for the reorganisation of His Majesty's military forces, and for that purpose to authorise the establishment of County Associations, and the raising and maintenance of a Territorial Force, and for amending the Acts relating to the Reserve Forces. [2*nd August* 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

COUNTY ASSOCIATIONS.

1. ESTABLISHMENT OF ASSOCIATIONS.—(1) For the purposes of the reorganisation under this Act of His Majesty's military forces other than the regulars and their reserves, and of the administration of those forces when so reorganised, and for such other purposes as are mentioned in this Act, an association may be established for any county in the United Kingdom, with such powers and duties in connection with the purposes aforesaid as may be conferred on it by or under this Act.

(2) Associations shall be constituted, and the members thereof shall be appointed and hold office in accordance with schemes to be made by the Army Council.

(3) Every such scheme shall provide—

(*a*) For the date of the establishment of the association:

(*b*) For the incorporation of the association by an appropriate name, with power to hold land for the purposes of this Act without licence in mortmain:

(*c*) For constituting the lieutenant of the county, or failing him such other person as the Army Council may think fit, president of the association:

(*d*) For the appointment of such number of officers representative of all arms and branches of the Territorial Force raised under this Act within the county (not being less than one half of the whole number of the association) as may be specified in the scheme:

(*e*) For the appointment by the Army Council, where it appears desirable, and after consultation with, and on the recommendation of, the authorities to be represented, of representatives of county and county borough councils and universities wholly or partly within the county:

(*f*) For the appointment of such number of co-opted members as the scheme may prescribe, including, if thought desirable, representatives of the interests of employers and workmen:

(*g*) For the appointment by the Army Council during the first three years after the passing of this Act, and subsequently for the election of a chairman and vice-chairman by the association, and for defining their powers and duties:

(*h*) For the mode of appointment, term of office, and rotation of members of the association, and the filling of casual vacancies:

(*i*) For the appointment by the association, subject to the approval of the Army Council, of a secretary and other officers of the association, and the accountability of such officers, and for the provision of offices:

(*j*) For the procedure to be adopted, including the appointment of committees and the delegation to committees of any of the powers or duties of the association:

(*k*) For enabling such general officers of any part of His Majesty's forces, and not being members of the association, as may be specified in the scheme, or officers deputed by them, to attend the meetings of the association and to speak, but not to vote:

(*l*) For dividing the county, where on account of its size or population it seems desirable to do so, into two or more parts, and for constituting sub-associations for the several parts, and for apportioning amongst the several sub-associations all or any of the powers and duties of the association, and regulating the relations of sub-associations to the association and to one another.

(4) A scheme may contain any consequential, supplemental, or transitory provisions which may appear to be necessary or proper for the purposes of the scheme, and also as respects any matter for which provision may be made by regulations under this Act and for which it appears desirable to make special provision affecting the association established by the scheme.

(5) All schemes made in pursuance of this Part of this Act shall be laid before both Houses of Parliament.

(6) Until an Order in Council has been made under this Act for transferring to the Territorial Force the units of the Yeomanry and Volunteers of any county, references in this section to the Territorial Force shall as respects that county be construed as including references to the Yeomanry and Volunteers.

2. Powers and Duties of Associations.—(1) It shall be the duty of an association when constituted to make itself acquainted with and conform to the plan of the Army Council for the organisation of the Territorial Force within the county, and to ascertain the military resources and capabilities of the county, and to render advice and assistance to the Army Council and to such officers as the Army Council may direct; and an association shall have, exercise, and discharge such powers and duties connected with the organisation and administration of His Majesty's military forces as may for the time being be transferred or assigned to it by order of His Majesty signified under the hand of a Secretary of State or, subject thereto, by regulations under this Act, but an association shall not have any powers of command or training over any part of His Majesty's military forces.

(2) The powers and duties so transferred or assigned may include any powers conferred on or vested in His Majesty, and any powers or duties conferred or imposed on the Army Council or a Secretary of State, by statute or otherwise, and in particular respecting the following matters:—

(*a*) The organisation of the units of the Territorial Force and their administration (including maintenance) at all times other than when they are called out for training or actual military service, or when embodied:

(*b*) The recruiting for the Territorial Force both in peace and in war, and defining the limits of recruiting areas:

(*c*) The provision and maintenance of rifle ranges, buildings, magazines, and sites of camps for the Territorial Force:

(*d*) Facilitating the provision of areas to be used for manœuvres:

(*e*) Arranging with employers of labour as to holidays for training, and ascertaining the times of training best suited to the circumstances of civil life:

(*f*) Establishing or assisting cadet battalions and corps and also rifle clubs, provided that no financial assistance out of money voted by Parliament shall be given by an association in respect of any person in a battalion or corps in a school in receipt of a parliamentary grant until such person has attained the age of sixteen:

(*g*) The provision of horses for the peace requirements of the Territorial Force:

(*h*) Providing accommodation for the safe custody of arms and equipment:

(*i*) The supply of the requirements on mobilisation of the units of the Territorial Force within the county, in so far as those requirements are directed by the Army Council to be met locally, such requirements where practicable to be embodied in regulations which shall be issued to county associations from time to time, and on the first occasion not later than the first day of January one thousand nine hundred and nine:

(*j*) The payment of separation and other allowances to the families of men of the Territorial Force when embodied or called out on actual military service:

(*k*) The registration in conjunction with the military authorities of horses for any of His Majesty's forces:

(*l*) The care of reservists and discharged soldiers.

3. Expenses of Association.—(1) The Army Council shall pay to an association, out of money voted by Parliament for army services, such sums as, in the opinion of the Army Council, are required to meet the necessary expenditure connected with the exercise and discharge by the association of its powers and duties.

(2) An association shall submit to the Army Council annually, at the prescribed time, and may submit at any other time for any special purpose, in the prescribed form and manner, a statement of its necessary requirements, and all payments to an association by the Army Council shall be made upon the basis of such statements in so far as they are approved by the Army Council.

(3) Subject to regulations under this Act, all money so paid to an association shall be applicable to any of the purposes specified in the approved statements in accordance with which the money has been granted, but not otherwise except with the written consent of the Army Council:

Provided that nothing in this section shall be construed as enabling the Army Council to give their consent to the application of money to any purpose to which, apart from this section, it could not lawfully be applied, or to give their consent, without the authority of the Treasury, in any case in which, apart from this section, the authority of the Treasury would be required.

(4) All other money received by an association (except such money, if any, as may be received by it for specified purposes) shall be available for the purposes of any of its powers and duties.

(5) An association shall cause its accounts to be made up annually and audited in such manner as may be prescribed, and shall send copies of its accounts as audited, together with any report of the auditors thereon, to the Army Council.

(6) Regulations made for the purposes of this section shall be subject to the consent of the Treasury.

(7) The members of an association shall not be under any pecuniary liability for any act done by them in their capacity as members of such association in carrying out the provisions of this Act.

4. Regulations.—(1) Subject to the provisions of this Act, the Army Council may make regulations for carrying this Part of this Act into effect, and may by those regulations, amongst other things, provide for the following matters:—

(*a*) For regulating the manner in which powers are to be exercised and duties performed by associations, and for specifying the services to which money paid by the Army Council is to be applicable:

(*b*) For authorising and regulating the acquisition by or on behalf of an association of land for the purposes of this Act and the disposal of any land so acquired:

(*c*) For authorising and regulating the borrowing of money by an association:

(*d*) For authorising the acceptance of any money or other property, and the taking

over of any liability, by an association, and for regulating the administration of any money or property so acquired and the discharge of any liability so taken over :

(*e*) For facilitating the co-operation of an association with any other association, or with any local authority or other body, and for providing by the constitution of joint committees or otherwise for co-operative action in the organisation and administration of divisions, brigades, and other military bodies, and for the provision of assistance by one association to another :

(*f*) For affiliating cadet corps and battalions, rifle clubs, and other bodies to the Territorial Force or any part thereof :

(*g*) For or in respect of anything by this Part of this Act directed or authorised to be done or provided by regulations or to be done in the prescribed manner :

(*h*) For the application for the purposes of this Part of this Act, as respects any matters to be dealt with by regulations, of any provision in any Act of Parliament dealing with the like matters, with the necessary modifications or adaptations, and in particular of any provisions as to the acquisition of land by or on behalf of volunteer corps.

(2) All regulations made in pursuance of this Part of this Act shall be applicable to all associations, except in so far as may be otherwise provided by the regulations or by any scheme made under this Part of this Act.

(3) All regulations made under this Part of this Act shall be laid before both Houses of Parliament as soon as may be after they are made.

5. Joint Committees of Associations.—(1) Any county associations may from time to time join in appointing out of their respective bodies a joint committee for any purpose in respect of which they are jointly interested.

(2) Any association appointing a joint committee under this subsection may delegate to it any power which such association might exercise for the purpose for which the committee is appointed.

(3) Subject to the terms of delegation any such joint committee shall in respect of any matter delegated to it have the same power in all respects as the associations appointing it.

(4) The costs of a joint committee shall be defrayed by the associations by whom it has been appointed, in such proportion as may be agreed between them, and the accounts of such joint committees and their officers shall for the purposes of the provisions of this Act be deemed to be accounts of the associations appointing them and of their officers.

Part II.

Territorial Force.

Raising and Maintenance of Force.

6. Raising and Number of Territorial Force.—It shall be lawful for His Majesty to raise and maintain a force, to be called the "Territorial Force," consisting of such number of men as may from time to time be provided by Parliament.

Government, Discipline, and Pay.

7. Government, Discipline, and Pay of Territorial Force.—(1) Subject to the provisions of this Part of this Act, it shall be lawful for His Majesty, by order signified under the hand of a Secretary of State, to make orders with respect to the government, discipline, and pay and allowances of the Territorial Force, and with respect to all other matters and things relating to the Territorial Force, including any matter by this Part of this Act authorised to be prescribed or expressed to be subject to orders or regulations.

(2) The said orders may provide for the formation of men of the Territorial Force into regiments, battalions, or other military bodies, and for the formation of such regiments, battalions, or other military bodies into corps, either alone or jointly with any other part of His Majesty's forces, and for appointing, transferring, or attaching

men of the Territorial Force to corps, and for posting, attaching, or otherwise dealing with such men within the corps; and may provide for the constitution of a permanent staff, including adjutants and staff sergeants who shall, except in special circumstances certified by the general officer commanding, be members of His Majesty's regular forces; and may regulate the appointment, rank, duties, and numbers of the officers and non-commissioned officers of the Territorial Force.

(3) Subject to the provisions of any such order, the Army Council may make general or special regulations with respect to any matter with respect to which His Majesty may make orders under this section.

(4) Provided that the said orders or regulations shall not—

(*a*) affect or extend the term for which, or the area within which, a man of the Territorial Force is liable under this Part of this Act to serve; or

(*b*) authorise a man of the Territorial Force when belonging to one corps to be transferred without his consent to another corps; or

(*c*) when the corps of a man of the Territorial Force includes more than one unit, authorise him when not embodied to be posted, without his consent, to any unit other than that to which he was posted on enlistment; or

(*d*) when the corps of a man of the Territorial Force includes any battalion or other body of the regular forces, authorise him to be posted without his consent to that battalion or body.

(5) Where a man of the Territorial Force was enlisted or re-engaged before the date of any order or regulation under this Part of this Act, nothing in such order or regulation shall render him liable without his consent to be appointed, transferred, or attached to any military body to which he could not without his consent have been appointed, transferred, or attached if the said order or regulation had not been made.

(6) Orders and regulations under this section may provide for the formation of a reserve division of the Territorial Force, and may relax or dispense with any of the provisions of this Act relating to the training of the men of the Territorial Force so far as regards their application to men in the reserve division, and may, notwithstanding anything in this section, authorise a man in the reserve division to be transferred from one corps to another, so, however, that a man in the reserve division shall not, without his consent, be transferred to a corps of another arm.

(7) All orders and general regulations made under this section shall be laid before both Houses of Parliament as soon as may be after they are made.

8. FIRST APPOINTMENTS TO LOWEST RANK OF OFFICERS OF THE TERRITORIAL FORCE.—Subject to any directions which may be given by His Majesty, first appointments to the lowest rank of officer in any unit of the Territorial Force shall be given to persons recommended by the president of the association for the county, if a person approved by His Majesty is recommended by the president for any such appointment within thirty days after notice of a vacancy for the appointment has been given to the president in the prescribed manner, provided he fulfils all the prescribed conditions as to age, physical fitness, and educational qualifications; and, where a unit comprises men of the Territorial Force of two or more counties, the recommendations for such appointments shall be made by the presidents of the associations for the respective counties in such rotation or otherwise as may be prescribed.

Enlistment, Service, Discharge.

9. ENLISTMENT, TERM OF SERVICE, AND DISCHARGE.—(1) Subject to the provisions of this Part of this Act, all men of the Territorial Force shall be enlisted by such persons and in such manner and subject to such regulations as may be prescribed:

Provided that every man enlisted under this Part of this Act—

(*a*) Shall be enlisted for a county for which an association has been established under this Act and shall be appointed to serve in such corps for that county or for an area comprising the whole or part of that county as he may select, and, if that corps comprises more than one unit within the county, shall be posted to such one of those units as he may select:

(*b*) Shall be enlisted to serve for such a period as may be prescribed, not exceeding four years, reckoned from the date of his attestation:

(*c*) May be re-engaged within twelve months before the end of his current term of service for such a period as may be prescribed not exceeding four years from the end of that term, and on re-engagement shall make the prescribed declaration before a justice of the peace or an officer, and so from time to time.

(2) A man enlisted in the Territorial Force, until duly discharged in the prescribed manner, shall remain subject to this Part of this Act as a man of the Territorial Force.

(3) Any man of the Territorial Force shall, except when a proclamation ordering the Army Reserve to be called out on permanent service is in force, be entitled to be discharged before the end of his current term of service on complying with the following conditions:—

(i) Giving to his commanding officer three months' notice in writing, or such less notice as may be prescribed, of his desire to be discharged; and

(ii) Paying for the use of the association for the county for which he was enlisted such sum as may be prescribed not exceeding five pounds; and

(iii) Delivering up in good order, fair wear and tear only excepted, all arms, clothing, and appointments, being public property, issued to him, or, in cases where for any good and sufficient cause the delivery of the property aforesaid is impossible, on paying the value thereof:

Provided that it shall be lawful for the association for the county, or for any officer authorised by the association, in any case in which it appears that the reasons for which the discharge is claimed are of sufficient urgency or weight, to dispense either wholly or in part with all or any of the above conditions.

(4) A man of the Territorial Force may be discharged by his commanding officer for disobedience to orders by him while doing any military duty, or for neglect of duty, or for misconduct by him as a man of the Territorial Force, or for other sufficient cause, the existence and sufficiency of such cause to be judged of by the commanding officer:

Provided that any man so discharged shall be entitled to appeal to the Army Council, who may give such directions in any such case as they may think just and proper.

(5) Where the time at which a man of the Territorial Force would otherwise be entitled to be discharged occurs while a proclamation ordering the Army Reserve to be called out on permanent service is in force, he may be required to prolong his service for such further period, not exceeding twelve months, as the competent military authority may order.

10. APPLICATION OF CERTAIN SECTIONS OF THE ARMY ACT, 44 AND 45 VICT. C. 58.—(1) The following sections of the Army Act shall apply to the Territorial Force (that is to say):—

Section eighty (relating to the mode of enlistment and attestation);

Section ninety-six (relating to the claims of masters to apprentices);

Section ninety-eight (imposing a fine for unlawful recruiting);

Section ninety-nine (making recruits punishable for false answers);

So much of section one hundred as relates to the validity of attestation and enlistment or re-engagement;

Section one hundred and one (relating to the competent military authority); and

So much of section one hundred and sixty-three as relates to an attestation paper, or a copy thereof, or a declaration, being evidence.

And the said sections shall apply in like manner as if they were herein re-enacted, with the substitution—

(*a*) Of "Territorial Force" for "regular forces," and of "man of the Territorial Force" for "soldier"; and

(*b*) (In section one hundred) of "has not within three months claimed his discharge "on any ground on which he is entitled under this subsection to do so" for "has received pay as a soldier of the regular forces during three months."

(2) A recruit may be attested by any lieutenant or deputy-lieutenant of any county in the United Kingdom, or by an officer of the regular or Territorial forces, and the sections of the Army Act in this section mentioned, and also section thirty-

three of the same Act, shall as applied to the Territorial Force be construed as if a justice of the peace in those sections included such lieutenant, deputy lieutenant, or officer.

11. Enlistment of Men Discharged with Disgrace from Army or Navy, or Contrary to Rules.—(1) If a person—

(*a*) Having been discharged with disgrace from any part of His Majesty's forces, or having been dismissed with disgrace from the Navy, has afterwards enlisted in the Territorial Force without declaring the circumstances of his discharge or dismissal; or

(*b*) Is concerned when subject to military law in the enlistment for service in the Territorial Force of any man, when he knows or has reasonable cause to believe such man to be so circumstanced that by enlisting he commits an offence against the Army Act or this Act; or

(*c*) Wilfully contravenes when subject to military law any enactments, orders, or regulations which relate to the enlistment or attestation of men in the Territorial Force,

he shall be guilty of an offence, and shall, whether otherwise subject to military law or not, be liable to be tried by court martial, and on conviction to suffer such punishment as is imposed for the like offence by section thirty-two or thirty-four of the Army Act, as the case may be, and may be taken into military custody.

(2) For the purpose of this section the expression "discharged with disgrace" means discharged with ignominy, discharged as incorrigible and worthless, or discharged for misconduct, or discharged on account of a conviction for felony or a sentence of penal servitude.

12. Enlistment into Army Reserve.—If a man of the Territorial Force enlists into the army reserve without being discharged from the Territorial Force, the terms and conditions of his service whilst he remains in the army reserve shall be those applicable to him as a man belonging to the army reserve, and not those applicable to him as a man of the Territorial Force.

13. Area of Service of Territorial Force.—(1) Any part of the Territorial Force shall be liable to serve in any part of the United Kingdom, but no part of the Territorial Force shall be carried or ordered to go out of the United Kingdom.

(2) Provided that it shall be lawful for His Majesty, if he thinks fit, to accept the offer of any part or men of the Territorial Force, signified through their commanding officer, to subject themselves to the liability—

(*a*) to serve in any place outside the United Kingdom; or

(*b*) to be called out for actual military service for purposes of defence at such places in the United Kingdom as may be specified in their agreement, whether the Territorial Force is embodied or not;

and, upon any such offer being accepted, they shall be liable, whenever required during the period to which the offer extends, to serve or be called out accordingly.

(3) A person shall not be compelled to make such an offer, or be subjected to such liability as aforesaid, except by his own consent, and a commanding officer shall not certify any voluntary offer previously to his having explained to every person making the offer that the offer is to be purely voluntary on his part.

Training.

14. Preliminary Training of Recruits of Territorial Force.—(1) Every man of the Territorial Force shall, by way of preliminary training, during the first year of his original enlistment—

(*a*) If so provided by Order in Council, be trained at such places within the United Kingdom, at such times, and for such periods, not exceeding in the whole the number of days specified by the Order in Council, as may be prescribed, and may for that purpose be called out once or oftener; and

(*b*) Whether such an Order in Council has been made or not, attend the number of drills and fulfil the other conditions prescribed for a recruit of his arm or branch of the service.

(2) The requirement to attend training and drills, and to fulfil conditions under

this section, shall be in addition to the requirement to attend training and drills and to fulfil conditions for the purpose of annual training.

15. ANNUAL TRAINING.—(1) Subject to the provisions of this section, every man of the Territorial Force shall, by way of annual training—

(*a*) Be trained for not less than eight nor more than fifteen, or in the case of the mounted branch eighteen, days in every year at such times and at such places in any part of the United Kingdom as may be prescribed, and may for that purpose be called out once or oftener in every year:

(*b*) Attend the number of drills and fulfil the other conditions relating to training prescribed for his arm or branch of the service:

Provided that the requirements of this section may be dispensed with in whole or in part—

(i) as respects any unit, by the prescribed general officer; and

(ii) as respects an individual man, by his commanding officer subject to any general directions by the prescribed general officer.

(2) His Majesty in Council may—

(*a*) Order that the period of annual training in any year of all or any part of the Territorial Force be extended, but so that the whole period of annual training be not more than thirty days in any year; or

(*b*) Order that the period of annual training in any year of all or any part of the Territorial Force be reduced to such time as to His Majesty may seem fit; or

(*c*) Order that in any year the annual training of all or any part of the Territorial Force be dispensed with.

(3) Nothing in this section shall be construed as preventing a man, with his own consent, in addition to annual training, being called up for the purpose of duty or instruction in accordance with orders and regulations under this Part of this Act.

16. LAYING OF DRAFT ORDERS IN COUNCIL RELATING TO TRAINING BEFORE PARLIAMENT.—Before any Order in Council is made under this Act providing for preliminary training or extending the period of annual training the draft thereof shall be laid before each House of Parliament for a period of not less than forty days during the Session of Parliament, and if either of those Houses before the expiration of those forty days presents an address to His Majesty against the draft or any part thereof, no further proceedings shall be taken, without prejudice to the making of a new draft Order.

Embodiment.

17. EMBODIMENT OF TERRITORIAL FORCE.—(1) Immediately upon and by virtue of the issue of a proclamation ordering the Army Reserve to be called out on permanent service, it shall be lawful for His Majesty to order the Army Council from time to time to give, and when given to revoke or vary, such directions as may seem necessary or proper for embodying all or any part of the Territorial Force, and in particular to make such special arrangements as they think proper with regard to units or individuals whose services may be required in other than a military capacity:

Provided that, where under any such proclamation directions have been issued for calling out all the men belonging to the first class of the Army Reserve, the Army Council shall, within one month after such directions have been issued, issue directions for embodying all the men belonging to the Territorial Force, unless an address has been presented to His Majesty by both Houses of Parliament praying that such directions as last aforesaid be not issued, and such directions shall not, unless the emergency so requires, be given until Parliament has had an opportunity of presenting such an address.

(2) Whenever, in consequence of the calling out of the whole of the first class of the Army Reserve, directions are required under this section to be given for embodying the Territorial Force, if Parliament be then separated by such adjournment or prorogation as will not expire within ten days, a proclamation shall be issued for the meeting of Parliament within ten days, and Parliament shall accordingly meet and sit upon the day appointed by such proclamation, and shall continue to sit and act in like manner as if it had stood adjourned or prorogued to the same day.

(3) Every order and all directions given under this section shall be obeyed as if enacted in this Act, and, where such directions for the time being direct the embodiment of any part of the Territorial Force, every officer and man belonging to that part shall attend at the place and time fixed by those directions, and after that time shall be deemed to be embodied, and such officers and men are in this Act referred to as embodied or as the embodied part or parts of the Territorial Force.

18. DISEMBODYING OF TERRITORIAL FORCE.—(1) It shall be lawful for His Majesty by proclamation to order that the Territorial Force be disembodied, and thereupon the Army Council shall give such directions as may seem necessary or proper for carrying the said proclamation into effect.

(2) Until any such proclamation of His Majesty has been issued the Army Council may from time to time, as they may think expedient for the public service, give such directions as may seem necessary or proper for disembodying any embodied part of the Territorial Force, and for embodying any part of the Territorial Force not embodied, whether previously disembodied or otherwise.

(3) After the date fixed by the directions for the disembodiment of any part of the Territorial Force, the officers and men belonging to that part shall be in the position of officers and men of the Territorial Force not embodied.

Notices.

19. SERVICE AND PUBLICATION OF NOTICES.—Notices required in pursuance of this Part of this Act or of the orders and regulations in force thereunder to be given to men of the Territorial Force shall be served or published in such manner as may be prescribed, and, if so served or published, shall be deemed to be sufficient notice, and every constable and overseer shall, when so required by or on behalf of the Army Council, conform with the orders and regulations for the time being in force under this Part of this Act with respect to the publication and service of notices, and in default shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding twenty pounds.

Offences.

20. PUNISHMENT FOR FAILURE TO ATTEND ON EMBODIMENT.—(1) Any man of the Territorial Force who without leave lawfully granted, or such sickness or other reasonable excuse as may be allowed in the prescribed manner, fails to appear at the time and place appointed for assembling on embodiment, shall be guilty, according to the circumstances, of desertion within the meaning of section twelve, or of absenting himself without leave within the meaning of section fifteen, of the Army Act, and shall, whether otherwise subject to military law or not, be liable to be tried by court-martial, and convicted and punished accordingly, and may be taken into military custody.

(2) Sections one hundred and fifty-three and one hundred and fifty-four of the Army Act shall apply with respect to deserters and desertion within the meaning of this section in like manner as they apply with respect to deserters and desertion within the meaning of those sections, and any person who, knowing any man of the Territorial Force to be a deserter within the meaning of this section or of the Army Act, employs or continues to employ him, shall be deemed to aid him in concealing himself within the meaning of the first-mentioned section.

(3) Where a man of the Territorial Force commits the offence of desertion under this section the time which elapsed between the time of his committing the offence and the time of his apprehension or voluntary surrender shall not be taken into account in reckoning his service for the purpose of discharge.

21. PUNISHMENT FOR FAILURE TO FULFIL TRAINING CONDITIONS.—Any man of the Territorial Force who without leave lawfully granted, or such sickness or other reasonable excuse as may be allowed in the prescribed manner, fails to appear at the time and place appointed for preliminary training, or for annual training, or fails to attend the number of drills and fulfil the other conditions relating to preliminary or

annual training prescribed for his arm or branch of the service, shall be liable to forfeit to His Majesty a sum of money not exceeding five pounds recoverable on complaint to a court of summary jurisdiction by the prescribed officer, and any sums recovered by such officer shall be accounted for by him in the prescribed manner.

22. Wrongful Sale, &c. of Public Property.—If any person designedly makes away with, sells, or pawns, or wrongfully destroys or damages, or negligently loses anything issued to him as an officer or man of the Territorial Force, or wrongfully refuses or neglects to deliver up on demand anything issued to him as an officer or man of the Territorial Force, the value thereof shall be recoverable from him on complaint to a court of summary jurisdiction by the county association; and he shall also, for any such offence of designedly making away with, selling or pawning, or wrongfully destroying as aforesaid, be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding five pounds.

Civil Rights and Exemptions.

23. Civil Rights and Exemptions.—(1) The acceptance of a commission as an officer of the Territorial Force shall not vacate the seat of any member returned to serve in Parliament.

(2) An officer or man of the Territorial Force shall not be liable to any penalty or punishment for or on account of his absence during the time he is voting at any election of a member to serve in Parliament, or during the time he is going to or returning from such voting.

(3) If a sheriff is an officer of the Territorial Force, then during embodiment he shall be discharged from personally performing the office of sheriff, and the under sheriff shall be answerable for the execution of the said office in the name of the high sheriff; and the security given by the under sheriff and his pledges to the high sheriff shall stand as a security to the King and to all persons whomsoever for the due performance of the office of sheriff during such time.

(4) An officer or man of the Territorial Force shall not be compelled to serve as a peace officer or parish officer, and shall be exempt from serving on any jury, and a field officer of the Territorial Army shall not be required to serve in the office of high sheriff.

Legal Proceedings.

24. Trial of Offences and Application of Penalties.—(1) Any offence under this Part of this Act, and any offence under the Army Act if committed by a man of the Territorial Force when not embodied, which is cognizable by a court-martial shall also be cognizable by a court of summary jurisdiction, and on conviction by such a court shall be punishable with imprisonment for a term not exceeding three months or with a fine not exceeding twenty pounds, or with both such imprisonment and fine, but nothing in this provision shall affect the liability of a person charged with any such offence to be taken into military custody.

(2) Any offence which under this Part of this Act is punishable on conviction by court-martial, shall for all purposes of and incidental to the arrest, trial, and punishment of the offender, including the summary dealing with the case by his commanding officer, be deemed to be an offence under the Army Act, with this modification, that any reference in that Act to forfeiture and stoppages shall be construed to refer to such forfeitures and stoppages as may be prescribed.

(3) Any offence which under this Part of this Act is punishable on conviction by a court of summary jurisdiction may be prosecuted, and any fine recoverable on such conviction may be recovered, in manner provided by sections one hundred and sixty-six, one hundred and sixty-seven, and one hundred and sixty-eight of the Army Act, in like manner as if those sections were herein re-enacted and in terms made applicable to this Part of this Act, subject to the following modification (namely)—

Every fine imposed under this Part of this Act on a man of the Territorial Force, or recovered on a prosecution instituted under this Part of this Act, shall, notwithstanding anything in any Act or charter or in the said sections to the contrary, be paid to the association of the county for which the man was enlisted.

(4) Where a man of the Territorial Force is subject to military law and is illegally absent from his duty, a court of inquiry under section seventy-two of the Army Act may be assembled after the expiration of twenty-one days from the date of such absence, notwithstanding that the period during which he was subject to military law is less than twenty-one days or has expired before the expiration of twenty-one days.

25. SUPPLEMENTAL PROVISIONS AS TO TRIAL OF OFFENCES.—(1) A person charged with an offence which under this Part of this Act is cognizable both by a court-martial and by a court of summary jurisdiction shall not be liable to be tried both by a court-martial and by a court of summary jurisdiction, but may be tried by either of them, as may be prescribed:

Provided that a man who has been dealt with summarily by his commanding officer shall be deemed to have been tried by court-martial.

(2) Proceedings against an offender before either a court-martial or his commanding officer, or a court of summary jurisdiction, in respect of an offence punishable under this Part of this Act, and alleged to have been committed by him when a man of the Territorial Force, may be instituted whether the term of his service in the Territorial Force has or has not expired, and may, notwithstanding anything in any other Act, be instituted at any time within two months after the time at which the offence becomes known to his commanding officer if the alleged offender is then apprehended, or, if he is not then apprehended, then within two months after the time at which he is apprehended.

(3) Where an offender has on several occasions been guilty of desertion, fraudulent enlistment, or making a false answer, he may for the purposes of any proceedings against him be deemed to belong to any one or more of the corps to which he has been appointed or transferred as well as to the corps to which he properly belongs, and it shall be lawful to charge the offender with any number of the above-mentioned offences at the same time, whether they are offences within the meaning of the Army Act or offences within the meaning of this Part of this Act, and to give evidence of such offences against him, and, if he has been convicted of more than one offence, to punish him accordingly as if he had been previously convicted of any such offence.

26. EVIDENCE.—(1) Section one hundred and sixty-four of the Army Act (which relates to evidence of the civil conviction or acquittal of a person subject to military law) shall apply to a man of the Territorial Force who is tried by a civil court, whether he is or is not at the time of such trial subject to military law.

(2) Section one hundred and sixty-three of the Army Act (relating to evidence) shall apply to all proceedings under this Part of this Act.

Miscellaneous.

27. EXERCISE OF POWERS VESTED IN HOLDER OF MILITARY OFFICE.—(1) Any power or jurisdiction given to, and act or thing to be done by, to, or before any person holding any military office may, in relation to the Territorial Force, be exercised by or done by, to, or before any other person for the time being authorised in that behalf, according to the custom of the Service.

(2) Where by this Part of this Act, or by any order or regulation in force under this Part of this Act, any order is authorised to be made by any military authority, such order may be signified by an order, instruction, or letter under the hand of any officer authorised to issue orders on behalf of such military authority, and an order, instruction, or letter purporting to be signed by any officer appearing therein to be so authorised shall be evidence of his being so authorised.

28. APPLICATION OF ENACTMENTS.—(1) The Army Act shall apply to the

Territorial Force and officers and men thereof in like manner as it applies to the Militia, and officers and men of the Militia, except that men of the Territorial Force shall, in addition, be subject to military law when called out on actual military service for purposes of defence, and shall be liable to dismissal as a punishment, and for that purpose the amendments contained in the First Schedule to this Act shall be made in the Army Act.

(2) For the purpose of section one hundred and forty-three of the Army Act and of all other enactments relating to such duties, tolls, and ferries as are in that section mentioned, officers and men belonging to the Territorial Force, when going to or returning from any place at which they are required to attend, and for non-attendance at which they are liable to be punished, shall be deemed to be officers and soldiers of the regular forces on duty.

(3) His Majesty may by Order in Council apply, with the necessary adaptations, to the Territorial Force or the officers or men belonging to that force any enactment relating to the Militia, Yeomanry, or Volunteers, or officers or men of the Militia, Yeomanry, or Volunteers, other than enactments with respect to the raising, service, pay, discipline, or government of the Militia, Yeomanry, or Volunteers, and every such Order in Council shall be laid before both Houses of Parliament.

Transitory.

29. Transitory Provisions.—(1) Where an association has been established under this Act for any county His Majesty may by Order in Council transfer to the Territorial Force such units of the Yeomanry and Volunteers or part thereof raised in the county as may be specified in the Order, and every such unit or part thereof shall from the date mentioned in the Order be deemed to have been lawfully formed under this Part of this Act as an unit of the Territorial Force as provided by the Order, and the provisions of this Part of this Act shall apply to it accordingly.

(2) Every officer and man of an unit or part thereof mentioned in any such Order shall, from the date mentioned in that Order, be deemed to be an officer or man of the Territorial Force. Provided that nothing in this section or in any Order made thereunder shall, without his consent, affect the conditions or area of service of any person commissioned, enlisted, or enrolled before the passing of this Act.

(3) An Order in Council under this section may provide—

(*a*) For the application to officers and men who become subject thereto of the provisions of this Act as to conditions and area of service, and for the continuance of the application to officers and men who remain subject thereto of the provisions as to conditions and area of service previously in force as respects those officers and men:

(*b*) For transferring to the association any property vested in a Secretary of State for the purposes of any unit to which the Order relates:

(*c*) For transferring to the association any property belonging to or held for the benefit of any such unit so however that all property so transferred shall as from the date of the transfer be held by the association for the benefit in like manner of the corresponding unit of the Territorial Force or for such other purposes as the association, with the consent of such corresponding unit, to be ascertained in the prescribed manner, shall direct; and any question which may arise as to whether any property is transferred to an association, or as to the trusts or purposes upon or for which it is or ought to be held, shall be referred for the decision of a Secretary of State, whose decision shall be final. The corresponding unit of the Territorial Force shall, in the event of any such transfer, become entitled, notwithstanding the terms of any trust, limitation, or condition affecting the property so transferred to the estate or interest in such property of the unit to the property of which the order relates; but, subject to this provision, the interest of any beneficiary other than such unit shall not, without the consent of such beneficiary, be affected. The

Order may, if it be deemed proper, having regard to the special circumstances of any case, provide for the appointment of special trustees to act together with or to the exclusion of the association in regard to any such property, and such special trustees may be the existing trustees of such property:

(*d*) For transferring to the association any liabilities of any such unit which the association is willing to assume, and providing for the discharge of any such liabilities which are not so transferred:

(*e*) For transferring to the association any land or interest in land acquired by the council of a county or borough on behalf of any volunteer corps to which the Order relates, and any outstanding liabilities of the council incurred in respect thereof, if the council and the association consent:

and may contain such supplemental, consequential, and incidental provisions as may appear necessary or proper for the purposes of the Order.

(4) Every Order in Council made under this section shall be laid before both Houses of Parliament.

Part III.

Reserve Forces.

30. Enlistment and Terms of Service of Special Reservists.—(1) The power of enlisting men into the first class of the army reserve under the Reserve Forces Act, 1882 (45 and 46 Vict. c. 48), shall extend to the enlistment of men who have not served in His Majesty's regular forces, and men so enlisted who have not served in the regular forces are in this Part of this Act referred to as special reservists, and a special reservist may be re-engaged, and when re-engaged shall continue subject to the terms of service applicable to special reservists.

(2) A special reservist may, in addition to being called out for annual training, be called out for a special course or special courses of training at such place or places within the United Kingdom at such time or times and for such period or periods, not exceeding in the whole six months, as may be prescribed, in like manner and subject to the like conditions as he may be called out for annual training, and may during any such course be attached to or trained with any body of His Majesty's forces.

(3) Notwithstanding the provisions of section eleven of the Reserve Forces Act, 1882, any special reservists may be called out for annual training for such period or periods as may be prescribed by any order or regulations under the Reserve Forces Act, 1882.

(4) Provided that where one of the conditions on which a man was enlisted or re-engaged is that he shall not be called out for training, whether special or annual, for a longer period than the period specified in his attestation paper, he shall not be liable under this section to be called out for any longer period.

(5) Where a proclamation ordering the army reserve to be called out on permanent service has been issued, it shall be lawful for His Majesty at any time thereafter by proclamation to order that all special reservists shall cease to be so called out, and thereupon a Secretary of State shall give such directions as may seem necessary or proper for carrying the said proclamation into effect.

(6) A special reservist who enlists into the regular forces shall upon such enlistment be deemed to be discharged from the army reserve.

31. Agreements as to Extension of Service.—A Secretary of State may, by regulations under the Reserve Forces Act, 1882, authorise any special reservist having the qualifications prescribed by those regulations to agree in writing that, if the time when he would otherwise be entitled to be discharged occurs whilst he is called out on permanent service, he will continue to serve until the expiration of a period, whether definite or indefinite, specified in the agreement; and if any man who enters into such an agreement is so called out, he shall be liable to be detained in service

for the period specified in his agreement in the same manner in all respects as if his term of service were still unexpired.

32. Liability of Reservists to be Called Out.—(1) A special reservist shall, if he so agrees in writing, be liable during the whole of his service in the army reserve, or during such part of that service as he so agrees, to be called out on permanent service without such proclamation or communication to Parliament as is mentioned in section twelve of the Reserve Forces Act, 1882, and the calling out of men under this section shall not involve the meeting of Parliament as required by section thirteen of that Act:

Provided that—

(*a*) The number of men so liable shall not at any one time exceed four thousand:

(*b*) The power of calling out of men under this section shall not be exercised except when they are required for service outside the United Kingdom when warlike operations are in preparation or in progress:

(*c*) Any agreement under this section may provide for the revocation thereof by such notice in writing as may be therein stated:

(*d*) Any exercise of the power of calling out men under this section shall be reported to Parliament as soon as may be:

(*e*) The number of men for the time being called out under this section shall not be reckoned in the number of the forces authorised by the Annual Army Act for the time being in force.

(2) Six thousand shall be substituted for five thousand as the maximum number of men liable to be called out under section one of the Reserve Forces and Militia Act, 1898 (61 and 62 Vict. c. 9), and the liability to be called out under that section may, if so agreed, extend to the first two years of a man's service in the first class of the army reserve.

(3) In paragraph (5) of section one hundred and seventy-six of the Army Act the words "under His Majesty's proclamation" shall be repealed.

33. Power to Form Battalions, &c. of Reservists.—Orders and regulations under the Reserve Forces Act, 1882, may provide for the formation of special reservists into regiments, battalions, or other military bodies, and for the formation of such regiments, battalions, or other military bodies into corps, either alone or jointly with any other part of His Majesty's forces, and for appointing, transferring, or attaching special reservists to such corps, and for posting, attaching, or otherwise dealing with special reservists within such corps.

34. Transfer of Militia Battalions to Reserve.—(1) His Majesty may by Order in Council transfer to the Army Reserve such battalions of the Militia as may be specified in the Order, and every battalion so transferred shall from the date mentioned in the Order be deemed to have been lawfully formed under this Part of this Act as a battalion of special reservists.

(2) As from the said date every officer of any battalion so transferred shall be deemed to be an officer in the reserve of officers, and every man in such battalion shall be deemed to be a special reservist, and the Order may contain such provisions as may seem necessary for applying the provisions of the Reserve Forces Acts, 1882 to 1906, as amended by this Act, to those officers and men:

Provided that, unless any officer or man in any battalion so transferred indicates his assent to such transfer certified by his commanding officer, nothing in the Order shall effect his existing conditions of service.

(3) All Orders in Council made under this section shall be laid before both Houses of Parliament.

35. Amendment of 45 and 46 Vict. c. 48, s. 6 (4).—Subsection (4) of section six of the Reserve Forces Act, 1882, which makes a certificate purporting to be signed by an officer appointed to pay men belonging to the army reserve evidence in certain cases, shall, where a person other than an officer is appointed to pay men belonging to the army reserve, apply to certificates purporting to be signed by such person.

36. Commissions in Reserve of Officers not to Vacate Seat in Parliament.—The acceptance of a commission as an officer in the reserve of officers shall not vacate the seat of any member returned to serve in Parliament.

TERRITORIAL AND RESERVE FORCES ACT, 1907.

PART IV.

SUPPLEMENTAL.

37. PROVISIONS AS TO ORDERS, SCHEMES, AND REGULATIONS.—(1) Every Order in Council or scheme required by this Act to be laid before each House of Parliament shall be so laid within forty days next after it is made, if Parliament is then sitting, or, if not, within forty days after the commencement of the then next ensuing session; and if an address is presented to His Majesty by either House of Parliament within the next subsequent forty days, praying that any such order or scheme may be annulled, His Majesty may thereupon by Order in Council annul the same, and the order or scheme so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

(2) All Orders in Council, orders, schemes, and regulations made under this Act, may be varied or revoked by subsequent Orders in Council, orders, schemes, and regulations made in the like manner and subject to the like conditions.

38. DEFINITIONS.—In this Act, unless the context otherwise requires,—

The expression "county" means a county or riding of a county for which a lieutenant is appointed, and includes the City of London; and each county of a city or county of a town mentioned in the first column of the Second Schedule to this Act shall be deemed to form part of the county set opposite thereto in the second column of that schedule;

The expression "man of the Territorial Force" includes a non-commissioned officer;

The expression "prescribed" means prescribed by orders or regulations;

Other expressions have the same meaning as in the Army Act.

39. SPECIAL PROVISIONS AS TO SPECIAL PLACES.—(1) The Lord Warden of the Cinque Ports may ex officio be a member of the association of the county of Kent or of the county of Sussex, or of both, as may be provided by schemes under this Act.

(2) The Warden of the Stannaries may ex officio be a member of the association of the county of Cornwall or of the county of Devon, or of both, as may be provided by schemes under this Act.

(3) The Lord Mayor of the City of London shall ex officio be president of the association of the City of London.

(4) The Governor or Deputy Governor of the Isle of Wight shall ex officio be a member of the association of the county of Southampton.

(5) Nothing in this Act shall affect the raising and levying of the Trophy Tax as heretofore in the City of London, but the proceeds of the Tax so levied may be applied by His Majesty's Commissioners of Lieutenancy for the City of London, if the Royal London Militia Battalion is reconstituted as a battalion of the Army Reserve, for any purposes connected with that battalion, and may also, if His Majesty's Commissioners of Lieutenancy for the City of London in their discretion see fit, be applied for the purposes of any of the powers and duties of the association of the City of London under this Act.

40. APPLICATION TO SCOTLAND AND THE ISLE OF MAN.—(1) In the application of this Act to Scotland the following modifications shall be made:—

(*a*) This Act shall apply to a county of a city in like manner as to any other county: Provided that on the representation or with the consent of the corporation of any county of a city it shall be lawful for His Majesty, by order signified under the hand of a Secretary of State, at any time after the passing of this Act, to declare that such county of a city shall for the purposes of this Act be deemed to form part of the county set opposite thereto in the second column of the Third Schedule to this Act, and to provide for all matters which may appear necessary or proper for giving full effect to the order;

(*b*) The expression "county borough council" means the town council of a royal, parliamentary, or police burgh with a population of or exceeding twenty thousand according to the census for the time being last taken;

(*c*) The expression "land" includes heritages;

(*d*) The expression "overseer" means an inspector of poor.

(2) This Act shall apply to the Isle of Man as if it formed part of, and were included in the expression, the United Kingdom, subject to the following modifications:—

(*a*) The Isle of Man shall be deemed to be a separate county;

(*b*) References to the Governor of the Island shall be substituted for references to the lieutenant of a county;

(*c*) References to a High Bailiff or two justices of the peace and to conviction by such a Bailiff or justices shall be substituted for references to a court of summary jurisdiction and to conviction under the Summary Jurisdiction Acts;

(*d*) References to the Tynwald Court shall be substituted for references to Parliament in the section of this Act relating to civil rights and exemptions.

41. SHORT TITLE.—This Act may be cited as the Territorial and Reserve Forces Act, 1907, and so far as it relates to the reserve forces may be cited with the Reserve Forces Acts, 1882 to 1906, as the Reserve Forces Acts, 1882 to 1907.

SCHEDULES.

FIRST SCHEDULE.

AMENDMENT OF ARMY ACT (s. 28).

Section.	Amendment.
S. 13 (1) (*a*) and (*b*) . .	After the word "Militia" there shall be inserted the words "or Territorial Force."
S. 115 (7)	After the word "Whenever" there shall be inserted the words "a proclamation ordering the Army Reserve to be called out on permanent service or."
S. 115 (8)	After the words "then if" there shall be inserted the words "a proclamation ordering the Army Reserve to be called out on permanent service or."
S. 175	After paragraph (3) there shall be inserted the following paragraph:— "(3A) Officers of the Territorial Force other than members of the permanent staff."
S. 176	After paragraph (6) there shall be inserted the following paragraph:— "(6A) All non-commissioned officers and men belonging to the Territorial Force— "(*a*) When they are being trained or exercised, either alone or with any portion of the regular forces or otherwise; and "(*b*) When attached to or otherwise acting as part of or with any regular forces; and "(*c*) When embodied; and "(*d*) When called out for actual military service for purposes of defence in pursuance of any agreement."
S. 181 (4)	The words "the unit of the Territorial Force" shall be inserted after the words "officer commanding," where those words first occur, and the words "an unit of the Territorial Force" shall be inserted after those words where they secondly occur, and the words "Territorial Force" shall be inserted after the words "an officer, non-commissioned officer, or man of the."
S. 181 (4) (*a*)	After the word "any" there shall be inserted the words "man of the Territorial Force or."
S. 181 (4) (*b*) and (*c*) . .	The word "Militia" shall be repealed in both places where that word occurs, and the words "of the Territorial Force or Militia" shall be inserted after the word "man" in both places where that word occurs.
S. 181 (6)	After the word "Volunteers" there shall be inserted the words "or the Territorial Force."
S. 190 (12)	After the word "means" there shall be inserted the words "the Territorial Force."

TERRITORIAL AND RESERVE FORCES ACT, 1907.

SECOND SCHEDULE (s. 38).

Names of Cities and Towns.	County.
ENGLAND.	
County of the city of Chester	Chester.
County of the city of Exeter	Devon.
County of the town of Poole	Dorset.
County of the city of Gloucester	Gloucester.
County of the city of Bristol	Gloucester.
County of the city of Canterbury	Kent.
County of the city of Lincoln	Lincoln.
County of the city of Norwich	Norfolk.
County of the town of Newcastle-upon-Tyne	Northumberland.
Borough and town of Berwick-upon-Tweed	Northumberland.
County of the town of Nottingham	Nottingham.
County of the town of Southampton	Southampton.
County of the city of Lichfield	Stafford.
County of the city of Worcester	Worcester.
County of the city of York	West Riding of York.
County of the town of Kingston-upon-Hull	East Riding of York.
County of the town of Carmarthen	Carmarthen.
County of the town of Haverfordwest	Pembroke.
IRELAND.	
County of the city of Waterford	Waterford.
County of the town of Londonderry	Londonderry.

THIRD SCHEDULE (s. 40).

SCOTLAND.

Name of County of City.	County.
County of the city of Edinburgh	Edinburgh.
County of the city of Glasgow	Lanark.
County of the city of Dundee	Forfar.
County of the city of Aberdeen	Aberdeen.

CHAPTER 10.

An Act to repeal section fifty-seven of the Factory and Workshop Act, 1901, *and part of section seven of the Coal Mines Regulation Act*, 1887, *relating to the Employment of Women and Children.* [*9th August* 1907.]

BE it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. REPEAL OF CERTAIN PROVISIONS AS TO EMPLOYMENT OF WOMEN.—Section fifty-seven of the Factory and Workshop Act, 1901 (which relates to the employment of women in flax scutch mills), and in paragraph (5) of section seven of the Coal Mines Regulation Act, 1887 (which relates to the employment of women and children above ground), the words "of not less than eight hours between the termination of employment on Friday and the commencement of employment on the following Saturday and in other cases" are hereby repealed.

2. SHORT TITLE.—This Act may be cited as the Employment of Women Act, 1907.

CHAPTER 11.

An Act to make further provision with respect to the sums to be paid by Canada to the several Provinces of the Dominion. [*9th August* 1907.]

Whereas an address has been presented to His Majesty by the Senate and Commons of Canada in the terms set forth in the schedule to this Act:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Payments to be made by Canada to Provinces.—(1) The following grants shall be made yearly by Canada to every province, which at the commencement of this Act is a province of the Dominion, for its local purposes and the support of its Government and Legislature:—

(*a*) A fixed grant—

where the population of the province is under one hundred and fifty thousand, of one hundred thousand dollars;

where the population of the province is one hundred and fifty thousand, but does not exceed two hundred thousand, of one hundred and fifty thousand dollars;

where the population of the province is two hundred thousand, but does not exceed four hundred thousand, of one hundred and eighty thousand dollars;

where the population of the province is four hundred thousand, but does not exceed eight hundred thousand, of one hundred and ninety thousand dollars;

where the population of the province is eight hundred thousand, but does not exceed one million five hundred thousand, of two hundred and twenty thousand dollars;

where the population of the province exceeds one million five hundred thousand, of two hundred and forty thousand dollars; and

(*b*) Subject to the special provisions of this Act as to the provinces of British Columbia and Prince Edward Island, a grant at the rate of eighty cents per head of the population of the province up to the number of two million five hundred thousand, and at the rate of sixty cents per head of so much of the population as exceeds that number.

(2) An additional grant of one hundred thousand dollars shall be made yearly to the province of British Columbia for a period of ten years from the commencement of this Act.

(3) The population of a province shall be ascertained from time to time in the case of the provinces of Manitoba, Saskatchewan, and Alberta respectively by the last quinquennial census or statutory estimate of population made under the Acts establishing those provinces or any other Act of the Parliament of Canada making provision for the purpose, and in the case of any other province by the last decennial census for the time being.

(4) The grants payable under this Act shall be paid half-yearly in advance to each province.

(5) The grants payable under this Act shall be substituted for the grants or subsidies (in this Act referred to as existing grants) payable for the like purposes at the commencement of this Act to the several provinces of the Dominion under the provisions of section one hundred and eighteen of the British North America Act, 1867 (30 and 31 Vict. c. 3), or of any Order in Council establishing a province, or of any Act of the Parliament of Canada containing directions for the payment of any such grant or subsidy, and those provisions shall cease to have effect.

(6) The Government of Canada shall have the same power of deducting sums charged against a province on account of the interest on public debt in the case of the grant payable under this Act to the province as they have in the case of the existing grant.

(7) Nothing in this Act shall affect the obligation of the Government of Canada to pay to any province any grant which is payable to that province, other than the existing grant for which the grant under this Act is substituted.

(8) In the case of the provinces of British Columbia and Prince Edward Island, the amount paid on account of the grant payable per head of the population to the provinces under this Act shall not at any time be less than the amount of the corresponding grant payable at the commencement of this Act; and if it is found on any decennial census that the population of the province has decreased since the last decennial census, the amount paid on account of the grant shall not be decreased below the amount then payable, notwithstanding the decrease of the population.

2. SHORT TITLE AND INTERPRETATION.—This Act may be cited as the British North America Act, 1907, and shall take effect as from the first day of July nineteen hundred and seven.

SCHEDULE.

TO THE KING'S MOST EXCELLENT MAJESTY.

Most Gracious Sovereign,

We, Your Majesty's most dutiful and loyal subjects, the Senate and Commons of Canada, in Parliament assembled, humbly approach Your Majesty for the purpose of representing that it is expedient to amend the scale of payments authorised under section 118 of the Acts of the Parliament of the United Kingdom of Great Britain and Ireland, commonly called the British North America Act, 1867, or by or under any terms or conditions upon which any other provinces were admitted to the Union, to be made by Canada to the several provinces of the Dominion for the support of their Governments and Legislatures by providing that—

A. Instead of the amounts now payable, the sums hereafter payable yearly by Canada to the several provinces for the support of their Governments and Legislatures be according to population, and as follows:—

(*a*) Where the population of the province is under 150,000, $100,000;

(*b*) Where the population of the province is 150,000, but does not exceed 200,000, $150,000;

(*c*) Where the population of the province is 200,000, but does not exceed 400,000, $180,000;

(*d*) Where the population of the province is 400,000, but does not exceed 800,000, $190,000;

(*e*) Where the population of the province is 800,000, but does not exceed 1,500,000, $220,000;

(*f*) Where the population of the province exceeds 1,500,000, $240,000.

B. Instead of an annual grant per head of population now allowed, the annual payment hereafter be at the same rate of eighty cents per head, but on the population of each province, as ascertained from time to time by the last decennial census, or in the case of the provinces of Manitoba, Saskatchewan, and Alberta respectively, by the last quinquennial census or statutory estimate, until such population exceeds 2,500,000, and at the rate of sixty cents per head for so much of said population as may exceed 2,500,000.

C. An additional allowance to the extent of one hundred thousand dollars annually be paid for ten years to the province of British Columbia.

D. Nothing herein contained shall in any way supersede or affect the terms special to any particular province upon which such province became part of the Dominion of Canada, or the right of any province to the payment of any special grant heretofore made by the Parliament of Canada to any province for any special purpose in such grant expressed.

We pray that Your Majesty may be graciously pleased to cause a measure to be laid before the Imperial Parliament at its present Session repealing the provisions of section 118 of the British North America Act, 1867, aforesaid, and substituting therefor the scale of payments above set forth, which shall be a final and unalterable settlement of the amounts to be paid yearly to the several provinces of the Dominion for their local purposes, and the support of their Governments and Legislatures.

Such grants shall be paid half-yearly in advance to each province, but the Government of Canada shall deduct from such grants as against any province all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in the said Act.

All of which we humbly pray Your Majesty to take into your favourable and gracious consideration.

(Signed) R. DANDURAND,
Speaker of the Senate.

(Signed) R. F. SUTHERLAND,
Speaker of the House of Commons.

Senate and House of Commons,
Ottawa, Canada,
26th April 1907.

CHAPTER XII.

An Act to amend the Matrimonial Causes Acts, 1857 *and* 1866, *by extending the powers of the Court in relation to Maintenance and Alimony, and leave to intervene.*

[*9th August* 1907.]

CHAPTER XIII.

FINANCE ACT, 1907.

[7 EDW. 7. CH. 13.]

ARRANGEMENT OF SECTIONS.

PART I.

CUSTOMS AND EXCISE.

Section.

1. Duty on tea.
2. Continuance of additional customs duties and drawbacks on tobacco, beer, and spirits.
3. Continuance of additional excise duties and drawbacks on beer and spirits.
4. Means of ascertaining strength or weight of spirits.
5. Amendment of the Revenue Act, 1883, as to imported plate.

PART II.

STAMPS.

6. Extension of exemption from stamp duty in case of certain affidavits and declarations.
7. Stamping of hire-purchase agreement.
8. Provisions as to policies of insurance.
9. Proxies executed abroad.
10. Reduction of duty on loan capital issued for the purpose of the conversion or consolidation of existing capital.
11. Remission of stamp duty on customs and excise debentures and certificates.

PART III.

DEATH DUTIES.

12. Amended rates of estate duty.
13. Extension of power to remit death duties.
14. Power to entertain application for discharge from claims for estate duty made at any time.
15. Calculation of the allowance to be made in respect of duty paid before the commencement of the Finance Act, 1894.
16. Limited aggregation of certain settled property abolished.

PART IV.

LOCAL TAXATION ACCOUNT.

17. Provision with respect to certain grants to local taxation accounts.

PART V.

INCOME TAX.

18. Income Tax for 1907–1908.
19. Relief in respect of earned income where total income does not exceed £2000.
20. Special provisions applicable to partners.
21. Particulars to be given by employers.
22. Liability to make returns.
23. Extension of time for certain proceedings.
24. Provisions with respect to computing profits by average of three years.
25. Payment of tax on patent royalties by deduction.
26. Provisions with respect to deductions for wear and tear of machinery or plant.
27. Power of Commissioners for special purposes to allow relief under s. 23 of 53 and 54 Vict. c. 8.
28. Deductions by clergymen or ministers of religion in respect of dwelling-houses in certain cases.

PART VI.

NATIONAL DEBT.

29. Reduction of debt.

FINANCE ACT, 1907.

Part VII.

General.

30. Repeal, construction, and short title.
Schedules.

CHAPTER XIII.

An Act to grant certain duties of Customs and Inland Revenue, to alter other duties, and to amend the Law relating to Customs and Inland Revenue and the National Debt, and to make other provisions for the financial arrangements of the year.

[*9th August* 1907.]

Most Gracious Sovereign,

We, Your Majesty's most dutiful and loyal subjects the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled, towards raising the necessary supplies to defray Your Majesty's public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

Part I.

Customs and Excise.

1. Duty on Tea.—The duty of customs payable on tea until the fourteenth day of May nineteen hundred and seven, under the Finance Act 1906 (6 Edw. 7, c. 8), shall be deemed to have been continued as from that date and shall continue to be charged, levied, and paid until the first day of July nineteen hundred and eight on the importation thereof into Great Britain or Ireland (that is to say):—

Tea, the pound . . . . . fivepence.

2. Continuance of Additional Customs Duties and Drawbacks on Tobacco, Beer, and Spirits.—The additional duties of customs on tobacco, beer, and spirits imposed by sections two, three, four, and five of the Finance Act, 1900 (63 and 64 Vict. c. 7) (including the increased duties imposed by section five of that Act), shall continue to be charged, levied, and paid, and the additional drawback allowed under the said section four shall continue to be allowed, until Parliament otherwise determine, and those duties and that drawback shall be deemed to have been continued as from the first day of July nineteen hundred and seven.

3. Continuance of Additional Excise Duties and Drawbacks on Beer and Spirits.—The additional duties of excise on beer and spirits imposed by sections six and seven of the Finance Act, 1900, shall continue to be charged, levied, and paid, and the additional drawback allowed under the said section six shall continue to be allowed, until Parliament otherwise determine, and those duties and that drawback shall be deemed to have been continued as from the first day of July nineteen hundred and seven.

4. Means of Ascertaining Strength or Weight of Spirits.—(1) The Commissioners of Customs and the Commissioners of Inland Revenue may jointly make regulations authorising the use of any means described in the regulations for ascertaining for any purpose the strength or weight of spirits.

(2) Where under any enactment Sykes's hydrometer is directed to be used or may be used for the purpose of ascertaining the strength or weight of spirits, any means so authorised by regulations may be used instead of Sykes's hydrometer, and references to Sykes's hydrometer in any enactment shall be construed accordingly.

(3) Any regulations made under this section shall be published in the London, Edinburgh, and Dublin Gazettes, and shall take effect from the date of publication, or such later date as may be mentioned in the regulations for the purpose.

(4) The expression "spirits" in this section has the same meaning as in the Spirits Act, 1880 (43 and 44 Vict. c. 24).

5. AMENDMENT OF THE REVENUE ACT, 1883, AS TO IMPORTED PLATE.—Notwithstanding anything to the contrary in section ten of the Revenue Act, 1883 (46 and 47 Vict. c. 55), and subject to the conditions there set forth, gold and silver plate imported into Great Britain or Ireland may be delivered into the hands of the officers of any assay office selected by the importer though it be not the assay office nearest to the port of importation, and may, upon security being given to the satisfaction of the Commissioners of Customs, be removed to the assay office without being in charge of an officer of customs.

PART II.

STAMPS.

6. EXTENSION OF EXEMPTION FROM STAMP DUTY IN CASE OF CERTAIN AFFIDAVITS AND DECLARATIONS.—The limitation of the exemption numbered (2) under the heading "Affidavit and Statutory Declaration" in the First Schedule to the Stamp Act, 1891 (54 and 55 Vict. cap. 39), to affidavits or declarations made before a justice of the peace shall cease to have effect.

7. STAMPING OF HIRE-PURCHASE AGREEMENT.—Any agreement for or relating to the supply of goods on hire, whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied, shall be charged with stamp duty as an agreement, or, if under seal (or in Scotland with a clause of registration), as a deed, as the case requires, and the exemption numbered (3) under the heading "Agreement or any Memorandum of an Agreement," in the First Schedule to the Stamp Act, 1891 (which exempts agreements for the sale of goods), shall not apply in the case of any such instrument.

8. PROVISIONS AS TO POLICIES OF INSURANCE.—(1) It is hereby declared, for the removal of doubts, that "a policy of insurance for any payment agreed to be made by way of indemnity against loss or damage of or to any property" within the meaning of the Stamp Act, 1891, includes any notice or advertisement in a newspaper or other publication which purports to insure such payment.

(2) The provisions of section one hundred and sixteen of the said Act (which relates to composition for stamp duty on policies of insurance against accident) shall apply to policies of insurance for any payment agreed to be made by way of indemnity against loss or damage of or to any property as they apply to policies of insurance against accident.

(3) Section eleven of the Finance Act, 1899 (62 and 63 Vict. c. 9) (which relates to policies of insurance in respect of injury to workmen), shall be read as if two pounds were substituted for one pound as the amount of the annual premium therein mentioned.

9. PROXIES EXECUTED ABROAD.—So much of subsection (2) of section eighty of the Stamp Act, 1891, as prevents the stamping after execution of a letter or power of attorney or voting paper charged with the duty of one penny shall cease to apply as regards any such instrument which has been first executed at any place out of the United Kingdom, and accordingly any such instrument so executed after the commencement of this Act may be stamped after execution in accordance with section fifteen of the said Act.

10. REDUCTION OF DUTY ON LOAN CAPITAL ISSUED FOR THE PURPOSE OF THE CONVERSION OR CONSOLIDATION OF EXISTING CAPITAL.—(1) Where it is shown to the satisfaction of the Commissioners that the loan capital issued by any local authority, corporation, company, or body of persons, in respect of which a statement has, after the commencement of this Act, been delivered to the Commissioners under section eight of the Finance Act, 1899 (62 and 63 Vict. cap. 9), has been wholly or partly applied for the purpose of the conversion or consolidation of then existing loan capital, that authority, corporation, company, or body of persons, as the case may be, shall be entitled to repayment in respect of the duty charged on the statement so delivered at the rate of two shillings for every hundred pounds of the capital to which the statement relates which is so shown to have been applied for the purpose of the conversion

or consolidation of then existing loan capital; but this section shall not apply to any duty payable in respect of a mortgage or marketable security which has been paid on any trust deed or other document securing the loan capital which has been issued.

(2) If it is represented to the Commissioners by any such local authority, corporation, company, or body of persons that loan capital about to be issued by them is to be applied, in whole or in part, for the purpose of the conversion or consolidation of existing loan capital, the Commissioners may postpone the time for the delivery of the statement and the payment of duty under section eight of the Finance Act, 1899, until the capital has been issued or until such other time as the Commissioners think fit for the purpose of enabling the payment and repayment of the duty to take place as one transaction.

11. REMISSION OF STAMP DUTY ON CUSTOMS AND EXCISE DEBENTURES AND CERTIFICATES.—The duty payable under the Stamp Act, 1891, on any debenture or certificate for entitling any person to receive any allowance by way of drawback or otherwise payable out of the revenue of customs or excise, for or in respect of any goods, wares, or merchandise exported or shipped to be exported from the United Kingdom to any part beyond the sea, and on any certificate of any goods, wares, or merchandise having been duly entered inwards, which shall be entered outwards for exportation at the port of importation, or be removed from thence to any other port for the more convenient exportation thereof, where such certificate is issued for enabling a person to obtain a debenture or certificate entitling him to receive a drawback of any duty of customs, shall cease to be payable, and any such debentures or certificates shall not be liable to stamp duty.

PART III.

DEATH DUTIES.

12. AMENDED RATES OF ESTATE DUTY.—The scale set out in the First Schedule to this Act shall, in the case of persons dying on or after the nineteenth day of April nineteen hundred and seven, be substituted for the scale of rates of estate duty set out in section seventeen of the Finance Act, 1894 (57 and 58 Vict. c. 30) (in this Part of this Act referred to as the Principal Act):

Provided that where an interest in expectancy (within the meaning of Part I. of the Principal Act) in any property has before the nineteenth day of April nineteen hundred and seven been bonâ fide sold or mortgaged for full consideration in money or money's worth, then no other duty on that property shall be payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if this section had not passed; and in the case of a mortgage any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee.

13. EXTENSION OF POWER TO REMIT DEATH DUTIES.—The power of the Commissioners under subsection (11) of section eight of the principal Act to remit the payment of estate duty or interest thereon shall apply to the other duties which are included in the definition of death duties in subsection (3) of section thirteen of that Act as well as to estate duty.

14. POWER TO ENTERTAIN APPLICATION FOR DISCHARGE FROM CLAIMS FOR ESTATE DUTY MADE AT ANY TIME.—The Commissioners may, if they think fit, entertain any application made for the purpose of subsection (2) of section eleven of the principal Act (which relates to discharge from claims for estate duty), at whatever time the application is made; and, as respects any application so entertained, the provisions of that subsection shall have effect notwithstanding that the application is made before the lapse of the two years mentioned in that subsection.

15. CALCULATION OF THE ALLOWANCE TO BE MADE IN RESPECT OF DUTY PAID BEFORE THE COMMENCEMENT OF THE FINANCE ACT, 1894.—The deduction to be allowed under section twenty-one of the Finance Act 1896 (59 and 60 Vict. c. 28), in respect of death duties previously paid on property on which estate duty is payable shall, instead of being the amount of the duty paid or payable, be the amount which would have been payable on account of the duty if the duty were calculated on the value of the property on which estate duty is payable: Provided that, if as respects any such deduction the person by whom the duty is payable requires the Commissioners, on the first delivery

of his account, to calculate the deduction as if this section had not passed, the deduction shall be so calculated.

16. LIMITED AGGREGATION OF CERTAIN SETTLED PROPERTY ABOLISHED.—In the case of persons dying on or after the nineteenth day of April nineteen hundred and seven, any settled property which would, under subsection (2) of section twelve of the Finance Act, 1900 (63 and 64 Vict. c. 7), be aggregated with other property so as to enhance the rate of duty to the limited extent provided in that section, shall, for the purposes of the principal Act, instead of being so aggregated, be treated as an estate by itself.

PART IV.

LOCAL TAXATION ACCOUNT.

17. PROVISION WITH RESPECT TO CERTAIN GRANTS TO LOCAL TAXATION ACCOUNTS.—(1) The grants specified in the Second Schedule to this Act shall instead of being charged in manner provided by the Acts relating to those grants, be charged on and paid out of the Consolidated Fund or the growing produce thereof, but in the case of grants which are payable during the continuance of any temporary Act only so long as that Act is continued.

(2) The proceeds of the local taxation (customs and excise) duties, and of the duties on local taxation licences (including any duty charged under subsection (1) of section eight of the Locomotives on Highways Act, 1896 (59 and 60 Vict. c. 36), payable under any Act in force at the commencement of this Act into any local taxation account, shall, instead of being paid into that account, be paid into the Exchequer, and there shall be paid into any such local taxation account out of the Consolidated Fund or the growing produce thereof a sum equal to the amount which would have been paid into that account as the proceeds of the duties if this Act had not passed.

(3) Where under this section or under any other enactment the amount of any sum paid into any local taxation account is made to depend on the proceeds of the duties on local taxation licences, those proceeds shall be calculated, in the event of any alteration of the rate of duties, as if the duties were at the rate in force at the commencement of this Act:

Provided that, if in any year owing to any alteration in the rate of duties the rate of any such duty is higher than the rate in force at the commencement of this Act, and the proceeds of that duty in that year as so calculated are less than the average proceeds of the duty for the three years ending the thirty-first day of March nineteen hundred and seven, the proceeds of the duty instead of being calculated as aforesaid shall be deemed to be the amount of those average proceeds, and the Commissioners of Inland Revenue shall give their certificates as to the sums ascertained to be the proceeds of those duties accordingly.

(4) In this section the expression "proceeds of duties" includes sums ascertained to be the proceeds of the duties, and any reference in any enactment to the duties or proceeds of the duties referred to in this section shall, so far as relates to the distribution of or mode of dealing with those duties or proceeds, be construed as a reference to the sums to be paid in lieu thereof under this section.

(5) This section shall have effect as from the commencement of the current financial year, and, as respects any payment made or other thing done between the commencement of the current financial year and the date of the passing of this Act, the Treasury may cause such adjustments of accounts to be made as are required to give effect to the provisions of this section.

PART V.

INCOME TAX.

18. INCOME TAX FOR 1907–8.—(1) Income tax for the year beginning on the sixth day of April nineteen hundred and seven shall be charged at the rate of one shilling.

(2) All such enactments relating to income tax as were in force on the fifth day of April nineteen hundred and seven shall, subject to any amendments made by this Act, have full force and effect with respect to the duty of income tax hereby granted.

(3) The annual value of any property which has been adopted for the purpose either of income tax under Schedules A and B in the Income Tax Act, 1853 (16 and 17 Vict. c. 34), or of inhabited house duty, during the year ending on the fifth day of April nineteen hundred and seven, shall be taken as the annual value of such property for the same purpose during the next subsequent year; provided that this subsection—

(*a*) so far as respects the duty on inhabited houses in Scotland, shall be construed with the substitution of the twenty-fourth day of May for the fifth day of April; and

(*b*) shall not apply to the Metropolis as defined by the Valuation (Metropolis) Act, 1869 (32 and 33 Vict. c. 67).

19. Relief in Respect of Earned Income where Total Income Does Not Exceed £2000.—(1) Any individual who claims and proves, in manner provided by this section, that his total income from all sources does not exceed two thousand pounds, and that any part of that income is earned income, shall be entitled, subject to the provisions of this section, to such relief from income tax as will reduce the amount payable on the earned income to the amount which would be payable if the tax were charged on that income at the rate of nine pence.

(2) The relief given by this section shall be in addition to and not in derogation of any exemption or other relief or abatement under the Income Tax Acts, except that where an individual is entitled to relief from income tax under section eight of the Finance Act, 1898 (61 and 62 Vict. c. 10), or, in respect of the payment of premiums, under section fifty-four of the Income Tax Act, 1853 (16 and 17 Vict. c. 34) (as extended by any subsequent enactment), relief shall be given under this section only in respect of such earned income (if any) as remains after deducting therefrom the amount on which he is relieved of income tax under the said sections eight and fifty-four.

(3) Where relief is given under section eight of the Finance Act, 1898, or section fifty-four of the Income Tax Act, 1853, by way of repayment of the tax after relief has been given under this section, the amount repaid shall be adjusted so that the total amount of the relief given under this section and under the said sections eight and fifty-four does not exceed the amount which would have been given if the whole relief had been claimed simultaneously.

(4) An individual who desires relief under this section must, in cases where he is required to make a return for the purpose of the assessment of income tax, claim that relief at the time the return is made and must, in any case, claim that relief before the thirtieth day of September in the year for which the tax is charged.

For the purpose of making a claim for relief under this section with respect to income tax charged under this Act for the current year, any individual may, before the thirtieth day of September nineteen hundred and seven, substitute a fresh return for any return previously made by him.

(5) An individual shall not be entitled to relief under this section in respect of any income the tax on which he is entitled to charge against any other person, or to deduct, retain, or satisfy out of any payment which he is liable to make to any other person.

(6) Subject to the provisions of this section, all the provisions of the Income Tax Acts which relate to claims for exemption, relief, or abatement, or the proof to be given with respect to those claims, shall apply to claims for relief under this section and the proof to be given with respect to those claims.

(7) For the purposes of this section the expression "income" means income as estimated according to the several rules and directions of the Income Tax Acts; and the expression "earned income" means—

(*a*) any income arising in respect of any remuneration from any office or employment of profit held by the individual, or in respect of any pension, superannuation, or other allowance, deferred pay, or compensation for loss of office given in respect of the past services of the individual or of the husband or parent of the individual in any office or employment of profit, whether the individual or husband or parent of the individual shall have contributed to such pension, superannuation allowance, or deferred pay or not; and

(*b*) any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual; and

(*c*) any income which is charged under Schedules B or D in the Income Tax Act, 1853, or the rules prescribed by Schedule D in the Income Tax Act, 1842 (5 and 6 Vict. c. 35), and is immediately derived by the individual from the carrying on or exercise by him of his profession, trade, or vocation either as an individual, or, in the case of a partnership, as a partner personally acting therein.

In cases where a wife's profits are deemed to be profits of the husband, any reference in this provision to the individual includes either the husband or the wife.

(8) Section thirty-four of the Finance Act, 1894, shall cease to have effect so far as it gives relief or abatement to persons who are entitled to relief under section eight of the Finance Act, 1898.

20. Special Provisions Applicable to Partners.—Where an individual carrying on or exercising any profession, trade or vocation in partnership with any other person makes any claim for exemption, relief, or abatement under the Income Tax Acts, the income of the individual from the partnership for the year to which the claim relates may be treated separately for the purpose of any such exemption, relief, or abatement; and if so treated shall be deemed to be the share to which he is entitled during the said year in the partnership profits, such profits being estimated according to the several rules and directions of those Acts.

21. Particulars to be Given by Employers.—(1) Every employer, when required to do so by notice from an assessor, shall, within the time limited by the notice, prepare and deliver to the assessor a return of the names and places of residence of any persons employed by him, to whom this provision applies, and of the payments made to those persons in respect of that employment, and section fifty-five of the Income Tax Act, 1842 (5 and 6 Vict. c. 35), shall apply with respect to any such return as it applies with respect to the lists, declarations, or statements mentioned in that section.

This provision applies to all persons employed by an employer, except persons who are not employed in any other employment, and whose remuneration in the employment for the year does not exceed the sum for the time being fixed as the limit for total exemption from income tax.

(2) Where the employer is a body of persons, corporate or unincorporate (including a company), the secretary of the body, or other officer (by whatever name called) performing the duties of secretary, shall be deemed to be the employer for the purposes of this provision, and any director of a company, or person engaged in the management of a company, shall be deemed to be a person employed.

22. Liability to make Returns.—(1) Every person upon whom notice is served in manner prescribed by section forty-eight of the Income Tax Act, 1842 (which relates to the delivery of notices by assessors), requiring him to make a return of any profits, gains, or income in respect of which he is chargeable with duty under Schedule D or Schedule E in the Income Tax Act, 1853, shall make a return in the form required by the notice, whether he is or is not chargeable with duty, and in default shall be liable to a penalty under section fifty-five of the Income Tax Act, 1842, accordingly:

Provided that a penalty inflicted in the case of a person proceeded against for not complying with this provision, who proves that he was not chargeable to duties, shall not exceed five pounds for any one offence.

(2) The duties imposed on officers of any corporation, company, fraternity, fellowship, or society by sections forty and fifty-four of the Income Tax Act, 1842, and by section eighteen of the Customs and Inland Revenue Act, 1879 (42 and 43 Vict. c. 21), shall in the case of any company, be performed by the secretary of the company or other officer (by whatever name called) performing the duties of secretary.

23. Extension of Time for Certain Proceedings.—(1) Notwithstanding anything in an Acte concerninge Informers, being chapter five of the Acts of the thirty-first year of the reign of Queen Elizabeth (31 Eliz. c. 5), or in subsection (4) of section twenty-one of the Taxes Management Act, 1880 (43 and 44 Vict. c. 19), or in subsection (2) of section twenty-two of the Inland Revenue Regulation Act, 1890 (53 and 54 Vict. c. 21), or in any other enactment, proceedings for the recovery of any fine or penalty incurred under the Income Tax Acts may be commenced within three years next after the fine or penalty is incurred.

(2) The time during which an assessment may be amended or an additional first

assessment made under section fifty-two of the Taxes Management Act, 1880 (43 and 44 Vict. c. 19) (which relates to the amendment of assessments), or during which an assessment may be made on the estate of a deceased person under section twenty-four of the Customs and Inland Revenue Act, 1890 (53 and 54 Vict. c. 8) (which relates to the power to make such assessments), shall be any time within the year of assessment or within three years after the expiration thereof; and the time during which in cases of omission to charge any person a charge may be made and allowed or signed under section sixty-three of the Taxes Management Act, 1880 (which relates to the powers of surveyors to make such charges), shall be a period of three years after the expiration of the year for which the person ought to have been charged.

(3) Nothing in this section shall affect proceedings for the recovery of fines or penalties incurred before the commencement of this Act, or extend the time during which any assessment may be made or amended, or a charge may be made on any person in respect of income tax charged under any Act passed before the commencement of this Act.

24. Provisions with Respect to Computing Profits by Average of Three Years.—(1) Section one hundred and thirty-three of the Income Tax Act, 1842 (28 and 29 Vict. c. 30), and section six of the Revenue Act, 1865 (which provide for the reduction of assessments or the repayment of duty in certain cases where the profits of the year of assessment fall short of the sum on which the assessment has been made), shall cease to have effect as respects income tax charged for the year beginning the sixth day of April nineteen hundred and seven, or for any subsequent year.

(2) Where a person charged or chargeable with income tax in respect of any profession, trade, or vocation which has been set up or commenced within the period of three years upon the average of which the profits or gains are to be taken under the Income Tax Acts, or within the year of assessment, proves at the end of the year of assessment to the satisfaction of the Commissioners by whom the assessment has been or can be made that the actual profits or gains arising from the profession, trade, or vocation in the year of assessment fall short of the profits or gains as computed in accordance with those Acts, he shall be entitled to be charged on the actual amount of the profits or gains so arising instead of on the amount of the profits or gains so computed, and, if he has paid the full amount of the tax on the profits or gains so computed, be entitled to repayment of the amount overpaid.

(3) Where a profession, trade, or vocation is discontinued in any year, any person charged or chargeable with income tax in respect of that profession, trade, or vocation, shall be entitled to be charged on the actual amount of the profits or gains arising from the profession, trade, or vocation in that year, and shall also, if he proves to the satisfaction of the Commissioners by whom the assessment has been or could have been made that the total amount of the income tax paid during the three previous years in respect of that profession, trade, or vocation, exceeds the total amount which would have been paid if he had been assessed in each of those years on the actual amount of the profits or gains arising in respect of the profession, trade, or vocation, be entitled to repayment of the excess.

25. Payment of Tax on Patent Royalties by Deduction.—(1) In estimating, under any schedule of the Income Tax Acts, the amount of the profits and gains arising from any trade, manufacture, adventure, concern, profession, or vocation, no deduction shall be made on account of any royalty, or other sum, paid in respect of the user of a patent, but the person paying the royalty or sum shall be authorised, on making the payment, to deduct and retain thereout the amount of the rate of income tax chargeable during the period through which the royalty or sum was accruing due.

(2) Subsection (3) of section twenty-four of the Customs and Inland Revenue Act, 1888 (51 and 52 Vict. c. 8), shall apply to any such royalties or sums as it applies to interest of money or annuities charged with income tax under Schedule D in the Income Tax Act, 1853.

26. Provisions with Respect to Deductions for Wear and Tear of Machinery or Plant.—(1) For the purpose of enabling deductions for wear and tear to be allowed by the additional Commissioners, claims in respect of those deductions shall be included in the annual statement required to be delivered under the Income Tax Acts of the profits or gains of the concern for the purpose of which the machinery or plant is used,

and the additional Commissioners in assessing those profits and gains shall make such allowances in respect of those claims as they think just and reasonable.

(2) No deduction for wear and tear or payment on account of any such deduction shall be allowed in any year if the deduction when added to the deductions allowed on that account in any previous years to the person by whom the concern is carried on will make the aggregate amount of the deductions exceed the actual cost to that person of the machinery or plant, including in that actual cost any expenditure in the nature of capital expenditure on the machinery or plant by way of renewal, improvement, or reinstatement.

(3) Where as respects any trade, manufacture, adventure, or concern full effect cannot be given to the deduction for wear and tear in any year owing to their being no profits or gains chargeable with income tax in that year, or owing to the profits or gains so chargeable being less than the deduction, the deduction or part of the deduction to which effect has not been given, as the case may be, shall, for the purpose of making the assessment for the following year, be added to the amount of the deduction for wear and tear for that year and deemed to be part of that deduction, or if there is no such deduction for that year, be deemed to be the deduction for that year, and so on for succeeding years.

(4) In this section the expression "deduction for wear and tear" means the deduction allowed, or which would be allowed, under section twelve of the Customs and Inland Revenue Act, 1878 (41 and 42 Vict. c. 15), as representing the diminished value, by reason of wear and tear during the year, of machinery or plant used for the purposes of any trade, manufacture, adventure, or concern.

27. POWER OF COMMISSIONERS FOR SPECIAL PURPOSES TO ALLOW RELIEF UNDER S. 23 OF 53 AND 54 VICT. C. 8.—Any application for relief under section twenty-three of the Customs and Inland Revenue Act, 1890, may be made either to the Commissioners for the general purposes of the Acts relating to income tax as provided in that section or to the Commissioners for the special purposes of those Acts, and the last-named Commissioners shall have the same power under that section as the first-named Commissioners have.

28. DEDUCTIONS BY CLERGYMEN OR MINISTERS OF RELIGION IN RESPECT OF DWELLING-HOUSES IN CERTAIN CASES.—Where a clergyman or minister of any religious denomination pays rent for a dwelling-house, and uses any part thereof mainly and substantially for the purposes of his duty or function as such clergyman or minister, such part of the rent of the dwelling-house, not exceeding one-eighth, as the Commissioners by whom any assessment for income tax is made may allow, shall be treated for the purposes of section fifty-two of the Income Tax Act, 1853, as expenses to which the provisions of that section as to deduction and repayment apply.

PART VI.

NATIONAL DEBT.

29. REDUCTION OF DEBT.—The amount of the permanent annual charge for the National Debt under section one of the Sinking Fund Act, 1875 (38 and 39 Vict. c. 45), shall, during the current financial year, be the sum of twenty-nine and a half million instead of twenty-eight million pounds, and subsection (4) of section seven of the Finance Act, 1905, shall, as respects the current financial year, have effect accordingly.

PART VII.

GENERAL.

30. REPEAL, CONSTRUCTION, AND SHORT TITLE.—(1) The Acts specified in the Third Schedule to this Act are hereby repealed to the extent mentioned in the third column of that Schedule.

(2) Part I. of this Act so far as it relates to duties of customs shall be construed together with the Customs Consolidation Act, 1876 (39 and 40 Vict. c. 36), and the Acts amending that Act, and so far as it relates to duties of excise shall be construed

together with the Acts which relate to the duties of excise and the management of those duties.

Part II. of this Act shall be construed together with the Stamp Act, 1891 (54 and 55 Vict. c. 39).

Part III. of this Act shall be construed together with the Finance Act, 1894 (57 and 58 Vict. c. 30).

Part V. of this Act shall be construed together with the Income Tax Acts, 1842 and 1853, and any other enactments relating to Income Tax, and those enactments and Part V. of this Act are in this Act referred to as the Income Tax Acts.

(3) This Act may be cited as the Finance Act, 1907.

SCHEDULES.

FIRST SCHEDULE.

SCALE OF RATES OF ESTATE DUTY (s. 12).

Where the Principal Value of the Estate				Estate Duty shall be payable at the Rate per Cent. of
	£		£	
Exceeds	100	and does not exceed	500	One pound.
,,	500	,, ,,	1,000	Two pounds.
,,	1,000	,, ,,	10,000	Three pounds.
,,	10,000	,, ,,	25,000	Four pounds.
,,	25,000	,, ,,	50,000	Four pounds ten shillings.
,,	50,000	,, ,,	75,000	Five pounds.
,,	75,000	,, ,,	100,000	Five pounds ten shillings.
,,	100,000	,, ,,	150,000	Six pounds.
,,	150,000	,, ,,	250,000	Seven pounds.
,,	250,000	,, ,,	500,000	Eight pounds.
,,	500,000	,, ,,	750,000	Nine pounds.
,,	750,000	,, ,,	1,000,000	Ten pounds.
,,	1,000,000	,, ,,	1,500,000	Ten pounds on one million, and eleven pounds on the remainder.
,,	1,500,000	,, ,,	2,000,000	Ten pounds on one million, and twelve pounds on the remainder.
,,	2,000,000	,, ,,	2,500,000	Ten pounds on one million, and thirteen pounds on the remainder.
,,	2,500,000	,, ,,	3,000,000	Ten pounds on one million, and fourteen pounds on the remainder.
,,	3,000,000	. . . . .		Ten pounds on one million, and fifteen pounds on the remainder.

SECOND SCHEDULE (s. 17).

(1) The estate duty grants paid under section nineteen of the Finance Act, 1894 (57 and 58 Vict. c. 30); and

(2) The agricultural rates grant paid under section two of the Agricultural Rates Act 1896 (59 and 60 Vict. c. 16); and

(3) The Scottish Agricultural rates grant paid under section three of the Agricultural Rates, Congested Districts, and Burgh Land Tax Relief (Scotland) Act, 1896 (59 and 60 Vict. c. 37).

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THIRD SCHEDULE.

ENACTMENTS REPEALED (S. 30).

Session and Chapter.	Short Title.	Extent of Repeal.
5 and 6 Vict. c. 35.	The Income Tax Act, 1842.	The third rule of the rules applying to both the preceding cases in section one hundred from "except for the purpose" to "gains of such partnership." Section one hundred and thirty-three, except so far as it is referred to or incorporated in any other enactment.
28 and 29 Vict. c. 30.	The Revenue Act, 1865.	Section six.
54 and 55 Vict. c. 39.	The Stamp Act, 1891.	The following parts of the First Schedule:— The words "and made before a justice of the peace" in the exemption numbered (2) under the heading "AFFIDAVIT and STATUTORY DECLARATION." "CERTIFICATE of any goods, wares, or merchandise, "having been duly entered inwards, which shall be entered "outwards for exportation at the port of importation, or "be removed from thence to any other port for the more "convenient exportation thereof, where such certificate is "issued for enabling a person to obtain a debenture or "certificate entitling him to receive a drawback of any duty "of customs . . . . . 0 4 0" "DEBENTURE or CERTIFICATE for entitling any person to "receive any allowance by way of drawback or otherwise "payable out of the revenue of customs or excise, for or in "respect of any goods, wares, or merchandise exported or "shipped to be exported from the United Kingdom to any "part beyond the sea. "Where the allowance to be received does not "exceed £10 . . . . . 0 1 0 "Exceeds £10 and does not exceed £50 . . 0 2 6 "Exceeds £50 . . . . . 0 5 0"
57 and 58 Vict. c. 30.	The Finance Act, 1894.	The scale of the rates of estate duty in section seventeen, except as respects persons dying before the nineteenth day of April nineteen hundred and seven.
63 and 64 Vict. c. 7.	Finance Act, 1900.	In section two, the words "as from the sixth day of March "nineteen hundred until the first day of August nineteen "hundred and one." In section three, the words "as from the sixth day of March "nineteen hundred until the first day of August nineteen "hundred and one." In section four, the words "as from the sixth day of March "nineteen hundred until the first day of August nineteen "hundred and one," and the words "in and for the same "period." In section five the words "as from the sixth day of March "nineteen hundred until the first day of August nineteen "hundred and one," wherever they occur, and the words "This section shall not affect the continuance after the first "day of August nineteen hundred and one of the duties "existing prior to this section taking effect." In section six, the words "as from the sixth day of March "nineteen hundred until the first day of August nineteen "hundred and one," and the words "between the fifth day "of March nineteen hundred and the first day of August "nineteen hundred and one." In section seven, the words "as from the sixth day of March "nineteen hundred until the first day of August nineteen "hundred and one."

SALMON AND FRESHWATER FISHERIES ACT, 1907.

CHAPTER XIV.

An Act to make better provision as to the Relief of Persons released from detention in Prisons, Reformatory and Industrial Schools, and Inebriate Reformatories.

[21*st August* 1907.]

CHAPTER XV.

SALMON AND FRESHWATER FISHERIES ACT, 1907.

[7 EDW. 7. CH. 15.]

ARRANGEMENT OF SECTIONS.

Section.
1. Power of Board of Agriculture and Fisheries to make orders.
2. Contents of the order.
3. Application for the order.
4. Procedure for making the order.
5. Confirmation by Parliament.
6. Expenses.
7. Consents in case of Crown and Duchy foreshore and land.
8. Short title, extent, and construction.
SCHEDULE.

CHAPTER XV.

An Act to enable Provisional Orders to be made for regulating Salmon and Freshwater Fisheries.

[21*st August* 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. POWER OF BOARD OF AGRICULTURE AND FISHERIES TO MAKE ORDERS.—With a view to the improvement and development of the salmon fisheries or freshwater fisheries, or either of them, within any area, the Board of Agriculture and Fisheries may, upon such application as is hereinafter mentioned, make a provisional order for the regulation of any such fisheries within the area defined by the order.

2. CONTENTS OF THE ORDER.—(1) A provisional order under this Act may provide for—

(*a*) defining the area within which the order is to apply;

(*b*) the constitution and incorporation of a board of conservators;

(*c*) applying to a board of conservators so constituted, and an area so defined, either without modification, or subject to such modifications as may be contained in the order, all or any of the provisions of the Salmon and Freshwater Fisheries Acts with respect to boards of conservators and fishery districts constituted under those Acts;

(*d*) the imposition, collection, and recovery of contributions to be assessed on private fisheries regulated by the order or on the owners or occupiers thereof;

(*e*) enabling the conservators to purchase or take on lease any part of the foreshore specified in the order, together with any easement over any adjoining land necessary for securing access to the foreshore so acquired, and by themselves or their lessees to erect on the foreshore so acquired and work fixed engines for salmon;

Provided that any such order—

(i) shall not authorise a fixed engine for salmon to be worked for a period exceeding five years unless the authority is from time to time extended by licence of the Board for such term as may be specified in the licence and not exceeding at any one time five years, and the Board shall not grant any such licence until they have inquired into the effect of the working of the engine on the salmon fisheries within the area; and

(ii) shall provide that all rents and profits of the fixed engines for salmon authorised by the order to be worked by the conservators shall be appropriated for the purpose of securing the restriction or abolition of the use in the area of nets and other obstructions to the passage of salmon :

(*f*) modifying in relation to the fisheries within the area any of the provisions of the Salmon and Freshwater Fisheries Acts which relate to the regulation of fisheries, or of any local Act relating to any fishery within the area;

(*g*) abolishing any board of conservators established under the Salmon and Freshwater Fisheries Acts within the area, and transferring their property and liabilities to the board of conservators constituted by the order, and making such adjustments between the two bodies as may appear to the Board to be necessary or expedient;

(*h*) requiring returns to be made by persons taking fish within the area;

(*i*) the payment out of any funds in the hands of the board of conservators constituted by the order of the costs of the applicants in obtaining the order and its confirmation by Parliament;

(*j*) the general regulation of the fisheries within the area,

and may contain any incidental, consequential, or supplemental provisions, including provisions for payment of compensation to persons injuriously affected by the order, which may appear to be necessary or proper for the purposes of the order.

(2) For the purpose of the acquisition of any part of the foreshore or any easement necessary for giving access thereto authorised to be taken compulsorily under any such provisional order, the provisions of the Lands Clauses Acts which relate to the purchase and taking of lands otherwise than by agreement, and to the entry upon lands by the promoters of the undertaking, are, subject to the modifications set out in the schedule to this Act, incorporated with this Act.

(3) The Board of Agriculture and Fisheries shall make rules providing for proper notice being given of an application for the inclusion in a provisional order of a power to acquire compulsorily any part of the foreshore or any easement over adjoining land to owners, lessees, and occupiers of the foreshore or land affected, and also for public notice being given of the application by advertisement.

(4) A provisional order under this Act shall not apply to any waters in which the business of artificially propagating or rearing salmon or trout is carried on under a licence granted by the Board of Agriculture and Fisheries, and any such licence may be granted by the Board, subject to such conditions (if any) as they think fit, and may be revoked if the Board are of opinion that any condition has not been observed.

3. Application for the Order.—A provisional order under this Act shall not be made except on the application of a board of conservators constituted under the Salmon and Freshwater Fisheries Acts, or of a county council, or of persons who in the opinion of the Board of Agriculture and Fisheries are the owners of one-fourth at least in value of the private fisheries proposed to be regulated or constitute a majority of the persons holding licences to fish in public waters within the area of the proposed order, and every such application shall be advertised by the applicants in such manner as the Board of Agriculture and Fisheries direct.

4. Procedure for Making the Order.—(1) The Board of Agriculture and Fisheries, if they consider that a primâ facie case is made out by the applicants for the making of a provisional order under this Act, shall hold a local inquiry (of which due notice shall be given) by an inspector or other officer of the Board, who shall report the result of his inquiry to the Board, and they, if satisfied of the propriety of making an order, shall prepare a draft, and shall once in each of two successive weeks notify the making of the draft order in some newspaper in general circulation within the area to which the draft relates, and the notification shall specify the place where copies of the draft can be inspected and obtained, and the time within which and the manner in which notices of objection to the draft are to be sent to the Board.

(2) The Board may, if they think it expedient, and shall, if any county council having authority within the area of the proposed order object, hold a local inquiry by an inspector or other officer of the Board with respect to any objections made to the

draft order, and shall, after considering all such objections and the report of the officer who held the inquiry (if any) thereon, settle the terms of the draft order.

5. CONFIRMATION BY PARLIAMENT.—(1) The Board of Agriculture and Fisheries may submit to Parliament for confirmation any provisional order made by them in pursuance of this Act, and any such order shall be of no force whatever unless and until it is confirmed by Parliament.

(2) The Board may revoke either wholly or partially any such order before the order is confirmed by Parliament, but such revocation shall not be made whilst the Bill confirming the order is pending in either House of Parliament.

(3) If while the Bill confirming any such order is pending in either House of Parliament a petition is presented against any order comprised therein, the Bill, so far as it relates to such order, shall be referred to a Select Committee, and the petitioner shall be allowed to appear and oppose as in the case of private Bills.

(4) Any such order may be repealed, altered, or amended by a further provisional order made by the Board in like manner as the original order, and confirmed by Parliament.

6. EXPENSES.—Any expenses incurred by any board of conservators or county council under this Act in respect of any provisional order or confirming Bill made thereunder, or in respect of any application for any such order, shall, whether or not the application for the order was made by the board or the council, be defrayed—

(*a*) in the case of a board of conservators, as expenses incurred by them under the Salmon and Freshwater Fisheries Acts; and

(*b*) in the case of a county council, out of the county fund.

7. CONSENTS IN CASE OF CROWN AND DUCHY FORESHORE AND LAND.—Where any portion of the foreshore proposed to be comprised in a provisional order under this Act, or any fishery proposed to be affected by any such order, or any land over which it is proposed to acquire an easement under any such order, belongs to His Majesty in right of the Crown, or forms part of the possessions of the Duchy of Lancaster or the Duchy of Cornwall, the Board of Agriculture and Fisheries shall not make the Order—

(*a*) In the case of any foreshore under the management of the Commissioners of Woods, or of any fishery or land belonging to His Majesty in right of the Crown, without the consent of the Commissioners of Woods, or one of them;

(*b*) In the case of any foreshore under the management of the Board of Trade, without the consent of the Board of Trade;

(*c*) In the case of any foreshore or fishery or land forming part of the possessions of the Duchy of Lancaster, without the consent of the Chancellor of the Duchy;

(*d*) In the case of any foreshore or fishery or land forming part of the possessions of the Duchy of Cornwall, without the consent of the Duke of Cornwall, or other the persons for the time being empowered to dispose for any purpose of the lands of the Duchy.

8. SHORT TITLE, EXTENT, AND CONSTRUCTION.—(1) This Act may be cited as the Salmon and Freshwater Fisheries Act, 1907, and may be cited with the Salmon and Freshwater Fisheries Acts, 1861 to 1892.

(2) This Act shall not apply to Scotland (except the River Esk, in Dumfriesshire, and its tributaries) or to Ireland, or to the River Tweed, as defined by bye-law under the Salmon Fisheries (Scotland) Act, 1862 (25 and 26 Vict. c. 97), or to its tributaries.

(3) In this Act the expression "Salmon and Freshwater Fisheries Acts" means the Salmon and Freshwater Fisheries Acts, 1861 to 1892, and the Fisheries (Norfolk and Suffolk) Act, 1896 (59 and 60 Vict. c. 18), and other expressions have the same meaning as in those Acts.

SCHEDULE.

MODIFICATIONS OF THE LANDS CLAUSES ACTS (S. 2).

The following modifications shall have effect in the construction of the provisions of the Lands Clauses Acts incorporated by this Act for the purposes thereof:—

(*a*) The expression "special Act" means this Act inclusive of any provisional order authorising the compulsory acquisition of any part of the foreshore, except that the period of three years mentioned in section one hundred and twenty-three of

the Lands Clauses Consolidation Act, 1845, shall be calculated from the passing of the Act confirming the provisional order;

(*b*) The expression "the promoters" means the board of conservators constituted by the order; and

(*c*) The expression "land" includes easements in or relating to land.

CHAPTER XVI.

An Act to Facilitate the Admission in Evidence of Statutes passed by the Legislatures of British Possessions and Protectorates, including Cyprus. [21*st August* 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. PROOF OF STATUTES OF BRITISH POSSESSIONS.—(1) Copies of Acts, ordinances, and statutes passed (whether before or after the passing of this Act) by the Legislature of any British possession, and of orders, regulations and other instruments issued or made, whether before or after the passing of this Act, under the authority of any such Act, ordinance, or statute, if purporting to be printed by the Government printer, shall be received in evidence by all courts of justice in the United Kingdom without any proof being given that the copies were so printed.

(2) If any person prints any copy or pretended copy of any such Act, ordinance, statute, order, regulation or instrument which falsely purports to have been printed by the Government printer, or tenders in evidence any such copy or pretended copy which falsely purports to have been so printed, knowing that it was not so printed, he shall on conviction be liable to be sentenced to imprisonment with or without hard labour for a period not exceeding twelve months.

(3) In this Act—

The expression "Government printer" means, as respects any British possession, the printer purporting to be the printer authorised to print the Acts, ordinances, or statutes of the Legislature of that possession, or otherwise to be the Government printer of that possession:

The expression "British possession" means any part of His Majesty's dominions exclusive of the United Kingdom, and, where parts of those dominions are under both a central and a local Legislature, shall include both all parts under the central Legislature and each part under a local Legislature.

(4) Nothing in this Act shall affect the Colonial Laws Validity Act, 1865 (28 and 29 Vict c. 63).

(5) His Majesty may by Order in Council extend this Act to Cyprus and any British protectorate, and where so extended this Act shall apply as if Cyprus or the protectorate were a British possession, and with such other necessary adaptations as may be made by the Order.

2. SHORT TITLE.—This Act may be cited as the Evidence (Colonial Statutes) Act, 1907.

CHAPTER XVII.

PROBATION OF OFFENDERS ACT, 1907

[7 EDW. 7. CH. 17.]

ARRANGEMENT OF SECTIONS.

Section.

1. Power of courts to permit conditional release of offenders.
2. Probation orders and conditions of recognizances.
3. Probation officers.
4. Duties of probation officers.
5. Power to vary conditions of release.
6. Provision in case of offender failing to observe conditions of release.
7. Power to make rules.
8. Application to Scotland.
9. Application to Ireland.
10. Short title and repeal.

SCHEDULE.

PROBATION OF OFFENDERS ACT, 1907.

CHAPTER XVII.

An Act to permit the Release on Probation of Offenders in certain cases, and for other matters incidental thereto. [21*st August* 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. POWER OF COURTS TO PERMIT CONDITIONAL RELEASE OF OFFENDERS.—(1) Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either—

(i) dismissing the information or charge ; or

(ii) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

(2) Where any person has been convicted on indictment of any offence punishable with imprisonment, and the court is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

(3) The court may, in addition to any such order, order the offender to pay such damages for injury or compensation for loss (not exceeding in the case of a court of summary jurisdiction ten pounds, or, if a higher limit is fixed by any enactment relating to the offence, that higher limit) and to pay such costs of the proceedings as the court thinks reasonable ; and, if the offender is under the age of sixteen years, and it appears to the court that the parent or guardian of the offender has conduced to the commission of the offence, the court may under and in accordance with the Youthful Offenders Act, 1901 (1 Edw. 7 c. 20), order payment of such damages and costs by such parent or guardian.

(4) Where an order under this section is made by a court of summary jurisdiction, the order shall, for the purpose of revesting or restoring stolen property, and of enabling the court to make orders as to the restitution or delivery of property to the owner and as to the payment of money upon or in connexion with such restitution or delivery, have the like effect as a conviction.

2. PROBATION ORDERS AND CONDITIONS OF RECOGNIZANCES.—(1) A recognizance ordered to be entered into under this Act shall, if the court so order, contain a condition that the offender be under the supervision of such person as may be named in the order during the period specified in the order and such other conditions for securing such supervision as may be specified in the order, and an order requiring the insertion of such conditions as aforesaid in the recognizance is in this Act referred to as a probation order.

(2) A recognizance under this Act may contain such additional conditions as the court may, having regard to the particular circumstances of the case, order to be inserted therein with respect to all or any of the following matters :—

(*a*) for prohibiting the offender from associating with thieves and other undesirable persons, or from frequenting undesirable places ;

(*b*) as to abstention from intoxicating liquor, where the offence was drunkenness or an offence committed under the influence of drink ;

(*c*) generally for securing that the offender should lead an honest and industrious life.

(2) The court by which a probation order is made shall furnish to the offender a notice in writing stating in simple terms the conditions he is required to observe.

3. Probation Officers.—(1) There may be appointed as probation officer or officers for a petty sessional division such person or persons of either sex as the authority having power to appoint a clerk to the justices of that division may determine, and a probation officer when acting under a probation order shall be subject to the control of petty sessional courts for the division for which he is so appointed.

(2) There shall be appointed, where circumstances permit, special probation officers, to be called children's probation officers, who shall, in the absence of any reasons to the contrary, be named in a probation order made in the case of an offender under the age of sixteen.

(3) The person named in any probation order shall,—

(*a*) where the court making the order is a court of summary jurisdiction, be selected from amongst the probation officers for the petty sessional division in or for which the court acts; or

(*b*) where the court making the order is a court of assize or a court of quarter sessions, be selected from amongst the probation officers for the petty sessional division from which the person charged was committed for trial:

Provided that the person so named may, if the court considers it expedient on account of the place of residence of the offender, or for any other special reason, be a probation officer for some other petty sessional division, and may, if the court considers that the special circumstances of the case render it desirable, be a person who has not been appointed to be probation officer for any petty sessional division.

(4) A probation officer appointed for a petty sessional division may be paid such salary as the authority having the control of the fund out of which the salary of the clerk to the justices of that petty sessional division is paid may determine, and if not so paid by salary may receive such remuneration for acting under a probation order as the court making the order thinks fit, not exceeding such remuneration as may be allowed by the regulations of such authority as aforesaid, and may in either case be paid such out-of-pocket expenses as may be allowed under such regulations as aforesaid, and the salary or remuneration and expenses shall be paid by that authority out of the said funds.

(5) A person named in a probation order not being a probation officer for a petty sessional division may be paid such remuneration and out-of-pocket expenses out of such fund as the court making the probation order may direct, not exceeding such as may be allowed under the regulations of the authority having control of the fund out of which the remuneration is directed to be paid.

(6) The person named in a probation order may at any time be relieved of his duties, and in any such case, or in case of the death of the person so named, another person may be substituted by the court before which the offender is bound by his recognizance to appear for conviction or sentence, or, if he be a probation officer for a petty sessional division, by a court to whose control that officer is subject.

(7) In the application of this Act to the City of London and the metropolitan police court district, the city and each division of that district shall be deemed to be a petty sessional division.

4. Duties of Probation Officers.—It shall be the duty of a probation officer, subject to the directions of the court—

(*a*) to visit or receive reports from the person under supervision at such reasonable intervals as may be specified in the probation order or, subject thereto, as the probation officer may think fit;

(*b*) to see that he observes the conditions of his recognizance;

(*c*) to report to the court as to his behaviour;

(*d*) to advise, assist, and befriend him, and, when necessary, to endeavour to find him suitable employment.

5. Power to Vary Conditions of Release.—The court before which any person is bound by his recognizance under this Act to appear for conviction or sentence may, upon the application of the probation officer, and after notice to the

PROBATION OF OFFENDERS ACT, 1907.

offender, vary the conditions of the recognizance and may, on being satisfied that the conduct of that person has been such as to make it unneccessary that he should remain longer under supervision, discharge the recognizance.

6. Provision in Case of Offender Failing to Observe Conditions of Release.—(1) If the court before which an offender is bound by his recognizance under this Act to appear for conviction or sentence, or any court of summary jurisdiction, is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension, or may, if it thinks fit, instead of issuing a warrant in the first instance, issue a summons to the offender and his sureties (if any) requiring him or them to attend at such court and at such time as may be specified in the summons.

(2) The offender, when apprehended, shall, if not brought forthwith before the court before which he is bound by his recognizance to appear for conviction or sentence, be brought before a court of summary jurisdiction.

(3) The court before which an offender on apprehension is brought, or before which he appears in pursuance of such summons as aforesaid, may, if it is not the court before which he is bound by his recognizance to appear for conviction or sentence, remand him to custody or on bail until he can be brought before the last-mentioned court.

(4) An offender so remanded to custody may be committed during remand to any prison to which the court having power to convict or sentence him has power to commit prisoners. In the case of a child or young person under the age of sixteen, he shall, if remanded, be dealt with wherever practicable in accordance with the provisions of section four, subsection one, of the Youthful Offenders Act, 1901.

(5) A court before which a person is bound by his recognizance to appear for conviction and sentence, on being satisfied that he has failed to observe any condition of his recognizance, may forthwith, without further proof of his guilt, convict and sentence him for the original offence or, if the case was one in which the court in the first instance might, under section fifteen of the Industrial Schools Act, 1866 (29 and 30 Vict. c. 118), have ordered the offender to be sent to a certified industrial school, and the offender is still apparently under the age of twelve years, make such an order.

7. Power to make Rules.—The Secretary of State may make rules for carrying this Act into effect, and in particular for prescribing such matters incidental to the appointment, resignation, and removal of probation officers, and the performance of their duties, and the reports to be made by them, as may appear necessary.

8. Application to Scotland.—This Act shall apply to Scotland, subject to the following modifications:—

(1) There may be appointed as probation officers for a district being a royal, parliamentary, or police burgh, or a county outwith the police boundaries of any such burgh, such persons as the burgh magistrates may determine for the burgh and the sheriff for the county; and a probation officer when acting under a probation order shall be subject to the control of the burgh police court or sheriff court, as the case may be;

(2) The immediately preceding subsection shall be substituted for subsection one of section three of this Act, and references in this Act to a petty sessional division shall be construed as references to a district;

(3) The expression "court of summary jurisdiction" where occurring in section three of this Act shall include the sheriff sitting with a jury;

(4) "Bond" shall be substituted for "recognizance," the "Secretary for Scotland" shall be substituted for "the Secretary of State," and "the High Court of Justiciary" shall be substituted for "a court of assize or a court of quarter sessions";

(5) The authority having power to regulate the remuneration of probation officers shall be the town council in a burgh and the county council in a county, and such remuneration shall be paid out of the burgh general or police assessment or the county general assessment, as the case may be.

9. Application to Ireland.—In the application of this Act to Ireland "Lord Lieutenant" shall be substituted for "Secretary of State," and each division of the police district of Dublin metropolis shall be deemed to be a petty sessional division.

7 EDWARD 7, CHAPTER 17.

10. SHORT TITLE AND REPEAL.—(1) This Act may be cited as the Probation of Offenders Act, 1907.

(2) The enactments mentioned in the schedule to this Act shall be repealed to the extent specified in the third column of that schedule.

(3) This Act shall come into operation on the first day of January one thousand nine hundred and eight.

SCHEDULE.

ENACTMENTS REPEALED (S. 10).

Session and Chapter.	Short Title.	Extent of Repeal.
42 and 43 Vict. c. 49.	The Summary Jurisdiction Act, 1879	Section sixteen.
50 and 51 Vict. c. 25.	The Probation of First Offenders Act, 1887 . . .	The whole Act.
1 Edw. 7. c. 20	The Youthful Offenders Act, 1901	Section twelve.

CHAPTER XVIII.

An Act to amend the Married Women's Property Act, 1882. [21*st August* 1907.]

CHAPTER XIX.

An Act to enable portion of a term of imprisonment in Ireland to be remitted as a reward for good conduct. [21*st August* 1907.]

CHAPTER XX.

An Act to apply a sum out of the Consolidated Fund to the service of the year ending on the thirty-first day of March one thousand nine hundred and eight, and to appropriate the Supplies granted in this Session of Parliament.

[21*st August* 1907.]

CHAPTER XXI.

BUTTER AND MARGARINE ACT, 1907.

[7 EDW. 7. CH. 21.]

ARRANGEMENT OF SECTIONS.

Section.
1. Registration of factories and consignments.
2. Inspection of factories.
3. Prohibition of adulterants in butter factories.
4. Limit of moisture in butter, margarine, and milk-blended butter.
5. Provisions as to the importation of butter, margarine, and milk-blended butter.
6. Regulations as to milk-solids in butter.
7. Regulations as to preservatives.
8. Marking of wrappers, etc., used in connection with margarine.
9. Regulation of sale of milk-blended butter.
10. Names of margarine, etc.
11. Penalties for offences.
12. Amendment of section eight of Margarine Act, 1887.
13. Definition of margarine.
14. Short title, construction, and commencement.

BUTTER AND MARGARINE ACT, 1907.

CHAPTER XXI.

An Act to make further provision with respect to the Manufacture, Importation, and Sale of Butter and Margarine and similar Substances. [21*st August* 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. REGISTRATION OF FACTORIES AND CONSIGNMENTS.—(1) The provisions of section nine of the Margarine Act, 1887 (50 and 51 Vict. c. 29), as amended by section seven of the Sale of Food and Drugs Act, 1899 (62 and 63 Vict. c. 51), relating to the registration of manufactories of margarine, shall, with the necessary adaptations, apply to—

(*a*) Butter factories, that is to say, any premises on which by way of trade butter is blended, reworked, or subjected to any other treatment, but not so as to cease to be butter ; and

(*b*) Any premises on which there is manufactured any milk-blended butter (that is to say, any mixture produced by mixing or blending butter with milk or cream other than condensed milk or cream) or on which there is carried on the business of a wholesale dealer in milk-blended butter.

(2) The provisions of section seven of the Sale of Food and Drugs Act, 1899, relating to registers of consignments of margarine, shall, with the necessary adaptations, apply to consignments of milk-blended butter.

(3) Premises shall not be used as a butter factory if they form part of or communicate, otherwise than by a public street or road, with any other premises which are required to be registered under the Sale of Food and Drugs Acts or under paragraph (*b*) of this section, and if any premises are so used the occupier thereof shall be guilty of an offence under this Act, and the local authority shall remove from the register of butter factories kept by them any premises used as a butter factory contrary to this provision :

Provided that this subsection shall not apply to premises which on the first day of January one thousand nine hundred and seven were being used as a butter factory and formed part of or communicated with premises which were then registered under the Sale of Food and Drugs Acts, if and so long as the Board of Agriculture and Fisheries so direct.

2. INSPECTION OF FACTORIES.—(1) Any officer of the Board of Agriculture and Fisheries or of the Local Government Board shall have power to enter at all reasonable times any premises registered under the Sale of Food and Drugs Acts or this Act, and to inspect any process of manufacture, blending, reworking, or treatment used therein, and to take samples for analysis of any butter, margarine, margarine cheese, milk-blended butter, or of any article capable of being used in the manufacture, treatment, or adulteration of any such article as aforesaid.

(2) An officer of a local authority who is authorised to procure samples under the Sale of Food and Drugs Acts shall, if specially authorised in that behalf by the local authority, have the like powers of entry, inspection, and sampling as regards any premises registered with the authority as a butter factory.

(3) If the Board of Agriculture and Fisheries have reason to believe—

(*a*) that on any unregistered premises there is carried on any process of manufacture, blending, reworking, or treatment or any wholesale dealing which under the Sale of Food and Drugs Acts or this Act cannot be carried on except on registered premises ; or

(*b*) that on any premises butter is by way of trade either made or stored, and that for the purposes of those Acts inspection is desirable,

the Board may specially authorise any officer of the Board to enter the premises, and in such case the officer shall have the like powers of entry, inspection, and sampling as if the premises were registered.

(4) Where under this section a special authority is required, an officer of the Board or of a local authority shall not be entitled to exercise any of his powers under this section unless, if so requested by or on behalf of the occupier of the premises to be entered, he produces his authority.

(5) Subsection (2) of section seven of the Sale of Food and Drugs Act, 1899, is hereby repealed.

3. Prohibition of Adulterants in Butter Factories.—If any substance intended to be used for the adulteration of butter is found in any butter factory, the occupier of the factory shall be guilty of an offence under this Act, and if any oil or fat capable of being so used is found it shall be deemed to be intended to be so used, unless the contrary is proved.

4. Limit of Moisture in Butter, Margarine, and Milk-Blended Butter.—(1) If any butter which, when prepared for sale or consignment, contains more than sixteen per cent. of water is in any butter factory, or if any margarine which, when prepared for sale or consignment, contains more than sixteen per cent. of water is in any margarine factory, or if any such butter or margarine is consigned from a butter factory or margarine factory, the occupier of the factory or consignor, as the case may be, shall (whether the excess of moisture is due to adulteration or not) be guilty of an offence under this Act, unless the occupier or consignor proves to the satisfaction of the court that the butter or margarine was not made, blended, reworked, or treated in the factory.

(2) Any person who manufactures, sells, or exposes or offers for sale, or has in his possession for the purpose of sale, any milk-blended butter which contains more than twenty-four per cent. of water, shall be guilty of an offence under this Act.

5. Provisions as to the Importation of Butter, Margarine, and Milk-Blended Butter.—(1) There shall be included in the list of articles importation of which is made an offence by section one of the Sale of Food and Drugs Act, 1899, the following articles:—

(*e*) Butter containing more than sixteen per cent. of water;

(*f*) Margarine containing more than sixteen per cent. of water, or more than ten per cent. of butter fat;

(*g*) Milk-blended butter containing more than twenty-four per cent. of water;

(*h*) Milk-blended butter, except in packages conspicuously marked with such name as may be approved by the Board of Agriculture and Fisheries for the purpose;

(*j*) Butter, margarine, or milk-blended butter which contains a preservative prohibited by any regulation made under this Act, or an amount of a preservative in excess of the limit allowed by any such regulation;

and in the said section the words "adulterated or impoverished butter (other than margarine) or," and the words "butter or" shall be repealed.

(2) The maximum fine for an offence under the said section one, as amended by this section, shall, where the article in respect of which the offence was committed is butter, margarine, margarine cheese, or milk-blended butter, be either such as is provided in the said section one, or, at the election of the Commissioners of Customs, a fine equal to the value of the goods imported bearing the same mark or description, to be estimated and taken according to the rate and price for which goods of the like kind but of the best quality were sold at or about the time of the importation.

(3) In any proceeding under the said section one as amended by this section the certificate of the principal chemist of the Government Laboratories, or, if the person who made the analysis be called as a witness, the evidence of that person, that an imported substance is margarine or milk-blended butter shall raise a presumption, until the contrary is proved, that the substance is margarine or milk-blended butter, and the defendant shall not be entitled to require the person who made the analysis to be called as a witness unless he shall, at least three clear days before the return day, give notice to the prosecutor that he requires his attendance, and deposit with the prosecutor a sum sufficient to cover the reasonable costs and expenses of his attendance, which costs and expenses shall be paid by the defendant in the event of his conviction.

(4) Where a sample taken under the said section one as amended by this section is certified by the principal chemist to be margarine or milk-blended butter the Commissioners of Customs shall upon receiving the certificate forthwith notify the importer thereof.

BUTTER AND MARGARINE ACT, 1907.

6. REGULATIONS AS TO MILK-SOLIDS IN BUTTER.—The power of making regulations under section four of the Sale of Food and Drugs Act, 1899, shall extend to making regulations as to the proportion of any milk-solid other than milk-fat in any sample of butter or milk-blended butter.

7. REGULATIONS AS TO PRESERVATIVES.—(1) The Local Government Board may, after such inquiry as they deem necessary, make regulations for prohibiting the use as a preservative of any substance specified in such regulations in the manufacture or preparation for sale of butter, margarine, or milk-blended butter, or for limiting the extent to which, either generally or as regards any particular substance or substances, preservatives may be used in the manufacture or preparation for sale of butter, margarine, or milk-blended butter.

(2) Any regulations made under this section shall be notified in the London, Edinburgh, or Dublin Gazette as the case may require, and shall also be made known in such other manner as the Local Government Board may direct.

(3) Any person who manufactures, sells, or exposes or offers for sale, or has in his possession for the purpose of sale, any butter, margarine, or milk-blended butter which contains a preservative prohibited by a regulation under this section, or an amount of a preservative in excess of the limit allowed by any such regulation, shall be guilty of an offence under this Act.

8. MARKING OF WRAPPERS, ETC., USED IN CONNEXION WITH MARGARINE.—If in any wrapper enclosing margarine, or on any package containing margarine, or on any label attached to a parcel of margarine, or in any advertisement or invoice of margarine a person dealing in margarine describes it by any name other than either "margarine," or a name combining the word "margarine" with a fancy or other descriptive name approved by the Board of Agriculture and Fisheries and printed in type not larger than and in the same colour as the word "margarine," he shall be guilty of an offence under this Act.

9. REGULATION OF SALE OF MILK-BLENDED BUTTER.—(1) Milk-blended butter shall be dealt with under such name or names as may be approved by the Board of Agriculture and Fisheries and under the conditions applicable to the sale or description of margarine, with the substitution of an approved name for the word "margarine," and with this modification, that, in any case where, in order to comply with those conditions, the article is delivered to the purchaser in a wrapper, there shall, in addition to the approved name, be printed on the wrapper in such manner as the Board approve such description of the article, setting out the percentage of moisture or water contained therein, as may be approved by the Board.

(2) Milk-blended butter, whenever forwarded by any public conveyance, shall be duly consigned under the name which, as respects the article consigned, has been approved by the Board under this section; subject to this modification, section eight of the Margarine Act, 1887, shall apply to milk-blended butter in like manner as it applies to margarine.

(3) If any person deals with, sells, or exposes or offers for sale, or has in his possession for the purpose of sale, or describes any milk-blended butter contrary to the provisions of this section, he shall be guilty of an offence under this Act, but any defence which would be a defence under section seven of the Margarine Act, 1887, as respects margarine, shall be a defence under this section as respects milk-blended butter.

10. NAMES OF MARGARINE, ETC.—A name shall not be approved by the Board of Agriculture and Fisheries for use in connexion with margarine if it refers to or is suggestive of butter or anything connected with the dairy interest, nor shall such a name be approved as a name under which milk-blended butter may be imported or dealt with.

11. PENALTIES FOR OFFENCES.—(1) Any person guilty of an offence under this Act shall be liable on conviction under the Summary Jurisdiction Acts for a first offence to a fine not exceeding twenty pounds, and for a second offence to a fine not exceeding fifty pounds, and for a third or any subsequent offence to a fine not exceeding one hundred pounds, and in cases where imprisonment can be inflicted under section seventeen of the Sale of Food and Drugs Act, 1899, to such imprisonment as is by that section authorised.

(2) Section five of the Margarine Act, 1887 (which exempts employers from liability in certain cases), and section eleven of the same Act (which relates to the appropriation of penalties), and section twelve of the same Act (which relates to proceedings under that Act), shall apply to proceedings under this Act, with the substitution of references to this Act for references to the Margarine Act, 1887.

12. AMENDMENT OF SECT. 8 OF MARGARINE ACT, 1887.—Except in the Administrative County of London, section eight of the Margarine Act, 1887, shall have effect as if the words "inspector of weights and measures" were inserted after the word "nuisances."

13. DEFINITION OF MARGARINE.—(1) For the purposes of the Sale of Food and Drugs Acts and this Act the expression "margarine" shall mean any article of food, whether mixed with butter or not, which resembles butter and is not milk-blended butter.

(2) The above definition shall be substituted for the definition of margarine in the Margarine Act, 1887.

14. SHORT TITLE, CONSTRUCTION, AND COMMENCEMENT.—(1) This Act may be cited as the Butter and Margarine Act, 1907, and shall be construed as one with the Sale of Food and Drugs Act, 1899, and may be cited with the Sale of Food and Drugs Acts as the Sale of Food and Drugs Acts, 1875 to 1907.

(2) This Act shall come into operation on the first day of January one thousand nine hundred and eight.

CHAPTER XXII.

An Act to amend the Law relating to Clerks of Petty Sessions in Ireland.

[21*st August* 1907.]

CHAPTER XXIII.

An Act to establish a Court of Criminal Appeal and to amend the Law relating to Appeals in Criminal Cases. [28*th August* 1907.]

CHAPTER XXIV.

LIMITED PARTNERSHIPS ACT, 1907.

[7 EDW. 7. CH. 24.]

ARRANGEMENT OF SECTIONS.

Section.

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LIMITED PARTNERSHIPS ACT, 1907.

CHAPTER XXIV.

An Act to establish Limited Partnerships. [28*th August* 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. SHORT TITLE.—This Act may be cited for all purposes as the Limited Partnerships Act, 1907.

2. COMMENCEMENT OF ACT.—This Act shall come into operation on the first day of January one thousand nine hundred and eight.

3. INTERPRETATION OF TERMS.—In the construction of this Act the following words and expressions shall have the meanings respectively assigned to them in this section, unless there be something in the subject or context repugnant to such construction:—

"Firm," "firm name," and "business" have the same meanings as in the Partnership Act, 1890 (53 and 54 Vict. c. 39).

"General partner" shall mean any partner who is not a limited partner as defined by this Act.

4. DEFINITION AND CONSTITUTION OF LIMITED PARTNERSHIP.—(1) From and after the commencement of this Act limited partnerships may be formed in the manner and subject to the conditions by this Act provided.

(2) A limited partnership shall not consist, in the case of a partnership carrying on the business of banking, of more than ten persons, and, in the case of any other partnership, of more than twenty persons, and must consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm, and one or more persons to be called limited partners, who shall at the time of entering into such partnership contribute thereto a sum or sums as capital or property valued at a stated amount, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed.

(3) A limited partner shall not during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his contribution, and if he does so draw out or receive back any such part shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back.

(4) A body corporate may be a limited partner.

5. REGISTRATION OF LIMITED PARTNERSHIP REQUIRED.—Every limited partnership must be registered as such in accordance with the provisions of this Act, or in default thereof it shall be deemed to be a general partnership, and every limited partner shall be deemed to be a general partner.

6. MODIFICATIONS OF GENERAL LAW IN CASE OF LIMITED PARNERSHIPS.—(1) A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm:

Provided that a limited partner may by himself or his agent at any time inspect the books of the firm and examine into the state and prospects of the partnership business, and may advise with the partners thereon.

If a limited partner takes part in the management of the partnership business he shall be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner.

(2) A limited partnership shall not be dissolved by the death or bankruptcy of a limited partner, and the lunacy of a limited partner shall not be a ground for dissolution of the partnership by the court unless the lunatic's share cannot be otherwise ascertained and realised.

(3) In the event of the dissolution of a limited partnership its affairs shall be wound up by the general partners unless the court otherwise orders.

(4) Applications to the court to wind up a limited partnership shall be by petition under the Companies Acts, 1862 to 1900, and the provisions of those Acts relating to the winding-up of companies by the court and of the rules made thereunder (including provisions as to fees) shall, subject to such modifications (if any) as the Lord Chancellor, with the concurrence of the President of the Board of Trade, may

by rules provide, apply to the winding-up by the court of limited partnerships, with the substitution of general partners for directors.

(5) Subject to any agreement expressed or implied between the partners—

(*a*) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the general partners;

(*b*) A limited partner may, with the consent of the general partners, assign his share in the partnership, and upon such an assignment the assignee shall become a limited partner with all the rights of the assignor;

(*c*) The other partners shall not be entitled to dissolve the partnership by reason of any limited partner suffering his share to be charged for his separate debt;

(*d*) A person may be introduced as a partner without the consent of the existing limited partners;

(*e*) A limited partner shall not be entitled to dissolve the partnership by notice.

7. Law as to Private Partnerships to Apply where not Excluded by this Act.—Subject to the provisions of this Act, the Partnership Act, 1890 (53 and 54 Vict. c. 39), and the rules of equity and of common law applicable to partnerships, except so far as they are inconsistent with the express provisions of the last-mentioned Act, shall apply to limited partnerships.

8. Manner and Particulars of Registration.—The registration of a limited partnership shall be effected by sending by post or delivering to the registrar at the register office in that part of the United Kingdom in which the principal place of business of the limited partnership is situated or proposed to be situated a statement signed by the partners containing the following particulars:—

(*a*) The firm name;

(*b*) The general nature of the business;

(*c*) The principal place of business;

(*d*) The full name of each of the partners;

(*e*) The term, if any, for which the partnership is entered into, and the date of its commencement;

(*f*) A statement that the partnership is limited, and the description of every limited partner as such;

(*g*) The sum contributed by each limited partner, and whether paid in cash or how otherwise.

9. Registration of Changes in Partnerships.—(1) If during the continuance of a limited partnership any change is made or occurs in—

(*a*) the firm name,

(*b*) the general nature of the business,

(*c*) the principal place of business,

(*d*) the partners or the name of any partner,

(*e*) the term or character of the partnership,

(*f*) the sum contributed by any limited partner,

(*g*) the liability of any partner by reason of his becoming a limited instead of a general partner or a general instead of a limited partner,

a statement, signed by the firm, specifying the nature of the change shall within seven days be sent by post or delivered to the registrar at the register office in that part of the United Kingdom in which the partnership is registered.

(2) If default is made in compliance with the requirements of this section each of the general partners shall on conviction under the Summary Jurisdiction Acts be liable to a fine not exceeding one pound for each day during which the default continues.

10. Advertisement in Gazette of Statement of General Partner Becoming a Limited Partner and of Assignment of Share of Limited Partner.—(1) Notice of any arrangement or transaction under which any person will cease to be a general partner in any firm, and will become a limited partner in that firm, or under which the share of a limited partner in a firm will be assigned to any person, shall be forthwith advertised in the Gazette, and until notice of the arrangement or transaction is so advertised, the arrangement or transaction shall, for the purposes of this Act, be deemed to be of no effect.

(2) For the purposes of this section, the expression "the Gazette" means—

In the case of a limited partnership registered in England, the London Gazette;

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In the case of a limited partnership registered in Scotland, the Edinburgh Gazette;
In the case of a limited partnership registered in Ireland, the Dublin Gazette.

11. Ad Valorem Stamp Duty on Contributions by Limited Partners.—The statement of the amount contributed by a limited partner, and a statement of any increase in that amount, sent to the registrar for registration under this Act, shall be charged with an ad valorem stamp duty of five shillings for every one hundred pounds, and any fraction of one hundred pounds over any multiple of one hundred pounds, of the amount so contributed, or of the increase of that amount, as the case may be; and in default of payment of stamp duty thereon as herein required, the duty with interest thereon at the rate of five per cent. per annum from the date of delivery of such statement shall be a joint and several debt to His Majesty, recoverable from the partners, or any of them, in the said statements named, or, in the case of an increase, from all or any of the said partners whose discontinuance in the firm shall not, before the date of delivery of such statement of increase, have been duly notified to the registrar.

12. Making False Returns to be Misdemeanor.—Every one commits a misdemeanor, and shall be liable to imprisonment with hard labour for a term not exceeding two years, who makes, signs, sends, or delivers for the purpose of registration under this Act any false statement known by him to be false.

13. Registrar to File Statement and Issue Certificate of Registration.—On receiving any statement made in pursuance of this Act the registrar shall cause the same to be filed, and he shall send by post to the firm from whom such statement shall have been received a certificate of the registration thereof.

14. Register and Index to be Kept.—At each of the register offices hereinafter referred to the registrar shall keep, in proper books to be provided for the purpose, a register and an index of all the limited partnerships registered as aforesaid, and of all the statements registered in relation to such partnerships.

15. Registrar of Joint Stock Companies to be Registrar under Act.—The registrar of joint stock companies shall be the registrar of limited partnerships, and the several offices for the registration of joint stock companies in London, Edinburgh, and Dublin shall be the offices for the registration of limited partnerships carrying on business within those parts of the United Kingdom in which they are respectively situated.

16. Inspection of Statements Registered.—(1) Any person may inspect the statements filed by the registrar in the register offices aforesaid, and there shall be paid for such inspection such fees as may be appointed by the Board of Trade, not exceeding one shilling for each inspection; and any person may require a certificate of the registration of any limited partnership, or a copy of or extract from any registered statement, to be certified by the registrar, and there shall be paid for such certificate of registration, certified copy, or extract, such fees as the Board of Trade may appoint, not exceeding two shillings for the certificate of registration, and not exceeding sixpence for each folio of seventy-two words, or in Scotland for each sheet of two hundred words.

(2) A certificate of registration, or a copy of or extract from any statement registered under this Act, if duly certified to be a true copy under the hand of the registrar or one of the assistant registrars (whom it shall not be necessary to prove to be the registrar or assistant registrar) shall, in all legal proceedings, civil or criminal, and in all cases whatsoever, be received in evidence.

17. Power to Board of Trade to make Rules.—The Board of Trade may make rules (but as to fees with the concurrence of the Treasury) concerning any of the following matters:—

(*a*) The fees to be paid to the registrar under this Act, so that they do not exceed in the case of the original registration of a limited partnership the sum of two pounds, and in any other case the sum of five shillings;
(*b*) The duties or additional duties to be performed by the registrar for the purposes of this Act;
(*c*) The performance by assistant registrars and other officers of acts by this Act required to be done by the registrar;
(*d*) The forms to be used for the purposes of this Act;
(*e*) Generally the conduct and regulation of registration under this Act and any matters incidental thereto.

CHAPTER XXV.

An Act for amending the Law relating to the Administration of Oaths for the purpose of Proceedings in Prize Courts. [28*th August* 1907.]

CHAPTER XXVI.

An Act to amend the Law with respect to Customs Duties in the Isle of Man. [28*th August* 1907.]

CHAPTER XXVII.

ADVERTISEMENTS REGULATION ACT, 1907.

[7 Edw. 7. Ch. 27.]

ARRANGEMENT OF SECTIONS.

Section.
1. Short title.
2. Local authorities to have power to make byelaws for regulation of advertisements.
3. Byelaws to be confirmed by Secretary of State.
4. Expenses.
5. Powers of Act to be in addition to any existing powers.
6. Application to Scotland.
7. Definition.
8. Enforcement of byelaws of London County Council.
9. Application to Ireland.
10. Penalties.

CHAPTER XXVII.

An Act to authorise Local Authorities to make Byelaws respecting the Exhibition of Advertisements. [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Short Title.—This Act may be cited as the Advertisements Regulation Act, 1907.

2. Local Authorities to have Power to make Byelaws for Regulation of Advertisements.—Any local authority may make byelaws—

(1) For the regulation and control of hoardings and similar structures used for the purpose of advertising when they exceed twelve feet in height:

(2) For regulating, restricting, or preventing the exhibition of advertisements in such places and in such manner, or by such means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape:

Provided that a local authority in making byelaws under this section shall provide for the exemption from the operation of such byelaws of any hoardings and similar structures in use for advertising purposes at the time of the making of the byelaws, and of any advertisements exhibited at that time, for such period, not being less than five years from that time, as they may think fit.

3. Byelaws to be Confirmed by Secretary of State.—(1) A byelaw made under this Act shall not have any effect until confirmed by the Secretary of State, and shall not be so confirmed until at least thirty days after the local authority have published it in such manner as the Secretary of State may by general or special order direct.

(2) The Secretary of State shall, before confirming any byelaw, consider any objections to it which may be addressed to him by persons affected or likely to be affected thereby.

(3) The Secretary of State may, before confirming any byelaw, order that a local inquiry be held with respect to the byelaw or with respect to any objections thereto. The person holding any such inquiry shall receive such remuneration as the Secretary

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of State may determine, and that remuneration and the expenses of the local inquiry shall be paid by the local authority making the byelaw.

(4) Byelaws made under this Act may apply either to the whole of the area of the local authority, or to any specified part thereof.

(5) Byelaws made by a county council shall not be of any force or effect within any borough or urban district the council of which is a local authority under this Act.

(6) The production of a copy of any byelaw certified by a person purporting to be the clerk of the local authority to be a true copy shall, until the contrary is proved, be evidence of the byelaw and of the due making thereof, and, if it is so stated in the certificate, of the byelaw having been duly confirmed.

4. EXPENSES.—Any expenses incurred by a local authority in England or Ireland in carrying into effect the provisions of this Act or any byelaw made thereunder shall be defrayed in the case of a county out of the county fund, in the case of the city of London out of the consolidated rate of that city, in the case of a borough out of the borough fund or borough rate, and in the case of an urban district as part of the general expenses incurred in the execution of the Public Health Acts: Provided that a county council shall not raise any sum on account of their expenses under this Act within any borough or urban district the council of which is a local authority under this Act.

5. POWERS OF ACT TO BE IN ADDITION TO ANY EXISTING POWERS.—The powers and provisions of this Act shall be deemed to be in addition to and not in derogation of any powers and provisions of any local Act, and any powers of making byelaws under any general Act and any such powers and provisions may be exercised and enforced in the same manner as if this Act had not been passed.

6. APPLICATION TO SCOTLAND.—In the application of this Act to Scotland—

(1) The Secretary for Scotland shall be substituted for the Secretary of State:

(2) Byelaws made by a county council shall not be of any force or effect within a royal, parliamentary, or police burgh:

(3) A county council may make byelaws under this Act for preventing the affixing or otherwise exhibiting advertisements upon any wall, tree, fence, gate, or elsewhere on private property, without the consent of either the owner or occupier previously given in writing, or except by virtue of some other sufficient legal authority:

(4) The section of this Act relating to expenses shall apply with the substitution of "general purposes rate" for "county fund," "royal, parliamentary, or police burgh" for "borough," and "burgh general or police assessment" for "borough fund or borough rate."

7. DEFINITION.—For the purposes of this Act the expression "local authority" means—

(1) Within the city of London, the mayor, aldermen, and commons of that city, in common council assembled:

(2) Within any municipal borough in England, the council of that borough:

(3) Within any royal, parliamentary, or police burgh in Scotland, the town council:

(4) Within any urban district in England containing a population according to the last census for the time being of over ten thousand, and within any urban district in Ireland containing a population according to the last census for the time being of over five thousand, the council of that district:

(5) Elsewhere in England, Scotland, or Ireland, the county council.

8. ENFORCEMENT OF BYELAWS OF LONDON COUNTY COUNCIL.—It shall be the duty of every metropolitan borough council to enforce within its own area any byelaws made by the London County Council under paragraph (1) of section two of this Act.

9. APPLICATION TO IRELAND.—In the application of this Act to Ireland the Lord Lieutenant, acting with the advice of the Privy Council, shall be substituted for the Secretary of State, the Public Health (Ireland) Acts, 1878 to 1900, shall be substituted for the Public Health Acts, and any references to a borough shall not have effect.

10. PENALTIES.—If any person acts in contravention of or fails to comply with any byelaw made under this Act, he shall be liable on summary conviction to a penalty not exceeding five pounds, and to a penalty not exceeding twenty shillings for every day during which the offence is continued after his conviction thereof.

CHAPTER XXVIII.

PATENTS AND DESIGNS (AMENDMENT) ACT, 1907.

[7 EDW. 7. CH. 28.]

ARRANGEMENT OF SECTIONS.

PART I.

PATENTS.

Section.

1. Grant of patents to two or more persons.
2. Amendment of 46 and 47 Vict. c. 57, s. 5.
3. Deposit of samples in the case of chemical inventions.
4. Supplementary provisional specifications.
5. Patents of addition.
6. Extension of 2 Edw. 7 c. 34 s. 1 to specifications published subsequently to application.
7. Amendment of 2 Edw. 7 c. 34 s. 1 (6).
8. Power to postdate application in cases of disconformity.
9. Disconformity.
10. Grounds of opposition.
11. Extension of period for sealing patents in certain cases.
12. Applications for extension of time for payment of fees, etc.
13. Amendment of specification by disclaimers.
14. Power of comptroller to revoke patents on certain grounds.
15. Revocation of patents worked outside the United Kingdom.
16. Compulsory licences.
17. Procedure on petitions for extension of term of patent.
18. Date of patent substituted for patent obtained by fraud.
19. Repeal of provisions as to procedure.
20. Time for applications by representatives of deceased inventors.
21. Secret patents.
22. Anticipation.
23. Restoration of lapsed patents.
24. Avoidance of certain conditions attached to the sale, etc. of patented articles.
25. Defences to actions for infringement, etc.
26. Power to counterclaim for revocation in an action for infringement.
27. Exemption of innocent infringer from liability for damages.
28. Provisions as to appeals and references to the court.

PART II.

DESIGNS.

29. Application for the registration of designs.
30. Rules as to applications for registration of designs.
31. Copyright in designs.
32. Marking of registered designs.
33. Registration of designs.
34. Inspection of registered designs.
35. Cancellation of registration of designs used wholly or mainly abroad.
36. Penalty and damages in respect of piracy of registered design.
37. Application of ss. 31 and 32 of principal Act to designs.

PART III.

GENERAL.

38. Rules as to branch offices.
39. Entries in registers.
40. Rectification of registers by court.
41. Correction of clerical errors.
42. Excluded days.
43. Penalties for false representations.
44. Royal Arms.

45. Evidence before comptroller.
46. Costs and security for costs.
47. Misuse of title of "Patent Office."
48. Agents for patents.
49. Construction.
50. Application of Act to Scotland.
51. Short title, commencement, and repeal.
SCHEDULE.

CHAPTER XXVIII.

An Act to amend the Law relating to Patents and Designs. [28*th August* 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

PATENTS.

1. GRANT OF PATENTS TO TWO OR MORE PERSONS.—Where, after the commencement of this Act, a patent is granted to two or more persons jointly, they shall, unless otherwise specified in the patent, be treated for the purpose of the devolution of the legal interest therein as joint tenants, but, subject to any contract to the contrary each of such persons shall be entitled to use the invention for his own profit without accounting to the others, but shall not be entitled to grant a licence without their consent, and, if any such person dies, his beneficial interest in the patent shall devolve on his personal representatives as part of his personal estate.

2. AMENDMENT OF 46 AND 47 VICT. C. 57, S. 5.—Subsections (3) and (4) of section five of the Patents, Designs, and Trade Marks Act, 1883 (which Act, as amended by any subsequent enactment, is hereinafter referred to as the principal Act), shall be repealed and in lieu thereof shall be substituted the following:—

"(3) A provisional specification must describe the nature of the invention;

"(4) A complete specification must particularly describe and ascertain the nature of the invention and the manner in which the same is to be performed;

"(4A) In the case of any provisional or complete specification where the comptroller deems it desirable he may require that suitable drawings shall be supplied with the specification, or at any time before the acceptance of the same, and such drawings shall be deemed to form part of the said specification."

3. DEPOSIT OF SAMPLES IN THE CASE OF CHEMICAL INVENTIONS.—The following paragraph shall be inserted in section five of the principal Act:—

"(6) Where the invention in respect of which an application is made is a chemical invention, such typical samples and specimens as may be prescribed shall, if in any particular case the comptroller considers it desirable so to require, be furnished before the acceptance of the complete specification."

4. SUPPLEMENTARY PROVISIONAL SPECIFICATIONS.—Where the same applicant has put in two or more provisional specifications for inventions which are cognate or modifications one of the other, and has obtained thereby concurrent provisional protection for the same, and the comptroller is of opinion that the whole of such inventions are such as to constitute a single invention and may properly be included in one patent, he may accept one complete specification in respect of the whole of such applications and grant a single patent thereon. Such patent shall bear the date of the earliest of such applications, but, in considering the validity of the same and for the purposes of section eleven of the principal Act as modified by this Act, the court or the comptroller, as the case may be, shall have regard to the respective dates of the provisional specifications relating to the several matters claimed therein.

5. PATENTS OF ADDITION.—(1) Where a patent for an invention has been applied for or granted, and the applicant or the patentee, as the case may be, applies for a

further patent in respect of any improvement on or modification of the invention, he may, if he thinks fit, in his application for the further patent, request that the term limited in that patent for the duration thereof be the same as that of the original patent or so much of that term as is unexpired.

(2) Where an application containing such a request is made, a patent (hereinafter referred to as a patent of addition) may be granted for such term as aforesaid.

(3) A patent of addition shall remain in force so long as the patent for the original invention remains in force, but no longer, and in respect of a patent of addition no fees shall be payable for renewal.

(4) The grant of a patent of addition shall be conclusive evidence that the invention is a proper subject for a patent of addition, and the validity of the patent shall not be questioned on the ground that the invention ought to have been the subject of an independent patent.

6.—EXTENSION OF 2 EDW. 7 C. 34, S. 1, TO SPECIFICATIONS PUBLISHED SUBSEQUENTLY TO APPLICATION.—(1) An investigation under section one of the Patents Act, 1902, shall extend to specifications published after the date of the application in respect of which the investigation is made, and being specifications which have been deposited pursuant to prior applications; and that section shall, subject to rules under the principal Act, have effect accordingly.

(2) Where, on such an extended investigation, it appears that the invention claimed in the specification deposited pursuant to an application is wholly or in part claimed in any published specification deposited pursuant to a prior application, the applicant shall, whether or not his specification has been accepted or a patent granted to him, be afforded such facilities as may be prescribed for amending his specification, and in the event of his failing to do so the comptroller shall, in accordance with such procedure as may be prescribed, determine what reference, if any, to other specifications ought to be made in his specification by way of notice to the public.

(3) For the purposes of this section an application shall be deemed to be prior to another application if the patent applied for when granted would be of prior date to the patent granted pursuant to that other application.

(4) This section shall come into operation at such date as the Board of Trade may by order direct, and shall apply only to applications made after that date, and the order shall be laid before both Houses of Parliament.

7. AMENDMENT OF 2 EDW. 7 C. 34, S. 1 (6).—The following proviso shall be added to subsection (6) of section one of the Patents Act, 1902:—

"Provided that the comptroller, if satisfied that the invention claimed has been wholly and specifically claimed in any specification to which the investigation has extended, may, in lieu of requiring references to be made in the applicant's specification as aforesaid, refuse to grant a patent."

8. POWER TO POSTDATE APPLICATION IN CASES OF DISCOMFORMITY.—The following subsection shall be added after subsection (3) of section nine of the principal Act, which relates to the comparison of provisional with complete specifications:—

"(3A) If the examiner reports that the invention described in the complete specification is not substantially the same as that which is described in the provisional specification, the comptroller may, with the consent of the applicant, instead of refusing to accept the complete specification, cancel the provisional specification and treat the application as having been made on the date at which the complete specification was left, and the application shall have effect as if made on that date:

"Provided that where the complete specification includes an invention not included in the provisional specification, the comptroller may allow the original application to proceed so far as the invention included both in the provisional and in the complete specification is concerned, and treat the claim for the additional invention included in the complete specification as an application for that invention made on the date at which the complete specification was left."

9. DISCONFORMITY.—A patent shall not be held invalid on the ground that the complete specification claims a further or different invention to that contained in the provisional, if the invention therein claimed, so far as it is not contained in the provisional, was novel at the date when the complete specification was put in, and the applicant was the first and true inventor thereof.

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10. GROUNDS OF OPPOSITION.—In subsection (1) of section eleven of the principal Act (which relates to the grounds on which the grant of a patent may be opposed), for the words "on the ground that the invention has been patented in this country on an application of prior date" there shall be substituted the words "on the ground that the invention has been claimed in any complete specification for a British patent which is or will be of prior date to the patent the grant of which is opposed, other than a specification deposited pursuant to an application made more than fifty years before the date of the application for such last-mentioned patent, or on the ground that the nature of the invention or the manner in which it is to be performed is not sufficiently or fairly described and ascertained in the complete specification."

11. EXTENSION OF PERIOD FOR SEALING PATENTS IN CERTAIN CASES.—(1) Where in consequence of the neglect or failure of the applicant to pay any fee a patent cannot be sealed within the period allowed by section twelve of the principal Act, that period may, on payment of the prescribed fee and on compliance with the prescribed conditions, be extended to such an extent as may be prescribed.

(2) APPLICATIONS FOR EXTENSION OF TIME FOR PAYMENT OF FEES, ETC.—In such cases as may be prescribed and subject to the prescribed conditions this section shall apply where the period allowed for the sealing of the patent has expired before the commencement of this Act.

12. Where an application is made for an extension of time under section seventeen of the principal Act, it shall not be necessary for the patentee to allege or prove the cause of his failure to pay the prescribed fee within the prescribed time, and where under that section or under section three of the Patents, Designs and Trade Marks (Amendment) Act, 1885 (48 and 49 Vict. c. 63), an application is made for an extension of time, the comptroller shall, on payment of the prescribed fee, grant an extension of time to the full amount applied for, not exceeding the amount which he is entitled to grant under those sections.

13. AMENDMENT OF SPECIFICATION BY DISCLAIMERS.—The following section shall be substituted for section nineteen of the principal Act:—

"In any action for infringement of a patent or proceedings before the court for the revocation of a patent, the court may by order allow the patentee to amend his specification by way of disclaimer in such manner and subject to such terms as to costs, advertisement, or otherwise, as the court may think fit:

"Provided that no amendment shall be so allowed that would make the specification, as amended, claim an invention substantially larger than, or substantially different from, the invention claimed by the specification as it stood before the amendment, and where an application for such an order is made to the court, notice of the application shall be given to the comptroller, and the comptroller shall have the right to appear and be heard, and shall appear if so directed by the court."

14. POWER OF COMPTROLLER TO REVOKE PATENTS ON CERTAIN GROUNDS.—(1) Any person who would have been entitled to oppose the grant of a patent, or is the successor in interest of a person who was so entitled, may, within two years from the date of the patent, in the prescribed manner apply to the comptroller for an order revoking the patent on any one or more of the grounds on which the grant of the patent might have been opposed:

Provided that when an action for infringement or proceedings for the revocation of the patent are pending in any court, an application under this section shall not be made except with the leave of the Court.

(2) The comptroller shall give notice of the application to the patentee, and after hearing the parties, if desirous of being heard, may make an order revoking the patent or requiring the specification relating thereto to be amended by disclaimer, correction, or explanation, or dismissing the application; but the comptroller shall not make an order revoking the patent unless the circumstances are such as would have justified him in refusing to grant the patent had the proceedings been proceedings in an opposition to the grant of a patent.

(3) A patentee may at any time by giving notice in the prescribed manner to the comptroller offer to surrender his patent, and the comptroller may, if after giving

notice of the offer and hearing all parties who desire to be heard he thinks fit, accept the offer, and thereupon make an order for the revocation of the patent.

(4) Any decision of the comptroller under this section shall be subject to appeal to the court.

15. Revocation of Patents Worked Outside the United Kingdom.—(1) At any time not less than four years after the date of a patent, and not less than one year after the passing of this Act, any person may apply to the comptroller for the revocation of the patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom.

(2) The comptroller shall consider the application, and, if after inquiry he is satisfied that the allegations contained therein are correct, then, subject to the provisions of this section, and unless the patentee proves that the patented article or process is manufactured or carried on to an adequate extent in the United Kingdom, or gives satisfactory reasons why the article or process is not so manufactured or carried on, the comptroller may make an order revoking the patent either—

(*a*) forthwith; or

(*b*) after such reasonable interval as may be specified in the order, unless in the meantime it is shown to his satisfaction that the patented article or process is manufactured or carried on within the United Kingdom to an adequate extent:

Provided that no such order shall be made which is at variance with any treaty, convention, arrangement, or engagement with any foreign country or British possession.

(3) If within the time limited in the order the patented article or process is not manufactured or carried on within the United Kingdom to an adequate extent, but the patentee gives satisfactory reasons why it is not so manufactured or carried on, the comptroller may extend the period mentioned in the previous order for such period not exceeding twelve months as may be specified in the subsequent order.

(4) Any decision of the comptroller under this section shall be subject to appeal to the court, and on any such appeal the law officer, or such other counsel as he may appoint, shall be entitled to appear and be heard.

16. Compulsory Licences.—(1) Petitions for the grant of a compulsory licence or for the revocation of a patent under section three of the Patents Act, 1902, shall be referred by the Board of Trade to the court instead of to the Judicial Committee of the Privy Council, and accordingly in that section for references to the Judicial Committee there shall be substituted references to the court, and for references to Orders in Council there shall be substituted references to orders of the court, and subsections (8), (9) and (10) of that section shall be repealed.

(2) In lieu of subsections (5) and (6) of the same section the following subsection shall be substituted:—

"(5) For the purposes of this section the reasonable requirements of the public shall not be deemed to have been satisfied—

"(*a*) if by reason of the default of the patentee to manufacture to an adequate extent and supply on reasonable terms the patented article or any parts thereof which are necessary for its efficient working or to carry on the patented process to an adequate extent or to grant licences on reasonable terms, any existing trade or industry, or the establishment of any new trade or industry, in the United Kingdom is unfairly prejudiced, or the demand for the patented article or the article produced by the patented process is not reasonably met; or

"(*b*) if any trade or industry in the United Kingdom is unfairly prejudiced by the conditions attached by the patentee before or after the passing of this Act to the purchase, hire, or use of the patented article or to the using or working the patented process."

17. Procedure on Petitions for Extension of Term of Patent.—The following section shall be substituted for section twenty-five of the principal Act:—

"(1) A patentee may, after advertising in manner provided by rules of the Supreme Court his intention to do so, present a petition to the court praying that his patent may be extended for a further term, but such petition must be presented at least six months before the time limited for the expiration of the patent;

"(2) Any person may give notice to the court of objection to the extension;

"(3) On the hearing of any petition under this section, the patentee and any person who has given such notice of objection shall be made parties to the proceeding, and the comptroller shall be entitled to appear and be heard, and shall appear if so directed by the court;

"(4) The court, in considering its decision, shall have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case;

"(5) If it appears to the court that the patentee has been inadequately remunerated by his patent, the court may by order extend the term of the patent for a further term not exceeding seven, or, in exceptional cases, fourteen years, or may order the grant of a new patent for such term as may be specified in the order and containing any restriction, conditions, and provisions the Court may think fit."

18. Date of Patent Substituted for Patent Obtained by Fraud.—A patent granted under subsection (8) of section twenty-six of the principal Act to an inventor in lieu of a patent revoked on the ground of fraud shall bear the same date as the revoked patent, and accordingly in that subsection the words "the date of revocation of," and the words "but the patent so granted shall cease on the expiration of the term for which the revoked patent was granted," shall be repealed:

Provided that no action shall be brought for any infringement of the patent so granted committed before the actual date when such patent was granted.

19. Repeal of Provisions as to Procedure.—Rules of the Supreme Court may be made for regulating the matters dealt with in subsections (5), (6), and (7) of section twenty-six and in section twenty-nine of the principal Act, which relate to the particulars to be delivered and the procedure to be adopted in proceedings upon petition for the revocation of a patent and in an action for infringement, and on the coming into operation of any rules of court made for that purpose the said enactments shall be repealed.

20. Time for Applications by Representatives of Deceased Inventors.—In section thirty-four of the principal Act (which relates to the grant of a patent on the application of representatives of a deceased inventor) the words "must be made within six months of the decease of such person and" are hereby repealed.

21. Secret Patents.—(1) Section forty-four of the principal Act (which relates to secret patents) shall apply to the Admiralty in like manner as it applies to the Secretary of State for War.

(2) Rules may be made under the principal Act, after consultation with the Secretary of State and the Admiralty, for the purpose of ensuring secrecy with respect to patents to which the said section as so extended applies, and those rules may modify any of the provisions of the principal Act in their application to such patents as aforesaid so far as may appear necessary for the purpose aforesaid.

22. Anticipation.—A patent shall not be held to be invalid by reason only of the invention in respect of which the patent was granted, or any part thereof having been published prior to the date of the patent, if the patentee proves to the satisfaction of the court that the publication was made without his knowledge and consent, and that the matter published was derived or obtained from him, and if he learnt of the publication before the date of his application for the patent that he applied for and obtained protection for his invention with all reasonable diligence after learning of the publication.

23. Restoration of Lapsed Patents.—When any patent has become void owing to the failure of the patentee to pay any prescribed fee within the prescribed time, the patentee may apply to the comptroller in the prescribed manner for an order for the restoration of the patent. Every such application shall contain a statement of the circumstances which have led to the omission of the payment of the said prescribed fee. If it appears from such statement that the omission was unintentional and that no undue delay has occurred in making the application, the comptroller shall advertise the application in the prescribed manner, and within such time as may be prescribed any person may give notice of opposition at the Patent Office. Where such notice is given, the comptroller shall notify the applicant thereof. After the expiration of the

prescribed period the comptroller shall hear the case and, subject to an appeal to the court, issue an order either restoring the patent or dismissing the application: Provided that in every order under this section restoring a patent, such provisions as may be prescribed shall be inserted for the protection of persons who may have availed themselves of the subject-matter of the patent after the patent had been announced as void in the illustrated official journal.

24. AVOIDANCE OF CERTAIN CONDITIONS ATTACHED TO THE SALE, ETC. OF PATENTED ARTICLES.—(1) It shall not be lawful in any contract made after the passing of this Act in relation to the sale or lease of, or licence to use or work any article or process protected by a patent to insert a condition the effect of which will be—

(*a*) to prohibit or restrict the purchaser, lessee, or licensee from using any article or class of articles, whether patented or not, or any patented process, supplied or owned by any person other than the seller, lessor, or licensor, or his nominees; or

(*b*) to require the purchaser, lessee, or licensee to acquire from the seller, lessor, or licensor, or his nominees, any article or class of articles not protected by the patent;

and any such condition shall be null and void, as being in restraint of trade and contrary to public policy: Provided that this subsection shall not apply if—

(i) the seller, lessor, or licensor proves that at the time the contract was entered into the purchaser, lessee, or licensee had the option of purchasing the article or obtaining a lease or licence on reasonable terms, without such conditions as aforesaid; and

(ii) the contract entitles the purchaser, lessee, or licensee to relieve himself of his liability to observe any such condition on giving the other party three months' notice in writing and on payment in compensation for such relief in the case of a purchase, of such sum, or in the case of a lease or license of such rent or royalty for the residue of the term of the contract, as may be fixed by an arbitrator appointed by the Board of Trade.

(2) Any contract relating to the lease of or licence to use or work any patented article or patented process, whether made before or after the passing of this Act, may at any time after the patent or all the patents by which the article or process was protected at the time of the making of the contract, has or have ceased to be in force, and notwithstanding anything in the same or in any other contract to the contrary, be determined by either party on giving three months' notice in writing to the other party; but where any such notice is given determining any contract made before the passing of this Act, the party giving the notice shall be liable to pay such compensation as failing agreement may be awarded by an arbitrator appointed by the Board of Trade.

(3) Any contract made before the passing of this Act relating to the lease of or licence to use or work any patented article or process and containing any condition which, had the contract been made after the passing of this Act, would by virtue of this section have been null and void may, at any time before the contract is determinable under the last preceding subsection, and, notwithstanding anything in the same or any other contract to the contrary, be determined by either party on giving three months' notice in writing to the other party, but, where any such notice is given, the party giving the notice shall be liable to pay such compensation as, failing agreement, may be awarded by an arbitrator appointed by the Board of Trade.

(4) The insertion by the patentee in a contract made after the passing of this Act of any condition which by virtue of this section is null and void shall be available as a defence to an action for infringement of the patent to which the contract relates brought while that contract is in force.

(5) Nothing in this section shall—

(*a*) affect any condition in a contract whereby a person is prohibited from selling any goods other than those of a particular person; or

(*b*) be construed as validating any contract which would, apart from this section, be invalid; or

(*c*) affect any right of determining a contract or condition in a contract exercisable independently of this section; or

(*d*) affect any condition in a contract for the lease of or licence to use a patented article, whereby the lessor or licensor reserves to himself or his nominees the right to supply such new parts of the patented article as may be required to put or keep it in repair.

25. DEFENCES TO ACTIONS FOR INFRINGEMENT, ETC.—Any ground on which a patent may be revoked under this Act or as an alternative to the grant of a compulsory licence under section three of the Patents Act, 1902, as amended by this Act, shall be available by way of a defence to an action for infringement, and shall also be a ground of revocation under section twenty-six of the principal Act.

26. POWER TO COUNTERCLAIM FOR REVOCATION IN AN ACTION FOR INFRINGEMENT.—A defendant in an action for infringement of a patent, if entitled to present a petition to the court for the revocation of the patent, may, without presenting such a petition, apply in accordance with the rules of the Supreme Court by way of counter-claim in the action for the revocation of the patent.

27. EXEMPTION OF INNOCENT INFRINGER FROM LIABILITY FOR DAMAGES.—A patentee shall not be entitled to recover any damages in respect of any infringement of a patent granted after the commencement of this Act from any defendant who proves that at the date of such infringement he was not aware nor had reasonable means of making himself aware of the existence of the patent, and the marking of an article with the word "patent," "patented," or any word or words expressing or implying that a patent has been obtained for the article, stamped, engraved, impressed on, or otherwise applied to the article, shall not be deemed to constitute notice of the existence of the patent unless the word or words are accompanied by the year and number of the patent:

Provided that nothing in this section shall affect any proceedings for an injunction.

28. PROVISIONS AS TO APPEALS AND REFERENCES TO THE COURT.—Where by virtue of this Act a decision of the comptroller is subject to an appeal to the court, or a petition may be referred or presented to the court, the appeal shall, subject to and in accordance with rules of the Supreme Court, be made and the petition referred or presented to such judge of the High Court as the Lord Chancellor may select for the purpose, and the decision of that judge shall be final except in the case of an appeal from a decision of the comptroller revoking a patent on any ground on which the grant of such patent might have been opposed.

PART II.

DESIGNS.

29. APPLICATION FOR THE REGISTRATION OF DESIGNS.—The following subsections shall be inserted at the end of section forty-seven of the principal Act (which relates to applications for the registration of designs):—

"(8) An application which owing to any default or neglect on the part of the applicant has not been completed so as to enable registration to be affected within the prescribed time shall be deemed to be abandoned.

"(9) Where an application has been abandoned or refused the application and any drawings, photographs, tracings, representations, or specimens left in connexion with the application shall not at any time be open to public inspection or be published by the comptroller.

"(10) A design when registered shall be registered as of the date of the application for registration."

30. RULES AS TO APPLICATIONS FOR REGISTRATION OF DESIGNS.—Rules may be made under the principal Act for regulating the matters dealt with in subsections two and three of section forty-seven and in section forty-eight of the principal Act, which relate to the form and manner in which applications for the registration of designs are to be made, and on the coming into operation of any such rules the said enactments shall be repealed.

31. COPYRIGHT IN DESIGNS.—(1) At the end of subsection (1) of section fifty of the principal Act (which relates to the term of copyright in a registered design) the following paragraph shall be added:—

"If within the prescribed time before the expiration of the said five years application for the extension of the period of copyright is made to the comptroller in the prescribed manner, the comptroller shall on payment of the prescribed fee extend the period of copyright for a second period of five years from the expiration of the original period of five years. If within the prescribed time before the expiration of such second period of five years application for the extension of the period of copyright is made to the comptroller in the prescribed manner, the comptroller may, subject to any rules under the principal Act, on payment of the prescribed fee, extend the period of copyright for a third period of five years from the expiration of the second period of five years."

(2) The disclosure of a design by the proprietor to any other person, in such circumstances as would make it contrary to good faith for that other person to use or publish the design, and the disclosure of a design in breach of good faith by any person other than the proprietor of the design, and the acceptance of a first and confidential order for goods bearing a new or original textile design intended for registration, shall not be deemed to be a publication of the design sufficient to invalidate the copyright thereof if registration thereof is obtained subsequently to the disclosure or acceptance.

32. MARKING OF REGISTERED DESIGNS.—(1) So much of section fifty-one of the principal Act as provides that the copyright in a registered design shall cease if the proprietor fails to comply with the requirements of that section with respect to the marking of articles to which the design has been applied is hereby repealed; but, in the event of any failure to comply with any such requirements, the proprietor of the design shall not be entitled to recover any penalty or damages in respect of any infringement of his copyright in the design, unless he shows that he took all proper steps to ensure the marking of the articles, or unless he shows that the infringement took place after the person guilty thereof knew or had received notice of the existence of copyright in the design.

(2) Where a representation is made to the Board of Trade by or on behalf of any trade or industry that in the interests of the trade or industry it is expedient to dispense with or modify as regards any class or description of articles any of the requirements of the said section fifty-one as to marking, the Board may, if they think fit, by rule under the principal Act dispense with or modify such requirements as regards any such class or description of articles to such extent and subject to such conditions as they think fit.

33. REGISTRATION OF DESIGNS.—Where a design has been registered in one or more classes of goods the application of the proprietor of the design to register it in some one or more other classes shall not be refused nor shall the registration thereof be invalidated:

(*a*) on the ground of the design not being a new and original design by reason only that it was so previously registered; or

(*b*) on the ground of the design having been previously published in the United Kingdom by reason only that it has been applied to goods of any class in which it was so previously registered.

34. INSPECTION OF REGISTERED DESIGNS.—(1) In section fifty-two of the principal Act (which prohibits the inspection of a design during the existence of the copyright in the design) after the words "during the existence of copyright in a design" there shall be inserted the words "or such shorter period, not being less than two years from the registration of a design as may be prescribed," and for the words "when the copyright in a design has ceased" there shall be substituted the words "after the expiration of the copyright in the design or such shorter period as aforesaid."

(2) At the end of the same section the following subsection shall be added:—

"(3) Different periods may be prescribed under this section for different classes of goods."

35. CANCELLATION OF REGISTRATION OF DESIGNS USED WHOLLY OR MAINLY ABROAD.—At any time after the registration of a design any person may apply to the comptroller for the cancellation of the registration on the ground that the design is used for manufacture exclusively or mainly outside the United Kingdom, and where such an

application is made the provisions of this Act with respect to the revocation of patents worked outside the United Kingdom including those relating to costs shall apply with the necessary modifications, except that there shall be no appeal from the decision of the comptroller. Such ground as aforesaid shall be available by way of a defence to an action for infringement of the copyright in the design.

36. PENALTY AND DAMAGES IN RESPECT OF PIRACY OF REGISTERED DESIGN.—(1) In section fifty-eight of the principal Act (which imposes penalties on the piracy of registered designs), at the end of paragraph (*a*) there shall be inserted the words "or to do anything with a view to enabling the design to be so applied."

(2) In the same section, after the words "publish or expose" there shall be inserted the words "or cause to be published or exposed."

(3) The following shall be substituted for section fifty-nine of the principal Act (which relates to actions for damages for infringement of registered designs):—

"Notwithstanding the remedy given by this Act for the recovery of such penalty as aforesaid, the registered proprietor of any design may, if he elects to do so, bring an action for the recovery of any damages arising from any acts to which a penalty is attached by this Act, and for an injunction against the repetition thereof."

37. APPLICATION OF SECTIONS 31 AND 32 OF PRINCIPAL ACT TO DESIGNS.—Section thirty-one of the principal Act (which relates to the certificates of validity of a patent), and section thirty-two of the same Act (which relates to the remedy in case of groundless threats of legal proceedings) shall apply in the case of registered designs in like manner as they apply in the case of patents, with the substitution of references to the copyright in a design for references to a patent, and of references to the proprietor of a design for references to the patentee, and of references to the design for references to the invention.

PART III.

GENERAL.

38. RULES AS TO BRANCH OFFICES.—Rules under the principal Act may provide for the establishment of branch offices for designs at Manchester or elsewhere, and for any document or thing required by the principal Act to be sent to or done at the Patent Office being sent to or done at any branch office which may be established.

39. ENTRIES IN REGISTERS.—In section eighty-seven of the principal Act (which relates to entries in registers of patents and designs) the following paragraph shall be inserted after the words "as the case may be," where they first occur:—

"When any person becomes entitled as mortgagee, licensee, or otherwise to any interest in a patent or design, the comptroller shall, on request and on proof of title to his satisfaction, cause notice of the interest to be entered in the prescribed manner in the register of patents or designs as the case may be."

40. RECTIFICATION OF REGISTERS BY COURT.—The following section shall be substituted for section ninety of the principal Act (which relates to the rectification of registers of patents and designs by the court):—

"(1) The court may, on the application in the prescribed manner of any person aggrieved by the non-insertion in or omission from the register of patents or designs of any entry, or by any entry made in either such register without sufficient cause, or by any entry wrongly remaining on either such register, or by an error or defect in any entry in either such register, make such order for making, expunging, or varying such entry as it may think fit.

"(2) The court may in any proceeding under this section decide any question that it may be necessary or expedient to decide in connexion with the rectification of a register.

"(3) The prescribed notice of any application under this section shall be given to the comptroller, who shall have the right to appear and be heard thereon, and shall appear if so directed by the court.

"(4) Any order of the court rectifying a register shall direct that notice of the rectification be served upon the comptroller in the prescribed manner, who shall upon the receipt of such notice rectify the register accordingly."

7 EDWARD 7, Chapter 28.

41. Correction of Clerical Errors.—The following section shall be substituted for section ninety-one of the principal Act, which relates to the correction of clerical errors:—

"The comptroller may on request in writing accompanied by the prescribed fee—

"(*a*) correct any clerical error in or in connexion with an application for a patent or in any patent or any specification;

"(*b*) cancel the registration of a design either wholly or in respect of any particular goods in connexion with which the design is registered;

"(*c*) correct any clerical error in the representation of a design or in the name or address of the proprietor of any patent or design, or in any other matter which is entered upon the register of patents or the register of designs."

42. Excluded Days.—Where the last day fixed by the principal Act for doing anything under that Act falls on any day specified in rules under that Act as an excluded day, the rules may provide for the thing being done on the next following day not being an excluded day, and section ninety-eight of the principal Act is hereby repealed.

43. Penalties for False Representations.—The following subsection shall be added to section one hundred and five of the principal Act (which imposes penalties for false representations):—

"(3) Any person who, after the copyright in a design has expired, puts or causes to be put on any article to which the design has been applied the word 'registered,' or any word or words implying that there is a subsisting copyright in the design, shall be liable on summary conviction to a fine not exceeding five pounds."

44. Royal Arms.—The following section shall be substituted for section one hundred and six of the principal Act:—

"(1) The grant of a patent under this Act shall not be deemed to authorise the patentee to use the Royal Arms or to place the Royal Arms on any patented article.

"(2) If any person, without the authority of His Majesty, uses in connexion with any business, trade, calling, or profession the Royal Arms (or arms so nearly resembling them as to be calculated to deceive) in such manner as to be calculated to lead to the belief that he is duly authorised to use the Royal Arms, he shall be liable, on summary conviction, to a fine not exceeding twenty pounds: Provided that nothing in this section shall be construed as affecting the right, if any, of the proprietor of a trade mark containing such arms to continue to use such trade mark."

45. Evidence Before Comptroller.—(1) Subject to rules under the principal Act in any proceeding under the principal Act or this Act before the comptroller the evidence shall be given by statutory declaration in the absence of directions to the contrary; but in any case in which the comptroller thinks it right so to do, he may take evidence vivâ voce in lieu of or in addition to evidence by declaration, or allow any declarant to be cross-examined on his declaration. Any such statutory declaration may in the case of appeal be used before the court in lieu of evidence by affidavit, but, if so used, shall have all the incidents and consequences of evidence by affidavit.

(2) In case any part of the evidence is taken vivâ voce, the comptroller shall, in respect of requiring the attendance of witnesses and taking evidence on oath, be in the same position in all respects as an official referee of the Supreme Court.

46. Costs and Security for Costs.—(1) The comptroller shall, in proceedings relating to an opposition to the grant of a patent or to an application for the amendment of a specification or the revocation of a patent, have power, by order, to award to any party such costs as he may consider reasonable, and to direct how and by what parties they are to be paid, and any such order may be made a rule of the court.

(2) If a party giving notice of opposition to the grant of a patent or to the amendment of a specification, or applying to the comptroller for the revocation of a patent, or giving notice of appeal from any decision of the comptroller, neither resides nor carries on business in the United Kingdom or the Isle of Man, the comptroller or, in case of appeal to the law officer, the law officer may require such party to give

security for costs of the proceedings or appeal, and in default of such security being given may treat the proceedings or appeal as abandoned.

47. Misuse of Title of "Patent Office."—If any person uses on his place of business, or on any document issued by him, or otherwise, the words "Patent Office," or any other words suggesting that his place of business is officially connected with, or is, the Patent Office, he shall be liable on summary conviction to a fine not exceeding twenty pounds.

48. Agents for Patents.—(1) Rules under the principal Act may authorise the comptroller to refuse to recognise as agent in respect of any business under that Act any person whose name has been erased from the register of patent agents, or who is proved to the satisfaction of the Board of Trade, after being given an opportunity of being heard, to have been convicted of such an offence or to have been guilty of such misconduct as would have rendered him liable, if his name had been on the register of patent agents, to have his name erased therefrom, and may authorise the comptroller to refuse to recognise as agent in respect of any business under the principal Act any company which, if it had been an individual, the comptroller could refuse to recognise as such agent.

(2) Where a company or firm acts as agent, such rules as aforesaid may authorise the comptroller to refuse to recognise the company or firm as agent if any person whom the comptroller could refuse to recognise as an agent acts as director or manager of the company or is a partner in the firm.

(3) The comptroller shall refuse to recognise as agent in respect of any business under the principal Act any person who neither resides nor has a place of business in the United Kingdom or the Isle of Man.

49. Construction.—Except where otherwise expressly provided, this Act shall apply to patents granted, designs registered, and to applications made as well before as after the commencement of this Act.

50. Application of Act to Scotland.—The expression "Rules of the Supreme Court" shall in this Act, except in section twenty-eight, as applying to Scotland mean Act of Sederunt; and notwithstanding anything contained in the Patents, Designs, and Trade Marks Acts, 1883 to 1902, or in this Act. The expression "Court" in section sixteen of this Act shall, in reference to petitions which are referred by the Board of Trade to the Court in Scotland, mean any Lord Ordinary of the Court of Session, and in section seventeen of this Act shall in reference to proceedings in Scotland mean such Lord Ordinary.

51. Short Title, Commencement, and Repeal.—(1) This Act may be cited as the Patents and Designs (Amendment) Act, 1907, and may be cited, and shall be construed as one, with the Patents, Designs, and Trade Marks Acts, 1883 to 1902.

(2) This Act shall, save as otherwise expressly provided, come into operation on the first of January one thousand nine hundred and eight.

(3) The enactments mentioned in the Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule.

SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
46 and 47 Vict. c. 57.	The Patents, Designs, and Trade Marks Act, 1883.	In section seventeen, the words "by accident, mistake, or inadvertence," and the words "if satisfied that the failure has arisen from any of the above-mentioned causes." Section nineteen. Section twenty-five. In section twenty-six, subsections (5), (6) and (7) as from the date when rules of the Supreme Court dealing with the like matters come into force. In subsection (8) of section twenty-six, the words "the date of revocation of" and the words "but the patent so granted "shall cease on the expiration of the term for which the "revoked patent was granted." Section twenty-nine, as from the date when rules of the Supreme Court dealing with the like matters come into force. In section thirty-four, the words "must be made within six months of the decease of such person and," subsections (2) and (3) of section forty-seven; and section forty-eight from the date when rules under the principal Act dealing with the like matters come in force. In section fifty, subsection (2). Section fifty-one, from "and if he fails" to the end of the section. Section fifty-four. Section fifty-nine. Section ninety. Section ninety-one. Section ninety-eight. Section one hundred and six.
51 and 52 Vict. c. 50.	The Patents, Designs, and Trade Marks Act, 1888.	Section twenty-four.
2 Edw. 7 c. 4.	The Patents Act, 1902.	In section three, the subsections numbered (5), (6), (8), (9) and (10).

CHAPTER XXIX.

PATENTS AND DESIGNS ACT, 1907.

[7 EDW. 7. CH. 29.]

ARRANGEMENT OF SECTIONS.

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PATENTS AND DESIGNS ACT, 1907.

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PART II.

DESIGNS.

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7 EDWARD 7, CHAPTER 29.

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CHAPTER XXIX.

An Act to consolidate the enactments relating to Patents for Inventions and the Registration of Designs and certain enactments relating to Trade Marks.

[28*th August* 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

PATENTS.

Application for and Grant of Patent.

1. APPLICATION.—(1) An application for a patent may be made by any person who claims to be the true and first inventor of an invention, whether he is a British subject or not, and whether alone or jointly with any other person.

(2) The application must be made in the prescribed form, and must be left at, or sent by post to, the patent office in the prescribed manner.

(3) The application must contain a declaration to the effect that the applicant is in possession of an invention, whereof he, or in the case of a joint application one at least of the applicants, claims to be the true and first inventor, and for which he desires to obtain a patent, and must be accompanied by either a provisional or complete specification.

(4) The declaration required by this section may be either a statutory declaration or not, as may be prescribed.

2. SPECIFICATIONS.—(1) A provisional specification must describe the nature of the invention.

(2) A complete specification must particularly describe and ascertain the nature of the invention and the manner in which the same is to be performed.

(3) In the case of any provisional or complete specification where the comptroller deems it desirable he may require that suitable drawings shall be supplied with the specification, or at any time before the acceptance of the same, and such drawings shall be deemed to form part of the said specification.

(4) A specification, whether provisional or complete, must commence with the title, and in the case of a complete specification must end with a distinct statement of the invention claimed.

(5) Where the invention in respect of which an application is made is a chemical invention, such typical samples and specimens as may be prescribed shall, if in any particular case the comptroller considers it desirable so to require, be furnished before the acceptance of the complete specification.

7 EDWARD 7, CHAPTER 29.

3. PROCEEDINGS UPON APPLICATION.—(1) The Comptroller General of Patents, Designs, and Trade Marks (hereinafter referred to as the comptroller) shall refer every application to an examiner.

(2) If the examiner reports that the nature of the invention is not fairly described, or that the application, specification, or drawings have not been prepared in the prescribed manner, or that the title does not sufficiently indicate the subject-matter of the invention, the comptroller may refuse to accept the application or require that the application, specification, or drawings be amended before he proceeds with the application; and in the latter case the application shall, if the comptroller so directs, bear date as from the time when the requirement is complied with.

(3) Where the comptroller refuses to accept an application or requires an amendment, the applicant may appeal from his decision to the law officer, who shall, if required, hear the applicant and the comptroller, and may make an order determining whether and subject to what conditions (if any) the application shall be accepted.

(4) The comptroller shall, when an application has been accepted, give notice thereof to the applicant.

4. PROVISIONAL PROTECTION.—Where an application for a patent in respect of an invention has been accepted, the invention may during the period between the date of the application and the date of sealing such patent be used and published without prejudice to the patent to be granted for the invention; and such protection from the consequences of use and publication is in this Act referred to as provisional protection.

5. TIME FOR LEAVING COMPLETE SPECIFICATION.—(1) If the applicant does not leave a complete specification with his application, he may leave it at any subsequent time within six months from the date of the application.

Provided that where an application is made for an extension of the time for leaving a complete specification, the comptroller shall, on payment of the prescribed fee, grant an extension of time to the extent applied for but not exceeding one month.

(2) Unless a complete specification is so left the application shall be deemed to be abandoned.

6. COMPARISON OF PROVISIONAL AND COMPLETE SPECIFICATION.—(1) Where a complete specification is left after a provisional specification, the comptroller shall refer both specifications to an examiner.

(2) If the examiner reports that the complete specification has not been prepared in the prescribed manner, the comptroller may refuse to accept the complete specification until it has been amended to his satisfaction.

(3) If the examiner reports that the invention particularly described in the complete specification is not substantially the same as that which is described in the provisional specification the comptroller may—

(*a*) refuse to accept the complete specification until it has been amended to his satisfaction; or

(*b*) (with the consent of the applicant) cancel the provisional specification and treat the application as having been made on the date at which the complete specification was left, and the application shall have effect as if made on that date:

Provided that where the complete specification includes an invention not included in the provisional specification, the comptroller may allow the original application to proceed so far as the invention included both in the provisional and in the complete specification is concerned, and treat the claim for the additional invention included in the complete specification as an application for that invention made on the date at which the complete specification was left.

(4) A refusal of the comptroller to accept a complete specification shall be subject to appeal to the law officer, who shall, if required, hear the applicant and the comptroller and may make an order determining whether and subject to what conditions (if any) the complete specification shall be accepted.

(5) Unless a complete specification is accepted within twelve months from the date of the application, the application shall (except where an appeal has been lodged) become void.

Provided that where an application is made for an extension of time for the acceptance of a complete specification, the comptroller shall, on payment of the prescribed

fee, grant an extension of time to the extent applied for but not exceeding three months.

7. INVESTIGATION OF PREVIOUS SPECIFICATIONS IN UNITED KINGDOM ON APPLICATIONS FOR PATENTS.—(1) Where an application for a patent has been made and a complete specification has been left, the examiner shall, in addition to the other inquiries which he is directed to make by this Act, make a further investigation for the purpose of ascertaining whether the invention claimed has been wholly or in part claimed or described in any specification (other than a provisional specification not followed by a complete specification) published before the date of the application, and left pursuant to any application for a patent made in the United Kingdom within fifty years next before the date of the application.

(2) If on investigation it appears that the invention has been wholly or in part claimed or described in any such specification, the applicant shall be informed thereof, and the applicant may, within such time as may be prescribed, amend his specification, and the amended specification shall be investigated in like manner as the original specification.

(3) If the comptroller is satisfied that no objection exists to the specification on the ground that the invention claimed thereby has been wholly or in part claimed or described in a previous specification as before mentioned, he shall, in the absence of any other lawful ground of objection, accept the specification.

(4) If the comptroller is not so satisfied, he shall, after hearing the applicant, and unless the objection is removed by amending the specification to the satisfaction of the comptroller determine whether a reference to any, and, if so, what prior specifications ought to be made in the specification by way of notice to the public.

Provided that the comptroller, if satisfied that the invention claimed has been wholly and specifically claimed in any specification to which the investigation has extended, may, in lieu of requiring references to be made in the applicant's specification as aforesaid, refuse to grant a patent.

(5) An appeal shall lie from the decision of the comptroller under this section to the law officer.

(6) The investigations and reports required by this section shall not be held in any way to guarantee the validity of any patent, and no liability shall be incurred by the Board of Trade or any officer thereof by reason of, or in connexion with, any such investigation or report, or any proceeding consequent thereon.

8. INVESTIGATION OF SPECIFICATIONS PUBLISHED SUBSEQUENTLY TO APPLICATION.—(1) An investigation under the last preceding section shall extend to specifications published after the date of the application in respect of which the investigation is made, and being specifications which have been deposited pursuant to prior applications; and that section shall, subject to rules under this Act, have effect accordingly.

(2) Where, on such an extended investigation, it appears that the invention claimed in the specification deposited pursuant to an application is wholly or in part claimed in any published specification deposited pursuant to a prior application, the applicant shall, whether or not his specification has been accepted or a patent granted to him, be afforded such facilities as may be prescribed for amending his specification, and in the event of his failing to do so the comptroller shall, in accordance with such procedure as may be prescribed, determine what reference, if any, to other specifications ought to be made in his specification by way of notice to the public.

(3) For the purposes of this section an application shall be deemed to be prior to another application if the patent applied for when granted would be of prior date to the patent granted pursuant to that other application.

(4) This section shall come into operation at such date as the Board of Trade may by order direct, and shall apply only to applications made after that date, and the order shall be laid before both Houses of Parliament.

9. ADVERTISEMENT ON ACCEPTANCE OF COMPLETE SPECIFICATION.—On the acceptance of the complete specification the comptroller shall advertise the acceptance; and the application and specifications with the drawings (if any) shall be open to public inspection.

10. EFFECT OF ACCEPTANCE OF COMPLETE SPECIFICATION.—After the acceptance of a complete specification and until the date of sealing a patent in respect thereof, or the

expiration of the time for sealing, the applicant shall have the like privileges and rights as if a patent for the invention had been sealed on the date of the acceptance of the complete specification. Provided that an applicant shall not be entitled to institute any proceeding for infringement until a patent for the invention has been granted to him.

11. OPPOSITION TO GRANT OF PATENT.—(1) Any person may at any time within two months from the date of the advertisement of the acceptance of a complete specification give notice at the Patent Office of opposition to the grant of the patent on any of the following grounds:—

(*a*) that the applicant obtained the invention from him, or from a person of whom he is the legal representative; or

(*b*) that the invention has been claimed in any complete specification for a British patent which is or will be of prior date to the patent the grant of which is opposed, other than a specification deposited pursuant to an application made more than fifty years before the date of the application for such last-mentioned patent; or

(*c*) that the nature of the invention or the manner in which it is to be performed is not sufficiently or fairly described and ascertained in the complete specification; or

(*d*) that the complete specification describes or claims an invention other than that described in the provisional specification, and that such other invention forms the subject of an application made by the opponent in the interval between the leaving of the provisional specification and the leaving of the complete specification,

but on no other ground.

(2) Where such notice is given the comptroller shall give notice of the opposition to the applicant, and shall, on the expiration of those two months, after hearing the applicant and the opponent, if desirous of being heard, decide on the case.

(3) The decision of the comptroller shall be subject to appeal to the law officer, who shall, if required, hear the applicant and the opponent, if the opponent is, in his opinion, a person entitled to be heard in opposition to the grant of the patent, and shall decide the case; and the law officer may, if he thinks fit, obtain the assistance of an expert, who shall be paid such remuneration as the law officer with the consent of the Treasury may determine.

12. GRANT AND SEALING OF PATENT.—(1) If there is no opposition, or, in case of opposition, if the determination is in favour of the grant of a patent, a patent shall, on payment of the prescribed fee, be granted to the applicant, or in the case of a joint application to the applicants jointly, and the comptroller shall cause the patent to be sealed with the seal of the patent office.

(2) A patent shall be sealed as soon as may be, and not after the expiration of fifteen months from the date of application, provided that—

(*a*) Where the comptroller has allowed an extension of the time within which a complete specification may be left or accepted, a further extension of four months after the said fifteen months shall be allowed for the sealing of the patent:

(*b*) Where the sealing is delayed by an appeal to the law officer, or by opposition to the grant of the patent, the patent may be sealed at such time as the law officer may direct:

(*c*) Where the patent is granted to the legal representative of an applicant who has died before the expiration of the time which would otherwise be allowed for sealing the patent, the patent may be sealed at any time within twelve months after the date of his death:

(*d*) Where in consequence of the neglect or failure of the applicant to pay any fee a patent cannot be sealed within the period allowed by this section, that period may, on payment of the prescribed fee and on compliance with the prescribed conditions, be extended to such an extent as may be prescribed, and this provision shall, in such cases as may be prescribed and subject to the prescribed conditions, apply where the period allowed for the sealing of the patent has expired before the commencement of this Act.

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13. DATE OF PATENT.—Except as otherwise expressly provided by this Act, a patent shall be dated and sealed as of the date of the application: Provided that no proceedings shall be taken in respect of an infringement committed before the publication of the complete specification.

14. EFFECT, EXTENT, AND FORM OF PATENT.—(1) A patent sealed with the seal of the Patent Office shall have the same effect as if it were sealed with the Great Seal of the United Kingdom, and shall have effect throughout the United Kingdom and the Isle of Man.

Provided that a patentee may assign his patent for any place in or part of the United Kingdom, or Isle of Man, as effectually as if the patent were originally granted to extend to that place or part only.

(2) Every patent may be in the prescribed form and shall be granted for one invention only, but the specification may contain more than one claim; and it shall not be competent for any person in an action or other proceeding to take any objection to a patent on the ground that it has been granted for more than one invention.

15. FRAUDULENT APPLICATIONS FOR PATENTS.—(1) A patent granted to the true and first inventor shall not be invalidated by an application in fraud of him, or by provisional protection obtained thereon, or by any use or publication of the invention subsequent to that fraudulent application during the period of provisional protection.

(2) Where a patent has been revoked on the ground of fraud, the comptroller may, on the application of the true inventor made in accordance with the provisions of this Act, grant to him a patent in lieu of and bearing the same date as the patent so revoked:

Provided that no action shall be brought for any infringement of the patent so granted committed before the actual date when such patent was granted.

16. SINGLE PATENT FOR COGNATE INVENTIONS.—(1) Where the same applicant has put in two or more provisional specifications for inventions which are cognate or modifications one of the other, and has obtained thereby concurrent provisional protection for the same, and the comptroller is of opinion that the whole of such inventions are such as to constitute a single invention and may properly be included in one patent, he may accept one complete specification in respect of the whole of such applications and grant a single patent thereon.

(2) Such patent shall bear the date of the earliest of such applications, but in considering the validity of the same and for the purpose of the provisions of this Act with respect to oppositions to the grant of patents, the court or the comptroller, as the case may be, shall have regard to the respective dates of the provisional specifications relating to the several matters claimed therein.

Term of Patent.

17. TERM OF PATENT.—(1) The term limited in every patent for the duration thereof shall, save as otherwise expressly provided by this Act, be fourteen years from its date.

(2) A patent shall, notwithstanding anything therein or in this Act, cease if the patentee fails to pay the prescribed fees within the prescribed times; provided that the comptroller, upon the application of the patentee, shall, on receipt of such additional fee, not exceeding ten pounds, as may be prescribed, enlarge the time to such an extent as may be applied for but not exceeding three months.

(3) If any proceeding is taken in respect of an infringement of the patent committed after a failure to pay any fee within the prescribed time, and before any enlargement thereof, the court before which the proceeding is proposed to be taken may, if it thinks fit, refuse to award any damages in respect of such infringement.

18. EXTENSION OF TERM OF PATENT.—(1) A patentee may, after advertising in manner provided by rules of the Supreme Court his intention to do so, present a petition to the court praying that his patent may be extended for a further term, but such petition must be presented at least six months before the time limited for the expiration of the patent.

(2) Any person may give notice to the court of objection to the extension.

(3) On the hearing of any petition under this section the patentee and any person

who has given such notice of objection shall be made parties to the proceeding, and the comptroller shall be entitled to appear and be heard, and shall appear if so directed by the court.

(4) The court, in considering its decision, shall have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case.

(5) If it appears to the court that the patentee has been inadequately remunerated by his patent, the court may by order extend the term of the patent for a further term not exceeding seven, or, in exceptional cases, fourteen years, or may order the grant of a new patent for such term as may be specified in the order and containing any restriction, conditions, and provisions the court may think fit.

19. Patents of Addition.—(1) Where a patent for an invention has been applied for or granted, and the applicant or the patentee, as the case may be, applies for a further patent in respect of any improvement in or modification of the invention, he may, if he thinks fit, in his application for the further patent, request that the term limited in that patent for the duration thereof be the same as that of the original patent or so much of that term as is unexpired.

(2) Where an application containing such a request is made, a patent (hereinafter referred to as a patent of addition) may be granted for such term as aforesaid.

(3) A patent of addition shall remain in force so long as the patent for the original invention remains in force, but no longer, and in respect of a patent of addition no fees shall be payable for renewal.

(4) The grant of a patent of addition shall be conclusive evidence that the invention is a proper subject for a patent of addition, and the validity of the patent shall not be questioned on the ground that the invention ought to have been the subject of an independent patent.

Restoration of Lapsed Patents.

20. Restoration of Lapsed Patents.—(1) Where any patent has become void owing to the failure of the patentee to pay any prescribed fee within the prescribed time, the patentee may apply to the comptroller in the prescribed manner for an order for the restoration of the patent.

(2) Every such application shall contain a statement of the circumstances which have led to the omission of the payment of the prescribed fee.

(3) If it appears from such statement that the omission was unintentional and that no undue delay has occurred in the making of the application, the comptroller shall advertise the application in the prescribed manner, and within such time as may be prescribed any person may give notice of opposition at the Patent Office.

(4) Where such notice is given the comptroller shall notify the applicant thereof.

(5) After the expiration of the prescribed period the comptroller shall hear the case and, subject to an appeal to the court, issue an order either restoring the patent or dismissing the application: Provided that in every order under this section restoring a patent such provisions as may be prescribed shall be inserted for the protection of persons who may have availed themselves of the subject-matter of the patent after the patent had been announced as void in the illustrated official journal.

Amendment of Specification.

21. Amendment of Specification by Comptroller.—(1) An applicant or a patentee may at any time, by request in writing left at the Patent Office, seek leave to amend his specification, including drawings forming part thereof, by way of disclaimer, correction, or explanation, stating the nature of, and the reasons for, the proposed amendment.

(2) The request and the nature of the proposed amendment shall be advertised in the prescribed manner, and at any time within one month from its first advertisement any person may give notice at the Patent Office of opposition to the amendment.

(3) Where such a notice is given the comptroller shall give notice of the opposition to the person making the request, and shall hear and decide the case.

(4) Where no notice of opposition is given, or the person so giving notice of opposition does not appear, the comptroller shall determine whether and subject to what conditions, if any, the amendment ought to be allowed.

(5) The decision of the comptroller in either case shall be subject to an appeal to the law officer, who shall, if required, hear the person making the request to amend and, where notice of opposition has been given, the person giving that notice, if he is, in the opinion of the law officer, entitled to be heard in opposition to the request, and, where there is no opposition, the comptroller, and may make an order determining whether and subject to what conditions (if any) the amendment ought to be allowed.

(6) No amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by the specification as it stood before amendment.

(7) Leave to amend shall be conclusive as to the right of the party to make the amendment allowed, except in case of fraud; and the amendment shall be advertised in the prescribed manner, and shall in all courts and for all purposes be deemed to form part of the specification.

(8) This section shall not apply when and so long as any action for infringement or proceeding before the Court for the revocation of a patent is pending.

22. Amendment of Specification by the Court.—In any action for infringement of a patent or proceedings before a court for the revocation of a patent the court may by order allow the patentee to amend his specification by way of disclaimer in such manner, and subject to such terms as to costs, advertisement or otherwise, as the court may think fit:

Provided that no amendment shall be so allowed that would make the specification, as amended, claim an invention substantially larger than, or substantially different from, the invention claimed by the specification as it stood before the amendment, and where an application for such an order is made to the court notice of the application shall be given to the comptroller, and the comptroller shall have the right to appear and be heard, and shall appear if so directed by the court.

23. Restriction on Recovery of Damages.—Where an amendment of a specification by way of disclaimer, correction, or explanation, has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the court that his original claim was framed in good faith and with reasonable skill and knowledge.

Compulsory Licences and Revocation.

24. Compulsory Licences and Revocation.—(1) Any person interested may present a petition to the Board of Trade alleging that the reasonable requirements of the public with respect to a patented invention have not been satisfied, and praying for the grant of a compulsory licence, or, in the alternative, for the revocation of the patent.

(2) The Board of Trade shall consider the petition, and if the parties do not come to an arrangement between themselves the Board of Trade, if satisfied that a primâ facie case has been made out, shall refer the petition to the court, and, if the Board are not so satisfied, they may dismiss the petition.

(3) Where any such petition is referred by the Board of Trade to the court, and it is proved to the satisfaction of the court that the reasonable requirements of the public with reference to the patented invention have not been satisfied, the patentee may be ordered by the court to grant licences on such terms as the court may think just, or, if the court is of opinion that the reasonable requirements of the public will not be satisfied by the grant of licences, the patent may be revoked by order of the court.

Provided that an order of revocation shall not be made before the expiration of three years from the date of the patent, or if the patentee gives satisfactory reasons for his default.

(4) On the hearing of any petition under this section the patentee and any person claiming an interest in the patent as exclusive licensee or otherwise, shall be made

parties to the proceeding, and the law officer or such other counsel as he may appoint shall be entitled to appear and be heard.

(5) For the purposes of this section the reasonable requirements of the public shall not be deemed to have been satisfied—

(*a*) if by reason of the default of the patentee to manufacture to an adequate extent and supply on reasonable terms the patented article, or any parts thereof which are necessary for its efficient working, or to carry on the patented process to an adequate extent or to grant licences on reasonable terms, any existing trade or industry, or the establishment of any new trade or industry in the United Kingdom is unfairly prejudiced, or the demand for the patented article or the article produced by the patented process is not reasonably met; or

(*b*) if any trade or industry in the United Kingdom is unfairly prejudiced by the conditions attached by the patentee before or after the passing of this Act to the purchase, hire, or use of the patented article or to the using or working of the patented process.

(6) An order of the court directing the grant of any licence under this section shall, without prejudice to any other method of enforcement, operate as if it were embodied in a deed granting a licence and made between the parties to the proceeding.

25. REVOCATION OF PATENT.—(1) Revocation of a patent may be obtained on petition to the court.

(2) Every ground on which—

(*a*) a patent might, immediately before the first day of January one thousand eight hundred and eighty-four, have been repealed by scire facias; or

(*b*) a patent may be revoked under this Act either by the comptroller or as an alternative to the grant of a compulsory licence;

shall be available by way of defence to an action of infringement and shall also be a ground of revocation under this section.

(3) A petition for revocation of a patent may be presented—

(*a*) by the Attorney-General or any person authorised by him; or

(*b*) by any person alleging—

(i) that the patent was obtained in fraud of his rights, or of the rights of any person under or through whom he claims; or

(ii) that he, or any person under or through whom he claims, was the true inventor of any invention included in the claim of the patentee; or

(iii) that he, or any person under or through whom he claims an interest in any trade, business, or manufacture, had publicly manufactured, used, or sold, within this realm, before the date of the patent, anything claimed by the patentee as his invention.

26. POWER OF COMPTROLLER TO REVOKE PATENTS ON CERTAIN GROUNDS.—(1) Any person who would have been entitled to oppose the grant of a patent, or is the successor in interest of a person who was so entitled, may, within two years from the date of the patent, in the prescribed manner apply to the comptroller for an order revoking the patent on any one or more of the grounds on which the grant of the patent might have been opposed.

Provided that when an action for infringement or proceedings for the revocation of the patent are pending in any court, an application under this section shall not be made except with the leave of the court.

(2) The comptroller shall give notice of the application to the patentee, and after hearing the parties, if desirous of being heard, may make an order revoking the patent or requiring the specification relating thereto to be amended by disclaimer, correction, or explanation, or dismissing the application; but the comptroller shall not make an order revoking the patent unless the circumstances are such as would have justified him in refusing to grant the patent had the proceedings been proceedings in an opposition to the grant of a patent.

(3) A patentee may at any time by giving notice in the prescribed manner to the comptroller offer to surrender his patent, and the comptroller may, if after giving notice of the offer and hearing all parties who desire to be heard he thinks fit, accept the offer, and thereupon make an order for the revocation of the patent.

(4) Any decision of the comptroller under this section shall be subject to appeal to the court.

27. REVOCATION OF PATENTS WORKED OUTSIDE THE UNITED KINGDOM.—(1) At any time not less than four years after the date of a patent and not less than one year after the passing of this Act, any person may apply to the comptroller for the revocation of the patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom.

(2) The comptroller shall consider the application, and, if after enquiry he is satisfied that the allegations contained therein are correct, then, subject to the provisions of this section, and unless the patentee proves that the patented article or process is manufactured or carried on to an adequate extent in the United Kingdom, or gives satisfactory reasons why the article or process is not so manufactured or carried on, the comptroller may make an order revoking the patent either—

(*a*) forthwith; or

(*b*) after such reasonable interval as may be specified in the order, unless in the meantime it is shown to his satisfaction that the patented article or process is manufactured or carried on within the United Kingdom to an adequate extent:

Provided that no such order shall be made which is at variance with any treaty, convention, arrangement, or engagement with any foreign country or British possession.

(3) If within the time limited in the order the patented article or process is not manufactured or carried on within the United Kingdom to an adequate extent, but the patentee gives satisfactory reasons why it is not so manufactured or carried on, the comptroller may extend the period mentioned in the previous order for such period not exceeding twelve months as may be specified in the subsequent order.

(4) Any decision of the comptroller under this section shall be subject to appeal to the court, and on any such appeal the law officer or such other counsel as he may appoint shall be entitled to appear and be heard.

Register of Patents.

28. REGISTER OF PATENTS.—(1) There shall be kept at the Patent Office a book called the register of patents, wherein shall be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licences under patents, and of amendments, extensions, and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may be prescribed.

(2) The register of patents existing at the commencement of this Act shall be incorporated with and form part of the register of patents under this Act.

(3) The register of patents shall be primâ facie evidence of any matters by this Act directed or authorised to be inserted therein.

(4) Copies of deeds, licences, and any other documents affecting the proprietorship in any letters patent or in any licence thereunder, must be supplied to the comptroller in the prescribed manner for filing in the Patent Office.

Crown.

29. PATENT TO BIND CROWN.—A patent shall have to all intents the like effect as against His Majesty the King as it has against a subject:

Provided that any Government department may, by themselves, their agents, contractors, or others, at any time after the application, use the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, as may be settled by the Treasury after hearing all parties interested.

30. ASSIGNMENT TO SECRETARY FOR WAR OR THE ADMIRALTY OF CERTAIN INVENTIONS.—(1) The inventor of any improvement in instruments or munitions of war may (either for or without valuable consideration) assign to the Secretary of State for War

or the Admiralty on behalf of His Majesty all the benefit of the invention and of any patent obtained or to be obtained for the invention; and the Secretary of State or the Admiralty may be a party to the assignment.

(2) The assignment shall effectually vest the benefit of the invention and patent in the Secretary of State or the Admiralty on behalf of His Majesty, and all covenants and agreements therein contained for keeping the invention secret and otherwise shall be valid and effectual (notwithstanding any want of valuable consideration), and may be enforced accordingly by the Secretary of State or the Admiralty.

(3) Where any such assignment has been made, the Secretary of State or the Admiralty may at any time before the publication of the complete specification certify to the comptroller that, in the interest of the public service, the particulars of the invention and of the manner in which it is to be performed should be kept secret.

(4) If the Secretary of State or the Admiralty so certify the application and specifications, with the drawings (if any), and any amendment of the complete specification, and any copies of such documents and drawings shall, instead of being left in the ordinary manner at the Patent Office, be delivered to the comptroller in a packet sealed by authority of the Secretary of State or the Admiralty.

(5) The packet shall, until the expiration of the term during which a patent for the invention may be in force, be kept sealed by the comptroller, and shall not be opened save under the authority of an order of the Secretary of State or the Admiralty or of the law officer.

(6) The sealed packet shall be delivered at any time during the continuance of the patent to any person authorised by the Secretary of State or the Admiralty to receive it, and shall if returned to the comptroller be again kept sealed by him.

(7) On the expiration of the term of the patent, the sealed packet shall be delivered to the Secretary of State or the Admiralty.

(8) Where the Secretary of State or the Admiralty certify as aforesaid, after an application for a patent has been left at the Patent Office, but before the publication of the complete specification, the application and specifications, with the drawings (if any), shall be forthwith placed in a packet sealed by authority of the comptroller, and the packet shall be subject to the foregoing provisions respecting a packet sealed by authority of the Secretary of State or the Admiralty.

(9) No proceeding by petition or otherwise shall lie for revocation of a patent granted for an invention in relation to which a certificate has been given by the Secretary of State or the Admiralty as aforesaid.

(10) No copy of any specification or other document or drawing, by this section required to be placed in a sealed packet, shall in any manner whatever be published or open to the inspection of the public, but, save as in this section otherwise directed, the provisions of this Act shall apply in respect of any such invention and patent as aforesaid.

(11) The Secretary of State or the Admiralty may at any time waive the benefit of this section with respect to any particular invention, and the specifications, documents, and drawings shall be thenceforth kept and dealt with in the ordinary way.

(12) The communication of any invention for any improvement in instruments or munitions of war to the Secretary of State or the Admiralty, or to any person or persons authorised by the Secretary of State or the Admiralty to investigate the same or the merits thereof, shall not, nor shall anything done for the purposes of the investigation, be deemed use of publication of such invention so as to prejudice the grant or validity of any patent for the same.

(13) Rules may be made under this Act, after consultation with the Secretary of State and the Admiralty, for the purpose of ensuring secrecy with respect to patents to which this section applies, and those rules may modify any of the provisions of this Act in their application to such patents as aforesaid so far as may appear necessary for the purpose aforesaid.

Legal Proceedings.

31. Hearing with Assessor.—(1) In an action or proceeding for infringement or revocation of a patent, the court may, if it think fit, and shall on the request of either of the parties to the proceeding, call in the aid of an assessor specially qualified, and

try the case wholly or partially with his assistance; the action shall be tried without a jury unless the court otherwise directs.

(2) The Court of Appeal may, if they think fit, in any proceeding before them call in the aid of an assessor as aforesaid.

(3) The remuneration, if any, to be paid to an assessor under this section shall be determined by the Court or the Court of Appeal, as the case may be, and be paid as part of the expenses of the execution of this Act.

32. Power to Counterclaim for Revocation in an Action for Infringement.—A defendant in an action for infringement of a patent, if entitled to present a petition to the court for the revocation of the patent, may, without presenting such a petition, apply in accordance with the rules of the Supreme Court by way of counterclaim in the action for the revocation of the patent.

33. Exemption of Innocent Infringer from Liability for Damages.—A patentee shall not be entitled to recover any damages in respect of any infringement of a patent granted after the commencement of this Act from any defendant who proves that at at the date of the infringement he was not aware, nor had reasonable means of making himself aware, of the existence of the patent; and the marking of an article with the word "patent," "patented," or any word or words expressing or implying that a patent has been obtained for the article, stamped, engraved, impressed on, or otherwise applied to the article, shall not be deemed to constitute notice of the existence of the patent, unless the word or words are accompanied by the year and number of the patent:

Provided that nothing in this section shall affect any proceedings for an injunction.

34. Order for Inspection, etc. in Action.—In an action for infringement of a patent, the court may on the application of either party make such order for an injunction inspection or account, and impose such terms and give such directions respecting the same and the proceedings thereon as the court may see fit.

35. Certificate of Validity Questioned and Costs thereon.—In an action for infringement of a patent, the court may certify that the validity of the patent came in question; and, if the court so certifies, then in any subsequent action for infringement the plaintiff in that action on obtaining a final order or judgment in his favour shall, unless the court trying the action otherwise directs, have his full costs, charges, and expenses as between solicitor and client.

36. Remedy in case of Groundless Threats of Legal Proceedings.—Where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats:

Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent.

Miscellaneous.

37. Grant of Patents to two or more Persons.—Where, after the commencement of this Act, a patent is granted to two or more persons jointly, they shall, unless otherwise specified in the patent, be treated for the purpose of the devolution of the legal interest therein as joint tenants, but, subject to any contract to the contrary, each of such persons shall be entitled to use the invention for his own profit without accounting to the others, but shall not be entitled to grant a licence without their consent, and, if any such person dies, his beneficial interest in the patent shall devolve on his personal representatives as part of his personal estate.

38. Avoidance of Certain Conditions Attached to the Sale, etc. of Patented Articles.—(1) It shall not be lawful in any contract made after the passing of this Act in relation to the sale or lease of, or licence to use or work, any article or process protected by a patent to insert a condition the effect of which will be—

(*a*) to prohibit or restrict the purchaser, lessee, or licensee from using any article or class of articles, whether patented or not, or any patented process, supplied

or owned by any person other than the seller, lessor, or licensor or his nominees; or

(*b*) to require the purchaser, lessee, or licensee to acquire from the seller, lessor, or licensor, or his nominees, any article or class of articles not protected by the patent;

and any such condition shall be null and void, as being in restraint of trade and contrary to public policy.

Provided that this subsection shall not apply if—

(i) the seller, lessor, or licensor proves that at the time the contract was entered into the purchaser, lessee, or licensee had the option of purchasing the article or obtaining a lease or licence on reasonable terms, without such conditions as aforesaid; and

(ii) the contract entitles the purchaser, lessee, or licensee to relieve himself of his liability to observe any such condition on giving the other party three months' notice in writing and on payment in compensation for such relief in the case of a purchase of such sum, or in the case of a lease or licence of such rent or royalty for the residue of the term of the contract, as may be fixed by an arbitrator appointed by the Board of Trade.

(2) Any contract relating to the lease of or licence to use or work any patented article or patented process, whether made before or after the passing of this Act, may at any time after the patent or all the patents by which the article or process was protected at the time of the making of the contract has or have ceased to be in force, and notwithstanding anything in the same or in any other contract to the contrary, be determined by either party on giving three months' notice in writing to the other party; but where any such notice is given determining any contract made before the passing of this Act, the party giving the notice shall be liable to pay such compensation as failing agreement may be awarded by an arbitrator appointed by the Board of Trade.

(3) Any contract made before the passing of this Act relating to the lease of or licence to use or work any patented article or process and containing any condition which, had the contract been made after the passing of this Act, would by virtue of this section have been null and void may, at any time before the contract is determinable under the last preceding subsection, and notwithstanding anything in the same or any other contract to the contrary, be determined by either party on giving three months' notice in writing to the other party, but where any such notice is given the party giving the notice shall be liable to pay such compensation as, failing agreement, may be awarded by an arbitrator appointed by the Board of Trade.

(4) The insertion by the patentee in a contract made after the passing of this Act of any condition which by virtue of this section is null and void shall be available as a defence to an action for infringement of the patent to which the contract relates brought while that contract is in force.

(5) Nothing in this section shall—

(*a*) affect any condition in a contract whereby a person is prohibited from selling any goods other than those of a particular person; or

(*b*) be construed as validating any contract which would, apart from this section, be invalid; or

(*c*) affect any right of determining a contract or condition in a contract exerciseable independently of this section; or

(*d*) affect any condition in a contract for the lease of or licence to use a patented article, whereby the lessor or licensor reserves to himself or his nominees the right to supply such new parts of the patented article as may be required to put or keep it in repair.

39. COSTS AND SECURITY FOR COSTS.—(1) The comptroller shall, in proceedings relating to an opposition to the grant of a patent or to an application for the amendment of a specification or the revocation of a patent, have power by order to award to any party such costs as he may consider reasonable, and to direct how and by what parties they are to be paid, and any such order may be made a rule of the court.

(2) If a party giving notice of opposition to the grant of a patent or to the amendment of a specification, or applying to the comptroller for the revocation of a patent,

or giving notice of appeal from any decision of the comptroller, neither resides nor carries on business in the United Kingdom or the Isle of Man, the comptroller, or, in case of appeal to the law officer, the law officer, may require such party to give security for costs of the proceedings or appeal, and in default of such security being given may treat the proceedings or appeal as abandoned.

40. PROCEDURE ON APPEAL TO LAW OFFICER.—The law officer may examine witnesses on oath and administer oaths for that purpose, and may make rules regulating references and appeals to the law officer and the practice and procedure before him under this Part of this Act; and in any proceeding before the law officer under this Part of this Act, the law officer may order costs to be paid by either party, and any such order may be made a rule of the court.

41. PROVISIONS AS TO ANTICIPATION.—(1) An invention covered by any patent applied for on or after the first day of January one thousand nine hundred and five shall not be deemed to have been anticipated by reason only of its publication in a specification left pursuant to an application made in the United Kingdom not less than fifty years before the date of the application for the patent, or of its publication in a provisional specification of any date not followed by a complete specification

(2) A patent shall not be held to be invalid by reason only of the invention in respect of which the patent was granted, or any part thereof, having been published prior to the date of the patent, if the patentee proves to the satisfaction of the court that the publication was made without his knowledge and consent, and that the matter published was derived or obtained from him, and, if he learnt of the publication before the date of his application for the patent, that he applied for and obtained protection for his invention with all reasonable diligence after learning of the publication.

42. DISCONFORMITY.—A patent shall not be held to be invalid on the ground that the complete specification claims a further or different invention to that contained in the provisional, if the invention therein claimed, so far as it is not contained in the provisional, was novel at the date when the complete specification was put in, and the applicant was the first and true inventor thereof.

43. PATENT ON APPLICATION OF REPRESENTATIVE OF DECEASED INVENTOR.—(1) If the person claiming to be inventor of an invention dies without making an application for a patent for the invention, application may be made by, and a patent for the invention granted to, his legal representative.

(2) Every such application must contain a declaration by the legal representative that he believes him to be the true and first inventor of the invention.

44. LOSS OR DESTRUCTION OF PATENT.—If a patent is lost or destroyed, or its non-production is accounted for to the satisfaction of the comptroller, the comptroller may at any time seal a duplicate thereof.

45. PROVISIONS AS TO EXHIBITIONS.—(1) The exhibition of an invention at an industrial or international exhibition, certified as such by the Board of Trade, or the publication of any description of the invention during the period of the holding of the exhibition, or the use of the invention for the purpose of the exhibition in the place where the exhibition is held, or the use of the invention during the period of the holding of the exhibition by any person elsewhere, without the privity or consent of the inventor, shall not prejudice the right of the inventor to apply for and obtain a patent in respect of the invention or the validity of any patent granted on the application, provided that—

(*a*) the exhibitor, before exhibiting the invention, gives the comptroller the prescribed notice of his intention to do so; and

(*b*) the application for a patent is made before or within six months from the date of the opening of the exhibition.

(2) His Majesty may by Order in Council apply this section to any exhibition mentioned in the Order in like manner as if it were an industrial or international exhibition certified as such by the Board of Trade, and any such Order may provide that the exhibitor shall be relieved from the condition of giving notice to the comptroller of his intention to exhibit, and shall be so relieved either absolutely or upon such terms and conditions as may be stated in the Order.

46. PUBLICATION OF ILLUSTRATED JOURNAL, INDEXES, ETC.—(1) The comptroller shall issue periodically an illustrated journal of patented inventions, as well as reports

of patent cases decided by courts of law, and any other information that he may deem generally useful or important.

(2) Provision shall be made by the comptroller for keeping on sale copies of such journal, and also of all complete specifications of patents in force, with any accompanying drawings.

(3) The comptroller shall continue, in such form as he deems expedient, the indexes and abridgments of specifications hitherto published, and shall prepare and publish such other indexes, abridgments of specifications, catalogues, and other works relating to inventions, as he thinks fit.

47. PATENT MUSEUM.—(1) The control and management of the Patent Museum and its contents shall remain vested in the Board of Education, subject to such directions as His Majesty in Council may think fit to give.

(2) The Board of Education may at any time require a patentee to furnish them with a model of his invention on payment to the patentee of the cost of the manufacture of the model, the amount to be settled, in case of dispute, by the Board of Trade.

48. FOREIGN VESSELS IN BRITISH WATERS.—(1) A patent shall not prevent the use of an invention for the purposes of the navigation of a foreign vessel within the jurisdiction of any of His Majesty's Courts in the United Kingdom, or Isle of Man, or the use of an invention in a foreign vessel within that jurisdiction, provided it is not used therein for or in connection with the manufacture or preparation of anything intended to be sold in or exported from the United Kingdom or Isle of Man.

(2) This section shall not extend to vessels of any foreign state of which the laws do not confer corresponding rights with respect to the use of inventions in British vessels while in the ports of that state, or in the waters within the jurisdiction of its courts.

PART II.

DESIGNS.

Registration of Designs.

49. APPLICATION FOR REGISTRATION OF DESIGNS.—(1) The comptroller may, on the application made in the prescribed form and manner of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom, register the design under this Part of this Act.

(2) The same design may be registered in more than one class, and, in case of doubt as to the class in which a design ought to be registered, the comptroller may decide the question.

(3) The comptroller may, if he thinks fit, refuse to register any design presented to him for registration, but any person aggrieved by any such refusal may appeal to the Board of Trade, and the Board shall, after hearing the applicant and the comptroller, if so required, make an order determining whether, and subject to what conditions, if any, registration is to be permitted.

(4) An application which, owing to any default or neglect on the part of the applicant, has not been completed so as to enable registration to be effected within the prescribed time shall be deemed to be abandoned.

(5) A design when registered shall be registered as of the date of the application for registration.

50. REGISTRATION OF DESIGNS IN NEW CLASSES.—Where a design has been registered in one or more classes of goods the application of the proprietor of the design to register it in some one or more other classes shall not be refused, nor shall the registration thereof be invalidated—

(*a*) on the ground of the design not being a new and original design, by reason only that it was so previously registered; or

(*b*) on the ground of the design having been previously published in the United Kingdom, by reason only that it has been applied to goods of any class in which it was so previously registered.

51. CERTIFICATE OF REGISTRATION.—(1) The comptroller shall grant a certificate of registration to the proprietor of the design when registered.

(2) The comptroller may, in case of loss of the original certificate, or in any other case in which he deems it expedient, furnish one or more copies of the certificate.

52. REGISTER OF DESIGNS.—(1) There shall be kept at the Patent Office a book called the Register of Designs wherein shall be entered the names and addresses of proprietors of registered designs, notifications of assignments and of transmissions of registered designs, and such other matters as may be prescribed.

(2) The register of designs existing at the commencement of this Act shall be incorporated with and form part of the register of designs under this Act.

(3) The register of designs shall be primâ facie evidence of any matters by this Act directed or authorised to be entered therein.

Copyright in Registered Designs.

53. COPYRIGHT ON REGISTRATION.—(1) When a design is registered, the registered proprietor of the design shall, subject to the provisions of this Act, have copyright in the design during five years from the date of registration.

(2) If within the prescribed time before the expiration of the said five years application for the extension of the period of copyright is made to the comptroller in the prescribed manner, the comptroller shall on payment of the prescribed fee extend the period of copyright for a second period of five years from the expiration of the original period of five years.

(3) If within the prescribed time before the expiration of such second period of five years application for the extension of the period of copyright is made to the comptroller in the prescribed manner, the comptroller may, subject to any rules under this Act, on payment of the prescribed fee, extend the period of copyright for a third period of five years from the expiration of the second period of five years.

54. REQUIREMENTS BEFORE DELIVERY ON SALE.—(1) Before delivery on sale of any articles to which a registered design has been applied, the proprietor shall—

(*a*) (if exact representations or specimens were not furnished on the application for registration), furnish to the comptroller the prescribed number of exact representations or specimens of the design; and if he fails to do so, the the comptroller may erase his name from the register, and thereupon the copyright in the design shall cease; and

(*b*) cause each such article to be marked with the prescribed mark, or with the prescribed words or figures, denoting that the design is registered; and if he fails to do so the proprietor shall not be entitled to recover any penalty or damages in respect of any infringement of his copyright in the design unless he shows that he took all proper steps to ensure the marking of the article, or unless he shows that the infringement took place after the person guilty thereof knew or had received notice of the existence of the copyright in the design.

(2) Where a representation is made to the Board of Trade by or on behalf of any trade or industry that in the interests of the trade or industry it is expedient to dispense with or modify as regards any class or description of articles any of the requirements of this section as to marking, the Board may, if they think fit, by rule under this Act dispense with or modify such requirements as regards any such class or description of articles to such extent and subject to such conditions as they think fit.

55. EFFECT OF DISCLOSURE ON COPYRIGHT.—The disclosure of a design by the proprietor to any other person, in such circumstances as would make it contrary to good faith for that other person to use or publish the design, and the disclosure of a design in breach of good faith by any person other than the proprietor of the design, and the acceptance of a first and confidential order for goods bearing a new or original textile design intended for registration, shall not be deemed to be a publication of the design sufficient to invalidate the copyright thereof if registration thereof is obtained subsequently to the disclosure or acceptance.

56. INSPECTION OF REGISTERED DESIGNS.—(1) During the existence of copyright in a design, or such shorter period not being less than two years from the registration of the design as may be prescribed, the design shall not be open to inspection except by the proprietor or a person authorised in writing by him, or a person authorised by the

comptroller or by the court, and furnishing such information as may enable the comptroller to identify the design, and shall not be open to the inspection of any person except in the presence of the comptroller, or of an officer acting under him, and on payment of the prescribed fee; and the person making the inspection shall not be entitled to take any copy of the design, or of any part thereof:

Provided that where registration of a design is refused on the ground of identity with a design already registered, the applicant for registration shall be entitled to inspect the design so registered.

(2) After the expiration of the copyright in a design, or such shorter period as aforesaid, the design shall be open to inspection, and copies thereof may be taken by any person on payment of the prescribed fee.

(3) Different periods may be prescribed under this section for different classes of goods.

57. INFORMATION AS TO EXISTENCE OF COPYRIGHT.—On the request of any person furnishing such information as may enable the comptroller to identify the design, and on payment of the prescribed fee, the comptroller shall inform such person whether the registration still exists in respect of the design, and if so, in respect of what classes of goods, and shall state the date of registration, and the name and address of the registered proprietor.

58. CANCELLATION OF REGISTRATION OF DESIGNS USED WHOLLY OR MAINLY ABROAD.—(1) At any time after the registration of a design any person may apply to the comptroller for the cancellation of the registration on the ground that the design is used for manufacture exclusively or mainly outside the United Kingdom, and where such an application is made the provisions of this Act with respect to the revocation of patents worked outside the United Kingdom (including those relating to costs) shall apply with the necessary modifications, except that there shall be no appeal from the decision of the comptroller.

(2) Such ground as aforesaid shall be available by way of a defence to an action for infringement of the copyright in the design.

Industrial and International Exhibitions.

59. PROVISIONS AS TO EXHIBITIONS.—(1) The exhibition at an industrial or international exhibition certified as such by the Board of Trade, or the exhibition elsewhere during the period of the holding of the exhibition, without the privity or consent of the proprietor, of a design, or of any article to which a design is applied, or the publication during the holding of any such exhibition, of a description of a design, shall not prevent the design from being registered, or invalidate the registration thereof: Provided that—

(*a*) The exhibitor, before exhibiting the design or article, or publishing a description of the design, gives the comptroller the prescribed notice of his intention to do so; and

(*b*) The application for registration is made before or within six months from the date of the opening of the exhibition.

(2) His Majesty may, by Order in Council, apply this section to any exhibition mentioned in the order in like manner as if it were an industrial or international exhibition certified as such by the Board of Trade, and any such Order may provide that the exhibitor shall be relieved from the condition of giving notice to the comptroller of his intention to exhibit, and shall be so relieved either absolutely or upon such terms and conditions as may be stated in the order.

Legal Proceedings.

60. PIRACY OF REGISTERED DESIGN.—(1) During the existence of copyright in any design it shall not be lawful for any person—

(*a*) For the purposes of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof, except with the licence or written consent of the registered proprietor, or to do any thing with a view to enable the design to be so applied; or

(*b*) Knowing that the design or any fraudulent or obvious imitation thereof has been applied to any article without the consent of the registered proprietor, to publish or expose or cause to be published or exposed for sale that article.

(2) If any person acts in contravention of this section he shall be liable for every contravention to pay to the registered proprietor of the design a sum not exceeding fifty pounds, recoverable as a simple contract debt, or if the proprietor elects to bring an action for the recovery of damages for such contravention, and for an injunction against the repetition thereof, he shall be liable to pay such damages as may be awarded and to be restrained by injunction accordingly:

Provided that the total sum recoverable as a simple contract debt in respect of any one design shall not exceed one hundred pounds.

61. Application of Certain Provisions of the Act as to Patents to Designs.—The provisions of this Act with regard to certificates of the validity of a patent, and to the remedy in case of groundless threats of legal proceedings by a patentee, shall apply in the case of registered designs in like manner as they apply in the case of patents, with the substitution of references to the copyright in a design for references to a patent, and of references to the proprietor of a design for references to the patentee, and of references to the design for references to the invention.

Part III.

General.

Patent Office and Proceedings thereat.

62. Patent Office.—(1) The Treasury may continue to provide for the purposes of this Act and the Trade Marks Act, 1905 (5 Edw. 7 c. 15), an office with all requisite buildings and conveniences, which shall be called, and is in this Act referred to as, the Patent Office.

(2) The Patent Office shall be under the immediate control of the comptroller, who shall act under the superintendence and direction of the Board of Trade.

(3) Any act or thing directed to be done by or to the comptroller may be done by or to any officer authorised by the Board of Trade.

(4) Rules under this Act may provide for the establishment of branch offices for designs at Manchester or elsewhere, and for any document or thing required by this Act to be sent to or done at the Patent Office being sent to or done at any branch office which may be established.

63. Officers and Clerks.—(1) There shall continue to be a comptroller-general of patents, designs, and trade marks, and the Board of Trade may, subject to the approval of the Treasury, appoint the comptroller, and so many examiners and other officers and clerks, with such designations and duties as the Board of Trade think fit, and may remove any of those officers and clerks.

(2) The salaries of those officers and clerks shall be appointed by the Board of Trade, with the concurrence of the Treasury, and those salaries and the other expenses of the execution of this Act and the Trade Marks Act, 1905, shall continue to be paid out of money provided by Parliament.

64. Seal of Patent Office.—Impressions of the seal of the Patent Office shall be judicially noticed and admitted in evidence.

Fees.

65. Fees.—There shall be paid in respect of the grant of patents and the registration of designs, and applications therefor, and in respect of other matters with relation to patents and designs under this Act, such fees as may be, with the sanction of the Treasury, prescribed by the Board of Trade, so however that the fees prescribed in respect of the instruments and matters mentioned in the first Schedule to this Act shall not exceed those specified in that Schedule.

7 EDWARD 7, Chapter 29.

Provisions as to Registers and other Documents in Patent Office.

66. Trust not to be Entered in Registers.—There shall not be entered in any register kept under this Act, or be receivable by the comptroller, any notice of any trust expressed, implied or constructive.

67. Inspection of and Extracts from Registers.—Every register kept under this Act shall at all convenient times be open to the inspection of the public, subject to the provisions of this Act and to such regulations as may be prescribed; and certified copies, sealed with the seal of the Patent Office, of any entry in any such register shall be given to any person requiring the same on payment of the prescribed fee.

68. Privilege of Reports of Examiners.—Reports of examiners made under this Act shall not in any case be published or be open to public inspection, and shall not be liable to production or inspection in any legal proceeding, unless the court or officer having power to order discovery in such legal proceeding certifies that such production or inspection is desirable in the interests of justice, and ought to be allowed.

69. Prohibition of Publication of Specification, Drawings, etc. where Application Abandoned, etc.—(1) Where an application for a patent has been abandoned, or become void, the specifications and drawings (if any) accompanying or left in connexion with such application, shall not, save as otherwise expressly provided by this Act, at any time be open to public inspection or be published by the comptroller.

(2) Where an application for a design has been abandoned or refused the application and any drawings, photographs, tracings, representations, or specimens left in connexion with the application shall not at any time be open to public inspection or be published by the comptroller.

70. Power for Comptroller to correct Clerical Errors.—The comptroller may, on request in writing accompanied by the prescribed fee,—

(*a*) correct any clerical error in or in connexion with an application for a patent or in any patent or any specification;

(*b*) cancel the registration of a design either wholly or in respect of any particular goods in connexion with which the design is registered;

(*c*) correct any clerical error in the representation of a design or in the name or address of the proprietor of any patent or design, or in any other matter which is entered upon the register of patents or the register of designs.

71. Entry of Assignments and Transmissions in Registers.—(1) Where a person becomes entitled by assignment, transmission, or other operation of law to a patent, or to the copyright in a registered design, the comptroller shall, on request and on proof of title to his satisfaction, register him as the proprietor of a patent or design.

(2) Where any person becomes entitled as mortgagee, licensee, or otherwise to any interest in a patent or design, the comptroller shall, on request and on proof of title to his satisfaction, cause notice of the interest to be entered in the prescribed manner in the register of patents or designs, as the case may be.

(3) The person registered as the proprietor of a patent or design shall, subject to the provisions of this Act and to any rights appearing from the register to be vested in any other person, have power absolutely to assign, grant licences as to, or otherwise deal with, the patent or design and to give effectual receipts for any consideration for any such assignment, licence, or dealing: Provided that any equities in respect of the patent or design may be enforced in like manner as in respect of any other personal property.

72. Rectification of Registers by Court.—(1) The court may, on the application in the prescribed manner of any person aggrieved by the non-insertion in or omission from the register of patents or designs of any entry, or by any entry made in either such register without sufficient cause, or by any entry wrongly remaining on either such register, or by an error or defect in any entry on either such register, make such order for making, expunging, or varying such entry as it may think fit.

(2) The court may in any proceeding under this section decide any question that it may be necessary or expedient to decide in connexion with the rectification of a register.

(3) The prescribed notice of any application under this section shall be given to the

comptroller, who shall have the right to appear and be heard thereon, and shall appear if so directed by the court.

(4) Any order of the court rectifying a register shall direct that notice of the rectification be served on the comptroller in the prescribed manner, who shall upon the receipt of such notice rectify the register accordingly.

Powers and Duties of Comptroller.

73. Exercise of Discretionary Power by Comptroller.—Where any discretionary power is by or under this act given to the comptroller, he shall not exercise that power adversely to the applicant for a patent, or for amendment of a specification, or for registration of a design, without (if so required within the prescribed time by the applicant) giving the applicant an opportunity of being heard.

74. Power of Comptroller to take Directions of Law Officers.—The comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to a law officer for directions in the matter.

75. Refusal to grant Patent, etc. in certain Cases.—The comptroller may refuse to grant a patent for an invention, or to register a design, of which the use would, in his opinion, be contrary to law or morality.

76. Annual Reports of Comptroller.—The comptroller shall, before the first day of June in every year, cause a report respecting the execution by or under him of this Act to be laid before both Houses of Parliament, and therein shall include for the year to which the report relates all general rules made in that year under or for the purposes of this Act, and an account of all fees, salaries, and allowances, and other money received and paid under this Act.

Evidence, etc.

77. Evidence before Comptroller.—(1) Subject to rules under this Act in any proceeding under this Act before the comptroller the evidence shall be given by statutory declaration in the absence of directions to the contrary; but in any case in which the comptroller thinks it right so to do, he may take evidence vivâ voce in lieu of or in addition to evidence by declaration or allow any declarant to be cross-examined on his declaration. Any such statutory declaration may in the case of appeal be used before the court in lieu of evidence by affidavit, but if so used shall have all the incidents and consequences of evidence by affidavit.

(2) In case any part of the evidence is taken vivâ voce, the comptroller shall, in respect of requiring the attendance of witnesses and taking evidence on oath, be in the same position in all respects as an official referee of the Supreme Court.

78. Certificate of Comptroller to be Evidence.—A certificate purporting to be under the hand of the comptroller as to any entry, matter, or thing which he is authorised by this Act, or any general rules made thereunder, to make or do, shall be primâ facie evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone.

79. Evidence of Documents in Patent Office.—Printed or written copies or extracts, purporting to be certified by the comptroller and sealed with the seal of the Patent Office, of or from patents, specifications, and other documents in the Patent Office, and of or from registers and other books kept there, shall be admitted in evidence in all courts in His Majesty's dominions, and in all proceedings, without further proof or production of the originals.

80. Transmission of Certified Printed Copies of Specifications, etc.—(1) Copies of all specifications, drawings, and amendments left at the Patent Office after the commencement of this Act, printed for and sealed with the seal of the Patent Office, shall be transmitted to the Edinburgh Museum of Science and Art, and to the Enrolments Office of the Chancery Division in Ireland, and to the Rolls Office in the Isle of Man, within twenty-one days after they have been accepted or allowed at the Patent Office.

(2) Certified copies of or extracts from any such documents and of any documents so transmitted in pursuance of any enactment repealed by this Act shall be given to any person on payment of the prescribed fee; and any such copy or extract shall be

admitted in evidence in all courts in Scotland and Ireland and in the Isle of Man without further proof or production of the originals.

81. Applications and Notices by Post.—Any application, notice, or other document authorised or required to be left, made, or given at the Patent Office or to the comptroller, or to any other person under this Act, may be sent by post.

82. Excluded Days.—Where the last day fixed by this Act for doing anything under this Act falls on any day specified in rules under this Act as an excluded day, the rules may provide for the thing being done on the next following day not being an excluded day.

83. Declaration by Infant, Lunatic, etc.—(1) If any person is, by reason of infancy, lunacy, or other disability, incapable of making any declaration or doing anything required or permitted by or under this Act, the guardian or committee (if any) of the person subject to the disability, or, if there be none any person appointed by any court possessing jurisdiction in respect of his property, may make such declaration or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of the person subject to the disability.

(2) An appointment may be made by the court for the purposes of this section upon the petition of any person acting on behalf of the person subject to the disability or of any other person interested in the making of the declaration or the doing of the thing.

Register of Patent Agents.

84. Register of Patent Agents.—(1) A person shall not be entitled to describe himself as a patent agent, whether by advertisement, by description on his place of business, by any document issued by him, or otherwise, unless he is registered as a patent agent in pursuance of this Act or an Act repealed by this Act.

(2) Every person who proves to the satisfaction of the Board of Trade that prior to the twenty-fourth day of December, one thousand eight hundred and eighty-eight, he had been bonâ fide practising as a patent agent shall be entitled to be registered as a patent agent in pursuance of this Act.

(3) If any person knowingly describes himself as a patent agent in contravention of this section he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding twenty pounds.

(4) In this section "patent agent" means exclusively an agent for obtaining patents in the United Kingdom.

85. Agents for Patents.—(1) Rules under this Act may authorise the comptroller to refuse to recognise as agent in respect of any business under this Act any person whose name has been erased from the register of patent agents, or who is proved to the satisfaction of the Board of Trade, after being given an opportunity of being heard, to have been convicted of such an offence or to have been guilty of such misconduct as would have rendered him liable, if his name had been on the register of patent agents, to have his name erased therefrom, and may authorise the comptroller to refuse to recognise as agent in respect of any business under this Act any company which, if it had been an individual, the comptroller could refuse to recognise as such agent.

(2) Where a company or firm acts as agents, such rules as aforesaid may authorise the comptroller to refuse to recognise the company or firm as agent if any person whom the comptroller could refuse to recognise as an agent acts as director or manager of the company or is a partner in the firm.

(3) The comptroller shall refuse to recognise as agent in respect of any business under this Act any person who neither resides nor has a place of business in the United Kingdom or the Isle of Man.

Powers, etc. of Board of Trade.

86. Power for Board of Trade to make General Rules.—(1) The Board of Trade may make such general rules and do such things as they think expedient, subject to the provisions of this Act—

(*a*) For regulating the practice of registration under this Act:

(*b*) For classifying goods for the purposes of designs:

(*c*) For making or requiring duplicates of specifications, drawings, and other documents:

(*d*) For securing and regulating the publishing and selling of copies, at such prices and in such manner as the Board of Trade think fit, of specifications, drawings, and other documents:

(*e*) For securing and regulating the making, printing, publishing, and selling of indexes to, and abridgments of, specifications and other documents in the Patent Office; and providing for the inspection of indexes and abridgments and other documents:

(*f*) For regulating (with the approval of the Treasury) the presentation of copies of Patent Office publications to patentees and to public authorities, bodies, and institutions at home and abroad:

(*g*) For regulating the keeping of the register of patent agents under this Act:

(*h*) Generally for regulating the business of the Patent Office, and all things by this Act placed under the direction or control of the comptroller, or of the Board of Trade.

(2) General rules shall whilst in force be of the same effect as if they were contained in this Act.

(3) Any rules made in pursuance of this section shall be advertised twice in the official journal to be issued by the comptroller, and shall be laid before both Houses of Parliament as soon as practicable after they are made, and if either House of Parliament, within the next forty days after any rules have been so laid before that House, resolves that the rules or any of them ought to be annulled, the rules or those to which the resolution applies shall after the date of such resolution be of no effect, without prejudice to the validity of anything done in the meantime under the rules or to the making of any new rules.

87. Proceedings of the Board of Trade.—(1) All things required or authorised under this Act to be done by, to, or before the Board of Trade, may be done by, to, or before the President or a secretary or an assistant secretary of the Board.

(2) All documents purporting to be orders made by the Board of Trade and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or by any person authorised in that behalf by the President of the Board, shall be received in evidence, and shall be deemed to be such orders without further proof, unless the contrary is shown.

(3) A certificate, signed by the President of the Board of Trade, that any order made or act done is the order or act of the Board, shall be conclusive evidence of the fact so certified.

88. Provision as to Order in Council.—An Order in Council under this Act shall, from a date to be mentioned for the purpose in the Order, take effect as if it had been contained in this Act; but may be revoked or varied by a subsequent Order.

Offences.

89. Offences.—(1) If any person makes or causes to be made a false entry in any register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanor.

(2) If any person falsely represents that any article sold by him is a patented article, or falsely describes any design applied to any article sold by him as registered, he shall be liable for every offence, on conviction under the Summary Jurisdiction Acts, to a fine not exceeding five pounds.

(3) If any person sells an article having stamped, engraved, or impressed thereon or otherwise applied thereto the word "patent," "patented," "registered," or any other word expressing or implying that the article is patented or that the design applied thereto is registered, he shall be deemed for the purposes of this section to represent that the article is a patented article or that the design applied thereto is a registered design.

(4) Any person who, after the copyright in a design has expired, puts or causes to

be put on any article to which the design has been applied the word "registered," or any word or words implying that there is a subsisting copyright in the design, shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding five pounds.

(5) If any person uses on his place of business, or on any document issued by him, or otherwise, the words "Patent Office," or any other words suggesting that his place of business is officially connected with, or is, the Patent Office, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding twenty pounds.

90.—(1) The grant of a patent under this Act shall not be deemed to authorise the patentee to use the Royal Arms or to place the Royal Arms on any patented article.

(2) UNAUTHORISED ASSUMPTION OF ROYAL ARMS.—If any person, without the authority of His Majesty, uses in connexion with any business, trade, calling, or profession the Royal Arms (or arms so nearly resembling them as to be calculated to deceive) in such manner as to be calculated to lead to the belief that he is duly authorised to use the Royal Arms, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding twenty pounds.

Provided that nothing in this section shall be construed as affecting the right, if any, of the proprietor of a trade mark containing such arms to continue to use such trade mark.

International and Colonial Arrangements.

91. INTERNATIONAL AND COLONIAL ARRANGEMENTS.—(1) If His Majesty is pleased to make any arrangement with the government of any foreign state for mutual protection of inventions, or designs, or trade marks, then any person who has applied for protection for any invention, design, or trade mark in that state shall be entitled to a patent for his invention or to registration of his design or trade mark under this Act or the Trade Marks Act, 1905, in priority to other applicants; and the patent or registration shall have the same date as the date of the application in the foreign state.

Provided that—

(*a*) The application is made, in the case of a patent within twelve months, and in the case of a design or trade mark within four months, from the application for protection in the foreign state; and

(*b*) Nothing in this section shall entitle the patentee or proprietor of the design or trade mark to recover damages for infringements happening prior to the actual date on which his complete specification is accepted, or his design or trade mark is registered, in this country.

(2) The patent granted for the invention or the registration of a design or trade mark shall not be invalidated—

(*a*) in the case of a patent, by reason only of the publication of a description of, or use of, the invention; or

(*b*) in the case of a design, by reason only of the exhibition or use of, or the publication of a description or representation of, the design; or

(*c*) in the case of a trade mark, by reason only of the use of the trade mark,

in the United Kingdom or the Isle of Man during the period specified in this section as that within which the application may be made.

(3) The application for the grant of a patent, or the registration of a design, or the registration of a trade mark under this section, must be made in the same manner as an ordinary application under this Act or the Trade Marks Act, 1905: Provided that—

(*a*) In the case of patents the application shall be accompanied by a complete specification, which, if it is not accepted within the twelve months from the application for protection in the foreign state, shall with the drawings (if any) be open to public inspection at the expiration of that period; and

(*b*) In the case of trade marks, any trade mark the registration of which has been duly applied for in the country of origin may be registered under the Trade Marks Act, 1905.

(4) The provisions of this section shall apply only in the case of those foreign states with respect to which His Majesty by Order in Council declares them to be

applicable, and so long only in the case of each state as the Order in Council continues in force with respect to that state.

(5) Where it is made to appear to His Majesty that the legislature of any British possession has made satisfactory provision for the protection of inventions, designs, and trade marks, patented or registered in this country, it shall be lawful for His Majesty, by Order in Council, to apply the provisions of this section to that possession, with such variations or additions, if any, as may be stated in the Order.

Definitions.

92. Provisions as to "the Court."—(1) In this Act, unless the context otherwise requires, "the court" means, subject to the provisions as to Scotland, Ireland, and the Isle of Man, the High Court in England.

(2) Where by virtue of this Act a decision of the comptroller is subject to an appeal to the court, or a petition may be referred or presented to the court, the appeal shall, subject to and in accordance with rules of the Supreme Court, be made and the petition referred or presented to such judge of the High Court as the Lord Chancellor may select for the purpose, and the decision of that judge shall be final, except in the case of an appeal from a decision of the comptroller revoking a patent on any ground on which the grant of such patent might have been opposed.

93. Definitions.—In this Act, unless the context otherwise requires,—

"Law officer" means the Attorney-General or Solicitor-General for England:

"Prescribed" means prescribed by general rules under this Act:

"British possession" does not include the Isle of Man or the Channel Islands:

"Patent" means letters patent for an invention:

"Patentee" means the person for the time being entitled to the benefit of a patent:

"Invention" means any manner of new manufacture the subject of letters patent and grant of privilege within section twenty-six of the Statute of Monopolies (that is, the Act of the twenty-first year of the reign of King James the First, chapter three, intituled "An Act concerning monopolies and dispensations with penal laws and the forfeiture thereof"), and includes an alleged invention:

"Inventor" and "applicant" shall, subject to the provisions of this Act, include the legal representative of a deceased inventor or applicant:

"Design" means any design (not being a design for a sculpture or other thing within the protection of the Sculpture Copyright Act, 54 Geo. 3 c. 56, 1814) applicable to any article, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined:

"Article" means (as respects designs) any article of manufacture and any substance artificial or natural, or partly artificial and partly natural:

"Copyright" means the exclusive right to apply a design to any article in any class in which the design is registered:

"Proprietor of a new and original design,"—

(*a*) Where the author of the design, for good consideration, executes the work for some other person, means the person for whom the design is so executed; and

(*b*) Where any person acquires the design or the right to apply the design to any article, either exclusively of any other person or otherwise, means, in the respect and to the extent in and to which the design or right has been so acquired, the person by whom the design or right is so acquired; and

(*c*) In any other case, means the author of the design;

and where the property in, or the right to apply, the design has devolved from the original proprietor upon any other person, includes that other person.

Application to Scotland, Ireland, and the Isle of Man.

94. APPLICATION TO SCOTLAND.—In the application of this Act to Scotland—

(1) In any action for infringement of a patent in Scotland the provisions of this Act with respect to calling in the aid of an assessor shall apply, and the action shall be tried without a jury, unless the court otherwise direct, but otherwise nothing shall affect the jurisdiction and forms of process of the courts in Scotland in such an action or in any action or proceeding respecting a patent hitherto competent to those courts; and for the purposes of the provisions so applied "court of appeal" shall mean any court to which such action is appealed:

(2) Any offence under this Act declared to be punishable on conviction under the Summary Jurisdiction Acts may be prosecuted in the sheriff court:

(3) Proceedings for revocation of a patent shall be in the form of an action of reduction at the instance of the Lord Advocate, or at the instance of a party having interest with his concurrence, which concurrence may be given on just cause shown only, and service of all writs and summonses in that action shall be made according to the forms and practice existing at the commencement of this Act:

(4) The provisions of this Act conferring a special jurisdiction on the court as defined by this Act, shall not, except so far as the jurisdiction extends, affect the jurisdiction of any court in Scotland in any proceedings relating to patents or to designs; and with reference to any such proceedings, the term "the Court" shall mean any Lord Ordinary of the Court of Session, and the term "Court of Appeal" shall mean either Division of that Court:

(5) Notwithstanding anything in this Act, the expression "the court" shall, as respects petitions for compulsory licences on revocation which are referred by the Board of Trade to the Court in Scotland, mean any Lord Ordinary of the Court of Session, and shall in reference to proceedings in Scotland for the extension of the time of a patent mean such Lord Ordinary:

(6) The expression "Rules of the Supreme Court" shall, except in section ninety-two of this Act, mean act of sederunt:

(7) If any rectification of a register under this Act is required in pursuance of any proceeding in a court, a copy of the order, decree, or other authority for the rectification, shall be served on the comptroller, and he shall rectify the register accordingly:

(8) The expression "injunction" means "interdict."

95. APPLICATION TO IRELAND.—In the application of this Act to Ireland—

(1) All parties shall, notwithstanding anything in this Act, have in Ireland their remedies under or in respect of a patent as if the same had been granted to extend to Ireland only:

(2) The provisions of this Act conferring a special jurisdiction on the court, as defined by this Act, shall not, except so far as the jurisdiction extends, affect the jurisdiction of any court in Ireland in any proceedings relating to patents or to designs; and with reference to any such proceedings the term "the Court" means the High Court in Ireland:

(3) If any rectification of a register under this Act is required in pursuance of any proceeding in a court, a copy of the order, decree, or other authority for the rectification shall be served on the comptroller, and he shall rectify the register accordingly.

96. ISLE OF MAN.—This Act shall extend to the Isle of Man, subject to the following modifications:—

(1) Nothing in this Act shall affect the jurisdiction of the courts in the Isle of Man in proceedings for infringement, or in any action or proceeding respecting a patent or design competent to those courts:

(2) The punishment for a misdemeanour under this Act in the Isle of Man shall be imprisonment for any term not exceeding two years, with or without hard

labour, and with or without a fine not exceeding one hundred pounds, at the discretion of the court:

(3) Any offence under this Act committed in the Isle of Man which would in England be punishable on summary conviction may be prosecuted, and any fine in respect thereof recovered, at the instance of any person aggrieved, in the manner in which offences punishable on summary conviction may for the time being be prosecuted.

Repeal, Savings, and Short Title.

97. SAVING FOR PREROGATIVE.—Nothing in this Act shall take away, abridge, or prejudicially affect the prerogative of the Crown in relation to the granting of any letters patent or to the withholding of a grant thereof.

98. REPEAL AND SAVINGS.—(1) The enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule—

(*a*) As respects the enactments mentioned in Part I. of that Schedule, as from the commencement of this Act;

(*b*) As respects the enactments mentioned in Part II. of that Schedule, as from the date when rules of the Supreme Court regulating the matters dealt with in those enactments come into operation;

(*c*) As respects the enactments mentioned in Part III. of that Schedule, as from the date when rules under this Act regulating the matters dealt with in those enactments come into operation;

and the enactments mentioned in Part II. and Part III. of that Schedule shall, until so repealed, have effect as if they formed part of this Act:

Provided that this repeal shall not affect any convention, Order in Council, rule, or table of fees having effect under any enactment so repealed, but any such convention, Order in Council, rule, or table of fees in force at the commencement of this Act shall continue in force, and may be repealed, altered or amended, as if it had been made under this Act.

(2) Except where otherwise expressly provided, this Act shall extend to all patents granted and all designs registered before the commencement of this Act, and to applications then pending, in substitution for such enactments as would have applied thereto if this Act had not been passed.

99. SHORT TITLE AND COMMENCEMENT.—This Act may be cited as the Patents and Designs Act, 1907, and shall, save as otherwise expressly provided, come into operation on the first day of January one thousand nine hundred and eight.

SCHEDULES.

FIRST SCHEDULE.

FEES ON INSTRUMENTS FOR OBTAINING PATENTS AND RENEWAL (s. 65).

(*a*) *Up to sealing.*

	£	*s.*	*d.*	£	*s.*	*d.*
On application for provisional protection	1	0	0			
On filing complete specification	3	0	0			
				4	0	0
or						
On filing complete specification with first application				4	0	0
On the sealing of the patent in respect of investigations as to anticipation				1	0	0

(*b*) *Further before end of four years from date of patent.*

On certificate of renewal				50	0	0

(*c*) *Further before end of eight years from date of patent.*

On certificate of renewal				100	0	0

7 EDWARD 7, CHAPTER 29.

Or in lieu of the fees of £50 and £100 the following annual fees:	£	s.	d.
Before the expiration of the fourth year from the date of the patent	10	0	0
" " " fifth " " "	10	0	0
" " " sixth " " "	10	0	0
" " " seventh " " "	10	0	0
" " " eighth " " "	15	0	0
" " " ninth " " "	15	0	0
" " " tenth " " "	20	0	0
" " " eleventh " " "	20	0	0
" " " twelfth " " "	20	0	0
" " " thirteenth " " "	20	0	0

SECOND SCHEDULE.

ENACTMENTS REPEALED (s. 98).

PART I.

Session and Chapter.	Short Title.	Extent of Repeal.
46 and 47 Vict. c. 57.	The Patents, Designs, and Trade Marks Act, 1883.	The whole Act, except subsections (5), (6), and (7) of section twenty-six, section twenty-nine, subsections (2) and (3) of section forty-seven, and section forty-eight.
48 and 49 Vict. c. 63.	The Patents, Designs, and Trade Marks (Amendment) Act, 1885.	The whole Act.
49 and 50 Vict. c. 37.	The Patents Act, 1886.	The whole Act.
51 and 52 Vict. c. 50.	The Patents, Designs, and Trade Marks Act, 1888.	The whole Act.
1 Edw. 7 c. 18.	The Patents Act, 1901.	The whole Act.
2 Edw. 7 c. 34.	The Patents Act, 1902.	The whole Act.
7 Edw. 7 c. 28.	The Patents and Designs (Amendment) Act, 1907.	The whole Act.

PART II.

Session and Chapter.	Short Title.	Extent of Repeal.
46 and 47 Vict. c. 57.	The Patents, Designs, and Trade Marks Act, 1883.	Subsections (5), (6), and (7) of section twenty-six, and section twenty-nine.

PART III.

Session and Chapter.	Short Title.	Extent of Repeal.
46 and 47 Vict. c. 57.	The Patents, Designs, and Trade Marks Act, 1883.	Subsections (2) and (3) of section forty-seven and section forty-eight.

CHAPTER XXX.

An Act to amend sections fifty-seven, fifty-eight, and fifty-nine of the Public Health (Scotland) Act, 1897, relating to the prevention of infectious diseases.

[28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PUBLIC HEALTH (SCOTLAND) AMENDMENT ACT, 1907.

1. Substitution of Precautionary for Prohibitory Provisions as to Infection.—(1) Section fifty-seven of the Public Health (Scotland) Act, 1897 (60 and 61 Vict. c. 38), shall be read as if the words "that proper precautions against spreading disease or infection have been taken, and that such child may attend school without the risk of infecting others" were substituted for the words "that such child has become free from disease and infection, and that the house and everything therein exposed to infection has been disinfected to the satisfaction of such medical officer or medical practitioner."

(2) Section fifty-eight of the said Act shall be read as if the words "shall (*a*) without proper precautions against spreading such disease or infection, milk any animal, or pick fruit, or engage in any occupation connected with food, or shall (*b*)" were substituted for the words "shall milk any animal, or pick fruit, or shall engage in any occupation connected with food, or"; and as if the words "or infection, and any person who knowingly" were substituted for the words "and any person who knowing himself to be suffering from any infectious disease."

(3) Section fifty-nine of the said Act shall be read as if the words "unless in every such case as aforesaid proper precautions have been taken against spreading such disease or infection; and any person contravening any of the foregoing provisions shall be liable to a penalty not exceeding ten pounds; and if without such precautions" were substituted for the words "and any person contravening any of the foregoing provisions shall be liable to a penalty not exceeding ten pounds; and if."

2. Short Title and Extent.—This Act shall apply to Scotland only, and may be cited as the Public Health (Scotland) Amendment Act, 1907; and the Public Health (Scotland) Act, 1897, and this Act may be cited collectively as the Public Health (Scotland) Acts, 1897 to 1907.

CHAPTER XXXI.

An Act to substitute a Statutory Declaration for the Certificate required under section two of the Vaccination Act, 1898, of Conscientious Objection. [28*th August* 1907.]

CHAPTER XXXII.

An Act to enable Regulations to be made for the Prevention of Danger arising to Public Health from the Importation, Preparation, Storage, and Distribution of Articles of Food. [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Power to make Regulations as to the Importation, Preparation, Storage, and Distribution of Articles of Food.—(1) The power of making regulations under the Public Health Act, 1896 (59 and 60 Vict c. 19), and the enactments mentioned in that Act, shall include the power of making regulations authorising measures to be taken for the prevention of danger arising to public health from the importation, preparation, storage, and distribution of articles of food or drink (other than drugs or water) intended for sale for human consumption, and, without prejudice to the generality of the powers so conferred, the regulations may—

(*a*) provide for the examination and taking of samples of any such articles;

(*b*) apply, as respects any matters to be dealt with by the regulations, any provision in any Act of Parliament dealing with the like matters, with the necessary modifications and adaptations;

(*c*) provide for the recovery of any charges authorised to be made by the regulations for the purposes of the regulations or any services performed thereunder.

(2) For the purposes of regulations made under this Act, articles commonly used for the food or drink of man shall be deemed to be intended for sale for human consumption unless the contrary is proved.

(3) In the application of this Act to Scotland, Part IV. of the Public Health

(Scotland) Act, 1897 (60 and 61 Vict. c. 38), shall be substituted for the Public Health Act, 1896.

2. Publication of Regulations.—All regulations made under this Act shall be laid as soon as may be before Parliament, and the Rules Publication Act, 1893 (56 and 57 Vict. c. 66), shall apply to such regulations as if they were statutory rules within the meaning of section one of that Act, and that Act as so applied shall, notwithstanding anything in subsection five of section one thereof, extend to Scotland, with the substitution of a reference to the Edinburgh Gazette for the reference to the London Gazette.

3. Short Title.—This Act may be cited as the Public Health (Regulations as to Food) Act, 1907.

CHAPTER XXXIII.

An Act to amend the Law relating to the capacity of Women to be elected and act as Members of County or Borough Councils. [28*th August* 1907.]

CHAPTER XXXIV.

An Act to continue various Expiring Laws. [28*th August* 1907.]

Whereas the Acts mentioned in the Schedule to this Act are, in so far as they are in force and are temporary in their duration, limited to expire on the thirty-first day of December nineteen hundred and seven:

And whereas it is expedient to provide for the continuance as in this Act mentioned of those Acts, and of the enactments amending or affecting the same:

And whereas by the Indian Railways Act Amendment Act, 1906 (6 Edw. 7 c. 9), section nine of the Indian Railways Act, 1894 (57 and 58 Vict. c. 12) (by which the duration of that Act was limited) was repealed, and it is expedient that the reference to that Act in the Schedule to the Expiring Laws Continuance Act, 1906 (6 Edw. 7 c. 51) should be repealed:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Continuance of Acts in Schedule.—(1) The Acts mentioned in the Schedule to this Act shall, to the extent specified in column three of that Schedule, be continued until the thirty-first day of December nineteen hundred and eight, and shall then expire, unless further continued.

(2) Any unrepealed enactments amending or affecting the enactments continued by this Act shall, in so far as they are temporary in their duration, be continued in like manner, whether they are mentioned in the Schedule to this Act or not.

(3) So much of the Expiring Laws Continuance Act, 1906, as refers to the Indian Railways Act, 1894, shall be repealed, and the Indian Railways Act Amendment Act, 1906, shall have effect as if the Expiring Laws Continuance Act, 1906, had never contained any reference to the Indian Railways Act, 1894.

2. Short Title.—This Act may be cited as the Expiring Laws Continuance Act, 1907.

EXPIRING LAWS CONTINUANCE ACT, 1907.

SCHEDULE.

1. Session and Chapter.	2. Short Title.	3. How far continued.	4. Amending Acts.
(1.) 3 and 4 Vict. c. 89.	The Poor Rate Exemption Act, 1840.	The whole Act.	——
(2.) 3 and 4 Vict. c. 91.	The Textile Manufactures (Ireland) Act, 1840.	The whole Act	5 and 6 Vict. c. 68. 30 and 31 Vict. c. 60.
(3.) 4 and 5 Vict. c. 30.	The Ordnance Survey Act, 1841.	The whole Act.	33 Vict. c. 13. 47 and 48 Vict. c. 43. 52 and 53 Vict. c. 30.
(4.) 10 and 11 Vict. c. 98.	The Ecclesiastical Jurisdiction Act, 1847.	As to the provisions continued by 21 and 22 Vict. c. 50.	——
(5.) 14 and 15 Vict. c. 104.	The Episcopal and Capitular Estates Act, 1851.	The whole Act.	17 and 18 Vict. c. 116. 21 and 22 Vict. c. 94. 22 and 23 Vict. c. 46. 23 and 24 Vict. c. 124. 31 and 32 Vict. c. 114, s. 10.
(6.) 17 and 18 Vict. c. 102.	The Corrupt Practices Prevention Act, 1854.	So much as is continued by the Corrupt and Illegal Practices Prevention Act, 1883.	26 and 27 Vict. c. 29, s. 6. 31 and 32 Vict. c. 125. 46 and 47 Vict. c. 51.
(7.) 26 and 27 Vict. c. 105.	The Promissory Notes Act, 1863.	The whole Act.	45 and 46 Vict. c. 61.
(8.) 27 and 28 Vict. c. 20.	The Promissory Notes (Ireland) Act, 1864.	The whole Act.	——
(9.) 28 and 29 Vict. c. 46.	The Militia (Ballot Suspension) Act, 1865.	The whole Act.	45 and 46 Vict. c. 49.
(10.) 28 and 29 Vict. c. 83.	The Locomotives Act, 1865.	The whole Act.	41 and 42 Vict. c. 58. 41 and 42 Vict. c. 77 (Part II.). 59 and 60 Vict. c. 36. 61 and 62 Vict. c. 29.
(11.) 29 and 30 Vict. c. 52.	The Prosecutions Expenses Act, 1866.	The whole Act.	——
(12.) 31 and 32 Vict. c. 125.	The Parliamentary Elections Act, 1868.	So much as is continued by the Corrupt and Illegal Practices Prevention Act, 1883.	42 and 43 Vict. c. 75. 46 and 47 Vict. c. 51.

7 EDWARD 7, Chapter 34.

1. Session and Chapter.	2. Short Title.	3. How far continued.	4. Amending Acts.
(13.) 32 and 33 Vict. c 21.	The Corrupt Practices Commission Expenses Act, 1869.	The whole Act.	34 and 35 Vict. c. 61.
(14.) 32 and 33 Vict. c. 56.	The Endowed Schools Act, 1869.	As to the powers of making schemes.	36 and 37 Vict. c. 87. 37 and 38 Vict. c. 87. 52 and 53 Vict. c. 40.
(15.) 33 and 34 Vict. c. 112.	The Glebe Loan (Ireland) Act, 1870.	The whole Act.	34 and 35 Vict. c. 100. 49 Vict. c. 6.
(16.) 34 and 35 Vict. c. 87.	The Sunday Observation Prosecution Act, 1871.	The whole Act.	——
(17.) 35 and 36 Vict. c. 33.	The Ballot Act, 1872.	The whole Act.	45 and 46 Vict. c. 50 (Municipal Elections).
(18.) 38 and 39 Vict. c. 84.	The Parliamentary Elections (Returning Officers) Act, 1875.	The whole Act.	46 and 47 Vict. c. 51, s. 32. 48 and 49 Vict. c. 62. 49 and 50 Vict. c. 57.
(19.) 39 and 40 Vict. c. 21.	The Jurors Qualification (Ireland) Act, 1876.	The whole Act.	57 and 58 Vict. c. 49. 61 and 62 Vict. c. 37, s. 69.
(20.) 41 and 42 Vict. c. 41.	The Parliamentary Elections Returning Officers Expenses (Scotland) Act, 1878.	The whole Act.	48 and 49 Vict. c. 62. 49 and 50 Vict. c. 58. 54 and 55 Vict. c. 49.
(21.) 43 Vict. c. 18.	The Parliamentary Elections and Corrupt Practices Act, 1880.	The whole Act.	46 and 47 Vict. c. 51.
(22.) 43 and 44 Vict. c. 42.	The Employers' Liability Act, 1880.	The whole Act.	6 Edw. 7 c. 58, s. 14.
(23.) 46 and 47 Vict. c 51.	The Corrupt and Illegal Practices Prevention Act, 1883.	The whole Act.	58 and 59 Vict. c. 40.
(24.) 47 and 48 Vict. c. 70.	The Municipal Elections (Corrupt and Illegal Practices) Act, 1884.	The whole Act.	56 and 57 Vict. c. 73.
(25.) 49 and 50 Vict. c. 29.	The Crofters Holdings (Scotland) Act, 1886.	As to the powers of the Commissioners for the enlargement of holdings, s. 22.	50 and 51 Vict. c. 24. 51 and 52 Vict. c. 63. 54 and 55 Vict. c. 41.

EXPIRING LAWS CONTINUANCE ACT, 1907.

1. Session and Chapter.	2. Short Title.	3. How far continued.	4. Amending Acts.
(26.) 51 and 52 Vict. c. 55.	The Sand Grouse Protection Act, 1888.	The whole Act.	——
(27.) 52 and 53 Vict. c. 40.	The Welsh Intermediate Education Act, 1889.	As to the powers of the joint education committee and the suspension of the powers of the Charity Commissioners.	53 and 54 Vict. c. 60.
(28.) 58 and 59 Vict. c. 21.	The Seal Fisheries (North Pacific) Act, 1895.	The whole Act.	——
(29.) 59 Vict. c. 1.	The Local Government (Elections) Act, 1896.	The whole Act.	——
(30.) 59 and 60 Vict. c. 48.	The Light Railways Act, 1896.	As to the powers of the Light Railway Commissioners.	——
(31.) 61 and 62 Vict. c. 49.	The Vaccination Act, 1898.	The whole Act.	——
(32.) 2 Edw. 7 c. 18.	The Licensing (Ireland) Act, 1902.	The whole Act.	——
(33.) 3 Edw. 7 c. 36.	The Motor Car Act, 1903.	The whole Act.	——

CHAPTER XXXV.

An Act to amend the Law as to the Council of India. [28*th August* 1907.]

CHAPTER XXXVI.

PUBLIC WORKS LOANS ACT, 1907.

[7 Edw. 7. Ch. 36.]

ARRANGEMENT OF SECTIONS.

Section.
1. Grants for public works.
2. Certain debts not to be reckoned as assets of local loans fund.
3. Transfer of volunteer corps mortgages from Commissioners to Secretary of State.
4. Public loan to Jamaica.
5. Public loan to Nigeria.
6. Extension of period for repayment of former loans under the Labourers (Ireland) Acts.
7. Transfer to Commissioners of Public Works in Ireland of powers of Public Works Loan Commissioners to make loans to harbour authorities in Ireland.
8. Amendment as to loans for planting in Ireland.
9. Remission of certain claims against Cullen Harbour Commissioners.
10. Short title.
SCHEDULES.

7 EDWARD 7, Chapter 36.

CHAPTER XXXVI.

An Act to grant Money for the purpose of certain Local Loans out of the Local Loans Fund, and for other purposes relating to Local Loans. [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Grants for Public Works.—(1) For the purpose of local loans there may be issued by the National Debt Commissioners the following sums, namely:—

(*a*) For the purpose of loans by the Public Works Loan Commissioners any sum or sums not exceeding in the whole the sums of three million pounds;

(*b*) For the purpose of loans by the Commissioners of Public Works in Ireland any sum or sums not exceeding in the whole the sum of seven hundred thousand pounds.

(2) The sums so issued shall be issued during a period ending on the day on which a further Act granting money for the purposes of those loans comes into operation and in accordance with the provisions of the National Debt and Local Loans Act, 1887 (50 and 51 Vict. c. 16).

2. Certain Debts not to be Reckoned as Assets of Local Loans Fund.—Whereas it is expedient that the principal of the several local loans specified in the First Schedule to this Act should, to the extent specified in the last column of that Schedule, not be reckoned as assets of the local loans fund established under the National Debt and Local Loans Act, 1887; therefore, the principal of the said loans shall to that extent be written off from the assets of the local loans fund, and the provisions to section fifteen of the said Act shall, so far as applicable, apply thereto.

3. Transfer of Volunteer Corps Mortgages from Commissioners to Secretary of State.—Whereas the Public Works Loan Commissioners have from time to time, under the powers conferred on them by the Military Lands Acts, 1892 to 1900, lent various sums of money to volunteer corps in England and Scotland upon the security of certain lands belonging to, and certain parliamentary grants payable to, those corps:

And whereas by an agreement dated the twenty-first day of March nineteen hundred and seven, and made between Robert Philpot, the secretary of the said Commissioners, of the one part, and the Secretary of State for the War Department of the other part (which agreement is hereinafter referred to as the English agreement and copies whereof have been deposited with the Clerk of the Parliaments and the Clerk of the House of Commons), the said Robert Philpot in consideration of the payment by the Secretary of State into the Bank of England to the credit of the Commissioners of the sum herein mentioned, being the total amount then due to the Commissioners for principal and interest in respect of the mortgages specified in the schedule to the English agreement, agreed upon the request of the Secretary of State to transfer to him those mortgages and the securities for the same:

And whereas by an agreement made between the same parties and executed by them on the sixteenth and nineteenth days respectively of March nineteen hundred and seven (which agreement is hereinafter referred to as the Scottish agreement and copies whereof have been deposited with the Clerk of the Parliaments and the Clerk of the House of Commons) the said Robert Philpot in consideration of the payment by the Secretary of State into the Bank of England to the credit of the Commissioners of the sum therein mentioned, being the total amount then due to the Commissioners for principal and interest in respect of the securities specified in the schedule to the Scottish agreement, bound himself and the Commissioners when called upon by the Secretary of State to transfer to him those securities:

And whereas it is expedient that the mortgages and securities specified in the respective schedules to the English and Scotch agreements and the several properties comprised in those mortgages and securities should become forthwith vested in the Secretary of State:

Therefore by virtue of this Act, and without any further assurance:—

PUBLIC WORKS LOANS ACT, 1907.

(1) The right of the Public Works Loan Commissioners to demand, sue for, and recover, and give receipts for the several sums secured by the mortgages and securities specified in the respective schedules to the English and Scottish agreements, and the benefit of all securities for those sums, and the benefit of and the right to sue on all covenants with the Commissioners, and the right to exercise all powers vested in the Commissioners under or by virtue of those mortgages and securities, shall become vested in the Secretary of State for the War Department for the time being absolutely; and

(2) The several properties comprised in the said mortgages and securities shall become vested in the Secretary of State for the War Department for the time being for all the estate and interest therein of the Commissioners, but subject to all rights of redemption now existing therein.

4. Public Loan to Jamaica.—(1) The Treasury may advance by way of loan to the Government of Jamaica, for the purpose of restoring, replacing, or improving public and other buildings damaged by the recent earthquake and subsequent fire in the colony or purchasing sites for new buildings to replace the same, or for the purpose of making loans to persons within the colony on such security and terms of repayment as may be authorised by the Legislature of the colony for the purposes of restoring or replacing buildings so damaged, or in other ways repairing the loss and damage caused by the earthquake and fire, any sums not exceeding in the whole eight hundred thousand pounds.

(2) The advance shall bear interest at the rate for the time being applicable to loans made out of the Local Loans Fund on the security of local rates in England.

(3) The provisions of the Colonial Loans Act, 1899 (62 and 63 Vict. c. 36), set out in the Second Schedule to this Act, shall apply with respect to the advance authorised by this section as if they were herein re-enacted.

5. Public Loan to Nigeria.—(1) The Treasury may advance by way of loan to the Government of Southern Nigeria, for the purpose of constructing and improving railway and other communication in Southern and Northern Nigeria, any sums not exceeding in the whole two million pounds.

(2) The advance shall bear interest at the rate for the time being applicable to loans made out of the Local Loans Fund, on the security of local rates in England.

(3) The provisions of the Colonial Loans Act, 1899 (62 and 63 Vict. c. 36), set out in the Second Schedule to this Act shall apply with respect to the advance authorised by this section as if they were herein re-enacted, but with the substitution in paragraph (*b*) of subsection (1) of section two as set out in the said schedule of the words "charges not existing at the date of the passing of this Act" for the words "subsequent charges."

6. Extension of Period for Repayment of Former Loans under the Labourers (Ireland) Acts.—(1) The period for the repayment of any loan made by the Commissioners of Public Works in Ireland under the Labourers (Ireland) Acts, 1883 to 1903, to rural district councils shall be extended by a period of eighteen and a half years, and the annual sum to be paid on account of the repayment of the outstanding principal of the loan and interest shall be re-calculated accordingly in accordance with regulations made by the Treasury for the purpose, and the payments to be made on the first day of May one thousand nine hundred and eight and thereafter in respect of that annual sum, shall be made on the basis of the sum as so re-calculated.

(2) Where any sums advanced by the Commissioners under the Labourers (Ireland) Acts, 1883 to 1903, have been issued by more than one instalment, the several instalments shall, for the purposes of this section, be treated as one advance, and the date from which the period for repayment is to be calculated for the purposes of this section shall be some convenient date fixed in accordance with regulations made by the Treasury, as nearly as may be midway between the gale day next after the issue of the first instalment and the gale day next after the issue of the last instalment.

(3) Nothing in this section shall affect the rate of interest on any such loan, nor prejudice any securities held by the Commissioners of Public Works in respect of the loan.

7. Transfer to Commissioners of Public Works in Ireland of Powers of Public Works Loan Commissioners to make Loans to Harbour Authorities in

Ireland.—The Power of the Public Works Loan Commissioners under Part I. of the Harbours and Passing Tolls, etc. Act, 1861 (24 and 25 Vict. c. 47), or any other Act, to make advances to harbour authorities shall, as regards advances to harbour authorities in Ireland, be transferred to the Commissioners of Public Works in Ireland, and, as respects any such advances, references in those Acts or in section seven of the Public Works Loans Act, 1882 (45 and 46 Vict. c. 62), or in any other Act or document to the Public Works Loan Commissioners, shall be construed as references to the Commissioners of Public Works in Ireland:

Provided that nothing in this section shall affect any loan made to a harbour authority in Ireland before the passing of this Act, or the powers and duties of the Public Works Loan Commissioners in relation thereto.

8. Amendment as to Loans for Planting in Ireland.—Planting, whether for shelter or for any other object, shall be a purpose for which loans may be made under the Landed Property Improvement (Ireland) Acts, and the words "for shelter" in section five of the Drainage and Improvement of Land (Ireland) Act, 1866 (29 and 30 Vict. c. 40), are hereby repealed.

9. Remission of Certain Claims against Cullen Harbour Commissioners.—Whereas the Public Works Loan Commissioners in the years eighteen hundred and eighty-six and eighteen hundred and eighty-seven advanced to the Cullen Harbour Commissioners, on the security of the harbour revenues, undertaking, and property, sums amounting to four thousand pounds towards defraying the cost of works authorised by the Cullen Harbour Order, 1884, the said loan being repayable with interest at the rate of three pounds fifteen shillings per cent. per annum within a period expiring on the fourth day of April nineteen hundred and twenty-seven:

And whereas the interest and instalments of principal due in respect of the loan were duly paid until the fourth day of October eighteen hundred and ninety-two, since which date the income of the harbour has proved insufficient to meet the payments due in respect of the loan, and there are now due to the Public Works Loan Commissioners arrears of interest which amounted on the thirty-first day of March last to one thousand four hundred and sixty-nine pounds five shillings and sixpence, while the principal outstanding amounts to three thousand six hundred and eighty-four pounds thirteen shillings and elevenpence:

And whereas repairs and improvements to the harbour are needed in order to render the accommodation adequate and safe, and the Cullen Harbour Commissioners are unable to raise the money for carrying out the necessary works as long as the said debt remains, and it is expedient that the said principal debt should be extinguished and the arrears of interest remitted:

Therefore the said principal debt so far as not repaid together with all claims for interest thereon shall be extinguished, and the amount thereof shall be deemed a free grant from Parliament.

10. Short Title.—This Act may be cited as the Public Works Loans Act, 1907.

SCHEDULES.

FIRST SCHEDULE (s. 2).

Part I.

Loan by the Public Works Loan Commissioners.

Advanced under the Harbours and Passing Tolls, etc. Act, 1861 (24 *and* 25 *Vict. c.* 47).

Name of Borrower.	Amount of Loan.	Amount to be written off from Local Loans Fund, and to be extinguished.
	£	£ s. d.
Cullen Harbour Commissioners	4000	3684 13 11

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Part II.

Loans by the Commissioners of Public Works, Ireland.

(1) *Loans under the Landed Property Improvement (Ireland) Act*, 1847 (10 *Vict. c.* 32).

Name of Borrower.	Amount of Loan.	Amount to be written off from Local Loans Fund.
	£	£ s. d.
Daniel Ottley	300	99 19 3
	200	73 15 3

(2) *Loans under the Land Law (Ireland) Act*, 1881 (44 *and* 45 *Vict c.* 49, *s.* 31).

Rose Monahan	200	127 18 10
Patrick McTague	60	1 10 6
Thomas and Patrick Loughlin, now Garret Hagans	80	2 5 9
Edward Galligan	80	29 8 6
Eleanor Ryan	100	80 2 2
Edward McManus	40	8 10 0
Samuel Kennedy	100	70 9 9
John Brady	70	63 6 3
John Mallon	50	36 6 7
Murty O'Shea	65	44 1 3
Lacky McGloin	40	36 9 5

(3) *Loans under the Drainage and Improvement of Lands (Ireland) Act*, 1863 (26 *and* 27 *Vict. c.* 88).

Name of Proprietor.	Amount of Principal Charge.	Amount to be written off from Local Loans Fund.
	£ s. d.	£ s. d.
Mrs Martha Switzer	30 5 10	5 6 2
J. Ryan	28 10 9	15 14 2
The Parsonstown and Portumna Railway Company	18 10 5	15 18 2

(4) *Loan under the Drainage Maintenance Act*, 1866 (29 *and* 30 *Vict. c.* 49).

Thomas Beirne	4 0 3	4 0 3

Part III.

Loans by the Fishery Board for Scotland.

Loan under the Crofters Holdings (Scotland) Act, 1886 (49 *and* 50 *Vict. c.* 29).

Name of Borrower.	Fishery District.	Amount of Loan.	Amount to be written off from Local Loans Fund.
		£	£ s. d.
Benjamin McIver	Helmsdale	66	3 15 7

7 EDWARD 7, Chapter 36.

SECOND SCHEDULE (ss. 4 and 5).

Provisions of Colonial Loans Act, 1899, Applied.

1. Power to make Advances to Certain Colonies and Places.—(1) . . . . . .

(2) The advances authorised by this Act shall be local loans within the meaning of the National Debt and Local Loans Act, 1887 (50 and 51 Vict. c. 16), and that Act shall apply accordingly.

(3) Every such advance . . . . . shall be repaid within such period (not exceeding fifty years from the date thereof) as the Treasury and the Secretary of State determine in each case, and either by means of equal instalments of principal, or by means of an annuity of principal and interest combined as may be similarly determined.

2. Security for Loan.—(1) An advance shall not be made in pursuance of this Act until the legislative authority of the colony or place to the Government of which the advance is to be made have provided to the satisfaction of the Treasury and the Secretary of State—

(*a*) for raising and appropriating and duly applying the loan ;

(*b*) for charging on the general revenues and assets of the colony, with priority over any subsequent charges, the principal of the loan ; and

(*c*) for so charging and also for remitting to the Treasury in such manner as the Treasury determine—

(i) such yearly or half-yearly payments on account of the interest on, and the repayment of the principal of, the loan as the Treasury fix ; and

(ii) interest at such rate as the Treasury fix on any such payment in arrear ; and

(*d*) for raising or securing the raising of sufficient revenue to meet the above charges.

(2) Every Act or ordinance of the legislative authority of the colony or place which in any way impairs the validity or priority of any such charge or diminishes the revenue to be raised as above mentioned shall, so far as it impairs or diminishes the same, be void unless the consent of the Treasury and the Secretary of State has been previously obtained.

CHAPTER XXXVII.

An Act to Authorise the Treasury to guarantee the payment of a Loan to be raised by the Colony of the Transvaal. [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. Power to Treasury to Guarantee Transvaal Loan.—(1) The Treasury may, subject to the provisions of this Act, guarantee in such manner as they think fit the payment of the interest on any loan raised by the Colony of the Transvaal for the purposes set out in the First Schedule to this Act, not exceeding in the aggregate an amount of stock sufficient to raise five million pounds, or stock of a nominal amount of five million pounds, whichever is least, and also the sinking fund payments for the repayment of the principal of the loan as fixed in accordance with this Act.

(2) Subsections (2) to (6) of section one of the South African Loan and War Contribution Act, 1903 (3 Edw. 7 c. 27), which are set out in the Second Schedule to this Act, with the modifications shown in that schedule, shall apply, with respect to the guarantee, and the raising of the loan under this Act, as if they were herein re-enacted.

(3) The Treasury may guarantee the payment of sums secured by any Transvaal Treasury bills, or other securities which may be issued with their approval by the Governor of the Colony of the Transvaal, for the purpose of temporarily raising any sums in anticipation of the loan in the same manner as they may guarantee the interest on and the sinking fund payments for the loan, and the provisions of this section shall apply with respect to any such guarantee accordingly.

2. Short Title.—This Act may be cited as the Transvaal Loan (Guarantee) Act, 1907.

SCHEDULES.

FIRST SCHEDULE (s. 1).

	£
1. Land and agricultural bank	2,500,000
2. Railways, public works, irrigation, agricultural settlement, and development, and any expenses of and incidental to the issue of the loan .	The balance.

SECOND SCHEDULE (s. 1).

SUBSECTIONS (2) TO (6) OF SECTION 1 OF THE SOUTH AFRICAN LOAN AND WAR CONTRIBUTION ACT, 1903.*

1. (1) . . . . . .

. . . . . .

(2) POWER TO TREASURY TO GUARANTEE LOANS.—A guarantee shall not be given in pursuance of this Act until the Government of the Transvaal have provided to the satisfaction of the Treasury and the Secretary of State—

(*a*) for raising, appropriating, and duly applying the loan for the purposes and in the manner set out in the *First* Schedule to this Act, subject to any arrangements which may be made for the application of savings on one head of expenditure to another head of expenditure :

(*b*) for the establishment and regulation of a sinking fund for the purpose of the repayment within a period not exceeding fifty years from the *first day of July nineteen hundred and eight* of the principal of the loan :

(*c*) for charging on the general revenues and assets of the colony or on any other revenues or assets which may be made available for the purpose, with priority over any charges not existing at the date of the passing of this Act, the principal and interest of the loan and any sinking fund payments for the repayment of the principal of the loan :

(*d*) for charging on the general revenues and assets of the colony immediately after the last-mentioned charge the repayment to the Treasury of any sum issued out of the Consolidated Fund under this Act on account of the guarantee of the loan, with interest thereon at the rate of four per cent. per annum :

(*e*) for raising or securing the raising of sufficient money to meet the above charges.

(3) If any loan guaranteed under this Act is raised by stock to which the Colonial Stock Act, 1877 (40 and 41 Vict. c. 59) applies, section nineteen of that Act shall not apply.

(4) Every Act or Ordinance of the Legislature of the Transvaal which in any way impairs the validity or priority of any such charge shall, so far as it impairs the same, be void unless the consent of the Treasury and the Secretary of State has been previously obtained.

(5) Any sums required by the Treasury for fulfilling their guarantee given under this Act shall be charged on and issued out of the Consolidated Fund or the growing produce thereof, and any sums paid on account of the repayment of any amount so issued out of the Consolidated Fund shall be paid into the Exchequer.

(6) The Treasury shall lay before both Houses of Parliament a statement of any guarantee given under this Act, and an account of any sums issued out of the Consolidated Fund for the purpose of any such guarantee as soon as may be after any guarantee is so given or any sum is so issued.

* Modifications are shown in italics.

CHAPTER XXXVIII.

An Act to make provision with respect to the Disposal of Mining Rights under section thirteen of the Irish Land Act, 1903, *and to amend section fifty-four of that Act.*

[*28th August* 1907.]

7 EDWARD 7, Chapter 39.

CHAPTER XXXIX.

FACTORY AND WORKSHOP ACT, 1907.

[7 Edw. 7. Ch. 39.]

ARRANGEMENT OF SECTIONS.

Laundries.

Section.
1. Application of 1 Edw. 7 c. 22 to laundries.
2. Hours of employment of women and young persons in laundries.
3. Special regulations to be complied with in laundries.
4. Application of provisions as to domestic workshops.

Institutions.

5. Application of Factory and Workshop Acts to certain institutions.

Supplemental.

6. Inspection of certain premises.
7. Short title, construction, commencement, and repeal.

CHAPTER XXXIX.

An Act to amend the Factory and Workshop Act, 1901, *with respect to Laundries, and to extend that Act to certain Institutions and to provide for the inspection of certain premises.* [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Laundries.

1. Application of 1 Edw. 7 c. 22 to Laundries.—The Factory and Workshop Act, 1901 (which Act, as amended by any subsequent enactment, including this Act, is hereinafter referred to as the principal Act), shall, subject to the provisions of this Act, apply to laundries as if at the end of Part II. of the Sixth Schedule to that Act, enumerating non-textile factories and workshops, the following paragraph were added :—

"(29) Laundries carried on by way of trade or for the purpose of gain, or carried on as ancillary to another business or incidentally to the purposes of any public institution."

2. Hours of Employment of Women and Young Persons in Laundries.—(1) In laundries, other than laundries ancillary to a business carried on in any premises which, apart from the provisions of this Act, are a factory or workshop,—

(*a*) The period of employment of women may on any three days in the week, other than Saturday, begin at six o'clock in the morning and end at seven o'clock in the evening, or begin at seven o'clock in the morning and end at eight o'clock in the evening, or begin at eight o'clock in the morning and end at nine o'clock in the evening.

Provided that a corresponding reduction is made in the periods of employment on other days of the week, so that the total number of hours of the periods of employment of women, including the intervals allowed for meals, shall not exceed sixty-eight in any one week ;

(*b*) Where the occupier of a laundry so elects, the following provisions shall apply to the laundry in lieu of the provisions of the last preceding paragraph :—

The period of employment of women may, on not more than four days, other than Saturday, in any one week, and on not more than sixty days in any calendar year, begin at six o'clock in the morning and end at seven o'clock in the evening, or begin at seven o'clock in the morning and end

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at eight o'clock in the evening, or begin at eight o'clock in the morning and end at nine o'clock in the evening;

(*c*) Different periods of employment may be fixed for different days of the week.

(2) The foregoing provisions of this section shall be deemed to be special exceptions within the meaning of section sixty of the principal Act, but it shall not be lawful for the occupier of a laundry to change from the system of employment under the above paragraph (*a*) to the system of employment under the above paragraph (*b*), or vice versâ, oftener than once a year. The entry required to be made in the prescribed register by subsection four of the said section sixty as so applied shall, in the case of overtime employment under paragraph (*b*), be made before the commencement of the overtime employment on each day on which it is intended that there should be such employment, and, in reckoning the sixty days for the purposes of paragraph (*b*), every day on which any woman had been employed overtime shall be taken into account.

(3) Subject as aforesaid, the provisions of the principal Act as to hours of employment shall apply to laundries.

3. Special Regulations to be Complied with in Laundries.—In every laundry—

(*a*) If mechanical power is used, a fan or other efficient means shall be provided, maintained, and used for regulating the temperature in every ironing room, and for carrying away the steam in every washhouse;

(*b*) All stoves for heating irons must be sufficiently separated from any ironing room or ironing table, and gas irons emitting any noxious fumes must not be used; and

(*c*) The floors must be kept in good condition and drained in such manner as will allow the water to flow off freely.

A laundry in which there is a contravention of any of these provisions shall be deemed to be a factory or workshop not kept in conformity with the principal Act.

4. Application of Provisions as to Domestic Workshops.—Subsection (2) of section one hundred and fourteen of the principal Act (which provides that certain domestic workshops are not to be deemed workshops within the meaning of that Act) shall apply to laundries as if for the words "the altering, repairing, ornamenting, or finishing of any article" there were substituted the words "the altering, repairing, ornamenting, washing, cleaning, or finishing of any article."

Institutions.

5. Application of Factory and Workshop Acts to Certain Institutions.—(1) Where in any premises forming part of an institution carried on for charitable or reformatory purposes, and not being premises subject to inspection by or under the authority of any Government Department, any manual labour is exercised in or incidentally to the making, altering, repairing, ornamenting, finishing, washing, cleaning, or adapting for sale, of articles not intended for the use of the institution, the provisions of the principal Act shall, subject to the provisions of this Act, apply to those premises notwithstanding that the work carried on therein is not carried on by way of trade or for the purposes of gain, or that the persons working therein are not working under a contract of service or apprenticeship.

(2) If in any institution to which this section applies the persons having the control of the institution (hereinafter referred to as the managers) satisfy the Secretary of State that the only persons working therein are persons who are inmates of and supported by the institution, or persons engaged in the supervision of the work or the management of machinery, and that such work as aforesaid is carried on in good faith for the purposes of the support, education, training, or reformation of persons engaged in it, the Secretary of State may by order direct that so long as the order is in force the principal Act shall apply to the institution subject to the following modifications:—

(*a*) The managers may submit for the approval of the Secretary of State a scheme for the regulation of the hours of employment, intervals for meals, and holidays of the workers, and of the education of children, and, if the Secretary of State is satisfied that the provisions of the scheme are not less favourable than the corresponding provisions of the principal Act, the Secretary of State may approve the scheme, and upon the scheme being so approved the princi-

pal Act shall, until the approval is revoked, apply as if the provisions of the scheme were substituted for the corresponding provisions of the principal Act; any scheme when so approved shall be laid as soon as possible before both Houses of Parliament, and if either House, within the next forty days after such scheme has been laid before that House, resolve that the scheme ought to be annulled, the scheme shall, after the date of the resolution, be of no effect without prejudice to the validity of anything done in the meantime thereunder, or to the making of any new scheme;

(*b*) The medical officer of the institution (if any) may, on the application of the managers, be appointed by the chief inspector of factories to be the certifying surgeon for the institution;

(*c*) The provisions of section one hundred and twenty-eight of the principal Act as to the affixing of an abstract of the principal Act and of notices shall not apply, but amongst the particulars required to be shown in the general register there shall be included the prescribed particulars of the scheme, or where no scheme is in force the prescribed particulars as to hours of employment, intervals for meals, and holidays, and education of children, and other matters dealt with in the principal Act;

(*d*) In the case of premises forming part of an institution carried on for reformatory purposes, if the managers of the institution so give notice to the chief inspector of factories, an inspector shall not, without the consent of the managers or of the person having charge of the institution under the managers, examine an inmate of the institution save in the presence of one of the managers or of such person as aforesaid:

Provided that the Secretary of State, on being satisfied that there is reason to believe that a contravention of the principal Act is taking place in any such institution, may suspend the operation of this provision as respects that institution to such extent as he may consider necessary;

(*e*) The managers shall not later than the fifteenth day of January in each year send to the Secretary of State a correct return in the prescribed form, specifying the names of the managers and the name of the person (if any) having charge of the institution under the managers, and such particulars as to the number, age, sex, and employment of the inmates and other persons employed in the work carried on in the institution as the Secretary of State may require, and shall, if any requirement of this paragraph is not complied with, be liable to a fine not exceeding five pounds.

Supplemental.

6. Inspection of Certain Premises.—Where in any premises which are subject to inspection by or under the authority of any Government Department any manual labour is exercised, otherwise than for the purposes of instruction, in or incidental to the making, altering, repairing, ornamenting, finishing, washing, cleaning, or adapting for sale, of any article, and the premises do not constitute a factory or workshop by reason that the work carried on therein is not carried on by way of trade or for the purposes of gain, or by reason that the persons employed in the work are not working under a contract of service or apprenticeship, the Secretary of State may arrange with the department that the premises shall, as respects the matters dealt with by the principal Act, be inspected by an inspector appointed under that Act, and where such an arrangement is made, inspectors appointed under the principal Act shall have, as respects such matters as aforesaid, the like right of entry and inspection as is conferred on inspectors of the department concerned.

7. Short Title, Construction, Commencement, and Repeal.—(1) This Act may be cited as the Factory and Workshop Act, 1907, and shall be construed as one with the Factory and Workshop Act, 1901; and the Factory and Workshop Act, 1901, and this Act may be cited together as the Factory and Workshop Acts, 1901 and 1907.

(2) This Act shall come into operation on the first day of January one thousand nine hundred and eight.

(3) Section one hundred and three of the Factory and Workshop Act, 1901, is hereby repealed.

NOTIFICATION OF BIRTHS ACT, 1907.

CHAPTER XL.

An Act to provide for the early Notification of Births. [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. Provisions for the earlier Notification of Births.—The provisions of this section shall have effect in the area of any local authority in which this Act is adopted by that authority in accordance with the provisions of this Act—

(1) In the case of every child born in an area in which this Act is adopted it shall be the duty of the father of the child, if he is actually residing in the house where the birth takes place at the time of its occurrence, and of any person in attendance upon the mother at the time of, or within six hours after, the birth, to give notice in writing of the birth to the medical officer of health of the district in which the child is born, in manner provided by this section.

(2) Notice under this section shall be given by posting a prepaid letter or postcard addressed to the medical officer of health at his office or residence, giving the necessary information of the birth within thirty-six hours after the birth, or by delivering a written notice of the birth at the office or residence of the medical officer within the same time; and the local authority shall supply without charge addressed and stamped postcards containing the form of notice to any medical practitioner or midwife residing or practising in their area, who applies for the same.

(3) Any person who fails to give notice of a birth in accordance with this section shall be liable on summary conviction to a penalty not exceeding twenty shillings: Provided that a person shall not be liable to a penalty under this provision if he satisfies the court that he had reasonable grounds to believe that notice had been duly given by some other person.

(4) The notification required to be made under this Act shall be in addition to and not in substitution for the requirements of any Act relating to the registration of births; and any registrar of births and deaths whose sub-district or any part thereof is situate within any area in which this Act is adopted shall at all reasonable times have access to notices of births received by the medical officer of health under this Act, or to any book in which those notices may be recorded, for the purpose of obtaining information concerning births which may have occurred in his sub-district.

(5) This section shall apply to any child which has issued forth from its mother after the expiration of the twenty-eighth week of pregnancy, whether alive or dead.

(6) Any expenses incurred by a local authority in the execution of this Act shall be paid as part of the expenses of that authority in the execution of the Acts relating to public health, and in the case of a rural district council shall be paid as general expenses.

2. Adoption of Act, and Definition of Local Authority.—(1) A local authority may by resolution adopt this Act in their area, and the provisions set out in the schedule to this Act shall have effect with respect to the resolution of adoption.

(2) A resolution of adoption shall not take effect until the consent of the Local Government Board has been obtained thereto.

(3) It shall be the duty of any local authority by whom this Act is adopted, as soon as the consent of the Local Government Board is given to the resolution of adoption, to bring the provisions of this Act to the attention of all medical practitioners and midwives practising in their area.

(4) In this Act, the expression "local authority" means the council of a borough (including the council of a metropolitan borough and the mayor, aldermen, and commons of the city of London in common council assembled), and the council of an

urban or a rural district, and the council of a county (other than the county of London) who may adopt the Act either for their whole county or for any county district therein:

Provided that—

(*a*) where the Act is adopted by the council of a county the county medical officer of health shall be substituted for the medical officer of health of the district, and the expenses of the execution of the Act shall be paid as general county expenses or special county expenses, as the case requires; and

(*b*) if, where the Act has been adopted by the council of a county for any county district, the council of the district, or, where the Act has been adopted by the council of a county district for their district, the council of the county, subsequently apply to the Local Government Board to be made the authority for the purposes of this Act, the Board may, if they think fit, make an order declaring that the Act shall take effect as if it had been adopted by the council of the county district instead of the council of the county, or by the council of the county instead of the council of the county district, as the case may be, and on any such order being made the Act shall take effect in accordance with the order.

(5) In London, the medical officer of health of every metropolitan borough (including the city of London) in which this Act is in force for the time being shall send weekly to the London County Council, in a form prescribed by the Local Government Board, a list of all notices of birth received by him under this Act during the past week.

3. Power of Local Government Board to put Act in Force in the Area of any Local Authority.—The Local Government Board may by order declare that this Act shall be in force in the area of any local authority who have power to adopt the Act, although it has not been so adopted, if they think it expedient, having regard to the circumstances of the area, and in that case the order of the Local Government Board shall have the same effect for the purpose as a resolution of adoption duly passed by the local authority of the area and assented to by the Local Government Board.

4. Application to Scotland.—In the application of this Act to Scotland—

(1) The expression "Local Government Board" means the Local Government Board for Scotland;

(2) The expression "sub-district" means parish or district;

(3) The expression "local authority" and the expression "council" mean the local authority under the Public Health (Scotland) Act, 1897 (60 and 61 Vict. c. 38), and subsection four of section two shall not apply;

(4) An offence may be tried before the sheriff or before any magistrate of a royal, parliamentary, or police burgh officiating under the provisions of any local or general Police Act; and an offender failing to make payment of a penalty shall be liable to imprisonment in terms of the Summary Jurisdiction Acts.

5. Application to Ireland.—In the application of this Act to Ireland, the Local Government Board for Ireland shall be substituted for the Local Government Board, and the expression "sub-district" means a registrar's district under the Acts relating to the registration of births.

6. Short Title.—This Act may be cited as the Notification of Births Act, 1907.

SCHEDULE.

Resolution of Adoption (s. 2).

1. A resolution of adoption must be passed at a meeting of the council.

2. One calendar month at least before the meeting of the council special notice of the meeting and of the intention to propose the resolution shall be given to every member of the council.

3. A resolution of adoption after being passed shall be published by advertisement in some one or more newspapers circulating within the area of the council by whom the resolution

is passed, and otherwise in such manner as the council thinks sufficient for giving notice thereof to all persons interested.

4. A copy of the resolution of adoption shall be sent to the Local Government Board.

5. The resolution of adoption shall come into operation at such time, not less than one month after the first publication of the advertisement, as may be fixed by the Local Government Board.

CHAPTER XLI.

WHALE FISHERIES (SCOTLAND) ACT, 1907.

[7 Edw. 7. Ch. 41.]

ARRANGEMENT OF SECTIONS.

Section.
1. Prohibition of exercise of whaling industry without licence.
2. Licences may be granted by Fishery Board for Scotland on certain conditions.
3. Offences by holder of licence and others.
4. Inspection of whaling factories, etc.
5. Saving for certain whales and whaling industries.
6. Penalties.
7. Local inquiry.
8. Definition.
9. Application, commencement, and short title.

CHAPTER XLI.

An Act to regulate Whale Fisheries in Scotland. [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Prohibition of Exercise of Whaling Industry without Licence.—No person shall in any part of Scotland land any whale, or engage in any way in the manufacture from whales of oil or other primary products, without a licence granted and issued subject to the conditions hereinafter provided, and any person acting in contravention of this section shall be liable on summary conviction to a penalty not exceeding five hundred pounds.

2. Licences may be Granted by Fishery Board for Scotland on certain Conditions.—It shall be lawful for the Fishery Board for Scotland (in this Act referred to as the Board) to issue licences under this Act, subject to the following conditions:—

(1) A person applying to the Board for a licence shall, at least two months before making such application, publish notice thereof once in each of two consecutive weeks with an interval between each publication of not less than six days in one or more newspaper or newspapers circulating in the district in which the factory or station existing or to be erected is situate:

Such notice shall state the name and address of the applicant, and shall contain a description of the site or intended site of the factory or station where the process of manufacture as aforesaid is to be conducted:

(2) It shall be lawful for the local authority under the Public Health (Scotland) Act, 1897 (60 and 61 Vict. c. 38), or for any persons interested, within fourteen days after the publication of such notice as aforesaid to lodge with the Board objections to the granting of any such licence, and the Board shall consider any such objections, and, after such inquiry, if any, as they may think necessary, shall grant or refuse such licence:

(3) Each licence shall contain a description of the site of the factory or station erected or proposed to be erected as aforesaid, and no such factory or station shall be removed from the site in the said licence described to any other site, unless and until such other site shall have been approved by the Board, and their approval shall have been endorsed on the licence:

(4) Subject as hereinafter mentioned the holder of a licence shall not use or employ

more than one whaling steamer; provided that the Board shall, on the application of any person who before the first day of January one thousand nine hundred and seven has erected a factory or station for the prosecution of the whaling industry, authorise such person, by special permission endorsed on his licence, to use or employ not more than three additional whaling steamers, when the Board, after due inquiry, are satisfied that such additional steamer or steamers are necessary for the full and proper working of such factory or station as it existed at that date:

(5) No licence shall be granted except to a British subject or to a Company registered in Great Britain. Provided that this subsection shall not apply to the case of a person who has erected a factory or station for the prosecution of the whaling industry before the date mentioned in the immediately preceding subsection:

(6) The Board may at any time, on the application of the holder of a licence, cancel the licence, or in the case of the holder of a licence endorsed with a special permission, vary the number of whaling steamers (but in no case to exceed four) the use of which is authorised thereby; but it shall not be lawful to transfer or assign any licence without the consent of the Board, and any transfer or assignment shall be endorsed upon the licence:

(7) There shall be paid to the Board in respect of every licence issued under the provisions of this Act a sum of one hundred pounds for each whaling steamer the use of which is authorised thereby, and such sum shall be payable on the issue of the licence and thereafter annually during its continuance:

(8) Every licence shall be subject to all the conditions contained in this Act, and it shall be lawful for the Board, in the event of the infringement of any such condition by the holder of a licence, or of the conviction of such holder or any person employed by him of an offence under this Act, without compensation to cancel any licence or to suspend any licence for a specified period.

3. Offences by Holder of Licence and Others.—(1) No holder of a licence or person employed by him shall in the prosecution of the whaling industry use any vessel, other than the whaling steamer from or by which a whale shall have been captured or killed, for the purpose of bringing or towing such whale to or towards any factory or station for manufacture.

(2) Every whaling steamer employed by the holder of a licence shall carry such distinctive mark as the Board, with the consent of the Board of Trade, may from time to time prescribe, and such mark shall be specified in the licence.

(3) No holder of a licence or person employed by him shall use, in the pursuit or capture of whales, any method or contrivance which does not include a harpoon with a whaling line attached thereto, and fixed or fastened to the whaling steamer from which the whale is captured or killed.

(4) No person shall pursue, kill, or shoot at any whale within three miles of low-water mark of any part of the coast of Scotland, and no holder of a licence or person employed by him shall pursue, kill, or shoot at any whale within the distance of one mile from any boat or vessel lying at anchor or engaged in fishing.

(5) No holder of a licence or person employed by him shall kill or shoot any herring-hog whale, or any whale which is accompanied by a calf.

(6) No holder of a licence or person employed by him shall in any year pursue, kill, or shoot whales between the first day of November and the thirty-first day of March, both days inclusive, or pursue, kill, or shoot whales within a distance of forty miles from low-water mark of any part of the coast of Scotland within such limits and during such period, not exceeding in any case five weeks during the summer herring fishing, as the Board may from time to time prescribe.

(7) In this section the expression "mile" means a nautical mile.

(8) Any person acting in contravention of this section shall be guilty of an offence under this Act.

(9) Where a whale which has been lawfully shot at and struck shall carry with it a fixed line within an area prohibited in terms of this section, nothing in this

section contained shall make it unlawful to continue the pursuit of such whale and to kill it in such area.

4. Inspection of Whaling Factories, etc.—(1) The Board shall give every assistance in carrying out the provisions of this Act, and, where necessary, shall employ their officers to facilitate its execution, and may, with the consent of the Secretary for Scotland, provide for the inspection of the factories or stations and vessels employed by the holders of licences, and such holders of licences and all persons employed by them shall give all reasonable facilities for such inspection, and shall make such returns on any matter connected with their whaling business as the Board may from time to time prescribe, and if required by the Board shall verify such returns by statutory declaration.

(2) The expenses incurred in any year by the Board in the execution of this Act shall, to the amount approved by the Treasury, be paid out of moneys provided by Parliament.

5. Saving for certain Whales and Whaling Industries.—(1) Nothing in this Act contained shall make it unlawful for any person to drive ashore and appropriate, sell, or otherwise make use of the smaller whales known as bottle-nose and caa-ing whales, or to appropriate, sell, or otherwise make use of such whales as he may find dead, whether floating on the sea or stranded on the shore.

(2) Nothing in this Act contained shall make it unlawful for any person to pursue any of the whaling industries commonly followed in Arctic or Antarctic waters, or to engage in the manufacture of oil or other products from whales captured in the exercise of any such industry.

6. Penalties.—Any person guilty of an offence under this Act shall, save as otherwise provided, be liable on summary conviction to a penalty not exceeding one hundred pounds, and on failure to make payment of the penalty which may have been imposed immediately or within a specified period shall be liable to imprisonment in accordance with the provisions of the Summary Jurisdiction Acts. Every offence under this Act may be prosecuted in any sheriff court which the Board may declare by a notice under the hand of the Chairman of or the Secretary to the Board to the procurator-fiscal of such sheriff court to be the court nearest to the spot where the offence was committed, or otherwise the most convenient for the trial of the case.

7. Local Inquiry.—For the purposes of this Act subsection one of section ninety-three of the Local Government (Scotland) Act, 1889 (52 and 53 Vict. c. 50), respecting the holding of local inquiries shall apply as if it were enacted herein with the substitution of the Board for the Secretary for Scotland; provided that the nomination of a person to hold an inquiry shall be certified by writing under the hand of the Chairman of or the Secretary to the Board, and such person shall be paid his reasonable expenses and such remuneration as may be approved by the Treasury.

8. Definition.—In this Act the expression "whaling steamer" includes any ship used for the purpose of capturing or killing whales, whether propelled by steam power or otherwise.

9. Application, Commencement, and Short Title.—(1) This Act shall apply to Scotland only, and shall commence on the first day of January one thousand nine hundred and eight.

(2) This Act may be cited as the Whale Fisheries (Scotland) Act, 1907.

CHAPTER XLII.

An Act to provide for the payment to the Fishery Board for Scotland of the penalties or other moneys recovered in respect of illegal sea fishing in Scotland.

[28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Penalties and Moneys Recovered to be Paid to the Fishery Board.—From and after the first day of April nineteen hundred and eight all penalties recovered in any prosecution for using or attempting to use any method of fishing in contraven-

tion of the Sea Fisheries (Scotland) Amendment Act, 1885 (48 and 49 Vict. c. 70), the Herring Fishery (Scotland) Act, 1889 (52 and 53 Vict. c. 23), the Herring Fishery (Scotland) Act Amendment Act, 1890 (53 and 54 Vict. c. 10), or the Sea Fisheries Regulation (Scotland) Act, 1895 (58 and 59 Vict. c. 42), or of any Act amending any of the said Acts, or of any byelaw or regulation under any of such Acts, shall be transmitted to the King's and Lord Treasurer's Remembrancer, and the balance remaining after deduction of the expenses of prosecutions chargeable to Votes of Parliament shall be paid to the Fishery Board for Scotland, and all moneys so paid, and all moneys accruing to the Board from the sale of anything lawfully forfeited and sold in respect of such method of fishing as aforesaid, shall be applied for the purpose of subsection three of section two of the Local Taxation Account (Scotland) Act, 1898 (61 and 62 Vict. c. 56), or otherwise in aid of the expenses incurred or to be incurred under any statutory power from time to time vested in the Board, in such manner as the Board may, with the consent of the Secretary for Scotland, determine.

2. Short Title.—This Act may be cited as the Sea Fisheries (Scotland) Application of Penalties Act, 1907, and shall be read along with the Act or Acts under which procedings are taken, as the case may be.

CHAPTER XLIII.

An Act to make provision for the better administration by the Central and Local Authorities in England and Wales of the enactments relating to Education. [28*th August* 1907.]

CHAPTER XLIV.

An Act to provide for the Abolition of two Judgeships of the High Court in Ireland, and to reduce the Salary of the Lord Chancellor of Ireland, and for other purposes connected therewith. [28*th August* 1907.]

CHAPTER XLV.

An Act to render compulsory the Carrying of Lights by Vehicles at Night. [28*th August* 1907.]

CHAPTER XLVI.

An Act to apply the provisions of the Life Assurance Companies Acts, 1870 *to* 1872, *to companies carrying on the business of insuring Employers against liability to pay compensation or damages to workmen in their Employment.* [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Application of Acts.—(1) The provisions of the Life Assurance Companies Acts, 1870 to 1872, relating to life assurance companies established or commencing to carry on the business of life assurance within the United Kingdom after the passing of the Life Assurance Companies Act, 1870 (33 and 34 Vict. c. 61), shall apply to every company, whether established before or after the passing of this Act, which carries on within the United Kingdom the business of insuring employers against liability to pay compensation or damages to workmen in their employment, subject to such necessary modifications and adaptations as may be made therein by Order in Council:

Provided that—

(*a*) those provisions shall not apply—

(i) to any company which carries on such business as aforesaid as incidental only to the business of marine insurance by issuing marine policies, or policies in the form of marine policies covering such liability as aforesaid, as well as marine adventure or adventure analogous thereto; or

(ii) to an association of employers which satisfies the Board of Trade that it is carrying on business wholly or mainly for the purpose of the mutual insurance of its members either against liability to pay compensation or damages to workmen employed by them, or against that liability and against any other risk incident to their trade or industry; or

(iii) to a member of Lloyd's or any other association of underwriters approved by the Board of Trade, provided that he complies with the requirements set forth in the Schedule to this Act; and

(*b*) such of those provisions as relate to deposits shall not apply to any company which has commenced to carry on such business as aforesaid within the United Kingdom before the passing of this Act.

(2) Where money is paid into a county court under the provisions of the Schedule to this Act, the court shall (unless the court for special reason sees fit to direct otherwise) order the lump sum to be invested or applied, in the purchase of an annuity or otherwise, in such manner that the duration of the benefit thereof may, as far as possible, correspond with the probable duration of the incapacity.

(3) For the purposes of this section the expression "company" means any person or persons, corporate or unincorporate, not being registered under the Acts relating to friendly societies.

(4) In the application of this Act to Scotland the expression "county court" means sheriff court.

2. Short Title and Commencement.—This Act may be cited as the Employers' Liability Insurance Companies Act, 1907, and shall come into operation on such day as may be specified in an Order in Council under this Act.

SCHEDULE.

Requirements to be Complied with by Underwriters (s. 1).

1. Every underwriter shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under section one of the Life Assurance Companies Amendment Act, 1872, in relation to deposits made by life assurance companies. The sum so deposited shall so long as any liability under any policy issued by the underwriter remains unsatisfied be available solely to meet claims under such policies.

2. Where the person insured by any policy issued by an underwriter is liable to make a weekly payment to any workman during the incapacity of the workman, and the weekly payment has continued for more than six months, the liability therefor shall before the expiration of twelve months from the commencement of the incapacity be redeemed by the payment of a lump sum in accordance with paragraph (17) of the First Schedule to the Workmen's Compensation Act, 1906, and the underwriter shall pay the lump sum into the county court, and shall inform the court that the redemption has been effected in pursuance of the provisions of this Schedule.

3. The underwriter shall furnish every year to the Board of Trade a statement in such form as may be prescribed by the Board showing the extent and character of the employers' liability business effected by him.

4. For the purposes of this Schedule "policy" means a policy insuring any employer against liability to pay compensation or damages to workmen in his employment.

CHAPTER XLVII.

An Act to amend the Law relating to Marriage with a Deceased Wife's Sister.

[28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Marriage with a Deceased Wife's Sister not to be deemed Void as a Civil

Contract except in Certain Cases.—No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity: Provided always that no clergyman in holy orders of the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this Act had not been passed:

Provided also that when any minister of any church or chapel of the Church of England shall refuse to perform such marriage service between any persons who, but for such refusal, would be entitled to have the same service performed in such church or chapel, such minister may permit any other clergyman in holy orders in the Church of England, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

Provided also that in case, before the passing of this Act, any such marriage shall have been annulled, or either party thereto (after the marriage and during the life of the other) shall have lawfully married another, it shall be deemed to have become and to be void upon and after the day upon which it was so annulled, or upon which either party thereto lawfully married another as aforesaid.

2. Saving of Existing Rights and Interests.—No right, title, estate or interest, whether in possession or expectancy, and whether vested or contingent at the time of the passing of this Act, existing in, to, or in respect of, any dignity, title of honour, or property, and no act or thing lawfully done or omitted before the passing of this Act, shall be prejudicially affected nor shall any will be deemed to have been revoked by reason of any marriage heretofore contracted as aforesaid being made valid by this Act. And no claim by the Crown for duties leviable on or with reference to death, and before the passing of this Act due and payable, and no payment, commutation, composition, discharge, or settlement of account in respect of any duties leviable on or with reference to death before the passing of this Act duly made or given, shall be prejudicially affected by anything herein contained.

Nothing in this Act shall affect the devolution or distribution of the real or personal estate of any intestate, not being a party to the marriage, who at the time of the passing of this Act shall be and shall until his death continue to be a lunatic, so found by inquisition.

3. Saving for 20 and 21 Vict. c. 85, sect. 27.—(1) Nothing in this Act shall remove wives' sisters from the class of persons adultery with whom constitutes a right, on the part of wives, to sue for divorce under the Matrimonial Causes Act, 1857.

(2) Notwithstanding anything contained in this Act or the Matrimonial Causes Act, 1857, it shall not be lawful for a man to marry the sister of his divorced wife, or of his wife by whom he has been divorced, during the lifetime of such wife.

4. Liability of Clergyman to Ecclesiastical Censure.—Nothing in this Act shall relieve a clergyman in holy orders of the Church of England from any ecclesiastical censure to which he would have been liable if this Act had not been passed by reason of his having contracted or hereafter contracting a marriage with his deceased wife's sister.

5. Interpretation.—In this Act the word "sister" shall include a sister of the half-blood.

6. Short Title.—This Act may be cited as the Deceased Wife's Sister's Marriage Act, 1907.

CHAPTER XLVIII.

An Act to amend the Law relating to the capacity of Women to be elected and act as Members of County or Town Councils in Scotland. [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Provision as to Capacity of Women to be County or Town Councillors.—

QUALIFICATION OF WOMEN (SCOTLAND) ACT, 1907.

(1) A woman shall not be disqualified by sex or marriage for being elected or being a councillor of the council of any county or burgh in Scotland, but shall not—

(*a*) if elected as a councillor, by virtue of holding that office be eligible for election, or for acting, as a burgh magistrate, or as a judge in any police court, or as a member of a licensing court or court of appeal; or

(*b*) if elected as chairman of a county council or provost of a burgh, by virtue of holding or having held that office be a justice of the peace or burgh magistrate, or be eligible for election, or for acting, as a burgh magistrate, or as a judge in any police court: Provided that where a woman is elected as provost of a burgh the number of bailies to be elected in the burgh shall while she holds office as provost be one more than the number otherwise fixed by law, and any additional bailie so elected shall hold office for the period prescribed by the law regulating the office of burgh magistrate or bailie, subject to the provision that he shall in no case continue to hold office after the woman has ceased to hold office as provost.

(2) Subsection (1) of section nine of the Local Government (Scotland) Act, 1889 (52 and 53 Vict. c. 50), and the word "male" occurring in section twelve of the Town Councils (Scotland) Act, 1900 (63 and 64 Vict. c. 49), are hereby repealed.

2. Definitions.—In this Act the words "burgh" and "provost" have the meanings assigned to them in the Town Councils (Scotland) Act, 1900, and the word "county" does not include a county of a city.

3. Short Title and Extent.—This Act may be cited as the Qualification of Women (County and Town Councils) (Scotland) Act, 1907, and shall apply to Scotland only.

CHAPTER XLIX.

An Act to amend the Law with respect to Vaccination in Scotland by authorising a statutory declaration of conscientious objection. [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Statutory Declaration as to Conscientious Objection and Exemption from Penalties.—(1) No parent or other person shall be liable to any penalty under section seventeen or section eighteen of the Vaccination (Scotland) Act, 1863 (26 and 27 Vict. c. 108), if, within six months from the birth of the child he makes a statutory declaration that he conscientiously believes that vaccination would be prejudicial to the health of the child, and within seven days thereafter delivers the declaration to the registrar of the district in which such child was born and registered. A registrar to whom such a declaration is duly delivered shall not, so far as regards the child named therein, carry out the procedure as to intimation and transmission prescribed by the said sections in respect of the failure to transmit to him the certificate in those sections mentioned.

(2) A registrar shall keep such record of statutory declarations as may be prescribed by the Registrar-General, and shall furnish to any local authority executing the Public Health (Scotland) Act, 1897 (60 and 61 Vict. c. 38), within his district such periodical returns of statutory declarations as may be required of him and approved by the Local Government Board for Scotland, and for each declaration intimated in any such return he shall be paid by the local authority the sum of twopence, and the local authority shall provide the forms on which such returns are to be made and shall pay for their transmission by letter post.

(3) A registrar shall at any reasonable time allow searches to be made in such record of statutory declarations, and shall upon demand give a copy certificated under his hand of any entry therein on payment of the fee for a search and certificate respectively prescribed by section fifteen of the Vaccination (Scotland) Act, 1863.

(4) A statutory declaration made for the purposes of this Act shall be exempt from stamp duty.

(5) A statutory declaration for the purposes of this Act shall be made in the form set out in the schedule to this Act, or in a form to the like effect.

(6) In the application of this Act to a child born before the passing thereof there shall be substituted for the period of six months from the birth of the child the period of six months from the passing of this Act.

2. Short Title and Extent.—This Act shall apply to Scotland only, and may be cited as the Vaccination (Scotland) Act, 1907; and the Vaccination (Scotland) Act, 1863, and this Act shall be construed together as one Act, and may be cited collectively as the Vaccination (Scotland) Acts, 1863 to 1907.

SCHEDULE.

Form of Declaration.

I, *A. B.*, of , in the parish of , being the father [*or* mother, *or* person having the care, nurture, or custody] of a child named *C. D.*, who was born at on the day of 19 , do hereby solemnly and sincerely declare that I conscientiously believe that vaccination would be prejudicial to the health of the child, and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

Dated this day of 19 .

(Signed) *A. B.*

Declared before me at on day of 19 .

(Signed) *E. F.*,
A Justice of the Peace [*or* Magistrate *or* Judge Ordinary].

CHAPTER L.

COMPANIES ACT, 1907.

[7 Edw. 7. Ch. 50.]

ARRANGEMENT OF SECTIONS.

Prospectus and Allotment.

Section.
1. Obligations of companies where no prospectus is issued.
2. Amendment of 63 and 64 Vict. c. 48, s. 10.
3. Penalty for failure to file prospectus.
4. Simultaneous offer and allotment of shares and debentures.
5. Limitation of time for issue of certificates.
6. Filing of contracts of allotment of shares not payable in cash.

Issue of Shares at a Discount and Payment of Commissions.

7. Statement as to commissions and discounts.
8. Amendment of 63 and 64 Vict. c. 48, s. 8.

Payment of Interest out of Capital.

9. Power of company to pay interest out of capital in certain cases.

Mortgages and Charges.

10. Amendment of 63 and 64 Vict. c. 48, s. 14, as to registration of mortgages and charges.
11. Registration of enforcement of security.
12. Registration of secured debts created before 1st of January 1901.
13. Effect of floating charge.
14. Perpetual debentures.
15. Power to re-issue redeemed debentures in certain cases.
16. Specific performance of contract to subscribe for debentures.
17. Inspection of register of mortgages.
18. Right of debenture holders to inspect the register of debenture holders and to have copies of trust deed.

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Auditors; Balance Sheet; and Reports.

Section.
19. Auditors.
20. Application to Scotland of s. 26 of 25 and 26 Vict. c. 89 and s. 19 of 63 and 64 Vict. c. 48.
21. Filing of annual statement of affairs by limited companies.
22. Report by directors under 63 and 64 Vict. c. 48, s. 12.
23. Rights of preference shareholders, etc., as to receipt and inspection of reports, etc.

General Meeting, Etc.

24. Annual general meeting.
25. Poll.

Winding up.

26. Amendment of law as to voluntary winding up.
27. Rights of creditors in a voluntary winding up.
28. Reckoning of contingent liabilities on petition to wind up.
29. Winding-up order where company has no assets.
30. Amendment of 51 and 52 Vict. c. 62, and 52 and 53 Vict. c. 60.
31. Dissolution of companies.

Directors.

32. Power of court to grant relief in certain cases.
33. Contributions under 53 and 54 Vict. c. 64.
34. Qualification of director.

Requirements as to Companies established outside the United Kingdom.

35. Requirements as to companies established outside the United Kingdom.

Miscellaneous.

36. Validity of debentures to bearer in Scotland.
37. Definition of private company.
38. Application of 33 and 34 Vict. c. 104 to companies not being wound up.
39. Re-organisation of capital.
40. Exemption of life assurance companies from 25 and 26 Vict. c. 89, s. 44.
41. Filing of accounts of receivers and managers.
42. Revocation of licences under 30 and 31 Vict. c. 131, s. 23.
43. Interpretation of 46 and 47 Vict. c. 30.
44. Construction of s. 56 of 25 and 26 Vict. c. 89.
45. Extraordinary resolutions.
46. Signature of documents.
47. Annual Report by Board of Trade.
48. Penalty for improper use of word "Limited."
49. Prosecution of offences under Companies Acts.
50. Miscellaneous amendments of Companies Acts.
51. Repeal.
52. Short title, construction, and commencement.

Schedules.

CHAPTER L.

An Act to amend the Companies Acts, 1862 *to* 1900. [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Prospectus and Allotment.

1. Obligations of Companies where no Prospectus is Issued.—(1) A company which does not issue a prospectus on or with reference to its formation shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar a statement in lieu of prospectus, signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the First Schedule to this Act.

(2) Sections two, six, and eleven of the Companies Act, 1900 (63 and 64 Vict. c. 48), as amended by this Act, shall apply to companies which do not issue a prospectus inviting public subscription of their shares, subject to the modifications set out in the Second Schedule to this Act.

(3) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say):—

(*a*) the amount (if any) fixed by the memorandum or articles of association and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or

(*b*) if no amount is so fixed and named, then the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash,

has been subscribed and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

(4) Section five of the Companies Act, 1900, shall apply as if the foregoing provisions of this section were included amongst the foregoing provisions of that Act mentioned in the said section five.

(5) This section shall not apply to private companies as defined by this Act, or to any company which has alloted any shares or debentures before the commencement of this Act.

2. Amendment of 63 and 64 Vict. c. 48, s. 10.—(1) The following subsection shall be substituted for subsection one of section ten of the Companies Act, 1900:—

"(1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state—

"(*a*) the contents of the memorandum of association, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and

"(*b*) the number of shares, if any, fixed by the articles of association as the qualification of a director, and any provision in the articles of association as to the remuneration of the directors; and

"(*c*) the names, descriptions, and addresses of the directors or proposed directors; and

"(*d*) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted; and the amount, if any, paid on such shares; and

"(*e*) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which such shares or debentures have been issued or are proposed or intended to be issued; and

"(*f*) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of publication of the prospectus, and the amount payable in cash, shares, or debentures to the vendor, and, where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor; provided that, where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors; and

"(*g*) the amount (if any) paid or payable as purchase money in cash, shares, or

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debentures of any such property as aforesaid, specifying the amount (if any) payable for goodwill; and

"(*h*) the amount (if any) paid within the two preceding years or payable as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission; provided that it shall not be necessary to state the commission payable to sub-underwriters; and

"(*i*) the amount or estimated amount of preliminary expenses; and

"(*j*) the amount paid within the two preceding years or intended to be paid to any promoter and the consideration for any such payment; and

"(*k*) the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of publication of the prospectus; and

"(*l*) the names and addresses of the auditors (if any) of the company; and

"(*m*) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company; and

"(*n*) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively."

(2) The said section of the Companies Act, 1900, shall not apply to a circular or notice inviting existing members or debenture holders of the company to subscribe for shares or debentures of the company, whether with or without the right to renounce in favour of other persons, and accordingly in subsection four of that section for the words "for further shares or debentures" there shall be substituted the words "for shares or debentures of the company, whether with or without the right to renounce in favour of other persons."

3. Penalty for Failure to File Prospectus.—If a prospectus is issued without a copy thereof being filed for registration as required by section nine of the Companies Act, 1900, the company and every person who is knowingly a party to the issue of the prospectus shall on conviction be liable to a fine not exceeding five pounds for every day from the date of the issue of the prospectus until a copy thereof is so filed.

4. Simultaneous Offer and Allotment of Shares and Debentures.—The following provision shall be substituted for subsection four of section six of the Companies Act, 1900:—

"(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures, or the receipt of any money payable on application for debentures."

5. Limitation of Time for Issue of Certificates.—(1) Every company shall within two months after the allotment of any of its shares, debentures, or debenture stock, and within two months after the registration of the transfer of any such shares, debentures, or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures, or debenture stock otherwise provide.

(2) If default is made in complying with the requirements of this section, the company, and every director, manager, secretary, and other officer of the company who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding five pounds for every day during which the default continues.

6. Filing of Contracts of Allotment of Shares not Payable in Cash.—(1)

Where such a contract as is mentioned in paragraph (*b*) of subsection (1) of section seven of the Companies Act, 1900, is not reduced to writing, the company shall within the time limited in the said section file with the registrar the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing.

(2) Such particulars shall be deemed to be an instrument within the meaning of the Stamp Act, 1891 (54 and 55 Vict. c. 39), and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section twelve of that Act.

(3) The provisions of section seven of the Companies Act, 1900, imposing penaltie for default shall apply as if the requirement of this section were a requirement contained in that section.

(4) If default has been made in filing with the registrar within the time limited by section seven of the Companies Act, 1900, any document required to be filed by that section or this section, the company, or any person liable for the default, may apply to the court for relief, and the court, if satisfied that the omission to file the document was accidental or due to inadvertence or that it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such period as the court may think proper.

Issue of Shares at a Discount and Payment of Commissions.

7. Statement as to Commissions and Discounts.—The total amount of the sums paid by way of commission in respect of any shares or debentures or allowed by way of discount in respect of any debentures shall be stated in the summary made under section twenty-six of the Companies Act, 1862 (25 and 26 Vict. c. 89), next after the payment of the commission or the allowance of the discount, and the total amount thereof, or so much thereof as has not been written off, shall be stated in every balance sheet until the whole amount thereof has been written off.

8. Amendment of 63 and 64 Vict. c. 48, s. 8.—(1) For removing doubts it is hereby declared that a vendor to, promoter of, or other person who receives payment in money or shares from, a company has, and always has had, power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under section eight of the Companies Act, 1900.

(2) The said section shall apply in cases where the shares are not offered to the public for subscription; provided that the payment of the commission is authorised by the articles of association of the company, and that the amount or rate paid or agreed to be paid as commission is disclosed in the statement in lieu of prospectus or in a statement in the prescribed form verified in like manner as a statement in lieu of prospectus and filed with the registrar, and, where a circular or notice, not being a prospectus, inviting subscriptions for the shares is issued, also disclosed in that circular or notice.

Payment of Interest out of Capital.

9. Power of Company to pay Interest out of Capital in Certain Cases.—Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of such share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the work, building, or plant:

Provided that—

(1) No such payment shall be made unless the same is authorised by the company's articles of association or by special resolution of the company:

(2) No such payment, whether authorised by the articles of association or by special resolution, shall be made without the previous sanction of the Board of Trade:

(3) Before sanctioning any such payment the Board of Trade may, at the expense of the company, appoint a person to inquire and report to them as to the circumstances of the case, and may, before making the appointment, require the company to give security for payment of the costs of the inquiry:

(4) The payment shall be made only for such period as may be determined by the Board of Trade; and such period shall in no case extend beyond the close of the half year next after the half year during which the works or buildings have been actually completed or the plant provided:

(5) The rate of interest shall in no case exceed four per cent. per annum or such lower rate as may for the time being be prescribed by Order in Council:

(6) The payment of such interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid:

(7) The accounts of the company shall show the capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate:

(8) Nothing in this section shall affect any company to which the Indian Railways Act, 1894 (57 and 58 Vict. c. 12), as amended by any subsequent enactment, applies.

Mortgages and Charges.

10. Amendment of 63 and 64 Vict. c. 48, s. 14, as to Registration of Mortgages and Charges.—(1) Every mortgage or charge created by a company after the commencement of this Act and being either—

(*a*) a mortgage or charge for the purpose of securing any issue of debentures; or

(*b*) a mortgage or charge on uncalled capital of the company; or

(*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

(*d*) a mortgage or charge on any land, wherever situate, or any interest therein; or

(*e*) a mortgage or charge on any book debts of the company; or

(*f*) a floating charge on the undertaking or property of the company,

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and where a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable:

Provided that—

(i) In the case of a mortgage or charge created out of the United Kingdom comprising solely property situate outside the United Kingdom, the delivery to and the receipt by the registrar of a copy of the instrument by which the mortgage or charge is created or evidenced, verified in the prescribed manner, shall have the same effect for the purposes of this section as the delivery and receipt of the instrument itself, and twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in the United Kingdom, shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be delivered to the registrar; and

(ii) where the mortgage or charge is created in the United Kingdom but comprises property outside the United Kingdom, the instrument creating or purporting to create such mortgage or charge may be sent for registration notwithstanding that further proceedings may be necessary to make such

mortgage or charge valid or effectual according to the law of the country in which such property is situate; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts;

(iv) the holding of debentures entitling the holder to a charge on land shall not be deemed to be an interest in land.

(2) The registrar shall keep, with respect to each company, a register in the prescribed form of all such mortgages and charges created by the company after the commencement of this Act, and requiring registration under this section, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

(3) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled pari passu is created by a company, it shall be sufficient if there are delivered to or received by the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the first issue of any debentures of the series the following particulars:—

(*a*) the total amount secured by the whole series; and

(*b*) the dates of the resolutions authorising the issue of the series and the date of the covering deed, if any, by which the security is created or defined; and

(*c*) a general description of the property charged; and

(*d*) the names of the trustees, if any, for the debenture holders:

together with the deed containing the charge, or, if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter such particulars in the register:

Provided that, where more than one issue is made of debentures in the series, there shall be sent to the registrar for entry on the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

(4) Where any commission, allowance, or discount has been paid or made, either directly or indirectly by the Company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required for registration under this section shall include particulars as to the amount or rate per cent. of the commission, discount, or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

(5) The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured (which certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with), and the company shall cause a copy of the certificate so given to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered:

Provided that nothing in this subsection shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge given under this section to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

(6) It shall be the duty of the company to send to the registrar for registration the particulars of every mortgage or charge created by the company and of the issues of debentures of a series and requiring registration under this section, but registration of any such mortgage or charge may be effected on the application of any person

interested therein, and, if the company fail to comply with the requirements of this subsection, then, unless the registration has been effected on the application of some other person, the company, and every director, manager, secretary, or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds for every day during which the default continues.

Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

(7) The register kept, in pursuance of this section, of the mortgages and charges of each company shall be open to inspection by any person on payment of the prescribed fee, not exceeding one shilling for each inspection.

(8) Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under this section to be kept at the registered office of the company, and to be open to inspection by the members and creditors of the company in like manner as the register of mortgages under section forty-three of the Companies Act, 1862, and the provisions of that section (including the penal provisions thereof) shall apply accordingly: Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

(9) Section fourteen of the Companies Act, 1900, is hereby repealed.

11. Registration of Enforcement of Security.—(1) If any person obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such a receiver or manager under any powers contained in any instrument, he shall, within seven days from the date of the order or of the appointment under the powers contained in the instrument, give notice of the fact to the registrar, and the registrar shall, on payment of the prescribed fee, enter the fact on the register of mortgages and charges.

(2) Where, at the commencement of this Act, any such receiver or manager is acting under an order or appointment made before the commencement of this Act, the notice shall be given within seven days after the commencement of this Act.

(3) If any person makes default in complying with the requirements of this section he shall on conviction be liable to a fine not exceeding five pounds for every day during which the default continues.

12. Registration of Secured Debts created before 1st of January 1901.—(1) It shall be the duty of a company within three months after the commencement of this Act to send to the registrar for registration a statement of the total amount outstanding at the commencement of this Act of the debts of the company secured by mortgages or charges created before the commencement of this Act, which under the provisions of this Act would have required registration had they been created after the commencement of this Act, except those already required to be registered under section fourteen of the Companies Act, 1900, and the registrar shall, on payment of the prescribed fee, enter those particulars on the register of mortgages and charges:

Provided that the neglect of the company to comply with the provisions of this subsection shall not prejudice the rights under any such mortgage or charge of any person in whose favour the mortgage or charge was made.

(2) If the company fail to comply with the requirements of this section, the company, and every director, manager, secretary, or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds for every day during which the default continues.

13. Effect of Floating Charge.—Where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum.

14. Perpetual Debentures.—For removing doubts it is hereby declared that a condition contained in any debentures or in any deed for securing debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the

happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

15. Power to Re-issue Redeemed Debentures in Certain Cases.—(1) Where either before or after the passing of this Act a company has redeemed any debentures previously issued, the company, unless the articles of association of the company or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the Company so to do, and not being an obligation enforceable only by the person to whom the redeemed debentures were issued, or his assigns, shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such a re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue they have either before or after the passing of this Act been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3) Where a company has either before or after the passing of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under this section, whether made before or after the passing of this Act, shall be treated as the issue of a new debenture for the purposes of stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued: Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp duty and penalty.

(5) Nothing in this section shall prejudice—

(*a*) the operation of any judgment or order of a court of competent jurisdiction pronounced or made before the seventh day of March one thousand nine hundred and seven as between the parties to the proceedings in which the judgment was pronounced or the order made, and any appeal from any such judgment or order shall be decided as if this Act had not been passed; or

(*b*) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished reserved to a company by its debentures or the securities for the same.

16. Specific Performance of Contract to Subscribe for Debentures.—A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

17. Inspection of Register of Mortgages.—The register of mortgages required by section forty-three of the Companies Act, 1862, shall be open to inspection by any person other than a creditor or member of the company on payment of such fee, not exceeding one shilling for each inspection, as may be fixed by regulations of the company, and that section shall apply accordingly.

18. Right of Debenture Holders to Inspect the Register of Debenture Holders and to have Copies of Trust Deed.—(1) Every register of holders of debentures of a company shall, except when closed in accordance with the articles of the company during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company,

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but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of such register or any part thereof on payment of sixpence for every one hundred words required to be copied.

(2) A copy of any trust deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust deed of the sum of one shilling or such less sum as may be prescribed by the company for such copy, or, where the trust deed has not been printed, on payment of sixpence for every one hundred words required to be copied.

(3) If inspection is refused, or a copy is refused or not forwarded, the company shall on conviction be liable to a fine not exceeding five pounds, and to a further fine not exceeding two pounds for every day during which the refusal continues, and every director, manager, secretary, or other officer of the company who knowingly authorises or permits such refusal shall incur the like liability.

Auditors; Balance Sheet; and Reports.

19. Auditors.—The following section shall be substituted for section twenty-three of the Companies Act, 1900:—

"(1) Every auditor of the company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

"(2) The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office, and the report shall state—

"(*a*) whether or not they have obtained all the information and explanations they have required; and

"(*b*) whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

"(3) The balance sheet shall be signed on behalf of the board by two of the directors of the company or, if there is only one director, by that director, and the auditors' report shall be attached to the balance sheet, or there shall be inserted at the foot of the balance sheet a reference to the report, and the report shall be read before the company in general meeting, and shall be open to inspection by any shareholder, who shall be entitled to be furnished with a copy of the balance sheet and the auditor's report at a charge not exceeding sixpence for every hundred words.

"(4) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a shareholder to the company not less than fourteen days before the annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to the shareholders, either by advertisement or in any other mode allowed by the articles, not less than seven days before the annual general meeting: Provided that if, after a notice of the intention to nominate an auditor has been so given, an annual general meeting is called for a date fourteen days or less after that notice has been given, the notice, though not given within the time required by this provision, shall be deemed to have been properly given for the purposes thereof, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this provision, be sent or given at the same time as the notice of the general annual meeting.

"(5) If any copy of a balance sheet which has not been signed as required by this section is issued, circulated, or published, or if any copy of a balance sheet is issued, circulated, or published without either having a copy of the auditor's report attached thereto or containing such reference to that report as is required by this section, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds."

20. Application to Scotland of s. 26 of 25 and 26 Vict. c. 89, and s. 19 of 63 and 64 Vict. c. 48.—In the case of companies registered in Scotland the summary mentioned in section twenty-six of the Companies Act, 1862, in addition to the particulars required to be specified by that section and by section nineteen of the Companies Act, 1900, shall also specify the total amount of debt due from the company in respect of all mortgages and charges, which, if the company had been registered in England, would be required, under this Act, to be filed for registration, or would have been required so to be filed if created after the commencement of this Act.

21. Filing of Annual Statement of Affairs by Limited Companies.—Every company required to forward to the registrar a summary under section twenty-six of the Companies Act, 1862, shall include in that summary a statement, made up to such date as may be specified in the statement, in the form of a balance sheet, audited by the company's auditors, and containing a summary of its capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of such liabilities and assets, and how the values of the fixed assets have been arrived at, but the balance sheet need not include a statement of profit and loss: Provided that this section shall not apply to any private company.

22. Report by Directors under 63 and 64 Vict. c. 48, s. 12.—(1) The report which the directors are required by section twelve of the Companies Act, 1900, to forward to every member of the company at least seven days before the date on which the statutory meeting of the company is held shall contain an abstract of the receipts of the company on account of its capital, whether from shares or debentures, and of the payments made thereout, up to a date within seven days of the date of the report exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company.

(2) A private company shall not be required to forward or to file the report required under section twelve of the Companies Act, 1900.

23. Rights of Preference Shareholders, etc. as to Receipt and Inspection of Reports, etc.—(1) Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance sheets of the company and the reports of the auditors and other reports as are possessed by the holders of ordinary shares in the company.

(2) This section shall not apply to a private company nor to a company registered before the commencement of this Act.

General Meeting, Etc.

24. Annual General Meeting.—(1) The following section shall be substituted for section forty-nine of the Companies Act, 1862:—

"A general meeting of every company shall be held once at least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting, and, if not so held, the company, and every director, manager, secretary, and other officer of the company who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds."

(2) When default has been made in holding a meeting of the company in accordance with the provisions of this section, the court may on the application of any member of the company call or direct the calling of a general meeting of the company.

(3) Any company which is a member of another company may, by minute of the directors, authorise any of its officials or any other person to act as its representative at any meeting of the latter company, and such representative shall be entitled to exercise the same functions on behalf of the company which he represents as if he had been an individual shareholder.

25. Poll.—A poll may be demanded at a meeting of a company at which a special resolution is submitted to be passed or confirmed under section fifty-one of the Companies Act, 1862, if demanded by three persons for the time being entitled according to the articles of the company to vote, unless the articles of the company require a

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demand by such number of such persons, not in any case exceeding five, as may be specified in the articles.

Winding Up.

26. Amendment of Law as to Voluntary Winding Up (25 and 26 Vict. c. 89).—The liquidator of a company being wound up voluntarily shall, within twenty-one days after his appointment, file with the registrar a notice of his appointment in the prescribed form, and if any liquidator contravenes this provision he shall on conviction be liable to a fine not exceeding five pounds for every day during which the contravention continues.

27. Rights of Creditors in a Voluntary Winding Up.—(1) Every liquidator appointed by a company in a voluntary winding up shall, within seven days from his appointment, send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held on a date, not being less than fourteen days nor more than twenty-one days after his appointment, and at a place and hour to be specified in the notice, and shall also advertise notice of the meeting once in the Gazette and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company was situate.

(2) At the meeting to be held in pursuance of the foregoing provisions of this section the creditors shall determine whether an application shall be made to the court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and, if the creditors so resolve, an application may be made accordingly to the court at any time, not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose at the meeting.

(3) On any such application the court may make an order either for the removal of the liquidator appointed by the company and for the appointment of some other person as liquidator or for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection either together with or without any such appointment of a liquidator, or such other order as, having regard to the interests of the creditors and contributories of the company, may seem just, and no appeal shall lie from an order of the court upon such application.

(4) The court shall make such order as to the costs of such application as it may think fit, and, if the court should be of opinion that, having regard to the interests of the creditors in the liquidation, there were reasonable grounds for the application, the court may order the costs of such application to be paid out of the assets of the company notwithstanding that such application is dismissed or otherwise disposed of adversely to the applicant.

(5) The expression "Gazette" in this section means in the case of a company registered in England the London Gazette, in the case of a company registered in Scotland the Edinburgh Gazette, and in the case of a company registered in Ireland the Dublin Gazette.

28. Reckoning of Contingent Liabilities on Petition to Wind Up.—In determining whether a company is unable to pay its debts within the meaning of section eighty of the Companies Act, 1862, the court shall take into account the contingent and prospective liabilities of the company, and any contingent or prospective creditor shall be a creditor entitled to present a petition for winding up the company under section eighty-two of that Act: Provided that the court shall not give a hearing to a petition for winding up the company by such a creditor until such security for costs has been given as the court thinks reasonable, and until a prima facie case for winding up has been established to the satisfaction of the court.

29. Winding-up Order where Company has no Assets.—An order to wind up a company shall not be refused on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

30. Amendment of 51 and 52 Vict. c. 62, and 52 and 53 Vict. c. 60.—In the Preferential Payments in Bankruptcy Act, 1888, and the Preferential Payments in

Bankruptcy (Ireland) Act, 1889, the date on which the order to wind up was made shall, in the case of a company ordered to be wound up compulsorily, be substituted for the date of the commencement of the winding up of the company:

Provided that this provision shall not apply where the order is made with respect to a company which before the date of the order had commenced to be wound up voluntarily.

31. Dissolution of Companies.—(1) Where a company has been wound up voluntarily and the return made by the liquidators to the registrar under section one hundred and forty-three of the Companies Act, 1862, has been registered in accordance with that section, the court may, on the application of the liquidators or of any other person who appears to the court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as to the court seems fit.

(2) Where a company has been dissolved, the court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidators of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

(3) It shall be the duty of the person on whose application any such order was made, within seven days after the making of the order, to file with the registrar an office copy of the order, and if such person fails to do so he shall be liable on conviction to a fine not exceeding five pounds for every day during which the default continues.

Directors.

32. Power of Court to Grant Relief in Certain Cases.—If in any proceeding against a director of a company for negligence or breach of trust it appears to a court that the director is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, the court may relieve him, either wholly or partly, from his liability on such terms as the court may think proper.

33. Contributions under 53 and 54 Vict. c. 64.—A person liable to make any payment under the provisions of the Directors' Liability Act, 1890, shall not be entitled to recover contribution from another person under section five of that Act if the person liable to make the payment was, and such other person was not, guilty of fraudulent misrepresentation.

34. Qualification of Director.—The following provision shall be substituted for subsection (3) of section three of the Companies Act, 1900:—

"(3) If after the expiration of the said period or shorter time any unqualified person acts as a director of the company he shall be liable on conviction to a fine not exceeding five pounds for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director."

Requirements as to Companies established outside the United Kingdom.

35. Requirements as to Companies established outside the United Kingdom.—(1) Every company incorporated outside the United Kingdom which at the commencement of this Act has a place of business in the United Kingdom, and every such company which after the commencement of this Act establishes such a place of business within the United Kingdom, shall within three months from the commencement of this Act or within one month from the establishment of such place of business, as the case may be, file with the registrar—

(*a*) a certified copy of the charter, statutes, or memorandum and articles of association, of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;

(*b*) a list of the directors of the company;

(*c*) the names and addresses of some one or more persons resident in the United

Kingdom authorised to accept on behalf of the company service of process and any notices required to be served on the company;

and, in the event of any alteration being made in any such instrument or in the directors or in the names or addresses of any such persons as aforesaid, the company shall file with the registrar a notice of the alteration within such time as may be prescribed.

(2) Any process or notice required to be served on the company shall be sufficiently served if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the address which has been so filed.

(3) Every company to which this section applies shall in every year file with the registrar such a statement of its affairs as would, if it were a company incorporated in the United Kingdom and having a capital divided into shares, be required under this Act to be included in the annual summary.

(4) Every company to which this section applies, and which uses the word "Limited" as part of its name, shall—

(*a*) in every prospectus inviting subscriptions for its shares or debentures in the United Kingdom state the country in which the company is incorporated; and

(*b*) conspicuously exhibit on every place where it carries on business in the United Kingdom the name of the company and the country in which the company is incorporated; and

(*c*) have the name of the company and of the country in which the company is incorporated mentioned in legible characters in all bill-heads and letter paper, and in all notices, advertisements, and other official publications of the company.

(5) If any company to which this section applies fails to comply with any of the requirements of this section the company, and every officer or agent of the company, shall on conviction be liable to a fine not exceeding fifty pounds, or, in the case of a continuing offence, five pounds for every day during which the failure continues.

(6) For the purposes of this section the expression "certified" means certified in the prescribed manner to be a true copy or a correct translation, and a share transfer or share registration office shall be deemed to be a place of business within the meaning of this section.

(7) There shall be paid to the registrar for registering any document required by this section to be filed with him a fee of five shillings or such smaller fee as may be prescribed.

Miscellaneous.

36. Validity of Debentures to Bearer in Scotland.—Notwithstanding anything contained in the statute of the Scots Parliament of 1696, chapter twenty-five, debentures to bearer issued in Scotland are declared to be valid and binding according to their terms.

37. Definition of Private Company.—(1) For the purposes of this Act the expression "private company" means a company which by its articles—

(*a*) restricts the right to transfer its shares; and

(*b*) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; and

(*c*) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

(2) A private company may, subject to anything contained in the memorandum or articles of association of the company, by passing a special resolution and by filing with the registrar such a statement in lieu of prospectus as the company, if a public company, would under the provisions of this Act have had to file before allotting any of its shares or debentures, together with such a statutory declaration as the company, if a public company, would under the provisions of section six of the Companies Act, 1900, have had to file before commencing business, turn itself into a public company.

(3) Where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this section, be treated as a single member.

(4) Wherever in the Companies Acts a minimum of seven members is required only two members shall be required in the case of a private company.

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38. Application of 33 and 34 Vict. c. 104 to Companies not being Wound Up. —The Joint Stock Companies Arrangement Act, 1870, shall apply to a company which is not in the course of being wound up, in like manner as it applies to a company which is in the course of being wound up, as if in that Act references to the court having jurisdiction to wind up the company were substituted for references to the court, and references to the liquidator were omitted therefrom, and references to the company were substituted for references to contributories of the company.

39. Reorganisation of Capital.—(1) A company may by special resolution confirmed by an order of the court modify the conditions contained in its memorandum of association so as to reorganise its capital, whether by the consolidation of shares of different classes, or by the division of its shares into shares of different classes: Provided always that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority of shareholders of that class representing three-fourths of the capital of that class and confirmed in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of such class.

(2) Where an order is made under this section an office copy thereof shall be filed with the registrar within seven days after the making of the order, and the resolution shall not take effect until such a copy has been so filed.

40. Exemption of Life Assurance Companies from 25 and 26 Vict. c. 89, s. 44. —Section forty-four of the Companies Act, 1862, shall not apply to any life assurance company nor any other assurance company to which the provisions of the Life Assurance Companies Acts, 1870 to 1872 (33 and 34 Vict. c. 61), as to the annual statements to be made by such companies apply, with or without modification, if the company complies with those provisions.

41. Filing of Accounts of Receivers and Managers.—Every receiver or manager of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall, on ceasing to act as such, and also once in every half year while he remains in possession, file with the registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall also on ceasing to act as such receiver or manager file with the registrar notice to that effect, which notice shall be entered by the registrar on the register of mortgages and charges, and every such receiver or manager who makes default in complying with the provisions of this section within the prescribed time shall be liable to a fine not exceeding fifty pounds.

42. Revocation of Licences under 30 and 31 Vict. c. 131, s. 23.—A licence granted by the Board of Trade under section twenty-three of the Companies Act, 1867 (which relates to associations formed for purposes not of gain), may at any time be revoked by the Board of Trade, and upon revocation the registrar shall enter the word "Limited" at the end of the name of the company upon the register, and the company shall cease to enjoy the exemptions and privileges granted by that section. Before any such licence is revoked under this section the Board of Trade shall give notice in writing of their intention to the company, and shall afford the company an opportunity of being heard in opposition to such revocation.

43. Interpretation of 46 and 47 Vict. c. 30.—For removing doubts it is hereby declared that the Commonwealth of Australia is a colony within the meaning of the Companies (Colonial Registers) Act, 1883.

44. Construction of s. 56 of 25 and 26 Vict. c. 89.—Section fifty-six, subsection (2), of the Companies Act, 1862, shall be read and construed as if the words therein "one-fifth part" had been "one-tenth part."

45. Extraordinary Resolutions.—An extraordinary resolution for the purposes of the Companies Act, 1862, and this Act, means a resolution which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution, and section fifty-three of the Companies Act, 1862, shall apply in the case of an extraordinary resolution in like manner as that section applies in the case of a special resolution, with the substitution of a reference to the date of the passing of the extraordinary resolution for the reference to the date of the confirmation of the special resolution.

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46. Signature of Documents.—Any writing or licence which under the Companies Acts, 1862 to 1900, is required to be under the hand of one of the principal secretaries or assistant secretaries of the Board of Trade may be under the hand of any person authorised in that behalf by the President of the Board of Trade.

47. Annual Report by Board of Trade.—The Board of Trade shall cause a general annual report of matters within the Companies Acts, 1862 to 1900, and this Act to be prepared and laid before both Houses of Parliament.

48. Penalty for Improper Use of Word "Limited."—If any person or persons trade or carry on business under any name or title of which "Limited" is the last word, such person or persons shall, unless duly incorporated with limited liability, be liable to a penalty not exceeding five pounds for every day upon which such name or title has been used.

49. Prosecution of Offences under Companies Acts.—All offences under the Companies Acts made punishable by any penalty may be prosecuted under the Summary Jurisdiction Acts.

50. Miscellaneous Amendments of Companies Acts.—The amendments specified in the Third Schedule to this Act, which relate to minor details, shall be made in the Companies Acts.

51. Repeal.—The enactments mentioned in the Fourth Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule.

52. Short Title, Construction, and Commencement.—(1) This Act may be cited as the Companies Act, 1907; and the Companies Acts, 1862 to 1900, and this Act may be cited together as the Companies Acts, 1862 to 1907, and are in this Act referred to as the Companies Acts, and this Act shall for all purposes (including its application to Scotland) have effect as part of the Companies Act, 1900.

(2) In this Act the expression "the court" when used in relation to a company shall, unless the context otherwise requires, mean the court having jurisdiction under the Companies Acts, 1862 to 1900, to wind up the company.

(3) The provisions of this Act relating to perpetual debentures and the power of a company to re-issue redeemed debentures in certain cases, shall come into operation on the passing of this Act, and the other provisions of this Act shall come into operation on the first day of July one thousand nine hundred and eight.

SCHEDULES.

FIRST SCHEDULE (s. 1).

The Companies Acts, 1862 to 19 .

STATEMENT IN LIEU OF PROSPECTUS

filed by

Limited

pursuant to section of the Companies Act, 1907.

Presented for filing by

The Companies Acts, 1862 to 19 .

LIMITED.

STATEMENT IN LIEU OF PROSPECTUS.

The nominal capital of the company	£
Divided into	Shares of £ each. " " " " " "
Names, descriptions, and addresses of directors or proposed directors	

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Minimum subscription (if any) fixed by the memorandum or articles of association on which the company may proceed to allotment.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid-up otherwise than in cash. The consideration for the intended issue of such shares and debentures.	1. shares of £ fully paid. 2. shares upon which £ per share credited as paid. 3. debentures £ 4. Consideration.
Names and addresses of (*a*) vendors of property purchased or acquired, or proposed to be (*b*) purchased or acquired by the company. Amount (in cash, shares or debentures) payable to each separate vendor. (*a*) For definition of vendor, *see* section 10 (2) of the Companies Act, 1900, as amended by this Act. (*b*) *See* section 10 (3) of the Companies Act, 1900.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.	Total purchase price £ Cash . . . £ Shares . . £ Debentures . . £ Goodwill . . £
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company, or Rate of such commission.	Amount paid. ,, payable. Rate per cent.
Estimated amount of preliminary expenses.	£
Amount paid or intended to be paid to any promoter. Consideration for such payment.	Name of promoter. Amount, £ Consideration :—
Dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the filing of this statement).	
Time and place at which such contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the company (if any).	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either	

to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.	
Whether the articles contain any provisions precluding holders of shares or debentures receiving and inspecting balance sheets or reports of the auditors or other reports.	Nature of the provisions.

We, *A. B.*, etc., secretary of the company, and *C. B.*, (A Director [or Solicitor]) of the company, hereby solemnly and sincerely declare that the statements above contained are true to the best of our knowledge, information, and belief, and we make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

SECOND SCHEDULE.

Modifications of Sections 2, 6, and 11 (s. 1).

References to a verified statement in lieu of prospectus and the filing thereof shall be substituted for references to a prospectus and the publication of a prospectus.

In section six the reference to shares offered for public subscription shall be construed as a reference to shares payable in cash.

There shall be added to subsection (1) of section six the following paragraph:

"(*d*) There has been filed with the registrar a statement in lieu of prospectus."

The registrar shall not give such a certificate as is mentioned in subsection (2) of section six unless a statement in lieu of prospectus has been filed with him.

THIRD SCHEDULE.

Miscellaneous Amendments of Companies Acts (s. 50).

Enactment to be amended.	Nature of Amendment.
Companies Act, 1862 (25 and 26 Vict. c. 89), s. 28.	After the word "stock" there shall be inserted the words "or re-converted stock into shares." After the word "conversion" there shall be inserted the words "or re-conversion." After the word "converted" there shall be inserted the words "or the stock re-converted."
s. 32.	After the words "hereinbefore mentioned" there shall be inserted the words "or any part thereof." After the word "sixpence" there shall be inserted the words "or such less sum as the company may prescribe." After the words "hundred words" there shall be inserted the words "or fractional part thereof."
s. 143.	At the beginning there shall be inserted the words "within one week after such meeting." After the words "the same was held" there shall be inserted the words "the registrar on receiving such return shall forthwith register it."
Companies Act, 1867 (30 and 31 Vict. c. 131), s. 16.	After the word "paid" there shall be inserted the words "or (as the case may be) the reduced amount, if any, which is to be deemed to have been paid."
Companies Act, 1879 (42 and 43 Vict. c. 76), s. 5.	For the words "in cases where no such increase of nominal capital may be resolved upon" there shall be substituted the words "either in conjunction with or without any such increase of nominal capital."
s. 7.	The whole section except the proviso to subsection (5) to be repealed.

7 EDWARD 7, Chapter 50.

FOURTH SCHEDULE.

Enactments Repealed (s. 51).

Session and Chapter.	Short Title.	Extent of Repeal.
25 and 26 Vict. c. 89.	The Companies Act, 1862.	Section forty-nine. In section fifty-one, the words "by at least five members." Section sixty-five. Section one hundred and twenty-nine, from "for the purposes of this Act" to the end of the section.
53 and 54 Vict. c. 63.	The Companies (Winding-up) Act, 1890.	Subsection (2) of section twenty-nine.
63 and 64 Vict. c. 48.	The Companies Act, 1900.	In subsection (3) of section two, the words "or to a company which does not issue any invitation to the public to subscribe for its shares." In section three, subsection (3). In section six, subsection (4) and subsection (7) except so far as relates to companies registered before the commencement of this Act. In section ten, subsection (1) and proviso (*b*) to subsection (4). In subsection (2) of section twelve, paragraph (*c*). Section fourteen. Section twenty-three.

CHAPTER LI.

SHERIFF COURTS (SCOTLAND) ACT, 1907.

[7 Edw. 7. Ch. 51.]

ARRANGEMENT OF SECTIONS.

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CHAPTER LI.

An Act to regulate and amend the Laws and practice relating to the civil procedure in Sheriff Courts in Scotland, and for other purposes. [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

7 EDWARD 7, Chapter 51.

Preliminary.

1. Short Title.—This Act may be cited for all purposes as the Sheriff Courts (Scotland) Act, 1907.

2. Commencement.—Unless otherwise specially enacted this Act shall come into operation on the first day of January one thousand nine hundred and eight.

3. Interpretation.—In construing this Act (unless where the context is repugnant to such construction)—

(*a*) "Sheriff" includes sheriff-substitute;

(*b*) "Tenant" includes sub-tenant;

(*c*) "Lease" includes sub-lease;

(*d*) "Action" includes every civil proceeding competent in the ordinary sheriff court;

(*e*) "Person" includes company, corporation, or association and firm of any description nominate or descriptive, or any Board corporate or incorporate;

(*f*) "Sheriff-clerk" includes sheriff-clerk depute;

(*g*) "Agent" means a law-agent enrolled in terms of the Law Agents (Scotland) Act, 1873 (36 and 37 Vict. c. 63);

(*h*) "Final judgment" means an interlocutor which, by itself, or taken along with previous interlocutors, disposes of the subject-matter of the cause, notwithstanding that judgment may not have been pronounced on every question raised, and that expenses found due may not have been modified, taxed, or decerned for;

(*i*) "Summary cause" includes—

(1) Actions (except applications under the Workmen's Compensation Act and actions with conclusions ad actum præstandum) for payment of money exceeding twenty pounds, and not exceeding fifty pounds, exclusive of interest and expenses;

(2) Actions of whatever kind (except applications under the Workmen's Compensation Act and actions under the Small Debt Acts) notwithstanding that the value may exceed fifty pounds, in which the parties consent to the action being treated as a summary cause;

(*j*) "Small Debt Acts" means and includes the Small Debt (Scotland) Acts, 1837 to 1889, and Acts explaining or amending the same;

(*k*) "Initial writ" means the statement of claim, petition, note of appeal, or other document by which the action is initiated;

(*l*) "Procurator-Fiscal" means procurator-fiscal in the sheriff-court;

(*m*) "Workmen's Compensation Act" means the Workmen's Compensation Act, 1906 (6 Edw. 7 c. 58), and any Acts explaining or amending the same;

(*n*) "Pursuer" means and includes any person making a claim or demand, or seeking any warrant or order competent in the sheriff court;

(*o*) "Defender" means and includes any person who is required to be called in any action;

(*p*) "Summary application" means and includes all applications of a summary nature brought under the common law jurisdiction of the sheriff, and all applications, whether by appeal or otherwise, brought under any Act of Parliament which provides, or, according to any practice in the sheriff court, which allows that the same shall be disposed of in a summary manner, but which does not more particularly define in what form the same shall be heard, tried, and determined.

Jurisdiction.

4. Jurisdiction.—The jurisdiction of the sheriffs, within their respective sheriffdoms, shall extend to and include all navigable rivers, ports, harbours, creeks, shores, and anchoring grounds in or adjoining such sheriffdoms. And the powers and jurisdictions formerly competent to the High Court of Admiralty in Scotland in all maritime causes and proceedings, civil and criminal, including such as may apply to

persons furth of Scotland, shall be competent to the sheriffs, provided the defender shall upon any legal ground of jurisdiction be amenable to the jurisdiction of the sheriff before whom such cause or proceeding may be raised, and provided also that it shall not be competent to the sheriff to try any crime committed on the seas which it would not be competent for him to try if the crime had been committed on land: Provided always that where sheriffdoms are separated by a river, firth, or estuary, the sheriffs on either side shall have concurrent jurisdictions over the intervening space occupied by water.

5. Extension of Jurisdiction.—Nothing herein contained shall derogate from any jurisdiction, powers, or authority presently possessed or in use to be exercised by the sheriffs of Scotland, and such jurisdiction shall extend to and include—

(1) Actions of declarator (except declarators of marriage or nullity of marriage, and actions the direct or main object of which is to determine the personal status of individuals):

(2) Actions of aliment, or of separation and aliment, and for regulating the custody of children:

(3) Actions of division of commonty and of division or division and sale of common property, in which cases the Act of 1695 concerning the division of commonties shall be read and construed as if it conferred jurisdiction upon the sheriff court in the same manner as upon the Court of Session:

(4) Actions relating to questions of heritable right or title (except actions of adjudication save in so far as now competent and actions of reduction), including all actions of declarator of irritancy and removing, whether at the instance of a superior against a vassal or of a landlord against a tenant:

(5) Suspension of charges or threatened charges upon the decrees of court granted by the sheriff or upon decrees of registration proceeding upon bonds, bills, contracts or other obligations registered in the books of the sheriff court, the books of council and session, or any others competent where the debt exclusive of interest and expenses does not exceed fifty pounds:

Provided that actions relating to questions of heritable right or title, including irritancy and removing or to division of commonties or division or divisions and sale, of common property shall, if raised in the sheriff court, be raised in the sheriff court of the jurisdiction and district where the property forming the subject in dispute is situated, and all parties against whom any such action may be brought shall in such action be subject to that jurisdiction: Provided also that it shall be competent for either party at the closing of the record or within six days thereafter to require the cause to be remitted to the Court of Session in the case of actions—

(*a*) Relating to questions of heritable right and title where the value of the subject in dispute exceeds fifty pounds by the year or one thousand pounds in value:

(*b*) Relating to the right of succession to moveables where the value of the subject in dispute exceeds one thousand pounds:

(*c*) Relating to division of commonty or division or division and sale of common property where the value of the subject in dispute exceeds fifty pounds by the year or one thousand pounds value:

Provided also, that on cause shown or ex proprio motu the sheriff may at any stage remit to the Court of Session any action of separation and aliment or relating to the custody of children.

6. Action Competent in Sheriff Court.—Any action competent in the sheriff court may be brought within the jurisdiction of the sheriff—

(*a*) Where the defender (or when there are several defenders where one of them) resides within the jurisdiction, or having resided there for at least forty days immediately prior to the raising of the action has ceased to reside there for less than forty days and whose present residence in Scotland is unknown:

(*b*) Where the defender carries on business, and has a place of business within the sheriffdom, and is cited either personally or at such place of business:

(*c*) Where the defender is a person not otherwise subject to the jurisdiction of the courts of Scotland, and a ship or vessel of which he is owner or part owner or master, or goods, debts, money, or other moveable property belonging to him, have been arrested within the jurisdiction:

(*d*) Where the defender is the owner or part owner or tenant or joint tenant, whether individually or as a trustee of heritable property within the jurisdiction, and the action relates to such property or to his interest therein:

(*e*) Where the action is for interdict against an alleged wrong being committed or threatened to be committed within the jurisdiction:

(*f*) Where the action relates to a contract the place of execution or performance of which is within the jurisdiction, and the defender is personally cited there:

(*g*) Where in an action of furthcoming or multiplepoinding the fund or subject in medio is situated within the jurisdiction; or the arrestee or holder of the fund is subject to the jurisdiction of the court:

(*h*) Where the party sued is the pursuer in any action pending within the jurisdiction against the party suing:

(*i*) Where the action arises out of the delict of the defender within the jurisdiction, and he is personally cited there:

(*j*) Where the defender prorogates the jurisdiction of the court.

7. Privative Jurisdiction in Causes under Fifty Pounds Value.—Subject to the provisions of this Act and of the Small Debt Acts, all causes not exceeding fifty pounds in value exclusive of interest and expenses competent in the sheriff court shall be brought and followed forth in the sheriff court only, and shall not be subject to review by the Court of Session: Provided that in actions ad factum præstandum, where the value of the cause is not disclosed, the same shall be deemed to exceed fifty pounds, unless in the course of the cause the sheriff shall determine, as after provided, that the value thereof is less than fifty pounds: Provided also that nothing herein contained shall affect any right of appeal competent under any Act of Parliament in force for the time being.

8. Summary Cause Procedure and Appeal.—In a summary cause the sheriff shall order such procedure as he thinks requisite, and (without a record of the evidence, unless on the motion of either party the sheriff shall order that the evidence be recorded) shall dispose of the cause without delay by interlocutor containing findings in fact and in law. Where the evidence has been recorded the judgment of the sheriff-substitute upon fact and law may in ordinary form be brought under review of the sheriff, but where the evidence has not been recorded, the findings in law only shall be subject to review. In a summary cause, if the sheriff, on appeal, is of opinion that important questions of law are involved, he shall state the same in his interlocutor, and he may then or within seven days from the date of his interlocutor grant leave to appeal to a division of the Court of Session on such questions of law, but otherwise the judgment of the sheriff shall be final.

9. Value of Cause. How Determined.—The sheriff before whom the cause depends shall (in such way as he may think expedient) inquire into and determine the value thereof for the purposes of this Act, and his determination shall be final as regards the competency of the action on the ground of value but not otherwise.

10. Privilege not to Exempt from Jurisdiction.—No person shall be exempt from the jurisdiction of the sheriff court on account of privilege by reason of being a member of the College of Justice.

Sheriffs.

11. Appointment of Sheriffs and Salaried Sheriffs-Substitute.—The right of appointing to the salaried offices of sheriff and salaried sheriff-substitute shall be vested in His Majesty, and shall be exercised on the recommendation of the Secretary for Scotland.

12. Qualification for Sheriff and Salaried Sheriff-Substitute.—Every person appointed to the office of sheriff shall be an advocate of five years' standing at least or, if not an advocate, a sheriff-substitute of five years' standing at least; and every person appointed to the office of salaried sheriff-substitute shall be an advocate or a law agent within the meaning of the Law Agents (Scotland) Act, 1873 (36 and 37 Vict. c. 63): Provided always that such advocate or law agent shall be of not less than five years' standing in his profession.

13. Removal from Office of Sheriff and Salaried Sheriff-Substitute.—It shall be lawful for the Secretary for Scotland, upon a report prepared at his instance by the

SHERIFF COURTS (SCOTLAND) ACT, 1907.

Lord President of the Court of Session and the Lord Justice-Clerk for the time being, declaring that a sheriff in Scotland is by reason of inability, neglect of duty, or misbehaviour unfit for his office, to issue an order for his removal from office: Provided always that such order shall lie before both Houses of Parliament for a period of four consecutive weeks while Parliament is sitting, and, if either House of Parliament within that period resolve that such order ought not to take effect, the same shall be of no effect, but otherwise shall come into operation at the expiration of the said period. In this paragraph "sheriff" does not include "sheriff-substitute."

A salaried sheriff-substitute shall be removeable from his office by the Secretary for Scotland for inability or misbehaviour upon the report of the Lord President of the Court of Session and the Lord Justice-Clerk for the time being.

14. Salaries of Sheriffs and Sheriffs-Substitute.—It shall be lawful to grant to any sheriff or sheriff-substitute such salary as to the Treasury may seem meet, and every such salary shall be paid by four equal quarterly instalments, and shall be charged upon and be payable out of the Consolidated Fund.

15. Leave of Absence to Sheriff.—It shall be lawful for the Secretary for Scotland, on an application made by or on behalf of any sheriff for leave of absence on account of temporary illness or other reasonable cause, to grant such leave of absence for such period as he shall deem proper, and to appoint some other person who shall be a sheriff of some other sheriffdom, or an advocate of not less than five years' standing, to act as interim sheriff in the place and during the absence of such sheriff, and on such interim appointment being made to fix what proportion of the salary of the sheriff shall be paid to the interim sheriff, and to certify the same in writing; and such certificate when presented in Exchequer to the King's and Lord Treasurer's Remembrancer shall be sufficient warrant for him for payment to such interim sheriff of the proportion of the sheriff's salary therein mentioned. A sheriff appointed to be interim sheriff under this section shall not by accepting such interim appointment vacate his office as sheriff. An interim sheriff appointed under this section shall have and exercise all the powers and privileges and perform all the duties of the sheriff, and his acts, orders, and judgments shall have the same force and effect as if done, made, or pronounced by the sheriff. In this section "sheriff" does not include sheriff-substitute.

16. Leave of Absence to Salaried Sheriff-Substitute.—In the event of any salaried sheriff-substitute, by reason of ill-health, being temporarily unable to discharge the duties of his office, it shall be lawful for the Secretary for Scotland on application being made to him by or on behalf of such sheriff-substitute to appoint a person qualified to fill the office of sheriff-substitute to act ad interim in the place and during the absence of such sheriff-substitute, and on such interim appointment being made the Treasury may, on the recommendation of the Secretary for Scotland, allow such interim sheriff-substitute such remuneration as they think fit out of monies to be provided by Parliament.

17. Honorary Sheriff-Substitute.—The sheriff may by writing under his hand appoint such persons as he thinks proper to hold the office of honorary sheriff-substitute within his sheriffdom during his pleasure, and for whom he shall be answerable. An honorary sherift-substitute, during the subsistence of his commission, shall be entitled to exercise the powers and duties appertaining to the office of sheriff-substitute. An honorary sheriff-substitute shall hold office, notwithstanding the death, resignation, or removal of the sheriff, until his commission shall be recalled by a succeeding sheriff. In this section "sheriff" does not include sheriff-substitute.

18. Courts to be held by Sheriffs in their Sheriffdoms.—Every sheriff shall, unless prevented by indisposition or other unavoidable cause, hold annually in his sheriffdom courts for the discharge of the judicial business of the sheriffdom; and such courts shall continue until the causes ready for trial or hearing when such courts commence shall be disposed of; and each sheriff shall give due notice of the times and places of such courts; and, unless otherwise prescribed, each sheriff shall, once in the year, go on the small debt circuit, in use to be held by the sheriff-substitute, and shall, on such occasions, in addition to holding the small debt court, despatch as much of the ordinary business as may be ready for adjudication, or as time may permit; and each sheriff shall annually, within ten days after the twelfth day of November, make a return to the Secretary for Scotland of the number of courts and sittings held by him, and of

the periods of holding each such court, in the immediately preceding year, stating the cause of absence in case the court hereinbefore directed shall not have been held by him in terms of this Act, provided that the above provisions shall not extend to the sheriffs of the Lothians and Peebles and of Lanarkshire: Provided always that it shall be lawful for the Secretary for Scotland to prescribe from time to time the number of courts to be held by the several sheriffs and the times and places for holding such courts, and also from time to time to prescribe the duties of the office of sheriff which such sheriffs respectively are required to perform personally. In this section "sheriff" does not include sheriff-substitute.

19. Secretary for Scotland to Regulate Number, Duties, and Residence of Salaried Sheriffs-Substitute.—It shall be lawful for the Secretary for Scotland from time to time to prescribe the number of salaried sheriffs-substitute of the several sheriffdoms, and the places at which such salaried sheriffs-substitute respectively are required generally to reside and to attend for the performance of their duties, the number of courts to be held by such sheriffs-substitute, the times and places of holding such courts, and the duties to be performed by such sheriffs-substitute; and it shall also be lawful for the Secretary for Scotland, if he shall think fit, to direct that the sheriff-substitute of one county shall perform the duties of sheriff-substitute in an adjacent county; and any such direction shall be equivalent in all respects to a commission to act in such adjacent county in favour of the sheriff-substitute so directed; and no salaried sheriff-substitute shall be absent from the sheriffdom for more than six weeks in any year nor for more than two weeks at any one time nor so as to interfere with the regular sittings of his court, without the special consent in writing of the sheriff, who shall be bound, in the event of his giving such consent, either to attend personally during the absence of such substitute, or to appoint another person qualified as in section twelve hereof to act as substitute in his stead.

20. Annuities to Sheriffs and Salaried Sheriffs-Substitute.—It shall be lawful for the Treasury, upon the recommendation of the Secretary for Scotland, to grant an annuity payable in like manner as the salaries to any person who has held, now holds, or may hereafter hold the office of sheriff or salaried sheriff-substitute whose period of service (notwithstanding that such service may not have been continuous and may have been in different sheriffdoms and may have been partly as sheriff-substitute and partly as sheriff) has been not less than ten years. Provided always that such annuity shall not exceed one-third of the salary payable to such person in case the period of his service shall have been not less than ten years, and shall not exceed two-thirds of such salary in case the period of service shall have been not less than fifteen years, and shall not exceed three-fourths of such salary in case the period of service shall have been not less than twenty years or upwards: Provided also that (except as hereinafter provided) no such annuity shall be granted to any sheriff or sheriff-substitute unless the periods of his actual service shall, when taken together, extend to one or other of the periods of service before mentioned, and that in computing the amount of said annuity the emoluments drawn by him on an average of the five preceding years shall be held to constitute his salary: Provided also that no such annuity shall be granted unless such sheriff or sheriff-substitute shall have duly fulfilled the duties of his office during one of the periods before mentioned, and is from age or permanent infirmity disabled from the due exercise of his office, which facts shall be certified by the Lord President, the Lord Justice-Clerk, and the Lord Advocate for the time being as having been established to their satisfaction: Provided also that if a sheriff is removed under section thirteen hereof before he has completed ten years' service on the ground that he is by reason of inability unfit for his office, it shall be lawful for the Treasury to grant him an annuity of such amount and for such period as they shall consider just in all the circumstances, but in no case exceeding three-tenths of the salary payable to such sheriff, and any such annuity shall be charged upon and payable out of the same fund and in the same manner as annuities to sheriffs are paid and charged under the first section of the Public Revenue and Consolidated Fund Charges Act, 1854 (17 and 18 Vict. c. 94). In the last proviso of this section "sheriff" shall not include sheriff-substitute.

21. Disqualifications and Disabilities of Sheriffs and Salaried Sheriffs-Substitute.—It shall not be lawful for a sheriff to advise, plead, or otherwise act as an

advocate before any of the King's Courts at Edinburgh, or at the Circuit Court, in any cause civil or criminal arising within or coming from his sheriffdom; and no sheriff or salaried sheriff-substitute shall be steward, chamberlain, factor, agent, or commissioner to any subject whatsoever, or shall exercise, or act in the employment, service, or office of such steward, chamberlain, factor, agent, or commissioner; and no sheriff or salaried sheriff-substitute shall be capable of being elected or of sitting or voting as a member of the House of Commons, nor shall he be entitled to vote at any election for any member of Parliament held within his sheriffdom; nor shall he act directly or indirectly as an agent for any candidate in any matter connected with, or preparatory to, any election for the county or burgh respectively in which he shall be sheriff or salaried sheriff-substitute; and it shall not be lawful for a salaried sheriff-substitute to engage in legal, banking, or other private practice or business, or to act directly or indirectly as a procurator before any court, or to be in partnership with any person so engaged or acting, nor shall such sheriff-substitute be appointed to any office, except such office as shall be by statute attached to the office of sheriff-substitute.

Any sheriff or salaried sheriff-substitute acting contrary to the provisions of this section shall be guilty of misbehaviour within the meaning of section thirteen of this Act.

Procurators-Fiscal.

22. Appointment of Procurator-Fiscal.—From and after the passing of this Act the right of appointing to the office of procurator-fiscal shall be vested in the Lord Advocate.

23. Removal of Procurator-Fiscal.—No person holding the office of procurator-fiscal at the passing of this Act, and receiving salary on that account, and no person who may be hereafter appointed to the office of procurator-fiscal, shall be removable from office, except by the Secretary for Scotland, for inability or misbehaviour, upon a report by the Lord President of the Court of Session and the Lord Justice-Clerk for the time being.

24. Procurator-Fiscal may appoint Depute.—A procurator-fiscal may, with the consent of the Lord Advocate, grant a deputation to one or more fit persons, for whose actings he shall be responsible, to sign writs, to appear in court, and to conduct prosecutions and inquiries in his name and on his behalf. In the event of a vacancy in the office of procurator-fiscal any depute or deputes so appointed shall have and discharge all the powers, privileges, and duties of a procurator-fiscal until such vacancy is filled up.

Session.

25. Sessions.—In each sheriff court there shall be held two sessions in the year, a winter and a summer session. The winter session shall extend from the first ordinary court day in October to the last ordinary court day in March. The sittings of the court may, at Christmas time, be suspended for a period not exceeding fifteen days. The summer session shall extend from the first ordinary court day in May to the last ordinary court day in July.

26. Vacation Courts.—The sheriff shall, before the termination of each winter session, appoint at least one court day during the spring vacation for the despatch of civil business, and before the termination of each summer session he shall in like manner appoint at least two court days during the autumn vacation for the same purpose. Any cause may proceed during vacation as during session, and in all causes interlocutors may competently be pronounced during vacation.

Appeals.

27. Appeal to Sheriff.—Subject to the provisions of this Act an appeal to the sheriff shall be competent against all final judgments of the sheriff-substitute and also against interlocutors—

(a) Granting or refusing interdict, interim or final;

(b) Granting interim decree for payment of money other than a decree for expenses, or making an order ad factum præstandum;

(c) Sisting an action;
(d) Allowing or refusing or limiting the mode of proof not being an interlocutor fixing a diet for jury trial;
(e) Against which the sheriff-substitute either ex proprio motu or on the motion of any party grants leave to appeal;

Provided always that notwithstanding the death, resignation, or removal of a sheriff, appeals may be taken from the judgment of the sheriff-substitute, which appeals shall be heard by the succeeding sheriff when he shall enter upon office.

28. Appeal to Court of Session.—Subject to the provisions of this Act it shall be competent to appeal to the Court of Session against a judgment of a sheriff-substitute or of a sheriff, but that only if the value of the cause exceeds fifty pounds; and the interlocutor appealed against is a final judgment; or is an interlocutor—

(a) Granting interim decree for payment of money other than a decree for expenses;
(b) Sisting the action;
(c) Against which the sheriff or the sheriff-substitute, either ex proprio motu or on the motion of any party, grants leave to appeal: Provided that any exclusion or allowance of appeal competent under any Act of Parliament in force for the time being shall not be affected by this or the preceding section.

29. Effect of Appeal.—An appeal shall be effectual to submit to review the whole of the interlocutors pronounced in the cause, and shall be available to and may be insisted in by all other parties in the cause notwithstanding they may not have noted separate appeals. An appeal shall not prevent immediate execution of a warrant of sequestration for rent, or of warrants to take inventories, or place effects in custody ad interim, or warrants for interim preservation, and an interim interdict, although appealed against, shall be binding till recalled.

Removal of Cause to Court of Session for Jury Trial.

30. Removal of Cause for Jury Trial.—In cases originating in the sheriff court (other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or under the Employers' Liability Act, 1880, 43 and 44 Vict. c. 42), where the claim is in amount or value above fifty pounds, and an order has been pronounced allowing proof (other than an order for proof to lie in retentis or for recovery of documents) it shall, within six days thereafter, be competent to either of the parties, who may conceive that the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried: Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the sheriff, or to remit it to a Lord Ordinary, or to send it for proof before a Judge of the Division before whom the cause depends.

Jury Trial in Sheriff Court.

31. Jury Trial in Sheriff Court.—In any action raised in the sheriff court by an employee against his employer concluding for damages under the Employers' Liability Act, 1880, or alternatively under that Act or at common law in respect of injury caused by accident arising out of and in the course of his employment, where the claim exceeds fifty pounds, either party may so soon as proof has been allowed, or within six days thereafter, require that the cause shall be tried before a jury, in which case the sheriff shall appoint the action to be tried before a jury of seven persons. The verdict of the jury shall be applied in an interlocutor by the sheriff, which shall be the final judgment in the cause, and may, subject to the provisions of this Act, be appealed to either Division of the Court of Session, but that only upon one or more of the following grounds—

(1) That the verdict has been erroneously applied by the sheriff;
(2) That the verdict is contrary to the evidence;
(3) That the sheriff had in the course of the trial unduly refused or admitted evidence or misdirected the jury;

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(4) That an award of damages is inadequate or is excessive.

Upon such appeal the court may refuse the appeal or may find under head (1) that the verdict was erroneously applied, and give judgment accordingly, or under the other heads before mentioned may set aside the verdict and order a new trial, provided that if the judges are equally divided in opinion the verdict shall stand.

32. Sheriff to State Questions for Jury.—Where jury trial has been ordered the sheriff shall after hearing parties, if he shall think that necessary or desirable, issue an interlocutor setting forth the question or questions of fact to be at the trial proponed to the jury and fixing a time and place for the trial, being not sooner than fourteen days from the date of the interlocutor.

33. Remuneration of Jurors.—Where jury trial has been ordered the party moving for it shall, on each day the trial proceeds, before the proceedings commence, deposit with the sheriff-clerk the sum of three pounds ten shillings, which deposit shall form part of the expenses of the cause; failing any such deposit being made, the sheriff may dismiss the cause. Out of said fund the sheriff-clerk shall pay to each juror a fee of ten shillings for each day on which he is empanelled. When a jury trial is not proceeded with, said deposit shall be returned to the depositor.

Removings.

34. Removings.—Where lands exceeding two acres in extent are held under a probative lease specifying a term of endurance, and whether such lease contains an obligation upon the tenant to remove without warning or not, such lease, or an extract thereof from the books of any court of record, shall have the same force and effect as an extract decree of removing obtained in an ordinary action at the instance of the lessor, or any one in his right, against the lessee or any party in possession, and such lease or extract shall along with authority in writing signed by the lessor or any one in his right or by his factor or law agent be sufficient warrant to any sheriff officer or messenger-at-arms of the sheriffdom within which such lands or heritages are situated to eject such party in possession, his family, sub-tenants, cottars, and dependants, with their goods, gear and effects, at the expiry of the term or terms of endurance of the lease: Provided that previous notice in writing to remove shall have been given—

(A) When the lease is for three years and upwards not less than one year and not more than two years before the termination of the lease; and

(B) In the case of leases from year to year (including lands occupied by tacit relocation) or for any other period less than three years, not less than six months before the termination of the lease (or where there is a separate ish as regards land and houses or otherwise before that ish which is first in date):

Provided that if such written notice as aforesaid shall not be given the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year: Provided further that nothing contained in this section shall affect the right of the landlord to remove a tenant who has been sequestrated under the Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), or against whom a decree of cessio has been pronounced under the Debtors (Scotland) Act, 1880 (43 and 44 Vict. c. 34), or who by failure to pay rent has incurred any irritancy of his lease or other liability to removal: Provided further that removal or ejectment in virtue of this section shall not be competent after six weeks from the date of the ish last in date: Provided further that nothing herein contained shall be construed to prevent proceedings under any lease in common form; and that the foregoing provisions as to notice shall not apply to any stipulations in a lease entitling the landlord to resume land for building, planting, feuing, or other purposes or to subjects let for any period less than a year.

35. Letter of Removal.—Where any tenant in possession of any lands exceeding two acres in extent (whether with or without a written lease) shall, either at the date of entering upon the lease or at any other time, have granted a letter of removal, either holograph or attested by one witness, such letter of removal shall have the same force and effect as an extract decree of removing, and shall be a sufficient warrant for ejection to the like effect as is provided in regard to a lease or extract thereof, and shall be operative against the granter of such letter of removal or any party in his

right within the same time and in the same manner after the like previous notice to remove: Provided always that where such letter is dated and signed within twelve months before the date of removal or before the first ish, if there be more than one ish, it shall not be necessary that any notice of any kind shall be given by either party to the other.

36. Notice to Remove.—Where lands exceeding two acres in extent are occupied by a tenant without any written lease, and the tenant has given to the proprietor or his agent no letter of removal, the lease shall terminate on written notice being given to the tenant by or on behalf of the proprietor, or to the proprietor by or on behalf of the tenant not less than six months before the determination of the tenancy, and such notice shall entitle the proprietor, in the event of the tenant failing to remove, to apply for and obtain a summary warrant of ejection against the tenant and every one deriving right from him.

37. Notice of Termination of Tenancy.—In all cases where houses, with or without land attached, not exceeding two acres in extent, lands not exceeding two acres in extent let without houses, mills, fishings, shootings, and all other heritable subjects (excepting land exceeding two acres in extent) are let for a year or more, notice of termination of tenancy shall be given in writing to the tenant by or on behalf of the proprietor or to the proprietor by or on behalf of the tenant: Provided always that notice under this section shall not warrant summary ejection from the subjects let to a tenant, but such notice, whether given to or by or on behalf of the tenant, shall entitle the proprietor to apply to the sheriff for a warrant for summary ejection in common form against the tenant and every one deriving right from him: Provided further that the notice provided for by this section shall be given at least forty days before the fifteenth day of May when the termination of the tenancy is the term of Whitsunday, and at least forty days before the eleventh day of November when the termination of the tenancy is the term of Martinmas.

Summary Removings.

38. Summary Removing.—Where houses or other heritable subjects are let for a shorter period than a year, any person by law authorised may present to the sheriff a summary application for removing, and a decree pronounced in such summary cause shall have the full force and effect of a decree of removing and warrant of ejection. Where such a let is for a period not exceeding four months, notice of removal therefrom shall, in the absence of express stipulation, be given as many days before the ish as shall be equivalent to at least one-third of the full period of the duration of the let; and where the let exceeds four months, notice of removal shall, in the absence of express stipulation, be given at least forty days before the expiry of the said period.

Procedure Rules.

39. Procedure Rules.—Subject to the provisions of any Act of Parliament in force after the passing of this Act, the procedure in all civil causes shall be conform to the rules of procedure set forth in the First Schedule hereto annexed. Such rules shall be construed and have effect as part of this Act.

40. Court of Session to Regulate Fees, etc.—The Court of Session may from time to time, by Act of Sederunt, make such regulations not inconsistent with the provisions of this Act as may be necessary for carrying into effect the purposes thereof for regulating the practice of the sheriff courts (including diligence and procedure under the Small Debt Acts); and for regulating the fees of agents, officers, shorthand writers, and others, and, with the concurrence of the Treasury, for regulating the fees of court; and for altering, amending, or adding to the rules of procedure in the First Schedule hereto: Provided that at least two weeks before the same is signed the terms of the proposed Act of Sederunt shall be published in the Edinburgh Gazette and at least two other newspapers in Scotland: Provided also that every such Act of Sederunt shall, within one week from the date thereof, be transmitted by the Lord President of the Court of Session to the Secretary for Scotland, in order that it may be laid before

the Houses of Parliament; and, if either of the Houses of Parliament shall within thirty-six days after it has been laid before them resolve that the whole or any part of such Act of Sederunt ought not to continue in force, the whole or such part thereof as shall be included in such resolution shall from and after the date of the passing of such resolution cease to be binding.

41. Meetings of Sheriffs.—For the purpose of preserving uniformity in the proceedings of sheriff courts, the sheriffs shall meet in Edinburgh once at least in each year, and may then, or at any other meeting, formulate for the consideration of the Court of Session any regulations which they propose should be enacted by Act of Sederunt, a printed draft of the same having been exhibited in each sheriff court for the space of fourteen days before the same is submitted to the court: Provided also that the necessary expenses of such meetings of sheriffs and of preparing and printing such propositions shall be allowed in the annual accounts in Exchequer of such one of the sheriffs as may from time to time be appointed by them to be their convener in the like manner as other ordinary expenses of sheriffs are allowed. In this section "sheriff" does not include "sheriff-substitute."

Small Debt Acts.

42. Extension of Small Debt Jurisdiction to £20.—The provisions of the Small Debt Acts shall extend and apply to all causes competent thereunder where the value of the cause does not exceed twenty pounds, and wherever the words "eight pounds six shillings and eightpence" or the words "twelve pounds" occur in these Acts they shall be read and construed as if for these words there were substituted the words "twenty pounds."

43. Small Debt Sequestration for Rent.—The provisions of the Small Debt Acts for sequestration for rent shall extend to all sequestrations applied for currente termino or in security.

44. Parties may Appear by Agents in Small Debt Court.—Section eight of the Small Debt Amendment (Scotland) Act, 1889 (52 and 53 Vict. c. 26), is hereby repealed, and in lieu thereof it is enacted that in any cause brought under the Small Debt Acts any party may appear by or along with an agent, and the sheriff may allow and include in the expenses of the cause a fee to such agent.

45. Procedure Rules Applicable to Small Debt Causes.—The provisions of section three (except subsections (*d*), (*h*), (*i*), (*k*), (*l*), (*m*), and (*p*)), section four, subsection (2) of section five, so far as relating to claims for aliment, section six (except subsection (*e*)), section forty-nine and section fifty-one hereof, and the rules ten, eleven, twelve, thirteen, fourteen, fifteen, seventeen, nineteen, twenty-one, twenty-six, fifty, fifty-five, sixty, sixty-three, seventy, seventy-nine, eighty, one hundred and twenty-six, one hundred and twenty-seven, one hundred and twenty-eight, one hundred and twenty-nine, one hundred and fifty-one, in the First Schedule hereto shall, so far as appropriate, apply to causes under the Small Debt Acts.

46. Sections 10 and 11 of the Debtors (Scotland) Act, 1838, to Apply to Small Debt Causes.—The provisions of sections ten and eleven of the Debtors (Scotland) Act, 1838 (1 and 2 Vict. c. 114), shall not apply to decrees of delivery under the Small Debt Amendment (Scotland) Act, 1889, but such decrees shall be enforceable by imprisonment under the warrant for execution contained in Schedule B of the Small Debt Amendment (Scotland) Act, 1889.

47. Second Extract of Small Debt Decree Competent.—It shall be lawful to issue a second or further extract of any decree under the Small Debt Acts, in the form as nearly as may be of Schedule B or C of the Small Debt Amendment (Scotland) Act, 1889, which extract may be written upon a separate paper, and shall have the same force and effect in all respects as the first extract.

48. Small Debt Cause may be Remitted to Ordinary Court Roll.—If the sheriff is of opinion that the importance of the questions raised in any cause brought under the Small Debt Acts warrants that course, he may at any stage remit the cause to his ordinary court roll either on cause shown or ex proprio motu, in which case the cause shall proceed in all respects (including appeal) as if it had been originally raised in the ordinary court.

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Postal Charge.

49. Postal Charge.—When a charge is necessary upon a decree for payment of money granted in the small debt court, and the place of execution of the charge is more than twelve miles distant from the seat of the court where such decree was granted, a charge may be given by post in the manner prescribed by the Citation Amendment (Scotland) Act, 1882 (45 and 46 Vict. c. 77).

Summary Applications.

50. Summary Applications.—In summary applications (where a hearing is necessary) the sheriff shall appoint the application to be heard at a diet to be fixed by him, and at that or any subsequent diet (without record of evidence unless the sheriff shall order a record) shall summarily dispose of the matter and give his judgment in writing: Provided that wherever in any Act of Parliament an application is directed to be heard, tried, and determined summarily or in the manner provided by section fifty-two of the Sheriff Courts (Scotland) Act, 1876 (39 and 40 Vict. c. 70), such direction shall be read and construed as if it referred to this section of this Act: Provided also that nothing contained in this Act shall affect any right of appeal provided by any Act of Parliament under which a summary application is brought.

The Poor's Roll.

51. Poor's Roll.—Where parties are unable from poverty to pursue or defend an action, it shall be lawful for the sheriff to admit such parties to the benefit of the poor's roll if, upon the report of the procurators for the poor, he is satisfied that such person is entitled thereto.

Repeal.

52. Repeal of Statutes.—The enactments mentioned in the Second Schedule hereto annexed are hereby repealed to the extent mentioned in the third column of that Schedule, and all laws, statutes, Acts of Sederunt, orders and usages now in force so far as the same are inconsistent with the provisions of this Act, are also hereby repealed. But provided that all actions pending at the date of the commencement of this Act shall nevertheless proceed to final determination in all respects as if this Act had not been passed.

SCHEDULES.

FIRST SCHEDULE.

Rules for Regulating Procedure in the Ordinary Court (ss. 39, 40, and 45).

Forms of Process.

1. Initial Writ.—Subject to the provisions of the Titles to Land Consolidation (Scotland) Act, 1868, and the Conveyancing and Land Transfer (Scotland) Act, 1874, as regards service of heirs and completion of title, all actions shall be commenced by writ as nearly as may be in the Form A hereto annexed.

2. Copy Account to be Served.—Where the claim or demand is founded upon a stated account a copy of the account shall be endorsed upon or attached to the initial writ and served along with it.

3. Writ to be Signed.—The writ shall be signed by the pursuer or complainer or by his agent, and the name and address of pursuer's agent (if any) shall be upon the back of every service copy.

4. Form of First Warrant.—The warrant of citation shall be as nearly as may be—

(*a*) In summary causes and summary removings, and also in summary applications when citation is necessary and in cases under the Workmen's Compensation Act, in the Form B hereto annexed:

(*b*) In all other causes, in the Form C hereto annexed.

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Induciæ.

5. Induciæ of Citation.—Actions shall proceed upon seven days' warning or induciæ when the defender is within Scotland, or fourteen days when he is in Orkney or Shetland or in any other island within Scotland or is furth of Scotland.

6. Special Induciæ.—The sheriff may shorten or may extend the induciæ, but not so as to be in any case less than forty-eight hours.

Citation.

7. Signature of Warrants.—Warrants may be signed by the sheriff-clerk, but any warrant may be signed by the sheriff or sheriff-substitute, and must be so signed if it contains an order for shortening or extending the induciæ or for interim interdict, sequestration, or other order not being an order for citation or warrant to arrest. In actions against persons furth of Scotland the warrant may authorise service edictally.

8. Mode of Citation.—Citation may be in the Form D hereto annexed, and the form of execution of citation, which shall be appended to or endorsed upon the initial writ, may be in the Form E hereto annexed.

9. Attestation of Officer's Execution of Citation.—If a warrant is executed by an officer, one witness shall be sufficient for the execution of citation, and the execution shall be signed by the officer and the witness, and shall specify whether the citation was personal, or, if otherwise, the mode of citation.

10. Endorsation of Warrant by Sheriff-Clerk of Defender's Residence not Necessary.—Any warrant of citation or any warrant or precept of arrestment proceeding upon a depending action or liquid document of debt may in any competent manner be lawfully executed within the jurisdiction of any sheriff without indorsation by the sheriff-clerk of that jurisdiction, and, if executed by an officer, may be so executed by an officer of the court which granted the warrant or precept, or by an officer of the jurisdiction within which it is to be executed.

11. Citing of Corporation.—A corporation or association, or a firm nominate or descriptive, or a board corporate or unincorporate, may be sued and summary diligence upon a sheriff court decree or a decree of registration executed against them under their nominate or descriptive name alone, and may be competently cited at their principal place of business (which term shall include the office or place of business of the clerk or secretary of any board or corporation), or where the principal place of business is outwith the jurisdiction, at any place of business within the jurisdiction.

12. Service of New.—If it appear to the sheriff that there has been any irregularity in service upon a defender who has not appeared, the sheriff may authorise the pursuer or complainer to make service of new upon such conditions as to the sheriff shall seem just.

13. Defender Appearing Barred Objecting to Citation.—A party who appears may not state any objection to the regularity of the service upon himself, and his appearance shall be deemed to remedy any defect in the service, unless where jurisdiction has been constituted by citation or by arrestment ad fundandum jurisdictionem.

14. Citation of a Minor.—Service in ordinary form on a minor and on his father, as curator-at-law, or upon a minor and his tutors and curators if known to pursuer, or, if they are not known, upon the minor himself in ordinary form, and his tutors and curators edictally, shall be good and sufficient service on the minor for every purpose of law.

15. Edictal Citation.—It shall be competent to execute edictally any warrant of citation granted or charge on an extracted decree pronounced by a sheriff against any person furth of Scotland, by delivery of a copy thereof at the office of the keeper of edictal citations at Edinburgh according to the mode established in regard to the execution edictally of citations and charges on warrants of the Court of Session; or by sending to such keeper in a registered post-letter a certified copy of such warrant or charge, of which copy the keeper shall acknowledge receipt. Every citation or charge so executed edictally shall be recorded in the record of edictal citations in Edinburgh in a separate record of edictal citations or charges against persons furth of Scotland cited or charged upon warrants proceeding from any sheriff court. Where the party cited or charged has a known residence or place of business in England or Ireland a copy of the writ and citation or of the decree and charge on fourteen days' induciæ shall be posted in a registered letter to the party at such address, and the execution shall express that this has been done. The sheriff-clerk shall in all warrants to cite persons furth of Scotland insert a warrant to cite edictally, and along with the execution of edictal citation pursuer's agent shall lodge a certificate of such postal intimation and the post office registered letter receipt.

Custody of Process.

16. Custody of Process.—Every initial writ shall after tabling remain in the custody of the sheriff-clerk, unless the sheriff shall grant a special order to the contrary. A process may

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be borrowed only by an agent entitled to practice in the jurisdiction, or by his duly authorised clerk, for whom he shall be responsible.

17. Lost Documents may be Replaced by Copies.—When any number of process is lost or destroyed, a copy thereof, authenticated in such manner as the sheriff may require, may be substituted, and shall, for the purposes of the action, be equivalent to the original.

18. Interlocutor Sheets, etc., to be Lodged by Pursuer.—In a defended action the pursuer shall lodge with the sheriff-clerk principal and duplicate interlocutor sheets and a principal and borrowing inventory of process; and the sheriff-clerk shall endorse upon all pleadings the date when the same are lodged. The principal interlocutor sheets and the borrowing inventory shall remain in the custody of the sheriff-clerk.

Transfer of Causes.

19. Transfer of Cause to more Convenient Sheriffdom where Several Defenders in Different Sheriffdoms.—Where an action in which there are two or more defenders has been brought in the court of the domicile of one of them, the sheriff may transfer the cause to any other court which has jurisdiction over any of the defenders, if in his opinion it is expedient that this should be done, and an action so transferred shall proceed in all respects as if it had been originally brought in that court.

20. Sheriff on Cause shown may Remit to another Sheriffdom.—The sheriff may upon sufficient cause, by interlocutor stating his reasons, remit any cause to another sheriffdom, and such interlocutor, when issued by a sheriff-substitute, shall by leave of the sheriff-substitute, and within seven days only, be subject to review by the sheriff, but shall not be further subject to review.

21. Where Plea of No Jurisdiction Stated, Cause may be Remitted to proper Sheriffdom.—Where a plea of no jurisdiction is sustained, the sheriff may, if he think proper, and upon such conditions as to costs as he may think fit, remit the cause to the sheriff before whom it appears to him it ought to have been brought, and it shall thereafter proceed in all respects as if it had been originally there brought. When such remit is made by the sheriff-substitute, the interlocutor remitting shall by leave of the sheriff-substitute and within seven days only be subject to review by the sheriff but shall not be further subject to review.

Appearance.

22. Notice of Appearance.—If a defender intend to state a defence he shall (except in a summary cause), before the expiry of the induciæ, lodge with the sheriff-clerk a notice of appearance in the following terms:—

[Place and date]—C. D., [design him] defender, intends to defend the action against him [and others] at the instance of A. B. [design him].

C. D. *Defender*,
or X. Y. [add address],
Defender's Agent.

Undefended Causes.

23. In Undefended Cause Decree may be Granted at any Time after Expiry of Induciæ.—Where a defender does not answer or lodge a notice of appearance the sheriff may at any time, after the expiry of the induciæ, upon written craving to that effect being endorsed upon the initial writ by the pursuer or his agent, decern in terms of the claim or demand as set forth in the initial writ, and for expenses as the same may be certified by a note endorsed upon the initial writ by the auditor of court, subject to any restriction endorsed upon the writ or set forth in a minute by the pursuer or his agent.

24. Extract of Decree in Absence in Seven Days.—The sheriff-clerk may issue an extract of such decree after the expiry of seven days from the date of the sheriff's judgment.

25. Finality of Decree in Absence.—A decree pronounced in absence, and which has not been recalled or brought under review by suspension, where suspension is competent, or by reduction, shall become final, and be entitled to all the privileges of a decree in foro—

(*a*) In six months from its date, or from the date of charge under it, where the service of the writ or of the charge has been personal:

(*b*) In any event after the lapse of twenty years from its date.

26. Amendment of Writ in Undefended Action.—In an undefended action the sheriff may allow the pursuer or his agent to amend any error or defect in the initial writ, and may, if he see fit, order the amended writ to be served upon the defender, and may allow him to appear within such time as he may think proper. But the expense occasioned by such amendment shall not be chargeable against the defender, and such amendment shall not have the effect of validating diligence used on the dependence of the action so as to prejudice creditors of the defender, but such amendment shall be operative to the effect of obviating

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objections to such diligence when stated by the defender himself, or by any persons representing him by a title, or in right of a debt contracted by him subsequent to the using of such diligence, and any diligence which was competent upon the original writ shall be competent upon the amended writ.

Reponing.

27. Defender may be Reponed against Decree in Absence.—At any time before implement of a decree in absence, the defender may apply to be reponed by lodging with the sheriff-clerk and serving upon pursuer a note setting forth his proposed defence, and his explanation of his failure to appear.

28. Upon Consignation.—Along with this reponing note the defender shall consign the sum of two pounds in the hands of the sheriff-clerk.

29. Sheriff may Recall the Decree in Absence.—Upon such consignation the sheriff, if satisfied with the defender's explanation, may recall the decree so far as not implemented, whereupon the action shall proceed in all respects as if the defender had appeared.

30. Or Refuse to Recall.—If the sheriff is not satisfied with the defender's explanations he may refuse the reponing note.

31. Pursuer Entitled to Consigned Money.—In either case the pursuer shall be entitled to uplift the consigned money.

32. Reponing Note to operate as Sist of Diligence.—A reponing note, when duly lodged and intimated to the pursuer or to his agent, shall operate as a sist of diligence.

33. Judgment upon a Reponing Note Final.—Any interlocutor or order upon a reponing note, or recalling, or incidental to the recall of a decree in absence, shall be final and not subject to review.

Defended Causes.

34. Defended Cause to be Tabled.—Where appearance has been entered the sheriff-clerk shall enrol the cause for tabling on the first court day occurring after the expiry of the inducie.

35. If not Tabled to Drop from Roll.—An action which has not been tabled, and in which protestation has not been craved, shall drop from the roll, but within three months the sheriff may direct it to be again enrolled for tabling under such conditions as to notice, or re-service, or expenses, or otherwise as he shall think fit.

36. If Case not Tabled Defender may Crave Protestation.—If the pursuer do not then table the cause, the defender or his agent, upon producing the service copy of the writ, may crave protestation for not insisting, which the sheriff may grant, and may modify the amount of protestation money payable to defender.

37. Extract of Protestation.—Protestation shall not be extracted till the expiry of seven free days from the date of its granting, except where arrestments have been used, in which case extract may be given out after the lapse of forty-eight hours.

38. Effect of Protestation.—Upon protestation being extracted, the instance shall fall.

39. Recall of Protestation.—Before extract protestation may be recalled, and the pursuer may be allowed to proceed with his action upon making payment to the defender of the amount of the protestation money, and upon such other conditions as to the sheriff shall seem just.

40. Sheriff may Direct any Cause to be Tried as a Summary Cause.—When any defended action (other than a claim under the Workmen's Compensation Act) has been tabled, the sheriff of consent of parties, notwithstanding that its value exceeds fifty pounds, may, at any stage, direct that it be tried as a summary cause, and his decision as to this shall be final.

41. Procedure in a Summary Cause.—In a summary cause the sheriff may order a condescendence and defences if he thinks fit, or may make or certify a note upon the writ or separately of the pleas of parties and appoint a diet for the trial of the cause, or may order such other procedure as the circumstances seem to him to require.

42. In Non-Summary Cause Condescendence within Three Days of Tabling.—In all other defended causes the pursuer shall at the tabling of the cause, or within three days thereafter, lodge a condescendence setting forth succinctly and in articulate articles the grounds of action and his pleas in law.

43. Defences within Six Days.—Within six days of the condescendence being lodged the defender shall lodge his defences.

44. Enrolment for Adjustment.—The sheriff-clerk shall, upon defences being lodged, enrol the cause for an ordinary court day occurring not less than four days thereafter for adjustment. The adjustment shall not be adjourned more than once unless upon special cause shown.

45. Certified Copy Writ Warrant for Arrestment.—In every defended action the pursuer shall, after defences have been lodged, and before the diet for adjustment, lodge in process a copy of the initial writ and warrant thereon certified by him or his agent, which may

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thereafter be borrowed by the agent of any party to the process, and such certified copy shall be sufficient warrant where competent to arrest on the dependence. Separate precepts of arrestment may be issued by the sheriff-clerk upon production to him of a writ containing pecuniary conclusions upon which a warrant of citation has been granted, or of a liquid document of debt.

46. Form of Defences.—Defences shall be in the form of articulate answers to the condescendence, having appended a note of defender's pleas, and where necessary a statement of facts founded on in defence which shall be set forth succinctly.

47. Documents Founded on to be Produced before Record Closed.—Each party shall, along with his pleadings, or at latest before the closing of the record, if required by any other party in the action or by the sheriff, lodge any documents founded upon in the pleadings, so far as the same are within his custody or power.

48. Diligence for Recovery of such Documents.—Where such documents are not produced by either party, or where they are in the hands of third parties, the sheriff may, on the motion of either party, grant commission and diligence for their recovery, and may on that account delay closing the record.

49. Revisal may be Ordered.—The sheriff may upon cause shown, or ex proprio motu, order a revisal of the pleadings, or may order pursuer to answer defender's separate statement of facts.

50. Documents may be Challenged Ope Exceptione.—When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof.

51. Caution may be Ordered when Action of Reduction Competent.—The sheriff may, where an objection is so stated and where an action of reduction would be competent, order the objector to find caution, or to make consignation as he shall direct.

52. Closing Record.—When the pleadings have been adjusted the sheriff shall close the record.

53. Alterations to be Initialed by Sheriff.—All alterations or additions made on the record shall be authenticated by the sheriff's initials.

54. Preliminary Pleas to be First Disposed of.—If preliminary pleas have been stated the sheriff shall first dispose of them, unless he thinks that from their being connected with the merits, or on any other ground, they should be reserved till a future stage of the cause.

55. Counter-claim may be Stated in Defences.—Where a defender pleads a counter-claim it shall suffice that he state the same in his defences, and the sheriff may thereafter deal with it as if it had been stated in a substantive action, and may grant decree for it in whole or in part, or for the difference between it and the claim sued on.

56. Failure of either party to Appear or to Implement Orders of Court Entitles other party to Decree.—In a defended action (including a jury cause) when any production or pleading has not been lodged or order implemented within the time required by statute or ordered by the sheriff, or where in a defended action either party fails to appear by himself or his agent at any diet, or fails to make payment of any court dues or deposit, the sheriff may grant decree as craved, or of absolvitor, or may dismiss the action, with expenses, but the sheriff may upon cause shown prorogate the time for lodging any production or pleading or implementing any order. If all parties fail to appear, the sheriff shall, unless sufficient reason appear to the contrary, dismiss the action.

57. Agent Failing to Return Process may be Fined.—When an agent has borrowed a process, or any part thereof, and fails to return it for any diet at which it is required, the sheriff may impose upon such agent a fine not exceeding one pound, which shall be payable to the clerk of court for behoof of His Majesty's Exchequer, but an order so imposing a fine may on cause shown be recalled by the sheriff who granted it. Orders made under this section shall not be subject to review. For the purposes of this section every agent practising before his court shall be subject to the jurisdiction of the sheriff.

58. If Probation Renounced Parties to Sign Minute.—If at the time of closing the record the parties renounce probation, they shall sign a minute to that effect on the interlocutor sheet, and the sheriff may order the case to be debated then or at a subsequent diet.

59. Proof may be Ordered.—If proof is necessary, the sheriff shall (unless the cause has been ordered for jury trial), with the least possible delay, fix a date for taking the proof, and may limit the mode of proof.

60. Remit to Person of Skill.—The sheriff may remit to any person of skill, or other person, to report on any matter of fact; and, when such remit is made of consent of both parties, the report of such person shall be final and conclusive with respect to the matter of the remit. When such a remit is made, upon the motion of either party, the expense attending its execution shall in the first instance be paid by the party moving for it. When the remit is on joint motion, or by the sheriff ex proprio motu, the expense shall in the first instance be paid by the parties equally, unless the sheriff shall otherwise order.

61. Parties may by Minute Agree to Cause being tried as Small Debt Cause.—The parties to any action may lodge in process a minute, signed by themselves or their agents, agreeing to the cause being disposed of in the manner provided under the Small Debt Acts,

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whereupon the sheriff shall remit the action to his small debt court roll, and the whole powers and provisions of the Small Debt Acts shall become applicable to the cause.

62. Diligence for Recovery of Documents.—At any time after a proof has been allowed, or an order made for jury trial, the sheriff, upon the motion of either party, may grant commission and diligence for the recovery of such documents as the sheriff shall deem relevant to the cause.

63. Evidence to lie in Retentis.—Evidence in danger of being lost may be taken to lie in retentis, and, if satisfied that it is desirable so to do, the sheriff may, upon the motion of either party at any time, either take himself, or grant authority to a commissioner to take, such evidence.

64. Reference to Oath.—When any person desires to refer to the oath of his adversary, he shall lodge a minute to that effect, signed by himself or his agent. If the party to whose oath reference has been made fail to appear at the diet for taking his deposition, the sheriff may hold him as confessed, and decern accordingly.

65. Recording of Evidence.—Evidence in a cause or a disposition, whether before the sheriff or a commissioner, may be taken down by the sheriff or commissioner, or by a clerk or shorthand writer nominated by the sheriff or commissioner, to whom the oath de fideli administratione shall be administered and evidence may be recorded in narrative form or by question and answer as the sheriff or commissioner shall direct, and the extended notes of evidence, certified by such clerk or shorthand writer, shall be the notes of the oral evidence in the cause. The sheriff or commissioner may, if he think fit, dictate to the clerk or shorthand writer what he is to record.

66. Sheriff may amend Record of Evidence.—If the correctness of the notes of evidence or of a deposition be questioned, the sheriff may satisfy himself in regard thereto by the examination of witnesses or otherwise, and may amend the record of evidence or a deposition.

67. Shorthand Writer's Fees.—When a shorthand writer is so employed to record evidence, he shall in the first instance be paid, as regards commissions by the party moving for the commission, and as regards proofs or jury trials by the parties equally. The agents of parties shall be personally liable for the shorthand writer's fees. And it shall be competent for the sheriff to make an order directing payment to be made.

68. Production of Documents may be Ordered.—The sheriff may order production of documents at any stage of the cause, and the sheriff may allow a party, at any time before judgment, to produce any document which he has failed to produce timeously, upon such conditions as to payment of expenses and allowing further proof as to the sheriff shall seem just.

69. Proof to be taken Continuously.—The proof shall be taken so far as possible continuously, but the sheriff may adjourn the diet from time to time.

70. Evidence may be Taken on Commission.—The evidence of any witness or haver resident beyond the jurisdiction of the court, or who although resident within the jurisdiction resides at some place remote from the seat of the court, or who is by reason of illness, age, or infirmity unable to attend the diet of proof, or a jury trial, may be taken by commission in like manner as evidence to lie in retentis.

71. Citation of Witnesses.—A copy of an interlocutor certified by the sheriff-clerk allowing a proof or fixing a diet for the trial of any action or for the examination of witnesses or havers, or fixing a date for a jury trial, shall be sufficient warrant for citation of witnesses or havers. If any witness or haver duly cited on an inducie of at least forty-eight hours, and after having been tendered his travelling expenses, if the same shall have been demanded, fail to attend a diet, either before the sheriff or before his commissioner, such witness or haver may be ordained by the sheriff to forfeit and pay a penalty not exceeding forty shillings, unless a reasonable excuse be offered and sustained, and the sheriff may grant decree for said penalty in favour of the party on whose behalf said witness or haver was cited.

72. Form of Citation.—Witnesses and havers may be cited as nearly as may be in Form F hereto annexed, and the execution of citation shall be as nearly as may be in the Form G, and an agent who cites a witness shall be personally liable for the fees of the witness.

73. Second Diligence against Witness Failing to Attend.—It shall further be competent to the sheriff to grant second diligence (which shall be effectual in any sheriffdom within Scotland without endorsation) for compelling the attendance of said witness or haver under pain of arrest and imprisonment, until caution be found as the sheriff may require for his due attendances, the expense whereof may in like manner be decerned for against the witness or haver.

74. Objections Taken in Course of Proof to be Noted.—When the sheriff, or a commissioner, repels or sustains an objection taken in the course of a proof, the objection stated, and any answer made to it, shall, if desired by the objector, be shortly noted on the notes of evidence to the sheriff's or commissioner's dictation, but the examination of the witness shall nevertheless proceed. The sheriff or commissioner may, if he consider the objections of sufficient importance, direct the evidence objected to to be taken on a separate paper; but it shall not be competent during the course of a proof to submit to review any judgment pronounced upon the competency of the evidence.

7 EDWARD 7, Chapter 51.

75. Appeal on Questions of Admissibility of Evidence.—On the proof being declared closed, or within seven days thereafter, if the sheriff-substitute has not in the interval pronounced judgment, it shall be competent by leave of the sheriff-substitute to appeal to the sheriff upon objections to the admissibility of evidence taken during the course of the proof, and the sheriff shall, with or without a hearing, dispose of such appeal with the least possible delay, and, if he think that evidence accepted should not have been allowed, he may delete the same from the notes of evidence, and if he think that evidence has been improperly rejected, he may appoint the same to be taken before the case is advised on its merits.

76. Appeal on Ground of Confidentiality.—If any person, whether a party to the cause or other person, plead before the sheriff-substitute confidentiality with reference to documentary or oral evidence, or, on pleas of alleged hypothec or otherwise, shall object to produce documents, the sheriff-substitute shall, on the notes of evidence, minute his decision on such pleas, and any party in the cause or the party pleading confidentially by leave of the sheriff-substitute may, in open court, take an appeal to the sheriff, who shall, with or without a hearing and with the least possible delay, dispose of such appeal.

77. Proof to proceed notwithstanding such Appeal.—Such incidental appeal shall not remove the cause from the sheriff-substitute, who may proceed with the cause as regards points not necessarily dependent upon the ruling so appealed against.

78. Parties to be heard at Close of Proof.—At the close of the proof, or at an adjourned diet, if for any reason the sheriff shall see fit to postpone the hearing, the sheriff shall hear the parties or their agents, and thereafter shall pronounce judgment with the least possible delay.

Amendment of Pleadings.

79. Record may be Amended by Sheriff.—Upon the motion of either party the sheriff may, at any stage of the cause, and upon such conditions as to expenses reservice or otherwise as he shall deem proper, allow a record to be altered or amended to the effect of determining the real question in controversy (including amendment of the instance and the initial writ and the adding of parties) notwithstanding that the conclusions of the action may thereby be enlarged or altered.

80. Effect of Amendment.—No such amendment shall have the effect of validating diligence used prior thereto on the dependence of the action so as to prejudice the rights of creditors of the defender interested in defeating such diligence, but such amendment shall be operative to the effect of obviating objections to such diligence when stated by the defender himself, or by any person representing him by a title, or in right of a debt contracted by him subsequent to the execution of such diligence.

Abandonment.

81. Abandonment of Action.—A pursuer may at any stage of an action before an interlocutor granting absolvitor or dismissing the action has been pronounced offer to abandon his action by lodging a minute to that effect, signed by himself or his agent, in which case, upon payment to defender of his expenses, the sheriff may dismiss the action, and pursuer may bring a new action if otherwise competent. If the pursuer fails, within fourteen days of the date of taxation, to pay the defender's expenses, the defender shall be entitled to decree of absolvitor, with expenses.

Judgment.

82. Sheriff to state Reasons for Judgment.—To all interlocutors, except those of a formal nature, the sheriff shall append a note setting forth the grounds upon which he has proceeded, and in his final judgment on the merits he shall set forth his findings in fact and in law separately.

83. Date of Judgment to be Date of Entry in Court Books.—The sheriff may pronounce or sign any judgment or interlocutor when furth of his sheriffdom, but the date of every interlocutor shall be deemed to be the date upon which it is entered in the books of the court.

84. Clerical Error in Judgment may be Corrected.—At any time before extract, or before the transmission of a process in which an appeal has been taken the sheriff may correct any clerical or incidental error in his judgment.

Extract.

85. Time of Extract.—Extract of any decree, interlocutor, or order of the sheriff (other than a decree in absence or a decree for expenses), if the same shall not have been sooner appealed against, may be issued in a summary cause after the lapse of seven days; and in any

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other cause, after the lapse of fourteen days from its date, or at such earlier date as the sheriff shall allow extract.

Appeal.

86. Appeal from the Sheriff-Substitute.—A final judgment of the sheriff-substitute may if appeal be competent and unless otherwise provided be appealed to the sheriff or to the Court of Session at any time within three months of its date (but not later), if the same shall not sooner have been extracted or implemented. Any other appealable interlocutor of the sheriff-substitute may be appealed within fourteen days (but not later), if not sooner extracted.

87. Form of Appeal.—An appeal shall be taken by the appellant or his agent dating and signing a note on the interlocutor sheet in the following terms :—

The pursuer [or defender or other party] appeals [to the sheriff] or [to the Division of the Court of Session].

Or if the interlocutor sheet is not in the hands of the sheriff-clerk (which fact shall be certified by him), the note of appeal may be written upon a separate paper, and lodged along with the sheriff-clerk's said certificate.

88. On Appeal Process to go to Sheriff or Clerk of Session.—On an appeal being taken, the sheriff-clerk shall within two days transmit the process to the sheriff or to the principal clerk of session as the case may be, and also send written notice of the appeal to the other parties or their agents, but failure to give such notice shall not invalidate the appeal.

89. Reclaiming Note or Oral Hearing may be Ordered.—The sheriff may order a reclaiming note and answers, or may hear parties orally.

90. But may be Dispensed with.—The sheriff may, on the motion of both parties and if he see fit, dispose of the appeal without ordering either a reclaiming note and answers or an oral hearing.

91. Sheriff to Regulate Interim Possession, etc., Pending Appeal.—Notwithstanding an appeal, the sheriff shall have power to regulate all matters relating to interim possession, to make any order for the preservation of any property to which the action relates or for its sale if perishable, or for the preservation of evidence, or to make in his discretion any interim order which a due regard to the interests of the parties may require. Such orders shall not be subject to review except by the Appellate Court at the hearing of the appeal.

92. Appeal to Court of Session.—Within three months from its date (but not later), a final judgment of the sheriff, if not sooner extracted or implemented may, if appeal be competent, be appealed to the Court of Session. Any other appealable judgment of the sheriff may, if not sooner extracted or implemented, be appealed within fourteen days (but not later).

93. Form of Appeal.—The party desiring so to appeal, or his agent, shall do so by writing on the interlocutor sheet (or on a separate paper, in like manner as in the case of an appeal from the sheriff substitute) a note in the following terms :—

The pursuer [*or* defender *or* other party] appeals to the Division of the Court of Session.

94. Sheriff-Clerk to Transmit Process to Edinburgh.—On receiving such note of appeal the sheriff-clerk shall within two days transmit the process to the principal clerk of session at Edinburgh, and shall also send written notice of the appeal to the other parties or their agents, but failure to give such notice shall not invalidate the appeal.

95. Form of Appeal to Court of Session in Actions Advocated under this Act.—If any action is desired to be removed to the Court of Session in terms of sections five and thirty of this Act, the party so desiring its removal shall write a minute to that effect upon the interlocutor sheet, whereupon the sheriff-clerk shall give intimation to the other parties or their agents and shall transmit the process to the keeper of the roll of the Court of Session, who shall, under the direction of the Lord President, allocate the cause to a Division and a Lord Ordinary, and thereafter the cause shall proceed in all respects as if it had originally been raised in the Court of Session.

96. Abandonment of Appeal.—After an appeal has been noted, the appellant shall not be entitled to abandon it unless of consent of all parties, or by leave of the Appellate Court.

97. In sections 86, 87, 88, 89, 90, and 92 "sheriff" does not include sheriff-substitute.

Expenses.

98. Decree for Expenses to Include Dues of Extract.—Every decree for expenses shall be deemed to include a decree for the expense of extracting the same, and extract of such decree for expenses may be issued after the lapse of seven days unless otherwise directed by the sheriff.

99. Decree for Expenses may be Extracted in Agent's Name.—Expenses allowed in any action, whether in absence or in foro, shall, unless modified at a fixed amount, be taxed before decree is granted for them, and the sheriff may allow a decree for expenses to go out and be extracted in name of the agent who conducted the cause.

7 EDWARD 7, Chapter 51.

100. Objection to Auditor's Report.—Within two days after the lodging of the auditor's report on taxation it shall be competent to lodge a note of objections to an auditor's report, and the sheriff shall dispose of such objections in a summary manner, with or without answers.

Wakening.

101. Wakening Action.—If no interlocutor shall have been pronounced in a cause for a year and a day it shall be held to have fallen asleep.

102. To be by Minute.—Where the whole of the parties or their agents subscribe a minute on the interlocutor sheet consenting to the cause being wakened the sheriff may pronounce an interlocutor wakening the cause, and thereafter proceed with it.

103. Publication of Application for Wakening.—Where all parties do not so consent, the party desiring to have the cause wakened may lodge a minute to that effect, which the sheriff may order to be intimated to the other parties or their agents, and to be published in such manner as the sheriff shall direct, and the agent for the party applying for wakening shall lodge a certificate that the intimation and publication ordered have been made. If satisfied, the sheriff may thereafter pronounce an interlocutor wakening the cause, and proceed with it.

Sequestration for Rent.

104. In Sequestration for Rent.—In actions for sequestration, and sale, for recovery, or in security of rent, whether brought after the term of payment or currente termino, payment of rent may be concluded for, and decree for payment of such rent or part thereof, when the same has become due and payable, may be pronounced and be extracted in common form.

105. Warrant may be Granted to Inventory and Secure.—In the first deliverance upon a writ for sequestration for rent the sheriff may sequestrate the effects of a tenant, and grant warrant to inventory and secure the same and all warrants to sequestrate, inventory, sell, eject, or re-let shall be deemed to include authority, if need be, to open shut and lockfast places for the purpose of carrying such warrants into execution.

106. Sequestrated Effects may be Sold.—The sheriff may order the sequestrated effects to be sold at the sight of an officer of court or other person named.

107. Sale to be Reported within Fourteen Days.—When a sale follows, it shall be reported within fourteen days and pursuer shall lodge the roup rolls or certified copies thereof and a state of debt

108. Sheriff may Decree for Balance due after Sale.—In the interlocutor approving the report of sale, or by separate interlocutor, the sheriff may give decree against the defender for any balance remaining due.

109. Sheriff may appoint Caretaker or Order Caution.—The sheriff may at any stage appoint a fit person to take charge of the sequestrated effects, or may require the tenant to find caution that they shall be made forthcoming.

Removings.

110. Action of Removing where Fixed Term of Removal.—An action of removing may be raised at any time, provided the tenant has bound himself to remove by writing, dated and signed within twelve months of the term of removal, or, where there is more than one ish, of the ish first in date to remove. When the tenant has not so bound himself, an action of removing may be raised at any time provided that—

(*a*) In the case of a lease of lands exceeding two acres in extent for three years and upwards, an interval of not less than one year nor more than two years shall elapse between the date of notice of removal and the term of removal first in date;

(*b*) In the case of leases of lands exceeding two acres in extent, whether such leases be written or verbal held from year to year or under tacit relocation, or for any other period less than three years, an interval of not less than six months shall elapse between the date of notice of removal and the term of removal first in date; and

(*c*) In the case of houses let with or without land attached not exceeding two acres in extent, as also of land not exceeding two acres in extent without houses, as also of mills, fishings, shootings, and all other heritable subjects excepting land exceeding two acres in extent, and let for a year or more, forty days at least shall elapse between the date of notice of removal and the term of removal first in date.

Provided that nothing herein contained shall affect section 27 of the Agricultural Holdings Act, 1883: Provided also that in any defended action of removing, the sheriff may order the defender to find caution for violent profits: Provided also that in actions of declarator of irritancy and removing by a superior against a vassal, the pursuer shall call as parties the last entered vassal and such heritable creditors and holders of postponed ground burdens as are disclosed by a search for twenty years prior to the raising of the action, and the expense of the search shall form part of pursuer's expenses of process.

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111. Form of Notice of Removal.—Notices under sections 34, 35, and 36 of this Act shall be as nearly as may be in the Form H annexed hereto, and a letter of removal may be in the terms of Form I.

112. Form of Notice under Section 37.—Notices under section 37 of this Act shall be as nearly as may be in the Form J hereto annexed, and such form may be used, mutatis mutandis, also for notices to the proprietor by or on behalf of the tenant.

113. Removal Notices.—Removal notices under sections 34, 35, 36, 37, and 38 of the Act may be given by a messenger-at-arms or sheriff officer, or by registered letter signed by the person entitled to give such notice, or by the law agent or factor of such person, posted at any post office within the United Kingdom in time to admit of its being delivered at the address thereon on or prior to the last date upon which by law such notice must be given, addressed to the person entitled to receive such notice, and bearing the particular address of such person at the time if the same be known, or, if the same be not known, then to the last known address of such person.

114. Evidence of Notice to Remove.—A certificate of notice under rule 111, dated and endorsed upon the lease or extract, or upon the letter of removal, and signed by the sheriff officer, messenger-at-arms, or by the person giving the notice, or his law agent, or factor, or an acknowledgment of notice endorsed on the lease or extract or letter of removal by the party in possession or his agent, shall be sufficient evidence that notice has been given. Where there is no lease, a certificate endorsed upon a copy of the notice or letter, certified to be correct, by the person, sheriff officer, messenger-at-arms, law agent, or factor sending the same, which certificate shall be signed by such party sending the notice or letter, shall also be sufficient evidence that notice has been given. A certificate of notice under rule 112, dated and endorsed upon a copy of the notice or letter signed by the party sending the notice, shall be sufficient evidence that such notice has been given.

Summary Removings.

115. Form of Action for Summary Removing.—The action for summary removing as authorised by section 38 of this Act may be at the instance of a proprietor or his factor, or any other person by law authorised to pursue a process of removing, and be in the Form K hereto annexed.

116. Form of Warrant.—The warrant to be granted thereon may be in the Form B hereto annexed upon two days' inducíæ and may be signed by the sheriff-clerk.

117. Decree in Absence may be Recalled within Three Days.—If the defender fail to appear, the sheriff may dispose of the cause in his absence, but, if within three days the defender shall satisfy the sheriff that there was reasonable excuse for his non-appearance, the sheriff may re-hear the cause, and, if decree has been granted and not implemented, may recall the decree upon such conditions as to expenses and otherwise as the sheriff shall deem reasonable. Where decree is pronounced in absence, the sheriff may give such directions as he may deem proper for the preservation of the defender's goods and effects.

118. Service Copy Warrant Sufficient to Cite Witnesses.—The warrant upon the petition or complaint of the defender's service copy thereof shall be sufficient warrant for the citation of witnesses.

119. Small Debts Procedure Applies to Summary Removing.—Such causes shall be conducted and disposed of in the summary manner in which proceedings are conducted under the Small Debt Acts and shall not be subject to review.

120. Form of Decree.—When decree and warrant of ejection is granted it shall be in the Form L hereto annexed.

121. Sheriff may Order Caution.—The sheriff may order written answers or adjourn the hearing of such causes, but where defences cannot be instantly verified, the sheriff shall ordain the defender to find caution for violent profits, unless the sheriff shall dispense with caution, which he may do if he see fit.

122. When Caution Found Procedure as Ordinary Action.—Where a defender has given in answers, and caution for violent profits has been found or has been dispensed with, such causes shall, as nearly as may be thereafter, be conducted according to the procedure in ordinary actions of removing, and shall be subject to review in common form.

Summary Suspension.

123. Summary Application for Suspension of Charge may be Brought in Court of Defender's Domicile.—Where a charge has been given on a decree of court granted by the sheriff or a decree of registration proceeding upon a bond, bill, contract, or other form of obligation registered in any sheriff court books, or in the books of council and session, or any others competent, or on letters of horning following on such decree, for payment of any sum of money not exceeding fifty pounds, exclusive of interest and expenses, the person so charged may apply in the sheriff court of his domicile for suspension on caution of such charge and diligence.

124. Diligence may be Sisted on Caution.—On sufficient caution being found in the hands of the sheriff-clerk for the sum charged for interest and expenses, and a sum to be fixed by the sheriff in respect of expenses to be incurred in the suspension process, the sheriff may sist diligence, order intimation and answers, and proceed to dispose of the cause in a summary manner.

125. Judgment of Sheriff Final on Competency.—If objections be taken to the competency or regularity of suspension proceedings, the judgment of the sheriff-substitute, on such objections, may be appealed to the sheriff, but his judgment thereon shall be final.

Arrestment.

126. When Arrestment Schedule not served Personally Copy to be sent by Post.—If a schedule of arrestment has not been personally served upon an arrestee, it shall be necessary, to make the arrestment effectual, that a copy of the schedule be also sent by postal registered letter to the last known place of abode of the arrestee, or if such place of abode is unknown, or if the arrestee is a firm or corporation, to the arrestee's principal place of business if known, or, if not known, to any known place of business of the arrestee, and the officer shall in his execution certify that this has been done, and specify the said address.

127. Arrestment to be Reported.—An arrestment used on the dependence shall fall, unless the action shall have been served within seven days of the date of execution of arrestment, and tabled within fourteen days after service, and, when an arrestment has been executed, the party using it or his agent shall forthwith report the execution to the sheriff-clerk.

Furthcoming and Multiplepoinding.

128. Forum of Action of Multiplepoinding.—An action of furthcoming or multiplepoinding may be raised in the sheriffdom where the fund or subject in medio is situated, or in that to whose jurisdiction the arrestee or the holder of the fund is subject although the common debtor may not reside within either sheriffdom.

129. Real Raiser to be Set Forth.—The party raising an action of multiplepoinding shall set forth in the initial writ who is the real raiser. The sheriff may, in an action of multiplepoinding, allow the real raiser his expenses preferably out of the fund in medio; and, in an action of furthcoming, the expenses of bringing the action shall be deemed to be part of the arrestor's claim, which may be made good out of the arrested fund or subject.

130. Claims to be Ordered.—Where, in an action of multiplepoinding, no defences are stated, and where defences are stated and repelled, the sheriff shall order claims and, if necessary, answers within a short space.

131. Several Claimants may state One Paper.—Several claimants may state the facts on which they base their claims on the same paper, but, where necessary, they shall append separate claims and separate pleas in law.

132. When Competing Claims Procedure as in Ordinary Action.—Where there are defences in an action of furthcoming or competing claims in a multiplepoinding process the procedure shall be as near as may be that in ordinary actions where defences have been lodged.

Jury Trial.

133. Jury.—The jury shall consist of two special and five common jurors, who shall be chosen from a panel of five special and ten common jurors to be cited for the diet.

134. Citation of Jury.—The jury shall be cited by the sheriff-clerk from the sheriff court jury book in the manner prescribed by law or in use to be followed for the citation of jurors in Scotland; and all statutory or other regulations and customs relative to the citation, non-attendance, selection and swearing of jurors shall (subject to rule 135) apply to jury trial in the sheriff court.

135. Challenge of Jurors.—Each party in the cause shall have right to challenge one special and one common juror, but not more; and in this matter, where there are more pursuers or defenders than one, they shall act collectively and not individually.

136. Jury to have Copy Issue.—Each juror empanelled shall, at the commencement of the trial, be supplied by the pursuer with a copy of the questions of fact proponed as set forth in the sheriff's interlocutor.

137. Practice in Proofs to Apply.—The law and practice relating to the taking of evidence in proofs before the sheriffs shall apply to jury trials. Unless all the parties appearing put in a minute (which may be signed by their agents) dispensing with a record of the proceedings, the same shall be taken by an official shorthand writer of the court, but the notes need not be extended unless, in the case of an appeal, their production shall be ordered by the appellate court, in which event it shall be the duty of the appellant to procure the extended notes, certified by the shorthand writer, and to lodge the same with the principal clerk of session.

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138. Evidence on Commission.—When evidence has been taken to lie in retentis, if the sheriff is satisfied that the deponing witness is dead, or that he cannot attend at the trial owing to absence or infirmity or other sufficient cause, it shall be competent for the sheriff, on the motion of any party in the cause (irrespective of which party moved for the commission to take such evidence) to direct that the report of the commission be read to the jury, and when so read such report shall form part of the evidence in the cause; but depositions shall not be read or referred to if the deponing witness attends at the trial.

139. Exceptions.—Exceptions taken in the course of the trial to rulings of the sheriff in regard to admission or rejection of evidence, or in regard to points of law laid down in the course of the trial or in the sheriff's charge to the jury, shall, if required by the party taking the exception, be recorded to the sheriff's dictation upon the official shorthand notes before the jury proceed to consider their verdict.

140. Addressing Jury.—No person shall be entitled to address the jury until the leading of evidence has been concluded; but thereafter the parties, personally or by counsel or law agent, may address the jury. One speech only on behalf of each interest represented shall be made.

141. Charge to Jury.—If the sheriff deem it necessary to charge the jury, he shall do so immediately after, or as soon as practicable after, the conclusion of the speeches, or, if none be made, after the conclusion of the evidence.

142. Productions.—Documents or productions intended to be put in evidence or referred to at the trial shall be lodged with the clerk of court four days before the date fixed for the trial, but the sheriff may allow productions to be exhibited and produced at the trial if he is satisfied that they could not reasonably have been lodged earlier and that reasonable notice had been given to the other parties of intention to produce at the trial.

143. Verdict by Majority.—The jury may return a verdict by a majority of its number at any time not less than one hour after the jury has been enclosed.

144. Form of Verdict.—The verdict of the jury shall be returned in the form of specific answers to the questions proponed by the sheriff, with the addition of a statement of the amount at which they assess the damages in the event of damages being awarded.

145. Verdict to be Recorded.—The verdict returned by the jury shall be recorded upon the interlocutor sheets, and signed by the clerk of the court, and this having been done, the jury shall be discharged.

146. And Followed by Interlocutor.—Any party in the cause may, so soon as the verdict has been so recorded or within fourteen days thereafter, move the sheriff to apply the verdict, and upon this motion the sheriff may hear parties and may make avizandum. As soon as practicable the sheriff shall issue an interlocutor applying the verdict and grant decree accordingly. In this interlocutor the sheriff shall also dispose of the question of expenses.

147. Interlocutor Final if no Shorthand Notes.—Where no shorthand notes of the proceedings have been taken, the interlocutor applying the verdict shall not be subject to review.

148. Grounds of Appeal to Court of Session.—If shorthand notes have been taken, it shall be competent for any party in the cause within fourteen days after the date of the final interlocutor of the sheriff applying the verdict (but not later) to appeal to a Division of the Court of Session by lodging with the sheriff-clerk a note of appeal in the Form M annexed hereto.

149. Transmission of Process.—The sheriff-clerk shall, within three days of his receiving the note of appeal, notify the other parties in the cause, and transmit the process to the principal clerk of session at Edinburgh.

150. New Trial.—If the court shall order a new trial, the principal clerk of session shall re-transmit the process to the sheriff-clerk, and the sheriff shall as soon as practicable fix a date of new trial, which shall proceed as herein directed as regards the original trial.

Charge.

151. Charge Against a Corporation.—A company, corporation, association or firm, or a board corporate or incorporate, may be competently charged under their nominate or descriptive name at their principal place of business (which term shall include the office or place of business of the clerk or secretary of any board or corporation), or where their principal place of business is furth of Scotland, at any place of business in Scotland.

The Poor's Roll.

152. Agents to Meet to Nominate Agents for Poor.—The sheriff shall annually make an order appointing the agents enrolled in his court (or, where the sheriffdom is divided into districts having separate local courts, the agents enrolled in the district courts) to meet to nominate a specified number of agents for the poor.

153. Notice of Meeting on Court-house Walls.—Notice of such order shall be given

by a copy thereof being affixed on the walls of the court-houses and sheriff-clerk's offices in the sheriffdom.

154. Nomination to be Reported to Sheriff.—At said meeting the agents present shall, by a majority of votes, nominate the required number of agents, and cause the nominations to be reported to the sheriff.

155. Sheriff may Confirm or Refuse.—The sheriff shall have power to confirm the nominations, in whole or in part, or to decline to do so.

156. Notice to Agents.—Six days before the list is submitted to the sheriff, the sheriff-clerk shall notify each agent who has been nominated, and such agent may, before the nominations are confirmed, represent to the sheriff any reason why his nomination should not be confirmed.

157. If Agents Fail to do so Sheriffs may Nominate.—In the event of the agents failing to nominate as above provided for, or the sheriff not confirming the nomination, the sheriff may himself make the requisite nomination, or may appoint another meeting to be held.

158. Agents to Act for One Year.—The agents nominated shall act as agents for the poor in the sheriffdom, or the district in which they are appointed, for one year, but they shall be eligible for re-nomination.

159. Agents to Act as Directed by Sheriff.—The agents so nominated shall as they themselves arrange, or as the sheriff shall direct, act as procurators for the poor in all causes, civil and criminal, including attendance at the circuit court.

160. Agents to Assist each Other.—The agents for the poor, in their respective districts, shall assist each other by taking precognitions, or proofs on commission, or otherwise as may be requisite and reasonable.

161. In sections 152 to 157 "sheriff" does not include sheriff-substitute.

162. Applicant to Produce Certificate of Poverty.—Along with his application for the benefit of the poor's roll, the applicant shall produce a certificate signed by the inspector or an assistant inspector of poor of the parish or district where the applicant resides, bearing that the applicant is unable, through poverty, to pay for the conduct of legal proceedings.

163. Application to be Remitted to Procurators for Poor.—The sheriff shall remit the application to the procurators for the poor, who shall notify the parties, and after inquiry shall make a report to the sheriff.

164. If they Report Applicant Entitled, Sheriff to Appoint an Agent to Conduct Cause.—If they report that the applicant has a probable cause of action and is entitled to the benefit of the poor's roll, the sheriff shall appoint one of the agents to take charge of the applicant's case.

165. Agent to Conclude Cause.—Such agent shall conduct the cause to its final issue, notwithstanding that during its progress he may have ceased to be an agent for the poor.

166. Agent to have no Claim for Fees unless Recovered from Other Party.—Unless expenses shall be awarded against and recovered from the opposite party, the agent shall have no claim for fees; but the litigant shall be liable to him for actual outlays incurred with the litigant's sanction.

167. Agent not Liable for Fees.—The agent shall not be liable for witnesses' fees, shorthand writers' fees, or court dues unless they are recovered by the agent personally.

168. Agent not Liable for Court Dues.—Neither the agent nor the litigant shall be liable for dues of court or officers' fees, unless these are awarded against and recovered from the opposite party, in which case the litigant (or the agent, if he personally recovers the same) shall be liable.

169. Sheriff may Remove Litigant from Poor's Roll.—It shall be in the power of the sheriff at any time to deprive any litigant of the benefit of the poor's roll.

Form A.

Sheriffdom of at

A. B. [*design him; if he sues in any special character set that forth; as also where necessary relationship to defender*, e.g., *wife of defender or a creditor of defender, etc.*],
Pursuer.

Against

C. D. [*design him; if sued in any special character set that forth*, e.g., *as trustee, or as vitious intromitter, etc.*],
Defender.

The claim or demand or complaint of the pursuer is [*here state shortly the general nature of the claim or demand or ground of appeal or cause of action, as for example:*—

(*a*) For payment of £ for goods sold and delivered (or otherwise) conform to account hereto annexed.

(*b*) For delivery of.

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(*c*) For an accounting with defender as [*state character in which defender is liable to account*].
(*d*) For exoneration as holder of [*state fund or subject* in medio].
(*e*) For declarator that.
(*f*) For warrant to.
(*g*) For sequestration (*for rent or in bankruptcy*).
(*h*) For recall of arrestments (*used by defender in the hands of, etc.*).
(*i*) For letters of arrestment ad fundandum jurisdictionem.
(*j*) For confirmation of byelaws.
(*k*) For appointment of judicial factor.
(*l*) That defender be ordained to (*execute work, sign deeds, remove or as the case may be*).
(*m*) That pursuer is aggrieved by (*state shortly nature of byelaw, order, etc., appealed against*).
(*n*) (*Otherwise as the case may be.*)

Therefore the pursuer craves the Court [*here set forth the specific decree, warrant, or order asked, giving all the particulars to be embodied (if necessary) in an extract*].

(*To be signed*) *A. B.*, Pursuer;
or
X. Y. [*add designation and business address*].
Pursuer's Agent.

Form B.

[*Place and date.*] Grants warrant to cite the defender [*or respondent*] by serving a copy of the writ and warrant upon an induciæ of , and appoints him to answer within the sheriff court-house at [*in Room No. , or in Chambers, or as the case may be*], on the day of at o'clock noon, under certification of being held as confessed. [When necessary add (meantime sequestrates and grants warrant to inventory and secure); or (grants warrant to arrest on the dependence) or (otherwise as the case may be).]

Form C.

[*Place and date.*] Grants warrant to cite the defender by serving a copy of the writ and warrant upon an induciæ of days, and appoints him, if he intend to defend, to lodge a notice of appearance with the sheriff-clerk at within the induciæ, under certification of being held as confessed. [*Meantime grants interim interdict, or warrant to arrest on the dependence, or sequestrates and grants warrant to inventory; or otherwise, as the case may be.*]

Form D.

[*Place and date, and, if necessary, hour.*] *C. D.*, defender. You are hereby served with the foregoing [*or within-written*] writ and warrant, and required to answer thereto, conform to the said warrant. [*If posted and if necessary add (the induciæ is reckoned from twenty-four hours after date of posting).*]

(*To be signed*) *P. Q.*, Sheriff Officer,
or
X. P. [*add designation and business address*].
Pursuer's Agent.

Form E.

[*Place and date*] I, , do hereby certify that upon the day of [*if necessary add between the hours of and*] I duly cited *C. D.*, the defender [*or respondent*], to answer to the foregoing [*or within-written*] writ. This I did by [*set forth mode of service; if by officer and not by post add in presence of L. M.* (*design him*), witness hereto with me subscribing].

(*To be signed*) *P. Q.*, Sheriff Officer;
L. M., Witness;
or
X. Y. [*add designation and business address*].
Pursuer's Agent.

7 EDWARD 7, Chapter 51.

Form F.

K. L. [*design him*], you are hereby required to attend at the Sheriff Court House at [*street address*] [*if necessary, add within Court Room, No.* , *or in Chambers*], on , the day of , at o'clock noon, to give evidence for pursuer [*or appellant or complainer*] [*or defender or respondent*] in the action *A. B.* [*design him*], pursuer, against *C. D.* [*design him*], and [*if necessary*] you are required to bring with you [*specify documents*] under penalty of forty shillings if you fail to attend.

Dated this day of [*if necessary add between the hours of and noon.*]

[*Signed*] *P. Q.*, sheriff officer;

or

X. Y. [*add designation and business address*].
Pursuer's [*or defender's or appellant's or respondent's*] Agent.

Form G.

[*Place and date.*] I, do hereby certify that upon the day of [*if necessary, add between the hours of and noon*], I duly cited *K. L.* [*design him*], to attend at o'clock noon, within to give evidence for the in the action *A. B.* [*design him*], against *C.D.* [*design him*], and I also required him to bring with him [*specify documents*]. This I did by [*set forth mode of citation*].

[*Signed*] *P. Q.*, sheriff officer;

or

X. Y. [*add designation and business address*].
Pursuer's [*or defender's or appellant's or respondent's*] Agent.

Form H.

To [*name, designation, and address of party in possession*].

You are required to remove from [*describe subjects*] at the term of [*or if different terms, state them and the subjects to which they apply*], in terms of lease [*describe it*] or [*in terms of your letter of removal of date*] or [*otherwise as case may be*].

Form I.

To [*name and designation of addressee*].

[*Place and date.*] I am to remove from [*state subjects by usual name or short description sufficient for identification*] at the term of

K. L. [*add designation and address*].

If not holograph to be attested thus—

M. N. [*add designation and address*], witness.

Form J.

[*Place and date.*]

You are required to remove from [ ] that portion of ground [*describe it*]; *or* the mill of [*describe it*]; *or* the shootings of the land and estate of [*describe them*]; *or* [*other subjects to which this notice is applicable*], at the term of Whitsunday [*insert year*] [*or Martinmas, as the case may be, inserting after the year the words, being the* 15*th day of May*, or *the* 11*th day of November*, or *the* 28*th day of May*, or *the* 28*th day of November, as the case may be*].

To *K. L.* [*designation and address*].

Form K.

In the sheriff court of
at
A. B. [*design him*], pursuer, complains that he [*or his author, as the case may be*], let to *C. D.* [*design him*], defender [*or his author, as the case may be*], a dwelling-house, garden, and pertinents

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[*or other subjects, as the case may be*], situated at , for the period from to , and that the defender refuses or delays to remove therefrom, although his term of occupancy has expired, and it is necessary to obtain warrant for his ejection; therefore decree ought to be granted for removing and ejecting the defender, his family, sub-tenants, cottars, and dependants, with their goods and gear, furth and from the said subjects [*here insert date at which removal or ejection is sought*], that the pursuer or others in his right may then enter to and possess the same. [*If expenses are sought add,* "*and the defender ought to be found liable in the expenses of process and dues of extract.*"]

[*Signature of pursuer or his agent.*]

FORM L.

At the day of the sheriff [*in absence of defender, or having heard parties, as the case may be*] grants warrant for ejecting the said *C. D.*, defender, and others mentioned in the complaint from the subjects therein specified, such ejection not being sooner than [*here insert time appointed for ejection, and whether after a charge on such inducice as may be deemed proper or instantly*]: Finds the defender liable in of expenses [*or otherwise, as the case may be*] and decerns.

[*Signature of Sheriff.*]

FORM M.

At the jury trial in the action at the instance of *A. B.* [*design him*], pursuer, against *C. D.* [*design him*], defender, held at on the day of before sheriff [substitute], of

The questions of fact proponed to the jury, and their answers thereto, were as follows:—

Question 1. [*State it per sheriff's interlocutor.*]

Answer 1. [*State it per the recorded verdict of the jury.*]

. . . . . .

The jury awarded damages to , and assessed the same at £ .

The sheriff on pronounced the interlocutor, a copy of which is appended hereto.

The [*state party appealing*] appeals to the Division of the Court of Session upon the ground [*here state the grounds conform to section 31 of the Act*].

(*a*) That in the interlocutor complained of the verdict was erroneously applied.

(*b*) That the verdict of the jury was contrary to evidence in respect [*here set forth clearly and succinctly the particulars in which it is alleged the evidence led and the verdict returned are inconsistent*].

(*c*) That evidence was unduly admitted [*or rejected*] in regard to [*here set forth shortly the fact in regard to which the evidence was admitted or rejected*].

(*d*) That the sheriff misdirected the jury in regard to [*here state shortly the point of law alleged to be misdirection*].

(*e*) That the damages awarded by the jury were excessive.

M. P. pursuer [*or other party*],
or
X. Y. [*signature and business address*],
Agent for the .

Appendix. [*Here copy interlocutor appealed against.*]

SECOND SCHEDULE (s. 52).

Session and Chapter.	Short Title.	Extent of Repeal.
20 Geo. 2 c. 43.	The Heritable Jurisdictions (Scotland) Act, 1746.	Section 29.
21 Geo. 2 c. 19.	The Sheriffs (Scotland) Act, 1747.	Sections 10 and 11.

7 EDWARD 7, Chapter 51.

Session and Chapter.	Short Title.	Extent of Repeal.
28 Geo. 2 c. 7.	The Sheriffs (Scotland) Act, 1755.	The whole Act.
50 Geo. 3 c. 112.	The Court of Session Act, 1810.	Sections 36, 37, 38, and 40, so far as these sections relate to Sheriff Court.
6 Geo. 4 c. 23.	The Sheriff Courts (Scotland) Act, 1825.	Sections 1, 3, 4, 5, and 8, so far as these sections relate to civil causes in the Sheriff Court, and section 10.
6 Geo. 4 c. 120.	The Court of Session Act, 1825.	Section 40, so far as relating to appeal for jury trial from Sheriff Court to Court of Session.
9 Geo. 4 c. 29.	The Circuit Courts (Scotland) Act, 1828.	Section 22.
11 Geo. 4 and 1 W. 4 c. 69.	The Court of Session Act, 1830.	Sections 22, 23, 24, and 32, as also in section 33 the words "and all actions of separation a mensa et thoro."
2 and 3 W. 4 c. 65.	The Representation of the People (Scotland) Act, 1832.	Section 36, so far as relating to sheriff and sheriff-substitute.
1 and 2 Vict. c. 114.	The Debtors (Scotland) Act, 1838.	Section 19.
1 and 2 Vict. c. 119.	The Sheriff Courts (Scotland) Act, 1838.	The whole Act, except sections 25, 27, and 28, and section 31, so far as that section relates to courts other than Sheriff Courts.
16 and 17 Vict. c. 80	The Sheriff Courts (Scotland) Act, 1853.	The whole Act, except section 34.
27 and 28 Vict. c. 106.	The Sheriffs-Substitute Act, 1864.	The whole Act.
30 and 31 Vict. c. 96.	The Debts Recovery (Scotland) Act, 1867.	The whole Act.
31 and 32 Vict. c. 100.	The Court of Session Act, 1868.	Sections 65, 66, 67, 68, 69, 70, 73, and 79, so far as those sections relate to appeals from Sheriff Court.
33 and 34 Vict. c. 86.	The Sheriff Courts (Scotland) Act, 1870.	Sections 13 and 14.
38 and 39 Vict. c. 81.	The Sheriffs-Substitute (Scotland) Act, 1875.	Sections 1 and 2.
39 and 40 Vict. c. 70.	The Sheriff Courts (Scotland) Act, 1876.	Sections 4 to 25, both inclusive. Sections 27 to 34, both inclusive. Sections 46 to 52, both inclusive. Section 54, except in so far as it relates to commissary regulations. All the schedules.
40 and 41 Vict. c. 50.	The Sheriff Courts (Scotland) Act, 1877.	The whole Act.
52 and 53 Vict. c. 26.	The Small Debt Amendment (Scotland) Act, 1889.	Section 8.
61 and 62 Vict. c. 8.	The Sheriffs Tenure of Office (Scotland) Act, 1898.	The whole Act.

MERCHANT SHIPPING ACT, 1907.

CHAPTER LII.

An Act to amend section seventy-eight of the Merchant Shipping Act, 1894, *with respect to the deduction of the space occupied by propelling power in ascertaining the tonnage of a ship.* [28*th August* 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Restriction on Deduction for Space Occupied by Propelling Power.—The deduction under section seventy-eight of the Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60) (in this Act referred to as "the principal Act"), for the space occupied by the propelling power of a ship shall not in any case exceed fifty-five per cent. of that portion of the tonnage of the ship which remains after deducting from the gross tonnage any deductions allowed under section seventy-nine of the principal Act: Provided that—

(*a*) This section shall not apply to steam ships constructed for the purpose of towing vessels so long as they are exclusively employed as tugs, but if and when employed for the carriage of passengers, cargoes, or stores, or using graving docks or dry docks or places provided for the repairing of vessels the register tonnage on which dues based on register tonnage may be levied by any harbour or dock authority shall be ascertained in manner provided by the Merchant Shipping Acts, 1894 to 1906, as amended by this Act; and

(*b*) This section shall not come into operation until the first day of January nineteen hundred and fourteen in the case of the following ships (in this Act referred to as existing ships), namely, ships constructed, or the construction of which has been commenced, before the first day of May nineteen hundred and seven, and ships a contract for the construction of which has been made before the first day of May nineteen hundred and seven, though the construction has not actually commenced before that date.

2. Saving for Authorities having Power to Charge Otherwise than on Register Tonnage.—Nothing in this Act shall affect any power which any dock or harbour authority have under any Act or Order confirmed by Parliament or having the effect of an Act of Parliament to charge tonnage rates, dues, or charges otherwise than on registered or register tonnage.

3. Provisions as to Ships already Registered.—(1) Where, in ascertaining the tonnage of an existing ship, a deduction has been made for the space occupied by the propelling power of the ship greater than the maximum deduction allowed under this Act, the tonnage of the ship shall, before the date on which this Act comes into operation as respects that ship, be recalculated on the basis of allowing the maximum deduction under this Act instead of that previously allowed, and the necessary alteration of the particulars and certificate of the registry of the ship shall be made and shall take effect on that date.

(2) The registrar of every port of registry shall make any alteration in the particulars of the registry of any ship registered at that port, which is required for the purposes of this section, and shall send notice of the alteration so made to the managing owner of the ship.

(3) The managing owner of the ship, on the receipt of any such notice of alteration, shall forthwith transmit the notice to the master of the ship, and the master of the ship on receipt of the notice shall produce it to the registrar of the port at which the ship is when the notice is received, if that port is a port having a registrar, and if not to the registrar of the first port having a registrar at which the ship arrives after the notice is received, and the registrar shall alter the certificate of registry of the ship in accordance with the notice.

(4) If the managing owner or master of a ship fails to comply with the provisions of this section, the managing owner or master, as the case may be, shall be liable on summary conviction, in respect of each offence, to a fine not exceeding fifty pounds.

(5) The expression "managing owner" in this section includes any person

registered under section fifty-nine of the principal Act in cases where there is no managing owner.

4. Short Title, Construction, and Commencement.—This Act may be cited as the Merchant Shipping Act, 1907, and shall be construed as one with the principal Act; and the Merchant Shipping Acts, 1894 to 1906, and this Act may be cited together as the Merchant Shipping Acts, 1894 to 1907.

CHAPTER LIII.

An Act to amend the Public Health Acts. [28*th August* 1907.]

CHAPTER LIV.

An Act to amend the Law with respect to Small Holdings and Allotments. [28*th August* 1907.]

CHAPTER LV.

An Act to amend the Law relating to Cabs and Stage Carriages in London. [28*th August* 1907.]

CHAPTER LVI.

An Act to facilitate the provision of Land for certain Evicted Tenants in Ireland and for other purposes connected therewith, and to make provision with respect to the tenure of office by the Estates Commissioners. [28*th August* 1907.]

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APPENDIX TO STATUTES.

ACTS OF SEDERUNT.

ACT OF SEDERUNT TO REGULATE PROCEDURE IN THE COURT OF SESSION.

[20*th March* 1907.]

WHEREAS it is provided by Section 106 of the Act of Parliament, 31 and 32 Vict., cap. 100 (entitled "An Act to Amend the Procedure in the Court of Session and the judicial arrangements in the Superior Courts of Scotland, and to make certain changes in the other Courts thereof") viz. :—"The Court of Session may from time to time make such regulations by Act of Sederunt as shall be necessary for carrying into effect the purposes of this Act; and for regulating the times and forms of summonses and writs and modes of procedure, and of pleadings; and generally the practice of the said Court in respect of the matters to which this Act relates; and for regulating the fees of the agents practising before the said Court; and, so far as may be found expedient, for altering the course of proceeding hereinbefore prescribed in respect to the matters to which this Act relates, or any of them; and may also repeal or alter the provisions of any Act of Sederunt relating to any of the matters hereinbefore specified, as may be inconsistent with such new regulations; and for that purpose the said Court may meet during vacation as well as during session: Provided that every such Act of Sederunt shall, within one month after the date thereof, be transmitted by the Lord President of the Court of Session to one of Her Majesty's principal Secretaries of State in order that it may be laid before both Houses of Parliament; and if either of the Houses of Parliament shall, by any resolution passed within thirty-six days after such Act of Sederunt has been laid before such House of Parliament, resolve that the whole or any part of such Act of Sederunt ought not to continue in force, in such case the whole or such part thereof as shall be so included in such resolution shall from and after such resolution cease to be binding." Therefore the Lords of Council and Session, in pursuance of the powers vested in them, do hereby enact and declare as follows :—

ADDITIONAL DIVISION OF INNER HOUSE.

1. Section 8 of the principal Act is hereby repealed from and after the words "or of any Act of Sederunt" to the end of the said section, and in place thereof it is hereby enacted that it shall be competent for the Court from time to time, by Act of Sederunt, to appoint any three judges to meet as a Court at such times as shall be specified in the Act of Sederunt, for the purpose of hearing and disposing of causes standing on the Rolls of the First and Second Divisions of the Inner House, and to appoint one or more of the Depute-Clerks of Session to act as clerk or clerks of said Court; and further, by Act of Sederunt, to make all necessary regulations as to the causes which shall from time to time be so heard and disposed of; and the senior Judge present shall preside, and shall sign the judgment of the said Court; and such judgment shall have the same effect in all respects as a judgment of one of the Divisions of the Inner House of the Court.

AMENDMENT OF RECORD.

2. The first proviso in Section 29 of the above-recited Act is hereby repealed; and the following provisions shall have effect in addition to the provision as to amendment of records in defended actions contained in said Section 29; but always subject to the provision at the end of said section as to the effect of amendments invalidating diligence:—

(*a*) Where an action or other proceeding has been commenced in the name of the wrong person as Pursuer, or where it has been commenced without a person whose conjunction may be deemed necessary to make a good instance, or where it is doubtful whether it has been commenced in the name of the right person, the Court or Lord Ordinary, if satisfied that it has been so commenced through *bona-fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, may allow any other person to be sisted as pursuer in substitution for, or in addition to, the original party, on such terms as to expenses as to the Court or Lord Ordinary shall seem proper.

(*b*) Where a party sues or is sued in a representative character, but it appears that he ought to have sued or been sued in his own right, the Court or Lord Ordinary may, at the instance of either party, on such terms as to expenses as to the Cour

APPENDIX TO STATUTES.

or Lord Ordinary shall seem proper, amend the record accordingly; and thereupon the action shall proceed in all respects as if the proper description of the party had been given in the Summons or other Writ.

(*c*) Where a party sues or is sued in his own right, but it appears that he ought to have sued or been sued in a representative character, the Court or Lord Ordinary may, at the instance of either party, on such terms as to expenses as to the Court or Lord Ordinary shall seem proper, amend the record accordingly; and thereupon the action shall proceed in all respects as if the proper description of the party had been given in the Summons or other Writ.

(*d*) Where the name or description of a pursuer or defender in the Summons or other Writ is insufficient or incorrect, it may be amended at the instance of either party, by order of the Court or Lord Ordinary, on such terms as to expenses as to the Court or Lord Ordinary shall seem proper; and thereupon the action shall proceed in all respects as if the name or description had been originally such as it appears after the amendment has been made; but if no objection is taken to the name or description the action may proceed, and in the judgment and all subsequent proceedings founded thereon the party may be named and described in the same manner as in the Summons or other Writ.

(*e*) Where in the course of an action it appears that all the parties who have an interest have not been called, it shall not be necessary for the Pursuer to bring a supplementary or additional action as heretofore, but it shall be competent for the Court or Lord Ordinary to allow the record to be amended by inserting in the Summons or other Writ the name of such additional Defender, and to have the record as amended served on him, along with a notice in the form contained in the Appendix hereto specifying the day upon which he must lodge defences or answers as the case may be; and thereafter the action shall proceed as if such added Defender had originally been made a party to the cause; and in the event of no defences or answers being lodged by such added Defender, after being duly served as aforesaid, the Pursuer shall be entitled to take decree against him in the undefended roll or otherwise according to the present practice. In the event of defences being lodged, the Pursuer shall print the record along with such defences; and the action shall thereafter proceed in ordinary form: Provided always that the Pursuer shall be liable for any expenses occasioned to the original Defender by his failure to call such added Defender in the first instance, unless cause be shown to the contrary; and the Court or Lord Ordinary shall make it a condition of such amendment being allowed that said expenses shall first be paid unless satisfied that the Pursuer had sufficient reason for not calling the said additional Defender in the first instance.

(*f*) It shall be competent for the Pursuer, at any time before final judgment, to amend the conclusions of the Summons or other Writ to the effect of increasing the sum for which he sues, or subjecting any other additional funds or property to the adjudication of the Court, on such terms as to expenses as to the Court or Lord Ordinary shall seem proper; and such amendment shall be allowed in all cases where, according to the existing practice, it would have been competent to raise a supplementary action; but in all other cases shall only be allowed in the discretion of the Court or Lord Ordinary.

(*g*) It shall be competent for the Court or Lord Ordinary to allow any amendment of the Summons or other Writ which may be necessary for the purpose of determining, in the existing action or proceeding, the real question in controversy between the parties, notwithstanding that, in consequence of such amendment, a larger or different remedy than that originally concluded for is thereby sought; but such amendment shall only be allowed on such terms as to expenses as to the Court or Lord Ordinary shall seem proper.

Procedure in Actions of Reduction.

3. The Summons in an action of reduction may be in the form, or as nearly as may be in the form, contained in the Schedule hereunto annexed. In the event of the form now in use being employed, it shall not be competent for the Agent to charge any higher fees for the preparation of said Summons or in connection with the procedure in the action than if the form now sanctioned had originally been used.

APPENDIX TO STATUTES.

4. It shall not be competent for a defender who objects on any ground to satisfy the production to lodge preliminary defences; but if he intends to defend the action, he shall put in defences stating his preliminary objections as well as his defences on the merits of the reduction.

5. Where the Defender does not state any objection against satisfying the production, he shall, along with his defences, produce the Writs or Documents sought to be reduced so far as the same are in his possession or under his control.

6. Where in any action a deed or writing is founded on by either party, all objections thereto may be stated and maintained by way of exception without the necessity of bringing a reduction thereof, unless the Court or Lord Ordinary shall consider that the matter would be more conveniently tried in a separate action of reduction.

Actions of Proving the Tenor.

7. Where an action of proving the tenor has been brought before one of the Judges of the Outer House, he shall not make great avizandum to the Inner House; but defences in said action shall be lodged, and a Record made up, in the same manner as in the case of ordinary contested actions; and the cause shall be disposed of by the Lord Ordinary in the Precedure Roll or after proof, and subject to the like review as if the action were an ordinary petitory action.

Where in an action of proving the tenor no appearance has been entered and no defences lodged, the Lord Ordinary shall fix a diet of proof, and shall dispose of the same with the same powers and in the like manner as are exercised by the Inner House according to the present practice.

Miscellaneous Provisions.

8. Where the Pursuer in any action of damages in the Court of Session, not being an action for defamation or for libel, or an action which is competent only in the Court of Session, recovers by the verdict of a jury £5 or any sum above £5 but less than £50, he shall not be entitled to charge more than one-half of the taxed amount of his expenses, unless the Judge before whom the verdict is obtained shall certify that he shall be entitled to recover any larger proportion of his expenses, not exceeding two third parts thereof.

9. Where a commission is granted by the Court or a Lord Ordinary for the examination of a witness, the Court or Lord Ordinary may, on the motion of either party to the cause, dispense with interrogatories in all cases where the commission falls to be executed within the United Kingdom, and also where the commission is to be executed abroad, on being satisfied that such a course is most expedient in the interests of the parties to the cause, and most conducive to the administration of justice.

10. It shall be competent for the Judge who sits at each Vacation Court to deal at such Courts with every motion which could competently be made in causes depending in the Outer House during Session. But this shall not be construed as making it competent to deal with the adjustment of Records or the adjustment of Issues; and the Judge shall not be bound to dispose of such motions, if in his opinion they can conveniently be postponed until the meeting of the Court.

11. It shall also be competent for the said Judge to entertain and dispose of all incidental motions in Petitions presented to the Inner House, provided that such motions do not, in the case of contentious petitions, involve the merits of the cause.

12. Section 15 of the principal Act is hereby amended to the effect that said section shall apply to lost interlocutor sheets as well as to the writs or pleadings therein enumerated.

Bill Chamber.

13. It shall be competent for the Lord Ordinary on the Bills to award expenses and to decide all questions relating thereto in processes of Suspension, Interdict, Suspension and Interdict, or Suspension and Liberation depending in the Bill Chamber, to the same effect as if such actions had been transmitted to the Court of Session.

14. A warrant to dismantle a ship shall not require the signature of a Lord Ordinary on the Bills; but such warrant, if signed by the Clerk of the Bill Chamber, or

the Assistant Clerk of the Bills in his absence, shall have the same force and authority as if signed by the Lord Ordinary on the Bills according to the existing practice.

15. Where a Note of Suspension, Interdict, Suspension and Interdict, or Suspension and Liberation has been lodged in the Bill Chamber, and no appearance has been entered, and no Answers have been lodged, and the Note has been passed with or without a sist, or with or without *interim* interdict or liberation, it shall not be necessary to mark the cause to a Division or Outer House Judge, or to transmit the process to an Outer House Clerk of the Outer House Judge; but the Lord Ordinary on the Bills shall have power to pronounce a final judgment in whole or in part granting the prayer of the Note, suspending the charge, sisting execution, or declaring the interdict to be perpetual, or the *interim* liberation to be final; and the Lord Ordinary shall have power to award expenses against the Respondent and to decern for the taxed amount thereof in the same manner as if the case had been transmitted to an Outer House Judge according to the present practice, and such interlocutor and process may be transmitted to the office of the Extractor of the Court of Session and there dealt with in the same way as if it were an interlocutor and process in the Court of Session.

16. After a cause which has been initiated in the Bill Chamber has been transmitted to one of the Judges of the Outer House, it shall be competent for the Lord Ordinary before whom the cause may be depending to pronounce an order granting or recalling *interim* interdict or for *interim* regulation of the matters in dispute, at any stage of the cause, in the same manner and to the same effect and subject to the like review as is now competent to the Lord Ordinary on the Bills; and such order may also be pronounced by any of the Divisions of the Court before whom the cause may for the time being depend at any stage thereof.

17. This Act shall be read along with and construed as part of the Act 31 & 32 Vict., cap. 100, but it shall not be held as limiting or affecting in any way the inherent jurisdiction of the Court of Session to regulate its own procedure from time to time, except in so far as same is prescribed by Act of Parliament.

DUNEDIN, *I.P.D.*

SCHEDULES.

Form of Notice of Service when calling Additional Defender.

X.Y.

(Designation and address.)

Take notice that, in the action in which A. B. is the pursuer and C. D. is the defender, the record in which, as now amended, is herewith enclosed, your name has, by Order of Lord , Ordinary, dated , been added as a defender; and the conclusions of the action, originally directed against the said C. D., are now also directed against you. If you desire to defend the said action you will require to lodge defences within days from the date of service hereof, under certification that, if you fail to do so, the said A. B. will be entitled to take decree against you in the undefended roll in terms of the conclusions of the said action [or obtain decree in absence against you, in cases of Suspension and Interdicts, etc.].

Form of Summons of Reduction.

Edward the Seventh, etc.—Whereas it is humbly meant and shewn to us by our Lovite, A. B.,—*Pursuer*; against C. D.,—*Defender*; in terms of the condescendence and note of plea in law hereunto annexed: Therefore the defender Ought and Should be Decerned and Ordained, by Decree of the Lords of our Council and Session, to exhibit and produce before our said Lords (here enumerate the deeds sought to be reduced); and the said deeds Ought and Should be reduced by decree of our said Lords, and the pursuer reponed and restored thereagainst *in integrum*; and the defender Ought and Should be Decerned and Ordained, by decree foresaid, to make payment to the pursuer of the sum of £ sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland, used and observed in the like cases as is alleged.—Our will is herefore, etc.

APPENDIX TO STATUTES.

ACT OF SEDERUNT TO REGULATE IN CERTAIN POINTS THE PROCEDURE UNDER THE WORKMEN'S COMPENSATION ACT, 1906 [6 EDW. VII., CAP. 58].

[26*th June* 1907.]

THE Lords of Council and Session, in virtue of the powers conferred by the Workmen's Compensation Act, 1906 (hereinafter called "the Act"), and in pursuance of said Act, do enact and ordain as follows:—

I. A party to any arbitration under the Act may appear in person, or be represented—

(*a*) By counsel;

(*b*) By a duly qualified law agent; or

(*c*) Where written authority from him is produced, by a member of his family, or any other person;

but no fee paid to a counsel shall be allowed on taxation, unless the arbitrator has certified that the employment of counsel was proper; and no person other than a counsel (when the employment of counsel is authorised) or a duly qualified law agent shall be entitled to have any fee or reward for appearing or acting on behalf of any party in an arbitration under the Act; provided always that an arbitrator may, in the case of a workman appearing in person, or a member of his family appearing for him, or in the case of a manager, clerk, or other servant appearing as the representative of an employer, make such allowance in respect of loss of time and travelling expenses as he shall think reasonable.

An application under paragraph 9 of the First Schedule to the Act may in the case of neglect of children by a widow be made by the Procurator-Fiscal of the Sheriff Court or by the Parish Council.

II. An application for the settlement by arbitration of any claim for compensation under the Act shall not be made unless and until some question has arisen between the parties, and such question has not been settled by agreement. The application shall state concisely the question which has arisen.

III. An application for the settlement by arbitration of the amount payable as compensation under the Act in a case where death has resulted from the accident may be made by the employer, or by the executor or other legal personal representative, if any, of the deceased workman, or by all or any of his dependants. It shall set forth the names of all the dependants (including those persons who claim to rank as dependants) so far as known to the applicant or applicants, and, where it is presented by or on behalf of some only of the enumerated dependants, the rest of them shall be called as respondents; provided always that, if in the course of the proceedings it appears that there are other dependants than those who are parties thereto, the Sheriff may order the petition to be served upon the omitted dependants, and may sist procedure in order to enable him or them to appear.

IV. Applications under this Act, if the parties reside in different districts, shall be made to the Sheriff Court of the County or District of a County

1. In which the accident occurred; or
2. In the case of a claim by virtue of section 8 of the Act, in which the workman was last employed in the employment to the nature of which the disease was due; or
3. If the accident occurred at sea,
   (*a*) in which the ship is at the time when intimation or service of the application is made; provided that such intimation or service is made to or on the master of the ship in the same county or district of a county; or
   (*b*) in which the managing owners of the ship, or some or one of them, or the manager, may reside or have a place of business;

without prejudice to any transfer as hereinafter provided.

V. If a Sheriff before whom an application under the Act is brought is of opinion that the case can be more conveniently tried and determined in any other Court in Scotland, England, or Ireland, he may on the motion of any of the parties make an Order remitting the case to such Court, and on such Order being made it shall be the duty of the Sheriff Clerk to transmit the application with all the relative documents to

APPENDIX TO STATUTES.

the Sheriff Clerk or Registrar of the Court named in the Order, and to transfer to such Sheriff Clerk or Registrar any money invested in connection with such application in his name as Sheriff Clerk, and the case shall thereafter proceed in the last-mentioned Court as if it had originated there.

VI. When any money ordered to be transferred from one Court to another is invested in the Post Office Savings Bank in the name of the Sheriff Clerk, such money shall be transferred into the name of the Sheriff Clerk or Registrar of the Court to which the money is ordered to be transferred, in accordance with regulations to be made by the Postmaster-General with the consent of the Treasury; and where any money ordered to be transferred is not so invested, it shall forthwith be so invested, and shall when invested be transferred as hereinbefore directed.

VII. Where a claim for compensation under the Act is made against a principal, he may, at the calling of the case, move the Sheriff for authority to serve a copy of the petition, together with a notice of the claim for indemnity, upon any person against whom he intends to claim indemnity, and such person may within the time fixed by the Sheriff lodge a notice of appearance. If he does lodge a notice of appearance, he shall thereafter be deemed to be a party to the arbitration, and the question of his liability to indemnify the principal may, if they both consent, be summarily and finally determined therein; provided always that, if he is held in that process not to be liable to indemnify the principal, he shall not be subjected in any part of the claimant's expenses. If he fails to lodge a notice of appearance, he shall not be entitled, in any subsequent proceedings against him at the instance of the principal, to dispute the validity of any award made under the petition, whether the same be made of consent or otherwise.

VIII. In any claim for compensation under section 8 of the Act, if the employer alleges that the disease was in fact contracted while the workman was in the employment of some other employer, the Sheriff may grant authority to the employer to serve a copy of the application and of his averment as to the time and place of contracting the disease upon such other employer, and such other employer shall, upon such service, be held to be a party in the arbitration.

IX. Applications under paragraphs 7, 8, 9, 15, 16, or 17 of the First Schedule to the Act, or paragraphs 9 (*c*) or 14 of the Second Schedule to the Act, shall be made by a Minute, which shall be lodged in the original process, if any, and if there be no process, a copy of the recorded Memorandum, certified by the Sheriff Clerk, shall be lodged along with the Minute, and shall be held to be the process. Such Minute shall be intimated to the other party or parties interested, and thereafter be disposed of summarily, as if it were an application for settlement by arbitration under the Act. In all the cases referred to in this clause an entry shewing how the application is disposed of shall be made by the Sheriff Clerk in the special register kept for the purposes of the Act.

X. The costs of and incident to all proceedings under the Act shall not exceed the limits prescribed by the Act of Sederunt of 4th December 1878, entitled "An Act of Sederunt regulating the fees of agents practising before the Sheriff Courts in Scotland," and the regulations and table of fees therein contained shall, so far as applicable, be held to apply to such proceedings. It shall be competent to an arbitrator agreed on by the parties to direct payment to his clerk of such remuneration as may be allowed by the auditor of the Sheriff Court of the district, but not exceeding a fee of £1 for each day of the trial, a fee of 5s. for each other necessary meeting with the parties, and a fee of 2s. for each necessary letter, besides outlays and copying charges.

XI. (1) The memorandum as to any matter decided by a committee, or by an arbitrator other than a Sheriff, or by agreement, which is by paragraph 9 of the Second Schedule appended to the Act required to be sent to the Sheriff Clerk, shall be as nearly as may be in terms of Form I. in the Appendix hereto. The Sheriff Clerk shall forthwith send a copy (for which, unless it is supplied to him along with the memorandum, he shall be allowed to charge at the rate of 1s. per sheet) to the party or parties interested (other than the party from whom he received it) in a registered letter containing a request that he may be informed within a reasonable specified time whether the memorandum and award (or agreement) set forth therein are genuine, or are objected

to; and if within the specified time he receives no intimation that the genuineness is disputed, or that the recording is objected to, then he shall, but not sooner than seven days after the dispatch of such letter of request, record the memorandum in the special register to be kept by him for the purpose, unless he himself refuses to record it under paragraph 9 (*d*) of the said Second Schedule; but if the genuineness is disputed, or the recording is objected to, he shall send a notification of the fact to the party from whom he received the memorandum, along with an intimation that the memorandum will not be recorded without a special warrant from the Sheriff.

(2) An award by a Sheriff under the Act, or a certified copy thereof, shall be forthwith recorded by the Sheriff Clerk in the said register as if it were a memorandum, and written notice of such recording and of the terms of the award shall be forthwith sent by him to the parties interested.

(3) Where an award of compensation has been made by a Court under sub-section 4 of section 1 of the Act, the certificate thereof shall be sent by the party to whom the same is given to the Sheriff Clerk of a Sheriff Court having jurisdiction, and the Sheriff Clerk shall forthwith record it in the said register as if it were a memorandum, and written notice of such recording and of the terms of the certificate shall be sent by him to the other party or parties interested.

XII. When the genuineness of a memorandum under paragraph 9 of the Second Schedule appended to the Act is disputed, or when an employer objects to the recording of such memorandum under sub-section (*b*) of said paragraph, or the Sheriff Clerk refuses under sub-section (*d*) of said paragraph to record such memorandum, the person disputing the genuineness, or the employer or the Sheriff Clerk, as the case may be, shall lodge a Minute stating clearly all the grounds for his action, and the memorandum shall thereupon be dealt with as if it were an application to the Sheriff for settlement by arbitration of the questions raised by the Minute.

XIII. Where an award, or a memorandum under paragraph 9 of the Second Schedule appended to the Act, or a certificate granted by a Court under sub-section 4 of section 1 of the Act has been recorded in the books of any Court, and any party takes in another Court any proceedings under the Act with reference to the subject matter of such award, memorandum, or certificate, he shall lodge with his application an extract or certified copy of such award, memorandum, or certificate.

XIV. No sum of money shall be paid into Court except upon an Order of Court, or under and in respect of a recorded Memorandum.

XV. (1) An application to the Court under paragraph 15 of Schedule I. of the Act shall be signed by or on behalf of both parties, and shall contain a statement of the facts which render the application necessary. It shall be accompanied by a copy of the report of every medical practitioner who has examined the workman, either on behalf of the employer or on the selection of the workman, and also by a copy of the application and of all the productions made therewith. The fee payable by the applicants shall be calculated at the rate of one shilling in the pound on twenty-six times the amount of the weekly payment claimed by or payable to the workman, so that the total fee shall not exceed one pound.

(2) The Sheriff Clerk shall, if he finds the application to be in order, refer the matter to one of the medical referees appointed for the county or district of a county, and shall deliver or send by registered post to such referee the reference, which shall be as nearly as possible in terms of Form IV. in the Appendix hereto, and a copy of the application and productions.

(3) The Sheriff Clerk shall also direct the workman to submit himself for examination by the medical referee, subject to and in accordance with any regulations made by the Secretary of State, and it shall be the duty of the workman on being served with such direction, which shall be as nearly as possible in terms of Form V. of the Appendix hereto, to submit himself for examination accordingly.

(4) Before making such direction the Sheriff Clerk shall inquire whether the workman is in a fit condition to travel for the purpose of examination, and if satisfied that he is in a fit condition, shall direct him to attend at such time and place as the referee may fix, and if satisfied that he is not in a fit condition to travel, shall so state in the reference.

(5) The Sheriff Clerk shall deliver or send by registered post to each party a copy

of the reference, and to the workman a copy of the direction to submit himself for examination.

(6) The medical referee on receipt of the reference shall fix a time and place for examination of the workman, and shall send notice thereof to the employer and workman.

(7) The medical referee shall, as soon as possible, forward his certificate on the matter to the Sheriff Clerk by registered post.

(8) On the receipt of the certificate of the medical referee, the Sheriff Clerk shall inform the parties by post that it has been received, and shall permit any party to inspect the same during office hours, and shall on the application and at the cost of either party furnish him with a copy of the certificate or allow him to take a copy thereof.

XVI. (1) When a workman receiving a weekly payment intends to cease to reside within the United Kingdom, he may apply to the Court to refer to a medical referee the question whether the incapacity of the workman resulting from the injury is likely to be of a permanent nature.

(2) The application shall be made by notice in writing, according to Form VI. in the Appendix, which shall be lodged with the Sheriff Clerk, and shall be accompanied by a copy of the report of any medical practitioner who has examined the workman on the selection of the workman; and a copy of the application and of such report (if any) shall be served on the employer or his solicitor ten clear days before the hearing of the application, unless the Sheriff Clerk gives leave for shorter notice; and the applicant shall lodge a copy of the application and of the report (if any) for the use of the medical referee.

(3) If the workman has been examined by a medical practitioner on behalf of the employer, the employer may at or at any time before the hearing of the application furnish the workman with a copy of the report of that practitioner as to the workman's condition, and lodge a copy of the report for the use of the medical referee.

(4) The Sheriff Clerk, on being satisfied, after hearing parties if he thinks it necessary, that the applicant has a *bona fide* intention of ceasing to reside in the United Kingdom, shall refer the question to a medical referee, such reference being made as far as possible in terms of Form VII. in the Appendix hereto; and if he is not so satisfied, he may refuse to do so, but in that case he shall, if so requested by the applicant, refer the matter to the Sheriff, who may make such order as he may think fit.

(5) If the question is referred by the Sheriff Clerk or by order of the Sheriff to a medical referee, the Sheriff Clerk shall, in or as nearly as may be in terms of Form V. of the Appendix hereto, direct the workman to submit himself for examination by the medical referee, subject to and in accordance with any regulations made by the Secretary of State; and the provisions of paragraphs 2 to 6 of section XV. hereof shall with the necessary modifications apply.

(6) The medical referee shall, as soon as possible, forward his certificate in the matter to the Sheriff Clerk by registered post, specifying therein the nature and cause of the incapacity of the workman, and whether the same is total or partial; and the Sheriff Clerk shall thereupon proceed in accordance with paragraph 8 of section XV. hereof.

(7) Where the medical referee certifies that the incapacity resulting from the injury is likely to be of a permanent nature, the Sheriff Clerk shall on application furnish the workman

(*a*) with a copy of the certificate of the medical referee, certified by the Sheriff Clerk to be a true copy; and

(*b*) with a copy of the award, memorandum, or certificate under which the weekly payment is payable, certified by the Sheriff Clerk to be a true copy; and

(*c*) with a certificate of identity according to Form VIII. in the Appendix hereto; and

(*d*) with a notice according to Form IX. in the Appendix, annexing thereto forms of certificate and declaration according to Forms X. and XI. in the Appendix;

and shall procure from the workman a specimen of his signature, and retain the same for reference.

(8) A workman who desires to have the weekly payments payable to him remitted to him while residing out of the United Kingdom, shall at intervals of three months

from the date to which such payments were last made, submit himself to examination by a medical practitioner in the place where he is residing, and shall produce to him the copy of the certificate of the medical referee and the certificate of identity furnished under the immediately preceding paragraph, and shall obtain from him a certificate in terms of Form X. in the Appendix that the incapacity of the workman resulting from the injury continues; and such certificate shall be verified by declaration by the medical practitioner, in the presence of the workman, before a person having authority to administer an oath.

(9) The workman shall also make a declaration of identity according to Form XI. in the Appendix, before a person having authority to administer an oath, producing to such person the copy and certificate above-mentioned, and the certificate of the medical practitioner by whom he has been examined.

(10) The workman shall forward the certificate and declaration in the two last preceding paragraphs mentioned to the Sheriff Clerk, with a request, according to Form XII. in the Appendix, for the transmission to him of the amount of the weekly payments due to him, specifying the place where and the manner in which the amount is to be remitted, which request shall be signed by the workman in his own handwriting.

(11) On receipt of the certificate, declaration, and request, the Sheriff Clerk shall examine the same, and may, if not satisfied that the same are in order, return the same for correction.

(12) When the Sheriff Clerk is satisfied that the certificate, declaration, and request are in order, he shall send to the employer a notice according to Form XIII. in the Appendix, requesting him to forward the amount due; and the employer shall thereupon forward the amount to the Sheriff Clerk, who shall remit the same, less any fees payable to the Sheriff Clerk and the cost of transmission, to the workman, at the address and in the manner requested by him, such remittance being in all cases at the cost and risk of the workman.

XVII. The following regulations shall apply to cases to be stated by a Sheriff in virtue of the provision contained in paragraph 17 (*b*) of the Second Schedule appended to the Act:

(*a*) An application to a Sheriff to state a case on a question of law determined by him shall be made by minute lodged in the process within seven days after the Sheriff has issued his award, and such minute shall set forth the question (or questions) of law proposed as the subject matter of the case, and shall be accompanied by a deposit of £1, which shall be paid to the Sheriff Clerk as his fee for preparing the case.

(*b*) The Sheriff Clerk shall within seven days from the lodging of such minute, accompanied as aforesaid, prepare the case and submit the same in draft to the parties or their agents.

(*c*) Should the parties or their agents fail to agree as to the terms of the case, these shall be settled by the Sheriff, provided always that, if the Sheriff on a draft case being submitted to him is of opinion that any question of law stated in it was not raised by the admissions made or the facts proved before him, or that the application for a case is frivolous, he may refuse to state or sign the case, but in that event he shall grant to the applicant a certificate specifying the cause, and bearing the date, of the refusal.

(*d*) The case shall be as nearly as possible in terms of Form II. in the Appendix hereto, and shall bear to be stated by the Sheriff and shall be signed by him.

(*e*) The appellant shall, within seven days after the case as settled has been delivered to him, give written notice of his intention to proceed with it, and of the Division to which he proposes to submit it, to the other party or parties interested, and shall at the same time send to each of such parties a copy of the case. He shall also within the said seven days transmit the case by post to, or cause the same to be lodged with, the principal clerk of the Division mentioned in the foresaid notice, together with a certificate under the hand of himself or his law agent of the notice having been given to the other parties.

(*f*) The regulations as to the printing of appeals from the Sheriff Court contained in the Act of Sederunt of 10th March 1870, "anent probation and appeals from inferior courts," shall apply to cases stated under the Act, provided always that it shall not be necessary to print any document, except the case, without a special order from the Court, and provided also that either party may move for an order on the Sheriff Clerk to transmit the process.

(*g*) The Court shall have power when determining a case to make such order arising out of the answer (or answers) given by them to the question (or questions) put as they shall think necessary, and also to make such order as to the costs of the case as to them may seem right. They may also, before giving their determination, send back the case to the Sheriff for amendment.

(*h*) When a Sheriff has refused to state and sign a case, the applicant for the case may within seven days from the date of such refusal apply by a written note to one of the Divisions of the Court of Session for an order upon the other party or parties to show cause why a case should not be stated. Such note, which may be in terms of Form III. of the Appendix hereto, shall be accompanied by the above-mentioned certificate of refusal, and shall state shortly the nature of the cause, the facts, and the question or questions of law which the applicant desires to raise, and any Judge of the Division, or in vacation the Lord Ordinary officiating on the Bills, may, after intimation to the other party or parties, dispose of it summarily, and his judgment upon it, as well as upon the question of costs, shall be final. If an order is pronounced requiring the Sheriff to state and sign a case, the case shall be stated as hereinbefore provided, and these regulations shall apply to the subsequent procedure.

XVIII. This Act of Sederunt shall come into operation on 1st July 1907, but except so far as it relates to references to medical referees and proceedings consequential thereon, shall not apply in any case where the accident happened before the commencement of the Act.

And the Lords appoint this Act to be inserted in the Books of Sederunt, and to be printed and published in common form.

J. H. A. MACDONALD, *I.P.D.*

APPENDIX.

FORM I.

Form of Memorandum under paragraph 9 of Schedule II. (and Act of Sederunt, section 11).

Workmen's Compensation Act, 1906.

A. B. (*name and design him or them, and if legal representative state character*), *Claimant*,

v.

C. D. (*name and design him or them*), *Respondent.*

CLAIM.—The claimant claimed compensation from the respondent in respect of—

Personal injury (*here state very shortly the nature of the injury*, e.g. *broken leg, loss of arm, internal injuries, etc.*),

[or]

The death of *of whom the claimant is* (*here state relationship*, e.g. *widow, son, etc., and whether or not dependent, or representative*),

caused by accident in the employment of (*here state whether in service of the respondent; or of a contractor, naming and designing him, employed by the respondent*),

at on

APPENDIX TO STATUTES.

Difference and Mode of Settlement.—The question in dispute, which was (*here state shortly whether liability, right to claim, or amount of compensation only was disputed*) was *referred to* (*here state whether a committee or arbitrator, describing or naming them*) [or] *determined by agreement.*

Determination and Compensation Fixed.—The *decision* [or] *award* [or] *agreement* was made on , and was as follows:

(*Here set out the same.*)

Request to Record.—It is requested that this memorandum be recorded in the Special Register of the Sheriff Court of at .

To The Sheriff Clerk,
Court House,
.....

Signature.....
Dated.....

Form II.

Form of Stated Case.

In the Sheriff Court of at , on appeal to the Division of the Court of Session, in an arbitration under the Workmen's Compensation Act, 1906, between A. B. (*name and design him*), *Appellant*, and C. D. & Co. (*name and design them*), *Respondents.*

This is an arbitration [*state concisely and without argument the nature of the application, and the facts admitted or proved which raise the question* (*or questions*) *of law to be submitted on appeal*].

The question (or questions) of law for the opinion of the Court is (or are) [*state it or them*].

This case is stated [*or*, as adjusted by the parties, is stated] by me.

(*Signature of Sheriff.*)

Dated this day of 19 .

Form III.

Form of Note for Order to state a Case.

In the Sheriff Court of at , on appeal, at the instance of A. B. (*name and design him*), *Appellant*, to the Division of the Court of Session, in an arbitration under the Workmen's Compensation Act, 1906, between (*state the parties*).

In this arbitration, which was decided by Sheriff , on , the said Sheriff has refused, conform to certificate herewith produced, to state and sign a case for which the appellant duly applied in writing.

[*Here state concisely and without argument the nature of the application, and the facts alleged to be admitted or proved which raise the question* (*or questions*) *of law proposed to be submitted on appeal.*]

The question (or questions) of law proposed to be submitted for the opinion of the Court is (or are) [*state it or them*].

The appellant prays for an order on the respondents, the said , to show cause why a case should not be stated by the Sheriff for the following reasons:—[*here state seriatim the reasons*].

[*To be signed by the appellant or his counsel or law agent.*]

Dated this day of 19 .

APPENDIX TO STATUTES.

FORM IV.

Form of Reference by Sheriff Clerk to Medical Referee under Schedule I., section 15 of the Act, and Act of Sederunt, section 15 (2).

Workmen's Compensation Act, 1906.

Sheriff Court of at .

A. B., *Claimant*, *v.* C. D., *Respondent.*

On the application of A. B., residing at , and C. D. , of (a copy of which is hereto annexed), reference is hereby made to of a medical referee under the said Act, to examine the said and give his certificate *as to the condition of the said and his fitness for employment, specifying if necessary the kind of employment for which he is fit;*
[*or*]
whether or to what extent the incapacity of the said is due to the accident.

Copies of the reports of the medical practitioners by whom the said has been examined are annexed. The said , who is now at , has been directed to submit himself for examination.

The said is in a fit condition to travel and he has been directed to attend for examination at such time and place as may be fixed by the referee;
[*or*]
The said does not appear to be in a fit condition to travel.

The referee is requested to forward his certificate to the Sheriff Clerk of at on or before the day of .

Dated.....

Signature.....
Sheriff Clerk of.....

FORM V.

Form of Direction by Sheriff Clerk to Workman (Act of Sederunt, sections 15 (3) and 16 (5)).

Workmen's Compensation Act, 1906.

Sheriff Court of at .

A. B., *Claimant*, *v.* C. D., *Respondent.*

To A. B. (*here state name and address*).

Take notice that Mr of , one of the medical referees under the Act, has been appointed to examine you in accordance with the application made.

You are hereby required to submit yourself for examination by him [*add where workman is in a fit condition to travel*] *and to attend for that purpose at such time and place as may be fixed by him.*

Dated.....

Signature..... .....
Sheriff Clerk of..... ...

FORM VI.

Form of Notice of Application by Workman intending to reside Abroad for Reference to Medical Referee under Schedule I., paragraph 18 of the Act, and Act of Sederunt, section 16 (2).

Workmen's Compensation Act, 1906.

Sheriff Court of at .

A. B., *Claimant*, *v.* C. D., *Respondent.*

Take notice that A. B., now residing at , to whom, under a *Memorandum* [*or*] *Award* [*or*] *Certificate*, recorded on , a weekly payment of

APPENDIX TO STATUTES.

is payable by the said , intends to cease to reside in the United Kingdom.

The said A. B. craves the Court to refer to a medical referee the question whether the incapacity of the said A. B. resulting from the injury is likely to be of a permanent nature.

Dated.....

Signature... ... .
(of Applicant or Applicant's Agent).

To The Sheriff Clerk of
Court House,
.....

FORM VII.

Form of Reference by Sheriff Clerk to Medical Referee under Schedule I., paragraph 18 *of the Act, and Act of Sederunt, section* 16 (4).

Workmen's Compensation Act, 1906.

Sheriff Court of at .

A. B., *Claimant, v.* C. D., *Respondent.*

On the application of A. B., now residing at (a copy of which is hereto annexed), reference is hereby made to of , a medical referee under the said Act, to examine the said , and to give his certificate as to whether the incapacity of the said , resulting from the injury, is likely to be of a permanent nature.

The said , who is now at , has been directed to submit himself for examination.

The said is in a fit condition to travel, and has been directed to attend for examination at such time and place as may be fixed by the referee;

[or]

The said does not appear to be in a fit condition to travel.

The referee is requested to forward his certificate to the Sheriff-Clerk of at , on or before the day , specifying therein the nature and cause of the incapacity of the said , and whether the same is total or partial.

Dated.....

Signature.. .....
Sheriff Clerk of.....

FORM VIII.

Form of Certificate of Identity (*Act of Sederunt, section* 16 (7) (*c*)).

(*To be printed on thick blue Foolscap.*)

Workmen's Compensation Act, 1906.

TO BE CAREFULLY PRESERVED. No. of Certificate .

Notice.—This Certificate is no security whatever for a Debt.

Sheriff Court of at .

A. B., *Claimant, v.* C. D., *Respondent.*

This is to certify that A. B. , late of (*address and description*), is entitled to a weekly payment of from (*name and address of employer*) as compensation payable to the said A. B. in respect of personal injury caused to him by

APPENDIX TO STATUTES.

accident, arising out of and in the course of his employment, such weekly payment to continue during the total or partial incapacity of the said A. B. for work; and that the description of the said A. B. and his incapacity for work, as certified by the medical referee, appointed under the said Act, are as follows:—

Age
Height
Hair Eyes
Nature of incapacity. (*Describe nature and cause of incapacity and whether the same is total or partial, as in certificate of medical referee.*)
Dated.....

Signature.....
Sheriff Clerk of.....

FORM IX.

Form of Notice to be given by Sheriff Clerk to Workman intending to reside Abroad (*Act of Sederunt, section* (16) (7) (*d*)).

Workmen's Compensation Act, 1906.

Sheriff Court of at .

A. B., *Claimant, v.* C. D., *Respondent.*

To A. B. (*address and description*).

Take notice that if you desire to obtain payment of the weekly payments payable to you under the *award* [or] *memorandum* [or] *certificate* hereto annexed, while you are residing out of the United Kingdom, you must at intervals of three months from the date up to which such payments have been made, submit yourself to examination by a medical practitioner in the place where you are residing, and produce to him the copy of the certificate of the medical referee, and the certificate of identity hereto annexed; and you must obtain from such medical practitioner a certificate in the form hereto annexed, that he has examined you, and that your incapacity resulting from the injury specified in the certificate of the medical referee continues; and such certificate must be verified by the medical practitioner by declaration in your presence before some such person as hereinafter mentioned.

You must also attend before some such person as hereinafter mentioned, and make a declaration in the form hereto annexed that you are the same person as mentioned in the copy of the certificate of the medical referee and in the certificate of identity hereto annexed, and in the certificate of the medical practitioner by whom you have been examined, producing to such person the copy and certificates above-mentioned.

You must then transmit to me at my office, situated at , the certificate of the medical practitioner by whom you have been examined, and your declaration together with a request for transmission to you of the amount of the weekly payment due to you, specifying the place where and the manner in which the amount is to be transmitted, according to the form hereto annexed, which request must be signed in your own handwriting.

The persons before whom a certificate may be verified on a declaration made are:—

1. Any person having authority to administer an oath in the place in which you reside.

2. Any British ambassador, envoy, minister, chargé d'affaires, or secretary of embassy or legation, exercising his functions in any foreign place in which you reside, or any British consul-general, consul, vice-consul, acting-consul, pro-consul, or consular agent exercising his functions in any foreign place in which you reside.

Dated this day of

Signature.....
Sheriff Clerk of.....

APPENDIX TO STATUTES.

FORM X.

Form of Medical Certificate to be obtained by Workman residing out of the United Kingdom (Act of Sederunt, sect. 16 (7, d) and (8)).

Workmen's Compensation Act, 1906.

Sheriff Court of at .

A. B., *Claimant*, *v.* C. D., *Respondent.*

I (*name, address, and qualification of medical practitioner*) hereby certify that I have this day examined A. B. of , whom I conscientiously believe to be the same person as A. B. of described in the copy certificate of the medical referee in the above-mentioned proceedings, dated the day of , and in the certificate of identity, dated the day of , produced to me by the said A. B. ; and that in my opinion the incapacity of the said A. B. , resulting from the injury described in the said certificate of the medical referee, still continues.

Dated this day of .

Signature.....

Declared at this day of in the presence of the said A. B. , the copy of the certificate of the medical referee, and the certificate of identity above-mentioned being at the same time produced.

Before me

.....

.....

[*Signature and description of person before whom the declaration is made.*]

FORM XI.

Form of Declaration of Identity by Workman residing out of the United Kingdom (Act of Sederunt, section 16 (7, d) and (9)).

Workmen's Compensation Act, 1906.

Sheriff Court of at .

A. B., *Claimant*, *v.* C. D., *Respondent.*

I, A. B. of , hereby declare that I am the same person as A. B. of , described in the copy of the certificate of the medical referee in the above-mentioned proceedings, dated the day of , now produced by me, and in the certificate of identity, dated the day of , now produced by me, and the same person as A. B. of , described in the certificate of declared by the said in my presence on the day of , *and now produced by me.*

[*Signature of Claimant.*]

Declared at this day of , the certificates above-mentioned being at the same time produced.

Before me

.....

.....

[*Signature and description of person before whom the declaration is made.*]

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FORM XII.

Form of Request for Transmission of Weekly Payments by Workman residing out of United Kingdom (*Act of Sederunt, section* 16 (10)).

Workmen's Compensation Act, 1906.

Sheriff Court of at .

A. B., *Claimant, v.* C. D., *Respondent.*

Sir,—I herewith enclose medical certificate and declaration of identity, and request that the amount of the weekly payments due to me in the above-mentioned proceedings may be transmitted to me at (*here give full address and state how transmission is to be made as*), by *Post Office Order payable at* (*here give name of Post Office*),
[or]
Banker's draft on the (*here give name and address of Bank*).—I am, sir, your obedient servant.

(*To be signed by the workman in his own handwriting.*)

To The Sheriff Clerk of.....
Court House,
.....,
Scotland.

FORM XIII.

Form of Notice by Sheriff Clerk to Employer of Receipt of Certificate, Declaration and Request for Payment Abroad (*Act of Sederunt, section* 16 (12)).

Workmen's Compensation Act, 1906.

Sheriff Court of at .

A. B., *Claimant, v.* C. D., *Respondent.*

I hereby give notice that proof has been received of identity and of continuance of incapacity, and I have to request you to transmit the sum of , being the amount of the weekly payments payable to A. B. , under the *award* [or] *memorandum* [or] *certificate*, from (*here state the date to which they were last paid*) to (*here give date* 13 *weeks from preceding date*) to me, to be remitted to the said A. B. .

Dated this day of 19 .

Signature.....
Sheriff Clerk of.....

To
(*Name and address of employer.*)

APPENDIX TO STATUTES.

STATUTORY RULES AND ORDERS, 1907.
No. 407.

MASTER AND SERVANT.
WORKMEN'S COMPENSATION.
INDUSTRIAL DISEASES.

Order of the Secretary of State, dated May 22, 1907, *extending the provisions of the Workmen's Compensation Act,* 1906, *to certain Industrial Diseases.*

Whereas by section 8 of the Workmen's Compensation Act, 1906, the provisions of that Act are applied, in certain cases and subject to certain modifications, to workmen disabled by, or suspended from their usual employment on account of their having contracted, a disease mentioned in the Third Schedule to the Act;

And whereas it is enacted by sub-section (2) of the said section that if the workman at or immediately before the date of his disablement or suspension was employed in a process mentioned in the second column of the Third Schedule to the Act, and the disease contracted is the disease in the first column of that Schedule set opposite the description of the process, then the disease shall be deemed, except as otherwise provided in the sub-section, to have been due to the nature of that employment unless the employer proves the contrary;

And whereas sub-section (6) of the same section empowers the Secretary of State to make Orders for extending the provisions of that section to other diseases and other processes, and to injuries due to the nature of any employment specified in the Order not being injuries by accident, either without modification or subject to such modifications as may be contained in the Order;

Now I, the Right Honourable Herbert John Gladstone, one of His Majesty's Principal Secretaries of State, by this Order made under sub-section (6) of the said section, do hereby direct that the provisions of section 8 of the Workmen's Compensation Act, 1906, shall extend and apply to the diseases, injuries, and processes specified in the first and second columns of the Schedule annexed to this Order, as if the said diseases and injuries were included in the first column of the Third Schedule to the Act and as if the said processes were set opposite in the second column of that Schedule to the diseases or injuries to which they are set opposite in the second column of the Schedule annexed hereto.

H. J. Gladstone,
One of His Majesty's Principal
Secretaries of State.

Whitehall,
May 22nd, 1907.

SCHEDULE.

Description of Disease or Injury.	Description of Process.
1. Poisoning by nitro- and amido-derivatives of benzene (dinitro-benzol, anilin, and others) or its sequelae.	Any process involving the use of a nitro- or amido-derivative of benzene or its preparations or compounds.
2. Poisoning by carbon bisulphide or its sequelae.	Any process involving the use of carbon bisulphide or its preparations or compounds.
3. Poisoning by nitrous fumes or its sequelae.	Any process in which nitrous fumes are evolved.
4. Poisoning by nickel carbonyl or its sequelae.	Any process in which nickel carbonyl gas is evolved.
5. Arsenic poisoning or its sequelae.	Handling of arsenic or its preparations or compounds.
6. Lead poisoning or its sequelae.	Handling of lead or its preparations or compounds.

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Description of Disease or Injury.	Description of Process.
7. Poisoning by *Gonioma Kamassi* (African box-wood) or its sequelae.	Any process in the manufacture of articles from *Gonioma Kamassi* (African boxwood).
8. Chrome ulceration or its sequelae.	Any process involving the use of chromic acid or bi-chromate of ammonium, potassium, or sodium, or their preparations.
9. Eczematous ulceration of the skin produced by dust or caustic or corrosive liquids, or ulceration of the mucous membrane of the nose or mouth produced by dust.	
10. Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye, due to pitch, tar, or tarry compounds.	Handling or use of pitch, tar, or tarry compounds.
11. Scrotal epithelioma (chimney-sweeps' cancer).	Chimney-sweeping.
12. Nystagmus.	Mining.
13. Glanders.	Care of any equine animal suffering from glanders; handling the carcase of such animal.
14. Compressed air illness or its sequelae.	Any process carried on in compressed air.
15. Subcutaneous cellulitis of the hand (beat hand).	Mining.
16. Subcutaneous cellulitis over the patella (miners' beat knee).	Mining
17. Acute bursitis over the elbow (miners' beat elbow).	Mining.
18. Inflammation of the synovial lining of the wrist joint and tendon sheaths.	Mining.

STATUTORY RULES AND ORDERS, 1907.

No. $\frac{486}{S.\ 19}$.

MASTER AND SERVANT, SCOTLAND.

WORKMEN'S COMPENSATION ACT, 1906.

Regulations, dated June 25, 1907, *made by the Secretary of State and the Treasury as to the duties and fees of Certifying and other Surgeons, and as to References to, and remuneration and expenses of, Medical Referees, in Scotland, under section* 8 *of the Act.*

I, the Right Honourable Herbert John Gladstone, one of His Majesty's Principal Secretaries of State, and We, the Lords Commissioners of His Majesty's Treasury, in pursuance of the powers respectively conferred on us by the Workmen's Compensation Act, 1906, section 8, sub-sections (1) (*f*), (3) and (5), and section 10, sub-section (1), hereby make the following regulations:—

Definitions.

1. In these regulations—
   (i.) "Act" means the Workmen's Compensation Act, 1906.
   (ii.) "Workman" means a workman as defined in section 13 of the Act.
   (iii.) "Certifying Surgeon" means either the certifying surgeon mentioned in sub-section (1) (i) of section 8 of the Act, or a medical practitioner appointed by the Secretary of State under sub-section (5) of section 8 to have the powers and duties of a certifying surgeon under the said section.
   (iv.) "Appointed Surgeon" means a surgeon having power, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, to suspend a workman from employment in the process or processes specified in such rules or regulations.

APPENDIX TO STATUTES.

(v.) "Medical Referee" means a medical practitioner appointed by the Secretary of State to Act as medical referee for the purposes of section 8 of the Act.

(vi.) "Sheriff Clerk" includes sheriff clerk depute for the purposes of ordinary sheriff court jurisdiction.

(vii.) The words "disease to which the Act applies" mean a disease mentioned in the third schedule to the Act or a disease or injury (not being an injury by accident) to which the provisions of section 8 of the Act have been extended by an Order made by the Secretary of State under sub-section (6) of that section.

2. Where a workman applies to a certifying surgeon for a certificate (hereinafter called "a certificate of disablement") that he is suffering from a disease to which the Act applies, and is thereby disabled from earning full wages at the work at which he was employed, the certifying surgeon, on payment of the prescribed fee, and after obtaining the particulars specified in the schedule to these regulations (Form 1) and such further information, if any, respecting the case as in the particular circumstances he may deem necessary, shall either proceed at once, if the application is made by the workman in person, to make a medical examination of the workman, or shall appoint forthwith a time and place for making such examination, and give notice thereof to the workman. Such notice, if given in writing, shall follow, as closely as may be, the form prescribed in the schedule (Form 2).

3. After personally examining the workman, the certifying surgeon shall either give the workman a certificate of disablement or shall certify that he is not satisfied that the workman is entitled to such certificate, and shall in either case deliver his certificate to the workman. The certificate given shall be in the form prescribed in the schedule to these regulations (Forms 3 and 5).

4. Where in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, the certifying or appointed surgeon, after having personally examined a workman, suspends him from his usual employment on account of his having contracted any disease to which the Act applies, or where in the case of a workman applying to be suspended on account of his having contracted any such disease, the surgeon as aforesaid, after having personally examined such workman, refuses to order his suspension, he shall, on the application either of the employer or of the workman, and on payment of the prescribed fee, certify such suspension or refusal to suspend in accordance with the form prescribed in the schedule to these regulations (Forms 6 and 8), and shall deliver such certificate to the applicant.

5. Where a certificate of disablement is given or a workman is suspended, and the case is one in which, under the provisions of sub-section (2) of section 8 of the Act as extended by an Order of the Secretary of State made under sub-section (6) of the said section, the disease contracted by the workman will be deemed, unless the employer proves, or the certifying surgeon certifies, to the contrary, to have been due to the nature of the employment in the process in which at or immediately before the date of the disablement or suspension the workman was employed, the certifying surgeon, if he is of opinion that the disease contracted by the workman was not due to the nature of such employment, shall certify accordingly. Such certificate shall, where possible, be given simultaneously with, and included in, the certificate of disablement or the certificate (if any) of suspension, but may also be given separately on application by the employer and on payment of the prescribed fee; and in either case shall follow the form prescribed in the schedule to these regulations (*see* Forms 4 and 7).

For the purposes of this regulation an appointed surgeon shall have the same powers and duties as a certifying surgeon.

6. A copy of any certificate given by a certifying or appointed surgeon under the foregoing regulations shall, together with any other documents relating to the case, be retained and kept by the surgeon; and copies of any such certificate shall, on payment of the prescribed fee, be supplied by the surgeon to the employer and the workman.

7. The fees which the certifying and appointed surgeons shall be entitled to charge in respect of duties performed under section 8 of the Act shall be as follows:—

Fees payable by the Workman.

(i.) For any certificate given under regulation 3—

(*a*) in cases where the medical examination of the workman is made by the surgeon in the performance of his duties under the Factory and Workshop Act, 1901, a fee of 1*s.*;

(*b*) in all other cases, a fee of 5*s.*, and where the workman is unable to present himself for examination at the residence of, or other nearer place fixed by, the certifying surgeon, for every mile or portion thereof which the certifying surgeon is required to travel therefrom for the purpose of examining the workman, an additional fee of 1*s.*

(ii.) For any certificate of suspension or refusal to suspend, under regulation 4, when the medical examination of the workman is made in pursuance of any special rules or regulations under the Factory and Workshop Act, 1901, a fee of 1*s.*

(iii.) For a copy of any certificate obtained under regulation 6, a fee of 1*s.*

Fees payable by the Employer.

(iv.) For any certificate of suspension or refusal to suspend, obtained by the employer under regulation 4, a fee of 1*s.*

(v.) Where the employer applies under regulation 5 for a certificate that the disease contracted is not due to the nature of the employment, in respect of every such application (to include the certificate, if given), a fee of 2*s.* 6*d.*

(vi.) For a copy of any certificate obtained under regulation 6, a fee of 1*s.*

References to Medical Referees.

8. Where an employer or workman is aggrieved by the action of a certifying or appointed surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman, he may—

(*a*) if he is an employer, within seven days of the receipt of the notice of disablement or suspension required to be given under the Act, or, in a case of disablement, if the notice is not accompanied by the certificate of the surgeon, or a copy thereof, and the employer forthwith requires the workman to furnish him with a copy, within seven days of the receipt of such copy; or

(*b*) if he is a workman, within seven days of the date on which the surgeon has refused to give him a certificate of disablement or suspension,

apply to the sheriff clerk of the sheriff court for the district in which the workman was employed at the time of his examination by the surgeon, for the matter to be referred to a medical referee; provided that it shall be within the discretion of the sheriff clerk, on good cause shown, to extend in any case by not more than seven days the period within which an application is required to be made.

9. (*a*) Any application under the foregoing regulation (Forms 9 and 10) shall be made in writing, and shall state the grounds on which the reference is asked for, in accordance with the form prescribed in the schedule to these regulations, or as near thereto as may be.

(*b*) The application shall be accompanied by the certificate or a copy of the certificate obtained from the surgeon by whose action the applicant is aggrieved, and by any available report or reports of any medical practitioner by whom the workman has been examined; and if the applicant is an employer, by the notice of disablement or suspension served on him by the workman, and by an undertaking to pay any reasonable travelling expenses incurred by the workman in attending for examination by the medical referee.

(*c*) The applicant shall also file with the sheriff clerk such copies of the application and other documents as aforesaid as may be necessary for the use of the medical referee and of the employer or workman, as the case may be, hereinafter referred to as the respondent, who together with the applicant is directly interested in the application.

(*d*) In the event of any dispute as to the amount of the travelling expenses payable to the workman by the employer, the matter may be referred to the sheriff clerk, whose decision shall be final.

APPENDIX TO STATUTES.

10. It shall be the duty of the sheriff clerk on receiving an application to satisfy himself that it is duly made in accordance with the foregoing regulations, and if it is not, to return it for amendment. If and when the application is in accordance with the regulations, he shall refer the matter forthwith to a medical referee, and shall forward to such medical referee by registered post one of the copies of the application and the other documents filed therewith, with an order of reference according to the form prescribed in the schedule. (Form 11.)

11. The sheriff clerk shall also make an order (Form 12) directing the workman to submit himself for examination by the medical referee. Before making such order the sheriff clerk shall inquire whether the workman is in a fit condition to travel for the purpose of examination, and if satisfied that he is in a fit condition shall by the order direct him to attend at such time and place as the referee may fix, and if satisfied that he is not in a fit condition to travel, shall so state in the order of reference; and it shall be the duty of the workman, on being served with the order, to submit himself for examination accordingly.

12. The sheriff clerk shall deliver or send by registered post to both parties a copy of the order of reference, and shall also send to the respondent copies of the other documents forwarded to the medical referee, and shall send to the workman a copy of the order directing him to submit himself for examination.

13. In the case of a reference under these regulations, the medical referee shall be one of those appointed by the Secretary of State for the sheriffdom which includes the district in which the case arises, and if the sheriffdom has been sub-divided and medical referees have been appointed for the sub-divisions, shall be one appointed for the sub-division comprising the aforesaid district. Provided that if any medical referee is or has been specially appointed by the Secretary of State, either for the sheriffdom or otherwise, for the purpose of deciding on any specified case or class of cases in which a reference may be made under these regulations, the reference in any such case shall be made to the medical referee so appointed. Provided also that if the surgeon by whose action the applicant is aggrieved has been appointed a medical referee, the reference shall not be made to him, but to such other medical referee as may be authorised to act.

14. The medical referee shall, on receipt of an order of reference duly signed by a sheriff clerk, together with copies of the documents required to be sent therewith, fix a time and a place for a personal examination of the workman, and shall send notice to the employer and workman accordingly (Forms 13 and 14). It shall be the duty of the workman, and, if the employer is the applicant, of the employer or a person duly authorised by him, to attend at the time and place fixed by the medical referee; and in the event of failure on the part of the workman or employer or both to appear as required by this regulation, the medical referee shall decide on the matter referred to him forthwith upon such information as shall be available, and with or without a personal examination. Provided that where the absence of the employer or his representative or of the workman is shown to the satisfaction of the medical referee to be unavoidable, or where the medical referee considers it necessary to apply for expert assistance as hereinafter provided, it shall be open to him to adjourn the inquiry on the reference and to resume it at such time and place as he may fix, after giving due notice to all parties concerned.

15. Except as otherwise provided by regulation 14, the medical referee shall, before deciding on the matter referred to him, make a personal examination of the workman, and shall consider any statements made or submitted by either party.

16. The medical referee shall, in the form prescribed in the schedule (Form 15) to these regulations (subject to such additions and modifications as the circumstances of the case may require), notify in writing his decision to the sheriff clerk, to the applicant, and to the respondent.

17. The medical referee shall send to the Home Office (Form 16) at the end of each quarter a statement (accompanied by any vouchers necessary), in the form prescribed in the schedule to these regulations, of the fees due to him for the quarter under these regulations.

18. The following fees and allowances are authorised to be paid to medical referees under these regulations;—

APPENDIX TO STATUTES.

(i.) For deciding the matter referred to him in any reference and for all duties performed in connection therewith, 2 guineas.

(ii.) Where in order to examine the workman the medical referee is compelled to travel to a place distant more than two miles from his residence or such other centre as may be prescribed by the Secretary of State, in addition to the above fee, 5*s.* for each mile beyond two, and up to ten, miles distant from such residence or centre, and thereafter 1*s.* for each mile distant therefrom.

(iii.) In cases involving special difficulty the medical referee may apply for special expert assistance, which may be granted by the Secretary of State if he thinks fit, on such terms as to remuneration or otherwise, as he may with the sanction of the Treasury determine.

19. In cases where a claim is made under regulation 18 (ii.) in respect of an examination of a workman, the medical referee, in submitting his quarterly statement under regulation 17, shall certify the distance of the place where the examination was made from his residence or other prescribed centre.

20. The sheriff clerk shall keep a record, in the form prescribed in the schedule (Form 17), of all references made by him under these regulations, and shall send the same to the Secretary of State at the end of each quarter.

21. These regulations shall come into force on the 1st day of July 1907, and shall apply to Scotland.

H. J. Gladstone,
One of His Majesty's Principal Secretaries of State.

Joseph A. Pease,
J. H. Whitley,
Two of the Lords Commissioners of His Majesty's Treasury.

25th June 1907.

SCHEDULE.

(FORM 1.)

Particulars to be obtained by Certifying Surgeon upon application by Workman for Certificate of Disablement.

1. Name and address of workman ...
2. Disease in respect of which certificate is applied for ... ...
3. Symptoms complained of... ...
4. Employment to the nature of which disease is attributed ...
5. Name and place of business of employer who last employed workman in such employment
6. (*Where application is not made by workman in person*) whether workman is able to travel for purposes of examination ...

(FORM 2.)

Notice to Workman of time and place appointed for his Examination by Surgeon.

Workmen's Compensation Act, 1906.

I hereby give you notice, with reference to your application for a certificate of disablement under section 8, sub-section (1), of the above-named Act, that I propose

APPENDIX TO STATUTES.

to examine you at on the day of at o'clock, and that you are required to submit yourself for examination accordingly.

To (*the Workman*).

(Signed)

Certifying Surgeon.

(FORM 3.)

Certificate of Disablement.

Workmen's Compensation Act, 1906.

I, (*a*) as certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district of (*or* as a medical practitioner appointed by the Secretary of State to have the powers and duties of a certifying surgeon for the purposes of section 8 of the Act), hereby certify that having personally examined (*b*) on the day of I am satisfied that (*c*) is suffering from (*d*) being one of the diseases to which the Workmen's Compensation Act applies, and is thereby disabled from earning full wages at the work at which (*c*) has been employed; and I * certify that the disablement commenced on the day of .

1. Full name and address of workman
2. Process in which workman states he was employed at or immediately before the date of disablement ... ...
3. Name and place of business of employer stated by workman to have last employed him in process above mentioned ... ...
4. Leading symptoms of disease ...

Dated this day of .

(Signed)

(*a*) strike out portion of description inapplicable. (*b*) name of workman. (*c*) "he" or "she." (*d*) name disease according to the terms in which it is described in the third schedule to the Act or Order of the Secretary of State, adding it to the schedule.

* If the surgeon is unable to certify a date on which the disablement commenced, he should strike out this part of the certificate. In that case the disablement will be deemed to have commenced on the date on which this certificate is given. *See* section 8 (4) of the Act.

(FORM 4.)

Certificate (supplementary to a Certificate of Disablement) to be given by Certifying Surgeon in circumstances mentioned in Regulation 5.

1. *When the certificate is included in the certificate of disablement, it should run as follows:—*

But whereas the said workman appears to have been employed at or immediately before the date of disablement in (*a*) being a process (*b*) the second column of the third schedule to the Act, and the disease contracted by him, viz. (*c*) is a disease which (*d*) is set opposite the above-mentioned process, I hereby certify that in my opinion the said disease is not due to the nature of such employment.

Dated this day of .

(Signed)

(*a*) name process. (*b*) "mentioned in" or "added by an Order of the Secretary of State to." (*c*) name disease. (*d*) "in the first column of that schedule" or "under the provisions of the said Order."

APPENDIX TO STATUTES.

2. *When the certificate is given separately on a subsequent application of the employer, it should be in the follwing form :—*

Workmen's Compensation Act, 1906.

Whereas I, (*e*) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district of (*or* as a medical practitioner appointed by the Secretary of State to have the powers and duties of a certifying surgeon, for the purposes of section 8 of the above-named Act), on the day of certified that (*f*) was suffering from (*g*) being a disease to which the Workmen's Compensation Act applies, and was thereby disabled from earning full wages at the work at which he was employed ; and whereas the said (*f*) appears to have been employed at or immediately before the date of disablement in (*h*) being a process (*i*) the second column of the third schedule to the Act, and the disease above-named is a disease which (*k*) is set opposite the above-mentioned process, I hereby certify that, in my opinion, the said disease was not due to the nature of such employment.

Dated this day of .

(Signed)

(*e*) strike out portion of description inapplicable. (*f*) name workman. (*g*) name disease. (*h*) name process. (*i*) "mentioned in" or "added by an Order of the Secretary of State to." (*k*) "in the first column of that schedule" or "under the provisions of the said Order."

(FORM 5.)

Certificate of Certifying Surgeon refusing to give Certificate of Disablement.

Workmen's Compensation Act, 1906.

I, (*a*) as certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district of (*or* as a medical practitioner appointed by the Secretary of State to have the powers and duties of a certifying surgeon for the purposes of section 8 of the above Act), hereby certify that having personally examined (*b*) who has applied for a Certificate of Disablement in respect of (*c*) being a disease to which the Workmen's Compensation Act applies, I am not satisfied that (*d*) is suffering from the said disease so as to be disabled from earning full wages at the work at which (*d*) has been employed.

1. Full name and address of workman ... ...
2. Employment to nature of which disease complained of was attributed ... ...
3. Name and place of business of employer stated by workman to have last employed him in such employment ... ...

Dated this day of .

(Signed)

(*a*) strike out portion of description inapplicable. (*b*) name workman. (*c*) name disease. (*d*) "he" or "she."

(FORM 6.)

Certificate of Suspension by Certifying or Appointed Surgeon.

Workmen's Compensation Act, 1906.

I, the (*a*) surgeon for (*b*) hereby certify that after personally examining (*c*) , I have on the day of

APPENDIX TO STATUTES.

in pursuance of the (*d*) made under the Factory and Workshop Act, 1901, suspended the said (*c*) from (*e*) usual employment on account of (*e*) having contracted (*f*) being a disease to which the Workmen's Compensation Act applies.

1. Full name and address of workman ... ...
2. Employment from which workman is suspended ... ...
3. Name and place of business of employer ... ...
4. Leading symptoms of disease ...

Dated this day of .

(Signed)

(*a*) "certifying" or "appointed." (*b*) name works at which workman is employed. (*c*) name workman. (*d*) name the special rules or regulations governing the employment. (*e*) "his" or "her." (*f*) name disease.

(FORM 7.)

Certificate to be given in cases of suspension by Surgeon in circumstances mentioned in Regulation 5.

1. *When the certificate is included in a certificate of suspension, it should run as follows:—*

But whereas the said workman appears to have been employed at or immediately before the date of suspension in (*a*) being a process (*b*) the second column of the third schedule to the Act, and the disease contracted by him, viz. (*c*) is a disease which (*d*) is set opposite the above-mentioned process, I hereby certify that in my opinion the said disease is not due to the nature of such employment.

Dated this day of .

(Signed)

(*a*) name process. (*b*) "mentioned in" or "added by an Order of the Secretary of State to." (*c*) name disease. (*d*) "in the first column of that schedule" or "under the provisions of the said Order."

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2. *When the certificate is given separately on an application by the employer, it should be in the following form:—*

Workmen's Compensation Act, 1906.

Whereas I, the (*a*) surgeon for (*b*) on the day of in pursuance of the (*c*) made under the Factory and Workshop Act, 1901, suspended (*d*) from (*e*) usual employment on account of (*e*) having contracted (*f*) being a disease to which the Workmen's Compensation Act applies, and whereas the said (*d*) appears to have been employed at or immediately before the date of suspension in (*g*) being a process (*h*) the second column of the third schedule to the Act, and the disease above named is a disease which (*i*) is set opposite the above-mentioned process, I hereby certify that in my opinion the said disease was not due to the nature of such employment.

Dated this day of .

(Signed)

(*a*) "certifying" or "appointed." (*b*) name works at which workman was employed. (*c*) name special rules or regulations governing the employment. (*d*) name of workman. (*e*) "his" or "her." (*f*) name disease. (*g*) name process. (*h*) "mentioned in" or "added by an Order of the Secretary of State to." (*i*) "in the first column of that schedule" or "under the provisions of the said Order."

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(FORM 8.)

Certificate by Certifying or Appointed Surgeon of Refusal to suspend.

Workmen's Compensation Act, 1906.

I, the (*a*) surgeon for (*b*) hereby certify that (*c*) having applied to me to be suspended from his usual employment in pursuance of (*d*) made under the Factory and Workshop Act, 1901, on account of (*e*) having contracted (*f*) being a disease to which the Workmen's Compensation Act applies, I have after personally examining the said (*c*) refused to suspend (*g*) .

1. Full name and address of workman ... ...
2. Name and place of business of employer ... ...
3. Grounds for refusal to suspend ...

Dated this day of .

(Signed)

(*a*) "certifying" or "appointed." (*b*) name works at which workman is employed. (*c*) name workman. (*d*) name the code of special rules or regulations governing the employment. (*e*) "his" or "her." (*f*) name disease. (*g*) "him" or "her."

(FORM 9.)

Application by Employer for Reference to Medical Referee.

In the Sheriff Court of holden at .

In the matter of the Workmen's Compensation Act, 1906,

and

In the matter of a Certificate of Disablement (*or* Suspension) granted in the case of (*name and address of workman*) in pursuance of the provisions of section 8 of the above-mentioned Act and the regulations made thereunder by the Secretary of State.

Application for a reference in the above-mentioned matter to a medical referee, pursuant to section 8, sub-section (1) (f), of the Act and to the above-mentioned regulations, is hereby made on behalf of (*name and place of business of applicant*) who states:—

1. That on the day of notice of disablement (*or* suspension) was given to the applicant by the above-mentioned under the provisions of the said Act.

2. That the said notice was consequent on a certificate of disablement given (*or* order of suspension made), on the day of , in pursuance of the said Act and regulations, by Mr residing at (*full address*), the certifying surgeon under the Factory and Workshop Act, 1901, for the district of (*or* a medical practitioner appointed by the Secretary of State to have the powers and duties of a certifying surgeon under section 8 of the said Act, *or* a surgeon appointed in pursuance of (*describe special rules or regulations under the Factory Act*) at (*name of factory or other place of employment*)).

3. That the applicant is aggrieved by the action of the above-mentioned Mr in giving the said certificate (*or* in making the said order of suspension), and claims that the said had not contracted the disease in respect of which the said certificate was given (*or* in respect of which the said order was made) (*or, in the case of a certificate of disablement*, was not suffering from the disease therein specified so as to be disabled from earning full wages at the work at which he was employed), in support of which claim he mentions the following circumstances:—(*)

And the applicant hereby undertakes, if the matter is referred to a medical referee, to repay to the said (*workman*) any reasonable travelling expenses he may incur in attending for examination by such referee.

* State grounds for claim, *e.g.*, report of any doctor employed by applicant.

APPENDIX TO STATUTES.

Two copies of this application are annexed hereto, together with a copy of the notice and certificate of disablement (*or* suspension). (The above-mentioned report of the medical practitioner employed by me, and two copies thereof, are also annexed.)

Dated this day of .

(Signed)

Applicant.

To the Sheriff Clerk.

(Form 10.)

Application by Workman for Reference to Medical Referee.

In the Sheriff Court of holden at .

In the matter of the Workmen's Compensation Act, 1906,

and

In the matter of a Refusal of a certifying (*or* appointed) Surgeon to give a Certificate of Disablement to (*or* to suspend) (*name and address of applicant*) in pursuance of the provisions of section 8 of the above-mentioned Act and the regulations made thereunder by the Secretary of State.

Application for a reference in the above-mentioned matter to a medical referee, pursuant to section 8, sub-section (1) (f), of the said Act and to the above mentioned regulations, is hereby made on behalf of the said who states:—

1. That on the day of applicant applied to Mr residing at (*full address*) the certifying surgeon under the Factory and Workshop Act, 1901, for the district of (*or* a medical practitioner appointed by the Secretary of State to have the powers and duties of a certifying surgeon for the purposes of section 8 of the said Act, *or* a surgeon appointed in pursuance of (*describe special rules or regulations under Factory Act*) at (*name of factory, or other place of employment*)), for a certificate of disablement (*or* to be suspended) in respect of a disease to which the provisions of section 8 of the Workmen's Compensation Act apply.

2. That the said Mr refused to give the applicant a certificate of disablement (*or* to suspend the applicant) and certified to such refusal by a certificate, dated the day of , which is annexed to this application.

3. That the applicant is aggrieved by the action of the said Mr in refusing to give him a certificate of disablement (*or* to suspend him), and claims that he was suffering from the said disease, and was thereby disabled from earning full wages at the work at which he was employed (*or, in the case of a refusal to suspend*, that he had contracted the said disease and was thereby entitled, in accordance with the special rules (*or* regulations) made under the Factory and Workshop Act, 1901, for the process in which he was employed, to be suspended), in support of which claim he mentions the following circumstances:—(*)

4. That the employer on whom the applicant, if the matter is referred to a medical referee and decided in favour of the applicant, would serve the statutory notice of disablement (*or* suspension) is (*name and place of business of employer*).

Two copies of this application and the certificate of the surgeon (together with the above-mentioned report of the medical practitioner employed by me and two copies thereof) are annexed hereto.

Dated this day of .

(Signed)

Applicant.

To The Sheriff Clerk.

* State grounds of claim, *e.g.*, report, if any, of doctor employed by applicant.

APPENDIX TO STATUTES.

(FORM 11.)

Order of Reference to Medical Referee.

In the Sheriff Court of holden at

[*Heading as in application.*]

On the application of (a copy of which is hereto annexed), I hereby appoint Mr of , one of the medical referees appointed by the Secretary of State for the purposes of the Workmen's Compensation Act, 1906, to decide on the matter arising on the said application.

Copies of the notice and certificate of disablement (*or* suspension) (and of a report of a medical practitioner by whom the workman referred to in the application has been examined) are hereto annexed.

Or, if the workman is the applicant,

A copy of the certificate of the surgeon referred to in the application (together with a copy of a report of a medical practitioner by whom applicant has been examined), is hereto annexed.

The said , who is now at , has been directed to submit himself for examination by the referee.

I am satisfied that the said is in a fit condition to travel for the purpose of being examined, and he has been directed to attend on the referee for examination at such time and place as may be fixed by the referee.

[*Or* the said does not appear to be in a fit condition to travel for the purpose of being examined.]

Dated this day of .

Sheriff Clerk.

(FORM 12.)

Order on Workman to submit himself for Examination by Medical Referee.

In the Sheriff Court of holden at

[*Heading as in Application.*]

To A. B. , of (*address and description*).

TAKE NOTICE, that I have appointed Mr , of , one of the medical referees appointed by the Secretary of State for the purposes of the Workmen's Compensation Act, 1906, to decide on the matter arising on the above application.

You are hereby required to submit yourself for examination by the referee [*add, where workman is in a fit condition to travel*, and to attend for that purpose at such time and place as may be fixed by him].

Dated this day of .

Sheriff Clerk.

(FORM 13.)

Notice by Medical Referee to Workman.

Workmen's Compensation Act, 1906.

I hereby give you notice that I have received from the Sheriff Clerk of the Sheriff Court at , an order of reference appointing me to decide on your appeal against the action of Mr (*name of surgeon*) in refusing to give you a certificate of disablement (*or* to suspend you).

Or, if the employer is the appellant,

on the appeal made by (*name of employer*) against the action of Mr (*name of surgeon*) in giving you a certificate of disablement (*or* in suspending you);

APPENDIX TO STATUTES.

And that you are required to attend (*or, if the workman has been ascertained not to be in a fit condition to travel*, to submit yourself) for examination at on the day of at o'clock.

Any statement made or submitted by you shall be considered.

(Signed)

To *Medical Referee.*

(FORM 14.)

Notice by Medical Referee to Employer.

Workmen's Compensation Act, 1906.

I hereby give you notice that I have received from the Sheriff Clerk of the Sheriff Court at , an order of reference appointing me to decide on your appeal against the action of Mr (*name of surgeon*) in giving a certificate of disablement to (*or* in suspending) (*name of workman*).

Or, if the workman is the appellant,

on the appeal made by (*name of workman*) against the action of Mr (*name of surgeon*) in refusing to give him a certificate of disablement (*or* to suspend him);

And that I propose to examine (*name of workman*) at on the day of at o'clock.

Any statement made or submitted by you shall be considered.

Add, if the employer is the appellant.

You, or some person duly authorised by you, are hereby required to attend at the above time and place.

Dated this day of .

(Signed)

To *Medical Referee.*

(FORM 15.)

Decision of Medical Referee.

[*Heading as in application.*]

I hereby give you notice that having duly inquired into the above-mentioned matter in accordance with the regulations of the Secretary of State, I decide as follows:—

I dismiss (*or* allow) the appeal of (*name of employer*) against the certificate of disablement given to (*name of workman*) on the day of

or

I dismiss (*or* allow) the appeal of (*name of employer*) against the suspension of (*name of workman*) on the day of

or

I dismiss the appeal of (*name of workman*) against the refusal of Mr (*name of surgeon*) to give him a certificate of disablement in respect of (*name of disease*),

or

I allow the appeal of (*name of workman*) against the refusal of Mr (*name of surgeon*) to give him a certificate of disablement in respect of (*name of disease*), and I fix the day of as the date on which the disablement commenced,

or

I dismiss (*or* allow) the appeal of (*name of workman*) against the refusal of Mr (*name of surgeon*) to suspend him on the day of .

Dated this day of .

(Signed) *Medical Referee.*

To (*the Sheriff Clerk*),
and to (*the Employer*),
and to (*the Workman*).

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(FORM 16.)

Medical Referee's Statement of Fees in respect of References under Section 8 of the Workmen's Compensation Act, 1906.

Number.	Names of Parties.	Date on which Reference received.	Sheriff Clerk from whom received.	Date and Place of Examination.	Date and Terms of Decision.	Amount of Fees under each of the headings in Regulation 18. (i.)	(ii.)	(iii.)
1.						£. s. d.	£. s. d.	£. s. d.
2.								
					£			
						Total £	s.	d.

I hereby certify that I examined the workman on , at , which is distant miles from my residence or prescribed centre.

(Signed)

Medical Referee.

(FORM 17.)

Record of References to be kept by Sheriff Clerk.

For quarter ended .

Number of Reference.	Names of Parties.	Action of Surgeon by which Applicant is aggrieved.	Name of Surgeon.	Nature of Disease.	Date on which Reference made.	Whether Workman directed to attend on Medical Referee or not.	Name of Medical Referee.

STATUTORY RULES AND ORDERS, 1907.

No. 495 / S. 20.

MASTER AND SERVANT, SCOTLAND.

WORKMEN'S COMPENSATION ACT, 1906.

Regulations, dated June 27, 1907, *made by the Secretary of State and the Treasury as to the Duties and Remuneration of Medical Referees in Scotland under the provisions of the First and Second Schedules to the Workmen's Compensation Act*, 1906.

I, the Right Honourable Herbert John Gladstone, one of His Majesty's Principal Secretaries of State, and We, the Lords Commissioners of His Majesty's Treasury, in

APPENDIX TO STATUTES.

pursuance of the powers respectively conferred on us by the Workmen's Compensation Act, 1906, hereby make the following regulations:—

Part I.—Definitions and General Regulations.

1. In these regulations—

(i.) "Medical Referee" means a medical practitioner appointed by the Secretary of State to act as medical referee for the purposes of the Workmen's Compensation Act, 1906.

(ii.) "Reference" means—

(*a*) in regulations in Part II., the appointment of a medical referee by a sheriff clerk to give a certificate, in accordance with the provisions of paragraph (15) of the first schedule to the Workmen's Compensation Act, 1906, as to the condition of the workman and his fitness for employment, or as to whether or to what extent the incapacity of the workman is due to the accident.

(*b*) in regulations in Part III., the appointment of a medical referee by a sheriff clerk to give a certificate, in accordance with the provisions of paragraph (18) of the first schedule to the Workmen's Compensation Act, 1906, as to whether the incapacity resulting from the injury is likely to be of a permanent nature.

(*c*) in regulations in Part V., the appointment of a medical referee by a committee, arbitrator or sheriff to report on any matter material to any question arising in an arbitration under the Workmen's Compensation Act, 1906.

(iii.) "Committee" means a committee representative of an employer and his workmen, with power to settle matters under the Workmen's Compensation Act, 1906, in the case of the employer and workmen.

(iv.) "Arbitrator" means a single arbitrator agreed on by the parties to settle any matter which under the Workmen's Compensation Act, 1906, is to be settled by arbitration.

(v.) "Sheriff" includes sheriff-substitute.

(vi.) "Sheriff-clerk" includes sheriff clerk depute for purposes of ordinary sheriff court jurisdiction.

(vii.) The words "district in which the case arises" mean the district of the sheriffdom for purposes of ordinary sheriff court jurisdiction in which all the parties concerned reside, or, if they reside in different districts, the district prescribed by Act of Sederunt, subject to any transfer made under such Act.

2. In the case of any reference under these regulations, the medical referee, in the absence of special circumstances, shall be one of those appointed by the Secretary of State for the sheriffdom which includes the district in which the case arises, and shall, if the sheriffdom has been sub-divided, and medical referees have been appointed for the sub-divisions, be one appointed for the sub-division which comprises the aforesaid district. Provided that, where there has been a previous reference in any case, any subsequent reference in the same case shall, if possible, be made to the same referee and be accompanied by the previous report or certificate, or copy thereof, of the medical referee.

3. The medical referee shall not accept any reference under these regulations unless signed or countersigned by the sheriff clerk.

4. The medical referee shall send to the Home Office at the end of each quarter statements, in the forms prescribed in the schedule to these regulations (Forms I, J, K, and L), of the fees due to him for the quarter under these regulations.

5. In cases where a claim is made under the regulations in respect of travelling expenses, the medical referee, in submitting his quarterly statements under regulation 4, shall certify the distance of the place to which he was required to travel from his residence or other prescribed centre.

6. In cases involving special difficulty the medical referee may apply to the Secretary of State for special expert assistance, which may be granted by the Secretary

of State, if he thinks fit, on such terms as to remuneration or otherwise as he may with the sanction of the Treasury determine.

7. The sheriff clerk shall keep a record, in the form prescribed in the schedule (Form M), of all references made under these regulations, and of all cases in which a medical referee is summoned to sit as assessor, and shall send a copy thereof to the Secretary of State at the end of each quarter.

8. These regulations shall come into force on the 1st day of July 1907, and shall apply to Scotland.

Part II.—Regulations as to References under Schedule I., paragraph (15).

9. The medical referee shall, on receipt of a reference duly signed, fix a time and place for the examination of the workman, and shall send notice accordingly to both the parties signing the application on which the reference is made (Forms A and B).

10. Before giving the certificate required by the reference, the medical referee shall personally examine the workman and shall consider any statements that may be made or submitted by either party.

11. The certificate given by the medical referee shall be according to the form prescribed in the schedule to these regulations (Form C).

12. The medical referee shall forward his certificate to the sheriff clerk from whom he received the reference.

13. The following shall be the scale of fees to be paid to medical referees in respect of references under this part of the regulations:—

(i.) For a first reference (to include all the duties performed in connection therewith) ... ... 2 guineas.

(ii.) For a second or subsequent reference to the same medical referee in the same case ... ... 1 guinea.

(iii.) Where in order to examine the injured workman the medical referee is compelled to travel to a place distant more than two miles from his residence or such other centre as may be prescribed by the Secretary of State, in addition to the above fees—5*s.* for each mile beyond two, and up to ten, miles distant from such residence or centre, and thereafter 1*s.* for each mile distant therefrom.

Part III.—Regulations as to References under Schedule I., paragraph (18).

14. The medical referee shall, on receipt of a reference duly signed (Form D), fix a time and place for the examination of the workman, and shall send notice accordingly to the workman.

15. Before giving the certificate required by the reference the medical referee shall make a personal examination of the workman.

16. The certificate given by the medical referee shall be according to the form prescribed in the schedule to these regulations (Form E).

17. The medical referee shall forward his certificate to the sheriff clerk from whom he received the reference.

18. The fee to be paid to a medical referee in respect of a reference (to include all the duties performed in connection therewith) under this part of these regulations shall be one guinea.

Part IV.—Regulation as to Remuneration of Medical Referee for sitting as Assessor under Schedule II., paragraph (5).

19. Where a medical referee attends on the summons of the sheriff for the purpose of sitting with the sheriff as an assessor, as provided for in paragraph (5) of the second schedule to the Workmen's Compensation Act, 1906, he shall be entitled for such attendance (to include his services as assessor) to a fee of 3 guineas, and where in order so to attend on the sheriff he is compelled to travel to a place distant more than two miles from his residence or such other centre as may be prescribed by the Secretary of State, he shall be entitled, in addition to the above fee, to 5*s.* for each mile beyond two, and up to ten, miles distant from such residence or centre, and thereafter to 1*s.* for each mile distant therefrom.

APPENDIX TO STATUTES.

Part V.—Regulations as to References under Schedule II., paragraph (15).

Conditions of Reference.

20. Before making any reference, the committee, arbitrator, or sheriff shall be satisfied, after hearing all medical evidence tendered by either side, that such evidence is either conflicting or insufficient on some matter which seems material to a question arising in the arbitration, and that it is desirable to obtain a report from a medical referee on such matter.

Form and Mode of Reference.

21. Every reference shall be made in writing and shall state the matter on which the report of the medical referee is required, and the question arising in the arbitration to which such matter seems to be material. Such reference shall be in accordance with the form prescribed in the schedule to these regulations (Form F), or as near thereto as may be.

The reference shall be accompanied by a general statement of the medical evidence given on behalf of the parties; and if such evidence has been given before a committee or arbitrator, each medical witness shall sign the statement of his evidence, and may add any necessary explanation or correction.

22. On making the reference to the medical referee, the committee, arbitrator or sheriff shall make an order in the form prescribed in the schedule (Form G), directing the injured workman to submit himself for examination by the medical referee. Before making such order they shall inquire whether he is in a fit condition to travel for the purpose of examination; and if satisfied that he is in a fit condition, they shall by the same order direct him to attend at such time and place as the referee may fix.

It shall be the duty of the injured workman to obey any such order.

If the committee, arbitrator or sheriff is satisfied that the workman is not in a fit condition to travel, they shall so state in the reference.

23. The reference shall be signed, if made by a committee, by the chairman and secretary of the committee; if made by an arbitrator, by the arbitrator; if made by a sheriff, by the sheriff; or by the sheriff clerk of the sheriff court in which the arbitration is pending.

24. A committee or arbitrator making a reference, shall, without naming a medical referee, address the reference in general terms to "one of the medical referees appointed by the Secretary of State for the purposes of the Workmen's Compensation Act, 1906," and shall forward it to the sheriff clerk of the sheriff court of the district in which the case arises.

Duties of Sheriff Clerk.

25. (1) In the case of a reference by a committee or arbitrator, the sheriff clerk on receiving the reference—

(*a*) Shall see that the reference is in accordance with these regulations, and if it is not, shall return it for amendment;

(*b*) Shall insert the name of the medical referee proper to be appointed;

(*c*) Shall, when the reference is in accordance with these regulations, countersign it, and forward it forthwith to the medical referee.

(2) In the case of a reference by a sheriff, the sheriff clerk of the sheriff court in which the arbitration is pending shall sign (or countersign) it, and forward it forthwith to the medical referee.

26. The sheriff clerk, on receiving a report from a medical referee under regulation 28, shall forthwith file a copy at the court and transmit the report to the committee, arbitrator or sheriff by whom the reference was made.

If the committee, arbitrator or sheriff shall direct that the parties be at liberty to inspect the report, the sheriff clerk shall on receiving notice of such direction permit such inspection to be made during office hours, and shall on the application and at the cost of any party furnish him with a copy of the report or allow him to take a copy thereof.

APPENDIX TO STATUTES.

Report of Medical Referee.

27. The medical referee shall, on receipt of a reference duly signed, appoint a time and a place for the examination of the workman, and shall send him notice accordingly (Form H).

28. The medical referee shall give his report in writing, and shall forward it to the sheriff clerk from whom he received the reference.

29. The committee, arbitrator or sheriff may, by request signed and forwarded in the same manner as the reference, remit the report to the medical referee for a further statement on any matter not covered by the original reference.

Fees.

30. The following shall be the scale of fees to be paid to the medical referees in respect of references under this part of the regulations :—

(i.) For a first reference, to include examination of the injured workman and written report ... ... 2 guineas.

(ii.) For a further statement under regulation 29 on any matter not covered by the original reference ... ... 1 guinea.

(iii.) For a second or subsequent reference to the same referee in a further arbitration on the same case, to include examination, if necessary, and written report ... ... 1 guinea.

(iv.) Where in order to examine the injured workman the medical referee is compelled to travel to a place distant more than two miles from his residence or such other centre as may be prescribed by the Secretary of State, in addition to the above fees—5*s.* for each mile beyond two, and up to ten, miles distant from such residence or centre, and thereafter 1*s.* for each mile distant therefrom.

H. J. Gladstone,
One of His Majesty's Principal Secretaries of State.

J. Herbert Lewis,
Cecil Norton,
Two of the Lords Commissioners of His Majesty's Treasury.

27th June 1907.

SCHEDULE.

(FORM A.)

Notice by Medical Referee to Employer or Solicitor signing the application on employer's behalf (Schedule I. (15)).

Workmen's Compensation Act, 1906.

To

I hereby give you notice that in accordance with the Reference made to me by the Sheriff Clerk of the Sheriff Court of holden at , under Schedule I., paragraph (15), of the above-named Act, in the case of (*name and address of workman*) I propose to examine the said at on the day of at o'clock.

Any statements made or submitted by you (*or, if the notice is addressed to the solicitor*, by the employer), will be considered.

Dated this day of .

(Signed)

Medical Referee.

APPENDIX TO STATUTES.

(FORM B.)

Notice by Medical Referee to Workman or Solicitor signing the application on Workman's behalf (*Schedule I.* (15)).

Workmen's Compensation Act, 1906.

To

I hereby give you notice that in accordance with the Reference made to me in your case (*or, if notice is addressed to the solicitor*), in the case of (*name and address of workman*), by the Sheriff Clerk of the Sheriff Court of holden at , under Schedule I., paragraph (15), of the above-named Act, I propose to examine you (*or* the said) at on the day of at o'clock.

And you are required to submit yourself (*or* the said is required to submit himself) for examination accordingly.

Any statements made or submitted by you (*or, if notice is addressed to the solicitor*, by the workman) will be considered.

Dated this day of .

(Signed)

Medical Referee.

(FORM C.)

Certificate of Medical Referee as to condition of Workman and fitness for employment, or as to whether or to what extent incapacity of Workman is due to the accident (*Schedule I.* (15)).

Workmen's Compensation Act, 1906.

In accordance with the Reference made to me by the Sheriff Clerk of the Sheriff Court of holden at upon the application of (*names and addresses of parties*) I have on the day of examined the said (*name of workman*) and I hereby certify as follows:—

1. The said is*

and his condition is such that he is †

2. The incapacity of the said is ‡

NOTE.—*Either paragraph* 1 *or paragraph* 2 *to be filled up, or both to be filled up, according to the terms of the Reference.*

Dated this day of .

(Signed)

Medical Referee.

* Describe state of health.

† State whether workman is fit for his ordinary or other work, specifying where necessary the kind of work, or whether he is unfit for work of any kind.

‡ State whether or to what extent the incapacity is due to the accident (*or, in cases coming within section* 8 *of the Act*, to the disease).

(FORM D.)

Notice by Medical Referee to Workman (*Schedule I.* (18)).

Workmen's Compensation Act, 1906.

To

I hereby give you notice that in accordance with the Reference made to me in your case by the Sheriff Clerk of the Sheriff Court of holden at

APPENDIX TO STATUTES.

under Schedule I., paragraph (18), of the above-named Act, I propose to examine you at on the day of at o'clock, and you are required to submit yourself for examination accordingly.

Dated this day of .

(Signed)

Medical Referee.

(FORM E.)

Certificate of Medical Referee (Schedule I. (18)).

Workmen's Compensation Act, 1906.

In accordance with the Reference made to me by the Sheriff Clerk of the Sheriff Court of holden at under Schedule I., paragraph (18), of the above-named Act, I have on the day of examined of (*name and address of workman*) and I hereby certify that his incapacity is [*or* is not] likely to be of a permanent nature.

Dated this day of .

(Signed)

Medical Referee.

(FORM F.)

Reference to a Medical Referee (Schedule II. (15)).

In the matter of the Workmen's Compensation Act, 1906,

and

In the matter of an Arbitration between—

A. B.

Address

Description

Applicant,

and

C. D.

Address

Description

Respondent.

As the case may be { (*a*) We, a committee representative of and his workmen, and empowered to arbitrate in the matter arising under the Workmen's Compensation Act, between *A. B.* and *C. D.*; (*b*) I, , an arbitrator agreed upon by *A. B.* and *C. D.* to arbitrate in the matter arising between them under the Workmen's Compensation Act, 1906; (*c*) I, Sheriff (*or* Sheriff-substitute); having heard the evidence tendered by both parties, hereby certify that in our (*or* my) opinion the medical evidence given before us (*or* me) is conflicting (*or* insufficient) on a matter which seems to us (*or* me) to be material to a question arising in the above-mentioned arbitration, and that it is desirable to obtain a report from a medical referee on such matter, as follows:

(A) On the day of personal injury was (*or* is alleged to have been) caused to * by accident arising out of and in the course of his employment, under the following circumstances:—

†

Or in a case of industrial disease to which the Act applies—

(A) On the day of the said * was, under section 8 of the above-named Act, certified to be disabled by, or suspended from, his

APPENDIX TO STATUTES.

usual employment on account of his having contracted, a disease to which the said section applies, namely,‡

(B) The matter on which we are (*or* I am) satisfied that it is desirable to obtain a report is—

(C) Such matter seems to be material to the following question arising in the arbitration, viz. :—

We (*or* I) therefore appoint§ one of the medical referees appointed by the Secretary of State for the purposes of the Workmen's Compensation Act, 1906, to examine the said on the matter specified above, and to report to us (*or* me).

A statement of the medical evidence given before us (*or* me) is appended.

We are (*or* I am) satisfied that the said who is now at , is in a fit condition to travel for the purposes of being examined, and he has been directed to attend on the referee for examination at such time and place as shall be fixed by the referee; *or* does not appear to be in a fit condition to travel for the purpose of being examined.

The referee is requested to forward his report to—

The Sheriff Clerk,
Sheriff Court,

on or before the day of .

Dated this day of .

(Signed)
||

or On behalf of the Committee

Chairman / *Secretary* } *of Committee.*

Signature of Sheriff Clerk.

A previous reference was made to a medical referee in this case on the , 19 , and a copy of the report then given is attached.

* Insert name of injured workman.
† Here state the facts of the accident as ascertained from the evidence.
‡ Name disease.
§ The name must, if the reference is made by a committee or arbitrator, be left in blank to be inserted by the Sheriff Clerk.
|| For signature of sheriff or arbitrator.

(FORM G.)

Order on injured Workman to submit himself for examination by Medical Referee.

(*Title as in Reference.*)

To *Address*
of *Description.*

TAKE NOTICE—

That the Committee (*or* arbitrator, *or* sheriff) have (*or* has) appointed one of the medical referees under the Workmen's Compensation Act, 1906, to examine you for the purposes of the above-mentioned arbitration, and to report to them (*or* him).

You are hereby required to submit yourself for examination by such referee,* and to attend for that purpose at such time and place as may be fixed by him.

Dated this day of .

(*To be signed in the same manner as Reference.*)

* Strike out from "and to attend" when injured workman does not appear to be in a fit condition to travel.

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(FORM H.)

Notice by Medical Referee to injured Workman (Schedule II. (15)*).*

Workmen's Compensation Act, 1906.

To

I hereby give you notice that I have been appointed to examine and report on your case under Schedule II., paragraph (15), of the above-named Act, and that I propose to make such examination at on the day of at o'clock.

(Signed) *Medical Referee.*

(FORM I.)

Medical Referee's Statement of Fees in respect of References under Schedule I. (15).

Number.	Names of Parties.	Date on which Reference received.	Sheriff Clerk from whom received.	Date and Place of Examination.	Date on which Certificate sent to Sheriff Clerk.	Whether Certificate as to condition of Workman or as to cause of incapacity or both.	Amount of the Fees under each of the headings in Regulation 13. (i.)	(ii.)	(iii.)	Payments under Regulation 6.
							£ s. d.	£ s. d.	£ s. d.	£ s. d.
						£				
						Total ..	£ s. d.			

* I hereby certify that I examined the above-mentioned (*name of workman*) on at which is distant miles from my residence or prescribed centre. (Signed)

* Endorsement to be made on back of statement.

(FORM J.)

Medical Referee's Statement of Fees in respect of References under Schedule I. (18).

Number.	Name of Workman.	Date on which Reference received.	Sheriff Clerk from whom received.	Date of examination.	Date on which Certificate sent to Sheriff Clerk.	Whether incapacity certified to be permanent or not.	Fees under Regulation 18.	Payments under Regulation 6.
							£ s. d.	£ s. d.
							Total ..	£ s. d.

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(FORM K.)

Medical Referee's Statement of Fees for attendances as Assessor under Schedule II. (5).

Number.	Date on which Summons received.	Sheriff Clerk from whom Summons received.	Date and Place of Attendance.	Fees under Regulation 19.	
				For attendance.	For miles travelled.
				£ s. d.	£ s. d.

* I hereby certify that I attended on the day of at the Sheriff Court, holden at , which is distant miles from my residence (or prescribed centre).

* Endorsement to be made on back of statement.

(FORM L.)

Medical Referee's Statement of Fees in respect of References under Schedule II. (15).

Number.	Names of Parties.	Date on which Reference received.	Sheriff Clerk from whom received.	Date and place of Examination.	Date on which Report sent.	Amount of Fees under each of the headings in Regulation 30.				Payments under Regulation 6.
						(i.)	(ii.)	(iii.)	(iv.)	
						£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
					£					
									Total ..	£ s. d.

* I hereby certify that I examined the above-mentioned *(name of workman)* on , at , which is distant miles from my residence or prescribed centre.

(Signed)

* Endorsement to be made on back of statement.

APPENDIX TO STATUTES.

(Form M.)

Record of References, &c., to be kept by Sheriff Clerk.

Sheriff Court . Name of Sheriff clerk,
For quarter ended .

Number of Reference. (1.)	Names of Parties. (2.)	Workman's Employment. (3.)	Date on which Reference forwarded to Medical Referee. (4.)	Provision in the Act under which Reference is made, and if under Sched. II. (15), by whom made.* (5.)	Whether Workman directed to attend on Referee, or not. (6.)	Medical Referee appointed. (7.)	Date and number of previous Reference in same case, if any. (8.)

* Here say whether committee, arbitrator or sheriff.

Note.—In cases where there is no Reference, but the Medical Referee is summoned to sit as assessor, the Sheriff Clerk should write a note to that effect across columns 4, 5 and 6.

THE

SCOTS LAW TIMES EDITION

OF THE

STATUTES AFFECTING SCOTLAND.

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